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Leveraging change: the role of accountability forums in response to police harm

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Abstract

The nature of policing and the significant power police are granted by the state means they have the power to cause harm to individuals or groups. Policing requires legitimacy. The state in turn provides public forums to examine police conduct in addition to civil litigation for an individual. There are tensions in this dichotomy because police have dual accountability obligations when they cause harm: both to the public, who require this as a means of safeguarding the control given to the police, and to also the individual who deserves redress. This thesis examines some of the accountability mechanisms that are available and their effectiveness. It then suggests some ways these forums can be strengthened so that individual and public accountability can be better achieved.

Keywords: police accountability, harm, misconduct, civil litigation, damages, settlement

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I A tale of two Alan/Allen(s)

I start with a tale of two Alans who had their lives irrevocably changed by their interactions with police.

Allen Ball died in a police custodial suite in 2019 after being arrested for an alleged assault against his partner. At the time of his arrest, he was heavily intoxicated and showing signs of being unwell. He had expressed suicidal ideations but was placed in the custodial suite without regular monitoring or receiving medical assistance, against police protocol. He was later found unresponsive. Three police officers were charged and acquitted of his manslaughter.[1] Medical evidence given at trial stated Mr Ball would have survived had he received timely medical intervention.[2] A report by the Independent Police Conduct Authority (IPCA) found the police breached their duty of care to Mr Ball, both through individual actions of the police officers and also through systemic failings such as lack of custodial training.[3]

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[1] Independent Police Conduct Authority *Police fail in their duty of care to Allen Ball in Hāwera* (16 December 2021) [*IPCA Report Allen Ball*] at [1]–[6].

[2] Tara Shaskey "Police manslaughter trial told Allen Ball would probably not have died had medical treatment been provided" Stuff (Wellington, 26 May 2021).

[3] *IPCA Report Allen Ball*, above n 1, at [11].

On 8 June 2022, Alan Hall had his conviction for murder quashed some 36 years after initial conviction when it became apparent a miscarriage of justice occurred. The Supreme Court, in overturning the convictions, noted that the police had deliberately omitted witness evidence at trial[4] as well as conducting interviews with Mr Hall that were unfair, overly oppressive and in breach of the guidelines in place at the time.[5] These were just a few of the grounds in a series of deliberate and negligent actions taken by both the police and the prosecution. As the Supreme Court noted in its conclusion, the justice system failed both Mr Hall, the victim and his family.[6]

Situations like those of Mr Hall and Mr Ball erode public confidence in the police. Legitimacy and confidence are essential for the police to operate.[7] However, the nature of policing and the significant power they hold means they have the power to cause harm to individuals or groups. As a result of this wide remit of powers, policing is a "high-risk area for corruption and misconduct".[8] Therefore, to maintain necessary legitimacy, there must be means of holding the police to account when they cause harm. They must explain or justify why they caused the harm.

The state provides public forums to question police conduct in parallel to civil litigation for the individual. There are tensions in this dichotomy because police have dual accountability obligations when they cause harm: both to the public, who require this as a means of safeguarding the control given to the police, and to also the individual who deserves redress. Disparate goals between both the public and individuals, in addition to having overlap between multiple accountability forums, also makes the issue of where to go when police cause harm more complex. This thesis examines some of the available

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[4] *Hall v R* [2022] NZSC 71 at [13].

[5] At [35].

[6] At [42].

[7] Bethan Greener "Policing by consent is not 'woke' – it is fundamental to a democratic society" The Conversation (Melbourne, 24 February 2021). See also Gov.Uk "Definition of policing by consent" (10 December 2012) <www.gov.uk>.

[8] Louise Porter and Tim Prenzler "Complainants' Views of Police Complaints Systems; the Gap between Aspiration and Experience" in Tim Prenzler and Garth den Heyer (eds) *Civilian Oversight of Police: Advancing Accountability in Law Enforcement* (Routledge, London, 2019) at 74.

accountability mechanisms and looks at their effectiveness to meet certain outcomes and goals. It then suggests some ways these forums can be strengthened so that individual and public accountability can be better achieved and change leveraged.

A Structure and coverage

This thesis will examine and assess the public and private police accountability forums in Aotearoa/New Zealand in relation to police harm and misconduct. In doing so, the aim is to highlight some core problems.

First, the multiplicity of accountability forums, with different purposes of either providing public or individual accountability and each having their own eligibility and criteria, makes it harder for an individual to know where to go. This in turn raises the risk of different outcomes and choosing the wrong forum for what they are seeking. It may also encourage multiple complaints to different forums for the same thing so finality is not achievable.

Secondly, the nature of police harm means that accountability must be both at an individual and societal level. But the public and individuals want different things. This in turn causes tension because most of forums not designed for or capable of doing both. Finally, is whether forums actually enhance confidence and trust as well as fulfilling a learning function, as they are designed to do.

Part II introduces the framing concepts of public and private accountability forums, accountability outcomes and core criteria for accountability mechanisms. Parts III and IV will then assess the forums against the framework set out in Part II, to the extent it is relevant. Part VI will then assess the main forum of accountability for police misconduct and its ability to provide trust, confidence and learning functions. Part VII will then provide some potential solutions to better meet accountability goals.

Because this thesis is ambitious in terms of breadth, there are certain limitations which mean it will not be possible to cover every forum individually or in detail. The main purpose of this thesis is to highlight key tensions in seeking accountability against the

police, because individual needs and the public need for oversight makes the position more complicated. It will largely draw on New Zealand policing, although some useful international comparisons can be made.[9]

II Where should I go? What should I do?

When someone has been harmed by another citizen, they know to go to the police. But where do you go when you are harmed by the people whose job is to protect you? The issue is there is no one place to go. There are many. Each has their own specific purpose, criteria and some are more accessible than others. This section introduces the available mechanisms for seeking redress for police harm taking the view that, rather than making it easier to achieve accountability, it conversely makes it harder. For an individual seeking accountability, there might be multiple places they need to go to meet certain outcomes.

Accountability does not have a singular definition, but this thesis uses the Bovens framework:[10]

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

Accountability framed in this way is relational and occurs through dialogical process. The forum is delegated authority from the state to compel and question the actor. The forum is then both intermediary between the actor and the individual (or the public). But because there are multiple forums, there are then multiple intermediaries. That in turn produces three questions for an individual: Where should I go to seek accountability? What do I want? How will I get it?

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[9] How various dimensions of accountability are to be achieved differs to some extent across jurisdictions: Janet Ransley and others "Civil Litigation Against Police In Australia: Exploring Its Extent, Nature and Implications for Accountability" (2007) 40(2) ANZJ Crim 143 at 145.

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

A The 'where'

Multiple forums are representative of a trend in an "explosion" of accountability.[11] Accountability is strongly associated with legitimacy and confidence.[12] This has resulted in an increase in tribunals, authorities, regulators and ombudsmen-type bodies as accountability mechanisms are provided by the state to the public as a form of reassurance.[13] The rise of individualised regulators with specialised functions is an attempt to streamline some of the processes and increase administrative efficiencies. The rationale is that if you have a problem with the police, you will instinctively know to go the Independent Police Conduct Authority (the IPCA). The problem is that is not necessarily true.

This is the "problem of many eyes": where actors may be liable to give account to multiple people, individuals, bodies or organisations at the same time, simply due to the sheer number of accountability forums (see figs 1 and 2 below). Each forum has different criteria.[14] The end result can be that, rather than making it easier to achieve accountability, it becomes more difficult. Accountability then is in "danger of losing all critical meaning".[15] The forums are designed for different things: some are specifically designed to provide general accountability to the public but others specific individual accountability. These are in turn subject to other control factors, for example, the state may restrict access to the forum, such as commissions of inquiry and criminal prosecution.

1 Public accountability forums

The overarching purpose of a 'public' accountability forum is to provide accountability to the public, usually in the form of providing an account through explanation. These

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[11] Tony Wright "The politics of accountability" in Mark Elliott and David Feldman (eds) *The Cambridge Companion to Public Law* (Cambridge University Press, Cambridge, 2015) at 108.

[12] Mark Elliott and David Feldman (eds) "Introduction" in *The Cambridge Companion to Public Law* (Cambridge University Press, Cambridge, 2015) at 13.

[13] Wright, above 11, at 108.

[14] Bovens, above 10, at 455.

[15] Wright, above 11, at 96.

mechanisms are designed to provide reassurance. Some public accountability mechanisms are more informal and not state driven, such as media questioning and scrutiny. Some may be inherently political, such as question time and ministerial responsibility in Parliament. But the ones discussed here are ones the state deliberately creates with accountability for the public in mind. Public forums are not generally designed to provide a remedy and therefore rarely cater to individual accountability.

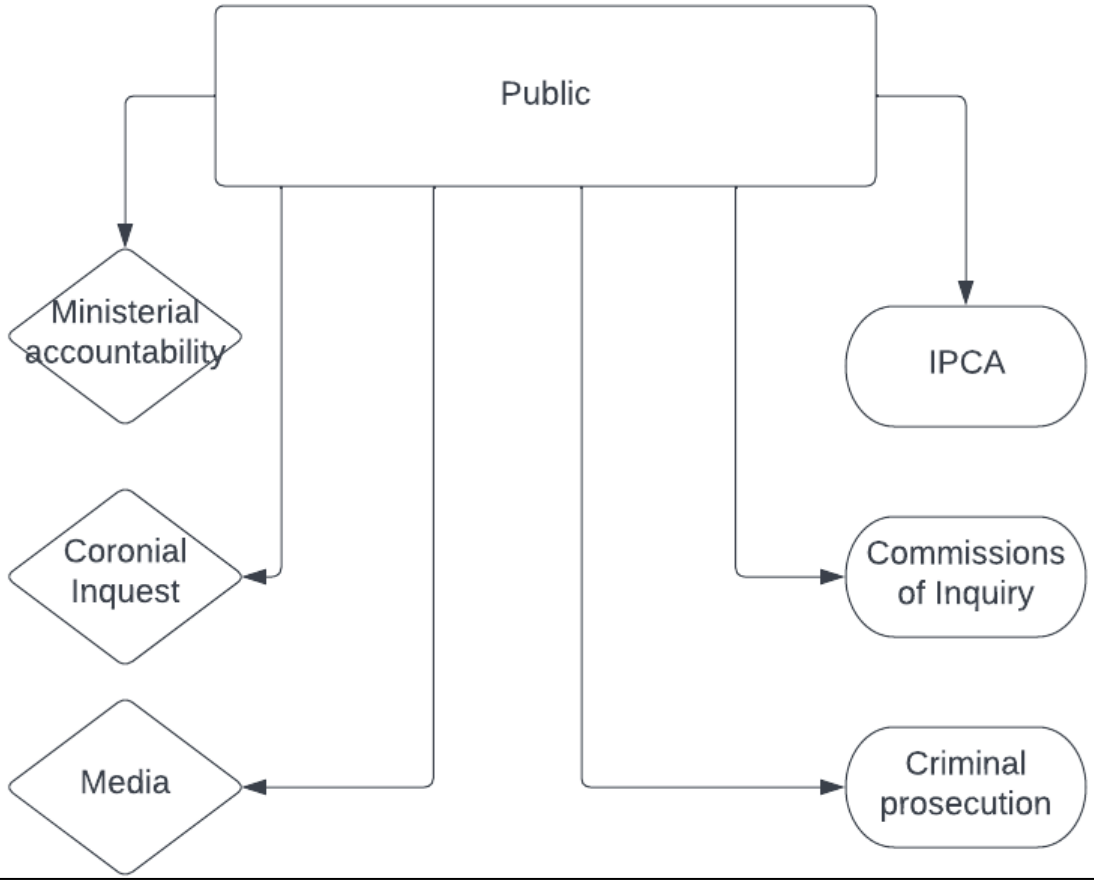

Figure 1: Diagram of public accountability forums.
Note Triangular shapes are mechanisms not covered in this thesis but are included for completeness to show the full picture. Coronial inquests are important but because they are limited to harm events that result in death they are not included in detail.

2 Private accountability forums

Private accountability forums relate to mechanisms where an individual may be seeking something more specific, such as those where remedies may be available, primarily

through civil litigation or private settlement (see fig 2 below).[16] But now there is a confusing layer of options available to choose from. The onus is on an individual to choose the right one for the purpose they are seeking to achieve.

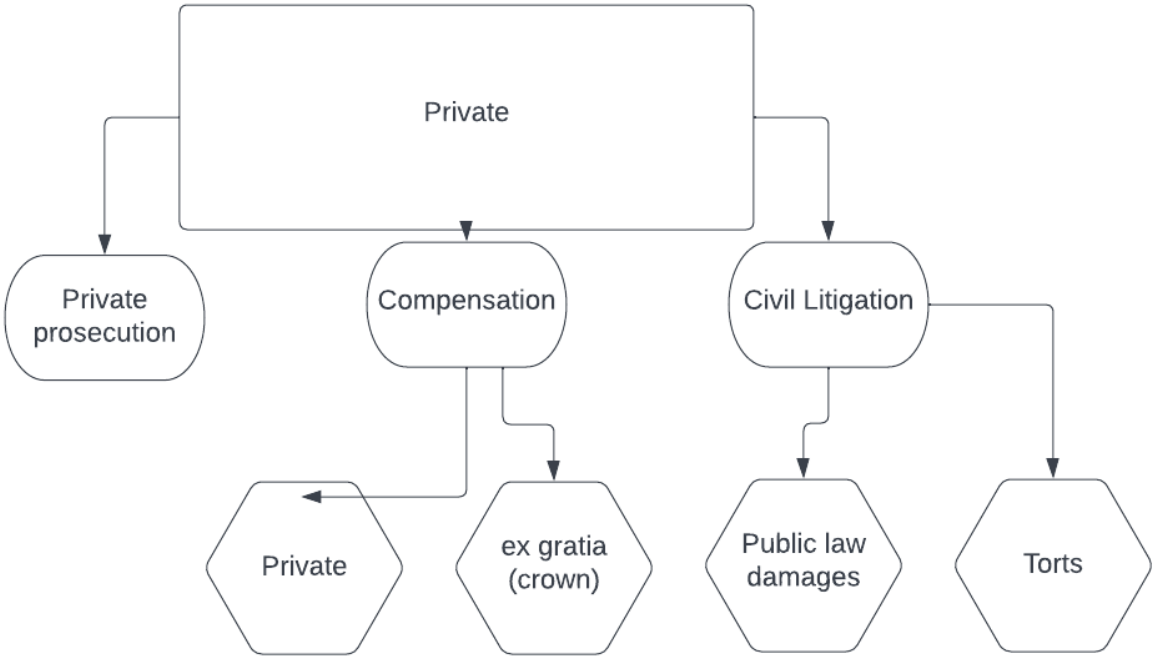

Figure 2: Private accountability forums

B The 'what': explanation, vindication and compensation

The "where" becomes more complicated when considered alongside motivation, or "what do I want?" Academic definitions generally look at accountability as a dialogue between the state and the public or generic non-specified individuals.[17] Therefore, specific individual motivations and reasons for seeking accountability may be overlooked because forums are not necessarily created with those needs in mind. Individuals may be motivated to seek accountability because they are seeking a particular outcome. Broadly

[16] There are also internal police complaint mechanisms, which will not be discussed in this thesis. They are mainly designed for low level complaints and not for serious harm or misconduct.

[17] Bovens, above n 10, at 450; and Wright, above n 11, at 96

speaking, this thesis uses three types of accountability goals throughout: explanation, vindication and compensation.[18]

1 Explanation

Explanation is the right to receive an account of how the harm occurred and why.[19] This term is also used in this thesis to encompass consequential outcomes of "explanation": such as learning and improvement functions,[20] assurance,[21] as well as catharsis.[22] Public accountability forums are designed for "explanation", such as commissions of inquiry.

2 Vindication and condemnation

Vindication has both a legal and ordinary meaning and is used in a dual sense here. In a legal sense, vindication relates to acknowledgement that a fundamental right has been breached.[23] In ordinary meaning, vindication is being cleared of blame or suspicion. As a desired outcome in this sense, vindication may be receiving an apology or acknowledgement of wrongdoing by the police. Condemnation is a more specific form of vindication: vindication frees the individual from misplaced wrongdoing, whereas condemnation specifically rebukes the actor.[24] Broader goals referred to in this thesis such as punishment and deterrence are placed under this definition.

3 Compensation

Compensation is an individual accountability goal. It aligns with the private law theory that certain harms should result in compensation.

These broad goals or outcomes intersect and may determine what forum is required to achieve that purpose. If there are multiple goals, it becomes increasingly difficult to

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[18] This is my own framework which draws conceptually on Ellen Rock "Misfeasance in Public Office: A Tort in Tension" (2019) 43 MULR 337.

[19] Bovens, above n 9, at 450 and Matthew Flinders *The Politics of Accountability in the Modern State* (Routledge, London, September 2017) at 12

[20] Bovens, above n 9, at 463.

[21] Wright, above n 10, at 9.

[22] At 9. See also Bovens, above n 9 at 464.

[23] Jason Varuhas *Damages and Human Rights* (Hart Publishing Ltd, Oxford, 2016) at 15.

[24] See "vindication" in Bryan A Garner (ed) *Blacks Law Dictionary* (10th ed) (Thompson Reuters, Minnesota, 2009).

satisfy them because no single forum is designed to provide all three without considerable difficulty. To illustrate, an IPCA investigation can provide explanation and vindication, but it cannot award compensation.[25] Only the courts or a private settlement can achieve compensation. Similarly, an individual may receive financial compensation through a private settlement but no vindication if there is a non-disclosure order. These complex tensions are a result of having multiple forums both for individuals and the public to achieve different things.

C The 'how'

The next challenge is assessing how accountability forums go about achieving their goals. That is, the forum needs specific tools to be able to fulfil the "what". The state grants forums specific powers to render accountability. Bovens describes these as the power to compel, question and sanction. Firstly, the actor must be obliged to explain actions to the forum. Secondly, the forum must be able to question or interrogate the actor. Thirdly, the forum should have the possibility of passing censure or sanctions against the actor.[26]

This leads to a complicated structure of multiple forums (the "where") interacting or competing with differing outcomes (the "what") that also have to grapple with their ability to compel, question and sanction ("the how"). The forum then provides accountability "outputs" or goals in the form of vindication, explanation or compensation to the extent it allows for them.

We now have a complex structure with multiple forums that have to be assessed by whether they are accessible to the individual or public only; by what goal or outcome is sought; and the accountability powers they have to provide those outcomes.

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[25] See Independent Police Conduct Authority "What you can complain about" Independent Police Conduct Authority <www.ipca.govt.nz>.

[26] Bovens, above n 10, at 451.

III State accountability forums

This section introduces some of the state accountability forums, looking at inquiries, the Independent Police Conduct Authority and criminal prosecution.[27] Given these are state-created accountability bodies, it will examine to what extent they have the requisite powers to inform, question and censure (the "how") but also weave in what kind of outputs they can offer, either to the public or individuals (the "what").

A Inquiries

1 Introduction

Inquiries are state-created accountability forums designed to obtain independent information and advice, identify significant failures of a government service or function, or anything that has had a major impact on the public.[28] Inquiries into police misconduct are more likely to be picked as a forum when there are systemic issues at play that would suggest a widespread or concerning problem to the public that requires independence.[29] That sometimes can be where individual interests intersect, such as the Arthur Allan Thomas Inquiry. While that inquiry related to the conviction and potential miscarriages of justice of Mr Thomas, the inquiry was looking at allegations of police planting evidence to obtain his conviction for murder.[30] Corruption and miscarriages of justice are areas where public and private interests intersect. That extends to systemic issues,

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[27] The IPCA is in this section as a 'public' forum, because it has been provided by the state for the benefit of the public. However, unlike commissions of inquiry and criminal prosecutions, which require state initiation, the IPCA is open to individual complaints but also has a wider statutory function of investigating serious events.

[28] Department of Internal Affairs "Public and Government Inquiries" Department of Internal Affairs <www.dia.govt.nz>; and Department of Internal Affairs "Different types of government reviews" Department of Internal Affairs <www.dia.govt.nz>.

[29] Stephen P Savage "Independent Minded: The Role and Status of "Independence" in the Investigation of Police Complaints" in Tim Prenzler and Garth den Heyer (eds) *Civilian Oversight of Police: Advancing Accountability in Law Enforcement* (Routledge, London, 2019) at 31.

[30] R L Taylor *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allan Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe* (P D Hasselberg, Government Printer, 1980).

such as the Inquiry into Police Conduct which investigated allegations that serving police officers had committed sexual assaults.[31]

2 Assessing the "how": the ability to question, compel and sanction

Inquiries, at least outwardly, appear to have many of the requisite qualities to satisfy accountability: the ability to compel, question and sanction. However, the reality is inquiries are tightly controlled by the executive and the framework of the Inquiries Act 2013. They can take many different forms and iterations, but their scope and purpose are determined by the executive-created terms of reference.[32] Because of their link to public confidence, inquiries therefore are highly political. This creates tension between politics, accountability and learning.[33] In turn, these factors can detract from an inquiry being a meaningful accountability mechanism.

An inquiry has strong powers in terms of compelling actors to "inform" and "justify" and in return the ability to "question", but this depends on the controlling factors of the terms of reference and the underlying Inquiries Act. Additionally, commissioners have powers of compulsion to obtain evidence,[34] the power to disclose evidence[35] and the power to summon witnesses.[36]

Who gets to question is also tightly controlled. Commissioners can designate "core participants",[37] groups or individuals that have a vested interest in the outcome or in determining the public narrative. Their participation is integral because they may hold

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[31] Margaret Bazley *Report of the Commission of Inquiry into Police Conduct Vol 1* (Inquiry into Policy Conduct, March 2007) [Inquiry into Police Conduct].

[32] See Department of Internal Affairs "Different types of Government reviews" Department of Internal Affairs <www.dia.govt.nz>. Essentially there is very little difference between them all apart from the "ranking" in importance.

[33] Raanan Sulitzeanu-Kenan "Reflection in the Shadow of Blame: When Do Politicians Appoint Commissions of Inquiry?" (2020) 40(3) British Journal of Political Science 613 at 614.

[34] Inquiries Act, s 20.

[35] Section 22.

[36] Section 23.

[37] Section 17(1).

crucial information.[38] These core participants have the right to give evidence and make submissions to the inquiry. Some core participants may have their needs and contributions weighted more heavily, meaning it may not be possible to treat each party equally or meet their personal accountability needs. The Act clearly promotes protection of those who may be implicated in a report to gain co-operation so that a full account can be rendered.[39] Participants are granted civil immunity[40] and further restrictions can be made such as closed hearings and restricting and suppressing access to evidence, both publicly and to core participants.[41] This can lead to significant dissatisfaction from core participants who seek individual accountability. In the Burnham Inquiry, Afghan villagers who had been designated as core participants withdrew from participation after certain information was withheld on the grounds of protecting national security.[42]

Because of the political nature of inquiries, it may mean practicalities are missed in attempts to reassure the public: therefore terms of reference can be very wide, essentially watering down an effective narrative, or so narrow as to pre-determine an outcome. Some of these issues are at the heart of a current inquiry into undercover policing in the United Kingdom. This inquiry's terms of reference cover undercover policing since 1968.[43] It has 247 core participants.[44] The misconduct ranges from the odd[45] to very significant interference with human rights, with some officers forming relationships and even having children with those they were surveilling.[46] The huge scope of the inquiry means threads of accountability are being pulled in different directions and it also means

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[38] Section 17(3).

[39] Sections 11 and 27.

[40] Section 27.

[41] Section 15.

[42] Inquiry into Operation Burnham "Inquiry response on withdrawal of Afghan villagers as core participants" (media release, 18 June 2019).

[43] Undercover Policing Inquiry *Terms of Reference* (Undercover Policing Inquiry, June 2016)

[44] See Undercover Policing Inquiry "Who is involved" Undercover Policing Inquiry <www.ucpi.org.uk>.

[45] Such as dressing up as a clown as part of infiltration of a protest: Paul Lewis and others "Police spy Lynn Watson filming in clown costume at anti-war protest" *The Guardian* (online ed, London, 25 January 2011)

[46] Rob Evans "Fourth officer allegedly fathered child after meeting woman undercover" *The Guardian* (online ed, London, 22 April 2021).

a mammoth task for commissioners who have been conducting the inquiry since 2015, without a defined end in sight.[47]

The inquiry has curtailed core participants right to question by allowing undercover officers retain their anonymity.[48] This has been assessed as necessary for those officers to freely give open and honest testimony in a situation where they were responding to orders from above. However, this is a terrible blow for individuals who want answers – answers that are specific to the harm done to them. But because an inquiry is designed to render a public account, individual accountability goals have been sacrificed for the public interest as a whole.

3 Assessing the "what" functions: who is best served by an inquiry?

An inquiry's main purpose is to provide an official narrative to the public, notably the "explanation" function. But an inquiry has some vindicatory function through condemnation.[49] There is no direct punitive function: an inquiry cannot make findings of criminal or civil liability, although it can make recommendations that steps towards this are taken.[50] This may appear confusing to the public, particularly if the conduct that is in question is essentially a criminal offence. For example, in the Inquiry into Police Conduct, the allegations were that of serving police officers committing sexual assaults. But the terms of reference stated the purpose was not to establish criminal liability of individuals.[51] Rather, judgment may be passed through the public narrative or recommendations and there is the ability to make findings of fault, which have

[47] It has five tranches of inquiry, all of which are either ongoing or incomplete: Undercover Policing Inquiry "About the Inquiry" Undercover Policing Inquiry <www.upci.org.uk>.

[48] Undercover Policing Inquiry "Chairman rules on anonymity applications from 16 NPOIU undercover police officers" (press release, 1 September 2021).

[49] See for example the condemnation of police conduct as "unacceptable", and "disgraceful" in the *Inquiry into Police Conduct*, above n 31, at 1.

[50] Inquiries Act, s 11.

[51] *Inquiry into Police Conduct*, above n 31, at [1.11].

reputational or moral force. Those recommendations are at the discretion of the commissioners although many inquiries are cautious in making findings of fault.[52]

Inquiries are powerful in that they can have political consequences. The Australian Fitzgerald Inquiry into police corruption ultimately saw four ministers and numerous police officers convicted on corruption charges.[53] The incumbent government was also voted out in the next election. Significant reform also followed.[54] In the United Kingdom, the Prime Minister formally apologised to the families of the victims of the Hillsborough tragedy some 23 years after a stadium collapse that killed 97 people. The apology was prompted by an inquiry which found police had lied and misdirected blame for the stadium crush to the fans rather than police crowd management.[55] This served both individual and public accountability because for years all the families had wanted was the truth; the inquiry and the subsequent apology had a cathartic function.

Inquiries as a rule do not provide individual accountability or compensatory functions, although there are rare occasions where public and individual accountability goals cross over. The Arthur Allan Thomas Inquiry was prompted by public disquiet about Mr Thomas's convictions and police conduct. The inquiry's terms of reference were wide and, importantly, allowed the commissioners to consider an award of compensation and fix the amount.[56] The inquiry had the dual function of providing a public, official narrative, establishing that the evidence had been planted but also vindication for

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[52] This is largely as a result of *Re Erebus Royal Commission (No 2)* [1981] 1 NZLR 618 (CA), which was a judicial review into Mahon J's inquiry into the Erebus aircrash. Mahon J stated in the report that Air New Zealand was conducting an "orchestrated litany of lies" giving evidence before the inquiry. The Court of Appeal judgment found Mahon J had overstepped the terms of reference and natural justice requirements.

[53] Crime and Corruption Commission Queensland "The Fitzgerald Inquiry" (21 August 2019) <www.ccc.qld.gov.au>.

[54] Chris Salisbury "Thirty years on, the Fitzgerald Inquiry still looms large over Queensland politics" The Conversation (Melbourne, 1 February 2022).

[55] BBC News "Hillsborough files: Reaction to release of Government papers" BBC News (13 September 2012).

[56] Arthur Allan Thomas Inquiry, above n 30, see Term of Reference 6 at [474] and the final recommendation of compensation for $1,087,450.35 at [515].

Mr Thomas that he was the victim of a miscarriage of justice and should be awarded compensation.

4 Conclusion

Inquiries are inherently political and resource heavy and are therefore ill suited for anything but the most serious events or misconduct. They are important tool of a democratic Government because it shows a willingness to invite criticism on state actions or act as a form of reassurance of the state's integrity. Relevantly, Crown Law has announced an inquiry into their conduct relating to the prosecution of Mr Hall.[57] Thus far, the police have not announced their own public inquiry but have limited their commitment to an internal investigation with no guarantee of this being made public, despite calls for the IPCA to oversee the review.[58]

B The Independent Police Conduct Authority

1 Introduction

The IPCA is an independent body dedicated to investigating complaints of police misconduct. It either receives individually lodged complaints or ones triggered by the statutory framework of the Independent Police Authority Act 1989 (the Act).[59] It can uphold or dismiss complaints against police actions and make recommendations for changes.[60] It also publishes results of its findings and records trends.[61] While it responds to individual complaints, its main function is to provide civilian oversight to the

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[57] Crown Law "Solicitor-General to Investigate Crown's role in miscarriage of justice concerning Alan Hal" (press release, 13 July 2022).

[58] Hamish Cardwell "Public's trust in police a factor in probe of Alan Hall case, law professor says" *Radio New Zealand* (Wellington, 6 July 2022).

[59] Independent Police Authority Act 1988, s 13.

[60] Independent Police Conduct Authority "Legislation and Accountability" Independent Police Conduct Authority <www.ipca.govt.nz>.

[61] For example, see Independent Police Conduct Authority *Annual Report 2020/2021* (Independent Police Conduct Authority, 2021) [Annual Report 2020/2021] at 17.

public.[62] The breadth and body of its work can vary greatly: while many complaints relate to conduct on duty, investigations can also cover off-duty behaviour.[63]

1 Assessing the "how": the ability to question, compel and sanction

Like inquiries, the IPCA has similar powers to compel actors to justify and give account. The IPCA can require evidence to be disclosed that is "relevant to the subject matter of the investigation"[64] and can summon any person "relating to the matter under investigation".[65] However, this is subject to limitations. Unlike an inquiry, the IPCA's investigatory phase is behind closed doors, whereas an inquiry has the choice of public or private hearings.[66] There is no ability for affected individuals to question actors, although they must be kept informed of any progress.[67] This justification for these restrictions is to ensure that police officers will co-operate. Unlike core participants in an inquiry, no person is entitled as of right to be heard by the Authority.[68]

In terms of the IPCA being able to "question" actors, this is limited to those who actively choose to engage with the process: the IPCA cannot investigate on its own motion without a complaint being lodged.[69] A complaint can be lodged on behalf of another person although the IPCA retains discretion to decline those complaints.[70] Complainants can ask for specific matters to be investigated, although the IPCA is not obliged to follow through with an investigation on the requested matters, only respond to the request.[71] Failure to *respond* to a complaint or request is amenable to judicial review and can result

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[62] Garth den Hayer and Alan Beckley "Police independent oversight in Australia and New Zealand" (2013) 14 Police Practice and Research 130 at 131.

[63] See for instance the family harm referred to below in Part VIII.

[64] Independent Police Conduct Authority Act, s 24(1).

[65] Section 24.

[66] Section 23.

[67] Section 30.

[68] Section 23(c).

[69] With the exception of s 12(b).

[70] Independent Police Conduct Authority "Making a complaint on behalf of someone else" Independent Police Conduct Authority <www.ipca.govt.nz>.

[71] The family of Steven Wallace asked for specific concerns to be investigated in the IPCA's investigation and the IPCA complied: Independent Police Conduct Authority *Report on the Shooting of Steven Wallace* (March 2009) [*Report on the Shooting of Steven Wallace*] at [196].

in an order to reinvestigate.[72] In *Deliu v Independent Police Conduct Authority*, the Court found the IPCA breached s 17 because they failed to respond to one of Mr Deliu's complaints.[73] The IPCA was ordered to investigate the outstanding complaint.[74]

The IPCA's ability to question can also be hampered by multiple accountability forums operating at the same time which can lead to significant delays in providing account. The IPCA may consider whether civil, criminal proceedings and coroner's inquests may be in pending or reasonably in contemplation before deciding to hold a hearing.[75] This means lengthy delays can be common causing significant grief to complainants and families.

It is additionally complex where death has resulted from police actions because of parallel investigations: an internal police review, coronial inquest and potentially criminal proceedings. In the case of Steven Wallace, who was shot dead by police in 2000, the IPCA investigation was both subject to the private prosecution brought by the Wallace family and the coronial inquest concluding before its findings could be reported.[76] But it also demonstrates how forums can be influenced and affected by those in parallel. For example, because a jury had found the police officer who shot Steven Wallace not guilty, the IPCA felt it inappropriate to examine any issues relating to the shooting itself and rather focused on the events immediately preceding and post shooting.[77]

The ability to compel and question is also heavily dependent on the IPCA having adequate relationships and "buy in" from both the public and police. The IPCA has issues with both. Accessibility and visibility of the IPCA amongst the public is a self-acknowledged concern, notably with Māori and Pasifika communities.[78] Without active participation, accounts may be one-sided or incomplete.

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[72] Per s 17 of the Act which requires the IPCA to settle on one of the specific procedures and notify the complainant.

[73] *Deliu v The Independent Police Conduct Authority* [2022] NZHC 413.

[74] At [83].

[75] Independent Police Conduct Authority Act, s 23(3)(ba).

[76] *Wallace v Attorney-General* [2021] NZHC 1963 at 513.

[77] *Report on the Shooting of Steven Wallace*, above n 71, at [115].

[78] *Annual Report 2020/2021*, above n 61, at 31.

Additionally, the IPCA's relationship with the police is not without tension: the IPCA's ability to question is also subject to police co-operation which threatens its ability to provide accountability. The IPCA has stated publicly that they are too dependent on police co-operation. Police can then hinder their investigative efforts.[79] In euphemistic terms, difficulties are couched as "needless areas of tension" in the relationship,[80] particularly relating to clearly defined roles around powers.[81] Police internal disciplinary investigations, for example, were cited as a key tension. Police and the Police Association are of the view the IPCA has no proper role in those internal disciplinary processes, contrasted to the IPCA's view that "there is a legitimate public interest in ensuring that the employment outcome is robust".[82]

The IPCA's main weakness is in its limited ability to impose sanctions. Rather it acts more as a "resolution" service with monitoring powers, similar to the Ombudsman function. The IPCA can make recommendations and monitors their implementation.[83] If the IPCA feels the police has failed to act, then it can send a copy of its recommendations to the Attorney-General and the Minister of Police. The Attorney-General is then obliged to place the report before Parliament.[84] This has the theoretical corrective function of preventing repeated instances of harm. Significantly, any disciplinary procedures for individuals remain in the hands of the police. This interaction with internal police processes means outcomes can appear inconsistent and often incredibly vague.[85]

2 Assessing the 'what': who is best served by the IPCA?

The IPCA's strength is in its ability to meet public accountability goals: that is the explanatory function. As noted in *Deliu*, "the Act is concerned with public interest of

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[79] Independent Police Conduct Authority *Briefing to Incoming Minister 2020 General Election* (Independent Police Conduct Authority, 2020) at [*IPCA Briefing*] [47].

[80] At [52].

[81] At [72].

[82] At [73].

[83] Independent Police Conduct Authority "Recommendations to Police" Independent Police Conduct Authority <www.ipca.govt.nz>.

[84] Independent Police Conduct Authority Act, s 29.

[85] See further on this below in Part VII.

police oversight rather than private legal remedies".[86] But even the public interest oversight is limited to making recommendations. Like inquiries, the IPCA lacks compensatory or punitive force: the IPCA cannot make findings of criminal or civil liability nor can it award any remedy or compensation to an individual if a complaint is upheld. It does have vindicatory force through the ability to uphold a complaint, but that in turn does not compel the police to make an apology or award compensation.

3 Conclusion

The IPCA a "mixed bag" in terms of providing outcomes. Part of that is because its ability to satisfy individual outcomes is subject to the overall public oversight purpose. The IPCA is representative of a move towards accountability agencies and regulators with narrow, specialised remits. That specific focus means that it avoids some of the pitfalls of inquiries with very large terms of reference. Conversely, because their work may not always be related to the most serious of events or exposed to greater media scrutiny, their profile is much lower and therefore public knowledge of what they do is likely low. However, straddling both public and private forums means the IPCA is one of the better placed forums for accountability and therefore the one that would benefit the most from reform, as discussed below at Part VII.

C Criminal prosecution

1 Introduction and assessing the "how" factors: the ability to question, compel and sanction

Criminal prosecution of police officers "send powerful messages" but are relatively rare.[87] Little needs to be said about criminal prosecution as having the requisite accountability features because the ability to question, compel and sanction is what the criminal law is designed to do.

Therefore, this section will rather examine why criminal prosecution against police officers is rarer and less likely to succeed. Firstly, the criminal law has stringent

[86] *Deliu*, above n 73, at [14].

[87] Ransley and others, above n 9, at 146.

standards of proof because of the punitive consequences; and, secondly, police officers retain distinct advantages over normal citizens when it comes to the criminal law at all stages of the process.

2 Implementing prosecutorial guidelines: the pre-charging phase

While police officers facing charges theoretically are equal to a citizen in the eyes of the law, knowledge of the law and how it operates means police officers may have an advantage. In applying the test as to whether the Crown should bring charges, there must be sufficient evidence to establish the charge.[88] This factor alone may make a criminal prosecution less likely, given that evidence for prosecutions is gathered by the police. Police have the requisite knowledge to evade or minimise evidence gathering for a prosecution. For example, this year a police officer caught drink-driving used his knowledge of police procedure to break into the department where his blood samples were being stored to destroy them.[89] Police also regularly give evidence in court and are familiar with legal processes and procedures compared to the average citizen.

Police also may be less inclined to gather evidence against fellow officers. Police culture is notably hierarchical and prioritises loyalty.[90] The Inquiry into Police Conduct noted "convenient memory lapses" and "closing of ranks",[91] as well as claims around the pervasive "wall of silence" an unwritten agreement to not snitch on fellow officers.[92] These factors not only affect criminal prosecution but all other accountability

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[88] Crown Law "Solicitor-General's Prosecution Guidelines 2013 (1 July 2013) [Prosecution Guidelines] at [5].

[89] Catrin Owen "Off-duty cop put on uniform, entered police station and destroyed blood sample" Stuff (Wellington, 20 September 2022)

[90] See Inquiry into Police Conduct, above n 31, at [7.5.1]; and the IPCA's note on this Independent Police Conduct Authority *Bullying, Culture and Related Issues in New Zealand Police* (March 2021) at [137] and [150] [*IPCA Police Culture Report*].

[91] Inquiry into Police Conduct, above n 31, at [7.50].

[92] At [7.50]. See also US sources: Selwyn Raab "The unwritten code that stops police from speaking" *The New York Times* (New York, 16 June 1985) and Aziz Z Huq and Richard H McAdams *Litigating the Blue Wall of Silence: How to Challenge the Police Privilege to Delay Investigation* (2016) U Chi Legal F 213 which discusses procedural privileges available to US police officers when accused of misconduct.

mechanisms, although increasing use of technology such as dashboard and body cams may negate or reduce the need to rely on the accounts of fellow officer accounts in future.

Police officers may also get more leeway through the test of whether prosecution is in the public's interest. This test only applies if the evidential burden is met. Factors for prosecution include if the offence is less serious or a significant passage of time has passed.[93] However, in fairness, there are factors that may also give weight to police being prosecuted, notably a high public interest in prosecuting those who abuse positions of authority or trust.[94]

Recently, the United Kingdom Crown Prosecution Services decided it was not in the public interest to bring a prosecution against an undercover officer using the ID of a dead baby.[95] The rationale behind the decision was that the officer in question was following orders in breaking the law and that this type of conduct is forming part of the inquiry into undercover policing. That means individual criminal acts can be waived if it is felt some other forum can better serve an accountability purpose. This is of course something the ordinary citizen cannot rely on, meaning the police essentially have more privilege when it comes to being prosecuted.

3 Bias and deference: the trial phase

In addition, bias, unconscious or otherwise, can also influence outcomes should prosecution proceed. Jury deliberations are confidential. It is therefore hard to know whether the cloak of authority that is perceived to be present when officers take the stand as witnesses may also be present when they are defendants.[96] The 'cloak of authority' is the theory that jurors give more deference to those labelled as experts or those wearing

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[93] Prosecution Guidelines, above n 88, at [5.5]

[94] See [5.8.12] and [5.8.18].

[95] Rob Evans "Police spy who stole identity of dead baby was not prosecuted, inquiry hears" The Guardian (online ed, London, 10 May 2022).

[96] See *Keil v Police* [2017] NZCA 430 at [39]. See also Shaila Dewan "Few Police Officers Who Cause Deaths are Charged or Convicted" *The New York Times* (online ed, New York, 24 September 2020).

something that symbolises trust and authority, such as a police uniform or a white coat.[97] United States studies have noted that police officers are rarely convicted in cases involving deadly force where the other individual was armed, perhaps as jurors are more sympathetic to the difficulties of finding oneself in a potential life or death situation.[98]

Looking at Alan Ball's manslaughter trial, the jury may have felt empathy for the difficult situation the officers had been placed in, but the lack of conviction was also aided by the higher standard of gross negligence required to obtain a manslaughter conviction.[99] The IPCA report concluded there was a breach of duty suggesting ordinary negligence standards were established in its view.[100] In the case of the private prosecution brought by the family of Steven Wallace against the officer who fired the fatal shot, the family expressed concerns about uniformed officers sitting in the body of the court, potentially swaying or intimidating the jury.[101] The IPCA noted that police officers wearing uniform in court while not giving evidence or on duty, breached police policy but were unable to substantiate claims it was a deliberate attempt to influence the jury.[102]

4 Who is best served by criminal prosecution?

Criminal prosecution is one of the strongest accountability forums we have. It is suitable for both public and private accountability goals as it satisfies the explanatory, vindicatory and (sometimes) the compensatory function.[103] Although it must be noted that for individuals affected by crime, the criminal prosecution process is often traumatic and may not make things better for them even if it 'involves' them. But prosecution is not a process an individual or even the member of the public gets to choose.[104] Ultimately the

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[97] This is also sometimes known as the 'white coat effect' when it applies to those giving expert evidence. See *Nguyen v R* [2017] NSWCCA 4 at [28]; and Richard R Johnson "The psychological influence of the police uniform" (2001) 70 FBI Law Enforcement Bulletin 27.

[98] German Lopez "Police officers are prosecuted for murder in less than 2 percent of fatal shootings" Vox (New York 2 April 2021); and Amelia Thomson-DeVeax and others "Why It's So Rare for Police Officers to Face Legal Consequences" FiveThirtyEight (Washington DC, 4 June 2020).

[99] Crimes Act 1961, s 150A(2).

[100] IPCA Report Allen Ball, above n 1, at [168].

[101] *Report on the Shooting of Steven Wallace*, above 71, at [193].

[102] At [195].

[103] The compensatory function is subject to Court-ordered reparation.

[104] Barring of course the right to bring a private prosecution which has its own difficulties.

state decides. Even if it may be in the public interest to prosecute more police officers, it could not relate to a change in the standard of proof as that would impair the integrity of the justice system. Therefore, criminal prosecution generally best serves public interests, rather than individual interests.

5 Conclusion

As the face of policing changes and it is now easier for the public to maintain oversight of police actions through social media, there are calls for increased prosecution of police officers, particularly in cases of deadly force. However, the nature of the prosecutorial system means the public do not necessarily get a say. A suggestion has been made that police officers should be subject to their own distinct criminal code to lessen the "gap" of advantages they have versus ordinary citizens.[105] Such suggestions would change the face of policing and prosecution significantly. The answer may not be in taking a harder line of pursuing prosecution given the burdens outlined above. The conversation is changing, at least in the United States, from "we need to hold police officers to account with criminal charges" to "we need to move police culture to include accountability".[106] This is something discussed further in Part VII.

IV Private forums of accountability

When looking at private forums of accountability, the "how" set out above, becomes less relevant and the "what" then becomes the driving force. An individual lacks the resourcing that is granted to public forums of accountability. But an individual also wants different things. The ability to question, compel and sanction may be less important in terms of tangible remedies such as compensation or even an apology.[107] But if an individual has limited rights, what kinds of accountability can they potentially get? The answer could be nothing, particularly if a remedy rests entirely on good will, such is the case in private settlements. But more avenues and remedies are available through civil

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[105] Monu Bedi "Toward a Uniform Code of Police Justice" (2016) U Chi Legal F 13 at 21. See also Monu Bedi "The Asymmetry of Crimes By and Against Police Officers" (2017) 66 Duke LJ 79.

[106] Shaila Dewan "Few police officers who cause deaths are charged or convicted" *The New York Times* (online ed, 24 September 2020).

[107] This is why the framework used in the first parts does not continue all the way through the thesis.

litigation although that comes with the added burden of the complexities of a wholly legal approach, rather than the hybrid forms in the public forums. Not to mention the stress of litigation as well as its cost, both financial and time.

D Compensation

1 Introduction: A quick fix? Cash for accountability

Money talks but can it provide accountability? If someone's accountability goal is solely compensation, then a quick fix solution may be the easiest, but it is a solution that does not fit easily within New Zealand's accountability framework. This section differentiates between two types of settlements: "private settlement", relating to use of the police's legal fund and "Crown ex gratia" relating to payments made for miscarriages of justice, though the miscarriage may be as a result of police misconduct.

2 Private settlements

Little is known about private settlements made directly by police, impairing its public accountability function. Official Information Act 1982 requests show the amounts paid out since 2014:[108]

[108] This combines data from two OIA requests (one obtained through open source website FYI and the other lodged by the author in July 2022): Letter from Ian Bradshaw (Practice Manager, Legal Services) to Mr Baw regarding police compensation data (26 February 2020, obtained under Official Information Act 1982 request to the New Zealand Police) via <www.fyi.org.nz>; and Letter from Ian Bradshaw (Practice Manager, Legal Services) to Ms McConnell regarding police compensation data) (12 August 2022, obtained under Official Information Act 1982 request to the New Zealand Police).

Year	Total cost $	No of claims
2014/15	888,803.96	N/A
2015/16	905,181.84	N/A
2016/17	398,785.33	N/A
2017/18	786,691.58	N/A
2018/19	809,895.00	N/A
2019/20	124,919	10
2020/21	700,741	20
2021/22	252,444	12

Figure 3: Compensation data 2014 to present

Out of the 43 claims since 2019, three of those were by order of the Court. The remaining claims were either negotiated or ex-gratia. These figures will also exclude any physical harm that has resulted in an ACC payout (more on this can be found in Part IV).

3 Crown ex gratia payments – "public" private settlements for miscarriages of justice

However, New Zealand does have 'public' private settlements that can better meet both public and individual accountability goals. These types of payments are for those who have been imprisoned due to a miscarriage of justice. Ex gratia payments from miscarriages of justice come from a Cabinet fund using established guidelines.[109] This fund is limited to those who have been imprisoned and had their conviction quashed on appeal, without retrial.[110] These payments have a stated purpose, which encompasses both individual and public accountability goals: vindication of the innocent, providing reasonable compensation for losses and to enhance public confidence in the justice system.[111]

[109] Ministry of Justice "Compensation Guidelines for Wrongful Conviction and Imprisonment" (August 2020) [The Guidelines].

[110] At [13]–[14]. Applicants must also be alive: there is doubt whether Mr Ellis's family will be eligible to make a posthumous application regarding recent decision he suffered a miscarriage of in *Ellis v R* [2022] NZSC 115.

[111] The Guidelines, above n 109, at [3].

There is no legal right to receive compensation. Rather there is a now-established public expectation that this will occur.[112] Awards are generally made on receipt of independent advice.[113] This ensures public funds are used in an appropriate manner but also to ensure impartiality. In return, the claimant agrees to cede any other claims.[114]

Notable ex gratia payments under the guidelines include Teina Pora, who was awarded $3.5 million, along with a public apology, after it was found he was wrongfully imprisoned when police coerced a confession from him.[115] These payments also have the added benefit of being amenable to judicial review. Mr Pora was subsequently successful in applying for inflationary costs to be added to his settlement package.[116]

The guidelines now have implicit additional coverage for those were convicted because of police misconduct with the potential for uplift if there is negligence, misconduct or bad faith relating to the investigation, prosecution and conviction.[117] However, the guidelines are ultimately constrained by the requirement of imprisonment. Mr King, who alleged negligent prosecution by the police, failed in a bid to receive an ex gratia payment because he was never convicted nor sentenced.[118] This change to the guidelines will be relevant in assessment of compensation for Alan Hall, who has already applied for an ex gratia payment.[119] He is in line to potentially receive one of the largest settlement packages in New Zealand history.

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[112] At [1]. For a timeline of ex gratia payments see Nicola Southall "Looking Backwards and Forwards: A Critique of New Zealand's System for Compensating the Wrongly Convicted" (LLB (Hons) Dissertation, University of Otago, 2016).

[113] The Guidelines, above n 109, at [22].

[114] At [28].

[115] Beehive "Teina Pora compensation adjustment" (press release, 8 November 2017).

[116] *Pora v Attorney-General* [2017] NZHC 2081, [2017] 3 NZLR 683.

[117] The Guidelines, above n 109, at [42].

[118] *King v Attorney-General* [2022] NZHC 695 at [147]. More about Mr King is contained below in Part IV(F).

[119] Shortland Chambers "Member Hon Rodney Hansen CNZM KC appointed to assess Alan Hall's compensation claim" (press release, 28 September 2022).

4 Assessing the 'what': who is best served by private settlements

A private settlement has the greatest ability to meet compensatory goals. It has the benefit of avoiding legal costs but may come without explanation or vindication through an apology. It also means individual incidents are not publicly reported. There is little then that can also be said about private settlements because they are, essentially, private.

Private settlements are an effective accountability measure for low level harms. For example, if the police accidentally hits a third party's car in a high-speed police chase, a private settlement out of the police legal fund would be the most straightforward option. Neither the public nor the individual are served by litigation in that instance. But when more serious incidents of harm occur, particularly those in relation to misconduct, private settlements then become problematic if they remain behind closed doors.

In contrast, ex gratia payments are defined and publicly announced. Ex gratia settlements satisfy explanatory, vindicatory and compensatory goals and can serve both individual and public accountability. They therefore could be said to be the best mechanism available. However, this comes with the very sad caveat that these cases are generally the worst type of harm possible, the type of misconduct that directly threatens the rule of law. It is therefore appropriate that they are reserved for only the most extreme cases.

5 Conclusion

Cash settlements have a lot of meaning for those individually harmed by police. However, publicly, cash payments may signal something else: without greater knowledge of these payments, it can lead to inferences of guilt or fault when it could just be convenience to make someone go away. The public is also left in the dark about both use of funds and potential misconduct. Settlement, therefore, could look like a licence to cause harm that you can buy your way out of. There are issues in paying people to go away, even if that is what they want. New Zealand is not a litigious society by default in comparison to somewhere like the United States, where suits and therefore settlements

against the police are commonplace and reach very high figures.[120] New Zealand generally prides itself on fairness and transparency and these are indeed principles that the Government seeks to promote, so private deals do not sit well with our sense of self.[121] This possibly indicates why the figures provided by the police legal fund are much lower than expected.

E Civil litigation claims: the place of last resort

1 Introduction

Where there is a right, there must be a remedy, but in cases of police harm and misconduct, the remedy received may not necessarily be the remedy sought. That is due to several factors: the existence of the Accident and Compensation Corporation scheme, the nature of public law damages in New Zealand and a general cautious approach of the courts in imposing liability against the police in tort claims. Civil litigation is a powerful tool, however, and one that allows an individual, through the supervisory jurisdiction of the court, to question, compel and sanction. However, all litigation comes with risk. Personal accountability goals may not always be reconcilable in terms of maintaining consistency within the law and certain public policy.

2 How ACC affects accountability

ACC is a no-fault compensation scheme. Provided statutory criteria are satisfied, claimants can receive rehabilitation and financial compensation.[122] As a result, s 217 of the Accident Compensation Act 2001 displaces torts relating to physical harm, such as assault and battery but does not extinguish exemplary damages. Like settlements referred to above, ACC provides a compensatory function but due to the no-fault nature of the scheme it is not a form of accountability: it has no explanatory or vindicatory function but it is an administrative efficiency.

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[120] Amelia Thomson-DeVeaux and others "Cities Spend Millions on Police Misconduct Every Year. Here's Why It's So Difficult to Hold Departments Accountable" FiveThirtyEight (Washington DC, 22 February 2021)

[121] See for example the proactive release policies of the current Government: Cabinet Officer Circular "Proactive Release of Cabinet Material: Updated Requirements" (23 October 2018) CO (18)4.

[122] See Accident Compensation Corporation "Types of financial support" and "Injuries we cover" ACC <www.acc.co.nz>.

This means civil litigation still serves an important purpose. Individuals who have been physically harmed can still use civil litigation in the form of public law damages to receive some explanatory and vindicatory outcomes provided the physical harm they have suffered was a breach of the New Zealand Bill of Rights Act 1990 (Bill of Rights). Claims that exist outside of physical harm are maintained at common law, meaning tort actions for things like trespass, deceit and negligence are still valid causes of action. However, each of these pathways has its own set of criteria and purpose. Public law damages operate on a corrective basis, in that it is designed to deter future infringement. Tort damages largely operate on a compensatory basis: behavioural change might be achieved but it is not the main purpose.[123] Those underlying purposes therefore can change the outcome.

F Torts

There is limited scope for tort claims against police because of ACC: use of force makes up one of the most common complaints against the police.[124] ACC simplifies the position for the courts but not for someone seeking further accountability. Additionally, courts have been cautious in claims of "novel" torts against the police in that "particular care is required in areas where the law is confused or developing".[125] In the United Kingdom, that scope is further narrowed with liability refused for claims relating to police resourcing and policy decisions[126] and actions of third parties.[127] These cases have been cited in New Zealand decisions, confirming the general position should be over ensuring consistency and stability within the law. This means tort action is not a particularly successful or easy claim to bring.

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[123] Candace McCoy (ed) *Holding Police Accountable* (The Urban Institute Press, Washington DC, 2010) at 115.

[124] See discussion below at but also Independent Police Conduct Authority "Complaints data" Independent Police Conduct Authority <www.ipca.govt.nz>.

[125] *Couch v Attorney-General* [2008] NZSC 45, [2008] NZLR 725 at [33].

[126] See *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 (HL): claim for failure to capture the Yorkshire Ripper in a timely manner.

[127] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732: claim for failure by the police to respond to an emergency call in a family violence incident which resulted in her death. See also Ransley at others, above n 9, at 147.

1 Negligence

A cautious approach has been confirmed recently in a strike out application for the novel tort of negligent investigation. Mr King was arrested for murder.[128] He was discharged just before the trial commenced after it was discovered one of the witnesses was unreliable.[129] Mr King's claim for ex gratia compensation failed and so he instead initiated civil proceedings of negligent investigation.[130] Mr King alleged that the investigation was flawed and that the police did not have a prima facie case against him. Mr King said the police acted negligently, in that they knew or ought to know the witness unreliable.[131]

The strike out application hinged on two separate time periods: negligence prior to his arrest and then the period after when he was in custody.[132] The Crown submitted there is no duty of care owed at an investigatory stage, citing the United Kingdom line of cases referenced above.[133] Mr King argued that, within the context of statutory provision relating to policing, there were references to act reasonably.[134]

Mr King's claim on suffering harm prior to his arrest was struck out on the basis it sought to "lower the bar" for liability within the existing tort of malicious prosecution because it would remove the need to prove malice.[135] The judge considered at the "pre-charging stage, it is unlikely that such negligence will have caused … significant loss".[136]

As for negligence, at the stage Mr King had been arrested, the judge was not willing to strike that claim out, but noted the availability of other suitable accountability forums, notably Bill of Rights damages.[137] This decision is reflective of the Court's general

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[128] *King v Attorney-General* [2017] NZHC 1696, [2017] 3 NZLR 556 [*King v Attorney-General* negligence] at [5]–[6].

[129] At [10].

[130] *King v Attorney-General*, above n 118.

[131] [*King v Attorney-General* negligence], above n 128, at [15].

[132] Mr King was on bail at the time he was arrested and so was recalled to prison: at [6].

[133] At [31].

[134] At [43]

[135] At [90].

[136] [*King v Attorney-General* negligence], above n 128, at [96].

[137] At n 82.

caution not to widen liability too far and risk hampering the function of day-to-day policing, the judge noting it would "effect a substantial change".[138]

A further case search shows there was no further litigation in relation to tort action followed. However, Mr King later failed to obtain Bill of Rights damages, so essentially has been left without remedy.[139] This demonstrates the inherent risk with no reward that can come with litigation.

2 Tort of deceit

Judges are cautious in finding a duty of care that may alter the face of policing or state liability more generally. But, additionally, civil proceedings against police may also be affected by any related criminal proceedings.

In *A v Attorney-General*, the plaintiff brought a claim under the torts of deceit and trespass in relation to police conduct during an undercover investigation.[140] Police initially suspected Mr A was involved in gang activities. Mr A operated a storage facility and an undercover officer rented a storage unit there while infiltrating a gang.[141] However, during the course of the operation, other gang members became suspicious he was a police officer.[142] The police sought to maintain the officer's cover by executing a search warrant of the storage unit, but the search warrant was fake.[143] By this time, police concluded Mr A was not involved in illegal activities.[144] He was, however, called by police, told about the search warrant and asked to come out to the storage unit for the search.[145]

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[138] Ransley and others, above n 9, at 147

[139] See n 118 above.

[140] *A v Attorney-General* [2018] NZHC 986, [2018] NZLR 439.

[141] At [3]–[4].

[142] At [7].

[143] At [9].

[144] At [7].

[145] At [12].

Mr A alleged the police committed the tort of deceit: they knew the search warrant to be false and intended for Mr A to rely on it and cause loss. Mr A succeeded on a limited based for deceit but failed on all other causes of action. The tort could only be made out the basis the fake search warrant induced him to travel to the storage unit, meaning his causative loss was assessed at $131.28, the cost of petrol to travel to the unit.[146] His claim for exemplary damages was denied, because even though the police's conduct was found to be illegal, they were acting in good faith and had no real intent to harm or cause Mr A loss.[147]

Mr A's claim was both aided and hindered by the fact that several other people had been arrested through the use of the "sham" search warrant.[148] In Mr A's favour, the judge noted that police actions had "repeatedly been found to be unlawful".[149] There had already been to some extent condemnatory force of police's actions through the Supreme Court's judgment in relation to the criminal proceedings: "conduct such as the use of bogus search warrants and the institution of bogus prosecutions is unacceptable"[150] and a "serious affront to the criminal justice system".[151]

However, that strong condemnation of the warrant in separate proceedings may have had an impact on Mr A's success. The judge noted "the police have already had to bear the very real and public consequences of their mistake". She noted that the litigation occurring extraneously to Mr A's claim would "act both as a deterrent and a discipline" to the police.[152] Therefore, the idea that accountability had already been served in some other way or forum does seem to make a difference across all civil proceedings, particularly in public law damages, which is discussed below. Whether that should be a factor, is debatable as the state is obviously awarded greater concessions than the average citizen to avoid potential freezing effects on governmental administration. While this

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[146] At [31].
[147] At [37].
[148] *Wilson v Attorney-General* [2015] NZSC 189 (2016) 1 NZLR 705.
[149] *A v Attorney-General*, above n 140, at [27].
[150] *Wilson v R*, above n 148, at [38].
[151] At [153].
[152] *A v Attorney-General*, above n 140, at [38].

protects the public and promotes administrative efficiency it means an individual may miss out, like Mr King and Mr A.

3 Misfeasance: a public law tort

Misfeasance has been described as the only "public law tort", which is designed to hold public officials to account for misuse of public powers.[153] The trouble is that it struggles as an accountability mechanism: the criteria is difficult to fulfil and there are disparate goals of deterrence, restoration and punishment in tension with each other.[154] Misfeasance requires either deliberate misuse of public power in the knowledge it will cause harm, or a reckless use of public power running the risk it may cause harm.[155] The public officer also needs to appreciate their action would cause harm and the harm that resulted must be of a type that was foreseeable.[156]

The leading case in New Zealand for misfeasance relates to claims made against a police officer for failing to report a rape.[157] Mrs Garrett alleged she was raped while in police custody. She claimed she reported the rape to a superior officer, but no investigation or charges eventuated. The superior did not dispute that the rape occurred but rather he alleged Mrs Garrett told him but said she did not want it to be investigated.[158] Mrs Garrett claimed his decision not to report the rape meant she suffered financial harm from loss of income, being no longer able to work, damage to her reputation and humiliation and distress.[159]

The case was initially determined by a jury, who found the superior officer not guilty. That verdict was upheld on appeal. While the superior officer failed to carry out his

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[153] Mark Aronson "Misfeasance in Public Office: A Very Peculiar Tort" (2011) 35 MULR 1 at 1.
[154] See Ellen Rock, above n 18, abstract.
[155] At 357.
[156] At 351.
[157] *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA).
[158] At 335.
[159] At 339.

duties, the Court held that there was no malice on his part and, further, the type of harm she was alleged to have suffered was not foreseeable to him.[160]

This seems like it should have been a case of criminal prosecution. The police officer admitted he had had sex with Mrs Garrett, albeit that it was consensual.[161] Investigation into her complaint was carried out by the police. They concluded there was insufficient evidence to prosecute, a decision the Court stated as one "unduly favourable to [the officer]"[162] and one said to be flawed.[163] This echoes the findings above in Part III(C) that police officers retain an advantage in criminal proceedings.

Again, the trend of caution when imposing public liability was at play here: Blanchard J noted the existence of other available forums that were better suited to hold police to account. Blanchard J neatly summarises many of the issues mentioned in the thesis: the parallel existence of multiple accountability forums coupled with the tension of accountability goals:[164]

> With particular reference to this case, it should not be overlooked also that a police officer who breaks the rules may be subjected to an inquiry by the Police Complaints Authority, discipline under the police legislation (as occurred in this case) and, in an extreme situation, to criminal proceedings. Those sanctions or public remedies are designed to persuade police officers to behave in accordance with the rules and, if they do not, to penalise or censure them. Those educational, deterrent and penalising effects and purposes are directed immediately at police officers.

The issue though is that ultimately those other mechanisms failed to work for the particular accountability Mrs Garrett wanted: for the superior officer who covered up her complaint to be held to account. He never faced any sanctions and instead chose to take early retirement, the Court noting "the charges were apparently not regarded as sufficiently serious to require deferment of his retirement until they could be heard".[165]

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[160] At 352.

[161] At 335.

[162] At 339.

[163] At 352.

[164] At 350.

[165] At 339. The officer accused of rape was dismissed, at 340.

There is then this tension between consistency and stability of the law versus providing a remedy for injustice. This highlights just why the other forums that Blanchard J mentions need to be strengthened, because if misfeasance is generally unachievable, can it be considered an accountability mechanism? Ellen Rock argued it is the "potentiality" of misfeasance that is important; that is the mere existence of it is more important than its successes. As long as it remains potentially viable, it means there is a mechanism available that has the potential to offer accountability measures such as restoration, condemnation and deterrence.[166]

Rock's reasoning may somewhat be supported by the case of *Niao v Attorney-General*, where the plaintiff was charged with shoplifting.[167] The charges were later withdrawn but the plaintiff claimed she was racially harassed while at the station and was planning on making a complaint to the IPCA. There was then evidence that one of the officers involved deliberately re-laid the shoplifting charges to persuade her to drop her civil complaint.[168] The Court found there was clear malice on the officer's part coupled with the knowledge that his actions would cause harm.[169] The Court awarded $2,500 for the misfeasance cause of action.[170] But again, there are so few cases where there would be open malice by a police officer or at least provable open malice. Ultimately, misfeasance is a poor mechanism for accountability because police misconduct rarely has the provable element of malice. The additional requirement to have foreseeability of certain types of harm also makes the tort less workable.

G Public law damages

"Public" law damages now serve an important accountability function in the place of ACC. This means an individual seeking compensation as a remedy still has an avenue, albeit a limited one, and also has a means of gaining account or vindication that they will not have received through an ACC payment. Public law damages are different from other

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[166] At 368.

[167] *Niao v Attorney-General* (1998) 5 HRNZ 269 (HC).

[168] At 270.

[169] At 294.

[170] At 298.

forms of damages, or at least seen as different by judges, because of their underlying purpose. Breaches under the Bill of Rights Act 1990 are infringements of fundamental rights.[171] Therefore, the Court is guided by the infringement and seeks to give an outcome that will vindicate the right but also deter and denounce the behaviour.[172] Public law damages are unusual in that they are designed to benefit the "public" to prevent reoccurrence, but the award goes to the individual harmed.

This 'purposeful' approach is evident in the recent case of *Pere v Attorney-General*, where Mr Pere was accidentally shot in the back by a member of the Armed Offenders Squad.[173] The officer was improperly holding their firearm when it accidentally discharged. The gun also was improperly loaded with dummy bullets that had been used for a training exercise and not replaced with live ammunition.[174] That alone saved Mr Pere's life.[175] The judge noted the breach was less serious than deliberate infringement, therefore "denunciation and deterrence are less significant".[176]

There are issues with accountability when this "purposeful" interpretation prevails. Awards can then be subject to judicial 'offsetting'. A Court may reduce or refuse to make an award if it is felt that vindication can occur in another way, such as a declaration that police actions were unlawful, or that resolution has already been achieved through another accountability forum. Additionally, a Court may factor in any steps the police have subsequently made to vindicate the breach, such as policy changes. In *Van Essen* the Court of Appeal noted the IPCA's report "substantially" vindicated the breach and implemented processes to prevent it occurring again, thus "achieving the relevant public law response required".[177] In *Falwasser*, the plaintiff was continuously pepper sprayed by the police for 20 minutes. The judge established there was no deterrent function, being

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[171] *Pere v Attorney-General* [2022] NZHC 1069 at [49].
[172] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [258], [300], [327] and [372].
[173] *Pere v Attorney-General* [2022] NZHC 1069.
[174] At [9].
[175] At [19].
[176] At [55].
[177] *Van Essen v Attorney-General* [2013] NZHC 917, [2013] NZAR 809 at [134].

satisfied the behaviour would not occur again.[178] The award would have been higher if not for the fact that police had already taken remedial steps.[179] Therefore, the award only had a punitive function.[180]

In this way, the public receives the benefit, not the individual. Future harm may be prevented but not the harm that has already been caused. This reasoning is similar to that seen above in the case of *A v Attorney-General* about "punishment enough" for police.[181] This seems to relate again to policy reasons: if the purpose of public law damages are to protect the public ultimately, then it shows to reason that the converse is true: being overly punitive to provide redress to an individual may also harm the public. This is one of the leading reasons why there is general caution in imposing liability against the state, because the public bears those consequences, particularly any policy changes. But to an individual, this reasoning can come across as unfair, especially in the case of public law damages where they may not realise the public is foremost in the judicial mind. A judge therefore determines the function of an award which in turn affects the amount awarded.

It should be noted that "offsetting" already occurs in other ways within the law. This reasoning is largely similar to aggravating and mitigating factors in sentencing. Plaintiffs who also fail in public law damages may have already received ACC funding, so would not be completely without compensation. It is a delicately balanced area of law, but one that is appropriate in the circumstances. It just signals there just needs to be other accountability mechanisms available that better serve complainants.

H Assessing the 'what': who is best served by litigation?

In all honesty, no one is best served by litigation in these cases given the inherent risk of litigation, the time it takes and the financial cost. New Zealand currently has a well-known access to civil justice problem, which marked by a lack of legal aid funding and

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[178] *Falwasser v Attorney-General* [2010] NZAR 445 (HC) at [123].
[179] At [124].
[180] At [129].
[181] At [38].

delays exacerbated by the Covid-19 pandemic.[182] This means if someone has suffered harm by the police, this may be further compounded by the complexities of the court system, exacerbating grievances.

There is also then the temptation of using the courts as a means of redress if other forums have failed to achieve a desired outcome or have fallen short of best practice or are generally distrusted. Research has shown that a lack of trust in how complaints are dealt with appears to be the impetus for civil litigation.[183] This is notably evident in the Wallace case where various proceedings have occurred over the course of 22 years and are now in the litigation phase.[184] The family felt the various other accountability mechanisms, including the coronial inquiry and IPCA investigation neither provided justice nor the compensation they sought.[185] While the family were initially somewhat successful, the Court of Appeal overturned the High Court finding that awarded them Bill of Rights damages.[186]

Litigation therefore is also risky: there is a saying that there are no winners in court. The principle of open justice means that has the positive benefit of public knowledge and oversight, but that risk is assumed by those who bring cases. And while courts have strong explanatory functions, satisfying that explanatory or vindicatory function may not be worth the risk. Therefore, civil litigation is only worth the risk for an individual if it is the only way to receive compensation. And even that needs to be carefully assessed.[187]

There is also the underlying assumption that civil litigation against the police has a strong deterrent force, in that by imposing financial consequences, behavioural change will

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[182] The Office of the Chief Justice *Annual Report for the period 1 January 2020 to 21 December 2021* (March 2022) at 23 and 40–41.

[183] Ransley and others, above n 9, at 149.

[184] See *Wallace v Attorney-General* [2021] NZHC 1963, *Wallace v Commissioner of Police* [2021] NZHC 3315 (costs); and *Wallace v Attorney-General* [2022] NZCA 375.

[185] Jonathan Mitchell "Steven Wallace's family's long search for justice" Radio New Zealand (Wellington, 24 July 2020).

[186] *Wallace v Attorney-General* [2022] NZCA 375.

[187] See Bridgette Toy-Cronin "I fought the law and the lawyers won" Newsroom (Wellington, 22 July 2020)

result.[188] However, New Zealand courts are conservative in awards and public law damages are often token amounts. If torts are awarded on a restorative rather than punitive basis, then that could also lack an expected corrective function.[189] The change anticipated therefore cannot be said to be through financial punishment but rather public condemnation, but it is unclear if this works.

It has been argued that within the United States civil suits against the police are corrective, because the financial amounts can be enormous, requiring indemnity from insurance companies.[190] Insurance companies can then refuse cover if the risk keeps occurring, thus having the financial incentive to change behaviour.[191] However, lawsuits do not seem to have stopped the frequent incidents of deadly force by police in America, particularly those against minorities.

4 Conclusion

Judicial reasoning plays a large part in whether civil litigation will succeed. A judge may look at the picture in the round, noting the existence of other forums that will better serve goals but notably will be alive to public policy grounds and consistency within the law. That suggests that while the courts play an important role in accountability, plaintiffs need to be aware of the risks of litigation. That means legal representation is absolutely essential, rendering the process inaccessible for many.

V Drawing the threads together

Looking at all these forums in the round, most of the forums have some drawback that makes them less effective: either they lack some, or all of the "how" to bring about accountability, or the "what", to provide certain outcomes from accountability.

For example, criminal prosecution can meet both public and individual accountability goals, has explanatory and vindicatory force but is rarely used and successful against

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[188] Ransley and others, above n 9, at 147.

[189] McCoy, above n 123, at 115.

[190] It should also be noted the United States has an entrenched constitution and a history of courts taking those rights very seriously if infringed.

[191] At 117.

police officers and access is restricted by the state. Civil litigation meets explanatory, vindicatory and compensatory functions but it is a costly and time-consuming process which generally yields nominal financial compensation. Settlement offers the greater benefits for an individual seeking compensation but is at will and then risks impairing public knowledge and accountability.

	Compel	Question	Sanction		Vindicatory	Explanatory	Compensatory
Commissions of Inquiry	✓	✓	?		✓	✓	X
IPCA	✓	✓	X		✓	✓	X
Criminal prosecution	✓	✓	✓		✓	✓	X
Settlements	X	X	X		?	?	✓
Civil litigation	✓	✓	✓		✓	✓	✓

Figure 4: Table summarising forums by the "how" and "what' measures

For individuals wanting accountability, they must have some idea from the outset around exactly what they are hoping to achieve. If they have multiple goals, then one mechanism may not meet them all. A forum may refuse to engage on the grounds that there are better forums available or that an existing forum has already satisfied the necessary goal. The individual may not agree and continue to "forum" shop.

What this all means is that someone or something will inevitably lose out. All the above means we may need to adjust our conception of how we view accountability. Because as it currently stands, if we expect accountability to have the ability to lessen the police causing harm, then the current mechanisms do not wholly support this. To make things even more complicated in this search for accountability, what if we have been wrong about what accountability achieves?

VI Shifting sands: questioning notions of accountability

Accountability forums are predicated on the belief that they foster trust and implement change.[192] In the case of trust, that is trust in the state and the police, with complaints-

[192] See Wright, above n 11, at 112; and Bovens, above n 10, at 463.

type bodies having a specific expectation of "improved public confidence".[193] In the case of change, it may be an assumption that any police misconduct dealt through a public forum will result in lessons learned or form some deterrent function.[194] The IPCA in particular is specifically designed to have an additional "research, education and prevention" function.[195] The problem is the forums we currently have to deal with police harm and misconduct do not particularly do any of these very well, although this section only focuses on the IPCA because of its role as a devoted body for police harm.

A A matter of trust

The expectation is that the more accountability forums, the greater the trust and confidence the public has in return. However, despite the increasing trend in accountability bodies, this appears to have not increased public trust in the state, but rather the opposite.[196] It is not that there is too much accountability but rather the accountability is then diluted. Having functions split between multiple forums then inevitability leads to confusion. For example, a survey conducted across three countries showed that while respondents supported the existence of police conduct authorities, they assumed those agencies had greater investigatory powers than they actually had.[197] Perceived lack of trust could be due to this knowledge 'gap' which could mean expectations will never be met.

The IPCA does not appear to have fostered an increase in trust of police, though it is important to note that for some people, no accountability body will ever increase their trust in the police, particularly for groups that have disproportionately been targeted by police on the basis of race, gender, religion and sexuality. It is this background, with varying expectations and attitudes towards police, that makes it harder to assess whether

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[193] Tim Prenzler "Democratic Policing, Public Opinion, and External Oversight" in Tim Prenzler and Garth den Heyer (eds) *Civilian Oversight of Police: Advancing Accountability in Law Enforcement* (Routledge, London, 2019) at 53.

[194] Bovens, above n 10, at 463.

[195] Den Hayer, above n 62, at 131. Other bodies also are designed to have this function, such as the Accident Compensation Corporation.

[196] Wright, above n at 112.

[197] Prenzler, above n 193, at 51.

any perceived lack of trust in confidence is because of inherent attitudes towards police or inherent issues within the forums themselves. Prenzler suggests that trust and satisfaction are still reconcilable with differing viewpoints and that while individual bias may exist "if stakeholders with potentially different agendas can be satisfied by the same system, this goes some way to validating its effectiveness."[198] However, this thesis has demonstrated that different agendas do not appear to be satisfied by the same or singular system.

B Learning functions and deterrence

Trust and confidence are in turn linked to outcomes from accountability forums, notably the expectation that lessons will be learned and similar events will be prevented from reoccurrence. However, studies have shown that bodies like the IPCA have poor 'learning' functions.[199]

Certain worrying trends seem to keep reoccurring, notably incidents with police training with firearms and tasers.[200] A 2021 summary by the IPCA found that police policy is unclear at what stage officers should consider arming themselves: meaning either officers may be inappropriately taking firearms to incidents, putting members of the public at risk, or not arming when they should, putting themselves at risk.[201] An investigation by Radio New Zealand found that New Zealand police officers have one week of firearms training

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[198] At 53.

[199] Den Hayer, above n 62 at 138; Louise Porter and Tim Prenzler, above n 8, at 83; and Garth den Heyer and Alan Beckley in Tim Prenzler and Garth den Heyer (eds) *Civilian Oversight of Police: Advancing Accountability in Law Enforcement* (Routledge, London, 2019) at 218.

[200] See for example the case of *Pere v Attorney-General*, above n 173; and IPCA "Taser used on officers during training" (press release, 2017-18 Summaries of Police investigations overseen by the IPCA) where officers were tased if they failed to hit targets in training. See also: Independent Police Conduct Authority "Unintentional discharge of Police firearm" (press release, 13 October 2020); Independent Police Conduct Authority "Serious failings in Police response to the actions of Rhys Warren" (press release, 19 July 2018) where three AOS officers were shot after they were incorrectly advised to enter a house with an armed occupant; and Independent Police Conduct Authority "Report into Fatal Police shooting of Lachan Kelly-Tumarae" (press release, 24 October 2013) where an officer was carrying a firearm despite not being certified to do so.

[201] Independent Police Conduct Authority "Officers should not have armed themselves when attending incident in Rotorua" (press release, 4 November 2021).

at Police College, far below the OECD average.[202] Police equally have noted they feel inadequately trained meaning the risk level for incidents reoccurring is high.[203]

Additionally, for the past four years, the top four complaints to the IPCA have related to investigation failures, attitude or use of language by a police officer, inadequate service and the use of force without a weapon.[204] For the last two years, the IPCA has also noted concerns about a rise in failure to respond to family harm incidents.[205] Many of these are in essence resourcing complaints and systemic issues rather than wilful misconduct or harm. But they are all important because individual misconduct can often be representative of policy or systemic organisational issues, such as the finding by the IPCA that the police have a negative workplace culture.[206] There is then a feedback loop: trust and confidence in accountability forums is further eroded by the lack of long-term change and reoccurrence. That may affect future engagement with the IPCA which further weakens their ability to provide accountability.

The IPCA's learning functions seem to be partially impaired by resourcing decisions. The current chair of the IPCA, Judge Doherty, stated the IPCA lacks the resources to do its job "the way it should be done" and that delays in reporting are chronic due to this shortfall.[207] Complaints have been rising since 2018.[208] An increased number of

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[202] Guyon Espiner "Shooting to wound 'something from the movies' – Coster" Radio New Zealand (1 April 2022).

[203] George Block "exclusive: 1000-plus Armed Offenders Squad call-outs this year, police officers feel inadequately trained" *New Zealand Herald* (online ed, Auckland, 1 October 2022). See also Seth V Stoughton "How Police Training Contributes to Avoidable Deaths" *The Atlantic* (online ed, Washington DC, 13 December 2014).

[204] Independent Police Conduct Authority *Annual Report 2017-2018* at 14; Independent Police Conduct Authority *Annual Report 2018-2019* at 13; Independent Police Conduct Authority *Annual Report 2019-2020* at 18 and Independent Police Conduct Authority *Annual Report 2020-2021* at 19.

[205] Independent Police Conduct Authority *Annual Report 2019/2020* (Independent Police Conduct Authority, 2020) at 18 and Independent Police Conduct Authority *Annual Report 2020/2021* (Independent Police Conduct Authority, 2021) at 19.

[206] Independent Police Conduct Authority *Bullying, Culture and Related Issues in New Zealand Police* (March 2021) [*IPCA Culture Report*].

[207] Guyon Espiner "IPCA constrained: How independent is NZ's police watchdog? Radio New Zealand (Wellington, 2 April 2022)

complaints requires more resourcing. Without the resourcing, the time to resolve complaints increased. That in turn weakens trust and confidence in the IPCA.

Year	Number of complaints	Percentage *increase* on previous year
2018	2592	-22
2019	3026	17
2020	3882	28
2021	4252	10

Figure 5: Summary of number of complaints from 2018-2021

Similarly, it is also unclear whether inquiries have made significant changes to police conduct and culture. The Inquiry into Police Conduct made a number of recommendations, particularly around sexual assault and harassment procedures, including a "report and be protected" standard.[209] However, the IPCA's 2021 report into a culture of bullying noted a persistence in sexual harassment against female officers with an ingrained "macho" mentality.[210] Many noted that while things were now better, male colleagues were unlikely to speak out in support of those who complained because allegiances were still promoted, particularly by senior leadership.[211]

C Conclusion

There is always going to be room for improvement in an area so significant as policing. The answer may be that we need to adjust our expectations and look more deeply into what the public really wants in terms of accountability from the police and whether our current frameworks can be adjusted to meet those goals. Attempts are being made at

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[208] The chart figures have been compiled from the last four IPCA Annual Reports: see at Independent Police Conduct Authority *Annual Report 2017/2018* (Independent Police Conduct Authority, 2018) at 13; Independent Police Conduct Authority *Annual Report 2018/2019* at 12; Independent Police Conduct Authority *Annual Report 2019/2020* (Independent Police Conduct Authority, 2020) at 14 and Independent Police Conduct Authority *Annual Report 2020/2021* (Independent Police Conduct Authority, 2021) at 16.

[209] *IPCA Culture Report*, above n 206, at [37].

[210] At [159].

[211] At [153].

least to increase public awareness of the IPCA and their work. The IPCA seems at least somewhat of a "poorer" cousin to other accountability measures which may be more high profile. However, the IPCA provides the specialised body of accountability for police misconduct. It therefore makes sense that efforts are made to improve it.

VIICan we fix it?

All of that is not to say that there is no way of making things better or easier for those seeking accountability. There is always room for improvement. But change requires will to *want* to change things, coupled with the *ability* to make that happen. And that is often where the problem lies. As mentioned above, changes to the IPCA and then the police itself are going to provide the most meaningful impact. These changes need to be both from the outside in and change from the inside out.

A Leverage, motivation and resources

It is easy to talk of change but significantly harder to accomplish it. There are plenty of groups and lobbyists that are significantly invested in seeing police culture and behaviour change. But often these groups lack the ability to bring about change. Schultz states there are three necessary components for making change: leverage, motivation and resources. Leverage is the ability to apply pressure for change. Motivation is the desire to bring about change. Resources is the ability bring about that change.[212] Unfortunately, interested parties rarely have all three. For example, Schultz suggests organisations like the Department of Justice have significant leverage and can enforce change through giving or withdrawing funding, but ultimately lack resourcing.[213] An individual bringing a civil suit against the police has no leverage, limited resources but plenty of motivation.

We can see this within our own "change" structures. But the IPCA's leverage is also curtailed through the powers it has been granted. This means for the IPCA to achieve greater accountability on behalf of the public, it must be granted more leverage. It also

[212] Joanna C Schwartz "Who can Police the Police" (2016) U Chi Legal F 437 at 439.

[213] At 442.

means for an individual to achieve specific accountability goals, they must be granted more resources too. That would require greater access to legal aid, something that is already in crisis, particularly for civil litigation. The legal aid problem is more complex and therefore improvements to the IPCA realistically would have a greater impact and potentially ameliorate some of the current pressure on civil litigation.

1 "We're gummy. I wouldn't say we're toothless"

The IPCA, in its own words, lacks resourcing which affects its leverage. The above quote is from the current head of the IPCA who said, "we do have quite a bit of influence in police, but we are toothless legislatively".[214] The IPCA has already told the Government what leverage they need. In its last briefing to the incoming Minister, the IPCA requested:

(a) Legislative clarification around the IPCA's role in internal police employment investigations.[215]

(b) The ability to investigate things of their own motion, which is currently limited to serious bodily injury or death.[216]

(c) The power to prosecute or the ability to refer direct to Crown Prosecution Services.[217]

The IPCA report into police culture confirms that the IPCA should have greater involvement in internal police processes. It is a "hopeless conflict of interest position" for police because of the risk of bias and sympathy when things remain internal.[218] Part

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[214] Espiner, above n 207.

[215] *IPCA Briefing Report*, above n 79, at [73].

[216] At [74].

[217] At [75].

[218] Tim Prenzler "Managing Police Conduct: Finding the Ideal Division of Labour between Internal and External Processes" in Tim Prenzler and Garth den Heyer (eds) *Civilian Oversight of Police: Advancing Accountability in Law Enforcement* (Routledge, London, 2019) at 253.

of that "hopeless" conflict of interest is driven by the hierarchical structure of the police, which in turn links to below suggested internal changes needed to transform the police.

As it currently stands, the public has limited knowledge of internal disciplinary measures, even those reported through the IPCA. In IPCA summaries between 2021 and 2022 multiple officers have been investigated for family harm incidents. One officer resigned,[219] one was dismissed.[220] Another received "confidential sanctions"[221] and one had insufficient evidence to lay a criminal charge although it was stated the incident "fell outside Police's values and expectations as an organisation".[222] No further information was provided. For these latter two incidents, the inference is that those officers still work for the police. Given New Zealand's unacceptably high family violence rate and active Government measures to respond to this, incidents like this require more transparency, but it is something that the IPCA has little to no ability to give.

A recent incident where a police officer used their powers to influence the dropping of charges highlights why IPCA should also be given powers for recommending prosecution. The IPCA found the incident was inappropriate and an abuse of power but cannot provide a sanction.[223] It appears that the officer is still employed by the police. Police also refused to respond to requests about any disciplinary action.[224] The public has a right to know what that discipline is. So do any affected individuals. This is particularly important as in many cases, the officer retains name suppression through IPCA reporting. Therefore, it also follows that granting IPCA the powers to directly refer

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[219] Independent Police Conduct Authority "Counties Manukau Authorised Officer arrested for family violence offending (press release, 5 July 2022).

[220] Independent Police Conduct Authority "Officer in Waitemata dismissed for family violence" (press release, 18 April 2022)

[221] Independent Police Conduct Authority "Off duty Police officer in Northland involved in family harm incident" (press release, 10 March 2022).

[222] Independent Police Conduct Authority "Police officer in Bay of Plenty involved in family harm incidents" (press release, 13 December 2021).

[223] Independent Police Conduct Authority "Officer improperly influenced prosecution in Northland" (press release, 14 July 2022).

[224] New Zealand Herald "Senior Northland cop convinced prosecutor to withdraw charges against business partner's son" *New Zealand Herald* (online ed, Auckland, 14 July 2022).

criminal prosecution to the Crown also minimises the risk of conflict of interest, split loyalties and corruption going unchecked.

In terms of investigating things of their own motion, this does not seem an unreasonable request, given the nature and extent of police powers. There is the possibility also of adopting a process akin to the United Kingdom where organisations, rather than individuals, can lay "super complaints".[225] This would be a particular useful mechanism in regard to the non-respond to family violence incidents referred to above as it would allow relevant agencies to make complaints. It would be useful in instances where an individual may choose not to lay a complaint but there is public interest for it to proceed.

The IPCA's suggestions for reform are modest. The IPCA could better serve *both* individual and public accountability should it be given greater remit towards recommending and awarding compensation. This would have the added benefit of moving something that is privately settled into the public sphere so there is transparency about the amount of money being paid out. There are significant advantages to increasing IPCA powers. It is a body that already has significant knowledge of policing practices and established relationships with the police. It is better placed for change than the courts.

B From the inside out: fostering a culture of accountability

While the concept of external leverage referred to above is important, so is the drive for internal change towards accountability. The police is a regulated profession with its own Code of Conduct.[226] Police retain a great deal of discretion to deal with problems in-house, particularly sanctions. Therefore, workplace culture and promoting internal accountability will be an important step. A code is only aspirational if there is nothing substantive underlying that in everyday police practice, particularly if, as the IPCA report notes, poor workplace culture may affect people reporting breaches of the Code of Conduct.

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[225] See Gov.Uk "Police super-complaints" (25 June 2018) <www.gov.uk>.

[226] New Zealand Police *Code of Conduct* (New Zealand Police, February 2022).

Policing is a profession that requires regular exercise of ethics and judgement. Ethical training was a key recommended outcome in the Police Conduct Inquiry Report. Police recruits now receive ethics training in their first week of training college.[227] The problem is that this is not enough, particularly in the confines of an artificial environment devoid of context.[228] Studies have shown that ethical conduct is largely determined situational (the particular context) and organisation (the ethical climate of the organisation) factors rather than individual character.[229] This is the idea that there are not bad apples, but bad barrels.[230] The prompt for the Inquiry into Police Conduct was public concern that there several bad individuals within the organisation; the result was rather that there were systematic flaws in the organisation that allowed bad apples to flourish. Organisational change still seems to elude police, given the IPCA's bullying and workplace report still noted the legacy of hierarchical structure and masculine dominated culture.[231] Similarly, in 2020 police established the National Integrity Unit to monitor internal corruption.[232] In its first year it investigated more than 230 incidents, noting many were "thematic in nature".[233] So as long as egoism and self-interest are promoted and rewarded, much like as in a law firm, collective welfare outcomes will be negatively impacted.

The startling similarities between noted issues in both the police and the legal profession indicate that both suffer from ethical climate issues, notably the ongoing issues with harassment and bullying.[234] Suggestions for reform within the legal sector have included ensuring all staff have a say in shaping policies that advocate for better ethical climate,

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[227] Inquiry into Police Conduct, above n 31, at [6.193.]

[228] This has also been expressed in relation to teaching law students ethics within the bounds of a classroom. See Christine Mary Venter "Encouraging Personal Responsibility: An Alternative Approach to Teaching Legal Ethics" (1995) 58 LCP 287.

[229] Paula D Baron and Lillian C Corbin "Ethics begin at home" (2016) 19:2 Legal Ethics 281 at 286.

[230] At 289.

[231] *IPCA Culture Report*, above n 206, at [14].

[232] New Zealand Police "New Police National Integrity Unit to guard against corruption" (press release, 12 March 2020).

[233] Sam Sherwood "Police's anti-corruption unit looks into more than 200 'matters' in 16 months" Stuff (Wellington, 18 July 2021).

[234] See Baron, above n 229, at 287.

particularly those 'at the bottom'.[235] This would be particularly important within the police because of its hierarchical nature. While certain initiatives have been launched, the IPCA report notes they need to be better co-ordinated, with "accountability at its core".[236] Internal policies may seem tangential to the police's relationship with the public. But a failure to deal with in-house culture means problems then leak into the core business of policing and interactions with the public. Pressure to cut corners or secure convictions at any cost then lead to situations like the planting of evidence in the case of Arthur Allan Thomas or coercing suspects into a confession in the case of Teina Pora.

It also needs to be acknowledged, even in this superficial manner, that policing is a difficult job. It is a calling, requiring immense resilience both mentally and physically. Police are subject to extreme stress and burnout, which in turn impacts on the ability to exercise moral judgement but also recruit and retain staff. In theory, improving the ethical climate of an organisation should improve things both internally and externally, ultimately benefiting accountability mechanisms. This coupled with external leveraging, including harnessing the power of existing forums such as the IPCA, can go some way to either ameliorating or preventing some of the harm that the police have the power to cause.

VIII Conclusion: who will police the police?

We are then left in a state of flux in terms of how we can hold the police accountable. However, now is the time to act. There has never been greater scrutiny on police behaviour and it is important to leverage that momentum. The best way to accomplish that is to make changes to the IPCA. If the IPCA gains more mechanisms to provide specific accountability goals both to the public and individuals, then this may improve the learning functions and prevent recurring incidents of harm. In turn, this can increase trust and confidence in the police.

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[235] At 291.

[236] *IPCA Culture Report*, above n 206, at [262].

So to end with another story. This time it is why trust and confidence in the police is important. Unchecked power may lead to people fearing the police. This ironically can lead to more harm as it often becomes self-fulfilling. This is the situation the United States now finds itself in because of over-policing, use of deadly force and ineffective accountability mechanisms. Christian Glass, a New Zealander living in the States, was terrified of the police. He rang them for help when his car broke down. He told them he was scared of them, as they held their weapons on them. They told him not to be scared, but they shot him when he refused to get out of the car. Christian was scared of the police and they fulfilled his fears. This is may be a drastic example and something we smugly think is not possible in Aotearoa, but that can only remain true with appropriate accountability measures in place. I ore ate tuatara ka puta ki waho.[237]

[237] A problem is solved by continuing to find solutions.

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