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UNITED NATIONS COURSE : 'HUMAN RIGHTS
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'COMPLAINTS AGAINST POLICE : HOW SHOULD THEY BE HANDLED

Hon Justice M D Kirby

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ABSTRACT

Mr. Justice Kirby is Chairman of the Australian Law Reform Commission. The first report of that Commission dealt with the method of handling complaints against the police. The report proposed a number of novel reforms which would have significantly changed the method of receiving, investigating and determining complaints against police in Australia. The proposals were incorporated in the *Australia Police Bill* which lapsed with the dissolution in 1975. The Commission reports assume the establishment of a national federal police force. However, the recommendations did not depend upon any particular organizational structure. They were designed to apply to a police force, however organized.

The question explored in this paper has also been the subject of a number of other reports during the past two years. Increasingly the old-fashioned model has proved unacceptable in communities made up of citizens with higher educational standards and growing awareness of their rights. The likelihood of changes in the present system is stressed in this paper. The present systems throughout Australia essentially leave the receipt, handling, investigation, determination and punishment in respect of civilian complaints entirely to police authorities. Mr. Justice Kirby suggests that this system will have to change, and that the question is not whether it will have to change but how and when.

Following examination of the present system in one State of Australia the issues and suggested criteria for any system of handling complaints, the paper proceeds to explore the reforms that should be introduced. It suggests that some reforms are really beyond dispute. They are agreed upon in most if not all of the recent inquiries and reports. There should be neutral ground for the receipt of complaints. There should be less formality in handling them. There should be a publicity of available procedures. Investigation should not be left to line staff but should be conducted by an independent squad. This is the "A 10" concept originating in Scotland Yard and spreading to many other police forces throughout the world to ensure unembarrassed investigations.

The "nub of the matter" is how serious complaints, short of criminal conduct, should be investigated. Mr. Justice Kirby proposes a role for the Ombudsman both to filter frivolous and vexatious complaints and to conciliate impartially which could be solved by apology or other means. For the rest, the issue is between an ex post review board or an independent tribunal. Although a Canadian report suggests the former, other reports, and Mr. Justice Kirby, favour the latter as providing the only feasible assurance of *real* justice in resolving the often emotional and contentious issues arising in police-public confrontations.

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COMPLAINTS AGAINST POLICE : HOW SHOULD THEY BE HANDLED?

The Hon. Mr. Justice M. D. Kirby *
Chairman of the Australian Law Reform Commission

INTRODUCTION

Complaints against police are news in Australia. Scarcely a week goes by but newspapers editorialize about the problem, weeklies contain their solutions and radio and television broadcasts present the public with the old conundrum *quis custodiet custodes?*

A number of events make the issue a topical one for debate here. Last year, the first report of the Australian Law Reform Commission proposed significant changes in the way in which complaints against the police should be handled in the case of Federal policemen.¹ Secondly, the British Parliament has now enacted the *Police Act 1976*. This Act embraces significant changes in the handling of complaints against police in Britain. As Australian police forces are substantially modelled after the British fashion and as ideas for legislative reform are frequently taken from Britain, the new Act is plainly a significant one. Thirdly, State police forces in Australia have recently undergone a number of enquiries which arose out of citizens' complaints. An inquiry in the State of Victoria by Mr. Beach, Q.C., produced a report which suggested the bringing of criminal charges against a large number of serving police officers.² The report promoted a strenuous debate and equal protests in police and civilian circles.

There are some who say that the lesson of the Beach inquiry in Victoria is that a new system is needed. Rather than leaving complaints to fester until they boil over into a major public enquiry, should not a new procedure be found which is and is seen to be manifestly fair to policemen and citizens alike? Is it acceptable, in the modern age, to leave the receipt, handling, investigation and determination of complaints against police to the

internal processes of the police force itself? That is the issue to which this paper is addressed. The theme is not harassment of the police. It is not succour to the enemies of society. Rather it is the recognition of the principle that the maturity of a society can be judged by the way in which it protects the individual with a grievance against authority. The issue should not be seen in isolation. It is part of a general movement which has produced the call for openness in government, review of administrative decisions, protection of privacy, the appointment of ombudsmen, concern for the rights of prisoners and for human rights generally. Some see this movement as a sign of weakness in society. I declare it to be a sign of its strength.

CRITERIA

At the moment, with minor exceptions, citizen complaints against police forces in Australia are handled entirely within the relevant force. In some cases there is a system of ex post review by an independent person or tribunal. Generally speaking, however, police themselves investigate complaints against their colleagues. Indeed, normally, the investigation is carried out by the line superior of the officer under complaint. Disputes are determined and punishment, if any, inflicted by the Commissioner of Police, on the recommendation of the investigator. Civil liberties bodies, lawyers and others complain that this leads to "covering up" complaints or discouraging them.³ As these complaints and criticisms grow more vocal, proposals for reform come up for consideration. These range from improving the present internal systems (to ensure a more efficient and fair procedure), on the one hand, to taking responsibility for handling civilian complaints against police entirely away from the police and giving it to a completely independent body, on the other.

In assessing the adequacy of any mechanism for handling civilian complaints against the police, it is suggested that the following objectives at least will have to be taken into account -

The protection of the public: The public has a right to expect fair and impartial law enforcement. Any misconduct by police officers should be detected and thoroughly investigated and, if necessary, appropriately punished.

Achievement of a high standard of law enforcement: This standard is related to the level of public confidence in the police. Public confidence will not be high if it is believed that misconduct by police officers

is tolerated and unworthy officers continue to play a part in the administration of justice.

Protection of the police: The police require protection from false allegations and from the erosion of self confidence and discipline in the service, each of which is necessary for morale.

A TYPICAL AUSTRALIAN SYSTEM

Nine Australian Police Forces.

In Australia there are nine distinct major police forces. As well, there are numerous other law enforcement offices. Each of the States of Australia has its own police force. The Australian Capital Territory and the Northern Territory each has a separate force. In addition, the Commonwealth Police attend to certain policing functions of the Federal Government. The proposal by the former Government to amalgamate the two Territory forces and the Commonwealth Police into an "Australia Police" was incorporated in the *Australia Police Bill 1975*. However, this Bill lapsed with the dissolution of Parliament in November 1975. The present Australian Government does not propose to proceed with the amalgamation. It was the proposed amalgamation of three of Australia's police forces that occasioned the inquiry by the Law Reform Commission.

The procedures adopted in the various Australian police forces to deal with citizen and other complaints are set out in some detail in *Complaints Against Police*.⁴ It is not to the point to scrutinize the individual difference from force to force.⁵ It will be sufficient to examine the position in the largest police force in Australia, the New South Wales Police. That procedure is to be found, in part, in section IX of the N.S.W. Police Rules. These Rules are made under the *Police Regulation Act, 1899* and the *Police Regulation (Superannuation) Act, 1906*. The procedure is as follows -

Reception of Complaints

A complaint made by a civilian must be in writing, signed by the complainant.⁶ Anonymous complaints are sometimes investigated. The complaint must be submitted to the District Officer in charge of the police officer complained of.

Investigation

Most civilian complaints are referred to the Internal Affairs Section of the N.S.W. Police. This Section was formed in 1974. Its present strength is ten policemen, one policewoman and five public servants. Having regard to the very large number of complaints received, only a fraction can be investigated by this Section. The Section considers complaints that come to it and decides whether, and if so by whom, the complaint will be investigated. In minor cases where the complaint is made at the local police station, the investigation may be carried out by the Metropolitan Area Superintendent, without reference to the Internal Affairs Section.

Investigation is carried out by a commissioned police officer. He may be the officer in charge of the division to which the policeman complained of is attached. He may be a specialist officer from the Criminal Investigation Branch. In some cases, a member of the Internal Affairs Section himself conducts the investigation.

Every complaint must be the subject of a report and explanation by the member of the force, the subject of the complaint. Reports and statements must be obtained from other police or civilian witnesses with a view to ascertaining the facts. Following the inquiry a report and recommendation must be submitted to the Police Commissioner with a view to a reply being forwarded to the complainant. ⁷

Determination

The Commissioner has several courses of action open to him -

- * He may find the complaint unjustified.
- * He may find it justified but not serious enough to warrant disciplinary action. In such a case the matter may be dropped or dealt with informally by caution or reprimand. ⁸
- * He may find that the facts as disclosed by the reports and statements may justify disciplinary action. In such a case the Metropolitan or Area Superintendent receives the case with a recommendation and a draft charge under police discipline. This sets out the offence. Before any such recommendation and draft charge are submitted, the Superintendent may, in his discretion, order the holding of an open departmental inquiry to ascertain the facts and to see whether the preferring of definite charges against the police officer is justified. After such an inquiry a charge can then be made. ⁹

* He may find that a criminal offence is disclosed. In such a case the matter is prosecuted in the Court.¹⁰

Disciplinary Proceedings

If a disciplinary charge is laid, it is heard by an officer not below the rank of Superintendent, who is the officer in charge of the district in which the person complained of serves. For the hearing of the charge, court procedure may be followed. Any person not connected with the inquiry is normally excluded.¹¹ The complainant is to be present if possible. Only the police officer charged is entitled to be represented by counsel. No person is entitled to have copy of the evidence given in any departmental inquiry or open departmental inquiry, except a police officer found guilty who wishes to appeal.¹²

Punishment

Once the Metropolitan or Area Superintendent determines the charge, if he finds it proved, he will make a recommendation to the Police Commissioner concerning punishment. This recommendation must take into account the officer's past history.¹³ The decision as to the penalty, if any, to be imposed is reposed in the Commissioner. It may be a reprimand, loss of seniority, reduction in rank, suspension, discharge from the force or payment of a fine.¹⁴

Appeal

The policeman has a right of appeal concerning penalty or finding to the Crown Employees Appeal Board which is established under the *Crown Employees Appeal Board Act*. The Chairman of the Crown Employees Appeal Board is a judge. The other members are appointed respectively by the Commissioner and the relevant police union.

REFORMS BEYOND DISPUTE? PROCEDURAL CHANGES:

Major and Minor Changes

The system outlined above is fairly typical of Australian internal discipline systems. Indeed, it is probably typical of the model which was adopted throughout the common law world. During the last decade, especially, numerous proposals have been advanced for the reform of the model. These proposals have ranged from suggestions for minor procedural reforms to calls for major changes, involving the interposition of an independent body which can partially or wholly take over the handling of complaints. Those who press for minor reforms, tend to stress the difficult tasks of the police in modern

society, the need to uphold morale and discipline. Those who urge major reforms stress the growing openness of government and the integral role of a respected police service in a free society. It is inevitable and inescapable that general attitudes to such questions will govern the approach taken to the reform of present procedures. Nevertheless, an analysis of the many reports that are now available on reforming systems for the handling of complaints suggests that some proposals are common to several reports. Some of them have gained general acceptance in police quarters. Most reforms of this class relate to procedures for processing complaints in a more obviously fair and independent way.

Reception of Complaints

An objection frequently raised by critics of the current model is that many complaints are never made at all. The potential complainant who has a proper objection to police conduct does not know that any such system exists or how to initiate it. This has produced the call for a public information campaign to increase awareness of such matters. The production of an information pamphlet might be a first step. It would be vital to utilize police public relations facilities and other means to educate the community concerning its rights. Because of the special problems of members of the community who do not speak English with ease, some attention could be given to providing information in foreign languages.¹⁵ The value of publicity is suggested by the recent investigation in Queensland by Scotland Yard Officers. Following the publicity given to their inquiry, they apparently received many other complaints against the police, although unrelated to their exercise.¹⁶ The Victorian Inquiry would appear to have had a like experience.

The present requirement that the complaint must be signed and in writing clearly discourages potential complainants. Anonymous complaints may be entirely excluded under the rules. However reprehensible may be the anonymous accuser, it has been said that individual citizens fear police retaliation if they complain and regard the present procedure as involving an unequal battle between them and the brotherhood of the service. One of the major arguments for the introduction of an independent element is that, by removing fear of retaliation, anonymous complaints will diminish.¹⁷

Another cause of anonymous complaints is the fear that a signed document may be used against a complainant. In the United States, there is

said to be a common practice designed to discourage complaints of charging the complainant with filing a false complaint.¹⁸ There is no such specific offence in New South Wales. It is said that a policeman accused may fabricate counter-charges to deter civilian complaints.¹⁹ There is no way of knowing whether such allegations are justified in more than isolated cases.

To overcome difficulties such as these proposals have been made, some from within the police service. The Victorian Police Standing Orders call for a "courteous, full and unprejudiced hearing" of any complaint.²⁰ More specifically, the English *Police Act 1964* imposes an obligation immediately to record every complaint when it is made.²¹ Other proposals have lately been advanced by which complaints would be received in "neutral territory" and not necessarily in writing in the first instance. It may be difficult for conscientious, honest policemen to understand. The fact remains that some citizens are fearful of making a complaint about one member of the police force to his colleagues, at a police station, for the specific attention of the accused's superiors. This fear and skepticism may warrant improved (or alternative) reception procedures.

Investigation of Complaints

Skepticism inevitably arises in some minds about policemen investigating other policemen. Suggestions are made that the whole effort of the investigation, frank criminality apart, is to establish the policeman's case rather than the complainant's. Professor Harding says that the public needs to be convinced that most investigating officers would in no sense regard the accused's cause as their own.²²

Present typical Australian systems may fall down by this criterion. Investigation by the officer in charge of the accused's division will undoubtedly offer the advantage of familiarity with the local area and with the officer complained of. But it clearly involves the disadvantage that personal friendships may intrude. The other qualities of the officer complained of may be given undue weight. The appearance, if not the reality, of "cover-up" will leave a sour taste in the mouth of the complainant.

No doubt some of these reasons, and perhaps the investigative advantage of independence, persuaded police forces in England and Western Australia (and others from time to time) that the investigator should not be the superior in the same line of command as the policeman whose conduct is being investigated.²³ In England, the chief officer of police is encouraged to

borrow officers from other forces to conduct investigations of the more serious complaints. Although this practice has sometimes been followed in Australia, police sources are skeptical about the success, especially where investigators are imported from overseas.

The call for independent investigation often leads to the suggestion of a special complaints unit in the police force. Such a unit, known as "A 10", has operated at Scotland Yard since 1972. With a much more limited role, the N.S.W. Force has an Internal Affairs Section. It is said that a special unit of this kind offers the advantage of skilled investigation, allows the rest of the force to concentrate on the prime duty of law enforcement and, as well, achieves an appropriate degree of independence and integrity in investigations.

Of course, there are some who will never be content whilst police investigate police. They will point to occasional failures within the "incorruptible" unit. Others will point to experience in the United States which suggests that officers assigned to this type of unit generally find themselves ostracized by their colleagues.²⁴ In England, this last possibility has led to constant change in the personnel of the squad. Members are chosen from different parts of the country and of the service.

There are a number of ancillary improvements often suggested in connection with the investigation of complaints. It is said that the complainant should have access to investigation reports, unless disclosure might prejudice other police investigations. It is argued that, especially in serious cases, investigation should be conducted in secret. Officers under investigation should not be aware of that fact. They, and their colleagues, should not be alerted to the investigation until the chosen time. It is objected that any person complained of, including a policeman, ought to be told of the fact of the complaint and of its terms.²⁵ But it is also true that in some circumstances investigation might be hampered by premature disclosure of the complaint. In trivial cases, the easiest means of handling a complaint may very well be to confront the officer directly with the allegation. In more serious cases, proper preparation may be needed before this is done. This is no more than basic investigative procedure, used to much effect by any skilled police investigator doing his job.²⁶

Disciplinary Proceedings

It seems to me that there are distinct disadvantages in principle in the procedure by which charges made against a junior officer are heard

by another in the same line of command above him. The procedure has all the ingredients of a hopeless conflict situation. It would require others making like decisions to disqualify themselves, for fear of the appearance of partiality. This is a fundamental question to which I shall return. There are ancillary procedural reforms that are suggested to improve the handling of complaints by whatever tribunal is chosen to do the job. Many of these are common to the several reports now available.

One proposal is that a complainant should have the right to counsel. This would allow him to examine and cross-examine witnesses and put his complaint to best advantage so that it can be fairly determined. It is also suggested that proceedings should normally be open to the public, so that confidence in the resolution of the complaint can be publicly achieved. Bentham put forward rationale of this. Courts, he said, should be open so that those who have the responsibility of judging should themselves be on trial.²⁷ His observation may not be entirely inapt for decision making involving the police, bearing in mind the importance of public confidence in the objectivity and fairness of the result. One can understand police fears that experienced criminals would seek to misuse such a facility and turn a much publicized public hearing into a trial of the police officer accused. Obvious limits and protections against such abuse would have to be built into any such system. The facility to close the hearing and to prohibit publication and the ordinary superintendence by a tribunal of its own proceedings may provide adequate protection for a police officer accused. It will always be difficult to persuade the citizen that he should have confidence in a body which meets in secret and is not subject to the scrutiny of public gaze.

There are many other subsidiary questions going to the procedures to be adopted to resolve complaints. These include the onus to be applied, whether penalties should be attached for false or malicious complaint and so on. They cannot be explored here.

Punishment

A frequent objection of present systems is that, even when a civilian complaint is established, police officers are inadequately punished by their colleagues. On the other hand, some evidence suggests that punishment²⁸ even for minor violations of police departmental rules can often be heavy.

Many inquiries have concluded that there is a need for a greater variety of sanctions than the job oriented punishments presently applied. New remedies such as letters of apology, expunging improper arrest records or unsubstantiated complaints, repair or replacement of damaged property and even the award of damages have been suggested.²⁹ Job oriented sanctions are frequently of small comfort to the complainant. The Swedish and Norwegian Ombudsmen are empowered to recommend compensation for citizens injured by public officials, including unidentifiable officials. Most reports conclude that present civil remedies are little value because of the expense, delay and complexity involved and because of the nature of the only ultimate remedy the courts can offer: damages in money.

FUNDAMENTAL CHANGES

In the Investigation of Complaints

Are the reforms suggested above enough? It has been argued that police investigators, even those attached to a special unit, remain under great pressure to "protect their own". The present system of investigating complaints appears, from an organizational point of view, much better suited for handling violations of internal rules and procedures that disrupt normal and routine operations of the force, than for responding effectively to complaints from outside the force against members of it. The "A 10" investigation system may provide safeguards against over protection of colleagues, discourtesy to the public, discouragement of complaints and so on. However, such a system still depends upon the enthusiasm of high-ranking officers in the enforcement of the safeguards against group solidarity.³⁰ There is an obvious tension here between the need, in the name of justice, that complaints be thoroughly probed in a fair and independent way and the need, in the name of morale and co-operation, that superiors should understand the difficulties, stresses and pressures applied to rank and file policemen doing their job.

There may well be occasions, as police assert, when the present "internal" system imposes on the accused officer a much heavier standard than any court would. The fact remains that many, if not most complaints, originate in the lower socio-economic classes of society. Whilst the receipt, investigation and determination of complaints are all made by the police, the people will not trust the honesty and integrity of the system. They will fear

reprisal. No one wishes to encourage the harassment of police by excessive complaints. No one should wish to discourage justifiable complaints that will, once corrected, restore public confidence in the force.

In the context of a proposed national police force, scattered throughout the continent, the inconveniences of a parallel extra-police force, together with the arguments relating to the unique skills of policemen as investigators persuaded the Law Reform Commission to accept the "A 10" model. Certain exceptions were proposed. However, these were limited in number and kind. The independent element was to be secured, in the investigation phase, by an "elite squad of incorruptibles".³¹

In the Determination of Complaints

The fundamental reason for introducing an independent element in determining complaints is that stated by Lord Campbell -

"It is of the last importance that the maxim that no man is to be the judge in his own cause should be held sacred.

And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest".³²

It is said that a body, independent of the force, will undermine the discipline of commanding police officers and diminish their prestige within the hierarchical system, by depriving them of ultimate discipline of personnel under command. Goode suggests that the need for an independent body has nothing to do with "trust" and "command".³³ It arises from the fact that a commanding officer must find it difficult to adjudicate a complaint fairly.

A somewhat similar objection is to the effect that police morale will be destroyed if complaints are handled by an outside body which is not as "sympathetic" to police difficulties as superior officers are. In part, this will depend upon the structure and personnel of the independent body. Similarly, although not organized along disciplined lines, the public service does not appear to be demoralized by external controls of ombudsmen.³⁴

There is understandable police apprehension that morale will be undermined, enthusiasm for the task diminished and much police time and public money wasted dignifying unfounded complaints by thorough investigation before an outside body. The criminal, it is asserted, usually tries to defend himself by accusing the police of irregular procedures and corruption. The charge is easy to make and always pregnant with emotion and publicity. The experience overseas, notably

with the Philadelphia Civilian Review Board, does not appear to support this objection.³⁵ If an appropriate filter against vexatious, frivolous and malicious complaints is interposed, the chances are small that a properly constituted tribunal which comprises experienced personnel will allow unjustified harassment of police authorities. As to loss of enthusiasm, an external system is not designed to deter *legitimate* law enforcement. In the long run the use of illegitimate and illegal means to fight illegality is contrary to the aims of law enforcement. The administration of justice should not tolerate dubious conduct in its name and by its officers. Furthermore, the oath taken by police officers in New South Wales binds them to enforce the law. If they do not do so "to the best of [their] power" they are themselves guilty of misconduct.

The President's Task Force in the United States came to grips with the fundamental issue here.

"No lasting improvement in law enforcement is likely unless police-community relations are substantially improved".³⁶

The increased public confidence in the way complaints against police are handled could be a significant step towards improving public confidence in police forces.³⁷

REFORM REPORTS: WHAT DO THEY PROPOSE?

Australian Law Reform Commission "Complaints Against Police", 1975

Some of the proposals of the Law Reform Commission have already been mentioned. It may be useful to collect the major reform suggestions that have been made for handling complaints against police in recent years.

Reception: The Commission suggested that citizens ought to be able to lay a complaint against police not only with the police but, if they chose, with the proposed Federal Ombudsman or with certain Commonwealth departmental offices.³⁸ In addition to establishing "neutral ground", important procedural changes were recommended laying emphasis upon minimizing formalities. The complaint need not be signed. But anonymous complaints should not be ignored.³⁹ The system should be given adequate publicity. Each complaint should be immediately recorded and, if made to the police, it should be reported to the Ombudsman.⁴⁰

Investigation: The Ombudsman's first task would be to screen complaints to eliminate those which were trivial or vexatious. A complaint not dismissed

on these grounds would be referred to a new internal discipline unit called the "Internal Security and Discipline branch".⁴¹ The organizational arrangements of the branch, based on the English "A 10" model were designed to ensure that the investigative function remained within the police force but was infused with a degree of independence. Normally investigations would be conducted in secret.

In certain limited circumstances it was proposed that the Ombudsman's office should have residual investigative powers:

- * Allegations against officers senior to all those in the Branch. (i.e. the Internal Security & Discipline Branch).
- * Allegations against a member of the Branch.
- * Minor cases but not so trivial as to warrant no action at all.
- * Cases linked with other matters being urgently investigated by the Ombudsman.
- * Cases involving the most extreme urgency.
- * Cases involving apparently inadequate investigation, by the Branch.⁴²

Determining Complaints: Should an investigation reveal evidence of a criminal offence warranting a charge against a police officer, the Ombudsman is to be informed. The normal steps taken by prosecuting authorities to institute proceedings are to be initiated.⁴³ The matter should then proceed normally in the criminal courts.

Where the offence complained of is a minor one or a case of misunderstanding or is otherwise susceptible to conciliation, it was proposed that the Ombudsman should make an attempt to settle the case informally. It was hoped that many tensions between police and citizens could be resolved in this way. No adequate procedure with an independent conciliator exists at present. The experience of the law seems to favour developments of this kind for resolving social friction.⁴⁴ The work of the Privacy Committee of N.S.W. shows how much can be achieved by mediation and conciliation.

If the processes of investigation, persuasion, mediation and conciliation fail or are considered inappropriate or if the matter, short of criminal charges, involves serious and intractable allegations, it was proposed that the issues be determined by a special tribunal known as the "Australia Police Tribunal". This Tribunal comprised a president and other presidential members (judges of the Australian Industrial Court) and non-presidential members:

all of whom were legally qualified persons. The Commission did not favour the participation of Commissioner's representatives, police association representatives, civil liberties representatives or "citizens" representatives.

The functions suggested for the tribunal were three. It would replace present Police Appeals Boards which have determined internal appeals against penalties imposed on members of the force by superior officers. It would also become the body to determine the serious civilian complaints mentioned above. Finally it was suggested that the tribunal should have a power of general inquiry which could be activated by reference from the Minister.⁴⁵

Important procedural safeguards were proposed. These included the facility of public hearings and legal representation, power to close the court and prohibit publication of evidence or documents relating to the proceedings.⁴⁶

Penalties and Appeal: Although the Commission did not favour confusing the proceedings with a power to grant damages, several alternative and more appropriate penalties were provided for. As well, a wide range of appeals was proposed both in respect of internal disciplinary matters and in respect of the determination of public complaints.⁴⁷

South Australian Criminal Law and Penal Methods Reform Committee: Criminal Investigation, 1974⁴⁸

The Report of the South Australian Committee, signed in December 1974, recommended that the function of investigation should remain with the police. Some measure of independence was proposed in the suggestion that investigations should be conducted by an officer of a division different to that of the officer under investigation. In the case of a serious offence, it was suggested that investigation should be conducted by a member of another police force.⁴⁹ South Australia has had since 1973 a Police Inquiry Committee. This consists of a special magistrate, a justice of the peace and a commissioned police officer.⁵⁰ The Committee proposed that public complaints against police officers should be determined by this Committee. Procedures not dissimilar to those suggested by the Australian Commission were advanced, including representation by counsel for both complainant and police officer. To secure access to the Inquiry Committee, the member of the public with a complaint was to be entitled to lay a charge under Police Regulations. The South Australian Committee favoured empowering the Police Inquiry Committee to assess monetary compensation which a complainant ought to receive, if the complainant elected to take that course.

The Grosman Report: Report on Policing: Problems of Prince Edward Island (Canada), 1974

A Report by Professor Grosman in October 1974 evidences the North American sympathy for participatory democracy. The report favoured the concept of local police committees, an idea not dissimilar to civilian review boards in the United States. Such committees, it was suggested, should be set up in all major towns. They would comprise the mayor or chief elected officer of the municipality and two other persons appointed annually by the Council, who would presumably be laymen.⁵¹

As well as being generally responsible for maintaining and establishing the police force, the report suggested that this committee should be given specific authority to inquire into the conduct of individual members of the police force and to refer such conduct to the Chief of Police for inquiry if it was thought warranted. Following such inquiry, the results would be reported to the Committee which would then determine the action, if any, that should be taken.⁵²

The criteria advanced for this approach were that public confidence in the complaint handling process was necessary for the integrity of the force but that the force should be protected so far as possible from unfounded complaints.⁵³

Maloney Report: The Metropolitan Toronto Review of Citizen-Police Complaint Procedure, 1975

In May 1975 Mr. Arthur Maloney, now the Ontario Ombudsman, recommended quite radical changes in the system for handling complaints against the Ontario Police. He studied and reviewed a large number of systems in different parts of the world including Australia. From this study he concluded -

"Fundamental changes are needed to meet today's needs in a modern and growing city and to enhance the ability of the Toronto Force to provide the kind of first class police service to which the metropolitan Toronto residents have grown accustomed".⁵⁴

Although arrived at quite independently, the Ontario Report's proposals are somewhat similar to those contained in the Australian Commission's Report. They may be summarized as follows -

- * The public and the news media should become acquainted with the system.

* The majority of complaints could and should be resolved informally.

* The Chief of Police should retain ultimate disciplinary powers.

* A special complaints department should be set up in the police force to carry out the function of investigating complaints.

* A commissioner of citizen complaints should be appointed to review all investigations and to decide whether and how complaints will be dealt with.

* The procedure for dealing with minor offences should be informal and should take place in the chambers of the citizens' commissioner.

* A trial tribunal (consisting of a specially legally qualified person, a member of the police force and a well respected citizen) should be established to conduct hearings of major offences.

* There should be a right of appeal to the courts in all cases.

* Complainant and police officer should have a right to be represented before the tribunal.

* All hearings should be open to the public. 55

Commission of Inquiry into the Royal Canadian Mounted Police: Public Complaints Internal Discipline and Grievance Procedure, 1976

The report of this national Canadian Commission was delivered in January 1976. The report did not follow the Maloney model. The report asserts that "in completely removing the adjudicative function from the responsibility of police management" the Maloney model was contrary to the philosophy that the police must retain initial responsibility for action in all aspects of public complaint procedures.⁵⁶ The approach of the Canadian Commission can be understood in the light of this philosophy.

The Commission based its proposals on a premise that a complainant should be entitled to *appeal* to an independent authority when dissatisfied with the way in which police authorities deal with a complaint.⁵⁷ The need for public confidence in the complaint handling system suggested review through the mechanism of the Federal Police Ombudsman.⁵⁸ A number of what have been called "procedural reforms"⁵⁹ of the type advocated by the Australian Commission were recommended as was the appointment of a special investigation unit within the police force.

Police Act 1976 (G.B.)

In August 1976 the Royal Assent was given to the *Police Act 1976*. The provisions of this Act are superimposed upon reforms which followed the *Final Report* of the Royal Commission on the Police, 1962 and the administrative reforms introduced by Sir Robert Mark, Commissioner of the Metropolitan Police Force. Most notable of these was the creation of the "A 10" Unit.

Under the new Act reports of investigations carried out by the police into complaints made by members of the public are to be passed to a Complaints Board. If the relevant Chief Constable has decided that disciplinary charges should be brought against an officer, it will be for the Complaints Board to decide whether they should be heard by the Chief Constable (as at present or by a Tribunal. This Tribunal consists of two Board members, not policemen, and the Chief Constable. The Chairman of the Tribunal will be a layman. If the Chief Constable has decided that there should be no charges, the Complaints Board may over-rule him. It may recommend charges and, if necessary, bring the charges itself before the Tribunal. The system is therefore not simply an ex post review. In appropriate cases, the initial determination will be carried out by an independent tribunal, the majority of whose members are not policemen.

Sir Robert Mark has expressed opposition to the system which is to commence operation in 1977. Indeed, he has threatened to retire prematurely rather than serve under it. But even Sir Robert Mark said in his 1973

Dimbleby Lecture -

"We realize...the [present] procedure has one major drawback. It looks like a judgment of policemen by other policemen. So long as this remains the case some of you will perhaps be, understandably, skeptical. No one likes to accept the verdict of a person thought to be a judge in his own cause. This is why the Home Office is trying to devise a system of outside review of such investigations which will have everyone's confidence".⁶⁰

The system ultimately devised does not, apparently, have Sir Robert Mark's confidence. It has, however, become law. It promises an important reform of English police procedures.

CONCLUSIONS

The reports mentioned above demonstrate an international concern about the adequacy and integrity of present methods of handling complaints against police officers. It is scarcely likely that Australia and countries with similar police systems will be able to quarantine themselves from the moves that have been traced above. These moves reflect developments in Europe and particularly in the United States along similar lines. The international debate is evidence of growing awareness among citizens of their rights. This is an awareness that parallels higher education levels in a community and the heightened social awareness produced by modern means of communication. There is a growing conviction that the interests of the police, the public and law enforcement itself require the introduction of independent elements which have previously been missing from the system. The proposals put forward have secured support from some police quarters, though not all.⁶¹ Are there common grounds that can promote agreed reforms?

Most inquiries can agree on ancillary matters. There should be neutral ground for the receipt of complaints. There should, perhaps, be less formality in the way the complaint is initiated. There should be multiple ways of activating the machinery. There should be greater publicity of the procedure available. These are minor matters.

More important is the general trend in favour of leaving investigation to the police but insulating the investigators from their colleagues. The "A 10" model continues to spread its persuasive example around the world. The removal of line superiors from the embarrassment of investigation seems to have achieved growing acceptance.

The nub of the matter is where the determination of the complaint should lie. Many will agree that the Ombudsman, or a person holding a similar office has a role to play in filtering frivolous or vexatious complaints. Perhaps he can also play a role in seeking to achieve informal resolution by conciliation. All will agree that criminal charges should proceed through the normal courts of the land. This still leaves the vexed area of those serious complaints which, short of criminal charges, require serious resolution. The way one approaches this issue depends upon value judgments. Those who place greater store on the maintenance of morale and discipline will tend to favour the ex post review proposed for the Royal Canadian Mounted Police. Those who place greater store upon public confidence in the police force and public

acceptance of the integrity of law enforcement officers will seek to infuse an independent element at an earlier stage in the complaints determining mechanism. They will feel that a review board, faced with no more than a sheaf of well prepared reports, is ill equipped to do *real* justice in the often emotional and contentious issues that arise in police - public confrontations. Others will no doubt apply a different value judgment.

For my part, I believe that the reputation of the police and the integrity of the system require something more than an ex post examination. What is needed here is not a sop to demands for independence but the reality of vigilant scrutiny. Nothing less is required if, in the modern age, the officers of police are to continue to command the respect which authority requires if it is to be effective. Views will differ on this. The opinion I express is reflected and explained in the first report of the Australian Law Reform Commission. It was contained in the *Australia Police Bill 1975* which was before the Australian Parliament in November 1975, when the Parliament was dissolved. It is now under the study of the new Australian Government. It gains support from similar conclusions reached in parallel inquiries made elsewhere on this vexed question. The recent legislation enacted at Westminster gives new impetus to the debate. It is likely that Australian Parliaments will before long have to come to grips with these problems.

FOOTNOTES

- * B.A., LL.M., B.Ec. This is a revised version of a paper read to the Institute of Criminology Seminar, Complaints Against Police, Sydney, 22 September 1976.
- 1. The Law Reform Commission Report No. 1 *Complaints Against Police*. Hereafter referred to as A.L.R.C.1.
- 2. Report to the Victorian Government by Mr. Barry Beach, Q.C., on the Victorian Police (not yet released); reported in *The Age* 13 October 1976, p.1.
- 3. R. Harding, Police Disciplinary Proceedings in England and Western Australia (1971-72) *University Western Australia Law Review* 195 at p.195.
- 4. A.L.R.C.1 pp.14ff.
- 5. M.R. Goode, Administrative Systems for the Resolution of Complaints Against the Police: A Proposed Reform *Adelaide Law Review* (1972) p.55 at pp.55-56.
- 6. Rule 8.

7. Rule 8.
8. Goode, *op cit* at p.56.
9. Rule 16.
10. Rule 22.
11. Rule 13 (c).
12. Rule 13 (g).
13. Rule 13A.
14. Goode, p.13.
15. A.L.R.C. 1, p.27.
16. *Sydney Morning Herald* 27/8/75, p.9.
17. A.L.R.C. 1, p.26.
18. Bent, A.E., *The Politics of Law Enforcement*, p.76.
19. *National Times*, 4-9 August, 1975, p.14.
20. St. Johnston, E., *A Report on the Victoria Police Force* p.168.
21. A.L.R.C.1, p.14.
22. Harding, p.195.
23. *Ibid*, p.205.
24. Bent, p.76.
25. St. Johnston, p.69.
26. A.L.R.C. 1, p.39.
27. Bentham cited by Lord Shaw in *Scott v Scott* [1913] A.C. at p.477.
28. *U.S. Task Force Report.*, p.197.
29. W. Gellhorn, *When Americans Complain: Governmental Grievance Proceed* p.192.
30. M. Beral & M. Sisk, *The Administration of Complaints by Civilians Against Police (1963-64)* 77 *Harvard Law Review* 499 at 517.
31. A.L.R.C. 1, p.19.
32. Quoted in Morris N. & Hawkins, G.J., *The Honest Politicians Guide to Crime Control*, p.99.
33. Goode, p.71.
34. G. Marshall, *Police and Government*, p.111.
35. Cf. Beral, p.217.

36. Quoted in Morris and Hawkins, p.98.
37. A.L.R.C.1, p.21.
38. A.L.R.C.1, p.24.
39. *Ibid*, p.26.
40. *Ibid*, pp.27-29.
41. *Ibid*, pp.31-32.
42. *Ibid*, p.32.
43. A.L.R.C.1, p.33.
44. *Ibid*, p.41.
45. *Ibid*, p.42.
46. *Ibid*, pp.46-49.
47. *Ibid*, p.55.
48. This was the Second Report on *Criminal Investigation* by the Committee.
49. *Ibid*, p.50.
50. *Ibid*, p.52.
51. At p.40 of the Report.
52. *Ibid*, p.42.
53. *Ibid*, p.41.
54. At p.206 of the Report.
55. *Ibid*, pp.207-225.
56. At p.69 of the Report.
57. *Ibid*, p.71.
58. *Ibid*, p.83.
59. *Ibid*, pp.71-81.
60. Sir Robert Mark's *Dimbleby Lecture*, quoted in A.L.R.C.1, p.2.
61. Following support of the A.L.R.C.1 proposals by the Police Association of New South Wales, the Premier of New South Wales, Mr. Wran, has now announced that his Government proposes to introduce legislation along the lines of that suggested in A.L.R.C.1, *Sydney Morning Herald*, 6 November, 1976, p.2.