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Alistair Beckett

The Existing and Proposed  
Police Complaints Procedures; and the  
Police Complaints Authority

Research paper for Administrative Law  
LLM (Laws 501)

Law Faculty

Victoria University of Wellington

Wellington 1987

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The Existing and Proposed  
Police Complaints Procedures; and the  
Police Complaints Authority

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## I. INTRODUCTION

The police function in a democracy as a community agent working for and assisting the community in the task of policing. Since the nature of its function is extremely complex it necessarily derives a great deal of trust and power from the people. It is entrusted particularly, with the legitimate use of force - one of the basic monopolies of power that a citizen can confer on government, and a wide discretion. This discretion not only permits the police to select the method and style of policing but it also permits individual police officers a great deal of latitude in their manner of law enforcement.

To function effectively, the police must operate with the educated acceptance, cooperation and approval of the community. Until recently, the faith and trust in the ability of the police to exercise its function with due diligence and professionalism has gone relatively unchallenged. There has been a minimal operational accountability. Institutionalised checks and safeguards which could have been relied upon to challenge and criticise police policies have not realised their potential. However, a growing knowledge of and sensitivity to civil rights generally, has highlighted frailties in the trust bestowed upon the police. Police discretion is perceived to be obscurely and ill-defined so that the need for its more adequate containment has become apparent. Similarly, fear of abuse of the 'legitimate' force exercised by the police has



caused a public demand for a more effective independent verification of the operation of the complaints process. The phrase 'sed quis custodiet ipsos custodes' (who will guard the guardians themselves) is a relevant question in light of these concerns. A succinct summary of the problem is provided by Morris:

"of complaints and the establishment of a conciliation process are vital".

"Today it is clear that the Police wield the greatest power that the state has over the individual citizen. They have such far reaching power that we must have effective and exceptional processes to complain about those rare occasions when the power is abused."<sup>1</sup>

The present machinery for dealing with complaints regarding formulations of wider police policy issues or abuses of force is operated almost entirely by the police. Consequently, the design of the present complaints process encourages the reception of complaints which in the main relate to misconduct rather than complaints about policies, procedures or practices. Hence, these deficiencies have contributed to the overall public questioning of the need to make the police generally more accountable to society.

In his report into the disturbances at Brixton, an eminent jurist, Lord Scarman stated:-

"An effective police complaints procedure then is vitally important."

"A complaints procedure which is generally acknowledged to be fair and impartial - to the public and to the accused police officer - is essential if

police effectiveness and the public confidence that



the police are to enjoy the degree of public support they must have in order to discharge their onerous and necessary task. If public confidence in the complaints procedure is to be secured, the early introduction of an independent element in the investigation of complaints and the establishment of a conciliation process are vital".<sup>2</sup>

Police activities then have become very much a matter of public concern with the resultant call for them to be subject to open public scrutiny, a call to which the New Zealand Labour Government has responded in setting up an independent monitoring of the police. The proposed legislation demonstrates the Government commitment to the principle that the police is accountable to the community it serves. At the same time the legislation also recognises the difficulty faced by police management in satisfying assessment, investigation and resolution of citizens complaints of alleged police misconduct. The independent review entity will be imposed to ensure not only that the police act with the high degree of prudence, foresight and technical acumen worthy of the powers society has entrusted in it but also to ensure that public trust is preserved by insisting upon the expeditious, thorough and impartial processing of complaints.

(c) Policing by Consent : Policing by consent relies very much upon the relationship between the police and the community. An effective police complaints procedure then is vitally important for the following interrelated reasons:

- (a) Mutual Aggrandisement : There is a clear link between police effectiveness and the public confidence that



comes with the faith that complaints will be fairly and efficiently dealt with. Low public confidence in the police complaints system means that the public tend to view complaining as unproductive. This pessimism may eventually serve to undermine the police. The imposition of an impartial complaints system will serve to augment confidence and trust in the community agent which in turn will likely increase the acceptability, status and authority of police.

(b) Congruent Values Barometer : The general attitude of the community to the police can make for greater or lesser confrontation. A procedure which is acceptable to the public is an essential part of keeping the police in touch with the community it serves. It will act as an instrument to detect and forecast attitudes and values and thereby will enable the police to maintain values consistent with that of the community. For instance, the police will be quickly alerted to the unpopularity of the enforcement of the more out-of-date or defective laws. They will also be encouraged more readily responsive to remedying discrepancies in police procedures and policies.

(c) Policing by Consent : Policing by consent relies very much upon good community/police relation and an effective complaints procedure will help cement this relationship.



(d) Public Perception : The public image of the police is an intangible yet vitally important factor influencing police work. Being subject to an effective complaints procedure will help dispel the perception that the police are a law unto themselves.

Part I of the Police Complaints Authority and Miscellaneous Amendments Bill 1987 (the Bill) directly and convincingly addresses the concerns of fear of abuse of force; the inadequate complaints process and the need for effective accountability. The Bill not only remodels the existing complaints system but also impacts on the constitutional position of the police in society. It achieves this by the establishment of a Police Complaints Authority (the Authority) which basically is an independent body that represents the public and monitors the police in the important areas of public concern.

#### Scope of Paper

Firstly, although the focus of this paper is on the new complaints system, it is necessary that the existing system should be analysed and criticised so that one can gain a true appreciation of the reform measures of the Bill. The existing complaints system is to a certain extent a direct result of the somewhat dubious validity of concepts such as "constabulary independence" and "accountability to the law". These concepts are substantial topics in their own right and consequently they will only be superficially dealt with in this paper.



Secondly, the need for a shift to external vigilance is canvassed and then the Bill is analysed in detail, in a critical clause by clause with comments on the substance, and drafting style; and comparisons drawn with overseas jurisdictions. The paper also focuses on the specific functions, duties and powers of the principal actors/deciders, drawing together some pertinent points. An evaluation of the competing interests involved in the Bill follows as well as comments on the nature of the legislation itself. The paper then concludes with a summary of some of the features of the proposed system with some other general observations.

## II. THE FUNCTION OF POLICE IN SOCIETY

Reducing it to its most elementary level, the police function as an agent of government to serve the community. Within this function, its work can be categorised into three broad roles which basically range from being in the vanguard of the administration of justice to the provision of social services. In the modern liberal democratic state its function has been described as being:

"... the instrument for enforcing the rule of law, they are the means by which civilised society maintains order, that people may live safely in their homes and go freely about their lawful business. Basically the task is the maintenance of the Queen's Peace - that is the preservation of law and order."<sup>3</sup>

But its function is perhaps more accurately and succinctly described in Sir Richard Mayne's instructions to the "New Police of the Metropolis" in 1829. There it was defined as being "[T]he prevention of crime...., the protection of life and property, and the preservation of public tranquillity"<sup>4</sup>.



The function of the New Zealand Police has not been given statutory form. However, The Oath of Office<sup>5</sup> of the New Zealand constable records a function similar to that of the early English model. The constable swears to:

"... well and truly serve our Sovereign Lady the Queen in the Police, without favour or affection, malice or ill-will, until ... legally discharged; ... will see and cause Her Majesty's peace to be kept and preserved; ... will prevent to the best of [his or her] power all offences against the peace; ...; and that while ... continu[ing] to hold the said office will to the best of [his or her] skill and knowledge discharge all the duties thereof faithfully according to law...."<sup>6</sup>

The Oath is complemented by regulation 11(1) of the Police Regulations 1959 which provides in part that the duty of a constable shall include being "...on the alert for the prevention and detection of crime and the protection of the public...."

The general nature of these statements not only indicates the extraordinarily broad responsibilities upon the police collectively and individually but it also belies the complex and multifaceted roles of its function. Its activities include the following roles:

- (a) Law enforcement and order maintenance: which involves, for example, preventing crime, detecting offenders, effecting arrests and prosecuting violators;
- (b) The provision of social services: which includes, for example, assisting the mentally defective, supervising the young, caring for the frail, keeping the peace and generally creating and maintaining a feeling of security in the community;
- (c) Non law enforcement work load: this role includes, for example, attending motor accidents, performing search



and rescue operations, rendering first aid, dealing with missing persons, abating nuisances, facilitating the movement of traffic, supervising crowds at public events, attending domestic disputes, administration of registration and licencing, taking reports on lost and found property.

The interrelationship between these aspects of the police function is a cause for competition and conflict. For instance, in dealing with domestic disputes (non law enforcement workload) evidence of any assault by one of the participants will likely cause the law enforcement role to be invoked and an arrest and prosecution will ensue. In policing crowds at public events (non law enforcement workload) or just simply keeping the peace (social service), the police have access to a variety of control or coercive measures (law enforcement) to enable it to maintain public tranquility.

To be successful in the pursuit of these roles, the elements of "consent" and "balance" are essential. The police, if it is to secure the consent of the community, must strike an acceptable balance between the three roles of its function.

Lord Scarman, summed up the balance required and tension between the roles as follows:<sup>7</sup>

"Crime and disorder are aberrations from 'normality' which it is the duty of the police to endeavour first to prevent and then, if need be, to correct. It follows that the police officer's first duty is to cooperate with others in maintaining 'the normal state of society'. Since it is inevitable that there will be aberrations from normality, his second duty arises, which is, without endangering normality, to enforce the law. His priorities are clear; the maintenance of public tranquillity comes first. If law enforcement puts at risk public tranquillity, he will have to make a difficult decision. Inevitably there will be situations in which the public interest requires him



to test the wisdom of law enforcement by its likely effect on public order. Law enforcement, involving as it must, the possibility that force may have to be used, can cause acute friction and division in a community - particularly if the community is tense and the cause of the law breaker not without support. 'Fiat justitia et ruant caeli'<sup>8</sup> may be apt for a Judge: but it can lead a policeman into tactics disruptive of the very fabric of society."

It is plain that with the limited resources available to the police, it can not hope to achieve the ambitious fulfillment of its function. Therefore, it is permitted a wide discretion in order for it to not only balance its roles and but also achieve an acceptable level of performance.

It follows then that the nature of the police function involves "the formulation of policies, the setting of standards, the assessment of priorities and the efficient utilisation of limited resources".<sup>9</sup> Hence it has been largely left to the police to deal with, for instance, the organising of policing methods, the juxtaposition in New Zealand of combining a rapid response crime control effort - (a law enforcement role which may be in danger of fostering resentment with some segments of the community), with that of a caring, sensitive policing (ie community policing); the need to prevent crime versus the need to detect it; the need to respect civil liberties whilst at the same time infringing them; the decision to employ reactive or proactive policing, patrol versus foot policing, the enforcement and prosecution of the criminal law in general and individual cases; the manner in which demonstrations and industrial disputes will be handled or whether or not dawn raids or firearms amnesties should be conducted, and most importantly, for the purpose of this paper, the nature and design of the process by which citizens complain about police actions.

The discretion in organising police policies, the assessment of priorities and the efficient use of resources is but one very important facet of the autonomy of policing. The other



facet relates to the exercise by individual officers of the power conferred upon their office. To assist the attainment of the overall police effort, police officers exercise an array of controls and powers involving the coercion and repression of citizens in general or selective cases. For instance, important day to day decisions, reflecting the overall police devised policies, include making an arrest, using force or bringing a prosecution against a citizen.

The width of this complex function underlines the need for effective control not only over individual members of the police, but also over the police generally. In the broad sense, there is need for an effective avenue by which the community can hold the police accountable for the exercise of its wide discretion and issue directions to it.

### III. CONSTITUTIONAL STATUS OF POLICE

Since the police are basically an agent of Government and thus of the community, one might expect that the community should be able to make its own judgments as the manner of policing it wants and how the police conduct operations. But an operational autonomy by the police has developed which is reflected in its constitutional status. This status accommodates the doctrines of "constabulary independence" and "accountability to the law." Consequently effective citizen participation in policing matters is minimised, whether it relates to decisions about the style of policing or the investigation and resolution of complaints against the police.

It is proposed to very briefly examine the notions of "constabulary independence" and "accountability to the law".

- (i) Constabulary Independence and Political Accountability<sup>11</sup>



Support for the notion of constabulary independence stems from both statute law and common law. In the first place the Commissioner of Police is appointed by the Governor General to have the general control of the Police.<sup>12</sup> The bestowment of direct control of the police to the Commissioner is quite unique in a Westminster style parliamentary system. Under this style of Government, the Minister in charge of the department or service invariably has the particular responsibility for its control and administration. For instance, the Customs Act<sup>13</sup> provides:

"Subject to the control of the Minister, the Department shall be charged with the administration of the Customs Act."

Similarly, the New Zealand Security Intelligence Service Act<sup>14</sup> provides:

"Subject to the control of the Minister, the functions of the New Zealand Intelligence Service shall be...."

and the Ministry of Transport Act<sup>15</sup> provides:

(2)"...the Ministry shall be under the control of the Minister of Transport.

(3) The Ministry shall, in all matters relating the administration of the enactments specified in Part II of the First Schedule of this Act, be under the control of the Minister of Civil Aviation and Meteorological Services."

The deferment of control to the Commissioner then reflects the special functions the police have in society. However, the Minister does have the ability to hold the Commissioner accountable for matters of an administrative or operational nature. For instance, the duties of the Commissioner of Police which are detailed in the Police Regulations 1959<sup>16</sup> which record that:

Normally, Ministers are responsible for the general conduct of their departments and they are



"(1) The Commissioner shall be responsible to the Minister for the general administration and control of the Police.

(2) He shall cause all members of the Police to discharge their duties to the Government and the public satisfactorily and efficiently."

These regulations establish the rather clouded relationship between the police and the executive. The Commissioner is clearly responsible to the Minister and Government as the unequivocal phrases, "shall be responsible to the Minister for the general administration and control" and "their duties to the Government" indicate.

But the peculiar relationship between the police and the Government also takes account of the historical significance of the office of the English constable and the common law doctrine of constabulary independence. Various judicial observations, particularly in England and Australia, have been interpreted as substantiating this doctrine<sup>17</sup>. This view necessarily implies that individual members of the police are answerable to the law and the law alone. The powers of a constable are exercised by him by virtue of his office. They cannot be exercised on the responsibility of anyone but himself. Thus a constable is exercising an original not a delegated authority.<sup>18</sup> Together these lines of argument provide the basis that since no person can instruct a constable to enforce the law. It has been assumed to follow that the Commissioner cannot be instructed on the organisation of operational policing including policy matters.

Recent commentators<sup>19</sup> have criticised the doctrine and maintain that the notions that the police rely upon to support police autonomy are flawed, particularly in light of the statutory directions in the Police Regulations. But the doctrine does receive some support from the practice of ministerial control. Normally, Ministers are responsible for the general conduct of their departments and they are



answerable in the exercise of that responsibility first to Parliament and ultimately to the electorate. That responsibility is less direct with the police but the Minister does have the ability to influence police policies and day-to-day operations. Ministerial responsibility has not been totally eroded. However, it is a very rare occurrence for the Minister to get involved in the application of law enforcement in specific or general cases.<sup>20</sup> Although the Minister has in the past intervened in some wider policy issues.<sup>21</sup>

In summary, although the legislative declarations appear to have regularised the common law status of the police, this has in effect not occurred. The statute law operates in tandem with the common law which conventionally has seen the reluctance of the Minister to get involved with the operational side of policing.

(ii) Accountability to the Law<sup>22</sup>

The notion of legal accountability of the police refers to the capacity of the courts to subject the activities of the Police to real scrutiny. The courts are regarded as an important institution of Government with a special responsibility to address misuse of police power and discretion. This perspective has provided a great deal of appeal to the police. It has also provided a basis for the rejection of other forms of accountability, for example, civilian oversight panels or an external complaints reviewer. This doctrine fosters the image of political independence and neutrality - the police are simply instruments to enforce the law. Further, "it provides what appears to be a democratic basis for police activities - the law which the police apply and to which they are answerable results from a democratic legislative process"<sup>23</sup>. This perspective also ensures that the police in this process are "depersonalised" (it is the law which requires it etc), which provides reassurance to the public. Also the entire process engenders public acceptability for the Police.



The cornerstone of the legal theory arises in the first Blackburn case<sup>24</sup> where Lord Denning asserted both the independence of the Commissioner from political intervention and the Commissioner's ultimate answerability to the courts for enforcing the law.

"I have no hesitation in holding that, like every constable in the land he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save under the Police Act 1964...I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every Chief Constable of the land, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all these things, he is not the servant of anyone, save the law itself. 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 the law alone. That appears sufficiently from Fisher v Oldham Corporation and Attorney-General for New South Wales v Perpetual Trustee Co Ltd"<sup>25</sup>.

This particular case, however, must be distinguished on its facts. It dealt with the complete non-enforcement of the law thus limiting the application of the doctrine that allegedly applies in respect of policy and command decisions.

At the individual police officer level the scope of the court's review is also very limited. Much police activity is not governed by legal rules and the capacity and open-ended nature of the law permits the individual officers a great deal of latitude. Most police work does not involve law



enforcement. Therefore, the nature of day to day police work which involves a myriad of situations in which police officers and citizens confront each other is not capable of being controlled by the courts.

In effect, the courts are simply not in a position to provide an effective and definitive role. "All the courts can do is ensure that officers have actually considered the particular case before them as opposed, for example, simply following a general policy directive or perhaps their own unthinking assumptions"<sup>26</sup>. They do not have the prerogative of picking and choosing cases and issues which they consider important to address.

The reality then of the legal accountability doctrine is that the police are rarely called upon by the courts to justify their actions. Most of the police "clientele" plead guilty, do not make complaints nor challenge police evidence or conduct at their hearings or trials. Further, since much of police work does not relate to law enforcement legal accountability by definition is limited.

The courts, however, do have a number of means of effecting a control over police conduct when it is required. For instance, where a case comes before it involving the infringement of the due process principles or Judges Rules<sup>27</sup> (ie detention of a suspect while enquiries are being made or the questioning of a suspect for an extra-ordinary long period), the court may simply dismiss the information. In other cases, whether there is a clear abuse of power or the case involves "bad faith" on the part of a police officer, the officer may be publicly censured. Yet, in other cases, the court may award costs against the police as an indication of what is not judicially acceptable behaviour.<sup>28</sup>

Whilst the legal constitutional status may be technically certain, it has to a certain extent been subjugated by the doctrines of constabulary independence and accountability to the law. The assertion that the Commissioner is responsible only to the law as well as maintaining a substantial



operational autonomy from political interference, has the effect of leaving him with a large discretion to decide policing policies. The failure then by the community to secure a process which would provide an adequate degree of protection from the police as well as provide a means of detection of abuse of power, is not the result of a divided pluralistic community but the result of a tradition.

Apart from the doctrine of ministerial responsibility the Commissioner is subject to two other forms of operational control. They include the Justice and Law Reform Committee (whose functions are set out on page 48) which has previously sought information from the Commissioner rather than having examined policies of the police within the terms contemplated by its brief. Thus to a certain extent this method of control by the Committee has limited value. Another control of limited value is the Annual Report to Parliament.<sup>29</sup> The purpose of the Annual Report is to provide an official source by which the Minister, Parliament and members of the public are informed about matters concerning the police. Theoretically the Report should be a document which not only informs the Minister and the Parliament of police activities and problems but also provides an important media for communication and self examination within the police itself. In reality Parliament rarely scrutinizes the very general and shallow contents of the report. At the time of preparation of this paper, the nature and structure of the Annual Report was being reviewed by police officials.

#### IV. THE CATEGORISATION AND NATURE OF COMPLAINTS

The police have a dual role of not only investigating offences committed by members of the public but they also have a separate responsibility for investigating complaints made against its own members. Complaints made by members of the public against the police fall into three categories<sup>30</sup>.



Firstly, there are complaints arising from the actions of individual members of the police in their law enforcement and order maintenance roles. Complaints in this category primarily involve misconduct whether it comprises an allegation of breach of the police disciplinary code or of criminal offending. For instance, assaults on citizens, maltreatment of prisoners, fabricating evidence or failing to investigate an offence. This category also includes complaints arising from the exercise by police officers of the discretion to prosecute a person for an offence. Many other complaints often are made on the basis of what is perceived to be impoliteness, casualness or some other attitudinal inadequacy on the part of the police.

Secondly, there are complaints arising from general police policy, practices and procedures which range from citizens objecting to the police use of soft nose bullets or the closing of rural police stations. Objectionable practices might include the filing of burglary reports if they are under a certain monetary value particularly if no suspect is named fall into this category or the manner in which the team policing units operate.

Lastly, there are complaints arising out administrative decisions. For instance, manpower and staffing of localities or the allocation of resources and their use are included in this category.

As it is observed complaints are capable of covering a broad spectrum of grievances. It does not follow that the same procedure of investigation and resolution is equally suitable for dealing with them all these categories. In fact the existing complaints system has functioned primarily to deal with the first category of complaints to the almost exclusion of the others. This category is of course subject to an Ombudsmen's ex post facto review. In regard to the latter two categories the police are in the same position as any other government department. These complaints are investigated by an Ombudsman under the Ombudsmen Act 1975 (although the policy category is subject to certain Ombudsmen jurisdictional limitations which will be traversed later).



## V. THE EXISTING COMPLAINTS SYSTEM

### (i) Development

Prior to 1982 there was no centralised repository within the police which recorded complaints made against its members. There was however an annual return from districts of "complaints and praise" which was collated by the Public Affairs Directorate<sup>31</sup> of the police. In this earlier system police District Commanders were the final arbiter of most complaints. The only forms of "independent" scrutiny occurred if a complaint was to be the subject of disciplinary proceedings (in which case the Commissioner reviewed the file) or if a further complaint was made expressing dissatisfaction with the original police investigation (either the Commissioner or an Ombudsman reviewed the file).

The number of complaints made under this system was never publicised. Nor was there any internal mechanism which provided for the analysis of the complaints in order to determine any patterns of misconduct. This earlier system was also characterised by the lack of a standardised investigative procedure for investigating officers (apart from some very general guidelines contained in the General Instruction Manual). Presumably, the Commissioner also found it difficult to provide quick and informative responses to questions on matters of public, media or ministerial attention.

The earlier complaints system was subjected to severe criticism by the former Chief Ombudsman, Sir George Laking, in his report on the investigation of complaints arising out of the South African Rugby Tour of New Zealand in 1981. In his general conclusions he reported:

"It appeared to me that in some instances the police inquiries were directed exclusively to the detection of an offender and to deciding what action should be taken against him. If identification of the offender was seen to be impracticable, investigation of the



complaint was carried no further. In situations where a complaint was directed against general misconduct by a group of members rather than that of a single member, investigation did not seem always to extend to an inquiry as to how that came about. Non-commissioned officers in charge of such groups were not generally called to account for the conduct of those under their command. Similarly, investigations did not generally extend to possible deficiencies in training or instructions. Consideration should be given to the adequacy of existing procedures for the effective investigation of claims of general misconduct to enable any short-comings in training programmes or in general or special instructions to be identified."<sup>32</sup>

**(ii) Existing procedure of complaints**

The appointment of a Deputy Commissioner (Administration) in 1982 provided an opportunity to conduct a full review of police procedures for receiving, investigating and determining complaints. The review was instituted primarily to counter the persistent calls by the media and sectors of the public generally for an independent overview of internal police investigations in the aftermath of the Springbok Tour.<sup>33</sup> The review confirmed what everybody knew - that in many respects, the complaint system was inadequate. Principally, it failed to meet the demand for fairness, effectiveness and independent review.

On 1 January 1983, a new policy of dealing with internal investigations was introduced along with a central register for recording complaints against the police.<sup>34</sup>

The present scheme requires that as soon as a complaint is made to the police it must be taken down in writing and the complainant is requested to sign it.<sup>35</sup> A complaint does not necessarily have to be made at a police station<sup>36</sup> nor does it have to be made to a police officer.<sup>37</sup> A Commissioned Officer then gives whatever directions considered appropriate



should the complaint require early attention.<sup>38</sup> A copy of the complaint is promptly forwarded through the normal channels to the District Commander indicating what action has already been taken.<sup>39</sup>

The District Commander after forwarding a written acknowledgement of the complaint to the complainant<sup>40</sup> then classifies the complaint as serious or non serious.<sup>41</sup> The purpose of these classifications is to enable the recording of serious complaints in the central register.<sup>42</sup> A "serious allegation" is one which alleges a member of police has committed a crime or offence punishable by imprisonment<sup>43</sup>, or unjustly arrested or mistreated a person;<sup>44</sup> or displayed prejudice or discrimination whether racial or otherwise against any person or group of persons;<sup>45</sup> or any other case which a District Commander considers serious.<sup>46</sup> A "non serious allegation" includes an allegation that a member of police has been neglectful, unreasonable, rude or has otherwise acted improperly in a minor way.<sup>47</sup> Only serious complaints are recorded in the central register. (See Appendix B which is a synopsis of serious complaints made against the police in recent years.

If the complaint is of a serious nature<sup>48</sup> or one which the District Commander is of the view warrants<sup>49</sup> inclusion in the complaints register,<sup>50</sup> he shall within 48 hours forward a copy of the complaint to the Deputy Commissioner (Administration).<sup>51</sup> The District Commander then appoints or arranges the appointment of a member of the appropriate level to conduct or supervise the enquiry.<sup>52</sup> The District Commander has to ensure that the officer complained about is advised of the substance of the complaint as soon as possible unless there is good reason for not doing so<sup>53</sup> and throughout the enquiry he is required to take a personal interest and ensure that it is handled expeditiously.<sup>54</sup>

In advising the complainant of the outcome of the enquiry the District Commander, by letter is required to:<sup>55</sup>



- (i) identify each allegation which may amount to a criminal or disciplinary offence;
- (ii) summarise the factual findings of the enquiry;
- (iii) clearly present the conclusions and reasons for them;
- (iv) indicate the decision as to any further police action.

Where proceedings could be instituted in open court, or by way of disciplinary proceedings, or there has been a high degree of public interest, or media publicity has been generated by the complaint, the District Commander must forward the complaint files to the Deputy Commissioner for a decision.<sup>56</sup> On the other hand a frivolous, vexatious or groundless allegation can be quickly put to rest<sup>57</sup> but he is required to advise all parties affected by his decision.<sup>58</sup> The Deputy Commissioner though still reviews all of these files before filing.<sup>59</sup>

Complaints made through the Commissioner or a Minister warrant an extra effort for early completion.<sup>60</sup> Complaints referred to the Police by an Ombudsman<sup>61</sup> do not apparently rank in the same manner previously described - although every endeavour is made to complete the investigation early. Where a complainant is dissatisfied with the police investigation and the Ombudsman has been approached the complaint is once again referred to the police for further enquiry.<sup>62</sup> In these cases the complainant is not interviewed except with the authority of the Commissioner<sup>63</sup> and the inquiry should be completed within a six weeks time frame.<sup>64</sup>

## VI. ALTERNATIVE MEANS OF REDRESS

A variety of other forums exist for aggrieved complainants to pursue redress for alleged improper police policies or actions. These include:



(i) Complaints to an Ombudsman This statutory officer as indicated above, can only act upon a complaint which has not In New Zealand external specialist control of the police is conducted by the Ombudsmen. The Ombudsmen Act 1975 includes the police among the agencies who are within the Ombudsmen's jurisdiction.<sup>65</sup> However, jurisdictional limitations weaken the oversight. For instance, section 13(7) of the Ombudsmen Act provides:

Finally, the other statutory impediment arises out of the Ombudsman "Nothing in this Act shall authorise an Ombudsman 1975 provide to investigate :

(d) Any decision, recommendation, act, or omission of any member of the Police that may be subject of an inquiry under section 33 of the Police Act 1958, unless a complaint in relation thereto has been made or conveyed to a member of the Police superior in rank to the member to whom the complaint relates; and

(i) the complaint has not been investigated; or

(ii) the complaint has been investigated and the complainant is dissatisfied with the final result."

The Ombudsmen, therefore, are precluded from investigating any complaint unless it has first been made to the police and only then if the complaint has not been investigated or the complainant is dissatisfied with the result. By the time the Ombudsmen review a police file all the definitive decisions have long been made and acted upon. The time delay between the police investigation and the Ombudsmen's enquiry makes it almost impossible for the reviewer to influence police investigations. As a result the complainant is provided with an ineffective means of redress or remedy.

Although a citizen could commence an action of this nature he Another limitation arises because the Ombudsmen are not at liberty to institute an own motion investigation into matters



relating to police practices. This statutory officer as indicated above, can only act upon a complaint which has not been investigated by the police or where it has been investigated but the complainant is dissatisfied with the final result. The own initiative enquiry, available in respect of other government agencies,<sup>66</sup> has never been available in respect of the police.

Finally, the other statutory impediment arises out of the Ombudsman's principal function. The Ombudsmen Act 1975 provides that "it shall be a function of the Ombudsmen to investigate any decision or recommendation... relating to a matter of "administration".<sup>67</sup> What amounts to "administration" has never been defined. "Successive Commissioners of Police have taken the view that some of the most vital decisions taken by the Police - decisions about whether or not to accept a complaint and as to whether or not to commence a criminal prosecution or not relate to matters of administration.... The view of the Commissioners was supported several years ago by an opinion from the Crown's legal advisers which went further. It advanced a wider contention that none of law enforcement operations of the Police relate to matters of administration".<sup>68</sup>

Consequently, according to this reasoning most police decisions are of an operational nature and as a result the Commissioner contends that the Ombudsmen lack the jurisdiction to investigate such matters. The reality has been somewhat at variance to the rhetoric though because a high level of co-operation has been established with the Ombudsmen having generous access to police files and reports. The argument does, however, highlight the precarious oversight function the Ombudsmen has in relation to the police.

(ii) Criminal Proceedings

Although a citizen could commence an action of this nature he or she would have to overcome a number of difficulties which relegates such an action to one of little practical value.<sup>69</sup>



There are two features which diminish the practicality of pursuing a private prosecution. Firstly, the achieving of credibility in the eyes of the Judge who in sitting in police courts might become immune to the allegations of misconduct against the police. Maintaining judicial objectivity and impartiality may be very difficult. The second feature relates to the production of evidence to the required standard of proof. This particular aspect makes it virtually impossible for an action to succeed without recourse to a number of respectable witnesses and independent evidence.

(iii) Civil Proceedings

An aggrieved complainant can always have recourse to the law of tort and pursue damages in respect to trespass against the person or against property, assault and false imprisonment. But the complainant is statutorily barred from bringing an action for damages in respect of injuries.<sup>70</sup>

Exemplary damages though for the tort of battery may be pursued. In order to succeed the plaintiff must allege and prove a high-handed trespass, whether to the person or property by a police officer. In order to overcome the statutory bar where personal injury has occurred the plaintiff must show "some additional feature... an abuse of power or the invasion of other rights of the plaintiff".<sup>71</sup> Should the plaintiff succeed "the punitive element in the damages awarded to the victim might occasionally be found to satisfy the community's sense of justice".<sup>72</sup>

(iv) Commissions, Committees of Inquiry and Ad Hoc Examiners<sup>73</sup>

The history of the police records that a number of important inquiries or investigations have been conducted to scrutinize police actions or decisions. Commissions, committees and individual examiners have been appointed from time to time to inquire into and report upon diverse matters of public interest involving both operational and administrative matters. For instance, questions relating to the discretion



to prosecute citizens, investigations into fatal shootings by police officers have been conducted and the conduct of some individual police officers have all been enquired into. Some wider police policy issues also have been canvassed in relation to gangs and violence. With an array of inquiry facilities available, an aggrieved complainant mounting a sufficiently strong lobby could cause any one of the above inquiry mechanisms to be instituted. In reality, there are easier and less costly means to deal with an individual or public concern and it is not often any of these formal processes are instituted.

Perhaps an aggrieved complainant might induce the Minister of Police to appoint a Committee of Inquiry established under the Police Act 1958. Consisting of a Judge and one or more senior members of police, its purpose would be to investigate and report to the Commissioner on "any matter relating to the Police". In practice this provision has only been exercised in exceptional circumstances.

(v) Coroners Court

Depending on the nature of the evidence adduced a Coroner may find that a police action causing the death of any person merits further investigation although that statutory officer cannot determine any matter. However, in the main, the Coroners enquiry is limited to determining only the manner of death.<sup>74</sup>

(vi) Members of Parliament and News Media

It is possible for an aggrieved person to complain to his or her Member of Parliament or to the news media. In the past, the police have displayed a keen sensitivity to public opinion and will quickly react to criticism mentioned in the House or reported in the media.

The 1976 Overstayer issue is an example of a question being asked in the House. The Minister of Police initially denied that "checks" had been carried out on a random basis but the



Opposition forced the issue and demanded an enquiry. The subsequent report by a police superintendent confirmed that the police did in fact carry out random checks in the initial period of the operation.<sup>75</sup>

On the other hand, for a particular complaint to be considered by the media, it must be worthy of the publicity. Consequently, unless the nature of the complaint is in some way unusual aggrieved citizens will normally be dissatisfied with this means of achieving redress.

#### VII. FEATURES OF THE EXISTING SYSTEM

The existing complaints system provides the police with an apparent monopolistic control. That body has the primary responsibility for investigating and determining the outcome of all complaints against police officers. But it would be wrong to conclude that the complaints system has not been devoid of effective Ombudsmen attention. The former Chief Ombudsman did campaign vigorously to bring about changes in the police complaints system. In the 1980 Annual Report to Parliament, he commented:

"Following a series of discussions with the Commissioner of Police, the internal procedures for the investigation of complaints from members of the public have been considerably modified...."<sup>76</sup>

Again, in 1983, following his investigation of complaints against the police arising out of the South African rugby tour of New Zealand in 1981, the then Chief Ombudsman drew the attention of the Commissioner to a number of general issues relating to the investigation of complaints which he invited the commissioners to consider.<sup>77</sup>

Finally, in his valedictory report, Mr G Laking dwelt at length on the investigation of complaints against the police. After citing the deficiencies in the Ombudsmen Act fabric to



effectively monitor the investigation of complaints, he canvassed the need for independent review of police action, criteria for the evaluation of complaints procedures and possible solutions.<sup>78</sup>

However, in the main, the police are usually only answerable for the conduct, speed, and strategy of an investigation perhaps by way of an ex post facto Ombudsman's review. Whilst the system does provide a uniformity in the ranking of complaints, the closed nature of the internal system leaves it open to suspicion. Germane to the features of this system is the lack of public documentation and information concerning its functioning and procedure, as well as the lack of comprehensive and meaningful statistics about complaints.

#### VIII CRITICISMS OF THE EXISTING SYSTEM<sup>79</sup>

Some general criticisms about the complaints system have already been referred to but it is worthwhile considering some more specific criticisms.

##### (i) Lack of Credibility

There is a general perception that the internal investigation of complaints fails in the proper conduct and surveillance of justice.

Even if the Police are rigorously impartial in the investigation and resolution of complaints they are still perceived to be acting with an attitude of over-protectiveness of their own. Thus the integrity of the system fails because in the eyes of the public it is seen as less than credible. Police officers too must also have confidence in the system. A system which does not treat officers fairly by observing their rights and entertains groundless complaints will diminish its own legitimacy in the eyes of police officers.



**(ii) Lack of Impartiality**

One of the most prominent criticisms of the existing system is that the police are seen to be "judges in their own cause". By investigating and adjudicating on complaints made against its own members the police are seen to be less than objective. This lack of objectivity arises in a number of ways. For instance, the investigation of a complaint is often undertaken by officers who are usually in constant daily contact with those who are the subject of the complaint. Hence there may be a natural predisposition to seek out an explanation that reflects favourably on the police officer concerned or the police generally. Where there is a conflict of evidence between police officers and others the inconclusive nature of the complaint must in practice result in the benefit of the doubt being given to the police officer.

The prejudging of complaints (a relatively rare occurrence these days) which attract widespread media attention is another concern. Understandably the police endeavour to maintain a high-profile untarnished image. For the sake of preserving that image and maintaining morale public allegations are occasionally challenged in the same public forum before the police investigation has been carried out or completed 79a. By taking such a public stance the police administration present the investigator with a conflict of roles. The investigator may feel obliged to justify that which was first asserted.

**(iii) Status and Credibility of Complainants**

The status and credibility of complainants may unduly influence the investigation and adjudication of complaints. There are a number of characteristics that tend to lessen the plausibility of complaints. For instance, the police may be very sceptical of a complaint received from a complainant who has been arrested, or lacks sobriety, or suffers from mental illness or is a gang member.<sup>80</sup> The nature of the incident



from which the complaint arises may also be given considerable weight particularly if it was an emotionally-charged situation. In these cases, investigators and the decision makers may be inclined to diminish the value of the complaint.

**(iv) Difficulties in Lodging Complaints**

Even though the system provides for complaints to be made at places other than a police station (eg via a solicitor, a Minister of Parliament or an Ombudsman) those who wish to complain usually do not have the wherewithal to use the other facilities. Their only real option is to make a complaint direct to the police. Yet, because of the potential prejudgements and use of discrediting characteristics that the police might employ, a complainant might be regarded with suspicion and antagonism. Fear of harassment and intimidation at a later time also deters many complainants from making their complaint directly to the police.

**(v) Failure to Scrutinize Policies and Management Decisions**

Part of the obligation of management of the police is to recognise dangers and opportunities of misconduct, to be alert to the signs of its existence and to devise measures to deal with it.

However, the emphasis in the existing system is oriented toward individual misconduct and not bad policies or management decisions. By giving emphasis to eliminating the rotten apple other more primary concerns of inadequate or bad police practices and procedures are not given the remedial attention which they merit. The complaints systems consequently fails to feed back effectively into the organisation so that defective policies, strategies and supervisory functions can be influenced and modified.



**(vi) Unfairness to Police Officers**

Although this is a minor point it is worthy of brief mention. The coercive nature of police powers may be brought to bear on individual officers who may be victimised or scapegoated. Because of the relationship of the officer to the police, the officer may feel obliged to co-operate on matters in order to protect his or her career. Consequently the system may not afford individual police officers suitable protection.

In summary, as the preceding discussion discloses, the existing complaints system suffers from a number of serious deficiencies. As a result public confidence in the police is reduced, public co-operation with the police is diminished and public approval of the process is withdrawn.

**IX. THE NEED FOR CHANGE**

Usually reform of the nature proposed by the Bill rides on the waves of a scandal but New Zealand has not been treated to any cause celebre or cases of police corruption. Perhaps a number of events though over the last 10 years or so have served to challenge and question the integrity of complaint systems and the right of the police to devise policies for the community. Collectively they offer an indication as to what might have prompted the reformers. (The following examples are referenced in Appendix C). Consider for instance the long public saga of the Arthur Allan Thomas affair which culminated in a Royal Commission in 1980, and which criticised some police practices as well as the partial manner in which the evidence was presented. Consider also the many complaints which were lodged with the Chief Ombudsman - a legacy of the Springbok Tour in 1981 - which were substantiated but no police officer was ever charged in relation to them<sup>81</sup>. This heightened public cynicism of the complaints procedure. Consider also the criticism of the former Chief Ombudsman Mr G Laking, who in his 1984



valedictory report, criticised aspects of the law which inhibited the Ombudsmen's office from monitoring, in an effective fashion complaints against the police.<sup>82</sup> Then there was the Committee of Inquiry into the Queen Street riots which criticised some aspects of police procedures;<sup>83</sup> and finally one needs to also consider the recommendations of independent investigators into several fatal shootings by the police. All three ad hoc examiners recommended changes to police procedures in one form or another. Perhaps the most significant recommendation was made by Mr Nicholson Q C in his report on the shooting of Paul Chase. He recommended that an independent examiner be appointed in every case where a person was shot by a member of the police (See Appendix C, paragraph E).

Perhaps too the reformers were mindful of Lord Scarman's findings on the Brixton Riots. According to the Law Lord if public confidence in the United Kingdom complaints system was to be secured "the early introduction of an independent element in the investigation ... was vital".<sup>84</sup> He also found that "any solution falling short of a system of independent investigation for all complaints was unlikely to be successful in achieving public confidence".<sup>85</sup>

These episodic but well publicised events may have collectively contributed to focus on deficiencies in the current complaints procedure. Consequently the mounting public pressure to change the process and the persistent defence of the status quo by the police having become increasingly untenable has led to an environment ripe for change.

Part I of the Bill which relates to the Police Complaints Authority formed part of the Labour Government's 1984 election manifesto. Upon being elected to power the Government has since endeavoured to give substance to the policy. In February 1985 the Minister of Police circulated 700 copies of a discussion paper entitled "Complaints Against Police" throughout New Zealand. Heralded by wide news media coverage the discussion paper outlined the concept of an



independent non police Authority with jurisdiction over complaints against the police as well as an own motion ability to carry out investigations. The concept was drafted against the existing system of the investigation of complaints and the paper was cautious to point out that the ultimate statutory responsibility for the discipline of the New Zealand police must remain with the Commissioner.<sup>86</sup>

The discussion paper offered a number of alternatives to the existing system which included:

- (i) Ad Hoc Appointees: Where a complaint is of sufficient significance an experienced legal practitioner could be appointed on an ad hoc basis to undertake the enquiry. However, this concept was negated because it was considered that the appointee should have a permanent ongoing responsibility.
- (ii) Ombudsmen's Office: Utilising the Ombudsmen's Office was discussed but challenged. The Ombudsmen's role primarily relates to matters of "administration".<sup>87</sup> The importance of the proposed statutory officer and its function, it was suggested required a greater degree of specialisation that could be provided by being an affiliate to the Ombudsman's Office.
- (iii) Panel: The concept of using three or more persons as a panel was considered. One or more of the panel members could review or investigate matters coming within their jurisdiction and if necessary the entire panel could convene to reach a conclusion. But such a system was considered to be potentially unwieldy and consequently negated.
- (iv) Sole Appointee: This alternative was offered as the preferred alternative. A respected and eminent public person, possessing wide experience in practical and legal matters, would be appointed solely for the specialised function of overseeing the investigation of serious complaints. The paper recorded the police administration's endorsement of this option.



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After Cabinet had considered the response, which in the main supported the general concept but with some variation of detail, an Officials Committee was appointed to consider the proposed legislation in detail. Chaired by Sir David Beattie the committee also comprised members from the Police Department, the Department of Maori Affairs, the Department of Justice and the Crown Law Office. The committee in its deliberations<sup>88</sup> considered existing overseas legislation on the topic, commentaries relevant to the proposed legislation, the views of individuals and groups and to a certain degree relied on the committee members' own experience and expertise.

*It is interesting to note that the Police Administration also*  
The Committee considered the notion of a specially appointed Police Ombudsman subject to the control of the Chief Ombudsman. The notion had a certain amount of appeal. Since there are Ombudsmen offices in the main centres of New Zealand the office is readily accessible. Further, the Ombudsmen have already developed a considerable specialisation in administrative investigations which is analogous to aspects of the Authority's functions.

Notwithstanding the cogent arguments in favour of the extension of the Ombudsman's office, some acknowledgement was given to the police opposition to such a move. For some time the Police Administration has endeavoured to keep the Chief Ombudsman at arms length in respect of operational matters and it has been critical of what it sees as that office's academic approach to investigations. As well, the Police Administration had expressed to the Committee doubts as to the quality of the Ombudsmen's staff to handle an enlarged investigative role. Should the Ombudsmen's Office expand its functions it would result in a lessening of morale according to the police. In choosing not to extend the Ombudmen's office, the Committee were more likely swayed by the fact that the investigation of police misconduct is of sufficient public importance to warrant a special appointment. The nature of the Authority's activities, tending to be quasi-judicial, favoured the appointment of a separate authority.



The trend overseas of moving to a special jurisdiction distanced from the Ombudsman's Office seems to have been another factor that influenced the Committee.

The Officials Committee then prepared a draft piece of legislation which is the basis of the current Bill. Some amendments were made by the Government. Following its first reading on 3 February 1987 it was referred to the Justice and Law Reform Select Committee for further inquiry. The Committee called for and received 38 submissions to the Bill from individuals and groups.

It is interesting to note that the Police Administration also made a submission to the Bill. This is a very unusual step in the New Zealand constitutional system. Normally it is expected that a Bill proposed by a Minister will have automatic Departmental backing. However, in a remarkable move the Police Administration's submission was made with the concurrence of the Minister of the Police.

#### X. THE BILL (See Appendix A)

The Police Complaints Authority is discussed in Part I of the Police Complaints Authority and Miscellaneous Amendments Bill. It was formally admitted to Parliament on 3 February 1987 by the Minister of Police, the Honourable A Hercus. Comprising 41 clauses, it is of comparable length to the legislation of overseas jurisdictions which have established similar police monitors. Part I of the Bill will in due course become a separate Act which will be administered by the Justice Department.

The complaints process contemplated by the Bill is divided up into four discernible parts although there is some fragmentation. In the first part, the Bill provides the necessary constitutional and housekeeping clauses establishing the office of the Authority. These clauses can



be found at both the front and rear of the Bill. Located in the middle of the Bill the drafters have recorded three other separate parts of the complaints process. These include the reception and categorisation of complaints, the handling and investigation procedures and then, finally, the determination of the complaints.

The long title records that the Bill will be:

"An Act to make better provision for the investigation and resolution of complaints against the Police by establishing an independent Police Complaints Authority, ...."

Whilst the title of the Bill indicates that it is a reform measure, perhaps the reader may in fact be misled by the title which at first glance may likely foster false expectations. It conveys the notion that all complaints will be investigated by an independent Police Complaints Authority. The reader of the Bill might have been more accurately informed if a purpose clause had been incorporated in the Bill, constructed in the following fashion:

The purposes of this Act are:

- (a) to ensure that all complaints made about the activities of the Police members and Police policies, procedures and practices are investigated in a quick and thorough manner;
- (b) to act as a deterrent to illegal, improper and inappropriate conduct by members of the Police;
- (c) to facilitate improvements in the complaints procedures and practices of the Police;
- (d) to promote public trust and confidence in the Police;



(e) to provide for police accountability to the community;

(f) to make consequential amendments to the Police "Complaints" Act 1958.

A purpose clause would serve as a complement to a remodelled title which would only record the fact that the Act makes provision for the establishment of a Police Complaints Authority.

#### **Police Complaints Authority - Clause 4**

The first substantive clause of the Bill is Clause 4 which establishes the Police Complaints Authority, who shall be appointed by the Governor-General on the recommendation of the House of Representatives.<sup>89</sup> The appointment process is significant in that all the parties in the House of Representatives must agree on a nomination. The Government can not use its majority to pass a resolution recommending an appointment to the Governor-General. This process reflects the need for the appointee to be acceptable to all parties. Whether in Opposition or Government, it is essential that any party in Parliament has confidence in the judgement and ability of the Authority.

#### (i) Nomenclature

The Beattie Committee considered a number of alternative titles for this statutory office, eg Police Complaints Examiner, Police Ombudsman, Police Examiner of Complaints, Police Complaints Authority, Independent Examiner for Police Complaints, Police Complaints Ombudsman and Examiner of Complaints against Police. Although the Committee confessed it was not enthusiastic about its choice it settled on this cumbersome title basically because it was used in the comparative United Kingdom Act.<sup>90</sup> The term is also used in the Victorian<sup>91</sup> and South Australian<sup>92</sup> legislation.



The name does accurately reflect aspects of the monitor's function. For instance, the word "Police" not only identifies the specialist area of concern but also defines the parameters of the application of the Act. The word "Complaints" indicates the type of interest that the monitor is to have regard to. In other words, it has a reactive role in a particular area rather than a general superintendence role over the police. Finally, the word "Authority" highlights the ranking or level this body will have compared to the Commissioner or the Ombudsmen. It is also an appropriate choice of word since it suggests that the monitor has the power and ability to enforce obedience, which it does, in its limited sphere of operations.

#### **Legal Background**

The quasi-judicial jurisdiction of the Office precludes the appointment of a lay person. So the Authority must be a qualified barrister or solicitor of the High Court who possesses suitable legal experience for the task. Since some complaints will involve allegations of criminal behaviour, the Authority will have to assess the quality of the evidence assembled, the credibility of witnesses and be familiar with the criminal standard of proof in order to make consistent and jurisprudential decisions. The use of the word "qualified" is odd drafting. Possessors of a law degree who have not been admitted to the bar but nevertheless possess suitable legal experience seem to be disqualified. There appears to be a strong emphasis on limiting the choice of appointees to practitioners rather than academics. Hence it is likely that the appointee will possess extensive legal and practical experience as a legal practitioner.

The appointment of a Judge as the Authority has been considered. Should such an occasion arise the appointment would not affect the Judge's tenure of judicial office, rank, title, status, precedence, salary, annual or other allowances, or other rights or privileges as a Judge (including matters relating to superannuation), and for all



purposes, service by a Judge as the Authority shall be taken to be service as a Judge.<sup>93</sup>

The Authority therefore needs to be not only suitably qualified but also possess proven experience. Normally, this latter element is translated into a time frame of 5 to 7 years experience, but such a requirement might potentially constrain the flexibility of an already narrow field from which selections will be made.<sup>94</sup>

The Minister of Police, has sought to abate fears that it will become a monocultural institution with a recent announcement that it is intended that either the Authority or the Deputy will be "on merit" a Maori.<sup>95</sup>

There is no specific restrictions on who cannot be appointed to be an Authority. For instance a number of appropriately qualified serving police officers may seek appointment. What too if the appointee is a Member of Parliament? Should persons in these two categories be prevented from attaining that Office? The Electoral Act 1986 in prescribing who can be members of the Representation Commission also prescribes who can not be a member. For instance, the Act provides:

"(b) two persons (not being public servants directly concerned with the administration of this Act or members of the House of Representatives) ...."<sup>96</sup> (emphasis mine).

A provision in the Bill, preventing a serving police officer or Member of Parliament being appointed as the Authority or Deputy Authority, might demonstrate the commitment to independence and impartiality sought to be attained by the Bill.

How busy will the Authority be? The number of serious complaints recorded by the Police over the last five years seems to be static - around 300 complaints (See Appendix B). This figure does not take account of the non serious



complaints of which no national statistics are currently recorded. When the Office is fully staffed and functioning could the Authority, if it desired to do so, engage in other remunerative employment? The Bill's silence in this respect might be taken that it is implied that the Authority should not engage in other outside activities. However, consider for example section 4 of the Ombudsmen Act 1975, which provides that:

"An Ombudsman shall not be capable of being a member of Parliament or of a local authority, and shall not without the approval of the Prime Minister, in each particular case hold any office of trust or profit, other than his office as an Ombudsman, or engage in any occupation for reward outside the duties of his office."

A similar provision in this Bill might have been overlooked.

#### **Term of Office - Clause 5**

The tenure of the Authority may be of a variable length of between 2 to 5 years<sup>97</sup> although there is provision for the Authority to be reappointed. Whilst a new perspective regularly introduced has some appealing aspects there is a fundamental problem with a variable tenure. Normally an appointment to any semi-adjudicating body or position is for a fixed term. The term is usually of sufficient duration for that officer to develop expertise in the field of operations. The Ombudsmen for instance shall hold office for a term of 5 years.<sup>98</sup> The length of this term provides a valuable constitutional check in that it rarely coincides with the 3 year parliamentary term. The Ombudsmen's independence is guaranteed from any political manipulation. This may not be the case with an Authority whose independence is likely to be compromised by the appointment for shorter terms with the possibility of reappointment, particularly if its decisions consistently displease the police, the public or the Government. Not only would its independence be compromised



but so would its ability to develop expertise. Shorter periods of appointment would inhibit the capitalisation of experience.<sup>99</sup>

By way of contrast, comparative monitors in the Victorian<sup>100</sup> and the Western Australian<sup>1</sup> jurisdictions are appointed for 5 years. The South Australian<sup>2</sup> counterpart is appointed for 7 years.

The Authority is required to continue to hold office notwithstanding the expiry of the term of appointment until that person is reappointed<sup>3</sup> as the Authority or a successor is appointed.<sup>4</sup> The Authority may also be informed in writing by the Minister of Justice that whilst he or she will not be reappointed that person is not to hold office until a successor is appointed.<sup>5</sup> This latter provision is interesting in that it anticipates tension between the House of Representatives and the Authority. The House is prepared, it seems, to allow the statutory office to operate without a nominated appointee (although its duties would be assumed by the Deputy Authority).<sup>6</sup> This provision to some extent may hold sinister connotations in that it has the potential of political manipulation. If, for instance, during this transition period, the Authority makes recommendations which are not favoured by the government, it could be simply served with notice that its tenure is at an end. There is no comparable provision in the Ombudsmen Act and it is difficult to see why the Authority should be placed in this invidious position.

The Authority must however resign the office on attaining the age of 72 years. That is the retirement age for members of the judiciary appointed to office before the 1 January 1980 and is in keeping with clause 4(4) of the Bill.<sup>7</sup>

#### Other Housekeeping Constitutional Clauses

It is pertinent to observe at this point that a reader of this Bill has to traverse a further seven housekeeping



clauses before getting to the essential provisions of the Bill - that of the functions of the Authority. It seems an unfortunate feature of much of the New Zealand drafting style that access to the law is unnecessarily impeded. Consequently the communication of the law is hindered and this Bill is another example of this unfortunate style. Whilst much of the contents of this Bill is fashioned on the provisions of the Ombudsmen Act 1975 there is no reason why its design could not have been styled on the Law Commission Act 1985. The Law Commission Act permits the reader to within the space of five consecutive sections at the beginning of the Act to note the purpose, establishment, functions, powers and responsibilities of the Law Commission.<sup>8</sup> If the Bill was similarly designed, the housekeeping clauses, which relate to the power to remove or suspend the Authority,<sup>9</sup> the filling of the Authority's vacancy,<sup>10</sup> the establishment of the Deputy Police Complaints Authority,<sup>11</sup> the oath to be taken by both the statutory officials,<sup>12</sup> salaries and allowances,<sup>13</sup> staff<sup>14</sup> and the superannuation and retiring allowances,<sup>15</sup> could be more conveniently be located in a schedule appended to the Bill - like the contents of the first schedule to the Law Commission Act 1985. Clause 6 deals with the power of removal or suspension of the Authority. It is similar to the traditional formula found in a number of Acts dealing with judicial and parliamentary office holders.<sup>16</sup> A Judge of the High Court can only be removed though on the grounds of misbehaviour or incapacity to discharge the functions of that Judge's office.<sup>17</sup> Clause 7 deals with the filling of the vacancy for an Authority. It is similar to Section 7 of the Ombudsmen Act 1975. Clause 8 deals with the Deputy Police Complaints Authority. The Deputy Authority may exercise all the powers, duties and functions of the Authority.<sup>18</sup> The powers of the Authority are not affected by the vacancy in its membership because



they are in such case assumed by the Deputy Authority.<sup>19</sup> Subclause (2) is drafted in an unusual style and is subject to repetition. Firstly, it states that the Deputy Authority shall be appointed in the same manner as the Authority and then it provides that "sections 4 to 7 of this Act shall apply....." In fact section 4 does relate to the appointment of the Authority. capacity perhaps a suitable gap in service between service in the two bodies might be considered Clause 9 deals with the oath to be taken by the Authority and Deputy Authority. The most notable point in relation to this clause in comparison to Section 10 of the Ombudsmen Act is that rather than adopting sexually discriminatory language (ie his - a feature of the Ombudsmen Act) or sex neutral language, the phrase "he or she" has been implanted in it. This is the only clause which adopts this particular language style and as a result it is inconsistent with the rest of the style adopted in the Bill. to gain insight into a variety of issues. A statistics system will ensure the Authority will Clauses 10 and 12 deal with salaries, superannuation and retiring allowances and have little relevance to the general reader.

Clause 11 deals with staff and merits further comment. Subclause (1) permits the Authority to appoint such officers and employees that are necessary to carry out efficiently the functions, powers and duties contemplated by the Act. The number of persons appointed shall be determined by the Minister of Justice. The selection of staff is extremely important because the appointees must have credibility with both the police and the public. They would need to be clearly beyond reproach. Apart from clerical staff it is envisaged that the infrastructure of the Authority's Office would include investigators, legal personnel and a collator of statistics/research officer. In respect to non police investigators it might be that they are to some extent disadvantaged. Police officers who are the subject of complaints are in a very strong position to frustrate an investigation unless there is strong corroborating evidence. An investigator who is unfamiliar with the police system may



be inhibited by police solidarity and non-cooperation and the investigator may be easily diverted from the issues. Although the overseas literature discloses that there is no insurmountable difficulty in building a competent civilian investigatory body former police officers may be considered essential in this function. If former police officers are selected in this capacity perhaps a suitable gap in service between service in the two bodies might be considered necessary. When selecting legal personnel the Authority might seek lawyers well versed in the criminal, administrative, labour and civil laws and who have a broad knowledge of the justice system and a sound grounding in the principles of justice. Their duties might likely include research, and the addressing of broader policy issues within the realm of the Authority. Finally it is envisaged a sophisticated statistics system will need to be devised to allow the review agency to gain insight into a variety of issues. A statistics system will ensure the Authority will make informed decisions and provide valuable recommendations for the improvement or reform of police policy, practices, or procedures.

In essence, it is incumbent upon the Authority to establish and cultivate an efficient team drawn from a variety of professions who possess the analytical and investigative skills to competently deal with the functions of the office.

#### Functions of the Authority - Clause 13

Like the Ombudsmen Act 1975, the reader has to wait until Clause 13 before coming upon the first pertinent and substantive provision of the Bill.

In the original discussion paper it was envisaged that the monitor would only deal with "serious complaints".<sup>20</sup> That category of complaints would include any complaint where it is alleged that a member of police had either been responsible for the death or injury to any person, had committed a crime or had committed any other act of



misconduct which the 'examiner' deems to be serious. The refinements proposed by the drafters of the Bill have considerably advanced the parameters of the monitors role.

Clause (1) records that it is the Authority's function:

(a) To receive complaints:

(i) Alleging any misconduct or neglect of duty by a member of Police;

Every complaint made against the police, no matter how serious or trivial, will come to the notice of the Authority.

The formula "misconduct or neglect of duty" is the same found in Part III of the Police Act 1985 and Regulation 46 Police Regulations 1959 which tabulates 62 offences of "misconduct or neglect of duty." From the stand point of consistency this formula is attractive. But there is a problem in that Regulation 46 is long overdue for a review. It includes offences which the member can commit whilst not involved in carrying out his duty, ie "offences" committed in his personal time. For example:

"(15) borrowing money from.... a person directly interested in the liquor trade"

"(24) failing without reasonable cause to pay a lawful debt."

Except that these matters have been determined to be "misconduct or neglect of duty", it is difficult to see why such dealings should be of interest to the police.

It also includes the absurd:

"30 Without reasonable excuse gossiping ... on duty."

Regulation 46 also replicates a number of criminal offences;

"(6) assaulting another member"



"(9) treating any person or prisoner... with unnecessary violence"

"(17) betting with a bookmaker"

"(50) altering any official document"

As indicated earlier, there is a need to overhaul the offences which amount to "misconduct or neglect of duty. In the meantime, the Authority might not be constrained by regulation 46 and perhaps one of its first tasks will include a review of this provision.

It is interesting to note that section 13(1) of the Ombudsmen Act 1975 permits an Ombudsman to "...investigate any decision or recommendation made, or any act done or omitted...." This language contrasts with the limiting phrase "misconduct or neglect of duty". Comparative overseas statutes also have a wider focus about the matters which the monitor can investigate. For instance, the Victorian and the South Australian legislation permit the respective Police Complaints Authority to receive complaints about the "conduct" of a member of the police force.<sup>21</sup> That term is defined as:

- "(a) an act or decision of a member of the police force;
- (b) failure or refusal by a member of the police force to act or make a decision in the exercise, performance or discharge or purported exercise performance or discharge, whether within or outside the state, of a power function or duty, that he has or by virtue of being a member of Police".

This provision permits a wider range of complaints to be received beyond that which only alleges misconduct. The Ombudsman in New South Wales similarly can receive complaints<sup>22</sup> concerning "conduct" but the term there is



defined slightly differently.<sup>23</sup> In respect to the Australian Federal Police, the Ombudsman receives complaints "concerning action taken ... by a member"<sup>24</sup> and this same expression also entitles the Parliamentary Commissioner for Administrative Investigations of Western Australia to receive complaints but in that jurisdiction the expression is not defined more narrowly.<sup>25</sup> By Section 6(1) of the Metropolitan Police Force Complaints Act 1984, Ontario's Public Complaints Commissioner can receive a "complaint". Since that word has not been defined it appears the Commissioner can receive complaints about any matter.

This particular aspect of clause 13 is unnecessarily narrow in scope and it may even act as a filter. For instance an aggrieved person reading the Bill might determine that his or her complaint falls outside the parameters of "misconduct or neglect of duty" particularly since the phrase itself is not defined. Greater consideration should have been given to the language contained in the Ombudsmen Act. Regard should also been given to the Victorian and South Australian legislation which invites any type of complaint but allows the respective monitors to categorise it and determine any future action.

The second arm of the subparagraph, raises some interesting points for example who is "a member of police"? Does it include, for example, any former member of police. It would appear that a former constable could not escape the jurisdiction of the Authority if misconduct or neglect of duty was committed while the constable was a member of the police. A change of status would not preclude the Authority from investigating misconduct during service with the police.

A "member of police" includes only those person who have been appointed to the police pursuant to either section 10 or 12 of the Police Act 1958. Every member of the police is a constable but some members can also be promoted to prescribed ranks. The Police Department (the Commissioner is a Departmental Head as well as the Commissioner of Police) also has a large contingent of civilian employees who act in a



variety of capacities to provide technical, administrative and professional support to the police effort. Although the 856 civilian staff are employed under the State Services Act 1962 and the State Services Conditions of Employment Act 1977, they are an integral part of the overall police operational scheme. A number of this body, during the course of their employment, come into contact with members of the public. For instance, many of the watchhouse computer operators attend the public counters. The armourers give expert evidence in court relating to the examination of a firearm following the commission of a serious crime. Other employees deal with lost and found property or assist in transporting of prisoners. Potentially the conduct of some of these Public Service employees may be the subject of a complaint of misconduct but they are not within the purview of the Authority by reason of the limiting jurisdiction. Any complaints or allegation of impropriety by Public Service employees are investigated by the Ombudsmen. The West Australian legislation<sup>26</sup> overcomes this needless jurisdictional split by permitting the monitor under that Act to oversee both groups of employees.

The Authority can also receive complaints:

- (ii) "Concerning any practice, policy or procedure of the Police affecting the body of persons making the complaint in a personal capacity."

The subparagraph is modelled on Section 13(1) of the Ombudsmen Act 1975, but provides a more restrictive jurisdiction. The Authority cannot automatically receive any complaint "concerning any practice, policy or procedure" from just any person. It must affect the person or body of persons making the complaint in a personal capacity. The Ombudsmen on the other hand can receive any complaint which affects any person or body of persons whether or not that person or body of persons is the complainant.

This particular provision has not attracted any visible concern from the Police Administration. Its attitude in this



particular respect may have been influenced by the capabilities of the Justice and Law Reform Committee. Policies of the police can be examined by this Committee whose third term of reference provides that it is:

"To examine the policy, administration and expenditure of departments and associated non-departmental government bodies related to justice, police and security intelligence."<sup>27</sup>

It has recently sought explanations from the Commissioner about certain incidents. From all accounts the Committee purported to hold the police accountable in terms of isolated operational headline events rather than in terms of scrutinizing policy or administrative matters in the wider sense. For instance it made "enquiries" through the Commissioner and the Minister of Police and were supplied with reports concerning events such as; "the long baton incident at Coromandel, the Dargaville shooting, the filing cabinet auctioned in Christchurch still containing some confidential cards, the diplomatic file lost off the roof of a car and the drink-drive blitz organised in Christchurch that the press suggested had not had the support of the local commander".<sup>28</sup> The method by which the Committee sought to hold the Commissioner accountable ie "enquiries" and "reports" also seems to be at variance with its brief, where the operative word is "examine". However, the nature of this accountability has perhaps served to make this provision more palatable to the police.

Perhaps the Committee, because of its heavy workload, may never choose to exercise its powers in relation to policy and administration matters preferring to leave that to either the Authority or the Ombudsmen.

This provision in the Bill then has potentially far reaching ramifications. It firmly implants effective accountability procedures upon the police in respect of policy and



operational matters. Further an astute Authority could solicit complaints from aggrieved parties (without necessarily disturbing the delicate balance espoused by the Bill) and thus achieve a greater executive control of the police. Notwithstanding this, the Authority is still in a strategic position to identify those police practices which are inconsistent with public expectations and it can recommend appropriate remedial action even when the remedial action is peripheral to an investigation.

A statutory original jurisdictional function is also placed upon the Authority by clause 13(1) who is:

(b) "to investigate of its own motion, where it is satisfied that there are reasonable grounds to carry out an investigation in the public interest, any incident involving death or serious injury notified to the Authority under Section 14 of this Act"

This provision regularises the current practice of appointing on an ad hoc basis senior legal practitioners as independent examiners into fatal shootings by the police. A sole permanent body will assume this role which will at the same time save confusion on the method of appointment. For instance, one of the independent examiners was appointed by the Attorney-General without reference to a statutory authority; another was appointed by virtue of the Commissioner's prerogative power of general control of the police; and yet another examiner was appointed without specific reference to the powers under which he was appointed. (See Appendix C paragraph E)

The Officials Committee initially proposed that the Authority would "investigate of its own motion ... any practice policy or procedure of the Police likely to give rise to any complaint under this Act". This originally contemplated function would have established a proactive process that might have prevented abuses before they occurred. In this respect, it would have complemented the important function in



subparagraph (a)(i) above. The original provision was regarded as a mechanism to forestall trouble where no complaint had been received.<sup>29</sup> The Authority could have also carried out an own initiative investigation into matters relating to policy and management within the Police Administration.

But the drafters of the Bill have severely curtailed the originally envisaged own motion investigation. It is now limited to the occasions where the Authority is (a) "satisfied on reasonable grounds", that an investigation is in the public interest and (b) the incident involves death or serious injury notified to the Authority under Section 14 of the Act. Cases alleging corruption or assaults not involving death or serious injury but which nevertheless result in actual bodily harm or other cases which reflect adversely upon the police are, thus, outside the immediate purview of the Authority. Similarly, matters indicating that an officer has committed a criminal or disciplinary offence not contained in a complaint are outside the jurisdiction of the Authority.

The term "serious injury" attracted criticism from the Police Administration and the Police Association. In its ordinary sense, "serious" obviously is by degree something more than minor. In order to elucidate this term the Officials Committee, relying on the Oxford Dictionary defined it as a injury that "in the opinion of a reasonable person it would give cause for anxiety or was an injury attended with danger".<sup>30</sup>

Both the Police Administration and Police Association indicated their concern at the potential width of this definition. Police work by its very nature frequently requires the application of legitimate reasonable force for a variety of reasons. Consequently injuries caused by the police range from bruising, abrasions and cuts to fractures. Some injuries even require the victim to be hospitalised.



Since the wide definition encapsulates a great number of the injuries caused by the Police in the normal course of their duties both the Police Association<sup>31</sup> and the Police Administration<sup>32</sup> made submissions to the Select Committee seeking the substitution of the term 'serious injury' with the term 'grievous bodily harm' as it is used in s188(1) of the Crimes Act. The Police Administration was particularly concerned since the Commissioner is obliged by Clause 14 to advise the Authority in writing setting out particulars of the incident in which the serious injury was caused. Presumably then, the Commissioner sought to avoid administrative problems<sup>33</sup> in the recording of all incidents of injuries and then notifying them to the Authority, as well as ensuring the continued quality application of law enforcement and order maintenance duties is not disrupted by a reduced effectiveness for fear that the Authority may review any injury incident. The Police Association even went so far as to allude to the phrase contained in the United Kingdom's Police and Criminal Evidence Act 1984<sup>34</sup> but then shied away from it "because the provision could be open for argument in the New Zealand context".<sup>35</sup>

It has been assumed by both police bodies that the injury may only be of a physical nature. Perhaps it could just as well include any psychological or emotional injury. Therefore to substitute the term with "grievous bodily harm" might be unnecessarily restrictive.

There are two other matters which the Police Administration and the Police Association have overlooked. Firstly the Beattie Committee's definition of serious injury is at variance with what really amounts to a serious injury in selecting, for example, an appropriate assault charge. Consider for instance the differences between charges of assault under section 9 of the Summary Offences Act 1981 and section 196 of the Crimes Act 1961 which reflect degrees between technical or very minor assaults and serious assaults. The seriousness of the assault requires a judgment as to the determination of the appropriate charge. The police make these type of judgment decisions daily and, therefore,



there is little need for it to feel constrained by the Official's Committee definition. The second matter is that the Authority can only instigate an own motion investigation if there are reasonable grounds to do so in the public interest. Obviously the majority of injuries will not fall into this category since the public have already provided the police with ability to use reasonable force in the first place.

The initial own motion investigation provided by the Bill represents a considerable advancement on that offered the Public Complaints Commissioner in Ontario who may investigate the allegations of a complaint only after it has received the first interim report of the investigation or at the expiration of 30 days.<sup>36</sup> There is also provision for the Public Complaints Commissioner to carry out an investigation at the request of the Chief of Police or where the Commissioner believes there has been undue delay or exceptional circumstances in the conduct of the investigation.<sup>37</sup>

The Victorian legislation provides that the Authority must investigate a complaint if it relates to the conduct of the Chief Commissioner or the Deputy or Assistant Commissioners. On the other hand, the Authority may investigate if the conduct is of a nature that an investigation is in the public interest or the conduct was carried out in accordance with established practices and procedures which the Authority considers ought to be reviewed.<sup>38</sup> The Federal Police legislation provides that if the complaint is in substance about the practices and procedures of the Australian Federal Police, the Ombudsman shall investigate the complaint.<sup>39</sup> In the United Kingdom the Authority cannot carry out an own motion investigation. In comparative terms, the proposed Authority has a restrictive own motion investigatory capability.

In providing the list of functions set out in Clause 13 the drafters have omitted to include the function of the Authority to carry out an investigation into any complaint



incident or other matter at the specific request of the Commissioner in accordance with Clause 23(2).

The final "function" listed in Clause 13(1) provides that the Authority is:

(c) To take such action in respect of complaints incidents and other matters as is contemplated by this Act

In the list of functions this particular paragraph is out of place. It addresses itself to methods rather than functions.

The use of the word "matter" and its recurrent use is an interesting feature. It appears to be either a shorthand phrase for "practise, policy or procedure", or more significantly, a shortened version of the phrase "matter of administration". That latter phrase is the foundation of the Ombudsmen function which permits the investigation into any decision, recommendation, act or omission. Potentially, the use of the word "matter" might be used to explore more than just a complaint concerning any formulated policy.

Subclause (2) of Clause 13 provides that the Authority shall not investigate any matter relating to the terms and conditions of service of any person as a member of police. This restriction has been imposed upon the Authority's function because complaints of industrial matters are primarily matters of administration which are wholly within the Ombudsmen's jurisdiction. Vide Clause 40 of the Bill which reaffirms the parameters of the Ombudsmen. Matters within the Ombudsmen's realm include complaints relating to matters of promotion, salary, allowances, discipline, dismissal or employment of police members generally.

Although there is no commencement provision, one presumes that the Authority's jurisdiction will extend to all matters occurring before as well as after the commencement of the Act. The question of retroactivity is dealt with in section 13(1) of the Ombudsmen Act. There, the Ombudsmen are



empowered to "investigate any decision or recommendation made or any act done or omitted, before or after the passing of this Act...." Thus, the question relating to the application of the Bill could be made more certain.

It should also be noted that it is not intended that the Authority investigate the exercise by the police of its discretion to prosecute, as that remains a function of the High Court".<sup>40</sup> Perhaps that intention might have been put on a statutory footing to officially record the parameters of the Authority's functions.

#### **Duty of Commissioner to notify the Authority of certain incidents involving death or serious injury - Clause 14**

The clause commences "where a member of the Police acting in the execution of the member's duty causes...." Therefore it is evident that the own motion investigation of the Authority (discussed earlier) pursuant to clause 13(1)(b) would be further restricted. Whereas clause 13(1)(a)(i) by reason of its link to Regulation 46 includes offences which occur during duty time as well as personal time, this clause is not so encompassing.

On the face of it, it covers those situations where the officer is acting lawfully when the death or serious injury occurs. But consider, for example, where an officer wilfully fractures the jaw of a suspect during an interview. Since the nature of the assault is unlawful, the officer at the time was technically not acting in the execution of duty. "Duty" applies only to the lawful conduct of the office of constable. Perhaps it would be necessary to insert some phrase that goes further than simply "acting" in the execution of a member's duty. Consider the following formulation by way of textual amendment:

"...or purporting to act in the exercise of or in connection with or incidental to the exercise of that members powers, functions or duties as a member of the police causes ..."



The words "causes or appears to have caused" are quite different to the word "involving" which is used in clause 13(1)(b). Since clause 13(1)(b) and clause 14 are so inextricably linked it is unfortunate that there is a lack of consistent phraseology. The words "causes or appears to have caused" connotes an active liability whereas "involved" connotes something less.

What does "appear" mean? Does it mean "prima facie", or "good cause to suspect" or does it mean "on reasonable grounds"? The term is somewhat problematical but if regarded in the texture of the overall legislation it is concluded that it means "prima facie" - at first glance. It is in the interests of all parties to avoid bad publicity and rumour by the early investigation of an incident by the Authority.

Death or serious injury could occur not only in the unlawful application of force but also as a result of a motor accident involving a police vehicle. Prisoners who die in police cells (eg commit suicide or naturally expire) are outside the jurisdictional scrutiny of the Authority but not the Coroner.<sup>41</sup>

It is evident that the Authority is only concerned with cases that involve death or serious injury to a person. Death or injury to animals and property would not attract an own motion investigation but it might be the subject of a complaint under clause 13(a)(i).

The Commissioner is required to, as soon as practicable give to the Authority a written notice setting out the particulars of the incident in which the death or serious injury was caused. The Commissioner, it seems might have some latitude of time before informing the Authority. Therefore, the Commissioner could wait until the preliminary enquiries of an investigation confirm one way or another whether all the ingredients of the clause are met. However, the word "appears" indicates that the Commissioner must act more promptly to enable the Authority to be effective.



There is no provision for the Authority to be advised orally of such an incident. It must receive written notice of the particulars of the incident before it initiates an own motion investigation, if one is necessary.

#### Mode of Complaint - Clause 15

Subclause (1) provides that a complaint may be made orally or in writing. (The Bill is silent as to which language the complainant may use.) Should the complaint be made orally it must be reduced to writing as soon as practicable.<sup>42</sup> There is no such prescribed form on which complaints are made. It seems that an oral "complaint" will lapse after a period of time, if it is not reduced to writing.

The Bill is silent as to what the complainant might expect at the conclusion of making a complaint. For instance the Ontario statute requires that the complainant be furnished with a prescribed statement which sets out the procedures in respect to the complaint and the complainant's rights under that Act. The complainant is also statutorily entitled to a copy of the statement of complaint provided.

One measure that will not be employed by those recording complaints is to advise the complainant that they may be the subject of a charge of making a false complaint should the matter prove to be unfounded. If the complaint is made at the police station a statement is always taken but there is no statutory requirement for the complainant to sign it. The present complaints process requires the complainant to sign their written complaint. In the normal course of events, complainants invariably do sign and confirm their commitment to seek appropriate redress.

When is a complaint not a complaint? For instance, consider the occasion where a complainant holds an honest but erroneous belief that an offence has taken place or it subsequently transpires that the misconduct was, in fact, not committed a police officer, but by, for example, a security guard or a traffic officer. What is the nature of this



grievance then? Should it continue to be regarded as a complaint against a police officer and reduced to writing or should the police be permitted a discretion to discontinue action? The matter is not clear but since the tenor of the legislation indicates that every written complaint shall be notified to the Authority. Therefore, brief details of the "complaint" should be recorded. To do otherwise might be misconstrued as trying to discourage the complainant from registering a complaint. Even a withdrawal of a complaint, later attributed to an admission of error by a complainant, should be recorded. So should trivial complaints capable of early resolution. There are sound reasons for recording every complaint. In the first place they provide useful statistics. Secondly with regard to trivial complaints, a number of complaints of a minor nature against a particular officer is a useful early warning device. These type of "complaints" should then be forwarded to the District Commander accompanied by a report outlining the reasons why they should not be proceeded with.

The Bill provides that the complaint may be made to any member of police. However, it is silent as to the procedure that should be adopted where a complainant insists on making a complaint to a member of police who is also the subject of the complaint. If the member does not record the complaint it is possible that failure to do so may attract liability under clause 38. The Bill, in these instances, fails to provide some form of indemnity for the subject member. It should for instance contain a provision to the effect that where a person complains to a member of police about that member's own conduct that member shall advise the complainant to make the complaint to some other specified person.

The proposed legislation makes it clear that it is not necessary for the complainant to register their grievance with the police alone. Complainants who are otherwise intimidated by making a complaint at a police station or are afraid of reprisal or rebuff by a member of police, have a number of options in lodging a complaint on neutral territory with other individuals or agencies. There is now provision



for the Authority or an Ombudsman to receive written complaints.<sup>43</sup> The Registrar or the Deputy Registrar of any District Court may also receive a complaint but only in written form.<sup>44</sup> The Ombudsman or Registrar or Deputy Registrar must then forward the complaint to the Authority as soon as possible.<sup>45</sup> It is arguable that these venues are too restrictive. Perhaps complaints could be received by citizens advice bureaux or by consultative or liaison committees, eg Prisoners Aid groups.

Subclause (5) provides a statutory safeguard for persons who are in custody on a charge or following conviction for an offence or a patient of any hospital within the meaning of the Mental Health Act 1969. Their mail, if it is addressed to the Authority, shall not be intercepted by the institutional authorities but forwarded immediately unopened.<sup>46</sup>

It is interesting to observe that some overseas jurisdictions have a number of mechanisms to reject complaints or declare some complaints not to be complaints ab initio. The New South Wales legislation,<sup>47</sup> for instance, has an elaborate scheme of filtering out complaints at the reception stage. The Victorian legislation prohibits the making of a complaint about the conduct of a member of the force to the Authority by another member of the force. A similar provision exists in the South Australian legislation.<sup>48</sup>

The New Zealand legislation it seems presumes that the principal users will apply common sense to the determination of the status of a complaint. For instance if a person dies or is unable or incapable of acting for himself, a complaint should be received if it is made by his personal representative or by a member of his family on the complainant's behalf.

(b) Environment of complaint:

Region, locality, exact place of occurrence.



**Duty of Commissioner to notify Authority of Complaints -  
Clause 16**

Every complaint received by the police must be notified to the Authority. Since the clause is silent as to forwarding every complaint to the Authority "notify" (on a narrow reading) implies that it may be sufficient for the Commissioner to forward a schedule to the Authority outlining the complaints received, for example, every week. As a consequence the Authority will have a record of all complaints and of their general nature. However, it is anticipated that "notify" would receive a wider reading and include the actual forwarding of the complaint and any other materials arising out of a preliminary investigation. Two reasons support this view. Firstly, the Authority has a reciprocal duty to "notify" the Commissioner (Clause 17) and it would be expected that it would forward all details in its possession to enable the police to carry out an investigation. Secondly, the Authority must be in possession of sufficient particulars to determine appropriate action under Clause 18.

Since the Authority will receive or be notified of all complaints it should be able to develop a reasonably accurate picture of the police image and co-ordinate a comprehensive analysis of the statistics gleaned from the complaints. Information is not only a great deterrent but it is also a valuable device in the direction of police policy. For instance the Authority can build up a dossier to give a composite picture not only of the police behaviour but also the general behaviour of the community by analysing the pattern which emerges from the following:

(a) Characteristics of complainants:

ie sex, age, whether drink or drugs involved at time of incident.

(b) Environment of complaint:

ie region, locality, exact place of occurrence.



- (c) When and where complaint filed:  
ie method, day of/day(s) after incident, average time  
lapse, longest interval.
- (d) Particulars of police officers involved:  
ie rank, age, length of service, numbers involved.
- (e) Method of disposition of the complaint by the police.
- (f) Time taken by the police investigation/review process.
- (g) Length of time the Authority's investigation/review  
process takes.

All these matters are questions of public interest and are not available under the existing system.

It is noteworthy to record that there is no time frame imposed upon the Commissioner to advise the Authority. Consider for instance the Victorian legislation which requires the Chief Commissioner to advise the Authority "as soon as possible ... in writing the prescribed details of the complaint".<sup>49</sup>

#### **Duty of Authority to Notify the Commissioner of Complaints - Clause 17**

This is the corresponding duty of the Authority to notify the Commissioner of every complaint received by it.

The effect of Clause 17 and Clause 13(1)(b) is that the Commissioner's responsibility for discipline and control of members of the police is not subverted by an unpublicised investigation by the external reviewer.

#### **Action Upon Receipt of Complaint - Clause 18**

Upon receipt or notification of a complaint the Authority has several options of action. This flexibility permits the



Authority to concentrate on the more serious complaints or incidents whilst still maintaining a watchful eye over other complaints.

The Authority "may do all or any of the following":

(a) investigate the complaint itself whether or not the Police have commenced a Police investigation:

In this situation, the Authority has a "de novo" power to investigate any complaint. Such a power stands in marked contrast to the relatively ineffectual "ex post facto" power of the Ombudsman.<sup>50</sup> The provision also anticipates that both the Authority and the police might conduct simultaneous investigations.

(b) Defer action until the receipt of a Police report on a Police investigation of the complaint.

This discretionary option might be treated with a great deal of caution by the Authority particularly in relation to serious complaints or alleged criminal offending. It potentially amounts to an "ex post facto" review.

(c) Oversee a police investigation of the complaint.

This power provides the Authority with the ability to ensure an investigation is carried out expeditiously, thoroughly and impartially.

The choice of the word "oversee" as opposed to the use of "supervise" might raise interesting questions as to what does "oversee" exactly mean. To some extent both words are synonyms. However, implicit in the word "supervise", is the ability of the Authority to require the investigating officers to account for their actions, to explain their strategy and tactics of the investigation or to justify the



particular lines and depth of questioning. The term "oversee" does not convey the same meaning of purpose although it may have the same effect.

It is of interest to note that the Authority's English counterpart is required to undertake mandatory supervision where the complaint alleges death or serious injury, or is a particular type of complaint specified in the regulations by the Home Secretary ie corruption. In every other matter the Authority has a discretion to supervise the police investigation.

(d) Decide in accordance with section 19 of this Act to take no action on the complaint.

This aspect will be discussed in relation to clause 19 itself.

Having decided a course of action, the Authority is then required to, as soon as practicable, advise the Commissioner and the complainant, the procedure it proposes to adopt under subsection (1) of section 18.<sup>51</sup>

The Authority may upon the receipt or notification of a complaint decide that it is capable of conciliation in accordance with any general instructions issued under section 30 of the Police Act 1958. If the Authority is of that opinion it may indicate that view to the Commissioner.<sup>52</sup> It is apparent that the Authority has no role in the formal sense with regard to the informal resolution of complaints. The system of conciliation or informal resolution is directed at minor complaints which form the great bulk of complaints. It would probably incorporate the very minor complaint or irritations of the police disciplinary code even though technically they might ordinarily lead to a disciplinary charge. Such resolution would require consent from both the complainant and the member of police concerned. The Beattie Committee remarked that a serious complaint would leave little room for the exercise of discretion.<sup>53</sup> Therefore,



that which is trivial in nature can be speedily resolved. Conciliation is a feature of a number of overseas legislations.<sup>54</sup>

The use of the phrase, "it may indicate that view to the Commissioner", highlights the Authority's position in relation to the Commissioner. It confirms that the Commissioner maintains the general administration and control of the Police.<sup>55</sup>

**Authority May Decide to Take No Action On Complaint - Clause 19**

The Authority has a discretion to terminate complaints in accordance with statutory criteria. These powers are similar to those contained in the Ombudsmen Act 1975<sup>56</sup>. The Authority may decide to take no action or further action on any complaint if the complaint relates to a matter which the aggrieved person had knowledge of more than 12 months before the complaint was made.<sup>57</sup> One would presume that an aggrieved person would make a complaint as soon as practicable. The South Australian legislation<sup>58</sup> limits the period to six months.

The reasons for refusing to take action or discontinuing action include:

(i) the subject matter of the complaint is trivial; or  
This is the same formula found in the Ombudsmen Act, and so is the following subparagraph.

(ii) the complaint is frivolous or vexatious or is not made in good faith; or

(iii) the person alleged to be aggrieved does not desire that action be taken, or as the case may be continued;

or the complainant in writing; and therefore advice might be given over the telephone. This feature seems to be



One presumes that it is implicit that the Authority would also consider the wider public issues before terminating a complaint under this heading.

It is interesting to note that the Ontario legislation provides that a complaint can only be withdrawn in accordance with the Act.<sup>59</sup> That is by giving notice on the prescribed form to the person in charge of the Public Complaints Investigation Bureau. However, if the Public Complaints Commissioner is of the opinion that the complaint was withdrawn because of a misunderstanding on the part of the complainant or as a result of a threat or improper pressure the complaint shall continue.

(iv) the identity of the complainant is unknown and investigation of the complaint would thereby be substantially impeded; or

Thus, a complaint can be rejected if it is made without disclosure of identity of the complainant, unless there are special reasons for continuing the investigation.

(v) that in all the circumstances an adequate remedy or right of appeal exists... which it would be reasonable for the person alleged to be aggrieved to exercise.

This provision makes it clear that these procedures do not affect a citizens right to pursue alternative avenues of action. In some circumstances then the Authority may decline or discontinue an investigation into a complaint.

The Authority may also decline to take further action if during the course of an Authority or police investigation it is apparent in all the circumstances that further action is unnecessary or inappropriate.<sup>60</sup> In which case the Authority is obliged to inform the complainant of the decision and reasons for it.<sup>61</sup> There is no obligation upon the Authority to advise the complainant in writing and therefore advice might be given over the telephone. This feature seems to be



inconsistent with the requirement that all complaints must be reduced to writing<sup>62</sup> although it is consistent with Clause 32(c) of the Bill.

#### Subsequent Powers in Relation to a Complaint - Clause 20

The Authority has a number of powers in relation to a complaint. For instance, it may at any time review the police investigation of a complaint.<sup>63</sup> A review is a time consuming business but an unavoidable feature. It may entail monitoring ongoing or pending trials in which relevant evidence may be uncovered or there may be delays for want of forensic analysis. The Authority might elect to investigate a complaint itself.<sup>64</sup> This latter power duplicates unnecessarily the power contained in Clause 18(1)(a). There it is provided that the Authority can "investigate the complaint whether or not the police have commenced an investigation".

A third power arises when the Authority elects to oversee a police investigation whereupon it can give any direction to the police concerning the investigation as it thinks fit. A direction might include, for instance, weekly progress reports. Perhaps the Authority could veto or require the appointment of a particular investigator where it thinks fit or it might require or recommend that the investigators be appointed from other districts in certain investigations.

The Authority also has the power to direct the police to re-open an investigation and thereafter oversee it.<sup>65</sup> An occasion might arise when acting upon the contents of the police reports the Authority decides to take no further action. That decision, however, might have been based upon erroneous information supplied by the police. Therefore the Authority needs a mechanism to re-open an investigation.

The Authority can direct the police to reconsider its proposals for action on a complaint.<sup>66</sup> In this regard the Authority can require the police beforehand to set out their methods of approach to an investigation.



The Authority may also decide that no further action is required because the police investigation has produced a satisfactory outcome.<sup>67</sup> This power is vital since the majority of complaints are trivial and are effectively resolved as a result of a police investigation.

The legislation does not address the occasion where criminal charges are outstanding or pending against either the complainant or the police officer. However, it is unlikely that the investigation of a complaint would be deferred or suspended until the result of the court case is known. Nor is it likely that the Authority would usurp or interfere with a proceeding within the jurisdiction of the Court. Therefore a matter which is currently the subject of a prosecution or civil litigation could not be delayed by the Authority.

#### **Duty of Police to Report to Authority on Police Investigation of Complaint - Clause 21**

The Officials Committee recognised that the greater majority of complaints would be continued to be investigated by the police themselves without any direction from the Authority.<sup>68</sup>

It has been said that this clause is the key to the Bill in that it represents the balance between preserving the Commissioner's responsibility for investigating complaints and taking action versus the public interest role of the Authority.<sup>69</sup> It is anticipated that the Authority will on most occasions defer from taking action until the police report of the investigation is received.<sup>70</sup>

The police are obliged to as soon as practicable and in no case later than 3 months after the completion of a police investigation of a complaint to report to the Authority.<sup>71</sup>

The Bill is silent as to the time frame for the police report to the Authority upon a police investigation of an incident or other matter where no complaint has been received. A feature of the drafting in this clause is the transposition of the word 'police' for "Commissioner". For instance, note clauses 22 and 23 where the specified duty falls upon the "Commissioner".



Whilst the Officials carefully chose the word "practicable" in order to give the police time to assess the results of the investigation before reporting,<sup>72</sup> the question of how one determines when an investigation is complete was not addressed. An investigator could always need to re-interview a witness in the future. Perhaps the police should report "as soon as practicable and in no case later than 3 months, after the initiation of a police investigation".

When the police report to the Authority they must indicate "whether the complaint has been upheld and, if so, what action has been taken or is proposed to be taken or is proposed to be taken to rectify the matter".<sup>73</sup> The provision necessarily requires the insertion of the words "or not" after "whether" to be more accurate.<sup>74</sup> There may be an occasion where a complaint is not upheld but the investigation may reveal the need for remedial action to prevent a similar complaint in the future which might be upheld.

The Authority is obliged to be informed if the "complaint has been settled by conciliation."<sup>75</sup> This particular provision, is unnecessary because it presumes the complaint has been upheld and rectified (paragraph (a) deals with that matter). The provision also suggests that the police can resolve a justifiable complaint without prior approval of the Authority. That seems to be inconsistent with clause 30 which applies to the procedures which the authority must adopt after a police investigation. Perhaps there might be an occasion where the police have resolved a matter by conciliation under subclause (1)(b) but will be required to reopen it for the investigation.<sup>76</sup>

Subclause (2) requires the police to supply to the Authority, when reporting under this clause, accompanying material sufficient to enable the Authority to assess the adequacy of the police investigation. In other words the police are required to be selective in supplying information to the Authority. The volume of accompanying material will depend on the nature and complexity of the complaint and its degree



of seriousness. There is a presumption that the police will also forward potentially damaging material. This ability to screen material seems to be contrary to the whole notion of oversight.

The statutory scheme also provides the police (or should that be Commissioner) with the ability to consult the Authority on their proposals for action on a complaint before officially reporting to the Authority. Therefore it is in the police interests to learn where the Authority has strong feelings and avoid subsequent embarrassment.

#### **Commissioner to Provide Information and Assistance at Request of Authority - Clause 22**

At the request of the Authority the Commissioner shall provide it "with all such information and assistance as is necessary for the proper performance by the Authority of its functions in relation to its investigation of any complaint, incident or other matter under this Act".<sup>77</sup> In other words the Commissioner is obliged to make the Authority's task as easy as possible if it is within the Commissioner's power to do so. Subclause (2) provides that on the occasions where the Authority oversees a police investigation the Commissioner shall supply it upon request with any or all information in the possession or under the control of the police that is relevant to the complaint,<sup>78</sup> and/or a report on the progress of the investigation.<sup>79</sup>

#### **Power of Police to Investigate Complaints and Other Matters - Clause 23**

This clause indicates that the majority of complaints are likely to be investigated by the police rather than by the Authority. Subclause (1) preserves the Commissioner's duty of general administration and control of the Police.<sup>80</sup> It provides that nothing in the Act will "prevent the Commissioner from commencing or continuing a Police investigation into any complaint, incident, or other matter". Police involvement then in the investigation and decision



making processes of complaints is diminished only to the extent provided by the Bill. The wording of the clause is interesting. It refers to the "power" of police to investigate complaints. But the Commissioner has more than a power, but a "duty", to investigate and the marginal note does not accurately record that fact. The duty emanates from the constituting provisions of the Police Act describing the function of the Commissioner.

One should not discount the possibility of simultaneous investigations occurring if the Authority initiates an investigation under Clause 20(b). This clause does not address itself to the question of paramountcy where simultaneous investigations occur. This type of situation may however be dealt with by the Authority, assuming it relates to a complaint, by reference to Clause 20(c). Otherwise it may have to be left to the good sense of the statutory officers.

In essence subclause (1) appears to be little more than a categorical reaffirmation of the Commissioner's duties of control over the police and remove any doubt that the Bill might cause.

The Commissioner may before or after the commencement of a police investigation request the Authority to take it over. The sort of occasions which merit this type of request might include cases of serious corruption, or complaints about a senior officer, or other cases reflecting adversely on the reputation of the police service. Or, for example, the Commissioner might request the Authority to carry out such investigation if the police investigation has for instance, met with a "wall of silence" from the ranks. The Police Administration cannot compel its members to subject themselves to an interview but the Authority, using the potentially coercive powers under clause 26(1) and (2) can compel officers to furnish information on oath or produce documents.



### Procedure Where Complaint or Other Matter Appears to be Outside the Jurisdiction of Authority - Clause 24

The Authority, when it establishes that it has no jurisdiction to investigate a complaint, shall notify the complainant in writing.<sup>81</sup> In so notifying the Authority is obliged to advise the complainant that recourse may be had to the Ombudsmen Act 1975<sup>82</sup> and if requested to so by the complainant, the Authority is obliged to forward the complaint to an Ombudsman.<sup>83</sup>

The Bill also provides a procedure whereby the Chief Ombudsman is able to confer with the Authority to establish within whose jurisdiction a complaint lies. The Authority is required to give its opinion as soon as practicable and to notify the Chief Ombudsman in writing. In order to delineate as clearly as possible the parameters of the respective jurisdictions the Ombudsmen Act is to be amended.<sup>84</sup> The Ombudsmen will specifically retain the ability to investigate the terms and conditions of service of any person who is a member of police. In these matters the Authority is statutorily prohibited from conducting such enquiries.<sup>85</sup> The Ombudsmen are also required to investigate every other decision, recommendation, act or omission of a member of police which the Authority determines is outside the Authority's jurisdiction. A transitional provision ensures that the Ombudsmen complete any investigation commenced before the commencement of the Act.<sup>86</sup>

Subclause (3) raises an interesting matter. "The Authority may at any time, by notice in writing to the Chief Ombudsman, request that any complaint or other matter relating to the police be investigated by an Ombudsman". The police have successfully resisted for years the intrusion of the Ombudsmen's investigations police operational matters. Will the Ombudsmen's jurisdiction extend beyond the present narrow interpretation of what constitutes a "matter of administration"?<sup>87</sup> The Bill and the amendment to the Ombudsmen Act do not make this clear. Perhaps this provision



has been drafted with the following scenerios in mind. For instance, an Ombudsman may be requested to investigate a complaint arising out of a Ministry of Transport/Police traffic blitz checkpoint or a combined Customs/Police drug raid, where the police are providing a support role but the complaint is directed against officers of both departments. Since the Ombudsmen are not so constrained in dealing with operational matters of other government departments and having regard to all the circumstances of the case, the Authority might request the Ombudsman to investigate the police component in the complaint.

The most interesting feature of this provision may well be the perceived subordinate role that the Chief Ombudsman now occupies in relation to the Authority. A stronger and revised jurisdiction over the police will be vested in the Authority. The Chief Ombudsman in the span of 24 years could not achieve such a jurisdiction. Now as a result of potentially confusing overlapping jurisdiction, the Chief Ombudsman may by notice in writing be requested by the Authority to undertake an investigation, the nature of which also raises further interesting questions. For instance, under which Act will the Ombudsman derive his powers to investigate? Since the Bill is basically a very detailed scheme, modelled to achieve a balance between all the parties, could that delicate balance be upset if a police officer, were subject to the Ombudsmen Act? What if the Ombudsmen formed an opinion that the subject matter of the investigation was wrong<sup>88</sup> and relayed that to the Authority? Presumably, the Authority would, since there is no corresponding provision for it to reach such an opinion,<sup>89</sup> affirm the finding by the most suitable formula provided in the Bill.

An alternative might be for the investigating Ombudsman to become a member of the Authority's staff<sup>90</sup> in order to be able to utilise the provisions of the Bill. Clearly though such subordination would undermine the long established and respected office of the Ombudsman.



Another alternative, and perhaps the most acceptable, is to avoid overlapping jurisdiction altogether by providing that the Authority has exclusive jurisdiction in relation to all matters pertaining to the police.

#### **Proceedings of the Authority - Clause 25**

Before proceeding to investigate any matter the Authority is obliged to inform the Commissioner and the complainant (if any) or any other person alleged to be aggrieved (unless the interest of justice otherwise require) of its intention to make an investigation.<sup>91</sup>

The clause does not discuss the manner of notification. There is no apparent requirement for the Authority do so in writing nor at the same time give reasons for the need of its investigation. One questions whether or not this duty is in fact a duplication of clause 18(1)(a) and (1). The term "any matter" presumably is to be read in the widest sense to include "complaint, incident or other matter". If that is so one wonders why the drafters omitted the words "other matter" from subclause (3)(a). From the point of view of consistency the words "complaint, incident, or" should be inserted before the word "matter" in the second line of the clause. This provision in effect replicates the effect of Section 18(1) of the Ombudsmen Act 1975.

Every investigation by the Authority shall be conducted in private. Hence the subject matter of the investigation and the actual investigation will not devolve into a public spectacle and media dramatisation distorting an issue will be avoided. The provision potentially discourages the creation of a critical lack of confidence in the police through sensationalist reporting. The external reviewer's position preserves the balance of the public's "need to know".

The Authority may hear or obtain information from such persons it thinks fit, including where it considers that cultural matters are a factor relevant to a complaint or an investigation, information from such persons as the Authority



thinks may have knowledge or experience in those matters.<sup>92</sup> This particular provision is an example of the Congruent Values Barometer. Policing in the 1980's is fraught with testy relationships between some segments of the public - particularly the ethnic and visible minorities groups in our communities. The ability of the Authority to investigate not only the complaint at hand but also to extend a wider enquiry to peripheral concerns will likely cause the development of policies will avoid a repetition of the original complaint. This course of investigation is subject to clause 33 of the Bill which relates to adverse comment. Therefore, if the Authority, as a result of gleaning information from others, forms an adverse opinion or recommendation or is going to comment adversely about any person, that person must be given a reasonable opportunity to be heard.

Since there is no judicial production of evidence in the customary adversarial model, it is not necessary for the Authority to hold a formal hearing.<sup>93</sup> Nor is any person entitled as of right to be heard by the Authority.<sup>94</sup> Both paragraphs are subject to the adverse comment clause.<sup>95</sup> Arguably the effect of the provisions may amount to a denial of natural justice in that two principals (ie complainant and police officer) might feel they have an absolute right to appear before the Authority. However, unless either person is likely to be subject to adverse criticism that right is dispensed with.

#### **Powers of Authority in Relation to Investigations - Clause 26**

The Authority has a similar powers in this regard to that of the Ombudsmen<sup>96</sup> in that if the Authority has an opinion that a person is able to give information relating to any matter under investigation it may require that person to furnish that information. That person may also be required to furnish documents or other things in his or her possession or control which the Authority considers relevant to the subject matter of the enquiry.



The common law has for centuries held that a person is not bound to answer a question which may render him liable to penalty, punishment or forfeiture.<sup>97</sup> Only a statute create principle will erode this principle<sup>98</sup> and that is the case with the proposed legislation.

Subclause (2) provides the Authority with the ability to summon and examine on oath any person who is able to give information relating to the matter under investigation.

A difficulty arises in subclause (3). There it is provided that "every investigation by the Authority shall be deemed to be a judicial proceeding within the meaning of section 108 of the Crimes Act 1961 (which relates to perjury)". The corresponding provision in the Ombudsmen Act uses the word "examination" rather than "investigation". Section 108(1) provides that "perjury is an assertion as to a matter of fact... made by a witness in a judicial proceeding as part of his evidence on oath...." Whilst the judicial proceeding element is reaffirmed in subsection (4) of section 108 the critical feature here is that the oath is only administered prior examination. Subclause (2) confirms this point "the Authority may summon before it and examine on oath". Either this error has been a careless transposition or it is intended to give the Authority greater powers than the Ombudsmen. If that is the case then it is plainly wrong at law because it fails to fulfil all the elements of s108. The corollary being that Clause 26(2) only authorises the oath to be administered on an examination not on an investigation.

#### **Protection and Privileges of Witnesses - Clause 27**

This provision is modelled on corresponding provisions in the Ombudsmen Act 1975<sup>99</sup> and the Human Rights Commission Act 1977.<sup>100</sup> Every person required by the Authority to give information, answer questions and produce documents and things, has the same privileges as witnesses have in Court. Thus the Authority has a mandate to ensure the rights of all complainants and police officers are scrupulously protected.



However, a person cannot use the shield of withholding any document or refusal to answer a question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.<sup>1</sup> The privilege is also limited by subclause (2) which provides that where the Authority requires information or the production of any document or thing which would in effect breach of obligation of secrecy or non disclosure, notwithstanding the earlier commitment the person is required to comply with the Authority's requirement.<sup>2</sup>

Two privileges to which the clause refers include the right against self incrimination and the right to silence. Should a person comply with the requirement of the Authority, that person is granted an immunity from prosecution for an offence against any enactment.<sup>3</sup> No statement, answer or other evidence arising out of an investigation or proceedings of the Authority is admissible in other proceedings except perjury or an offence against section 38 of the Act.<sup>4</sup>

#### **Disclosure of certain matters not to be required - Clause 28**

This provision deals with secrecy and privileges relating to matters of state. It replicates provisions in the Ombudsmen Act 1975 and the Human Rights Commission Act 1977.

Subclause (1) relates to certification from the Prime Minister, that if the giving of any information or the production of any document or thing might prejudice the security or defence of New Zealand<sup>5</sup> or a particular interest<sup>6</sup> the Authority shall not require the giving of any information or the production of any document or thing. Similarly the Attorney-General can certify that any information or production of any document or thing might prejudice the prevention, investigation or detection of offences or might involve the disclosure of proceedings of cabinet or any committee of cabinet relating to matters of secret or confidential nature whose disclosure might be injurious to the public interest, the Authority shall not require the



information to be given or the document or thing to be produced. The nature of these non disclosure provisions occur in all the comparative overseas legislation. The Western Australian legislation<sup>7</sup>, in fact, denies the Crown privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings. The only exception is to safeguard cabinet proceedings.

The Attorney-General's ability to certify that the disclosure of certain information or the production of any document or thing might prejudice the prevention, investigation or detection of offences, might be the source of some tension. The provision hints at an occasion whereby the Attorney-General acts as an arbitrator between the Commissioner and the Authority particularly with regard to offences. Does that include all those offences of misconduct listed in Regulation 46 of the Police Regulations 1959 or just criminal offences? The matter is not clear.

#### **Procedure After Investigation by the Authority - Clause 29**

The Authority has no power to make a determination which is in anyway binding on the Commissioner. It has a duty though to recommend a course of action.

Where the Authority itself undertakes an investigation it is required to form an opinion on whether or not any decision, recommendation, act or omission conduct policy, practice or procedure which was the subject matter of the investigation was contrary to law, unreasonable, unjustified, unfair or undesirable. The Ombudsman has an additional factor upon which to form an opinion and that is if the subject matter was wrong.<sup>8</sup>

After forming an opinion the Authority must convey it, with reasons, to the Commissioner. It may also make such recommendations as it thinks fit including a recommendation that disciplinary or criminal proceedings be considered against a member of police.



This power of the Authority is designed to be subservient to that of the Commissioner. To have a greater power, for instance, to "decide" disciplinary proceedings be brought or "require proceedings be instituted"<sup>9</sup> would result in a usurpation of the Commissioner's control of the police. As well, it could potentially amount to an erosion of the police and the Solicitor General's discretion to prosecute. On the other hand the Ombudsmen Act provides an Ombudsman with a more effective input into the determination of a complaint. It can recommend that proceedings be "taken".<sup>10</sup> The term is a great deal stronger and if used in the Bill would not necessarily compromise the Commissioner's duty. To some extent this diminutive power erodes the credibility of the office of the Authority.

Since no recommendation of action will be made lightly the Authority will likely advise punitive action only where there is a reasonable probability of a successful result.

#### **Procedure After Investigation by the Police - Clause 30**

Where the police are required to report to the Authority pursuant to section 21 they must form an opinion on the subject matter using the same formula that the Authority uses under Clause 29.

After considering the police report the Authority is required to indicate to the Commissioner whether or not it agrees with the decision or proposed decision.<sup>11</sup> It may, if it disagrees with the Commissioner, make recommendations supported by reasons as it thinks fit. It can include a recommendation that disciplinary or criminal proceedings be considered against a member of the police. Once again the diminutive word "considered" is used.

#### **Implementation of Recommendations of Authority - Clause 31**

The Commissioner is required as soon as reasonably practicable after receiving a recommendation of the Authority under clauses 29 and 30 to notify the Authority of any action



that will be taken to give effect to its recommendation. The Commissioner must also give any reasons for departing from or not implementating any recommendation.<sup>12</sup>

This provision varies slightly from the provision in the Ombudsmen Act 1975.<sup>13</sup> In the Bill there is a specific requirement for the Commissioner to notify the Authority within a time frame. In this case it is "reasonably practicable". However, under the Ombudsmen Act the Department is requested to notify the Ombudsmen within a specified time frame.

If, however, within a reasonable time after a recommendation has been made no appropriate or adequate action has been taken, the Authority may, after considering any comments made by the Commissioner either:

- (a) Send a copy of its opinion and recommendations on the matter with comments of the commissioner to the Attorney-General and the Minister of Police; and
- (b) Where it considers it appropriate transmit to the Attorney-General for tabling in the House of Representatives such report on the matter it thinks fit.<sup>14</sup>

The Parliamentary Commissioner in Western Australia has similar powers in these circumstances except it forwards a report directly to the Premier.<sup>15</sup> The Toronto Public Complaints Commissioner avoids to a certain extent tension with the Chief of Police. Under its legislation the Public Complaints Commissioner who, after making a review forms an opinion that a police practice or procedure should be altered, reports that opinion and recommendations direct to the Metropolitan Board of Commissioners of Police, the Chief of Police and the Metropolitan Toronto Police Association. The scheme of report diffusion is continued in the next step. Within ninety days of receiving such a report the



Metropolitan Board of Commissioners is required to forward a report accompanied by their own comments and that of the Chief of Police and the Metropolitan Toronto Police Association, to the Attorney-General, the Solicitor General and the Commissioner.<sup>16</sup>

The Australian Federal Police scheme varies slightly. Where the Ombudsman forms an opinion after the investigation of a complaint<sup>17</sup> the Minister automatically receives a copy of the report<sup>18</sup> as does the Commissioner.<sup>19</sup> The Ombudsman may request<sup>20</sup> the Commissioner within a specified time to particularise the action he proposes to take<sup>21</sup> and there is statutory duty for the Commissioner to comply. Should the Ombudsman be of the opinion that adequate or appropriate action has not been taken within a reasonable time he is obliged to inform the Prime Minister in writing.<sup>22</sup> The Ombudsmen may also forward the report to the President of the Senate and the Speaker of the House of Representatives for tabling in the respective chambers.<sup>23</sup>

The South Australian legislation introduces the Minister of Police to resolve a deadlock<sup>24</sup> and make determinations.<sup>25</sup> Except where there the case involves an offence or breach of discipline, the Minister is required to consult with the Attorney-General before making a determination.<sup>26</sup> Similarly the Victorian Minister of Police arbitrates between the Authority and the Chief Commissioner.<sup>27</sup> In the case of a dispute between the Ombudsman and the Commissioner in New South Wales<sup>28</sup> which is not resolved within the prescribed time<sup>29</sup> either or both of them may appeal to the Tribunal established by the Act. The Tribunal consisting of one person (not being the President<sup>30</sup>) has the power to determine the appeal.<sup>31</sup>

This type of provision then is capable of, according to overseas experience, a variety of permutations. Perhaps a more viable option in the New Zealand context, rather than intrude upon the House of Representatives<sup>32</sup> is to empower either the Attorney-General or the Minister of Police to arbitrate between the two statutory officers.



### Parties to be Informed of Progress and Result of Investigation - Clause 32

This clause preserves the right of natural justice. Where the Authority investigates a complaint it shall conduct the investigation with due expedition.<sup>33</sup> But one might ask what that direction has got to do with a provision relating to advice to parties of the progress and result of the investigation. Perhaps it would be better housed in clause 25 which relates to the proceedings of the Authority.

Authority and Staff to Maintain Secrecy - Clause 34

Where, however, it seems appropriate, the Authority may inform the complainant and the Commissioner of the progress of an investigation it is conducting.<sup>34</sup> But in every case after the conclusion of an investigation, it must inform the parties as soon as reasonably practicable the result of the investigation in a manner it thinks proper.<sup>35</sup> Could one infer that because this clause specifically refers to complaints, that investigations into incidents and other matters are not to be regulated by this clause?

officers have otherwise complete protection apart from the

The Authority might chose to telephone one of the parties the result of the investigation. There is no guidance on the manner of notification. Obviously the Authority has been allowed a great deal of flexibility in the means of advising parties but this flexibility is inconsistent with other provisions in the Bill which contemplates a formal written procedure. Consider, for instance, clause 24(1) which requires the Authority, when it receives a complaint which is outside its jurisdiction to "notify the complainant in writing accordingly".<sup>36</sup>

The reference to "result of the investigation" implies something less than the complainant or party being fully informed as to the Authority's findings and reasons for it's decision. It might be considered that "result" is an entirely inappropriate response.

A determination by the Authority would not preclude a person taking any other action to pursue a legal remedy that may be available, ie false imprisonment or assault.



**Adverse Comment - Clause 33**

This clause preserves the right of natural justice. The Authority is constrained from making, in any opinion or recommendation given under clause 29 or section 30, or in any report made or published under clause 31 or section 36, any adverse comment about any person, unless that person has been given a reasonable opportunity to be heard.

**Authority and Staff to Maintain Secrecy - Clause 34**

This provision reflects the usual provisions found in the Ombudsmen Act 1975 and the Human Rights Commission Act 1977.

**Proceedings Privileged - Clause 35**

The privative clause inserted at subsection (1)(a) provides the Authority or staff officer with limited<sup>37</sup> protection from criminal or civil proceedings. The Authority and staff officers have otherwise complete protection apart from the exercise or intended exercise of their functions if it is shown that they "acted in bad faith". Since under clause 32(c) the Authority only has to advise the results of an investigation, a sufficiently distressed party may as a result of the receipt of limited information feel that the Authority or staff member acted in "bad faith".

In order to overcome needless proceedings arising from ill informed aggrieved parties perhaps a sub-paragraph is merited recording the following:

"No proceedings shall be brought under subclause (1)(a) except with the leave of the High Court. The High Court shall not give leave unless it is satisfied that there is substantial ground for contention that the person to be proceeded against acted in bad faith."

The Authority and staff officers are precluded from being called to give evidence in any court or in any proceedings of



a judicial nature, in respect of anything coming to their knowledge as a result of the exercise of their functions.<sup>38</sup>

Subclause (3) appears to be an unnecessary duplication of clause 27(4)(a). Both provisions deal with the privilege relating to information given to the Authority during the course of an investigation or a proceeding. Subclause (3) also refers to the production of a document or thing. There is then a slight variation of the conclusion of the sentence in both provisions but they, for all intents and purposes have the same effect. It is logical that clause 27(4)(a) should be amplified to include the production of a document or thing, with the result that subclause (3) could be deleted altogether.

Subclause (4) in purporting to protect the Authority from defamation provides:

"For the purposes of clause 5 of the First Schedule to the Defamation Act 1954,

(a) Any report, opinion, or recommendation given by the Authority under section 29 or section 30 or section 31 of this Act; and"

This paragraph should also include reference to clauses 17, 19(3), 32(b) and 32(c) and it might be better housed on its own under a paragraph (c) to subclause (4). Since "manner" may include being informed orally of the a result of an investigation the Authority might be protected in this respect also.

Subclause (4) continues:

"(b) Any report published by the Authority or the Commissioner under section 36 of this Act, shall be deemed to be an official report made by a person holding an inquiry under the authority of the Government of New Zealand."



The drafters have omitted from this paragraph reference to the furnishing of the annual report under clause 37.

**Publication of Reports by the Authority and by the Commissioner - Clause 36**

The Authority has a general discretion to publish reports in the public interest or in the interests of any individual, relating to the exercise of its functions generally or in particular cases.<sup>39</sup>

The Commissioner may, after receiving from the Authority any opinion or recommendation given under section 29 or section 30, publish all or any part of the opinion or recommendation.<sup>40</sup> Potentially then the Commissioner can edit any opinion or recommendation. This feature is not bad in itself except if the editing detracts from the meaning of the original version. But subclause (3) provides that the Authority can guide the Commissioner on the desirability or extent of publication.

**Annual Report - Clause 37**

The Authority is required to furnish each year to the Minister of Justice a report of the exercise of its functions under the Act. In some respects this is a means of certifying Police conduct for the preceding year. Presumably the Authority should also be required to furnish a copy to the Minister of Police also. The Minister of Justice is obliged to lay a copy before the House of Representatives as soon as practicable.

**Offences - Clause 38**

A number of offences are recorded which if committed by any person are punishable on summary conviction and the person is liable to a fine not exceeding \$2,000. They basically deal with obstructing, hindering or resisting the Authority<sup>41</sup>; non compliance with any requirements of the Authority<sup>42</sup> and the giving of false or misleading information.<sup>43</sup>



It is surmised that the size of the penalty is designed in part to dissuade persons making a complaint to the Authority which is completely unfounded, made with a desire perhaps to influence a prosecution.

**Money to be Appropriated by Parliament for the Purpose of this Act - Clause 39**

This is simply a housekeeping clause and it would be more appropriately housed in a schedule to the Act with the other nominated clauses (ie salaries and allowances, staff and superannuation).

**Amendments to Other Acts - Clause 41**

Subclause (1) of clause 41 repeals section 60 of the Police Act 1958. Presently, section 60 affords a degree of protection to police officers in that subsection (1) imposes a one year time limit for commencing a civil action.

For their part the Police Administration have endeavoured to resist this proposed repeal. Its representative on the Beattie Committee presented a minority viewpoint which was subsequently presented in its entirety to the Select Committee. The police argument centres upon the statutory duties and responsibilities imposed on its officers. In many difficult and hostile situations a police officer, it was said, must react instantly under pressure without recourse to advice. Errors can and do happen which attract suits. The one year time limit, according to the police, ensures there is a "cut-off point" so that its officers can continue to pursue their duties free of the stress of being involved as a defendant in a civil suit.

The police pointed to sections 124(2) and (4) of the Mental Health Act 1969 which provides that leave from a High Court judge must be sought before bringing proceedings under that Act and such an application must be made within six months of the act complained of. Section 38 of the Alcoholism and Drug Addiction Act 1966 provides that that machinery also applies



to the former Act. Therefore, the Police Act provision, it was argued, was not unique and is essential. Vulnerability to civil actions merits additional protection. As a concession the police proposed that the time limit be extended to two years and sought the retention of the rest of the section.<sup>44</sup>

The majority of the Beattie Committee acknowledged the susceptibility of police officers to civil actions but considered that the feature should be weighed against the nature of police work and the extensive powers used by the police. Whilst the subsection refers to persons acting in the execution of the Police Act, that provision effectively covers the Crown as well as individual officers since the Crown stands in the place of the individual officer and meets any damages awarded. The Committee mindful that the United Kingdom had repealed similar protective legislation "considered that the ordinary limitation period<sup>45</sup> and other rules for the conduct of litigation should in fairness apply".<sup>46</sup>

Subsection (2) provides that a plaintiff in such an action should not recover if a tender of amends or sufficient sum of money is paid into the Court by the defendant. This provision affords a great protection to the police particularly when it, (the Crown), pays a sufficient sum before or after an action is brought or in respect of costs. One of its original purposes was to encourage the settlement of legitimate claims without the need for a Court hearing. This is borne out in practice with approximately 25% of cases settled early prior to Court action.<sup>47</sup>

The Beattie Committee on this point indicated the application of Rules 347-368 of the new High Court Rules relating the payments into Court. The extensive nature of these rules make subsection (2) redundant.<sup>48</sup>

By way of concluding this section, the Bill does not preclude an aggrieved party from pursuing other civil remedies. In fact, if a party is not satisfied with the Authority's



decision, civil remedies are still available to them. A number of the drafting concerns which have been alluded to in the body of this paper have been synthesised in Appendix D. Perhaps some of the suggestions could have been considered in the construction of the Bill.

## XI. ANALYSIS OF BILL

Having commented in some detail about the infrastructure and content of the Bill it is relevant to evaluate a number of other points about this particular legislation. For instance who are the effective actors/deciders and what are their functions? In the case of the deciders, what is the extent of the powers conferred upon them? How does the legislation treat the competing interests involved? And finally what is the nature of the legislation. Does it, for instance, exclude recourse to natural justice?

### A Actors/Deciders

This section will attempt to draw together the various functions, duties and powers of the primary actors/deciders which are scattered throughout the Bill.

There are two distinct categories into which the 12 characters referred to in the Bill fall. It is proposed to focus attention on the principal actors/deciders. In this process, discussion will centre on the extent of their functions, consideration will be given to their duties and an examination will be made of the powers conferred upon them. The second category which comprises those who maintain peripheral roles (but not unimportant roles), for instance, the Minister of Police or the Attorney-General, will not be discussed at all.



(i) Authority

Functions

The Authority is obviously the most central figure in the Bill and it is pertinent to restate its functions which are detailed in Clause 13. They include the reception of complaints whether alleging any misconduct or neglect of duty by any member of the police or complaints concerning any practice, policy, or procedure of the police affecting the person or body of persons making the complaint in a personal capacity. The Authority may also investigate of its own motion, where it is satisfied there are reasonable grounds to carry out an investigation in the public interest, any incident involving death or serious injury notified to the Authority by the Commissioner under section 14 of the Act. The Authority must also take such action in respect of complaints, incidents, and other matters as is contemplated by the Act. Finally, the Authority may also carry out any investigation at the request of the Commissioner.

In effect, the Authority will substitute the role of the Ombudsmen's office but with an increased jurisdiction over the police with regard to the reception, investigation and resolution of complaints. With regard to the ability to affect policy matters, the Authority will complement the Minister of Police's responsibility and it will also likely substitute the Justice and Law Reform Committee's and Ombudsmen's role in this area. The own motion investigation capability into any incident involving death or serious injury will replace the system of ad hoc police examiners who were appointed from time to time to carry out such investigation. Finally, the Authority has been designed to have such status and competence that it will likely make redundant the need for the Minister to appoint a person to oversee an enquiry pursuant to section 33 of the Police Act. It could also undertake the type of enquiries usually assigned to Ministerial Committees, Commissions of Inquiry and Royal Commissions (See Appendix C).



In summary, the Authority is basically an amalgam of the functions of various institutional police-monitoring bodies. Their functions have been reconstituted into a specialist unit with appropriate powers to provide a more effective oversight over the police.

#### Duties

The Authority has a number of duties imposed upon it by the Bill. For instance it is required to notify the Commissioner of every complaint received by it<sup>49</sup>; of the procedure it proposes to adopt upon receipt of a complaint<sup>50</sup> and of its intention to make an investigation using the procedure laid down in the Act.<sup>51</sup>

In respect of complainants, the Authority has a duty where it decides to take no action or further action on a complaint to inform the complainant of that decision and the reasons for it.<sup>52</sup> The complainant is also to be informed where the Authority intends to make an investigation.<sup>53</sup>

Clause 32 provides that in every case where the Authority undertakes its own investigation it must inform the parties concerned as soon as reasonably practicable at the conclusion of the investigation the result of the investigation.

Upon the completion of an investigation undertaken by the Authority (which it must conduct with due expedition), it is obliged to form an opinion whether the subject matter of the investigation was contrary to law, unreasonable, unjustified, unfair or undesirable.<sup>54</sup> The Authority is then required to convey its opinion with reasons to the Commissioner with any recommendations it thinks fit.<sup>55</sup> In respect of a police investigation the Authority shall form an opinion on the police report<sup>56</sup> and then shall indicate to the Commissioner whether or not it agrees with the Commissioner's decision or proposed decision and it may make any recommendations supported by reasons it thinks fit if it disagrees with the Commissioner's decision.<sup>57</sup>



The Authority and its staff are also required to maintain secrecy<sup>58</sup> and it shall furnish an annual report to the Minister of Justice on the exercise of its functions under the Act.<sup>59</sup>

These duties are consonant with the functions of a superintending body which is required to operate the delicate balance between public and police interests. The duties are sensible, and are likely to be appealing to most of the public as well as the police generally.

#### Powers

(a) Complaints: It is essential to the integrity of the new complaints system, that the Authority has the ability to enforce a reluctant witness to co-operate with it. Therefore a person who resists or hinders the Authority may be liable on summary conviction to a fine of \$2,000. Others who fail or refuse without reasonable excuse, to comply with any requirement of the Authority or who knowingly gives a false or misleading statement or false or misleading information is similarly liable.

Upon the receipt of complaints the Authority has a vast array of powers in relation to how the complaint will be actioned. For instance, it may:

- initially<sup>61</sup> - upon the receipt of a complaint:
  - investigate it;
  - defer action until receipt of a report of a police investigation;
  - oversee a police investigation;
  - decide in accordance with Section 19 to take no action;



- subsequently<sup>62</sup> - at any time after the receipt of a complaint
- review a police investigation;
- decide to investigate a complaint itself;
- give such directions as it thinks fit where it oversees a police investigation;
- direct the police to re-open an investigation and thereafter oversee the investigation;
- direct the police to reconsider their proposals for action;
- decide to take no further action in accordance with section 19;
- decide no further action by the Authority is required on the ground that it considers that the outcome of a police investigation is satisfactory.
- request the Chief Ombudsman to investigate any complaint or matter relating to the police;<sup>63</sup>
- request any or all information in the possession or under the control of the police that is relevant to the complaint and request a report on the progress of the investigation where it oversees a police investigation;<sup>64</sup>
- take up an investigation at the request of the Commissioner;<sup>65</sup>

The scope of these powers permits considerable control over police investigations. In this capacity, the Authority, who can "give such directions as it thinks fit" and "direct the police to reconsider their proposals for action" has information or the production of any document or thing which might prejudice the prevention, investigation or detection of



considerable coercive power, if recourse is had to the sanctions available in the offence section. A reserve power by way of an annual report to Parliament or by way of special report is also available to the Authority. The only restrictions imposed on the powers arise in clause 13(1)(c) where the Authority can only take such action in respect of complaints, incidents and other matters as is contemplated by the Act.

(b) Investigations: Where the Authority decides to investigate a complaint under clauses 18(1)(a), 20(b) and 20(d); or investigate an incident under clause 13(1)(b); or carry out or take over an investigation into any complaint, incident or other matter at the request of the Commissioner pursuant to Clause 23(2), it will be required to follow the procedure laid down in the Act.<sup>66</sup>

Under the procedure the Authority has a discretionary power to hear or obtain information from any person it thinks fit. It also has the power to require a person to furnish information relating to any matter under investigation by the Authority or produce documents or things in the possession or under the control of that person which may be relevant to the subject matter of the investigation.<sup>67</sup> In order to fulfil this power the Authority can summon before it and examine on oath any person who in the opinion of the Authority can give information.<sup>68</sup>

The scope of these powers appear again to be very extensive. The Authority has the ability to get to the truth of a matter. The powers are discretionary in that the Authority can only exercise them if it has "the opinion" that any person can assist. The power is restricted to the extent that if the Prime Minister certifies that the disclosure of information or production of any document or thing might prejudice the security of New Zealand or an interest protected by Section 7 of the Official Information Act 1982;<sup>69</sup> or the Attorney General certifies that disclosure of information or the production of any document or thing might prejudice the prevention, investigation or detection of



offences or might involve proceedings of cabinet; the Authority will not require the information to be given or document or thing to be produced.<sup>70</sup>

Disobedience of a summons would likely attract not only the sanctions imposed by the Summary Proceedings Act 1957 but might also liability under clause 38(a) or (b). Any person who under oath makes any false or misleading statement is liable to be charged with the offence of perjury. If the person is not being examined on oath but makes a false or misleading statement then that might attract liability under Clause 38(c). This particular provision provides that any person who makes any statement or gives any information to the Authority or any other person exercising powers under this Part of the Act commits an offence if that person does so knowing that the statement or information is false or misleading.

On these occasions, the Authority may send a copy of its opinion and recommendations on the matter. The Authority has a number of powers in respect of the resolution of complaints or investigations, but when compared to the powers mentioned earlier, they are quite diluted. For instance, clause 18(3) provides that where "any complaint appears to the Authority to be capable of resolution by conciliation.... it may indicate that view to the Commissioner".<sup>71</sup> This softer approach is also reflected in other clauses. For instance, when forming an opinion, where the investigation was carried out by itself that the decision, recommendation, act, omission, conduct, policy, practice or procedure which was the subject matter of the investigation was contrary to law, unreasonable unjustified, unfair or undesirable, the Authority must form an opinion and may make recommendations. The recommendations might include a recommendation that disciplinary or criminal proceedings be considered against a member of police.<sup>72</sup>

In the case of a police investigation the Authority is required to form an opinion after considering the police report. It has the ability to agree or disagree with the Commissioner. If it disagrees with the Commissioner's decision or proposed decision, it may make such



recommendations, supported by reasons, as it thinks fit, including a recommendation that disciplinary or criminal proceedings be considered against any member of the police.<sup>73</sup>

In essence, the scope of the Authority's powers are very limited in respect of resolving matters. The nature of the language, "may indicate" and "recommend... be considered", is weak when compared to the language dealing with the conduct of investigations, eg "direct" etc. This diluted ability has been intentionally designed so that the Authority's powers do not conflict with the Commissioner's stewardship of the police nor interfere with the Attorney-General's or the police discretion to prosecute.

The Authority has a reserve power in cases where it seems that no adequate and appropriate action has been taken by the Commissioner. On these occasions, the Authority may send a copy of its opinion and recommendations on the matter, together with the comments of the Commissioner to the Attorney-General and the Minister of Police.<sup>74</sup> It may also where it considers it appropriate transmit to the Attorney-General for tabling in the House of Representatives a report on any matter it thinks fit.<sup>75</sup> These reserve powers are potentially strong safeguards. The failure by the Commissioner to implement a recommendation of the Authority would not attract any form of sanction under the offence provisions. Clause 38(b) refers to "refusing or failing to comply with any requirement of the Authority" this would not include refusing or failing to comply with any recommendation of the Authority.

In summary the Authority has a number of powers, some of which are potentially coercive. However, those powers are only effective in a particular time frame in the existence of a complaint. Despite the recommendatory powers being somewhat diluted in comparison with the powers of direction, they are nevertheless supported by a number of reserve powers. What the Authority cannot achieve directly it may do



indirectly by taking the dispute to the political masters of the Commissioner. Such a deterrent power must ultimately enhance the integrity and standing of the Authority in the eyes of the public if it is so used.

(ii) Commissioner of Police

Function

The Commissioner is the other central character in the complaints procedure. It is important to recall briefly the Commissioner's wider functions and duties under the Police Act in order to view the Authority/Commissioner relationship in perspective. The Commissioner is responsible to the Minister for the general administration and control of the police which includes causing all members of the police to discharge their duties to the Government and the public, satisfactorily and efficiently.

The Bill does not interfere with the Commissioner's duty to control the police. Nor shall anything prevent the Commissioner from commencing or continuing a police investigation into any complaint, incident or other matter. But the Commissioner will no longer have the final word in the investigation and resolution of complaints since all police decisions will be reviewed.

Duties - Complaints

The Commissioner has a duty to notify the Authority of every complaint received by the police.<sup>76</sup> Clause 21 then imposes a duty on the Commissioner who shall as soon as practicable, and in no case later than 3 months after the completion of a police investigation into a complaint, report to the Authority whether the complaint has been upheld. If it has been upheld, the Commissioner must specify what action has been taken or is proposed to be taken to rectify the matter. The Commissioner also has to report whether the matter has been settled by conciliation.<sup>77</sup> If requested by the Authority the Commissioner is obliged to provide information



and assistance necessary for the Authority to function effectively in its investigation of a complaint.<sup>78</sup> Following a review by the Authority, who has formed an opinion and made a recommendation, the Commissioner is required to as soon as reasonably practicable, notify the Authority of action (if any) proposed to be taken to give effect to the recommendation. Alternatively, the Commissioner must give reasons for any proposed departure from or non implementation of any such recommendation.<sup>79</sup>

The Commissioner can also consult with the Authority on the proposals for action before actually reporting to the Authority.<sup>80</sup> The Commissioner also has the ability to ask the Authority to investigate any particular complaint.<sup>81</sup> The Commissioner still has a discretion to resolve any complaint<sup>82</sup> and a discretion to refuse to follow a recommendation of the Authority.<sup>83</sup> The powers are not subjected to any criteria except that the Commissioner must take ultimate responsibility for any particular course of action.

#### Incidents

In respect of incidents, the Commissioner is compelled to, as soon as practicable, give notice to the Authority setting out particulars of an incident in which death or serious injury has been caused or appears to have been caused by a member of police acting in the execution of the member's duty.<sup>84</sup> A second duty arises when he is requested by the Authority, he must provide all information and assistance necessary for the Authority to function effectively in its investigation of an investigation.<sup>85</sup> These two requirements do not impose any threat upon the police and are quite logical in their context.

#### Other Matters

Should the Commissioner request the Authority to investigate any matter which is not the subject of a complaint or an



incident as contemplated by the Bill then the request is brought within the sphere of clause 13(1)(c). The procedure of investigation is the same as that for a complaint.

(iii) Chief Ombudsman

The Chief Ombudsman does not have any functions or duties prescribed by the Bill. However, the Chief Ombudsman can request the opinion of the Authority on whether an investigation into a complaint or other matter impinges on the jurisdiction of the Authority.<sup>86</sup> Secondly, the Chief Ombudsman can at the request of the Authority have any complaint or other matter relating to police investigated by an Ombudsman.<sup>87</sup>

The difficulty with this latter power is determining under which legislation will the Ombudsman operate? Although this Bill is modelled on the Ombudsmen Act 1975 and the powers conferred upon the Authority are in most respects identical, the office of the Authority has been devised with care to balance all the interests concerned. An intrusion by the Ombudsman might be seen to upset that balance.

(iv) Complainants

Under the Bill, the aggrieved parties have no functions duties or powers. However the Bill statutorily recognises the complainant's right to make a complaint against the police. The Bill provides a credible system where complaints are received, considered, investigated and resolved satisfactorily, although this may not necessarily be to the complainant's satisfaction.

Complainants are able to make an oral or written complaint<sup>88</sup> alleging any misconduct or neglect of duty by any member of police,<sup>89</sup> or, if the complainant is affected in a personal capacity the complaint can concern any practice policy or procedure of the police.<sup>90</sup> If the complaint is made orally it must be reduced to writing.<sup>91</sup> The Bill provides two



additional facilities for complainants to use in making their complaints which are not available under the existing system. Currently a complainant can make a complaint to any member of police<sup>92</sup> or to an Ombudsman.<sup>93</sup> The new process provides that if a complaint is in writing then a Registrar or Deputy Registrar of any District Court can receive it and forward it on.<sup>94</sup> The second facility is that a complaint can be directly to the Authority itself.<sup>95</sup> Since it is anticipated that the Authority will likely be domiciled in Wellington with a Deputy Authority in Auckland, only residents in those cities are likely to have the advantage (unless complainants are prepared to travel) of making an oral complaint direct to the Authority.

If a complaint is made to the police, the Commissioner has a duty of notifying it to the Authority.<sup>96</sup> Upon receipt of a complaint the Authority is required to consider how it should be addressed.<sup>97</sup> Whatever procedure the Authority adopts the complainant must be advised as soon as practicable.<sup>98</sup> It might be that upon an indication from the Authority to the Commissioner and with the willing participation of the complainant and the subject officer the Commissioner will arrange for the matter to be resolved by conciliation.<sup>99</sup>

If the Authority decides to take no further action in accordance with Section 19, eg the complainant has had knowledge of the subject matter longer than 12 months<sup>100</sup> or the complaint is frivolous<sup>1</sup> or it appears to the Authority that, if as a result of a police investigation or a report of such,<sup>2</sup> no further action is necessary or appropriate; the Authority shall inform the complainant of that decision and reasons for it.<sup>3</sup>

If the complainant's grievance is outside the Authority's jurisdiction, the complainant will be advised in writing<sup>4</sup> and informed that the complainant has a right to make a complaint under the Ombudsmen Act 1975.<sup>5</sup> If so requested by the complainant the Authority is bound to forward the complaint to an Ombudsman.<sup>6</sup>



If the Authority elects to investigate any matter itself the complainant shall be informed.<sup>7</sup> However, the complainant has no right to be heard by the Authority<sup>8</sup> and if the complainant is heard it will not be in a public forum.<sup>9</sup> It is likely the complainant could during the course of an investigation be summonsed and examined on oath.<sup>10</sup> Perhaps, the complainant may also be required to produce documents or other things relevant to the subject matter of the investigation.<sup>11</sup>

Once a complainant is summonsed to give information that person has the same privileges as a witness in Court<sup>12</sup> and will not be out of pocket for attending an investigation.<sup>13</sup> Nor will the complainant be the subject of adverse comment unless that he or she has been given an opportunity to be heard.<sup>14</sup> Any information given to the Authority will not be given in evidence in Court or in any inquiry<sup>15</sup> or other proceedings and its confidentiality is preserved.<sup>16</sup>

Throughout the Authority's investigation the complainant may be appraised of its progress<sup>17</sup> but certainly at the conclusion of the investigation the complainant will be advised of the result in an appropriate manner.<sup>18</sup>

Upon the completion of an investigation the Authority is required to form an opinion on the subject matter of the investigation and make any recommendations it thinks fit. Perhaps a recommendation might include some form of monetary compensation to the complainant. Whatever the recommendation the complainant must rely on the Authority to defend his or her interests.<sup>19</sup> If the Commissioner fails to implement a recommendation the complainant is not restrained from taking the complaint to another forum.<sup>20</sup>

If a complainant is dissatisfied with the activities of the Authority, the complainant can only get a judicial review of the matter if the complaint can show that the Authority acted in bad faith.



(v) Subject Police Officers

Police officers who are the subject of a complaint have no functions, duties or powers under the Bill. They do have some rights and interests preserved though.

A great deal depends on the Authority and how the Authority wishes to proceed with a complaint, incident or other matter. If the Authority elects to investigate a matter itself pursuant to Clause 25, the subject officer is not necessarily informed by the Authority<sup>21</sup> nor is the officer entitled as of right to be heard.<sup>22</sup> The subject officer will not be the centre of a public spectacle,<sup>23</sup> which is particularly important, if the officer is exonerated by the investigation.

The Officer may be summonsed, examined on oath and required to give information or produce documents or things. Clause 27(1) provides that subject officers have the same privileges in relation to the giving of information or the production of documents or things, as a witness does in Court. Consequently an officer can invoke the right to silence on the grounds of self incrimination. But the officer cannot refuse to give information or produce any document or thing on the ground that compliance would breach an obligation or non disclosure imposed upon any enactment. Nor can the officer withhold any document or refuse to answer any question on the ground that disclosure of the document or the answering of the question would be injurious to the public interest except if the officer produces a certificate from the Prime Minister or Attorney-General.

Thus in order to establish a free flow dialogue the subjects of the investigation are encouraged to divulge information to the Authority and to that extent their interests are protected by Clause 27(4). If the subject officer or for that matter any other person elects to make a statement or give information, that statement or information will not be admissible in evidence against the officer or any other person in any Court or in any inquiry or other proceeding.<sup>24</sup>

Nor will the Authority or any person holding any office or



appointment under the Authority be called to give evidence in any forum in respect of anything coming to their knowledge in the exercise of their functions.<sup>25</sup> There are however two exceptions when information could be used against an officer. They involve cases where a charge of perjury or an offence against section 38 of the Act<sup>26</sup> has been laid.

Whilst a police officer who is the subject of an investigation might never receive a progress report on the investigation<sup>27</sup> the Authority is obliged to inform the officer of the result as soon as reasonably practicable after the conclusion of investigation.<sup>28</sup>

The subject officers interests are also protected to the extent that the Authority only has the power of recommendation, which may not necessarily be accepted by the Commissioner. Another important feature of the Bill is that rights of natural justice are preserved. The subject officer (or any other person) shall not be the subject of adverse comment unless that person has been given a reasonable opportunity to be heard.<sup>29</sup>

The Bill's emphasis then is to ascertain the true facts of a situation. That goal is sought to be achieved in a manner that is consonant with the interests of all parties.

#### B Competing Interests

There are three competing principal groups which have a vital interest in the design of the proposed complaints system. They are:

- (a) the public whose benefit and protection are the primary objectives of the whole process; and
- (b) members of the police who will be the subject of the process; and



The Bill (c) the police profession itself which has a vested interest in ensuring the maintenance of high standards of professional conduct.

Has the Bill attained the balance of these interests? In other words does the Bill operate in a manner which will be fair to all parties? Leigh said that it was important for a complaint procedure to:

"be efficient and administered with integrity; it must be fair and just to both the Police and the public. It must provide machinery which is theoretically, and as far as possible practically, accessible to the public at large; it must be structured in such a way as to be conducive to public confidence in its integrity. This does not mean that it must respond to the dictates of some pure form of participatory democracy. It does mean that the procedure cannot be left wholly in the hands of the Police alone. In particular, there is an element of conflict among the various interests and, as so often happens, a reasonable solution represents a compromise between them."<sup>30</sup>

What aggrieved citizens want from a complaint's process is certainty, open and fair justice. But principally their basic desires are that their complaints be upheld, offenders are punished and they receive some form of compensation, if it is appropriate. And they want the police to act properly in the future. The scheme of the Bill is aimed at accommodating these desires by providing complainants with an impartial scrutiny of their grievance. It is not expected that the Authority will make dramatic intrusions into the police. That would be counter-productive and perhaps diminish police members pride in their profession. From the police officers stance, the formal statutory procedures do preserve their basic rights. To do more than that would be unfair to the other interest groups.



The Bill is also fair to the police profession in another sense since it will no longer be involved in public debate of the shortcomings of the complaints system. The intervention of the Authority will attract any future criticisms relating to this process. Consequently the deflection of criticism may permit the police profession to foster a better community image.

The very idea of an extension of democratic control of the police has been seen in some quarters amongst other concerns as an attack upon the doctrine and practice of operational independence. For instance the New Zealand Police Association which represents all police members up to the rank of senior sergeant commented in its February 1987 newsletter that if the Bill is passed into law it will:

- Usurp the Commissioner's authority over the service Authority overall but some of the details give it cause for concern
- Remove the civil liberties of the members of the service
- Impede the ability of all members to carry out their known duties as an exercise of discretion will be under the cloud of the possible consequences of a subsequent complaint and will therefore cause which it dissension and indecision
- Reduce the importance of the Office of [Constable] in the eyes of the public and will give any individual the machinery to threaten and frustrate police in the execution of duty"<sup>31</sup>

This highly emotive and alarmist piece of writing is in direct contrast to the Police Association's earlier publicly reported comment which implied acceptance of the monitor and its ability to raise management and policy issues with the Police Administration.<sup>32</sup> This attitude by the representative body of police officers is incompatible with the balance that the Bill seeks to attain. However the tenor of a subsequent



newsletter<sup>33</sup> dealing with the proposed Authority was more subdued. A later article declared that the broad thrust of the Association's approach to the Justice and Law Reform Select Committee "was not to dismiss the Bill outright as this would be unrealistic - overseas experience shows that an independent authority at some time is inevitable". The submissions to the Select Committee were thus focussed on ensuring basic rights of Association members were protected and limitations were placed on the powers and functions of the Authority. In other words, according to the newsletter, "the Bill is significantly lacking in sufficient safeguards for members and has given the Authority almost unlimited power". Their criticisms in part centre around the "offences" contained under the heading of "misconduct and neglect of duty", the lack of a right to be heard and the definition of "serious injury". Despite these criticisms, the Police Association seem to accept the concept of the Authority overall but some of the details give it cause for concern.

Will the scheme be efficient? This is really a matter for conjecture. However, one can still draw conclusions from known facts. The Bill is framed on the Ombudsmen Act which has operated successfully for 24 years. That statutory office has attracted a great deal of praise for the manner in which it operates and there is no reason to doubt that the proposed scheme will not be as efficient. It is, after all, an appropriate means of judicially collating information and assessing evidence and reaching an opinion in an impartial manner.

Will this proposed complaints process be credible in the eyes of the users as well as the general public? Any such scheme which removes from the dominant control of the police the sole investigatory and decision making roles must be seen to be legitimate. The openness of the scheme operated by an external specialist with a brief, in part, to ensure the police is held accountable to the community, must provide the complaints system with a great deal of credibility. Police



officers who are treated in a judicial matter by an impartial monitor cannot ask for anything more. The police have been involved in the construction and design of the proposed scheme and thus, to the extent of its influence, guarantees police acceptability of the new process. The police organisation's capacity for effective self regulation too must also be enhanced and it has much to gain from the favourable testimony of an external monitor.

In sum, the Bill which is the product of compromise, is likely to achieve an appropriate balance to meet the needs of the three principal interest groups.

### C Nature of Legislation

The texture of the legislation specifically retains the protection afforded by the principles of natural justice. Indeed the legislature has prescribed a set of procedural safeguards which guarantee the preservation of the right of natural justice.

Another feature of the legislation is that external control has not been substituted for internal control. Control remains with the police for reasons apart from the statutory responsibilities of the Commissioner. Firstly the police know more about what they are doing than an external investigator. External supervision could only, at best, be superficial because of the ability of officers to conceal what they doing. Secondly the police organisation has a more extensive, subtle and discriminating set of controls over its members which external agencies can not provide. In addition to the formal disciplinary punishments involving promotions and postings, it can exhort, slight, harangue, praise or embarrass. In the third place, internal controls can operate more effectively to prevent errors before they occur and then can operate to anticipate and avoid mistakes. If left to external controls, remedial action would likely be implemented after mistakes had been made. Finally, the police are a tightly knit community who willingly respond to



discipline imposed by the organisation. This response would perhaps be less apparent with an external means of control.

incident involving death or serious injury apparently caused by a police officer in the execution of his or her duty. In the past various senior legal practitioners have been

## XII. FEATURES OF THE PROPOSED SYSTEM

There are a number of features of the proposed system which are worthy of comment. Firstly, the Bill institutionalises a new police complaints process with independent overseer with an array of powers. The legislation not only superimposes on the existing system an external oversight mechanism but it also considerably amplifies the means of receiving and investigating complaints against the police. The legislation has implanted a specialised mechanism of control created exclusively to deal with the police. This body is complemented by the Office of the Ombudsmen (whose effectiveness is limited) as well as the Justice and Law Reform Committee. The police will now be subject to scrutiny by three specialist regulatory agencies.

The proposed system is a marked departure from the existing one. It establishes a review procedure which satisfies the demand that justice should not only be done but seen to be done. The police will no longer have the dominant control of investigation of complaints. Within its jurisdiction the Authority will be competent of performing investigations. It will also become involved in a complaint almost immediately, no matter where the complaint is made, and thus will monitor the complaint ab initio.

Secondly, the Authority is not restricted to investigating complaints of misconduct by individual police officers. The Bill also introduces and institutionalises a facility whereby certain aggrieved citizens can complain about any police practice, policy or procedure. Perhaps with the advent of this specialist reviewer the Justice and Law Reform Committee will be less likely to invoke their powers of scrutinizing police policies.



Thirdly, the Bill institutionalises a facility whereby the permanent monitor can investigate of its own motion any incident involving death or serious injury apparently caused by a police officer in the execution of his or her duty. In the past various senior legal practitioners have been appointed on an ad hoc basis to carry out investigations.

To other subsidiary points can be made. Fourthly, the Authority performs a credibility function. It is more than a symbolic gesture in this area of concern with the police. And finally the flexibility of the proposed legislation places an emphasis of co-operation between the principal actors which is essential if the new system is to function effectively.

### XIII. CONCLUSION

How to best ensure police accountability has been a simmering point within the community for some time. It has developed in part from the traditional concerns to limit the powers of the state and more particularly those servants of the State who exercise wide coercive powers. It has also sprung from the need to safeguard the interests and freedom of the individual citizen. The police, because they are charged with the maintenance of law and order and protecting lives and property, are perhaps the most privileged, (because of their exercise of wide discretionary powers) but certainly one of the most important, servants of the State. Consequently a higher standard of conduct is expected of a police officer than that of the general public. But the existing complaints procedures have failed to attract widespread public confidence in its utility and there is no guarantee that the police are maintaining the higher standard of conduct. It is also the nature of the police profession that criticisms will also be directed at the police administration itself, rightly or wrongly for actions taken by it or the tactics and methods employed to deal with a



policing situation. Currently, aggrieved citizens do not have an effective facility to satisfy complaints concerning wider policy issues or police practices and procedures generally.

The Police Complaints Authority will be a centralised In developing the described processes, constitutional changes to the police status has been resisted. The operational autonomy and independence which has avoided effective accountability processes in the past has now been contained and will be monitored. In this sense the Bill addresses the confused nature of the constitutional status by impliedly recognising the effect the common law has in supplementing the statute law. The proposed legislation seeks to regulate it by institutionalising the specialist body to hold the police more readily accountable. The strong claim of accountability to the law which created the impression the police were carrying out a quasi-judicial role is not supplanted but refocused. The police who basically exercise an executive type function will now be subjected to a more rigorous democratic control.

The Labour Government in developing a competent process for handling citizen complaints about police conduct or methods has tapped an ever increasing mood in the community which asserts that it is reasonable and necessary to have the police account more to the public. The Authority will provide concerned and aggrieved citizens with an effective forum to voice their legitimate misgivings about the police. Individual officers will become more identifiably accountable since the process will ensure that violations of the law - especially abuses of rights are discovered and prevented, in a more impartial fashion.

Since external supervision can never be a substitute for effective internal controls the Authority does not displace the police organisations disciplinary processes. The police themselves must maintain active responsibility for self regulation and maintenance of performance standards. However the Authority is superimposed upon the existing discipline



framework which will be modified to the extent it accommodates the Authority and embodies the principles of the Act.

The Police Complaints Authority will be a centralised independent body created without the concession of structural decentralisation. It is not within the contemplation of the framer's of the Bill, that the oversight function be a costly, cumbrous and bureaucratic machine whose purpose is to undermine police morale, usurp the Commissioner's function and disappoint an expectant public. Framed with the successful South Australian model in mind the Authority will be responsible for exerting a combination of specialised political and bureaucratic supervision over the Police. The structure of the proposed statutory officer means that it will likely operate at an individual level in a very personal fashion.

Upon taking office the Authority will need to grasp the complexities of the legislation and its administration, become aware of the issues which need continuing attention and develop systems. Part of the challenging introduction to the office will be the employment of staff acceptable to all parties, the establishment of a formal structure and development of a functional administration. Since the Bill has not been designed to be a code the Authority will need to develop rules and procedures to be incorporated into subordinate legislation to supplement the administration of the system in accordance with principles of the Act.

Whilst the Authority will be operating at two levels eg dealing with allegations of individual injustices and scrutinizing wider policy issues and processes, one other integral part to the Authority's unwritten mandate requires discussion. That is the Authority also has an educative function. It will need to set in motion and maintain programmes that inform both members of the public and the police their rights and responsibilities under the Act. At the same time the Authority needs to market the new statutory



office. It will also need to establish regular channels of communication with diverse groups and agencies in the community as well as establishing ongoing communication with the police management. Therefore, it should be in a position at any time to gauge public views on relevant issues. In so functioning, the Authority will need to develop the capacity to familiarise both the police and the community with the expectations that each may reasonably have of each other. Facilitating dialogue in the manner expected will prevent situations of misunderstanding and hostility. Overall, the Bill provides the opportunity for excellent police/community relations. The design of the legislative scheme will certainly provide police management with information regarding existing discipline problems and community concerns which will enable it to take remedial action early.

Comparatively speaking the New Zealand legislation is free from much of the overly complex rules and procedures of overseas jurisdictions. It has also the advantage of avoiding the tokenism and shortcomings which are evident in some of the Commonwealth schemes.

One of the greatest achievements of the Bill is that a consensus has been reached on a matter of considerable significance to the administration of justice in the New Zealand community. The police are an instrument of the state and an agent of the community. It is right that it is supervised to ensure it does not become a law unto itself. The Government has fulfilled its democratic mandate by ensuring that in the final analysis the police are not autonomous and the Government is in "control" of the police and accountable for it.

There will always be individuals or groups polarised to the police and who regard the police as an anathema. They will undoubtedly not be satisfied by the Bill. But all in all the Bill goes some way to alleviating existing tensions between the community and the police. Mutual aggrandisement will likely be achieved and the credibility gap between the community and the police will be bridged by the authority.



An upgraded image is particularly essential for police acceptance in the community. Perhaps the independent Authority can revive the atmosphere of mutual trust, confidence and respect which has diminished over the years. This statutory proposal then is a necessary bold new reform and it a major contribution towards a truly effective system of community policing.

- 3 Royal Commission on the Police 1962 (Cmd 1728) p57
- 4 Quoted in the Scarman Report, supra n.1, at paras 4.57 and 4.63.
- 5 Section 27 Police Act 1958
- 6 This subsection (1)
- 7 Scarman Report supra n.2 at pages 62-63
- 8 "Let justice be done though the heavens collapse."
- 9 See J L Lambert, Police Powers and Accountability, p1
- 10 See David Bayley, "Accountability and the Control of the Police : Lessons for Britain", pages 152-153
- 11 See G Orr, "Police Accountability to the Executive and Parliament" in Policing at the Crossroads p45. In this article Professor Orr discusses the basis of the claimed independence.
- 12 Section 3(1) Police Act 1958
- 13 Section 5(2)
- 14 Section 4(1)
- 15 Section 2
- 16 Regulation 7 Police Regulations 1959
- 17 Shever v The King (1906) 3 CLR 969, (particularly 975 and 977) Fisher v Oldham Corporation [1930] 2 KB 304 Stabury v Exeter Corporation [1905] 2 KB 838 A G (1908) v Perpetual Trustees Co Ltd 1955 AC 457 Burne v Colman [1929] 45 W.N. 30 Glasbrook Bros Ltd v Glamorgan County Council [1925] AC 270 (particularly 277, 285, 292 and 307) Daksey Committee in England 1949 'Report of the Committee of Police Conditions of Service' (para 30) Royal Commission on the Police supra n.2 Pligg v Baldwin [1964] AC 40 (particularly Lord Reid at 65 and Lord Morris at 123) R v Commissioner of Police of the Metropolis, ex parte Blackburn [1968] 3 All ER 118. (See Lord Denning Master of the Rolls 135-136, Lord Justice Salomon 138 and Lord Justice Edmund Davies 140)



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**There is no PAGE 112  
in this document**



## FOOTNOTES

- 1 N Morris, The Honest Politicians Guide to Policing,  
p100
- 2 The Brixton Disorders April 10-12 1981 Report of An  
Enquiry Cmmd 8427, p7 (Hereafter referred to as the  
Scarman Report)
- 3 Royal Commission on the Police 1962 (Cmmd 1728) p57
- 4 Quoted in the Scarman Report, supra n.1, at paras 4.57  
and 4.63.
- 5 Section 37 Police Act 1958
- 6 Ibid subsection (1)
- 7 Scarman Report supra n.2 at pages 62-63
- 8 "Let justice be done though the heavens collapse."
- 9 See J L Lambert, Police Powers and Accountability, pl
- 10 See David Bayley, "Accountability and the Control of  
the Police : Lessons for Britain", pages 152-153
- 11 See G Orr, "Police Accountability to the Executive and  
Parliament" in Policing at the Crossroads p46. In  
this article Professor Orr discusses the basis of the  
claimed independence.
- 12 Section 3(1) Police Act 1958
- 13 Section 5(2)
- 14 Section 4(1)
- 15 Section 2
- 16 Regulation 7 Police Regulations 1959
- 17 Enever v The King (1906) 3 CLR 969, (particularly 975  
and 977) Fisher v Oldham Corporation [1930] 2 KB 364  
Stanbury v Exeter Corporation [1905] 2 KB 838  
A G (NSW) v Perpetual Trustee Co Ltd 1955 AC 457  
Horne v Coleman (1929) 46 W.N. 30  
Glasbrook Bros Ltd v Glamorgan County Council [1925]  
AC 270 (particularly 277, 285, 292 and 307)  
Oaksey Committee in England 1949 'Report of the  
Committee of Police Conditions of Service' (para 38)  
Royal Commission on the Police supra n.3  
Ridge v Baldwin [1964] AC 40 (particularly Lord Reid  
at 65 and Lord Morris at 122)  
R v Commissioner of Police of the Metropolis, ex parte  
Blackburn [1968] 2 QB 118. (See Lord Denning Master  
of the Rolls 135-136, Lord Justice Salmon 138 and Lord  
Justice Edmund Davies 148)



- 34 R v Commissioner of Police of the Metropolis ex parte Blackburn [1973] 1 QB 241. (See Lord Denning at 254, Roskill LJ at 262, Phillimore LJ at 258)
- 18 Enever v The King (1906) 3 CLR 969 per Griffith CJ at 977
- 19 See Orr n 11 and also N Cameron, "Developments and Issues in Policing in New Zealand" in Policing at the Crossroads, from page 7, where Cameron challenges the rhetoric of the traditional police assertions.
- 20 The Hon J K McLay (Minister of Justice), speaking for the Minister of Police, in response to a question in the House of Representatives said that "a decision whether a prosecution will be brought is for the police to make. The Government will not tell the police whether they should prosecute" (439 NZPD:2396 (1982)).
- 21 See G Orr n 11 pages 55-58 who discusses in some detail the 1976 police "Overstayer" operation and the 1981 Springbok Rugby Tour operation, which are instructive as to when and how the Minister will get involved in policy issues.
- 22 See Terrence Arnold "Legal Accountability and the Police: The Role of the Courts" in Policing at the Crossroads page 67.
- 23 Ibid page 67
- 24 R v Commissioner of Police of the Metropolis ex parte Blackburn [1968] 2 QB 118 at 135-136
- 25 Ibid 135-136
- 26 See N Cameron supra n.24 page 24
- 27 The Judges Rules 1912 and R v Convery [1968] NZLR 426
- 28 See s5 Costs in Criminal Cases Act 1967
- 29 Section 65 Police Act 1958
- 30 See Prof K Keith "The Ombudsman's Jurisdiction : What is a matter of Administration?" page 33
- 31 The Personnel Directorate did however, record in a register complaints which resulted in criminal or disciplinary proceedings.
- 32 Page 7, paragraph 17(c)
- 33 Of the 362 formal complaints of misconduct by the Police only six criminal or disciplinary charges were brought against Police Officers. Dissatisfaction with Police investigations resulted in 173 complaints being referred to the Ombudsman who upheld 75 of them.



- 34 Commissioners Circular 1982/27 (15 December 1982) which also amended General Instruction J80-89.
- 35 General Instruction J82(1)(c)
- 36 General Instruction J82(2)
- 37 General Instruction J88(1) provides that "where a complaint has been made via the Minister or Commissioner and forwarded to the District Commander, ...". Also implicit in Section 13(7)(d) of the Ombudsman Act an Ombudsman must refer on to the Commissioner any complaints not previously received or investigated by the Police before the Ombudsman can investigate it. See also General Instruction J89.
- 38 General Instruction J83(1)
- 39 General Instruction J83(2)
- 40 General Instruction J85(1)(a)
- 41 General Instruction J85(1)(b)
- 42 General Instruction J81(3). Non serious complaints are not collated on a national basis.
- 43 General Instruction J81(1)(a)
- 44 General Instruction J81(1)(b)
- 45 General Instruction J81(1)(c)
- 46 General Instruction J81(1)(d)
- 47 General Instruction J81(2)
- 48 Supra notes 43-46
- 49 General Instruction J84(2)(b)
- 50 General Instruction J84(1)
- 51 General Instruction J85(1)(c)
- 52 General Instruction J85(1)(d)
- 53 General Instruction J85(1)(f)
- 54 General Instruction J85(1)(g)
- 55 General Instruction J85(1)(h)
- 56 General Instruction J85(2)
- 57 General Instruction J85(3)
- 58 General Instruction J85(4)
- 59 General Instruction J85(5)



- 60 General Instrucion J88(3)
- 61 Section 13(7)(d) Ombudsmen Act 1975
- 62 Section 18(1) Ombudsmen Act 1975
- 63 General Instruction J89(4)(a)
- 64 General Instruction J89(4)(b)
- 65 First Schedule, Part I of the Ombudsmen Act 1975
- 66 Section 13(3) Ombudsmen Act 1975
- 67 Ibid section 13(1)
- 68 "Report of the Chief Ombudsman G R Laking on Leaving Office", 1984, page 28
- 69 See the Chief Ombudsman's 1978 Annual Report, page 13
- 70 Section 5(1) and (5) Accident Compensation Act 1972
- 71 Donselaar v Donselaar [1982], NZLR 97 per Somers J. at 117
- 72 Ibid Cooke J. at 104
- 73 See Appendix C
- 74 Section 12(1) Coronors Act 1951
- 75 The Evening Post, 23 December 1976
- 76 1980 Annual Report of the Ombudsman, page 7
- 77 Report of the Chief Ombudsman on the Investigation of Complaints Against the Police Arising from the South African Rugby Tour of New Zealand in 1981, para 5.11
- 78 Report of the Chief Ombudsman, G R Laking on Leaving Office, pp 24-36
- 79 For a detailed analysis see Warren Young, "Investigating Police Misconduct" in Policing at the Crossroads, page 119 onwards.
- 79a Ibid page 120. Young gives two examples - one relating to the Chase shooting in 1983 and the other to a Waitangi March in 1983 of this type of practice.
- 80 Ibid page 121
- 81 See n33
- 82 See "The Report of the Chief Ombudsman G R Laking on Leaving Office" (1984), particularly pages 24-36



- 83 See the Report of the Committee of Inquiry into the Queen Street Riot" (1984), paragraphs 6.20, 6.24 and 7.4.
- 84 See the Scarman Report, para 7.28
- 85 Ibid para 7.21
- 86 Discussion Paper "Complaints Against Police" February 1985 paragraph 1.1.
- 87 Section 13(1) Ombudsmen Act 1975
- 88 See Lester Castle Memorial Lecture 1987, pages 12-15 where Sir David sets out the Committees method of approach.
- 89 Clause 4(2). Clause 2(1) provides for the alternative use of the title "Authority"
- 90 Police and Criminal Evidence Act 1984 (hereinafter referred to as the UK Act)
- 91 Police Regulation (Amendment) Act 1985 s86B(1) (hereinafter referred to as the Victorian Act)
- 92 Police (Complaints and Disciplinary Proceedings) Act 1958 s5(1) (hereinafter referred to as the South Australian Act)
- 93 See also section 10 Law Commission Act 1985
- 94 See S9(2) Law Commission Act 1985 which requires that one Commissioner who shall be appointed as President of the Commission to be either a Judge or a retired Judge of the Court of Appeal or the High Court or a barrister or solicitor of the High Court of not less than 7 years standing.
- 12 Similarly, s288(2) Labour Relations Act 1987 provides that:
- 14 "No person other than a barrister or solicitor of not less than seven years standing of the High Court shall be appointed a Judge of the Labour Court."
- 15
- 95 See Hon A Hercus, New Zealand Parliament Debates Vol 31 1987:6735
- 96 Section 15(2)(b) Electoral Act 1956 as amended by s2(1) 1986/H6
- 97 Clause 5(1)
- 98 Section 5(1) Ombudsmen Act 1975
- 99 These points were well made to the Officials Committee by the Chief Ombudsman. See Beattie Report pages 8-10.



- 100 Victorian Act s86C(1) Act 1986
- 1 The Parliamentary Commissioner Act 1984, s5(3)  
(hereinafter referred to as the Western Australian  
Act).
- 2 South Australian Act s7(1)(a)
- 3 Clause 5(2)(a) the Victorian Act and s11(1) of the  
South Australian Act
- 4 Clause 5(2)(b)
- 5 Clause 5(2)(c). See also s11(3)(c) Law Commission Act  
1985.
- 6 Clause 8(3)
- 7 Section 13(1) of the Judicature Act (as amended by  
1981/40) provides that every Judge other than a former  
Judge appointed under section 11 or 11A of this Act  
shall retire from office on attaining the age of 68  
years. However, a Judge who was appointed prior to  
the 1 January 1980 may continue in office until he  
attains the age of 72 years.
- The retirement age for the Ombudsmen is also 72 years  
(s5(3) Ombudsmen Act 1975).
- The West and South Australian legislation provide for  
a 65 year retiring age.
- 8 See sections 3-7 Law Commission Act 1985.
- 9 Clause 6
- 10 Clause 7
- 11 Clause 8
- 12 Clause 9
- 13 Clause 10
- 14 Clause 11
- 15 Clause 12
- 16 See for example s6(1) Ombudsmen Act 1975. The  
Ombudsmen Act goes further and provides in subsection  
(2).
- "At any time when Parliament is not in session, any  
Ombudsman may be suspended from his office by the  
Governor General in Council for disability,  
bankruptcy, neglect of duty, or misconduct proved to  
the satisfaction of the Governor-General; but any such  
suspension shall not continue in force beyond 2 months  
after the beginning of the next ensuing session of  
Parliament.



- 17 See s23 Constitution Act 1986
- 18 Clause 8(1)
- 19 Clause 8(3)
- 20 Discussion Paper para 4-4(h)
- 21 Section 86L of the Victorian Act and s16(1) of the South Australian Act
- 22 Police Regulation (Allegations of Misconduct) Act 1978 S6(1B)(b) (hereinafter referred to as the NSW Act).
- 23 Ibid S4 "conduct" means "In relation to a member of the Police Force, any action or inaction, or alleged action or inaction of the member of the Police Force ..."
- 24 Section 22(1) Complaints (Australian Federal Police) Act 1981 (hereinafter referred to as the AFP Act). The meaning of action taken by a member is construed in section 4 "as a reference to action that a member takes or purports to take, whether within or outside Australia -
- (a) by virtue of his being a member; or
- (b) in the exercise of powers, or the powers, or the performance of functions conferred on him in his capacity as a member of this Act or by another law,
- whether or not the taking of the action is within or is, incidental to the performance of his duties."
- 25 See section 14(1)(a) Parliamentary Commissioner Act 1984 where "the Commissioner shall investigate any action taken by a member of the Police Force or Police Department whether or not that action relates to a matter of administration where the action was ... done in the exercise of or in connection with or incidental to that members powers duties or functions as a member of the Police Force or Police Department."
- 26 Ibid. See the reference to both Police Force and the Police Department
- 27 See Parliamentary Order Paper 26/7/85:2888
- 28 See B Dillon MP, New Zealand Parliamentary Debates Vol 31, 1987:6747
- 29 Beattie Report page 18
- 30 Ibid page 17
- 31 See the New Zealand Police Association Inc. Submissions on Police Complaints Authority and Miscellaneous Amendments Bill, para 3.8.



- 32 See the New Zealand Police Departments submission on the Police Complaints Authority and Miscellaneous Amendments Bill, para 2.
- 33 Ibid para 2.5
- 34 Section 87(4) defines "serious injury" as meaning "a fracture, damage to an internal organ, impairment of a bodily function, a deep cut or a deep laceration".
- 35 Supra n 31 (para 3.8)
- 36 See s18(1)(a) and 19(1) Metropolitan Toronto Police Force Complaints Act 1984 (hereinafter referred to as the Toronto Act)
- 37 Ibid s18(1)(b) and (c)
- 38 See s86N(4)(a) and (b)
- 39 Section 23(1)(a)
- 40 See Hon A Hercus, New Zealand Parliamentary Debates Vol 31, 1987:6735.
- 41 See s12 Coroners Act 1951
- 42 Clause 15(2). See also s16(1) Ombudsmen Act 1975 which requires every complaint to be in writing.
- 43 Ibid subclause (3)
- 44 Ibid
- 45 Ibid subclause (4)
- 46 This provision replicates s16(2) Ombudsmen Act 1975
- 47 Section 5 provides
- (a) the person has already made another complaint (...) about the same conduct and that other complaint:
- (i) is under consideration prior to determination as to whether it should be the subject of an investigation;
- (ii) is the subject of an investigation; or
- (iii) has been adjudicated upon after investigation;
- whether the investigation is, or is to be, under Part IV or otherwise Subsection (3)(a) does not apply to a complaint that is being examined by the Commissioner of Public Complaints.



- 64 (b) the person has already made another complaint in  
 65 accordance with this part about the same conduct  
 and:
- 66 (i) further consideration of that complaint  
 67 is in abeyance under section 54(1);
- 68 (ii) the Ombudsman has informed the  
 69 Commissioner that he has dealt with that  
 other complaint in a manner acceptable to  
 the complainant.
- 70 (iii) the Commissioner or other member of the  
 71 Police Force has dealt with the complaint  
 in a manner acceptable to the  
 complainant; or
- 72 (c) the person is not identified in the complaint,  
 73 the complaint is made in relation to a  
 74 particular incident and another complaint has  
 already been made in accordance with this Part  
 in relation to that incident about the same  
 75 conduct of the member of the Police Force.
- 48 See Victorian Act s86L(2)(a). South Australian Act  
 sl6(5)(a)
- 49 Victorian Act s86M(2)
- 50 Section 13(7)(d) Ombudsmen Act 1975
- 51 Clause 18(2)
- 52 Clause 18(3)
- 53 Beattie Report page 25
- 54 See for example sl9 of the AFP Act s22 of the South  
 Australian Act and sl4 of the NSW Act
- 55 Section 3(1) Police Act 1968 and Regulation 7(1)  
 Police Regulations 1959
- 56 See sl7
- 57 Clause 19(1)(a)
- 58 South Australian Act s21(1)(a)
- 59 See sl2 Toronto Act
- 60 Clause 19(2)
- 61 Clause 19(3)
- 62 Clause 15(2)
- 63 Clause 20(1)(a)
- 91 Clause 25(1)



- 64 Clause 20(1)(b)
- 65 Clause 20(1)(c)
- 66 Clause 20(1)(d)
- 67 Clause 20(1)(g)
- 68 Beattie Report page 5 *Act 1975*
- 69 Ibid *Westinghouse Electric Corporation (1977)*
- 70 See clause 18(1)(b)
- 71 Clause 21(1)
- 72 Beattie Report page 20
- 73 Clause 21(1)(a)
- 74 Clause 30(2)(a)
- 75 Clause 21(1)(b)
- 76 Clause 20(d)
- 77 Clause 22(1)
- 78 Clause 22(2)(a)
- 79 Clause 22(2)(b)
- 80 Section 3(1) Police Act 1958 and Regulation 7(1)  
Police Regulations 1959 *Police Act 1975*
- 81 Clause 24(1)(a) *the APP Act*
- 82 Clause 24(1)(b) *Ombudsmen Act 1975*
- 83 Clause 24(1)(c)
- 84 See clause 40
- 85 Clause 13(2)
- 86 Subclause (2) - But it is considered that the  
renumbering is wrong. It should be (d) and commence  
"Notwithstanding subsection (7)(d) of this section  
..."
- 87 Section 13(1) Ombudsmen Act 1975
- 88 Section 22(1)(d) Ombudsmen Act 1975
- 89 Clause 29(1)
- 90 Clause 11
- 91 Clause 25(1)



- 92 Clause 25(3)(a)
- 93 Clause 25(3)(b)
- 94 Clause 25(3)(c)
- 95 Clause 33
- 96 Section 19 Ombudsmen Act 1975
- 97 Re Westinghouse Electric Corporation [1977]  
3 All ER 703
- 98 Elder v Evans [1951] NZLR 801
- 99 Section 26
- 100 Section 73
- 1 Clauses 27(1) and 28(2)
- 2 Subclauses 2(a) and (b)
- 3 Subclause (3)
- 4 Subclause (4)
- 5 Clause 28(1)(a)(i)
- 6 Clause 28(1)(a)(ii)
- 7 Section 20(2)(b)
- 8 Section 22(1)(d) Ombudsmen Act 1975
- 9 See s26(3) of the AFP Act
- 10 Section 22(3)(g) Ombudsmen Act 1975
- 11 Subclause (2)(a)
- 12 Clause 31(1)
- 13 Section 22(3)
- 14 Clause 31(2)
- 15 Section 25(5) and (6) of the Western Australian Act
- 16 Section 21 Toronto Act
- 17 S31(2) AFP Act
- 18 Ibid s31(6)
- 19 Ibid s31(4)
- 20 Ibid s31(4)



- 21 Ibid s31(5)
- 22 Ibid s32
- 23 Ibid s33
- 24 See s34 South Australian Act
- 25 Ibid s34(4)
- 26 Ibid s34(5)
- 27 Section 86S Victorian Act
- 28 Section 30 NSW Act
- 29 Ibid s30(4)
- 30 Ibid s30(7)
- 31 Ibid s30(5)
- 32 Subclauses (2)(a), (2)(b) and (3)
- 33 Paragraph (a)
- 34 Paragraph (b)
- 35 Paragraph (c). To a certain extent that replicates S24(2) Ombudsmen Act 1975.
- 36 Clause 24(1)(a)
- 37 See also subclause (2)
- 38 Clause 35(1)(b)
- 39 Clause 36(1)
- 40 Clause 36(2)
- 41 Clause 38(a)
- 42 Clause 38(b)
- 43 Clause 38(c)
- 44 Police Department submission to the Select Committee paragraph 6.3
- 45 Law Reform (Limitations of Actions) Act 1984
- 46 Beattie Report, page 27
- 47 Ibid
- 48 Ibid
- 49 Clause 17



- 50 Clause 18
- 51 Clause 25
- 52 Clause 19(3)
- 53 Clause 25(1)
- 54 Clause 29(1)
- 55 Clause 29(2)
- 56 Clause 30(1)
- 57 Clause 30(2)
- 58 Clause 34(1)
- 59 Clause 37
- 60 Clause 18
- 61 Clause 20
- 62 Clause 24(3)
- 63 Clause 22(1)
- 64 Clause 23(2)
- 65 Clause 25
- 66 Clause 26(1)
- 67 Clause 26(2) and (3)
- 68 Clause 28(1)(a)
- 69 Clause 28(1)(b)
- 70 Clause 18(3)
- 71 Clause 29(2)
- 72 Clause 30(2)(b)
- 73 Clause 31(2)(a)
- 74 Clause 31(2)(b)
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- 76 Clause 21(1)(b)
- 77 Clause 22
- 78 Clause 31(1)
- 79 Clause 21(3)



- 80 Clause 23(2)
- 81 Clause 20(g)
- 82 Clause 31(1)
- 83 Clause 14 and Clause 35(2)
- 84 Clause 22(1)
- 85 Clause 24(2)
- 86 Clause 24(3)
- 87 Clause 15(1)
- 88 Clause 13(1)(a)(i)
- 89 Clause 13(1)(a)(ii)
- 90 Clause 15(2) of reports Clause 31(2) and (3)
- 91 General Instruction J88. Although an additional facility exists whereby a complaint can be made to a Member of Parliament who will forward the complaint to the Commissioner.
- 92 General Instruction J89
- 93 Clause 15(3)
- 94 Ibid 35(3) provides also that the proceedings are
- 95 Clause 16
- 96 Clause 18(1)
- 97 Clause 18(2)
- 98 Clause 18(3)
- 99 Clause 19(1)(a)
- 100 Clause 19(1)(b)(i), (ii)
- 1 Clause 19(2) Police Officers in England and Wales  
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- 2 Clause 19(3) 1975, 1.
- 3 Clause 24(1)(a) Police Association Inc Newsletter Vol 19
- 4 Clause 24(1)(b)
- 5 Clause 24(1)(c) Police Association Inc Newsletter Vol 19
- 6 Clause 25(1) page 59.
- 7 Clause 25(3)(c)



- 8 Clause 25(2) BIBLIOGRAPHY
- 9 Clause 26(2)
- 10 Clause 26(1) STATUTIONS
- 11 Clause 27(1) and Clause 35(3) 1977 to 1987.
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- 14 Clause 27(4)(a) Law Reform Commission Report No 1 Complaints
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- 16 Clause 32(b) Law Reform Commission Report No 9 Complaints
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- 18 Via publication of reports Clause 31(2) and (3)  
Clauses 36 and 37
- 19 Clause 31(2) Parliamentary Committee Session 1981-2 H.C. 98-1 Police
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- 21 Clause 25(3)(c) Police Complaints Board First Triennial Report (Cmd.
- 22 Clause 25(2) Chief Ombudsman, G L Laking OMO on Leaving
- 23 Clause 35(3) provides also that the proceedings are  
privileged of Ombudsman On the Investigation Of
- 24 Clause 35(1)(b) The Police Arising from the South
- 25 Clause 35(4) Of New Zealand In 1981 (June 1983)
- 26 Clause 32(b) Commission to Inquire into New South Wales
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44. Recruits	53. General search of person in custody
45. Temporary members of the Police	54. New sections (relating to charging for Police services) inserted in principal Act
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**PART II**

**AMENDMENTS TO POLICE ACT 1958**

42. This Part to be read with Police Act 1958

A BILL INTITULED

An Act to make better provision for the investigation and resolution of complaints against the Police by establishing an independent Police Complaints Authority, and to amend the Police Act 1958 5

BE IT ENACTED by the Parliament of New Zealand as follows:

**1. Short Title and commencement**—(1) This Act may be cited as the Police Complaints Authority and Miscellaneous Amendments Act 1987.

(2) This Act shall come into force on the 28th day after the 10 date on which it receives the Governor-General's assent.

**PART I**  
**POLICE COMPLAINTS AUTHORITY**

**2. Interpretation**—In this Part of this Act, unless the context otherwise requires,— 15

“Authority” means the Police Complaints Authority established under section 4 of this Act;

“Commissioner” means the Commissioner of Police appointed under the Police Act 1958;

“Deputy Authority” means the person appointed as the 20 deputy to the Police Complaints Authority under section 8 of this Act.

**3. Act to bind the Crown**—This Part of this Act shall bind the Crown.

*Police Complaints Authority* 25

**4. Police Complaints Authority**—(1) There shall be an authority to be known as the Police Complaints Authority.



(2) The Authority shall be a person appointed by the Governor-General on the recommendation of the House of Representatives.

(3) No person shall be appointed as the Authority unless that person—

(a) Is qualified as a barrister or solicitor of the High Court; and

(b) Possesses suitable legal experience for the task.

(4) The appointment of a Judge as the Authority shall not affect the Judge's tenure of judicial office, rank, title, status, precedence, salary, annual or other allowances, or other rights or privileges as a Judge (including matters relating to superannuation) and, for all purposes, service by a Judge as the Authority shall be taken to be service as a Judge.

(5) No person shall be deemed to be employed in the service of the Crown for the purposes of the State Services Act 1962 or the Government Superannuation Fund Act 1956 by reason of that person's appointment as the Authority.

**5. Term of office of Authority—**(1) Every person appointed as the Authority shall be appointed for a term of not less than 2 years and not more than 5 years, and may be reappointed.

(2) Every person appointed as the Authority shall, unless sooner vacating office by death, resignation, removal, or failure to be confirmed in office under section 7 (3) of this Act, continue to hold office, notwithstanding the expiry of that person's term of appointment, until—

(a) Reappointment as the Authority; or

(b) Appointment of a successor; or

(c) The person is informed in writing by the Minister of Justice that the person is not to be reappointed and is not to hold office until a successor is appointed.

(3) The person appointed as the Authority—

(a) May resign the office at any time by written notice given to the Governor-General;

(b) Shall resign the office on attaining the age of 72 years.

**6. Power to remove or suspend Authority—**The person appointed as the Authority may be removed or suspended from office by the Governor-General, upon an address from the House of Representatives, for disability, bankruptcy, neglect of duty, or misconduct.

**7. Filling of vacancy—**(1) Where any vacancy occurs in the office of Authority, the vacancy shall, subject to subsection (2) of this section, be filled by the appointment of a successor by the Governor-General on the recommendation of the House of Representatives.

(2) Where—

(a) A vacancy occurs while Parliament is not in session, or exists at the close of a session; and

(b) The House of Representatives has not recommended an appointment to fill the vacancy,—

the vacancy may, at any time before the commencement of the next ensuing session of Parliament, be filled by the appointment of a successor by the Governor-General in Council.

(3) Any appointment made under subsection (2) of this section shall lapse and the office shall again become vacant unless, before the end of the 24th sitting day of the House of Representatives following the date of the appointment, the House confirms the appointment.

**8. Deputy Police Complaints Authority—**(1) There may from time to time be appointed a deputy to the person appointed as the Police Complaints Authority, who, subject to the control of the Authority, shall have and may exercise all the powers, duties, and functions of the Authority under this Act.

(2) The Deputy Authority shall be appointed in the same manner as the Authority, and sections 4 to 7 of this Act shall apply to the Deputy Authority in the same manner as they apply to the Authority.

(3) On the occurrence from any cause of a vacancy in the office of Authority, and in case of the absence from duty of the person appointed as the Authority (from whatever cause arising), and for so long as any such vacancy or absence continues, the Deputy Authority shall have and may exercise all the powers, duties, and functions of the Authority.

(4) The fact that the Deputy Authority exercises any power, duty, or function of the Authority shall be conclusive evidence of his or her authority to do so.

**9. Oath to be taken by Authority and Deputy Authority—**(1) Before entering upon the exercise of duties under this Act, every person appointed as the Authority, or as



Deputy Authority, shall take an oath that he or she will faithfully and impartially perform the duties of that office, and will not, except in accordance with the provisions of this Act, divulge any information received by that person under this Act.

(2) The oath shall be administered by the Speaker or the Clerk of the House of Representatives.

**10. Salaries and allowances**—(1) There shall be paid to the Authority and the Deputy Authority—

(a) A salary at such rate as the Higher Salaries Commission from time to time determines; and

(b) Such allowances as are from time to time determined by the Higher Salaries Commission.

(2) There shall also be paid to the Authority and the Deputy Authority, in respect of time spent in travelling in the exercise of their functions, travelling allowances and expenses in accordance with the Fees and Travelling Allowances Act 1951, and the provisions of that Act shall apply accordingly as if the Authority or the Deputy Authority were a member of a statutory Board and the travelling were in the service of the statutory Board.

**11. Staff**—(1) Subject to the provisions of this section, the Authority may appoint such officers and employees as may be necessary for the efficient carrying out of its functions, powers, and duties under this Act.

(2) The number of persons that may be appointed under this section, whether generally or in respect of any specified duties or class of duties, shall from time to time be determined by the Minister of Justice.

(3) Officers and employees appointed under subsection (1) of this section shall be employed on such terms and conditions of employment and shall be paid such salaries and allowances as the Authority from time to time determines in agreement with the State Services Commission, or as the Minister of Justice from time to time determines in any case where the Authority and the State Services Commission fail to agree.

(4) No person shall be deemed to be employed in the service of the Crown for the purposes of the State Services Act 1962 or the Government Superannuation Fund Act 1956 by reason of that person's appointment under this section.

**12. Superannuation or retiring allowances of Authority, Deputy Authority, and staff**—For the purpose of providing a superannuation fund or retiring allowance for the Authority, the Deputy Authority, and any officer or employee of the Authority, sums by way of subsidy may from time to time be paid into any scheme under the National Provident Fund Act 1950 containing provision for employer subsidy or into any other employer-subsidised scheme approved by the Minister of Finance for the purposes of this section.

*Functions of Authority*

**13. Functions of Authority**—(1) The functions of the Authority shall be—

(a) To receive complaints—

(i) Alleging any misconduct or neglect of duty by any member of the Police; or

(ii) Concerning any practice, policy, or procedure of the Police affecting the person or body of persons making the complaint in a personal capacity;

(b) To investigate of its own motion, where it is satisfied that there are reasonable grounds to carry out an investigation in the public interest, any incident involving death or serious injury notified to the Authority by the Commissioner under section 14 of this Act;

(c) To take such action in respect of complaints, incidents, and other matters as is contemplated by this Act.

(2) Nothing in subsection (1) of this section shall authorise the Authority to investigate any matter relating to the terms and conditions of service of any person as a member of the Police.

**14. Duty of Commissioner to notify Authority of certain incidents involving death or serious injury**—Where a member of the Police acting in the execution of the member's duty causes, or appears to have caused, death or serious injury to any person, the Commissioner shall as soon as practicable give to the Authority a written notice setting out particulars of the incident in which the death or serious injury was caused.

**15. Mode of complaint**—(1) A complaint may be made either orally or in writing.

(2) A complaint made orally shall be reduced to writing as soon as practicable.



- (3) A complaint may be made to the Authority, to any member of the Police, to an Ombudsman, or, where the complaint is in writing, to the Registrar or Deputy Registrar of any District Court.
- 5 (4) Any Ombudsman or Registrar or Deputy Registrar to whom a complaint is made shall forward it to the Authority as soon as possible.
- (5) Notwithstanding any provision in any enactment, where any letter appearing to be written by or on behalf of—
- 10 (a) A person in custody on a charge or after conviction of any offence; or
- (b) A patient of any hospital within the meaning of the Mental Health Act 1969,—
- 15 is addressed to the Authority, the person for the time being in charge of the place or institution where the person is in custody or is a patient shall immediately forward the letter, unopened, to the Authority.

16. **Duty of Commissioner to notify Authority of complaints**—The Commissioner shall notify the Authority of every complaint received by the Police, other than a complaint notified to the Commissioner by the Authority.

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17. **Duty of Authority to notify Commissioner of complaints**—The Authority shall notify the Commissioner of every complaint received by it, other than a complaint notified to it by the Commissioner.

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18. **Action upon receipt of complaint**—(1) On receiving or being notified of a complaint under this Act, the Authority may do all or any of the following:

- 30 (a) Investigate the complaint itself, whether or not the Police have commenced a Police investigation;
- (b) Defer action until the receipt of a Police report on a Police investigation of the complaint;
- (c) Oversee a Police investigation of the complaint;
- 35 (d) Decide, in accordance with section 19 of this Act, to take no action on the complaint.

(2) The Authority shall, as soon as practicable, advise the Commissioner and the complainant of the procedure it proposes to adopt under subsection (1) of this section.

40 (3) Where any complaint appears to the Authority to be capable of resolution by conciliation in accordance with any

general instructions issued under section 30 of the Police Act 1958, it may indicate that view to the Commissioner.

19. **Authority may decide to take no action on complaint**—(1) The Authority may in its discretion decide to take no action, or, as the case may require, no further action, on any complaint if—

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- (a) The complaint relates to a matter of which the person alleged to be aggrieved has had knowledge for more than 12 months before the complaint was made; or
- (b) In the opinion of the Authority—
- 10 (i) The subject-matter of the complaint is trivial; or
- (ii) The complaint is frivolous or vexatious or is not made in good faith; or
- (iii) The person alleged to be aggrieved does not desire that action be taken or, as the case may be, continued; or
- 15 (iv) The identity of the complainant is unknown and investigation of the complaint would thereby be substantially impeded; or
- (v) There is in all the circumstances an adequate
- 20 remedy or right of appeal, other than the right to petition the House of Representatives, which it would be reasonable for the person alleged to be aggrieved to exercise.

(2) The Authority may decide not to take any further action on a complaint if, in the course of the investigation of the complaint by the Authority or the Police, or as a result of the Police report on a Police investigation, it appears to the Authority that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

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(3) In any case where the Authority decides to take no action, or no further action, on a complaint, it shall inform the complainant of that decision and the reasons for it.

20. **Subsequent powers in relation to complaint**—The Authority may at any time—

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- (a) Review a Police investigation of a complaint;
- (b) Decide to investigate a complaint itself;
- (c) Where it oversees a Police investigation, give such directions to the Police concerning the investigation as it thinks fit;
- 40
- (d) Direct the Police to re-open an investigation, and thereafter oversee the investigation:



(e) Direct the Police to reconsider their proposals for action on a complaint:

(f) Decide, in accordance with section 19 of this Act, to take no further action on the complaint:

5 (g) Decide that no action by the Authority is required on the ground that it considers that the outcome of a Police investigation is satisfactory.

**21. Duty of Police to report to Authority on Police investigation of complaint**—(1) The Police shall as soon as practicable, and in no case later than 3 months, after the completion of a Police investigation of a complaint, report to the Authority—

10 (a) Whether the complaint has been upheld and, if so, what action has been taken or is proposed to be taken to rectify the matter:

15 (b) Whether the complaint has been settled by conciliation.

(2) When reporting to the Authority under this section, the Police shall supply to the Authority accompanying material sufficient to enable the Authority to assess the adequacy of the Police investigation.

20 (3) The Police may consult the Authority on their proposals for action on a complaint before reporting to the Authority under this section.

**22. Commissioner to provide information and assistance at request of Authority**—(1) The Commissioner shall, where the Authority so requests, provide to the Authority all such information and assistance as is necessary for the proper performance by the Authority of its functions in relation to its investigation of any complaint, incident, or other matter under this Act.

30 (2) Where the Authority oversees a Police investigation of a complaint, the Commissioner shall, where the Authority so requests, provide to the Authority—

35 (a) Any or all information in the possession or under the control of the Police that is relevant to the complaint:

(b) A report on the progress of the investigation.

**23. Power of Police to investigate complaints and other matters**—(1) Nothing in this Act shall prevent the Commissioner from commencing or continuing a Police investigation into any complaint, incident, or other matter.

40

(2) If, either before or after the commencement of a Police investigation, the Commissioner forms the view that the complaint, incident, or other matter should be investigated by the Authority, the Commissioner may request the Authority to do so.

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**24. Procedure where complaint or other matter appears to be outside jurisdiction of Authority**—(1) Where a complaint has been received by or notified to the Authority, and it appears to the Authority that it has no jurisdiction to investigate the complaint, the Authority shall—

(a) Notify the complainant in writing accordingly; and

(b) Inform the complainant of the right to make a complaint under the Ombudsmen Act 1975; and

(c) Where the complainant so requests, forward the complaint to an Ombudsman.

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(2) The Chief Ombudsman may, in respect of any complaint or other matter relating to the Police, request the opinion of the Authority on whether an investigation into that complaint or other matter is within the jurisdiction of the Authority, and the Authority shall, as soon as practicable, notify the Chief Ombudsman in writing of its view.

20

(3) The Authority may at any time, by notice in writing to the Chief Ombudsman, request that any complaint or other matter relating to the Police be investigated by an Ombudsman.

25

*Proceedings of Authority*

**25. Proceedings of Authority**—(1) Before proceeding to investigate any matter under this Act the Authority shall inform the Commissioner, the complainant (if any), and, unless the interests of justice otherwise require, any person alleged to be aggrieved (if not the complainant) of its intention to make the investigation.

30

(2) Every investigation by the Authority under this Act shall be conducted in private.

(3) Subject to section 33 of this Act,—

35

(a) The Authority may hear or obtain information from such persons as it thinks fit, including, where it considers that cultural matters are a factor relevant to a complaint or investigation, information from such persons as the Authority thinks have knowledge or experience in those matters:

40



(b) It shall not be necessary for the Authority to hold any hearing;

(c) No person shall be entitled as of right to be heard by the Authority.

**5 26. Powers of Authority in relation to investigations—**

(1) The Authority may require any person who in its opinion is able to give information relating to any matter under investigation by the Authority to furnish such information, and to produce such documents or things in the possession or under the control of that person, as in the opinion of the Authority are relevant to the subject-matter of the investigation.

(2) The Authority may summon before it and examine on oath any person who in its opinion is able to give any information relating to the matter under investigation, and may for the purpose administer an oath to any person so summoned.

(3) Every investigation by the Authority shall be deemed to be a judicial proceeding within the meaning of section 108 of the Crimes Act 1961 (which relates to perjury).

**27. Protection and privileges of witnesses, etc.—**

(1) Except as provided in subsection (2) of this section and in section 28 (2) of this Act, every person shall have the same privileges in relation to the giving of information to the Authority, the answering of questions put by the Authority, and the production of documents and things to the Authority, as witnesses have in any Court.

(2) Where the Authority requires any person to give any information or produce any document or thing, and compliance with that requirement would breach an obligation of secrecy or non-disclosure imposed on that person by or under any enactment,—

(a) The existence of the obligation shall not constitute a ground for refusal or failure to give the information or produce the document or thing, as the case may be; and

(b) Compliance with any such requirement is not a breach of the relevant obligation of secrecy or non-disclosure, or of the enactment or provision by which that obligation is imposed.

(3) No person shall be liable to prosecution for an offence against any enactment, other than section 38 of this Act, by

reason of that person's compliance with any requirement of the Authority under section 26 of this Act.

(4) Except in proceedings for perjury within the meaning of the Crimes Act 1961 in respect of sworn testimony given before the Authority, or for an offence against section 38 of this Act,—

(a) No statement made or answer given by any person in the course of any investigation by or proceedings before the Authority shall be admissible in evidence against that or any other person in any Court or in any inquiry or other proceeding; and

(b) No evidence in respect of proceedings before the Authority shall be given against any person.

(5) Where the attendance of any person is required by the Authority under section 26 of this Act, the person shall be entitled to the same fees, allowances, and expenses as if the person were a witness in a Court and, for the purpose,—

(a) The provisions of any regulations in that behalf under the Summary Proceedings Act 1957 shall apply accordingly; and

(b) The Authority shall have the powers of a Court under any such regulations to fix or disallow, in whole or in part, or to increase, any amounts payable under the regulations.

**28. Disclosure of certain matters not to be required—**

(1) Where—

(a) The Prime Minister certifies that the giving of any information or the production of any document or thing might prejudice—

(i) The security or defence of New Zealand, or the international relations of the Government of New Zealand; or

(ii) Any interest protected by section 7 of the Official Information Act 1982 (which relates to the Cook Islands, Niue, Tokelau, and the Ross Dependency); or

(b) The Attorney-General certifies that the giving of any information or the production of any document or thing—

(i) Might prejudice the prevention, investigation, or detection of offences; or

(ii) Might involve the disclosure of proceedings of Cabinet, or any committee of Cabinet, relating to



matters of a secret or confidential nature, and such disclosure would be injurious to the public interest,—

5 the Authority shall not require the information to be given, or, as the case may be, the document or thing to be produced.

(2) Except as provided in subsection (1) of this section, the rule of law which authorises or requires the withholding of any document, or the refusal to answer any question, on the ground that the disclosure of the document or the answering  
10 of the question would be injurious to the public interest, shall not apply in respect of any investigation by or proceedings before the Authority.

*Procedure on Completion of Investigation*

**29. Procedure after investigation by Authority—**

15 (1) Where the Authority itself undertakes an investigation under this Act it shall form an opinion on whether or not any decision, recommendation, act, omission, conduct, policy, practice, or procedure which was the subject-matter of the investigation was contrary to law, unreasonable, unjustified,  
20 unfair, or undesirable.

(2) The Authority shall convey its opinion, with reasons, to the Commissioner, and may make such recommendations as it thinks fit, including a recommendation that disciplinary or criminal proceedings be considered against any member of the  
25 Police.

**30. Procedure after investigation by Police—**(1) Where the Police report to the Authority, pursuant to section 21 of this Act, on a Police investigation of a complaint, the Authority shall form an opinion on whether or not any decision, recommendation, act, omission, conduct, policy, practice, or  
30 procedure which was the subject-matter of the investigation was contrary to law, unreasonable, unjustified, unfair, or undesirable.

(2) After considering the Police report and forming its  
35 opinion, the Authority—

(a) Shall indicate to the Commissioner whether or not it agrees with the Commissioner's decision or proposed decision in respect of the complaint:

(b) May, where it disagrees with the Commissioner's decision  
40 or proposed decision, make such recommendations, supported by reasons, as it thinks fit, including a

recommendation that disciplinary or criminal proceedings be considered against any member of the Police.

**31. Implementation of recommendations of Authority—**(1) The Commissioner shall, as soon as reasonably practicable after receiving any recommendation of the Authority under section 29 (2) or section 30 (2) of this Act,—

(a) Notify the Authority of the action (if any) proposed to be taken to give effect to the recommendation; and  
(b) Give reasons for any proposal to depart from, or not to  
10 implement, any such recommendation.

(2) If, within a reasonable time after a recommendation is made, no action is taken which seems to the Authority to be adequate and appropriate, the Authority may, after considering any comments made by the Commissioner,—

(a) Send a copy of its opinion and recommendations on the matter, together with the comments of the Commissioner, to the Attorney-General and the Minister of Police; and

(b) Where it considers it appropriate, transmit to the  
20 Attorney-General for tabling in the House of Representatives such report on the matter as it thinks fit.

(3) The Attorney-General shall, as soon as practicable after receiving a report under subsection (2) (b) of this section, lay the  
25 report before the House of Representatives.

**32. Parties to be informed of progress and result of investigation—**Where the Authority investigates a complaint, it shall—

(a) Conduct the investigation with due expedition; and  
(b) If it seems appropriate, inform the complainant and the  
30 Commissioner of the progress of the investigation; and

(c) In every case, inform the parties concerned, as soon as reasonably practicable after the conclusion of the  
35 investigation, and in such manner as it thinks proper, of the result of the investigation.

**33. Adverse comment—**The Authority shall not, in any opinion or recommendation given under section 29 or section 30 of this Act, or in any report made or published under section 31  
40 or section 36 of this Act, make any comment that is adverse to



any person unless that person has been given a reasonable opportunity to be heard.

*Miscellaneous Provisions*

**34. Authority and staff to maintain secrecy**—(1) The Authority, and every person holding any office or appointment under the Authority, shall maintain secrecy in respect of all matters that come to their knowledge in the exercise of their functions, and shall not communicate any such matter to any person except for the purpose of giving effect to this Part of this Act.

(2) Every person holding any office or appointment under the Authority shall, before entering upon any official duty under this Act, take an oath, to be administered by the Authority or Deputy Authority, that that person will not divulge any information received by that person under this Act except for the purpose of giving effect to this Part of this Act.

(3) Notwithstanding subsection (1) of this section, the Authority may disclose such matters as in the opinion of the Authority ought to be disclosed—

(a) For the purposes of carrying out an investigation or other duty of the Authority under this Act; or

(b) In order to establish grounds for the Authority's conclusions and recommendations,—  
other than any matter which is likely to prejudice any of the interests described in subsection (1) of section 28 of this Act, whether or not any certificate has been given under that subsection.

(4) The Authority, and every person holding any office or appointment under the Authority, shall be deemed for the purposes of sections 105 and 105A of the Crimes Act 1961 to be officials.

**35. Proceedings privileged**—(1) Subject to subsection (2) of this section,—

(a) No proceedings, civil or criminal, shall lie against the Authority, or against any person holding any office or appointment under the Authority, for anything done or reported or said by the Authority or person in the course of the exercise or intended exercise of their functions under this Part of this Act, unless it is shown that the Authority or person acted in bad faith:

(b) Neither the Authority, nor any person holding any office or appointment under the Authority, shall be called to give evidence in any Court, or in any proceedings of a judicial nature, in respect of anything coming to their knowledge in the exercise of their functions under this Part of this Act. 5

(2) Nothing in subsection (1) of this section applies in respect of proceedings for—

(a) An offence against section 78 or section 78A (1) or section 105 or section 105A of the Crimes Act 1961; or 10

(b) The offence of conspiring to commit an offence against section 78 or section 78A (1) or section 105 or section 105A of the Crimes Act 1961; or

(c) The offence of attempting to commit an offence against section 78 or section 78A (1) or section 105 or section 105A of the Crimes Act 1961; or 15

(d) An offence against section 38 of this Act.

(3) Anything said or any information given or any document or thing produced by any person in the course of any investigation by or proceedings before the Authority under this Part of this Act shall be privileged in the same manner as if the investigation or proceedings were proceedings in a Court. 20

(4) For the purposes of clause 5 of the First Schedule to the Defamation Act 1954,—

(a) Any report, opinion, or recommendation given by the Authority under section 29 or section 30 or section 31 of this Act; and 25

(b) Any report published by the Authority or the Commissioner under section 36 of this Act,—

shall be deemed to be an official report made by a person holding an inquiry under the authority of the Government of New Zealand. 30

**36. Publication of reports by Authority and by Commissioner**—(1) The Authority may from time to time, in the public interest or in the interests of any person, publish reports relating to— 35

(a) The general exercise of its functions under this Act; or

(b) Any particular case or cases in relation to which it has exercised its functions under this Act,—

whether or not the matters dealt with in the report have been the subject of a report to the Attorney-General and the 40



Minister of Police, or to the House of Representatives, under section 31 of this Act.

5 (2) The Commissioner may, after receiving from the Authority any opinion or recommendation given under section 29 or section 30 of this Act, publish all or any part of the opinion or recommendation.

10 (3) In determining the desirability or extent of publication under subsection (2) of this section, the Commissioner shall take into account any recommendation of the Authority concerning publication.

15 (4) Neither the Authority nor the Commissioner shall, in any report published under this section, disclose any matter which is likely to prejudice any of the interests described in subsection (1) of section 28 of this Act, whether or not any certificate has been given under that subsection.

20 **37. Annual report**—(1) Without limiting the right of the Authority to report at any time under section 31 or section 36 of this Act, the Authority shall in each year furnish to the Minister of Justice a report on the exercise of its functions under this Act.

(2) A copy of every such report shall be laid before the House of Representatives as soon as practicable after the date on which it is furnished to the Minister.

25 **38. Offences**—Every person commits an offence under this Act and is liable on summary conviction to a fine not exceeding \$2,000 who,—

(a) Without reasonable excuse, obstructs, hinders, or resists the Authority or any other person in the exercise of their powers under this Part of this Act:

30 (b) Without reasonable excuse, refuses or fails to comply with any requirement of the Authority or any other person under this Part of this Act:

35 (c) Makes any statement or gives any information to the Authority, or to any other person exercising powers under this Part of this Act, knowing that the statement or information is false or misleading.

40 **39. Money to be appropriated by Parliament for purposes of this Act**—All salaries, allowances, and other expenditure payable or incurred under or in the administration of this Part of this Act shall be payable out of money to be appropriated by Parliament for the purpose.

**40. Amendment of Ombudsmen Act 1975, and saving**—  
(1) Section 13 (7) of the Ombudsmen Act 1975 is hereby amended by repealing paragraph (d), and substituting the following paragraph:

“(d) Any decision, recommendation, act, or omission of any member of the Police other than—

“(i) Any matter relating to the terms and conditions of service of any person as a member of the Police; or

“(ii) Any complaint or matter in respect of which the Police Complaints Authority has, in accordance with section 24 of the Police Complaints Authority and Miscellaneous Amendments Act 1987, determined that it has no jurisdiction, or requested that an investigation be undertaken by an Ombudsman.”

(2) Notwithstanding subsection (1) of this section, nothing in this Part of this Act shall apply to any matter which an Ombudsman has commenced to investigate before the commencement of this Act, and the Ombudsman may continue and complete the investigation of any such matter as if this Act had not been passed.

**41. Amendments to other Acts**—(1) The Police Act 1958 is hereby amended by repealing section 60.

(2) The Higher Salaries Commission Act 1977 is hereby amended by inserting in the Fourth Schedule (as substituted by section 3 of the Higher Salaries Commission Amendment Act 1980), after the item “The Commissioner of Police and the Deputy Commissioner of Police”, the following item:

“The Police Complaints Authority and the Deputy Police Complaints Authority.”

(3) The Official Information Act 1982 is hereby amended by inserting, in the First Schedule, in its appropriate alphabetical order, the following item:

“Police Complaints Authority”.



SYNOPSIS OF SERIOUS COMPLAINTS AGAINST POLICE

(Information obtained from Annual Reports of the New Zealand Police to Parliament)

Calendar Year	Number of Serious Complaints	Justified ie act complained of did occur and constituted a breach of statute law or misconduct under the provisions of the regulations	Criminal Charges	Discipline Charges S33 Police Act
1982/1983	246	42 (17.8%)	13	38 21 charges related to internal discipline
1983/1984	376	42 (11.17%)	9 (3 convicted 6 acquitted)	11 7 found guilty
1984/1985	357	34 (10.5%)	17 (10 convicted 7 acquitted)	11 6 found guilty
1985/1986	310	30 (10%)	10 (2 convicted 4 acquitted)	17 4 results not indicated
1986/1987	401	43	8 (6 convicted 2 acquitted)	14 (9 convicted 3 acquitted 2 disengaged on medical grounds causing discontinuance)



Commissions, Committees of Inquiry and Ad Hoc Examiners**A Royal Commissions**

- 1897 Royal Commission on Charges against Inspector John Emerson. Commissioner H Eyre-Kenny
- 1898 Royal Commission on the Police Force of New Zealand. Commissioner A Pitt
- 1905 Royal Commission on the Police Force of New Zealand. Commissioner H W Bishop
- 1909 Royal Commission on the Police Force of New Zealand. Commissioner H W Bishop
- 1980 Royal Commission to Inquire into the circumstances of the convictions of Arthur Allan Thomas for the murders of David Harvey Crewe and Janette Lenore Crewe.

**B Commission of Inquiry under the Commissions of Inquiry Act 1908**

- 1952 Commission of Inquiry into the Circumstances of the Prosecution of Daniella Sylvia Weir. Mr H W Bundle appointed Commissioner.
- 1954/  
1955 Commission of Inquiry to Inquire into Certain Matters relating to the conduct of members of the Police Force. Commissioner Sir Robert Kennedy. (Two interim reports produced in 1954 and the third and final report produced in 1955).
- 1955 Commission to Inquire into the Prosecution by the Police of Donald James Ruka and Murdoch Campbell Harris. Mr W H Carson S M appointed Commissioner.
- 1976 Commission of Inquiry into an Alleged breach of confidentiality of the police file on the Honourable Colin James Moyle MP. Commissioner Sir Alfred North.
- 1977 Commission of Inquiry into the case of a Niuean boy. Commissioner W J Mitchell.
- 1983 Commission of Inquiry into the circumstances of the Release of Ian David Donaldson from a Psychiatric Hospital and His Subsequent Arrest and Release on Bail. Mr P B Temm appointed Chairman.



**C Inquiries under Particular Statutes**

1977 Inquiry into Unauthorised Retrieval and Disclosure of Information from the Wanganui Computer Centre. Mr G R Laking investigated.

1977 Committee of Inquiry into the circumstances of an incident involving a former cabinet Minister (Minister of Overseas Trade, Mr Joe Walding) a Detective Senior Sergeant and a transvestite at an Auckland nightclub.

This inquiry was instituted under Section 56 Police Act 1958 where the Minister has the ability to appoint a District Court Judge and one or more members of the Police for the purpose of investigating and reporting to the Commissioner on any selected matter connected with the Police.

1978 Wanganui Computer Centre Privacy Commissioner (R A McGechan) Inquiry into Unauthorised Retrieval and Disclosure of Information by a Police Constable.

1985 Report to the Commissioner of Police concerning the Dunedin Sex Ring Scandal. Mr J A L Gibson appointed to review the police investigation.

1986 Inquiry into Reported Allegations of Police Misuse of the Wanganui Computer Report of the Wanganui Computer Centre Privacy Commissioner pursuant to sections 9 and 13 of the Wanganui Computer Centre Act 1976.

**D Committees of Inquiry**

1984 Committee of Inquiry into the Riot at Auckland on 7 December 1984. Chairman, the Honourable Mr P Mahon.

1987 Committee of Inquiry into the Ammunition Currently on the issue to the Police and Matters Incidental Thereto, Reviewer was the Hon Sir Cliton Roper.

**E Ad hoc Appointees Reports**

1983 Report for the Honourable M B R Couch M P Minister of Police re Paul Chase Shooting.

Appointment by the Attorney General of Mr Nichol森 QC to investigate. He recommended the appointment of an independent person to investigate Police shootings, in every case it occurred. (See p116 of his report).

1985 Report into the Shooting of Kevin David Fox and Donna Teresa Fox at Gore on 6 June 1985. Mr Penlington QC appointed independent examiner (via the powers and authorities vested in the Commissioner of Police S3(1)



of the Police Act 1958). He recommended changes to General Instructions (Para 650) changes to training (Para 651). He also recommended statutory changes to put independent examiners on a proper footing (Para 647).

1986 Report re Shooting of Benjamin Wharerau at Dargaville on 14 March 1986.

Mr R Fisher QC appointed independent examiner. Recommended changes to clarify General Instructions (17.1.1), to Firearms Refresher Training (17.1.1.4) etc.

#### **F Wider Inquiries Impinging on the Police Formulated Policies**

1981 Committee on Gangs. Chairman K Comber

1986 Committee of Inquiry into Violence. Chairman Sir Clinton Roper.

(b) to act as a deterrent to illegal, improper and inappropriate conduct by members of the Police;

(c) to facilitate improvements in the complaints procedures and practices of the Police;

(d) to promote public trust and confidence in the Police;

(e) to provide for police accountability to the community;

(f) to make consequential amendments to the Police Act 1951.

3 Clause 5. Fix the Authority's tenure to 3 years. (discussion pages 31-32)

4 Removal of all non-protective constitutional clauses to a schedule to the Bill/Act. (discussion page 33)

5 Redraft clause 5(2) as follows:

"(2) Sections 4 to 7 of this Act shall apply to the Deputy Authority in the same manner as they apply to the Authority."



## PROPOSED DRAFTING MODIFICATIONS TO THE BILL

This appendix outlines some of the stylistic, technical and textual legislative modifications which the author believes are necessary to fine-tune the proposed law.

- 1 Long Title (discussion page 28)  
"An Act to make provision for the establishment of a Police Complaints Authority, and to amend the Police Act 1958"
- 2 Purpose Clause (discussion page 28) to be inserted in vicinity of clause 3  
The purposes of this Act are:
  - (a) to ensure that all complaints made about the activities of the Police members and Police policies, procedures and practices are investigated in a quick and thorough manner;
  - (b) to act as a deterrent to illegal, improper and inappropriate conduct by members of the Police;
  - (c) to facilitate improvements in the complaints procedures and practices of the Police;
  - (d) to promote public trust and confidence in the Police;
  - (e) to provide for police accountability to the community;
  - (f) to make consequential amendments to the Police Act 1958.
- 3 Clause 5. Fix the Authority's tenure to 5 years. (discussion pages 31-33)
- 4 Removal of all housekeeping constitutional clauses to a schedule to the Bill/Act. (discussion page 33)
- 5 Redraft clause 8(2) as follows:  
"(2) Sections 4 to 7 of this Act shall apply to the Deputy Authority in the same manner as they apply to the Authority."



- 6 Redraft clause 13(1)(a)(i) (discussion pages 37-38)
- "(i) about the conduct of a member of the police or police department.
- Insert into the definition section conduct means;
- (a) an act or decision of a member of the police;
- (b) failure or refusal by a member of the police to act or make a decision the exercise, performance or discharge, whether within or outside the state of a power function or duty, that he has or by virtue of being a member of Police".
- 7 Redraft clause 13(1)(a)(ii) (discussion page 38)
- "(ii) concerning any practice, policy or procedure of the Police affecting the body of persons making the complaint".
- 8 Insert in clause 13(a) subclause (c) (discussion page 43)
- "to carry out an investigation into any complaint incident or other matter at the request of the commissioner in accordance with Section 23(2)".
- 9 Relegate the current clause 13(c) to subclause (2) and subclause (2) should become subclause (3).
- 10 Insert in clause 14 after the word "acting" (and delete in the execution of a members duty)
- "or purporting to act in the exercise of or in connection with or incident to the exercise of that members powers functions or duties as a member of Police causes..."
- 11 Clause 18(a) and (b) delete the second "Police" where it occurs.
- 12 Clause 19(a) (discussion page 53)
- "the Authority may in its discretion decide to take no action if
- (a) the complaint relates to a matter which the aggrieved person has had knowledge for more than six months before the complaint was made, unless there are good reasons to investigate or continue action".



- 13 Insert in Clause 21 (discussion page 58) the words "or so" after the word "whether".
- 14 Delete clause 21 (discussion page 58).
- 15 Clause 23 (discussion page 60) ought to refer in the marginal note to "duty" rather than "power".
- 16 Clause 25 (discussion page 63) insert "complaint incident" or before "other matter".
- 17 Clause 26(1) delete the words "the subject matter of the".
- 18 Clause 26(3) (discussion page 64) substitute "examination" for "investigation".
- 19 Amend Clause 35 (discussion page 72) by inserting  
"No proceedings shall be brought under subclause (1)(a) except with the leave of the High Court. The High Court shall not give leave unless it is satisfied that there is substantial ground for contention that the person to be proceeded against acted in bad faith".
- 20 Insert into Clause 35(4)(b) after "section 36" in the second line or the annual report made under section 37....".



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