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Cop or Comrade?

Accountability Deficits in Police Covert Operations Targeting Activist Groups

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Abstract

There is growing evidence that covert police operations involving surveillance and infiltration are expanding beyond a traditional undercover criminal investigation to target activist groups. Due to the nature of such activity and the legal uncertainty around police powers of this kind it is difficult to know when democratic rights are being undermined. This paper argues that if such police practice is occurring, the potential legal, political and administrative accountability mechanisms are inadequate in both their availability and effectiveness. While the current climate of security inhibits public disapproval of police spying, it is apparent that more robust legal standards are needed to prevent abuses of public power.

Key Words

Police accountability, protest, covert operations, surveillance, section 21 New Zealand Bill of Rights Act 1990.

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I Introduction

In the society of mass surveillance that we are living in, democratic rights are being compromised. The policing of protest and free speech is becoming a normalised part of 21st century police repertoire, and the New Zealand Police are no exception. In the midst of the Thompson and Clark spying allegations, the ongoing British Pitchford Inquiry into police spying of political groups and the revelations of activist/police double agents in New Zealand, police monitoring of dissident groups is an activity we should be concerned about.

The methodology of this paper creates a broad stipulated scenario, namely, that police are conducting covert infiltration operations into activist groups. This scenario is used as a target against which the main questions can be directed: What mechanisms are available to hold police accountable for covert surveillance of activists, what is their value from a range of perspectives and what underlies the deficiencies in these mechanisms? Using Mark Bovens' framework of accountability as a social relation, this paper canvasses through legal, political and administrative accountability mechanisms in order to understand deeper systemic issues and values that determine the boundaries of policing protest.

Part II provides a general outline of police and protest in New Zealand to set the scene for our stipulated scenario and draw the line between acceptable and unacceptable police conduct. Using this contextual background, it demarcates the stipulated scenario into three typologies of conduct and illustrates how accountability mechanisms will be tested. It concludes with a summary of the principle of police independence, which is a pervasive limitation for accountability mechanisms analysed in subsequent sections.

Part III focuses on legal accountability, the primary mechanism discussed in this paper. Using section 21 of the New Zealand Bill of Rights 1990 as a key example, the difficulties of establishing legal norm violations in order to gain access to the courts are illustrated. The two-step test from *Hamed v R*[1] struggles to demarcate acceptable and unacceptable police conduct consistently, and so reform to the relevant legislation and reconsiderations of the scope of public power are discussed as an avenue to improve the constitutional value of section 21.

[1] *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 (*Hamed).*

Other legal norms implicated by our scenario are briefly noted. The effectiveness of courts as an accountability mechanism is considered with reference to similar cases of policing protest, but the overall conclusion finds that legal accountability is most powerfully limited by complex legal standards preventing access to the courts.

Part IV looks at the value of administrative and political accountability mechanisms to fill the gaps evident in the law. Both the Independent Police Conduct Authority and external investigations are considered. While the accessibility of some traditional mechanisms is limited by police independence, contemporary examples of their use in the field of police conduct and spying on activists suggest they have potential value, particularly from a democratic perspective. Importantly, external investigations can be engaged prior to discovery of police conduct and prevent abuses of power from happening in the future. Recent developments illustrate the effectiveness of the interplay between administrative and political accountability in spurring public awareness and democratic influence.

Part V pulls together all of the elements of the paper into a wider analysis of cultural and societal values, the real driving force behind democratic accountability. It shows that the fundamental limitation on holding police accountable lies in the public's motivation (or lack thereof) to condemn such police conduct as unacceptable. Our speculated scenario can thus be viewed as a proxy for a much deeper constitutional problem, what we view as the role of the state. I conclude that the cultural values feeding our conception of the role of the state and police can be buffered by more robust legal standards and accountability institutions, as well as transparency on behalf of the police.

II Policing Protest

Infiltration of activist groups is just one part of the repertoire of policing protest, a concerning development of police and state power, facilitated by increased access to information and technology in our globalised society.[2] The purpose of this Part is to give context to the New

[2] David Baker, Simon Bronitt and Philip Stenning "Policing Protest, Security and Freedom: the 2014 G20 Experience" (2017) 18(5) Police Practice and Research 425 at 425.

Zealand experience of policing protest and surveillance. Against this background, fundamental questions of state power and security will illustrate the difficulty of 'drawing the line' between covert police activity that is accepted and that which seems inappropriate in a society that values democratic rights. This discussion will aid the reader in envisaging the stipulated scenario outlined below in Section D, to which we can subsequently apply legal standards and accountability mechanisms in Parts III and IV.

A Police and Protest in New Zealand

New Zealand has a unique history of protest. Notable examples are the anti-nuclear movement, the public divide during the Springbok tour and condemnation of government actions breaching Māori rights, such as the Bastion Point occupation and Foreshore and Seabed protests. Despite the environmental and human rights victories that New Zealand proudly claims as a result of those demonstrations of democratic will, the actions of the state and police have not always been facilitative. For example, police independence from the government was questioned in relation to the police brutality during the Springbok Tour[3] and the response to free Tibet protesters during Chinese President Jiang's visit.[4]

It seems that, especially since the Bill of Rights 1990, the courts have demonstrated a higher level of condemnation to breaches of protestors' democratic rights to protest, evidenced in the key authorities *Brooker* and *Morse*.[5] The wider recognition of protest rights in those cases reflects the liberal views of John Stuart Mill's 'harm principle': State coercion of freedom is only justified where the rights of others are harmed, rather than behavior that is simply offensive to public morality.[6]

[3] Philip A Joseph *Constitutional & Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 253.

[4] Philip Joseph "The Illusion of Civil Rights" [2000] NZLJ 151 at 151.

[5] John Ip "What a Difference a Bill of Rights Makes? The Case of the Right to Protest in New Zealand" (Public Law Research Paper, University of Auckland, 2010); *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91, *Valerie Morse v The Police* [2011] NZSC 45.

[6] John Stuart Mill "On Liberty (1859)" in M Warnock (ed) *Utilitarianism, On Liberty Essays on Bentham* (Collins/Fontana, 1962) at 135.

Despite the judiciary's more tolerant and legalistic approach, the executive and legislature powers have confounded emotion and politics into their recognition of the democratic rights of protesters. Recent law reform, dubbed 'The Anadarko Amendment', that created new offences in the Exclusive Economic Zone, has been condemned by Sir Geoffrey Palmer QC and others as "a sledgehammer designed to attack peaceful protest at sea."[7] In 2017, the scores of controversial charges for trespass, obstruction and disorderly behaviour against protestors of the 2015 Weapons Conference were all dropped for lack of evidence of any criminal activity.[8] These recent experiences reflect a growing failure to value protest rights. However, this type of activity is at the least in the public eye, and open to subsequent democratic scrutiny. The type of activity that is of greater concern is the undermining of protest rights by the state behind the curtain, through surveillance and monitoring within the bounds of murky law.

B Surveillance

State surveillance of its citizens balances on an unstable tightrope between fundamental rights of privacy, opinion and expression, recognised at regional and international levels, and the need for state security and effective law enforcement.[9]

Hamed v R (Hamed) is the leading case regarding covert police surveillance in New Zealand. It captured the public's attention through the media portrayal of the case with its charismatic protagonist Tame Iti and the subsequent documentary *The Price of Peace.*[10] The case was premised on police suspicion of a quasi-military style training camp taking place in Te Urewera, resulting in charges being laid relating to possession of firearms and terrorism. The camps were in fact a wider, cultural experience for Tūhoe iwi to understand their roots and historical injustices by the Crown against Tūhoe.[11] The police activity involved a number of surveillance techniques, pursuant to warrants, on public and private land, that substantially interfered with the privacy and dignity of individuals subject to it. The Supreme Court held that

[7] Greenpeace and others "In the defence of the right to peaceful protest at sea" (Joint Statement on Crown Minerals Bill Amendment 2013, 6 May 2013) at 1.

[8] Ben Irwin "All charge dropped against Wellington weapons expo protesters" (23 February 2017) Newshub <www.newshub.co.nz>.

[9] Frank La Rue *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* A/HRC/23/40 (2013) at 4-6.

[10] Kim Webby "The Price of Peace" (documentary film, 2015).

[11] Webby, above n 10.

some covert techniques were unlawful and the evidence improperly obtained, as they involved trespass on private land and activity outside the scope of the search warrants, amounting to a breach of section 21 of the Bill of Rights Act, the right to be free from unreasonable search and seizure.[12]

Since *Hamed,* New Zealand's search and surveillance law has been consolidated into the Search and Surveillance Act 2012 (SSA), particularly focusing on warrants related to surveillance technology. The SSA, drawing on experiences such as that in *Hamed*, reaffirms the fact that surveillance is a substantial intrusion by the state on rights of privacy, freedom of expression and assembly, and so such activity must be carefully regulated and provided for by the law in a transparent manner. However, while providing for activity that requires a warrant to be lawful, the Act is silent on whether activity not covered by the Act is then deemed to be unlawful. The deficiencies of the SSA noted by the Law Commission are explained more thoroughly in the Part III analysis of legal standards.[13]

Even with the potential for legislative reform to include guidance for covert operations, much of the public and academic debate has centered around cases of a fundamentally different nature than the targeting of activist groups. Infiltration of gangs, or conversations with police in cells that divulge incriminating evidence used in a subsequent murder trial[14] are less alarming examples of police surveillance than infiltration of political dissent groups. This paper aims to highlight where the difference lies, and why the lack of law or guidance related to the latter is something we should be concerned about.

C Drawing the Line

Instinctively, the 'line' between accepted covert police activity and unacceptable activity would be determined by crime prevention and national security. In a society that values the rule of law, "we do not become the focus of police attention...for no reason."[15] But to what extent can crime prevention justify the trampling of human rights? The Search and Surveillance

[12] *Hamed v R*, above n 1, at [8].

[13] Law Commission *Review of the Search and Surveillance Act 2012* (NZLC R141, 2018) at 9-14.

[14] *R v Kumar* [2015] NZSC 124, [2016] 1 NZLR 204; *R v Barlow* (1995) 2 HRNZ 635 (CA).

[15] Magnus Hörnqvist "The Birth of Public Order Policy" (2004) 46(1) Race and Class 30 at 31.

Act provides that warrants can only be granted when there are reasonable grounds to suspect an imprisonable offence may be committed, and the purpose of the search or surveillance is to acquire corresponding evidence.[16] Is the same level of foresight required for surveillance without statutory authorisation?

The recent experiences of EXIT International, a pro-euthanasia group, illustrates the blurred lines between acceptable and unacceptable covert police conduct. In 2016, police conducted a vehicle checkpoint outside an EXIT meeting to gather information about its members on the premise of 'saving lives'. This was later held to be unlawful by the Independent Police Conduct Authority,[17] as "an illegitimate use of police power that unlawfully restricted the right of citizens and freedom of movement."[18] However in 2018, Susan Austen, a member of EXIT International, was convicted on the charge of importing the euthanasia drug, pentobarbitone, following ongoing monitoring of police (pursuant to lawful warrants).[19] Despite being an inherently controversial issue and perceived by many as merciful, euthanasia is the crime of murder under our law. Therefore, police conduct to prevent it, provided it is in accordance with the law, may fall on the 'acceptable' side of the line. Such a demarcation would be consistent with case law regarding covert operations for serious criminal investigations.[20]

Less serious crimes trigger ideas of proportionality, a principle that provides helpful guidance for demarcating the line between acceptable and unacceptable conduct. Direct action by activist groups may result in charges of trespass, property damage or disorderly behaviour. It may also result in peaceful, lawful protest. Police infiltration of protest groups necessarily undermines the democratic rights of all members present, even if the potential crime, if any, is conducted by a few. United Nations materials emphasise the fact that state surveillance interfering with privacy rights is only permissible in exceptional circumstances, pursuant to express authorisation and respecting the principle of proportionality;[21] The "amorphous concept of

[16] Sections 6 and 51.

[17] Colin Doherty *Complaint about the Police use of a vehicle checkpoint* (Independent Police Conduct Authority, 15 March 2018) at 7.

[18] Melissa Nightingale "Euthanasia checkpoint 'unlawful': IPCA, Privacy Commissioner criticise police - who accepted they broke law" (16 March 2018) New Zealand Herald <www.nzherald.co.nz>.

[19] *R v Austen* [2018] NZHC 1024.

[20] *R v Kumar*, above n 14; *R v Barlow*, above n 14.

[21] Frank La Rue *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* A/HRC/17/27 (2011) at [59].

national security...is vulnerable to manipulation by the State as a means of justifying actions that target...human rights defenders, journalists or activists".[22] Considering the principle of proportionality, infringements of democratic rights by the state should not be justified for the prevention of minor or trivial crimes that may never eventuate.

Having drawn line between acceptable and unacceptable covert police activity, at least as a rough sketch, it seems that States are smudging it away with little consequence. In 2015, the United Kingdom commenced a public inquiry into undercover policing ('the Pitchford Inquiry') in response to serious allegations against police officers, ranging from engaging in sexual relationships with targets, using cover names of dead children and targeting left-wing political groups.[23] The UK Search and Surveillance scheme covers more activities than the SSA, including covert police activity, though the powers granted are very wide[24] and vulnerable to abuse and manipulation. While public awareness relating to the police spying on activists in New Zealand is growing, there are few notable, proven examples. In 2008, a former police spy, Robert Gilchrist, revealed to the media that he had been infiltrating numerous activist groups and trade unions for a decade, even to the extent of having a romantic long-term relationship with a fellow activist.[25] In light of the recent Thompson and Clark (T&C) scandal, revealing that the private investigation firm is widely used by the public service to spy on New Zealanders, including activists,[26] it may be a matter of time before our own Pitchford Inquiry is launched.

Considering the rich history of police and protest, surveillance and the blurred demarcations between what police spying is acceptable and what is not, one can see that covert police infiltration of activists is a complex issue. In the pursuit of what Hörnqvist describes as 'Western Public Order Policy,'[27] police are disregarding questions of proportionality and acting

[22] La Rue, above n 9, [60].

[23] Raphael Schlembach "The Pitchford Inquiry into undercover policing: some lessons from the preliminary hearings" (panel paper from the British Criminology Conference, 2016) at pp 57 and 58.

[24] Regulation of Investigatory Powers Act 2000 (UK).

[25] The Sunday Star Times "The activist who turned police informer" (25 April 2009) Stuff New Zealand <www.stuff.co.nz>.

[26] Bryce Edwards "Political Roundup: Thompson and Clark has been doing the dirty work of the state" (22 June 2018) New Zealand Herald <www.nzherald.co.nz>.

[27] Hörnqvist, above n 15.

in a way that the "stability and smooth functioning of the nation state [are] deemed to have more value than facilitating challenge to its basic injustices."[28]

D Testing accountability for covert infiltration and surveillance

This paper will repeatedly refer to a general, stipulated scenario against which the accountability framework will be applied. At the most basic level, this paper asserts that police are covertly infiltrating activist groups and monitoring their activity.

My assertion is based on the New Zealand revelation of Rob Gilchrist, 'activist turned police informant'. This revelation suggests that police, using informants, are engaging in covert infiltration of peaceful activist groups. Infiltration involves pretending to be a genuine member and attending meetings to gather information on membership, leadership and planned actions. The purpose is not always investigating crime or suspicion of specific criminal activity, but rather the monitoring of dissident activity, and eventually the interference of planned actions. Activist groups of the kind mentioned typically engage in direct action such as organised protests, blockades and other public demonstrations to achieve their goals and raise awareness.

Rather than using a real case to which legal tests and accountability mechanisms can be directed, I acknowledge that the particular conduct does in reality take on many factual variations, as illustrated by the previous contextual analysis. Therefore, I will refer to three general typologies, that broadly demarcate the police activity based on the type of activism engaged in, and the purpose of police surveillance and or infiltration:

1. *Reform advocates:* Those dissident groups generally associated with public awareness campaigns and voicing opposition without breaking any laws. Actions are less obtrusive to the public and police infiltration is generally for the purpose of monitoring, data gathering and surveillance.

[28] Basia Spalek and Mary O'Rawe "Researching Counterterrorism: A Critical Perspective from the Field in the Light of Allegations and Findings of Covert Activities by Undercover Police Officers" (2014) 7(1) Critical Studies on Terrorism 150 at 157.

2. *Zealous activists:* Protest groups organising direct action, for example street protests, blockades, occupations. Groups have a peaceful intention though in some cases members are arrested in direct actions for minor infringements such as trespass or disorderly behaviour. Police infiltration is the same as above, but potentially with the purpose of disrupting future actions or establishing intent for potential criminal proceedings.

3. *Radical insurgents:* Dissident groups with the intention of breaking the law, engaging in planned direct actions that often result in trespass, property damage or potentially violence. Police infiltration may be long term, purposeful and generally with the intention of investigating criminal activity and gathering evidence for subsequent prosecution.

It is important to note that these three typologies will not always be mutually exclusive, so the police conduct may reflect a combination of all three. The Pitchford Inquiry revealed that activist groups fitting within all three typologies have been targeted, from the most benign animal rights campaigners to anarchist networks, emphasising the need to consider the entire spectrum of activity.[29] Other factual variations that are relevant especially to the legal tests in Part III of the paper will include the location of the activity and organisation of activist groups.

Targeting our stipulated scenario and its three typologies, Parts III and IV will undertake an accountability analysis of this police conduct. Using Mark Bovens' conceptualisation of accountability as a social relation,[30] the analysis sets out what limited mechanisms are available, speculates as to how they could be utilised and discusses their effectiveness from three perspectives. An accountability relationships exists when "there is a relationship between an actor and a forum in which the actor is obliged to explain and justify his or her conduct, the forum can pose questions, pass judgment and the actor may face consequences."[31] The effectiveness of that relationship can be addressed from the *democratic perspective* (the accountability relationship provides a means by which executive behaviour can be scrutinised

[29] Rob Evans "Undercover police spied on more than 1,000 political groups in UK" (27 July 2017) The Guardian <www.theguardian.com>.

[30] Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13(4) ELJ 447.

[31] At 452.

and modified through the democratic chain of delegation), the *constitutional perspective* (the accountability relationship is able to limit abuses of executive power) and the *learning perspective* (the accountability relationship facilitates improvement in efficiency and effectiveness of institutions through feedback and incentives).[32]

Part III focuses on legal accountability mechanisms that are addressed primarily through the constitutional perspective, and Part IV focuses on political and administrative accountability mechanisms that are most useful from a democratic perspective.

E Police Independence vs Accountability

The tension of accountability and independence must be briefly noted, as an accountability analysis of police conduct is more complicated than if the paper was focused on different actors by virtue of the principle of police independence.

The New Zealand Police are regarded as an 'instrument of the Crown,'[33] with the function of keeping the peace, maintaining public safety, law enforcement, crime prevention, community support and reassurance, national security, participation of policing activities outside New Zealand and emergency management.[34]

The principle of police independence is fundamental to the rule of law,[35] ensuring that police uphold their function to enforce the law, serving the public and not the government of the day.[36] Police independence was, until recently, solely part of the common law.[37] However, this was not always implemented in practice, where police acted under Ministerial direction during the dawn raids campaign and the 1981 Springbok Tour.[38] After similar criticism of lack of police

[32] At 466.

[33] Policing Act 2008, s 7.

[34] Section 9.

[35] David Bayley *Governing the Police: Experience in six democracies* (ebook, Routledge, New York, 2016) at 47.

[36] Philip Stenning "Governance of the Police: Independence, Accountability and Interference" (lecture presented to TAFE SA Adelaide Campus, sponsored by Flinders University, Adelaide, 6 October 2011) at 251.

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

[38] Joseph, above n 3, at 253.

independence during the protests of the Chinese President's visit in 1999, the Justice and Electoral Committee identified the need to clearly define the constitutional status of police and their level of independence.[39] Police independence was later solidified in the Policing Act 2008, demarcating the operational independence of police and their Commissioner, while retaining accountability to the Minister for wider policy matters.[40] Although there exists a constant debate as to where the line between operational and policy matters is drawn,[41] the fundamental principle of the dichotomy is that independence should not come at the expense of accountability.

The importance of police independence cannot be understated, although Part IV shows that it has the effect of limiting the availability of accountability mechanisms, reflecting the difficulty of striking the balance.

III Legal Accountability

In a society where the law permeates almost every sphere of our lives, when we feel wronged or that some action against us is unjustified, there is expectation that the law will provide an answer. Mark Bovens calls legal accountability the most unambiguous type of accountability[42] and indeed, one would assume that if there was an element of police conduct that violated our rights or felt inappropriate, the courts would provide sure recourse.

This Part illustrates the fallacy in assuming the law will provide. Using the courts as a legal accountability mechanism first demands the establishment of a legal norm violation, and it is apparent that the standards available are not well suited to our stipulated scenario. Due to the complexity of the legal tests involved and endless factual variations, the legal 'hook' is not easy to establish and thus accountability mechanisms are limited in their accessibility. As to

[39] At 254.
[40] Section 16.
[41] Joseph, above n 3, 253.
[42] Bovens, above n 30, at 456.

effectiveness, this Part focuses primarily on the constitutional perspective and suggests some ways the law could be reformed to curtail abuses of state power.

The exact legal accountability mechanisms available are outlined and placed within Bovens' accountability framework, illustrating the paths that one can take to the courts in holding police accountable for the type of activity we are concerned with. Despite the fact that "greater trust … is placed in courts than in parliaments"[43], two case studies show the mixed effectiveness of relying on the law.

A Legal Standards

While there is no law against police covert infiltration of activists, the manner in which such activity is conducted is subject to other legal standards, of which a breach must be established prior to bringing the case in the courts.

The difficulty of establishing a norm violation for police covert infiltration is demonstrated using the example of section 21 of the New Zealand Bill of Rights Act, the right to be free from unreasonable search and seizure. After going through the two limbs of the section 21 test from *Hamed,* the deficiencies in this legal standard from the constitutional perspective become apparent, partially due to the complexities of the 'lawfulness and reasonableness' factors. So, a 'third' limb regarding positive lawful authorisation is explored in relation to the Search and Surveillance Act and judicial debate regarding 'the third source of authority' in order to show how legal accountability could be improved. Other legal standards implicated by our scenario are also briefly noted.

1 Section 21 of the New Zealand Bill of Rights Act 1990

Section 21, "everyone has the right to be secure against unreasonable search or seizure, whether of the person, property or correspondence or otherwise,"[44] is more than meets the eye. While commonplace understandings search and seizure evoke images of banging down doors and ransacking homes, section 21 "extends to forms of surveillance" and "any circumstances where

[43] Bovens, above n 30, at 456.

[44] New Zealand Bill of Rights Act 1990, s 21.

state intrusion on an person's privacy in this way is unjustified."[45] Section 21 is closely connected with privacy, extending beyond the protection of trespass to private property to the right to be left alone from unreasonable intrusion,[46] without going so far as guaranteeing a general right to privacy.[47] The fundamental justification for its wide scope is that "it holds the constitutional balance between the state and citizen."[48] When we understand the special constitutional value of section 21 as described by the Chief Justice, it becomes apparent why this is the major legal 'hook' by which we can hold police accountable for this conduct.

Section 21 thus provides us with a standard by which we can assess the manner of surveillance activity undertaken[49] such as covert police infiltration of activist groups. Blanchard J in *Hamed* held that a section 21 analysis involves a two-step process:[50]

a) Was what occurred a search or seizure?
b) If so, was that search unreasonable?

Throughout the analysis of the two limbs of the *Hamed* test and their relevant contextual factors, it is important to keep in mind that some commentators suggest using a three-limb test which addresses the relationship between reasonableness and lawfulness.[51] This will be discussed in more detail in the following section titled 'Lawfulness and Reasonableness: Improving Legal Accountability from a Constitutional Perspective.'

a) Was what occurred a search or seizure?

R v Jefferies established the wide scope of a section 21 'search' beyond private property rights.[52] In addition to its ordinary meaning, section 21 applies to a range of police conduct

[45] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 904.
[46] *Hunter v Southam Inc* [1984] 2 SCR 145 (SCC).
[47] Butler and Butler, above n 45, at 904.
[48] *Hamed v R*, above n 1, at [10] per Elias CJ.
[49] Butler and Butler, above n 45, at 904.
[50] *Hamed v R*, above n 1, at [162].
[51] Butler and Butler, above n 45, at 968.
[52] *R v Jefferies* [1994] 1 NZLR 290 (CA) at 319.

involving diverse intrusions into private life,[53] emphasising not only the right to be free from trespass and protection of property, but also individual values of self-determination and control of knowledge about oneself.[54] Blanchard J and the majority in *Hamed*, drawing on authorities from the United States, held that a search intrudes on a reasonable expectation of privacy, which requires both subjective expectation of the complainant and that expectation to be objectively recognised as reasonable by society.[55]

Whether an expectation of privacy is reasonable depends on a number of factors, including the nature of the information, the relationship between the parties and the manner in which the information was obtained.[56] The reasonable expectation of privacy of activist groups is complicated. They are open to the public to join but information regarding membership, meetings and details of direct actions may be necessarily confidential to ensure effective exercise of democratic protest rights. *Reform advocates*, given their greater focus on awareness campaigns over direct action, may find it more difficult to claim a reasonable expectation of privacy when they are often public and open. *Zealous activists* and *radical insurgents* are more likely to rely on secrecy of information regarding planned actions, and so factors such as vouching, no cell-phone policies and encrypted communication all weigh in the direction of privacy.

Basically, there is an expectation of privacy both subjectively and objectively in relation to outsiders whereas to trusted members, the information is open. How do we reconcile the situation where a police officer or their informant covertly poses as member, gaining trust and eventual membership, despite belonging to a class of persons to which the information would be necessarily private?

The problem lies in the deception, in respect of which existing case law is sparse and so our analysis can only be speculative. As the information was obtained in a manner that necessarily

[53] Scott Optican "What is a Search under s 21 of the New Zealand Bill of Rights Act 1990 - An Analysis, Critique and Tripartite Approach" [2001] NZ L Rev 239 at 242.

[54] *R v Jefferies*, above n 52, at 319.

[55] *Hamed v* R, above n 1, at [163].

[56] Nicole Moreham "Why is Privacy Important? Privacy, Dignity, and Development of the New Zealand Breach of Privacy Tort" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (LexisNexis, Wellington, 2008) 231 at 245.

involved manipulation and calculated effort (information that would not be disclosed but for the deception), this weighs in the direction of an expectation of privacy. However, the leading commentary of the New Zealand Bill of Rights Act notes that "voluntary participation in conversation with another person, even where that other person is a government agent or police officer but that fact is not known to his or her interlocutor"[57] is not a search. This reinforces the public/private factor, where activities or information accessible or disclosed to the public cannot attract a reasonable expectation of privacy.[58]

Such commentary is predominantly based on case law involving situations where the complainant disclosed incriminating information to an undercover police officer during an investigation, often related to murder charges.[59] Police activity with respect to *reform advocates* and *zealous activists* is fundamentally distinguishable from the case law. *Radical insurgents* may voluntarily risk disclosing evidence of their planned criminal actions, knowing it could result in later prosecution, but I am still tentative to analogise this situation to an undercover murder investigation. The other two typologies, provided we do not live in an Orwellian society, should assume that the success of their democratic rights is not dependent on potential surrounding informants. Based on our society's democratic values we could say that privacy from police infiltrators by activist groups is an objectively reasonable expectation, at least in relation to the first two typologies.

In fact, in *Hamed,* Tipping J dissents from the majority by stating that the definition of 'search' should exclude too much focus on reasonable expectations, which are better suited to the second limb of the section 21 test.[60] In the New Zealand Bill of Rights commentary, strict adherence to the public/private factor is also criticised, given the context of modern society's expansive surveillance in day-to-day activities.[61] Such an approach would be preferred from a constitutional perspective, as all three of our typologies would thus be brought within the first limb of the test. An artificial public/private distinction should not determine whether the courts can hold coercive state actions to account.

[57] Butler and Butler, above n 45, at 948.

[58] *Hamed v R*, above n 1, at [167]-[168].

[59] *R v Barlow*, above n 14; *Lopez v US* 373 US 427 (1963); *R v Fliss* [2002] 1 SCR 535 (SCC); *Hoffa v US* 385 US 293 (1966).

[60] *Hamed v* R, above n 1, 305 at [220]-[227].

[61] Butler and Butler, above n 45, at 937.

b) If so, was that search unreasonable?

The reasonableness test for search and seizure from the second limb of *Hamed* and the general section 5 'reasonable limits' provision in the Bill of Rights Act reflect the unequivocal fact that rights are not absolute.[62] There must be some method of demarcating searches and seizures that are of interest to the courts and those that are not, in order for effective law enforcement, especially in relation to criminal activity. Overall, what is reasonable will involve a number of factors, broadly, "consideration of the values underlying the right and a balancing of the relevant values and public interests involved."[63]

Relevant factors that determine the reasonableness of a search include the "nature of the place or object being searched, the degree of intrusiveness into the privacy of the person or persons affected and the reason why the search was occurring."[64]

The lack of a warrant or statutory authority also speaks to reasonableness, as it reflects the exercise of wide state power.[65] Section 21 is not a source of power for reasonable searches by the state.[66] Therefore, establishing the lawfulness of police activity with reference to positive authorisation will strongly point to reasonableness. What is unlawful will almost never be reasonable.[67] Some case law suggests there will nevertheless be cases when minor or technical breaches of the law are still deemed to be reasonable.[68] The question then arises whether searches not authorised by positive law are thus unlawful, and it is this complicated relationship between lawfulness and reasonableness that will be explored in the next section.

The nature of the place being searched will undoubtedly engage questions of public/private spaces, and so similar conclusions can be drawn to the 'reasonable expectation of privacy' in the first limb, whereby *reform activists* may feel secure in public spaces whereas *zealous*

[62] At 162.

[63] *R v Jefferies*, above n 52, at 301.

[64] *Hamed v R*, above n 1, at [172].

[65] At [51].

[66] *R v Jefferies*, above n 52, at 301.

[67] Gary Turkington and Ian Murray (eds) *Garrow and Turkington's Criminal Law in New Zealand: Search and Surveillance Act 2012* (online looseleaf ed, LexisNexis) at [SSA46.4].

[68] *Hamed v R*, above n 1, at [174].

activists and *radical insurgents* generally meet in private. A key factor that would put our scenario at the less reasonable end of the spectrum compared to existing case law is the reasons for the search and the use of the information. Proactive, general monitoring and disruption of future actions in relation to *reform activists* and *zealous activists* seems far less reasonable than a reactive investigation into the illicit plans of *radical insurgents.*

The public/private distinction was of key importance in the *Hamed* reasoning. Strict adherence to the distinction should be rejected in this limb just as in the first limb. The fact that most of our day-to-day life is capable of being public does not diminish our right to privacy. This broader approach to privacy reflects Nicole Moreham's assertion that privacy must be protected in order to preserve human dignity,[69] based on Kantian ideas of humans as rational beings and their fundamental existence as ends rather than means.[70] Though wider than the established privacy test in *Hosking v Runting,*[71] such a conception of privacy as dignity rationalises why police infiltration at least in relation to *reform advocates* and *zealous activists* seems unreasonable, regardless where the activity occurs.

In *R v Jefferies,* the court held that in addition to considering the values underpinning section 21, the court must engage in a balancing exercise of the relevant rights and public interests.[72] What is especially relevant to our fact scenario is that it reflects how section 21 can be a necessary condition for other protected rights, namely, freedom of expression, assembly, association and movement.[73] Exercise of a search that infringes other rights is unlikely to be reasonable, such as disrupting the democratic protest rights of the *reform advocates* or the *zealous activists*. There may be limited circumstances when the *zealous activist* may justifiably be targeted, for example in situations of serious civil unrest or national security; those scenarios are provided for in the SSA.[74] The public interest of safety and security would likely outweigh the rights of *radical insurgents,* who may attempt to exercise their rights with illegal means.

[69] Moreham, above n 56, at 238.

[70] Immanuel Kant *Grounding for the Metaphysics of Morals; with On a Supposed Right to Lie Because of Philanthropic Concerns* (translated by J Ellington) (3rd ed, Hackett Publishing Company, Indianapolis, 1993) at 35.

[71] *Hosking v Runting* [2005] 1 NZLR 1 (CA).

[72] *R v Jefferies,* above n 52, at 301.

[73] *Hamed v R,* above n 1, at [17].

[74] Sections 47(1)(c), 48.

The weightiest factors determining reasonableness should in fact relate to the lawfulness of searches. In preference to the two-step section 21 analysis proposed by Blanchard J,[75] the authors of the New Zealand Bill of Rights commentary suggest a three-step test, including a 'presumptive reasonableness' test related to statutory lawfulness prior to questions of reasonable limits.[76] The subsequent section addresses the importance of this potential 'third limb' by reference to positive authorisation that may come from the SSA, and discusses the role of the 'third source of authority' in exercises of police power.

2 Lawfulness and reasonableness: Improving legal accountability from a constitutional perspective

Positive legal authorisation for the police conduct we are concerned with can improve the effectiveness of legal accountability mechanisms, making the section 21 reasonableness limb more sensitive to abuses of power. This would provide certainty, transparency and a lower threshold for legal 'hooks' that require police to render account. This reinforces the separation of powers, in that the ultimate balancing test of reasonableness is undertaken by Parliament in their supreme role and not judges,[77] and avoids the ease with which, under the current approach, breaches of the law by state officials can be held to be reasonable.[78] If such an approach was adopted, questions of positive authorisation could, as suggested, arise as a 'presumptive reasonableness' limb prior to the reasonableness limb in the *Hamed* test. The question is thus: is this conduct a 'search' that is legal under the corresponding legislation (the SSA) or does it get its lawfulness from the 'third source of authority'?

a) The Search and Surveillance Act

The SSA aims to "strike a balance between law enforcement needs and human rights" by regulating the use of search and surveillance methods and technologies with powers to grant warrants when there is reasonable cause to suspect offending.[79] It is rare that lawful searches under the SSA will be considered unreasonable under section 21,[80] and so whether the

[75] *Hamed v R*, above n 1, [162].
[76] Butler and Butler, above n 45, at 968.
[77] Butler and Butler, above n 45, at 976.
[78] *R v Williams* [2007] NZCA 52, 3 NZLR 207 at [17].
[79] Search and Surveillance Act 2012, s 6.
[80] *R v Williams*, above n 78, at [24].

stipulated scenario of police conduct can be brought within the legislation is necessary to consider.

The SSA sets out a number of search and surveillance techniques that require a warrant in order to be lawful,[81] with some exceptions for warrantless powers in order to effect arrest.[82] The relevant provisions to this type of conduct will be outlined below, although the fact that the SSA does not yet regulate covert/infiltration operations results in a degree of artificiality in the current state of the Act.[83]

An enforcement officer may apply for a 'declaratory order' to conduct an activity not specifically authorised in the legislation, that may constitute a violation of an individual's reasonable expectation of privacy.[84] Declaratory orders are advisory statements of the judge that the conduct is reasonable and lawful.[85] The use of declaratory orders would largely overcome the problem of lawfulness and reasonableness and improve accountability from a constitutional perspective by explicitly setting out acceptable limits of police power in a paper trail. However, their use is not mandatory, and to date only one declaratory order has been obtained.[86]

Section 47(1)(a) states that enforcement officers do not require a warrant for activities where they are *lawfully* on private premises and recording what they observe or hear. Without a warrant, such participant surveillance on private property would need recourse to the common law doctrine of implied licence to be lawful, otherwise it would be a trespass.[87]

The original doctrine of implied licence was stated in *Robson v Hallett*, whereby officers have an implied licence to enter private property and walk to the door, seeking to be admitted to conduct 'lawful business.'[88] Since then, *Hamed* sought to clarify and reconcile the inconsistent

[81] Search and Surveillance Act, Part 2.
[82] Search and Surveillance Act, Part 3.
[83] Law Commission, above n 13, at 268.
[84] Section 66.
[85] Section 65.
[86] Law Commission, above n 13, at 99.
[87] Samuel Beswick and Meredith Connell "For Your (Government's) Eyes Only" [2012] NZLJ 214 at 216.
[88] *Robson v Hallett* [1967] 2 All ER 407 at 414.

application in New Zealand, by establishing two different types of implied licence.[89] While the details of the implied licence doctrine are outside the scope of this paper, it suffices to note that complex tests of 'reasonable expectation', 'imposed permission' and 'actual permission' are sensitive to minor fact variations and thus determinative of whether a search is lawful under the SSA or considered a trespass.[90]

Perhaps an implied licence could be inferred in the case of open meetings of *reform advocates,* and the secrecy of *zealous activists* and *radical insurgents* may result in a finding of trespass. If the facts determined that there was an implied licence, the police conduct would be positively authorised by section 47(1)(a). If the scenario involved trespass, the police conduct was not lawful under the SSA, and New Zealand case law states that warrantless surveillance involving trespass is illegal.[91] In this case, it is evident how the police could be held accountable for their conduct before the courts in a private action of trespass, rather than section 21.

Declaratory orders, section 47 and implied licence are possible sources of authority for the warrantless police surveillance in our stipulated scenario, though it is arguable that such legal norms should not even be engaged. The SSA was not designed to regulate any covert operations,[92] let alone operations exclusive of criminal investigation as those experienced by the *reform advocates* or *zealous activists*.

The Law Commission's Review of the SSA provides some useful suggestions that could improve the potential for the SSA to improve legal accountability from a constitutional perspective, providing more guidance for the court as to what police activity is acceptable and what is not. The Law Commission suggested a combination of requirements for warrants, policy statements and external auditing for covert operations, to increase the scope of activity under scrutiny. They were concerned that individuals subject to surveillance (in our scenario, the *reform advocates* and the *zealous activists*) would be in a perpetual state of ignorance of

[89] *Hamed v R,* above n 1, at [157]-[158].

[90] *Hamed v R,* above n 1, at [157]-[158]. This approach has since been critiqued as an artificial distinction that lacks justification in cases of deception, and as ignorant of questions of improper purpose (Richard Mahoney "Licentious Confusion" [2011] NZLJ 412 at 414).

[91] *Hamed v R,* above n 1.

[92] Law Commission, above n 13, at 268.

having their rights potentially breached, and thus no avenue for redress.[93] However, given the need to balance flexibility of law enforcement, the suggested reforms were not mandatory or comprehensive and, while providing more guidance than the current SSA, could still permit some excessive use of police powers to slip through the cracks.

In any case, providing more positive legal authority under the SSA for a wider breadth of police activity increases the scope for legal accountability mechanisms in the court to intervene, increasing the effectiveness from a constitutional perspective.

b) The Third Source of Authority

As the SSA outlines the circumstances in which surveillance activities are lawful, the subsequent question - whether activity not covered by the Act is therefore unlawful - raises a fundamental Diceyan proposition: Must some positive law authorise public action or do the Crown and its officials have the same ability to act as private individuals, in any manner not explicitly prohibited by law?

The legality of covert police infiltration of protest groups, amounting to a search under section 21 that is not covered by the SSA, falls on this fundamental question. Section 21 is not a source of power for reasonable searches by the state.[94] If we accept the position that no positive authorisation is needed, the police conduct in our stipulated scenario could avoid detection and never be held to account. It would not sit easily within the 'third limb' that predetermines reasonableness by pointing to lawfulness. If we reject the idea of a 'third source of authority', police conduct outside of the SSA is necessarily unlawful, and will not be reasonable under the improved three-limb test.

The key authority to this effect, *Entick v Carrington,* held that any actions by the state, as opposed to actions of private citizens, require positive authorisation in law: "If it is law, it will be found in our books. If it is not found there, it is not law."[95] This constitutional principle is

[93] At 284.

[94] *R v Jefferies,* above n 52, at 301.

[95] *Entick v Carrington* (1765) 19 St Tr 1029 at 1066.

reflected in Dicey's Rule of Law that protects citizens from arbitrary state power,[96] and has been cited in New Zealand cases where actions of public officials impose detriment on citizens or interfere with their liberties.[97] On the other hand, there is other academic and judicial authority to the opposite effect, stating that the government has a 'third source of authority', a residual power, to act without positive law authorisation in order to effectively govern.[98]

The majority in *Hamed* considered that police act lawfully when acting as private individuals are permitted to, and held that the police surveillance on roads accessible to the public not amounting to trespass was legal.[99] This removed a fundamental safeguard for the extensive use of coercive state power, and it follows that police infiltration of activist groups would be necessarily lawful, as we too, as private individuals, are lawfully entitled to join protest groups and gather information.

The law as it stands thus reflects a serious deficiency in accountability from a constitutional perspective; as long as police do not violate other positive legal norms, they need not render account for actions outside of a positive mandate.

It is from this perspective that academics and judges maintain the law should not stray from the principles in *Entick* and Dicey's Rule of Law. Elias CJ, dissenting in *Hamed,* held that the constitutional principle of legality prohibits the police from acting as private citizens are permitted to act.[100] Although police have ancillary powers to act in a way incidental to their express grant of power, which is necessary for effective law enforcement, this does not equate to a wide power to do anything that is not prohibited.[101] The adoption of *Malone* in New Zealand is also inconsistent with the New Zealand Bill of Rights Act. The rights are expressed without limitation, except in section 5 which allows 'reasonable limits *as prescribed by law…',*

[96] Joseph, above n 3, at 178.

[97] *Transport Ministry v Payn* [1977] 2 NZLR 50 (CA) held that a police officer could not forcibly enter private property to conduct a breath test without direct statutory authority. In *Fitzgerald v Muldoon and Others* [1976] 2 NZLR 615, the attempted repeal of the Superannuation Scheme by the Prime Minister was an illegal, 'pretended power' without consent from Parliament.

[98]BV Harris "The 'Third Source' of Authority for Government Action Revisited" (2001) 123 LQR 225 at 226; *Malone v Metropolitan Police Commissioner* [1979] Ch 344, [1972] 2 All ER 620 (Ch).

[99] *Hamed v R,* above n 1, at [217].

[100] *Hamed v R,* above n 1, at [24].

[101] At [25].

which further indicates that any state action capable of undermining individual must have some positive statutory authorisation.[102]

If our stipulated scenario arose in the future, it is unclear whether the court would follow Elias CJ's powerful dissent or concede the existence of a 'third source of authority' and hold such actions to be lawful. While the legal standards engaged are the same in our stipulated scenario as in *Hamed,* the facts can be distinguished. *Hamed* involved a criminal investigation using surveillance technology, but *reform advocates* or *zealous activists* may be targeted exclusive of a concrete investigation. The SSA now fills the gaps left by *Hamed,* but is silent on covert operations using informants rather than technology. Adopting the dissenting approach and rejecting the 'third source' would deem police infiltration of activist groups not prescribed by the SSA unlawful and, according to Elias CJ, unreasonable as section 21 "does not in itself provide any authority for 'reasonable' state intrusion."[103] This would improve the effectiveness of section 21 to hold police accountable by limiting discretionary use of police power and provide recourse in the courts for the *reform advocates* and *zealous activists* that might otherwise have been unaware their rights were being violated.

3 Other legal norms

In addition to section 21, other legal norms that may be engaged by covert police infiltration of activists have been alluded to in the preceding sections and they can also pave a path to legal accountability mechanisms. While they would likely attract equally complex legal tests, this section will briefly note other legal norms that if breached, could require police to render account in the courts.

Contrary to the majority in *Hamed,* Elias CJ held that section 21 "guarantees reasonable expectations of privacy." The link with privacy and search and seizure is noted across case law and academic writing, indicating the tort of privacy could too be engaged by such police conduct. The test in *Hosking v Runting* established a high threshold for breaches of privacy,

[102] At [35].
[103] At [19].

requiring the private information to be considered highly offensive if published[104] - to which our scenario may not apply if information is merely stored on a database. More recent commentary notes that the 'highly offensive limb' is unnecessary, especially when we understand privacy as indispensable to dignity.[105] If the tort was developed in this way, then legal accountability could be engaged with this legal standard as any intrusion on a reasonable expectation of privacy would thus be harmful.

In the earlier discussions of lawfulness related to the SSA and the 'third source' trespass was a consistently arising issue, indicating that a private action in trespass may also be available. Such a course of action would too be highly fact dependent and muddled by complex tests of implied licence already mentioned.

Finally, other civil democratic rights in the New Zealand Bill of Rights Act are also implicated by our fact scenario, what we may call the 'protest rights' - freedom of expression, assembly and association. While these freedoms are not explicitly prohibited by the police infiltration of protest groups - individuals are still free to discuss, meet and protest - they are indirectly undermined. The use of information gathered through a covert operation could inhibit the direct actions of the *zealous activists* or *radical insurgents,* and the acquiescence of undercover police monitoring of activist groups is inconsistent with the idea that these rights ought to be protected as "the most important building blocks of democracy."[106] Public law scholar Philip Joseph, in response to the police actions during President Jiang's visit said "A protest that is made ineffectual - one that cannot be seen - is no protest at all. The right is negated, not limited."[107]

All the legal norms engaged are undoubtedly subject to reasonable limitations, whether section 5 justified limits or a 'legitimate public concern' defence,[108] and a comprehensive analysis would vary depending on the exact facts. However, it is important to note that despite the unchartered waters of the scenario we are concerned with, a number of legal 'hooks' exist that could engage legal accountability mechanisms.

[104] *Hosking v Runting,* above n 71.

[105] Moreham, above n 56, at 244.

[106] Butler and Butler, above n 45, at 763.

[107] David Baker "Policing, Politics, and Civil Rights: Analysis of the Policing of Protest against the 1999 Chinese President's Visit to New Zealand" (2007) 8(3) Police Practice and Research 219 at 227.

[108] *Hosking v Runting,* above n 71, at 35.

B Legal Accountability Mechanisms

The previous section was concerned with establishing a legal norm violation, and the difficulties of doing so. If this can be achieved, there are number of paths that can be taken to the courts to hold police accountable. Some of the paths available are outlined below, though it will depend on the exact factual context of the police conduct as to which is most appropriate. Obviously, legal accountability mechanisms will only be engaged in circumstances where the infiltration has been uncovered which, under the current state of the law explained in the preceding section, may leave the *reform advocates* and even the *zealous activists* without any course of action.

1 Paths to the court

Judicial review may be available to question the lawfulness of police activity,[109] whether exercised as a search and surveillance power under the SSA or as part of general police function under the Policing Act 2008, as the police are an entity exercising a statutory power with important public consequences.[110] Judicial review is a supervisory mechanism over the executive, ensuring that decisions are made in accordance with law, fairly and reasonably.[111]

Under section 30 of the Evidence Act 2006, improperly obtained evidence may be excluded from the proceedings, if it would be unfair to allow its admission. This involves a 'balancing test' to determine if the exclusion is proportionate to the impropriety and the consideration of a number of factors. Obtaining evidence in breach of the Bill of Rights Act or inconsistently with the SSA could open a path to the court, though only available to the *radical insurgents* or potentially the *zealous activists* in criminal proceedings.

Private actions in tort or claims relating to a breach of rights under the Bill of Rights could also be brought before the court. These legal norm violations have been touched upon in this paper, relating to issues of trespass, breaches of privacy and other Bill of Rights claims.

[109] Butler and Butler, above n 45, at 915.

[110] Joseph, above n 3, at 838.

[111] Sir Robin Cooke "Third thoughts on administrative law" [1979] NZ Recent Law 218 at 225.

2 Evaluating accountability

Using the legal accountability provided by the courts sits easily within the conception of accountability as a social relation.[112] There is a relationship between the actor (police) and a forum (the court) in which the actor is obliged to explain and justify their conduct (arguing for reasonableness of the police infiltration or necessity), in which the forum can pose questions (in the course of ordinary court proceedings, evidence, witnesses) and pass judgment, and the actor may face consequences (losing the case or exclusion of evidence).

Examples of this accountability in action were evident in the discussions related to evidence in *Hamed*, whereby evidence collected in breach of section 21 of the Bill of Rights Act or in trespass were disputed under the section 30 exclusion. The consequences for the actor were minor. Except for a small subset of video surveillance in relation to the Arms Act, all other disputed evidence was admitted, with substantial weight placed on the police functions of law enforcement and maintaining public safety in the balancing test.[113] The government's response was even more shocking, passing an interim bill that retrospectively legalised the covert filming disputed in *Hamed* so not to jeopardise current investigations.[114] Rather than holding police accountable by curtailing abuses of state power, the courts in fact legitimised those abuses.

However, while effectiveness from a constitutional perspective was defective in *Hamed*, the case reflects some merits of accountability from the democratic and learning perspectives. From the democratic perspective, the highly publicised trial stimulated public protests and outrage at the actions of police, resulting in an official apology from the Police Commissioner to the Tūhoe people with the intention of mending Crown-Tūhoe relations.[115] From the learning perspective, while the means are grossly questionable, the interim bill was a temporary measure that preceded improvements to search and surveillance law. The resulting SSA provided more

[112] Bovens, above n 30, at 452.

[113] *Hamed v R*, above n 1, at 383.

[114] Video Camera Surveillance (Temporary Measures) Act 2011.

[115] Natalie Mankelow "Police apologise to Tūhoe over raids" (13 August 2014) RNZ <www.radionz.co.nz>.

detailed guidance to police and aimed to balance human rights concerns, providing better, though clearly not sufficient, governance of our public administration.[116]

One example where the consequences for the actor were more substantial was in Nicky Hager's judicial review case against police for the unlawful search and seizure of his private home.[117] The court's conclusion that the search warrants were unlawful and granting of interim costs, and a parallel claim for section 21 Bill of Rights damages resulted in a substantial settlement between police and Mr Hager and an official apology.[118] Both *Hamed* and *Hager* resulted in public pressure on the government to answer for oppressive police tactics. This reflects some merit from the democratic perspective, in a more nuanced fashion. It seems that the legal accountability in the courts provided a snare, in which the public attention was entrapped, and the subsequent accountability effectiveness from a democratic perspective comes when political accountability relationships are engaged.

The effectiveness of the courts varies depending on the course of action taken and the factual context. It could protect the targeted individuals from being punished or compensate them for breaches, disincentivise future police practice if evidence is excluded anyway or lead to legislative reform. However, as illustrated in the Legal Standards section, the major deficiencies lie not with the consequence of the forum's judgment, but rather beforehand, at the stage of establishing the legal norm violation for which the actor must render account. Essentially, most cases of this police conduct could never even reach the courts.

\C *Conclusion: The Law Only Gets One So Far*

Using Bovens' framework, legal accountability has limited effectiveness in holding police to account for their actions. The obvious point is that a section 30 exclusion, judicial review proceedings or private actions in tort cannot prevent breaches of rights from happening;[119] they

[116] Bovens, above n 30, at 466.

[117] *Hager v Attorney-General* [2015] NZHC 3268, [2016] 2 NZLR 523.

[118] David Fisher "Police pay Nicky Hager 'substantial damages' for unlawful search of his home in hunt for Dirty Politics hacker" (12 June 2018) New Zealand Herald <www.nzherald.co.nz>.

[119] Law Commission, above n 13, 284.

are engaged *ex post facto,* so without its discovery, such police conduct may remain perpetually behind the curtain in relation to the *reform advocates* or the *zealous activists*.

As the law currently stands, without establishing clear unlawfulness of police conduct, it is unlikely that the scope of judicial review would be extended to discretionary police operations.[120] Challenging the reasonableness or improper purpose of police infiltration of activist groups in general would be difficult based on the current New Zealand stance on the 'third source of authority.'[121]

Owing to their status as state officials and the fundamental rights involved, covert police infiltration of activist groups raises serious legal implications that should not be ignored because it has not yet amassed to a public scandal. Section 21 seems to be the primary legal norm that is raised by such conduct, though other legal norms also arise. Although we cannot know to what extent our fact scenario is happening, given recent allegations and the modern state of surveillance we live in today, we should be concerned with the extent of police powers that could be undermining our rights.

As our analysis has illustrated, the complex tests and approaches by both the courts and commentators to section 21 will be highly fact dependent, and some fundamental theoretical issues such as the 'third source' are still not settled law. Despite the legal tests available, it is evident that minor fact variations of such a covert operation could drastically change or completely circumvent the legal consequences. While the three typologies seem to provide a useful normative demarcation for what level of police attention is warranted in particular circumstances, the legal tests demarcate liability based on more trivial, circumstantial factors. This is evident in the fact that depending on the legal test or factor to be considered, the *reform advocates, zealous activists* and *radical insurgents* are affected inconsistently. At times they fall within the legal standard, at other times they do not. The Orwellian nature of our scenario, even if not amassing to a breach of section 21 or other legal norm, seems improper regardless and leads one to believe that legal doctrine is inadequate to hold the police accountable for their actions.

[120] *Hager v Attorney-General,* above n 117, at [50].

[121] See discussion of 'Third Source of Authority' in Part III - Legal Standards.

For this reason, coming from a normative perspective that values the fundamental value of voicing dissent and organised protest, other means of ensuring accountability need to be explored in relation to covert police infiltration of activist groups. Alternative accountability mechanisms such as the Independent Police Conduct Authority or external investigations may provide a more proactive means of addressing this type of police conduct and will likely give a deeper insight into police and surveillance culture in general, crucial to understanding the underlying principles at play.

IV Administrative and Political Accountability

There are a number of administrative accountability mechanisms available to hold actors exercising public powers to account in New Zealand, but their availability is limited by the principle of police accountability. For this reason, this paper has focused primarily on legal accountability and developing this area. In any case, the 'watchdog' institutions warrant some attention, both for their potential of exposing abuses of public power, but also their ability to prevent those abuses by proactive investigation, rather than solely *ex post facto* engagement.

Political accountability is fundamental in a Westminster system of parliamentary democracy. Public servants are held accountable through a chain of principal-agent relationships, from the public servant exercising the power in question, to the responsible Minister who is responsible to Parliament, and thus the voters who have delegated their sovereignty.[122] Administrative accountability is provided by independent quasi-legal bodies, or 'watchdogs', who exercise a supervisory function over the exercise of public power, mandated by statute or other legal norms.[123] This Part considers political and administrative accountability mechanisms together because, particularly in the context of police conduct, they seem to work together in holding actors accountable. The administrative mechanism provides the information which may lead to subsequent action in the democratic chain of delegation.

[122] Bovens, above n 30, at 455.

[123] At 456.

This Part focuses on two mechanisms, the Independent Police Conduct Authority and external investigations which could be led by either the Ombudsman or State Services Commissioner. The limitations of police independence are immediately apparent in simply trying to bring our stipulated scenario within the jurisdiction of these bodies, often requiring the discovery of the police conduct and pressure to investigate before any action can be taken. With reference to relevant case studies, the effectiveness of these various mechanisms is discussed and their limited but real potential from the democratic and constitutional perspectives is considered. Finally, recent developments in this field of inquiry are briefly noted, suggesting there is a growing pressure to improve accountability for police infiltration of activists.

A Independent Police Conduct Authority (IPCA)

The most obvious accountability mechanism that comes to mind for questions of improper police covert activity is the IPCA, New Zealand's official police oversight body. Given that their mandate to investigate complaints of police conduct or policy is necessarily wide, even without unlawfulness established by our stipulated scenario, the Police can be held accountable for improper conduct. The only caveat is, like legal accountability, the triggering of the IPCA's jurisdiction depends on the police covert activity being discovered post facto, and an individual complaint being made based on concrete evidence. This suggests that in most cases this form of accountability will only be available to the *radical insurgents* or eventually the *zealous activists.*

1 Jurisdiction of the IPCA

The IPCA is a Crown entity established by the Independent Police Conduct Authority Act 1988. They handle complaints related to police conduct, and may choose to investigate themselves, in conjunction with the police, refer the matter to the Police Commissioner for an internal investigation or dismiss the complaint based on specified grounds.[124] Unless police actions resulted in death or serious bodily injury, the Authority must be prompted by a complaint to instigate an investigation.[125] If the allegations of police misconduct or impropriety

[124] Independent Police Conduct Authority Act 1988, s 17.

[125] Colin Doherty *IPCA Annual Report 2016-2017* (Independent Police Conduct Authority, 2017) at 9.

of practice, policy or procedure are substantiated, the Authority makes recommendations to Police, ranging from changes to policy to disciplinary proceedings.[126] Though recommendations and reports are not legally binding, if the Authority deems the Police response unsatisfactory then the Attorney-General and Minister of Police are informed, and the matter may be tabled in Parliament.[127] The IPCA is a statutorily independent organisation. Their judgments are made impartially based on all available evidence and applicable law, in order to fulfill their purpose of building public and parliamentary trust in the Police.[128]

2 Evaluating accountability

The IPCA is a form of administrative accountability that easily fits within the framework of accountability as a social relation.[129] The actor may be the particular member of the Police implicated in a covert infiltration operation, or the Police in general as the executor of improper covert policies. The forum is the IPCA, to which the Police are obliged to explain and justify their conduct or policy in the course of the investigation. The IPCA poses questions during the investigation to the actors, passes judgment in their recommendation and the Police may face procedural (policy change) or disciplinary consequences. This administrative accountability relationship is a diagonal one, whereby the IPCA is not hierarchically superior to police nor can they enforce compliance.[130] They do however liaise with the Minister of Police who is responsible to Parliament, and it is in this two-step relation that the IPCA engages with the mechanism of political accountability too.

As the IPCA has not yet been engaged in respect of our scenario, we can simply speculate as to its effectiveness by drawing on IPCA reports relating to similar subject matters. From a democratic perspective, the IPCA is limited as an accountability mechanism. Firstly, the ability for voters, Parliament or other representative bodies to control executive power can only manifest if the reports are made publicly available. One could stipulate that given the nature of the police conduct at hand, concepts of confidentiality, public order and even national security

[126] At pp 7-9.
[127] At 9.
[128] At 7.
[129] Bovens, above n 30, at 452.
[130] Bovens, above n 30, at 460.

would be used to justify not releasing reports. Secondly, if the matter did come to the public forefront (perhaps tabled in Parliament), the principle of police independence would limit the chain of democratic control; the Minister of Police, responsible to Parliament, could only exercise influence over general police policy rather than holding individuals to account over individual covert operations.[131] If such an IPCA report was made public, we could infer from the negative public reaction to the T&C scandal that voters may exercise pressure on their democratically elected representatives to reconsider the extent to which we allow police to operate unchecked.

There is one related example in New Zealand's history when the IPCA's effectiveness from a democratic perspective was quite astonishing, and in fact worked in conjunction with another accountability mechanism: select committees and the Police Minister. In response to investigation by the Police Complaints Authority (now the IPCA) of police treatment of protesters during President Jiang's 1999 visit, public and political pressure within the new government resulted in the convening of a parliamentary sub-committee, the Justice and Electoral Committee, to address issues of police independence.[132] Not only was police independence subsequently codified in the Policing Act 2008, but the rules relating to policing public demonstrations were updated and clarified; the changes were welcomed by the Police Minister and even accepted by the Police Commissioner despite the serious condemnation of his force's actions.[133] While select committees or the Police Minister would not technically fit within Bovens' framework (the police need not render account, they are protected by police independence), the committee essentially functioned as a springboard between the Police Complaints Authority's judgment and the consequences faced by the police. This example reflects the democratic effectiveness of an administrative accountability mechanism, in stimulating political accountability means to monitor executive actors through the democratic chain of delegation and result in subsequent adjustment of behaviour.[134]

From a constitutional perspective, the IPCA has exposed abuses of public power in the past, although the long-term effects of this exposure are dubious. The IPCA public report on the

[131] Policing Act, s 16.
[132] Baker, above n 107, at 232.
[133] At 233.
[134] Bovens, above n 30, at 465.

police vehicle checkpoint targeting euthanasia activists deemed the conduct to be unjustified and outside the scope of the Land Transport Act,[135] with chairman Judge Colin Doherty noting that "it was an illegitimate use of police power that unlawfully restricted the right of citizens to freedom of movement."[136] It may be that our hypothetical scenario would also be deemed an abuse of public power, but without any further reform to clarify police power in this area, IPCA recommendations would have little teeth to ensure future abuses of power do not eventuate again.

The learning perspective also lends support to the IPCA as an effective accountability mechanism, in that recommendations to change practice, policy or procedure are usually implemented.[137] As mentioned before, the Police Complaints Authority's report on the President of China's visit held that police actions had "the obvious and inherent risk of curbing or inhibiting the right of protestors to carry out a lawful and peaceful protest."[138] As a result of the subsequent committee report the police amended their General Instructions and Manual of Best Practice to give more explicit guidance on policing demonstrations.[139] Although IPCA results are not binding, they are capable of stimulating the police to improve their policies and procedures to achieve desirable social outcomes,[140] and from this learning perspective they could prove to be an effective accountability mechanism, should our stipulated scenario arise in a future complaint.

Again, it must be noted that as long as IPCA is unable to proactively investigate, the effectiveness of the IPCA requires the particular conduct to be uncovered and manifested in a complaint. Past experiences indicate there is some value in the IPCA from the democratic and learning perspectives, subject to the publication of reports. As the following section will indicate, the mechanism of political accountability through a public inquiry seems to be the sole proactive method of holding police to account for the conduct we are concerned with; the courts and IPCA are only retrospective.

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[135] Doherty, above n 17, at 7.

[136] Nightingale, above n 18.

[137] Doherty, above n 125, at 4.

[138] L P Goddard *Tibetan Protest: Investigation of complaints by persons who protested against China's actions in Tibet during the state visit to Wellington by the President of the People's Republic of China on 14 September 1999* (Police Complaints Authority, September 2007) at 7.

[139] At 9.

[140] Bovens, above n 30, at 466.

B External Investigations

Having noted the difficulties of applying traditional accountability mechanisms given the specific nature of such police conduct, it seems that we should be focusing our attention to more proactive means - something akin to Britain's Pitchford Inquiry. Proactive measures that do not first require the discovery of such conduct or an individual complaint could thus provide recourse for the *reform advocates* and *zealous activists* who may have suspicions albeit little evidence or tangible experience. This type of administrative accountability (and subsequent political accountability that emerges) is also limited by the principle of police independence and the fact that these are generally unchartered waters. This section will thus be limited to external investigations by government 'watchdogs', based on the premise that an official inquiry into matters of national importance would not be possible until the issue of our stipulated scenario was sufficiently prominent in the public eye.

External investigations may be the most effective mechanisms to hold police accountable for this type of questionable conduct in the current climate and raise awareness, which may pave the way for more comprehensive inquiries in the future. Drawing on the structure of the Pitchford Inquiry and the current related T&C inquiry in New Zealand, this section will explore how an external investigation into such police conduct would be established and what it could achieve. The possible administrative bodies that could undertake such an investigation will be outlined at first, before addressing the effectiveness of external investigations by government watchdogs in general.

I use the terms 'investigation' and 'inquiry' relatively interchangeably, in line with how the matters have been referred to in media releases and other documents. When referring to the T&C 'inquiry', this is technically an investigation established by the State Services Commission and should not be confused with official inquiries into matters of national importance under the Inquiries Act 2013.

1 Ombudsman

The Ombudsman is an independent officer of Parliament tasked with looking after citizens' interests in their dealings with government by holding the public service to scrutiny and account.[141] The two core functions of the Ombudsman are the handling of official information requests under the Official Information Act (OIA) and dealing with complaints and investigations of the administrative conduct of state sector agencies.[142] Other functions include protections of rights and providing advice and guidance to agencies to improve governance. Given the existence of the IPCA, the Ombudsman's jurisdiction over Police is limited. Any complaints about police conduct are forwarded to the IPCA, unless they relate to official information requests, whereby the Ombudsman can investigate and review the refusal or delay of OIA requests.[143] The Ombudsman can also conduct self-initiated investigations into far reaching or systemic issues within government agencies, in order for wider administrative improvement.[144]

In order to utilise this accountability forum the police conduct would need to be brought within the scope of official information requests. This illustrates the limitations of holding the police to account in contrast to other public actors, and the awkward fit of police within traditional administrative accountability mechanisms. Nevertheless, despite its limited application, this is a feasible notion of how our stipulated scenario may be brought to the public forefront. An activist group, perhaps suspicious that they were being targeted by infiltrators, could make an OIA request into reasons or justifications for the suspected covert operation, if any. The combination of the Official Information Act and the Ombudsman are currently engaged in the T&C inquiry, whereby several complaints are under investigation relating to agencies that have withheld information regarding their dealings with T&C. This includes the Police, who refused to search for correspondence saying it was "too much work."[145]

[141] Joseph, above n 3, at 365.

[142] Office of the Ombudsman "What we do" Ombudsman Fairness For All <www.ombudsman.parliament.nz>.

[143] Official Information Act 1982, s 28.

[144] Office of the Ombudsman, above n 142.

[145] Zac Fleming "MPI, MSD botch Thompson and Clark OIA" (29 June 2018) RNZ <www.radionz.co.nz>.

Although to date OIA requests have been denied,[146] the media surrounding the T&C Inquiry implicating police in the scandal suggest that there is increasing pressure to release such information. The Ombudsman could therefore be instrumental in the future, as the effectiveness of administrative and political accountability mechanisms working together in the democratic sphere is constantly developing.

2 State Services Commissioner

The State Services Commission is New Zealand's central public service department, responsible for the entire State sector and its services (organisations that serve as instruments of the Crown). This includes public service departments, Crown entities and various other institutions including the New Zealand Police.[147] The function of the State Services Commissioner (the Commissioner) as an accountability mechanism for the state sector is evident in their responsibility to investigate and report on matters of departmental performance.[148] They have wide powers to conduct inspections and investigations,[149] and if such inquiries reveal breaches of minimum standards of integrity and conduct by any agency, the Commissioner may advise the responsible Minister.[150] It is in this role that the services of the Commissioner may be engaged.

On 16 March 2018, the State Services Commissioner announced an investigation into Southern Response (a government-owned company responsible for the Canterbury earthquake claims) and their use of private security consultants such as T&C to spy on claimants, amidst allegations of having breached the State Services Standards of Integrity and Conduct.[151] Following media coverage and information leaks, the terms of reference were eventually widened to include all State Sector departments and their dealings with the private security

[146] Letter from Travis Benson (Manager of National Intelligence Centre for the New Zealand Police) to Valerie Morse regarding the refusal of an Official Information Act request in respect of NZ Police dealings with Thompson & Clark concerning activist groups (4 September 2018).

[147] State Services Commission "State Services Commissioner - Role and Functions" (13 August 2015) <www.ssc.govt.nz>.

[148] State Services Commission, above n 147.

[149] State Sector Act 1988, Part 1.

[150] Section 57B.

[151] Peter Hughes "Southern Response Inquiry Details Announced" (State Services Commission press release, 16 March 2018).

firm.[152] Police are outside the scope of the inquiry because, despite being part of the State Sector, they are not covered by the State Services Standards of Integrity and Conduct.[153] A series of news articles published on Stuff Circuit in September 2018 exposed the failure to include police in the inquiry, along with real life experiences of activists who have been targeted by police.[154] In response, the Police Commissioner has announced an internal investigation into police use of external security consultants.[155] These recent developments will be discussed in more detail at the end of Part IV, but they illustrate the indirect ways in which using administrative accountability forums such as State Services Commission inquiries can proactively trigger a flow-on effect of other accountability mechanisms for the type of conduct we are concerned with.

3 Evaluating accountability

The accountability relationship between police and the forum may appear to have little teeth given the lack of 'bindingness' of an external investigation, but as this section will illustrate, it may be the most appropriate given the complex nature of the police conduct at hand.

We can fit external investigations within Bovens' conception of accountability as a social relation. There is a relationship between police and a forum (either the Ombudsman or the delegated head of inquiry by the State Services Commissioner). If the investigation is conducted by the Ombudsman regarding OIA requests, the police are obliged to explain and justify their refusal to release information. If the investigation is conducted by the State Services Commission, the Commissioner and their authorised delegates also have statutory powers of obtaining information and entering premises from the agency subject to the investigation.[156] The forum in both cases may pass judgment, usually in the form of a public

[152] Peter Hughes "Inquiry Terms of Reference Widened" (State Services Commission Southern Response Inquiry Terms of Reference, 27 March 2018; Letter from Debbie Power (Deputy State Services Commissioner) to Doug Martin (head of inquiry) regarding the Expansion to existing Inquiry: Nature and extent of TCIL's engagement with the State services (19 June 2018).

[153] State Services Commission "Agencies Covered by the State Services Commissioner's Standards of Integrity and Conduct" (19 June 2015) <ww.ssc.co.nz>.

[154] Eugene Bingham and Paula Penfold "Unseen: A Stuff Circuit Video Investigation" (September, 2018) Stuff New Zealand <www.interactives.stuff.co.nz>.

[155] Anna Leask "Police to probe use of external security consultants" (28 September 2018) Newstalk ZB <www.newstalkzb.co.nz>.

[156] State Sector Act 1988, ss 9 and 10.

report of the investigation and its findings of unjustified or improper conduct. As a result of the investigation, the actor may face consequences. Despite the fact that reports of government watchdogs cannot enforce sanctions, they are "very effective in securing redress or reparation",[157] whether in the negative sense that the Police Minister is pressured to explain their conduct to Parliament, or in the positive sense that police guidelines may be updated or law reform suggested.

If an investigation did find evidence of police infiltrating activist groups, particularly in cases of *reform advocates* or *zealous activists* where this did not involve a specific criminal investigation, the publication of the external investigation report could have far reaching consequences. At this point political and social accountability mechanisms would be engaged; given the negative public response to the T&C scandal we can expect some public condemnation of such police policy. Although political accountability in relation to specific covert operations is limited by the principle of police independence,[158] the wider 'policy' matters of such conduct would travel along the chain of democratic principal-agent relationships.[159] The Police Commissioner is accountable for policy matters to the Minister of Police (though operating on a 'no surprises principle'[160] would suggest that both parties would be well aware of covert policies) and the Minister is then in turn responsible to Parliament, who answers to their constituency.

Assessing the effectiveness of external investigations as an accountability mechanism from the democratic perspective would depend on the extent of public notification and transparency in the process. Some lessons from the early stages of the Pitchford Inquiry noted that in order to preserve legitimacy of the inquiry in the public eye as an accountability mechanism, "the public interest in openness and disclosure is given priority over the police's interest in confidentiality and anonymity."[161] Furthermore, the very existence of an investigation illustrates effective accountability from a democratic perspective, as such inquiries are typically the result of public and media pressure, defined in relation to the Pitchford Inquiry as the 'scandal proliferation

[157] Bovens, above n 30, at 452.

[158] Policing Act, s 16.

[159] Bovens, above n 30, at 452.

[160] State Services Commission "Formal Review of the New Zealand Police" (State Services Commission, the Treasury and the Department of the Prime Minister and Cabinet, September 2012) at 60.

[161] Schlembach, above n 23, at 59.

model'.[162] We can already see the beginnings of this process with the Police Commissioner's announcement of an internal investigation in response to the T&C inquiry. Waiting for police activity to develop into a scandal does limit how quickly police can be held accountable for their actions. Therefore, the responsivity and sensitivity of the decision to conduct an investigation will depend on the permitted discretion to investigate and resources available.[163] Cultural norms and societal attitudes towards police and activists, the level of accepted intrusiveness by the state and general feelings of security will also undoubtedly be influential. Provided that the final report is released to the public, the democratic effectiveness of both the establishment of an investigation and subsequent voter response is dependent on how those who delegated democratic power to the public service perceive the activity and their level of condemnation.

The effectiveness of external investigations from a constitutional perspective depends on whether institutions charged with the investigations deem our stipulated scenario to be an abuse of executive authority. This returns to the unsettled question of the 'third source of authority' in Part III. Would we follow the current legal position in New Zealand that police have the same power as individual citizens, or move with the growing scholarship of academics and judges that suggest police are abusing their power and undermining the rule of law when acting without positive legal authorisation?[164] Given the response to the T&C scandal, perhaps police infiltration of activists and potential undermining of other democratic rights would be perceived as an unacceptable extension of state power. Without clear legal standards, this perspective is unlikely to extend to the *radical insurgents*. The wide powers of our government watchdogs would have the potential to reveal abuses of power of mismanagement, although it is possible this information would not be disclosed to the public for reasons of national security or law enforcement. Further, until the legal framework is reformed to provide legal sanctions for the type of covert behaviour we are concerned with, the lack of available sanctions awarded to the Ombudsman and State Services Commissioner would have little preventative effects on future abuses of power. This lack of binding power in our government watchdogs suggests that the effectiveness of external investigations is mostly dependent on the democratic influence of

[162] Schlembach, above n 23, at 68.

[163] Joseph, above n 3, at 369.

[164] See Part III, Legal Standards section - "Third Source of Authority".

the public upon release of inquiry reports, rather than the ability to prevent constitutional abuses of power and privilege.

The learning perspective may also reveal effectiveness of external investigations as an accountability mechanism, as the work of the Ombudsman or State Services Commissioner is more likely to result in suggestions to improve policies and procedures rather than more serious sanctions. For example, it may be that police infiltration of activist groups not associated with a specific criminal investigation is not only indicative of a lack of integrity or appropriateness, but also a waste of police resources. Leaving questions of legal principles and morality aside, the learning perspective illustrates accountability for practical deficiencies in police conduct and may provide guidance for "enhancing the learning capacity and effectiveness of public administration."[165]

Overall, having briefly canvassed over the various available legal, administrative and political accountability mechanisms that could be implicated by our stipulated scenario, it is clear that the situation is neither adequate nor certain. Administrative and political accountability mechanisms provide some respite that police conduct does not go absolutely unchecked, but they are highly dependent on a number of factors; we cannot be certain of the level of public condemnation if such practices are revealed, and that will be the main factor that influences the flow-on effect of accountability mechanisms. Recent developments discussed below give some cause for optimism.

C Recent Developments

On the 28 September 2018, Police Commissioner Mike Bush announced that the Police would be launching an internal investigation into its use of security consultants, in response to the T&C Inquiry that excluded police from its scope. The announcement was a direct recognition of growing public concerns and an attempt to maintain trust and confidence in police policy.[166]

[165]Bovens, above n 30.

[166]Leask, above n 155.

The investigation will focus on the level and nature of police dealings with external security consultants, the associated reporting mechanisms and whether the conduct breaches the New Zealand Police Code of Conduct.[167] This type of internal investigation reflects what Bovens calls 'professional accountability', whereby the binding standards of acceptable practice for all professional peers are monitored and enforced by some professional supervisory body.[168] In this case, the investigation will be led by a senior detective.

While the proactiveness and responsiveness of the Police Commissioner may be commended, its effectiveness in truly holding police to account is not convincing. Despite the Commissioner ensuring that "our investigation is consistent with the intent and purpose of the State Services Commission inquiry,"[169] the investigation is due to be completed by the end of October. One month to investigate such a breadth of information is simply laughable. Furthermore, given the Police's response to OIA requests, it can be expected that a substantial amount of information will be kept confidential for matters of national security; there is also no guarantee a final report would be made public. The lack of oversight by an independent body (the likes of which is undertaken by the IPCA when complaints are made through that forum) also decreases the confidence that the process will be transparent and comprehensive.

In any case, the most positive development is that the issue of police spying on and infiltrating activist groups is coming to light in the public eye, which paves the way for accountability mechanisms to function through a democratic lens. The following Part analyses the systematic and cultural problems with democratic accountability, illustrating that despite the availability of accountability mechanisms, the underlying failures run far deeper.

V The Problem with Democratic Accountability: A Cultural Issue

All of the types of accountability discussed so far, particularly the administrative and political, have reflected the value of accountability from a democratic lens. However, popular control

[167] Leask, above n 155.

[168] Bovens, above n 30, at 456.

[169] Leask, above n 155.

over state action does not simply flow from engaging the accountability mechanisms and disclosing information; it is determined by the fundamental cultural values held by the voters regarding police, state and public power. There is reason to believe that covert police infiltration of activist groups is happening and we as a society are, willingly or inadvertently, unprepared and naive. It seems that the fundamental issue may be something far deeper and more complex than what can be remedied by law reform or institutional change: a culture of security and acceptance of the status quo.

The increasing global focus on security has been called "the birth of public order policy",[170] whereby the accepted scope of law enforcement has extended beyond enforcing the law and addressing crime, but to a general pursuit of security to justify coercive measures.[171] This has led to terms like 'eco terrorism' becoming common parlance,[172] the rise of private security industries and why we might see police infiltrating activist groups that pose no real threat to safety, such as the *reform advocates* and *zealous activists.* A major part of this public order policy is the influence of powerful economic interests, where activity causing 'economic damage' is equated to crime or terrorism. Indeed, this is evident in New Zealand's Anadarko Amendment and the unjustified arrests of protestors blockading the Weapons Conference.[173] Corporate infiltration of activists is a widespread activity,[174] so our stipulated scenario may simply represent a delegation of function.

One might suggest that prevention of crime or disorder, no matter how minor, is a rational function of law enforcement. We have a right to feel safe. This is reflected in the common law duty and perhaps even 'prerogative power' of police to take all necessary steps to prevent breaches of peace.[175] However, we should not cloak ourselves in a sense of security through the erosion of fundamental rights. A focus on security over crime invites subjective value judgments of what constitutes a threat being made by the executive branch of government, and

[170] Hörnqvist, above n 15.

[171] At 37.

[172] Steve Vanderheiden "Ecoterrorism or Justified Resistance? Radical Environmentalism and 'The War on Terror'" (2005) 33(3) Politics and Society 425.

[173] See Part II.

[174] Eveline Lubbers "Undercover Research: Corporate and Police Spying on Activists: An Introduction to Activist Intelligence as a New Field of Study" (2015) 13(3/4) Surveillance & Society 338.

[175] Joseph, above n 3, at 667.

shifts the focus to "what a person might do instead of what a person has done."[176] In his report on the promotion and protection of the right to freedom of opinion and expression, the UN Special Rapporteur warned against this type of public order policy, where the justifications for state coercion in the name of state security are wholly disproportionate to the fundamental values being undermined.[177]

Locally, it may be something in New Zealand's culture that influences acceptance of policing activism, or the lack of motivation to provide adequate legal safeguards and accountability mechanisms. The isolated nature and comparatively short history of New Zealand may create a public apathy towards intrusive law enforcement and surveillance. We have never experienced the true 'Orwellian state' and the life-threatening risks of being part of the political dissident as other countries, for example the post-Soviet bloc countries or those currently in states of civil unrest.[178] In a discussion of the cultural factors that contribute to New Zealand's increasing punitiveness towards criminals, characteristics of the New Zealand identity were noted such as its social cohesion, homogeneity, security and conformity.[179] Despite the friendly face and hospitality that New Zealand portrays, there is a marked intolerance to individuals that pose a threat to the social cohesion or deviate from the status quo.[180] Thus, in addition to the global pursuit of public order policy and security, there may be aspects unique to New Zealand that explain its ostracisation of the 'looney left', and sentiments of "if you have nothing to hide, you have nothing to fear."[181]

The pervasive nature of such a culture of security and acceptance of the status quo limits both the incentive to utilise accountability mechanisms and their subsequent effectiveness from a democratic perspective. This paper has used a stipulated scenario, covert police infiltration of activists, as a target, at which we can direct the available legal norms and accountability

[176]Hörnqvist, above n 15, at 37.

[177] La Rue, above n 9, at [60].

[178] Sophia Akram "Amid peace efforts, South Sudan arrests activist Peter Biar Ajak" (15 August 2018) Al Jazeera <www.aljazeera.com>. This article discusses government sanctioned arbitrary detention of activists, stating that "Hundreds of South Sudanese have been arbitrarily detained in utterly deplorable conditions by the [NSS] since the conflict began in 2013, including government critics, activists and journalists."

[179] John Pratt "The Dark Side of Paradise: Explaining New Zealand's History of High Imprisonment" [2006] 46(4) British Journal of Criminology 541 at 546.

[180] At 553.

[181] Anthony Robbins "If you have nothing to hide you have nothing to fear" (26 June 2013) The Standard <www.thestandard.org.nz>.

mechanisms discussed in Part III and IV in order to find the holes or areas where the fabric is wearing. Whether one believes covert police infiltration of activists is a reality that we should be concerned with is not important. The stipulated scenario can simply be regarded as a proxy for a much wider, systemic issue of culture and our conception of the state and role of law enforcement - which is increasingly tolerant of rights abuses and intolerant of the abused.

While systemic and cultural issues cannot be simply reformed, they can be buffered and supported by a stronger legal framework and more sensitive public accountability institutions to curtail abuses of public power and increase democratic oversight. Elliott and Feldman noted that public trust in politicians is declining, leading to an increasing responsiveness of government to popular public opinion.[182] This emphasises the real democratic potential for the administrative and political accountability mechanisms discussed, which is being hindered by cultural issues such as public order policy, security and perhaps a general apathy. It is dubious whether the success of the IPCA in response to the President of China's visit would be the same if the situation took place today. In addition to accountability, legitimacy of public institutions is determined by other political values such as democratic responsiveness and commitment to the public good.[183] This paper has illustrated that when it comes to matters of police conduct, the public good (determined by politically sanctioned cultural values of the moment) takes priority over democratic values. We delegate a wide discretion to the police and resist holding them accountable. Without undermining the obvious need for police independence, in a global culture of security and public order the reluctance of political and administrative accountability mechanisms to interfere in police conduct risks that abuses of public power go unchecked.

Elliott and Feldman emphasised that we can only evaluate the effectiveness of public institutions if we fully understand their function.[184] So what do we view as the role of the police? Is it proactive or reactive? Understanding this question provides us with the connection between the wider, cultural issues and the deficiencies in accountability mechanisms that have been analysed in this paper. Seemingly, the culture of security and acceptance of the status quo suggests we have delegated the police a wide, proactive function. The deficits in legal

[182] Mark Elliott and David Feldman *The Cambridge Companion to Public Law* (Cambridge University Press, Cambridge, 2015) at 3.

[183] At 12.

[184] At 15.

frameworks and accountability mechanisms analysed in this paper simply flow from this underlying value system and perpetuate it even further.

Returning again to democracy and our Westminster system of government, can we not simply accept that these are the underlying values of our society of the moment and the voters are thus entitled to give away protest rights in return for a feeling of security? I cannot accept this view. The gaping holes in the legal framework and insulation of police from accountability mechanisms provide opportunity for far more serious breaches of power, the likes of which have not been experienced in New Zealand to the extent as some other countries.[185] More importantly, public response to the T&C scandal actually indicates that society is concerned with police practice that they were previously unaware of. The values and assumptions of voters change as they are provided with information. The current law allowing warrantless searches and the conception of a 'third source of authority', paired with rejections of OIA requests illustrates that a key issue in this area is not solely the police conduct, but the lack of transparency and certainty.

With more information, we can hope (optimistically) to see a degree of cultural shift in societal perceptions of police and the state. Until then, when every politician turns their nose in disgust at the thought of covert infiltration of activist groups, the legal frameworks and accountability mechanisms must be made more robust and sensitive in order to be insulated from politically popular conceptions of the role of the state.

VI Conclusion

This paper has illustrated the complex web of policing protest, the legal norms, watchdog institutions and cultural values involved and most importantly, how we can hold this type of activity to account. The fundamental problem is, such discussions are only speculative. While the recent announcement of a police investigation into their use of external security consultants shows some development in this area, the questions posed in this paper will remain in the shadows of suspicion and speculation until further information is released. For the moment, it

[185] Akram, above n 178.

is simply clear that the accountability framework for police conduct of this nature is painfully inadequate and unprepared.

Focusing on the need for effective accountability mechanisms from a number of perspectives using Bovens' framework of accountability provides both simplicity and a rich understanding of accountability. This has however unveiled the risk of looking at accountability mechanisms with a tick-box mentality, in isolation of the wider ethos of good governance principles. If the particulars of certain conduct do not fit within the mechanism, little can be done. Accountability is just one public law principle against which we can evaluate public institutions. The analysis in this paper has illustrated that the deficits in accountability for our speculated police conduct stem from wider cultural issues that prevent pressure on police to render account.

Part II skimmed through the inconsistent history of activism, policing protest and surveillance in New Zealand, suggesting that as a society we are becoming less tolerant of protest rights, despite proudly proclaiming the success of our social movements in the past. A few relevant examples such as police activity during the Chinese President's visit and the treatment of EXIT International activists illustrated the effectiveness of our accountability mechanisms in the past.

The major concern was explored in Part III, the lack of effective legal accountability mechanisms. The analysis of section 21 of the Bill of Rights gave a clear example of how legal accountability mechanisms are undermined by irrelevant factual considerations and inconsistent legal tests. The SSA does not cover covert operations and there is great scope for imposing limitations on protected rights. The accepted legal stance of the 'third source of authority' goes against the rule of law and our conception of privacy does not adequately reflect the dignitary aspect of privacy. Access to the courts is thus limited by demarcations between situations that are not justifiably founded. While there are various paths to bring the issue before the court such as the section 30 exclusion and judicial review, finding the legal 'hook' is riddled with complexity.

Part IV noted both the deficiencies in political and administrative accountability mechanisms that are unable to rectify problems in the legal framework, but also the great potential from a democratic perspective. The principle of police independence places a substantial limitation on

the availability of certain mechanisms. The IPCA requires a specific complaint and its recommendations are not binding. An external investigation, the likes of which may be headed by the Ombudsman or State Services Commissioner, might have the most success in holding police accountable but that also depends on the situation coming to light and public pressure to conduct an investigation in the first place. This has essentially occurred; the Police Commissioner's announcement of an internal investigation can provide us with some optimism that the public is concerned with the lack of transparency in this field at the least, and democratic accountability may flow from there.

Do we wait for a cultural shift as more information is released, or do we drive full speed ahead towards law reform and institutional change? The answer is circular, as one option perpetuates the other. Regardless of where our value systems lie in the current political climate, this paper has illustrated that the current framework of accountability for police in this area has substantial failings, which leave the door open for far more serious abuses of public power. For now, it is important for all to reflect on the far-reaching social change that has been achieved through the expression of democratic rights of protest, and how those achievements have shaped the state of our democracy today. These rights are fundamental and worthy of protection; they ought not to be overridden by wider police concerns without effective and transparent safeguards.

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