Police Act Review

Building for a modern New Zealand Police

Issues Paper 2: **Governance and Accountability**

July 2006

BUILDING FOR A MODERN NEW ZEALAND POLICE

1. Introduction

Views are being sought on how some major issues in the Police Act review are framed for discussion

In March 2006, a project began to rewrite the legislative framework for policing in New Zealand. This is the second of a series of issues papers that allow for early input on how key topics are dealt with when drafting modern legislation for New Zealand Police. It focuses on Police's governance and accountability framework. This theme has been selected because a clear and robust set of governance and accountability arrangements is widely accepted to be an important feature of democratic policing [see boxed text]. Key topics this paper will explore include:

- The legal status and name of New Zealand Police
- Appointment, terms of engagement and tenure of the most senior police
- Role and functions of the Commissioner of Police
- The relationship between the Commissioner and the Minister of Police
- Police's statutory reporting and performance assessment arrangements
- Provision for independent inquiries.

Governance and accountability arrangements are key concerns for policing

> *Why should we be concerned with the arrangements for the governance and accountability of policing? Perhaps the most important reason for our interest in such questions concerns the unique relationship between policing and the institutions of democracy and their legitimacy. The powers that the police possess to protect fundamental liberties simultaneously provide the potential for severe abuses of those freedoms. The paradox of police governance is that the state is both the ultimate source of a solution to the problem of police accountability and the main beneficiary of the reproduction of the specific order. Thus, the state must promote the best arrangements both to empower and constrain the police, but at the same time impose clear limitations on its ability to influence policing in its own favour …..*
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> *Police accountability also involves broader questions of police effectiveness. Even in our increasingly globalised world, much crime and disorder remains essentially local in character. Police effectiveness in dealing with such problems depends crucially upon information and co-operation provided by the public. In turn, this depends on the police service being viewed as legitimate and worthy of trust and co-operation. Effective mechanisms of accountability and governance are vital in promoting such legitimacy.*
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> Trevor Jones, "The governance and accountability of policing", in Tim Newburn (ed.), *Handbook of Policing* [Devon: Willan Publishing, 2003], 603-627, at p 606.

Unusually, Police's constitutional position is not spelt out in legislation - instead, it reflects a mixture of law, convention and practice

Despite the importance of setting out clear governance and accountability arrangements for policing, the basic constitutional position of New Zealand Police has never been specifically addressed in legislation. Rather, Police's governance and accountability framework has been adapted to changes in public sector management, and experiences of successive Commissioner-Minister relationships. The resulting patchwork of law, convention and practice guides the way New Zealand Police relates to government. The Police Act Review provides a valuable opportunity to debate the most appropriate governance and accountability platform for Police in the future.

2. Background

A convenient starting point is Police's current governance and accountability environment. For some, this is familiar territory. If so, you may wish to fast forward to section 3 of this paper (on page 5), which outlines options for strengthening and formalising Police's governance and accountability arrangements. For others, what follows is an introduction to this specialist topic. It begins from the uncontroversial assumptions that keeping the peace and maintaining law and order are prerogative powers of the state, and that a public police force is part of the executive branch of government.

Legislation

The State Sector Act 1988 excludes Police from the list of public service departments, characterising it instead as "an instrument of the Crown". The Public Finance Act 1989 defines departments to include instruments of the Crown, meaning Police must comply with statutory reporting requirements and lawful Ministerially-required financial actions. The distinction suggests it is reasonable to treat Police like other departments of state for financial management and performance purposes, but for governance issues and in its relationships with Ministers, New Zealand Police holds a special position.

Although formally an "instrument of the Crown", Police is often treated like a mainstream government department

The Police Act 1958 contains no clear statement of the areas in which the Commissioner must act independently, and the areas where the Minister may legitimately give directions to the Commissioner. Nor does it address areas of responsibility that it is now customary to set out in statute for other departmental chief executives. The legislation merely provides for the Commissioner and one or more Deputy Commissioners to be appointed by and to serve "during the pleasure" of the Governor-General. The State Services Commissioner has no formal role under the current Police Act – even though the recent practice has been for him to manage the appointment process for the Police Commissioner and Deputy Commissioners.

Relatively little can be gained from looking at Police's current legislation

Limited insight is provided by the Police Regulations 1992. Regulation 3 specifies that the Commissioner is responsible to the Minister of Police for the general administration, control, financial management and performance of Police; as well as for ensuring members of Police discharge their duties to the government and the public satisfactorily, efficiently and effectively.

The other relevant provision is section 37 of the Police Act, which contains the constabulary oath of office. All police officers (from the Commissioner to the newest recruit) are understood in constitutional terms to be public office holders of the Crown, rather than being in a master/servant relationship in classic employment law terms. Every police officer swears:

The constabulary oath of office gives us perhaps the greatest insight

> That I will well and truly serve our Sovereign Lady the Queen in the Police, without favour or affection, malice or ill-will, until I am legally discharged; that I will see and cause Her Majesty's peace to be kept and preserved; that I will prevent to the best of my power all offences against the peace; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof faithfully according to law.

Case law and convention

Most accounts of the relationship between Police and government are based on the doctrine of constabulary independence. This doctrine has been variously described, but often reduces to one simple idea: that there are certain kinds of policing decisions that it is improper for Ministers to give directions on or seek to influence, and for police to accept directions on or acquiesce to. The dividing line between what is appropriate or not is often seen in terms of a split between policy issues and operational matters.

Constabulary independence is a concept which comes through strongly in case law

A 1993 opinion by the then Solicitor-General has been taken as an authoritative statement of the position in New Zealand. The opinion states:

- The Commissioner is an independent statutory officer acting with original not ministerially delegated authority in respect of law enforcement decisions in a particular case. The Commissioner cannot lawfully be made subject to ministerial directions in this regard and is bound only by the duty to act lawfully himself in exercising his powers.
- The Commissioner thus may not be subject to policy directions in respect of the enforcement of the criminal law in any particular area or type of offending. It is entirely a matter for the Commissioner to direct a law enforcement strategy in respect of types or places of crime (see *Whithair v Attorney-General (Police)* [1996] 2 NZLR 45 and *Practical Shooting Institute (New Zealand) Inc v Commissioner of Police* [1992] 1 NZLR 709).

Attention is often also drawn to a 1993 legal opinion by the former Solicitor-General, which summarises key propositions

- It is not open to the Commissioner to refuse to enforce the criminal law or any aspect but the Commissioner has a wide discretion on the chosen manner of enforcement in a particular case (see *Hill v Chief Constable of West Yorkshire* (1989) 1 AC 53).
- Decisions on what law enforcement resources are to be deployed in particular cases and on what general reasonable policy directions are to be made in classes of cases accordingly are for the Commissioner alone. However the Commissioner is otherwise subject to ministerial decision-making in relation to resources and matters of administration not directly affecting the Commissioner's duty to enforce the criminal law.
- There is room for the Minister of Police to require consultation with the Commissioner in respect of operational requirements and allocate targeted resources for a Police enforcement programme.

In summary, police must act independently when enforcing the law, and the Commissioner of Police has wide discretion on how to enforce the law in any given case. It is a matter for the Commissioner to direct how the law is enforced in relation to types of offending, or the locations where offences are committed. Decisions on what policing resources are deployed in individual cases, and what general policies apply to particular classes of case, are matters for the Commissioner.

In the end, there is general agreement on where Police sits in the constitutional scheme of things

The responsible Minister has a role in consulting the Commissioner over Police's operational requirements, and allocating resources for specific initiatives. The Minister also provides direction to the Commissioner on overall Police resourcing, and on matters of administration that do not directly affect the Commissioner's policing duties.

Strengths and weaknesses of the current environment

This brief overview highlights key features of Police's existing governance and accountability environment.

Current governance and accountability arrangements have endured, implying there may be some benefits to leaving things unwritten

Arguably, the greatest strength of this framework is it has stood the test of time. Although the model may have in-built tensions, cracks have only appeared when relations between Police and government have strained. The resilience of the unwritten rules that allow the model to work suggests that, at a certain level, the 'fuzziness' of the current approach may be valued by government Ministers and senior police. In short, there might be an upside to allowing for a degree of ambiguity. Lack of clarity "has certain beneficial effects for governments and police in that it has created a space for manoeuvre on specific occasions without requiring concessions on principle" (R Hogg and B Hawker, The Politics of Police Independence [1983] *Legal Service Bulletin* 161-165, 221-224, p 165).

The pluses of the current approach also come with minuses, however

This strength can also be a weakness. Police's largely uncodified governance and accountability environment sets it apart from other state sector agencies. For instance, there is no legislative requirement that the Commissioner is responsible for tendering advice to Ministers, or that the Commissioner acts independently in decisions relating to Police staff. There is also no clear statement of areas in which the Commissioner must act independently, and those where the Minister may direct the Commissioner.

This lack of clarity, driven by concern not to impinge on Police independence, has practical consequences. One result is standard state sector accountability and governance mechanisms are not applied to Police. This has been criticised by some as reflecting a culture of 'Police exceptionalism'.

Lack of clarity and transparency are commonly-cited weaknesses

The special position of Police, and the powers of its staff, come with important responsibilities. Chief amongst them, New Zealanders have a right to expect the highest standards of ethics, integrity and conduct from their police. In this sense, the strong organisational accountability that attaches to Police needs to flow through to the individuals who represent it. (Reinforcing the professionalism of Police staff is a subject that will be drawn out more fully in subsequent *Issues Papers*.)

3. Options for strengthening and formalising Police's governance and accountability arrangements

Despite its unique and somewhat unclear position, Police is still subject to multiple and overlapping accountabilities; both formal legal accountabilities, but just as importantly, in the sense of Police and the Commissioner being answerable to the New Zealand public (an accountability often expressed through the media).

In a structured way, oversight of Police is provided by parliamentary select committees, independent office holders like Ombudsmen and the Controller and Auditor-General, and via residual powers such as the ability to order ministerial inquiries and establish commissions of inquiry. There also exists the bedrock of legal accountability to the Courts. Police policies, practices and procedures (as well as alleged staff misconduct or neglect of duty) can also be subject to investigation, review and report by the Police Complaints Authority. Furthermore, Police is well embedded in government planning, funding and reporting cycles, through *Statement of Intent*, budgetary and *Annual Report* arrangements.

It is not a question of Police facing some sort of dire accountability deficit

Even so, it may yet be agreed that Police's governance and accountability arrangements should be clarified in legislation. This has certainly been the call from leading constitutional theorists, as well as a recommendation by parliament's Justice and Electoral Committee after its inquiry into matters relating to the visit of the President of China to New Zealand in 1999.

There are still calls for Police's basic constitutional position to be set out more clearly in legislation

A starting point might be the basic constitutional relationship between Police and government does not need to change, as it appears to work reasonably well. Rather than anticipating radical change, it may simply be a case of lifting the key aspects of current practice out of the realm of convention, and giving them a greater degree of certainty and transparency in legislation. Bringing extra clarity to this area should make it easier to understand the Police-government relationship.

Question 1: Do you support a move to legislatively clarify the relationship between Police and government?

A useful start point would be to make what is agreed (but largely not written down) more visible

If it is desirable to set out the basic reference points of Police's governance and accountability arrangements more authoritatively, it remains to consider how this would translate into legislation. The remainder of this *Issues Paper* takes up this challenge, seeking views on various governance and accountability proposals for New Zealand Police.

Legal status of Police

A coherent governance and accountability framework for Police might be expected to formally recognise New Zealand Police in legislation, and to invest it with some kind of legal personality as well as a sense of continuity.

The organisation that exists today as New Zealand Police can be traced back to the Police Force Act 1886 (and, before that, the armed constabularies of the 1840s), but neither the 1886 Act or 1958 Police Act contains a provision formally establishing it as a legal entity. Instead, Police is effectively established by implication, through definitions and references to "the Police" and "New Zealand Police" which are scattered throughout the statute book.

A good foundation on which to build would be to define New Zealand Police as a legal entity

While an odd omission, it may be thought unnecessary to fill this vacuum. "New Zealand Police" has entered common usage and presumably no one doubts its standing in day-to-day terms.

This would align a new Police Act with the approach taken in equivalent legislation, both here and overseas

On the other hand, it seems unsatisfactory an institution of state like New Zealand Police is not formally established, its continuity is not recognised, and it has no definitive status in legislation. Contemporary New Zealand statutes often contain provisions like section 6(1) of the Government Communications Security Bureau Act 2003: "There continues to be an instrument of the Executive Government of New Zealand known as the Government Communications Security Bureau". It is also normal in other jurisdictions' Police Acts to see a clear statement about the establishment or maintenance of the relevant police organisation. For example, section 5 of the Northern Territory's Police Administration Act 2005 provides that: "There is established by this Act the Police Force of the Northern Territory".

Giving Police a firm legal identity could be a way of clearly positioning it as an "instrument of the Crown"

One option when drafting police legislation for New Zealand would be to correct this anomaly, by including a clear statement about the continuation of New Zealand Police. This would be an avenue for clarifying the status of Police as a legal entity - including potentially referencing its status as an instrument of the Crown. Giving Police a formal legal personality may help clarify the roles, functions, responsibilities and powers that apply to Police as an organisation, as well as to its individual members.

Question 2: Do you support clarifying the status of New Zealand Police as a legal entity in the new Act? If so, would you wish to see explicit reference to Police being an instrument of the Crown?

The Police name

Drafting new legislation also offers an opportunity to confirm the name by which the police organisation is officially known. The option is whether to continue to use "New Zealand Police" or whether to use different phrasing, for instance "New Zealand Police Service" or "New Zealand Police Force".

Clarifying Police's legal status would also offer a chance to clear up any confusion about Police's name

The current name "New Zealand Police" was introduced with the 1958 Act. The official Police historian of this period has noted that removing the word "force" from Police's name was the most important philosophical change made by the legislation, yet the name change was not debated in the House nor discussed in Police's *Annual Report*. She adds: "It has generally been explained as expressing a desire to break away from the old military associations and stress the civilian, peace-keeping role of the police in a democratic society" (Susan Butterworth, *More than Law and Order: Policing a changing society, 1945-1992* [Dunedin: University of Otago Press, 2005], p 104). Similar motivations have been recorded overseas, where equivalent name changes have occurred, such as the shift in the United Kingdom during 1989 from Metropolitan Police Force to Metropolitan Police Service.

Internationally, the trend is away from describing police as "forces", in favour of police "services"

From one point of view, re-branding to "New Zealand Police Service" would symbolically support a service-focused, rather than enforcement-focused, professional culture. This might send an important internal and external signal of Police's awareness of the public's expectations as 'customers' of policing services. Viewed another way, though, any such re-branding may make little practical difference, and could actually end up being unhelpful if it was perceived simply as a marketing exercise.

Many people still think of Police as "the Police Force", and may prefer to see this reflected in its official title

Where Police sits on the continuum from the New Zealand Customs *Service* to the New Zealand Defence *Force* is an interesting question, but it is one that may ultimately have a polarising effect. A neutral middle-way would be to stick with the current "New Zealand Police". Yet to do so possibly misses out on what could be a very good conversation starter with New Zealanders about their police. It may be, in fact, there is significant public support for a return to the traditional name "New Zealand Police Force". It is possible to think of a number of arguments in

favour of such a move. For instance, it would openly acknowledge that, in the final analysis, police are the coercive arm of the state who are uniquely mandated to use legitimate force to keep the peace, prevent crime, and uphold the law.

Question 3: What do you think the official title of New Zealand's police should be?

Appointment, terms of engagement, and tenure of senior officers

One of the areas expected to be covered by a new Act is the appointment, terms of engagement and tenure of the head of New Zealand Police. Those who may be called on to serve as Acting Commissioner should presumably also have matters relating to their appointment, terms of engagement and tenure spelt out in legislation.

It is important to be clear about how the most senior police leadership roles are filled.

These matters are important within Police's governance and accountability architecture because of the constitutional significance of the positions. The Police Commissioner and his or her Deputies occupy roles that, by their very nature, can involve decisions which profoundly affect people's lives. They are also able to exercise some highly exceptional powers. For example, the Commissioner, or a Deputy Commissioner acting in his or her place, may be called upon to exercise powers under section 9(4) of the Defence Act 1990, relating to the use of the armed forces in an emergency. A Commissioner or Deputy Commissioner may also need to invoke powers under the International Terrorism (Emergency Powers) Act 1987.

Beyond operational responsibilities, the rationale for providing a statutory basis for these most senior Police roles is to create an additional safeguard for the independence of the office holders. At the most basic level, it offers a measure of protection against inappropriate pressure being brought to bear - for example, by threats of dismissal or reductions in remuneration.

They are significant roles however you look at it, and they should carry the same safeguards as other key positions

Extending these same safeguards to Deputy Commissioners provides them with similar support, should it ever be necessary to draw misbehaviour by the Commissioner to the attention of higher authorities, without fear of reprisal. (The Deputy Auditor-General's actions in 1994 regarding the Auditor-General's offending is an example of this check working in practice.)

APPOINTMENTS

In the interests of clarity and openness, it seems appropriate to formalise in statute the power to appoint a Commissioner of Police (as well as Deputy Commissioners, who may be required from time to time to act in the Commissioner's place). Doing so creates a measure of legal accountability and protects against the possibility of abuse - however unlikely that may be.

It is certainly common in overseas legislation for the power to 'hire and fire' the most senior police officers to rest with the government of the day. This has also been the historical position in New Zealand, and will presumably be the approach continued in future. Where questions may arise is the level of detail to be used in the relevant provisions, and whether the provisions simply reflect the status quo or if changes to current practice are proposed.

A new Police Act will need to include provisions relating to the appointment of Commissioners and Deputies

One approach would be for the State Services Commissioner to manage the appointment process for the Police Commissioner and his or her Deputies, submitting candidates to the Prime Minister and Police Minister for decision. Successful candidates could formally be appointed by the Governor-General. This

would reflect the current practice. It balances the need to ensure Commissioners and Deputy Commissioners of Police have the confidence of government, and the need for a sound and impartial process. In particular, involving the State Services Commissioner adds transparency for all would-be applicants, irrespective of whether they have a policing background.

Question 4: Do you favour formalising the appointment processes for the Commissioner and Deputy Commissioners in legislation? If so, what processes would you like to see followed?

Some have asked whether previous police experience should be a legal requirement for appointment to the most senior Police roles

A further issue is whether there should be any statutory pre-requisites for the top jobs in Police. For instance, one idea floated in the past is that future Commissioners and Deputies be required to take the constabulary oath of office. An explanation given for this idea is it would effectively reserve the top Police positions for those with frontline policing experience. Such occupational qualifications are not unknown on the statute books. By way of example, section 8(1) of the Defence Act 1990 limits eligibility for appointment as Chief of Defence Force to officers within the Armed Forces.

Constitutionally, though, it is unnecessary to link holding the office of constable with the ability to perform very senior Police roles. Sharing the same values as the bulk of an organisation's members is one thing (and the constabulary oath does contain a powerful statement of the Police ethos), but there are various other ways this can be demonstrated (including, possibly, crafting a contemporary oath which all members of staff would take on joining Police, binding them together with a common set of values).

Constitutional and historical precedent on this question is divided

There is precedent that stepping up to the role of Commissioner can mean relinquishing the status of a constable. Until the mid 1970s, a person appointed as the Commissioner of London's Metropolitan Police ceased to be a policeman; instead being sworn in as an *ex officio* justice of the peace. Despite this, no one doubted that the Metropolitan Police Commissioner continued to uphold the values embodied in the constabulary oath of office.

It is worth noting that there are many examples of civilians being appointed to senior police roles, both internationally and domestically. Not only have a number of civilians been appointed Chief Constables in the United Kingdom, but there was a standing practice in the Republic of Ireland between 1938 and 1965 to appoint a civil servant as Commissioner of An Garda Síochána. More recently, senior public servants have also been appointed as Deputy Commissioner in the Royal Canadian Mounted Police (during the late 1980s), as well as in New Zealand (from 2001 to the present day).

Senior bureaucrats have certainly filled police leadership roles in the past

New Zealand has had several experiences where the post of Commissioner has been filled by a senior civil servant rather than a police officer. Examples include the Under-Secretary of Justice acting as Commissioner in the 1900s, and the Secretary of Justice serving as Controller-General from 1955-1958.

'Street cop' experience is often seen as necessary for appointment as Commissioner

It remains the case that an operational policing background is often looked to as a de facto requirement for appointment to the most senior police roles. When the 1958 Police Act was passed, the then government maintained only a policeman could properly be Commissioner. Advancement through the ranks was seen as essential to effectively lead the organisation, as "only a policeman could understand the outlook, the aspirations and the problems of members of the force" [317 *New Zealand Parliamentary Debates* 1150]. This custom has been followed ever since. As recently as 2001, the Acting Minister of Police told parliamentarians:

> Future Commissioners will continue to have a strong operational policing background, and to be drawn from the pool of competent officers with New Zealand policing experience.
> [597 *New Zealand Parliamentary Debates* 13257]

While there is presently no legal requirement to appoint a Commissioner from the ranks of current or former officers, there may be interest in listing operational policing experience as an explicit criterion for appointment. Consideration could also be given to applying to the Police Commissioner's job some or all of the requirements for appointing departmental chief executives. Section 35(12) of the State Sector Act lists various criteria that must be considered before departmental heads are appointed. These include the need to appoint a person who can discharge the specific responsibilities placed on the particular chief executive, and who will promote efficiency and maintain appropriate standards of staff integrity and conduct.

In future, a range of considerations might be specified as relevant to the appointment of a Commissioner or Deputy

An alternative viewpoint is that any such moves would unnecessarily, and perhaps unhelpfully, limit the flexibility to appoint the best person to the job at any given time. Some may be comfortable simply retaining the current generic reference to appointing a "fit and proper person" as Commissioner or Deputy Commissioner of Police. This would align with the approach for other constitutionally important roles. For instance, the Public Audit Act 2001 does not state the Auditor-General must be a chartered accountant, or even that the office holder has auditing experience. Similarly, nowhere in legislation is there a requirement that the Solicitor-General be a trained lawyer, or hold a current practising certificate as a barrister and solicitor.

Looking ahead, what would best meet Police's needs in the 21st century?

Question 5: Do you think there should be statutory criteria to guide the appointment of Commissioners and Deputy Commissioners?

TERMS OF ENGAGEMENT

Two further matters central to the terms under which a Commissioner or Deputy Commissioner is appointed are: who sets their pay and conditions, and who reviews their performance while they hold office?

Currently, the Remuneration Authority determines the Commissioner's and Deputy Commissioners' remuneration, with other terms and conditions of their employment being agreed on a bilateral basis with the State Services Commissioner (acting with the delegated authority of the Minister of Police). Existing legislation is largely silent on these matters. An option for a new Police Act would be to provide clarity on how these issues are to be handled.

How to deal with pay and conditions and performance reviews are other important issues

From one perspective, it can be seen as odd to divorce the ability to fix a chief executive's pay from other aspects of his or her employment package. Managing remuneration is an integral part of performance management, and the main lever in most state sector chief executive performance reviews is the possible loss of the at-risk component of their salary. Threat of removal is only used in extreme circumstances, and is generally considered a poor way to influence performance. This may be seen to create a credible argument for taking the Police Commissioner's and Deputy Commissioners' remuneration away from the pay-fixing jurisdiction of the Remuneration Authority, and putting it on the same footing as other senior state servants.

Counter-arguments to mainstreaming the relationship can also be found. For instance, using the Solicitor-General and Auditor-General as analogies, the independence of such constitutionally important roles may be seen as compromised if their pay is set by the State Services Commissioner. Particular risks might be seen in salaries with an at-risk component, where perverse incentives could be created, potentially skewing policing decisions.

Arguments can be made on both sides about who should fix remuneration levels for the most senior Police roles

The status quo may be looked to as a durable model

Given arguments on both sides, a pragmatic compromise may be to retain the Remuneration Authority as the pay-setting body for the most senior positions within Police, combined with continuing requirements for public disclosure of salary bands. "Effective controls and accountability would still exist", while reinforcing a useful distance over remuneration arrangements for important statutory office holders (Graham Scott, *Public Management in New Zealand: Lessons and Challenges* [Wellington: NZBR, 2001], p 245).

Question 6: Who do you think should determine the pay and conditions of the Commissioner and Deputy Commissioners?

While connected, the decision about who determines the remuneration of the Commissioner and Deputies need not force a particular decision about their performance review arrangements. As now, it could be that pay is set by one authority, while the performance review function is done by another.

One approach to the performance review issue would be to essentially carry across current practice into law

If this option were favoured, new legislation could bring the Commissioner of Police within the ambit of the State Services Commissioner's performance management of chief executives in the public service. Such reviews might be limited to those matters for which the Police Commissioner is responsible to the Minister, thus protecting against encroachment in areas where independence on operational matters is important. Similar limitations work effectively for public service chief executives who are required to act independently, for example the Commissioner of Inland Revenue, the Government Statistician and the Director of the Serious Fraud Office.

In turn, the Police Commissioner might be made responsible for reviewing the performance of each Deputy Commissioner. In the event a dispute arose in the course of a review, legislation might include a requirement that the State Services Commissioner be consulted.

Alternatively, given the very high level of trust placed in the Commissioner and Deputy Commissioners, it might be argued that orthodox performance review arrangements should not apply. Such high-profile roles are intensely scrutinised by the media and the general public, with regular opportunities for performance feedback from senior Police colleagues, state sector peers and government Ministers. This may build an argument for continuing to leave the performance review arrangements for Commissioner and Deputy Commissioners of Police unspecified, similar to the way such details are not spelt out in legislation for the Solicitor-General or the Auditor-General.

Question 7: What performance review arrangements do you favour for the Commissioner and Deputy Commissioners?

TENURE

A starting point for thinking about the tenure of the Commissioner and Deputy Commissioners might be that they would continue to hold office "during the pleasure" of the Governor-General. Individual appointments could be for a maximum five year term, with the possibility of re-appointment.

The review of the Police Act gives a chance to build confidence around the terms of office that apply to the Commissioner and Deputy roles

Holding office "during the pleasure" of the Governor-General is a departure from the state sector norm. In effect, it allows for office holders to be dismissed if the government loses confidence in them. More positively, where legislation is silent on the matter, an incumbent can be re-appointed for a further period, if pleasure continues. (Such action has a statutory precedent in some areas. For example, section 37(5) of the State Sector Act explicitly allows for the Government Statistician

to be re-appointed "without first notifying the impending vacancy or examining other applicants".)

The 'at pleasure' arrangement is seen to be necessary because the strong independent powers of Police must be balanced by strong democratic accountability. If an elected government or the public loses confidence in a Commissioner or Deputy Commissioner of Police, clearly the person's position becomes untenable, and he or she must go from office. Arguably, because of their statutory powers, this is true even though there may not be "just cause and excuse" for dismissal in an employment context, as applies to other public sector chief executives under the State Sector Act.

'At pleasure' tenure still seems appropriate for these most senior Police roles

If future Commissioners and Deputy Commissioners continue to hold office 'at pleasure', there may yet be benefits to clarifying what this means.

The interests of transparency and public accountability might best be served by bringing dismissal (and re-appointment?) provisions for these Police roles into line with other constitutionally important positions, such as the State Services Commissioner. Should this view hold sway, new Police legislation might provide that the Governor-General may at any time remove a Commissioner or Deputy Commissioner of Police for reasons of misconduct, physical or mental incapacity affecting the performance of duty, bankruptcy, neglect of duty, or behaviour which individually or cumulatively indicates a lack of competence in any aspect of the role. Another model would be to list grounds for removal in a non-exhaustive way, offering more certainty but not constraining a government's flexibility if it were needed.

But it might be helpful to tease out what 'at pleasure' means for withdrawing or extending pleasure

The key point is that everyone would have a better understanding about the types of behaviour that could potentially result in pleasure being withdrawn, and an expectation that pleasure can be continued through re-appointment.

Question 8: Do you favour specifying in legislation that appointments as Commissioner or Deputy Commissioner be for terms of up to five years, with the possibility of re-appointment?

Question 9: Do you think the grounds for suspending or removing a Commissioner or Deputy should be spelt out in legislation?

In addition to specifying the grounds upon which a suspension or dismissal might be triggered, it would be possible to require some public element to the process that is used. An increasingly common requirement in overseas police legislation is that a ministerial statement of the grounds for removing a chief police officer must be tabled in parliament (see, for example, section 12(7) of the Garda Síochána Act 2005). Applying this model to New Zealand, it might be required that where a Police Commissioner or Deputy Police Commissioner is dismissed, the Governor-General must lay before the House of Representatives a full statement of the grounds for the removal within a finite number of sitting days, or as soon as practicable, after the date of the dismissal. A similar approach is currently set down for the job of Auditor-General (see clause 4 of Schedule 3 of the Public Audit Act 2001).

Greater clarity over process might also be helpful

Including such a requirement in a new Police Act might be seen to advance the community's right to know the reasons for removing a significant public office holder, and to deter the unlikely eventuality that a government might seek to dismiss a Commissioner or Deputy Commissioner for unsatisfactory reasons.

Ultimately, given the sensitive nature of the most senior Police roles, it seems reasonable to assume that a government would be slow to seek a dismissal.

Being too cautious - trying to design processes to cater for any eventuality - may not be the best way forward

As well as being potentially destabilising for New Zealand Police, any forced departure of a Commissioner or Deputy Commissioner would be sure to generate parliamentary debate and wide publicity, meaning a government would need to carefully weigh the perceived benefits of seeking the dismissal of the office holder against the political and organisational costs. Within New Zealand's constitutional tradition, it is also likely that if such action were contemplated, Ministers would act on legal advice to ensure the office holder was treated with procedural fairness. This may counsel against designing over-complicated suspension or termination clauses in a new Act.

Question 10: Should a new Act require a particular process to be followed (eg., tabling a statement in parliament) if a Commissioner or Deputy Commissioner is suspended or removed in the future?

Role and functions of the Police Commissioner

The current Act and Regulations are less-than-helpful in understanding the Commissioner's role and functions

The 1958 Act is largely silent on the Commissioner's role and functions, stating merely that the Commissioner "shall have the general control of the Police". Regulation 3 of the accompanying 1992 Regulations adds that the Commissioner is responsible to the Minister for the general administration, financial management and performance of Police, as well as for ensuring members of Police discharge their duties to the government and the public satisfactorily, efficiently and effectively. Implicitly, these descriptions can be said to cover strategic direction-setting, leadership of policing policy and resource management. But it is still a case of having to 'join the dots'.

The current legislative description of the Commissioner's role and functions can be viewed as inappropriately narrow for the needs of modern policing. Articulating such a role/functional statement in a new Police Act would create the opportunity to reinforce expectations of the Commissioner's responsibilities (eg., 'to ensure the effective, efficient and ethical delivery of policing services to the community'), including being clear about whether the Commissioner must have regard to particular matters (eg., the government's policy priorities) in doing his or her job. Drawing on previous thinking, one way this balance might be struck would be to include a section in a new Police Act along the following lines:

Casting more light on the Police Commissioner's role and functions would be useful, and likely to be welcomed

The Commissioner is responsible to the Minister for -

(a) the carrying out of the functions, duties, and powers of the police; and
(b) tendering advice to the Minister and other Ministers of the Crown; and
(c) the general conduct of the police; and
(d) the efficient, effective, and economical management of the police; and
(e) giving effect to any directions of the Minister on matters of government policy.

Greater clarity in this area seems likely to be welcomed by stakeholders, and would certainly be an advance on the current "general control" model which offers only a limited, inward-looking, view of the Commissioner's role.

Question 11: Do you support including a list of the Commissioner's responsibilities in a new Police Act? If so, how do you think these responsibilities should be defined?

Clarifying the relationship between the Commissioner and Minister

Being clearer about the Police Commissioner's areas of responsibility only gets us so far in clarifying the relationship between the Commissioner and the Minister who holds the Police portfolio. The flip side of the coin is being clearer about where Ministerial direction of the Commissioner is appropriate.

THINGS TO KEEP IN MIND

The Commissioner's responsibilities can also be understood by defining where Ministers are seen to play a part in policing

At the outset, it is important to note it is probably impossible to definitively capture in statute the relationship between the Commissioner and Minister. The relationship is a human one. The boundaries in any such relationship will, to some extent, be porous and not suitable for hard-and-fast definition. Qualities inherent in the relationship itself (especially the degree of trust between the Minister and Commissioner) will also do more to ensure a solid working partnership than any codified set of rules. As such, it may be wise to resist the urge to precisely define the boundaries of the Commissioner-Minister relationship in statute, lest it become a 'legislative straight-jacket'.

But we should not be trapped into thinking about the issues solely within a policing context

In legislatively defining this relationship, it is also worth remembering important characteristics of the relationship are by no means unique to Police; they apply equally to relations between the responsible Minister and the head of any large state sector organisation. In the words of one writer, "[t]he relationship between ministers and chief executives … is the fulcrum on which the levers of democracy pivot" (Colin James, *The Tie that Binds: The relationship between Ministers and Chief Executives* [Wellington: Institute for Policy Studies/Centre for Public Law, 2002], p 1).

KEY CONCEPTS

Internationally, there is a rich history of examining the relationship between chief police officers and government. A series of inquiries by distinguished jurists and other experts offers much of relevance, suggesting a number of anchor points for police-ministerial interactions. This helps when developing legislation that "better defines the legal mandate of police that can be accepted by differing political ideologies" (Grant Pitman, An interdependency model for police-executive relationships [2004] *International Journal of Police Science and Management*, vol 6(3), 115-125, p 123).

In saying this, the foundational idea of constabulary independence is a good place to start

A key concept which seems to attract broad consensus, regardless of people's political stripes, is the importance of constabulary independence.

As summarised earlier on in this *Issues Paper* [see pages 3-4], this doctrine often reduces to a simple idea: that police are operationally independent of government, and that Ministers cannot involve themselves in or direct how policing operations are carried out. A long line of judicial authority supports these basic propositions. The political neutrality of police is a settled part of New Zealand's constitution, and is an important feature of the separation of powers between the legislative and the executive branches of government.

A statutory formula for the relationship between Ministers and Commissioners must reinforce the operational need for independence in certain areas

A reason why constabulary independence is often put front and centre is that effective policing depends on the support of the public, and this support is often said to depend on policing being free from partisan politics. In the words of a former Commissioner of the Metropolitan Police: "The operational freedom of the police from political or bureaucratic interference is essential to their acceptability and to the preservation of democracy …. Their manifest impartiality is their most priceless asset" (Sir Robert Mark, *In the Office of Constable* [London: Collins, 1978], p 202).

In short, members of the public need to have confidence police will do their jobs in the best interests of the whole community, not just certain individuals or groups.

Being too hands off might be just as dangerous as being too hands on

The ministerial need to avoid political interference in policing should not, however, be taken to the opposite extreme. An arm's length relationship is one thing, but wilful blindness to relevant operational issues is another. As a respected Canadian scholar has argued, "undue restraint on the part of the responsible Minister in seeking information as to police methods and procedures can be as much a fault as undue interference in the work of … individual chiefs of police" (J L J Edwards, *Ministerial Responsibility for National Security* [Ottawa: Supply and Services, 1980], pp 96-97).

It can be difficult, but a balance must be struck

In a parliamentary democracy, there is inevitably a balance to be achieved. Despite its special constitutional position, Police delivers services in the same general context as other government agencies, and needs to be accountable to the community for the use of public resources. That accountability is expressed through New Zealand Police's accountability to the Minister who has portfolio responsibility for policing, who in turn has an accountability to parliament. With that ministerial responsibility comes the need to exercise a degree of control over the direction of policing, within accepted boundaries.

CAPTURING THE ESSENTIAL QUALITY OF THE RELATIONSHIP

Identifying where the bright lines are, and where we might allow for shades of grey, can be easier if we look at some real-world scenarios

While the essence of the relationship between the Minister and the Commissioner is fairly clear, there is potential for overlap and the line can become blurred. For example, there could be difficulties with a ministerial directive that would impact on the deployment of policing resources to such an extent that it would affect Police's ability to adequately enforce the law in relation to certain types of offending.

The challenges in clarifying the boundaries of legitimate ministerial direction can be illustrated by referring to some hypothetical examples.

Scenario	*Comment*
Launching a new police strategy • The Minister requests the Commissioner to develop a strategy to give added priority to the apprehension of burglary offenders.	The Minister is asking Police to reflect the policy priorities of the government, and is not unreasonably interfering with the Commissioner's decision-making capacity on operational matters.
Suggestion to discontinue a specific investigation • After receiving a report on a sensitive Police inquiry, the Minister indicates the Commissioner should consider discontinuing the inquiry.	Decisions on how to investigate alleged offending are matters for the Commissioner, and the Commissioner is not subject to Ministerial direction.
Tagged funding for special squads • The Minister proposes an increase in Vote Police, with the funding tagged to provision of additional specialist squads.	The Minister is able to legitimately provide such a direction on how extra funding in the annual parliamentary appropriation for Police is to be spent.
Directive on policing particular picket-line protests • The Minister tells the Commissioner that police should avoid arresting picketers at a particular work site who may commit offences, as this could impede a settlement of the dispute.	The Commissioner needs to take into account the broad policy objectives of the government relating to the resolution of industrial disputes, but decisions on offences arising from particular industrial action will always be a matter for the Commissioner.
Instructions on how to process certain cases • The Minister proposes requiring the Commissioner to issue a direction that in each case where a burglary suspect is arrested, bail is to be opposed.	Decisions with respect to individual cases are a matter for the Commissioner alone. It is for the Commissioner to issue any such directives around the Police stance on bail applications.

Setting zero or nominal outputs for certain offences • The Minister stipulates in the annual Purchase Agreement there are to be zero or only nominal prosecution outputs for possession of personal use amounts of illicit drugs.	The Minister is effectively directing the Commissioner not to enforce the law in relation to this particular class of offence. In the absence of a change in the relevant law by parliament, prosecution decisions in such cases rest solely with the Commissioner.

From the relevant case-law, and thinking through practical scenarios, it might be agreed a Police Minister may legitimately direct the Commissioner on matters of government policy (including objectives and priorities) that relate to crime prevention, the maintenance of order and public safety, delivery of policing services, and general areas of law enforcement - but not so as to have the effect of requiring the non-enforcement of a specific law/s.

Some basic anchors for the relationship between Ministers and Commissioners emerge from these worked examples

It might also be agreed a Minister may not direct the Commissioner regarding the enforcement of the law in particular cases or classes of cases, nor in relation to decisions on individual Police staff members.

BETTER DEFINING THE COMMISSIONER-MINISTER RELATIONSHIP IN LEGISLATION

Even acknowledging the appropriateness of a ministerial directions power, it is an open question whether this power should be given a legislative basis.

The current Police Act contains virtually no guidance on the boundaries of the Commissioner-Minister relationship, let alone use of a directions power. This offers no protection of the Commissioner's operational independence, nor does it recognise the Minister's role in setting crime policy objectives, or determining broad levels of resourcing for New Zealand Police. Because the Act offers no certainty about the parties' respective areas of responsibility, there is no certainty about the scope of a Ministerial directions power, or the circumstances in which it might be used. While this arguably gives the advantage of flexibility, the downside is the lack of clarity and transparency.

Questions remain over how to frame any ministerial direction power

This lack of certainty makes some constitutional commentators uneasy. They point out the tension between the apparent opportunity for Ministerial direction created by regulation 3(2) of the Police Regulations 1992, and the convention that no Minister of the Crown will intervene in or direct how police duties are discharged. Professor Joseph puts it this way in the standard text: "The Police Act 1958 and regulations are constitutionally deficient for failing to secure a sufficient legal separation between the Police Commissioner and the Government in matters of day-to-day law enforcement" (Philip Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd edition [Wellington: Brookers, 2001], para 9.5.4, p 297).

Leading academics urge that there be a clear 'no fly zone' for ministers spelt out in legislation

An opening created by the Police Act Review is to consider whether a new Act should be clearer about where ministerial direction of the Commissioner is possible; but just as importantly, where there is a ministerial 'no go' area.

Question 12: Are you in favour of a new Police Act seeking to clarify where ministerial direction of a Commissioner is appropriate?

HOW DETAILED SHOULD ANY MINISTERIAL DIRECTIONS POWER BE?

If there is general support for a Ministerial directions power to be included in new Police legislation, a key task will be to carefully define such a power. A fair degree of consensus emerged on this issue during consideration of the Police Amendment Bill (No 2), and it may not make sense to completely re-litigate what attracted widespread agreement then. On the other hand, there is a chance to look at the relevant provisions in the Bill with fresh eyes.

There are different ways a ministerial 'no fly zone' could be captured in a new Police Act …

… but in doing so, we need to be careful we do not ossify the concept of constabulary independence

In approaching this issue, it bears repeating that constabulary independence is a product of common law. One of the virtues of common law systems is that principles like constabulary independence can evolve in response to subtle constitutional and cultural changes. A risk in importing a common law concept into statute is that, depending on the form of words chosen, the concept might be interpreted too narrowly and inflexibly, or it may end up being too broad or vague to be of any value. Ultimately, a trade-off must be made. The goal is to agree on wording that is not too specific or too general.

Recognising that no one statutory formula is likely to find universal support, it is probably best to reflect the boundaries of constabulary independence with words that echo the relevant case-law, but also using language that is sufficiently abstract, to allow the principle to continue to evolve.

OVERSEAS EXAMPLES OF MINISTERIAL DIRECTION POWERS

There are a range of international precedents to draw upon in this regard. In Australia, Queensland's Police Service Administration Act 1990 contains a comprehensive Ministerial directions regime. Section 4.6 of the Act states:

> (2) The Minister, having regard to the advice of the Commissioner first obtained, may give, in writing, directions to the Commissioner concerning -
>
> (a) the overall administration, management and superintendence of the Police Service; and
>
> (b) policy and priorities to be pursued in performing the functions of the Police Service; and
>
> (c) the number and deployment of officers and staff members and the number and location of police establishments and police stations.
>
> (3) The Commissioner is to comply with all directions duly given under subsection (2).

For inspiration on how to achieve this, we can turn to Australia

Less prescriptive regimes are provided for elsewhere. For instance, section 7(1) of Tasmania's Police Act 2003 states that: "The Commissioner, under the direction of the Minister, is responsible for the efficient, effective and economic management and superintendence of the Police Service". A broad directions power is also provided for at the federal level. Section 37(2) of the Australian Federal Police Act 1979 states:

> The Minister may, after obtaining and considering the advice of the Commissioner and of the Secretary [of the Attorney-General's Department], give written directions to the Commissioner with respect to the general policy to be pursued in relation to the performance of the functions of the Australian Federal Police.

The South Australian approach is similar but goes one step further. Section 6 of the Police Act 1998 states that "subject to this Act and any written directions of the Minister, the Commissioner is responsible for the control and management of SA Police", while section 7 of the legislation lists "the appointment, transfer, remuneration, discipline or termination of a particular person" as matters upon which ministerial direction is disallowed.

LOCAL EXAMPLES OF MINISTERIAL DIRECTION POWERS

We can also take inspiration from closer to home …

There is clearly a degree of consistency between the Australian jurisdictions on how ministerial directions powers are expressed in statute. This offers clues for how a similar power could be spelt out in New Zealand legislation. Equally, distinctive features of Australia's policing environment may recommend looking closer to home for inspiration. This includes considering the general concept of Ministerial directions from a non-policing angle: notably, examining the way domestic legislation deals with relationships between Ministers and agency heads in other areas.

A helpful example might be section 6B of the Tax Administration Act 1994. While authorising the Minister of Revenue to issue written directions to the Commissioner of Inland Revenue about administering relevant legislation, section 6B(2) of the Act states this "does not authorise the giving of directions concerning the tax affairs of individual taxpayers or the interpretation of tax law". The legislation also has an eye to transparency and compliance. Subsections 6B(3) and (4) provide:

… including from non-police contexts

> (3) Every order made under subsection (1) shall as soon as practicable after it is made -
>
> (a) Be published in the Gazette; and
>
> (b) Be laid before the House of Representatives together with any accompanying statement of the reasons for the order and any advice of the Commissioner in relation to it.
>
> (4) An order made under subsection (1) becomes binding on the Commissioner on the 7th day after the date on which it is made.

PROVIDING FOR MINISTERIAL DIRECTIONS IN A NEW POLICE ACT

Reviewing the available precedents, if new legislation for New Zealand Police provides for a ministerial directions power, then as well as defining a 'no go' area for the Minister, decisions will need to be made on several matters. These include whether the statute provides a mechanism for the giving of such directions (including whether the Minister should be required to obtain and consider advice from the Commissioner before issuing any directions), and whether it is made explicit that ministerial directions must be followed. Indeed, the legislation might go further, and convey consequences which would flow from a Commissioner's failure or inability to follow any directions.

There may still be some issues of detail worth clarifying

Section 25(1) of the Garda Síochána Act 2005 offers another option. The Irish Minister for Justice, Equality and Law Reform may only issue directives to the Garda Commissioner "[f]ollowing the approval of the Government". This can be viewed as providing a safeguard against hasty or ill-conceived ministerial directives by allowing for the possible restraining input of Cabinet.

Ultimately, it may all come down to a question of individual preference. For instance, arguments can be made both for and against a requirement that a Minister receive advice from a Commissioner before issuing any directions. To some, it would be redundant to list such a requirement in legislation, given the regular dialogue there will be between the two. Irrespective of any legal requirement to consult, a Minister who is minded to issue a formal direction would presumably seek the Commissioner's advice about the idea.

There are probably no 'right' or 'wrong' answers

Others may not be so comfortable relying on customary practice. As the Commissioner is ultimately accountable for the performance of New Zealand Police, arguably he or she should have a right to provide advice to the Minister before the Minister imposes any direction. This would ensure the Minister is briefed on relevant issues, including possible ramifications, before making a direction. This would be a means by which standards of decision-making can be influenced and improved, and is consistent with the Commissioner's role as the senior adviser to the Minister on policing matters.

Question 13: In what situations do you think it would be appropriate for a Minister of Police to give directions to a Commissioner of Police?

Question 14: In what situations would it be inappropriate for a Minister of Police to give directions to a Commissioner of Police?

Question 15: Do you favour providing for a ministerial directions power in a new Police Act? If so, is there an existing legislative model for such a power that you would recommend as a precedent?

OPTIONS FOR MAKING MINISTERIAL DIRECTIONS PUBLIC

The transparency of any directions by ministers is a key concern …

If Ministerial directions are being given to a Commissioner, there is a strong argument such directions should be made public to better facilitate the Minister (and government) being held accountable for those directions.

There is certainly precedent to support mandatory tabling of any Ministerial directions given to a Police Commissioner (eg., section 6B(3) and (4) of the Tax Administration Act). Furthermore, paragraph 10.7.2 of the Legislation Advisory Committee's *Guidelines on Process and Content of Legislation* (2001) state: "Where the Government has a statutory power to give policy directions to a body or person …. [d]irections should be required to: be given in writing … published in the *Gazette* and laid before the House of Representatives as soon as practicable after they are given".

While transparency mechanisms may prevent the inappropriate exercise of a directions power, undue reliance on such a formal process could create administrative burdens, adversely affecting the free flow of information between the Minister and Commissioner. This may create a risk that such a formal directions power will remain un-utilised or under-utilised, driving the process underground and effectively undermining the desired transparency.

…even though transparency tools only get us so far

The idea that the glare of publicity will deter inappropriate directions is also not without problems. A similar idea underlies section 7 of the New Zealand Bill of Rights Act 1990, by which the Attorney-General brings to the House's attention any Bills appearing inconsistent with protected rights and freedoms. However, its effectiveness as a safeguard arguably depends on rarity of use: as frequency increases, parliamentary and public reactions become dulled.

Assuming a Minister of Police directs the Police Commissioner regularly and appropriately, a requirement to publish/table all such directions could end up trivialising the mechanism, and ultimately rendering it less meaningful. A mandatory tabling requirement can also be seen as inconsistent with the relationship between other Ministers and state sector chief executives - including those with statutory independence (eg., the Serious Fraud Office's Director and the Government Statistician).

Enabling scrutiny of any ministerial directions is still a basic expectation, and it may be that views differ only on how best to provide for such scrutiny

In overseas jurisdictions, different approaches are taken to whether Ministerial directions are made open to public scrutiny. In South Australia, there is a legislative requirement for the Minister to publish any directions in the Gazette, as well as to table them in both parliamentary chambers within set time limits. In Queensland, the Commissioner is required to maintain a central register that records any directions, with a further requirement to provide an annual certified copy of the register, with or without commentary attached, to an oversight body for tabling in state parliament. There is no formal requirement under the Australian Federal Police Act for ministerial directions to be gazetted or tabled in parliament, but as a matter of practice such directions are made publicly available on the AFP's website.

Ireland's Garda Síochána Act offers yet another model. Section 25(3) states:

> As soon as practicable after issuing a directive under this section, the Minister shall cause a copy of the directive to be laid before each House of the Oireachtas, but if compliance with this requirement might prejudice the security of the State or might impede the prevention, investigation or prosecution of an offence, it is sufficient if a written statement indicating that a directive has been issued is laid before each House.

Again, there are a number of overseas precedents to choose from

Question 16: How should a new Police Act deal with making it publicly known the Minister has given a formal direction to the Commissioner?

Ministerial ability to request reports from the Commissioner

On a day-to-day basis, there are numerous items of information and reports exchanged between the Office of the Commissioner of Police and the Office of the Minister of Police. Such exchanges are based on the convention of responsible government, and are consistent with overarching principles of democratic accountability.

There is sometimes debate over the appropriateness of Police providing reports to ministers

The environment within which communications occur between the offices of the Commissioner and Minister has stood the test of time, with successive office holders being prepared to constructively work through any differences of opinion. This suggests there may not be a need to legislate in this area.

A different approach is evident in some Australian jurisdictions, albeit they may reflect more troubled histories of Commissioner-Minister relationships. For example, section 37(6) of the Australian Federal Police Act states: "The Commissioner must give to the Minister such reports as the Minister requests relating to the administration and performance of the functions of the Australian Federal Police". Section 4.6(1) of Queensland's Police Service Administration Act provides for both a Ministerial power to require reports and a discretion for the Commissioner to supply unsolicited reports.

Internationally, the ability for ministers to request reports from police chiefs has been something of a moot point

In the New Zealand context, while it may seem unnecessary to specify how reports are provided between the Police Commissioner and Ministers, some might still see value in spelling this out in legislation.

Question 17: Do you think the types of communication between Ministers and the Police Commissioner should be set out in statute?

Help with assessing Police's performance

Up to now, the focus has largely been on how the relationship between the Police Commissioner and responsible Minister might be formalised, as a way of strengthening Police's governance and accountability arrangements. We can also look at ways this can be achieved by a focus on organisational requirements, rather than those sheeting home solely to the Commissioner.

Police's general statutory reporting obligations are few, contrasting with a number of highly specific reporting obligations under different pieces of legislation

As noted already, Police's current legislative framework contains few general reporting requirements, other than the obligation to produce an *Annual Report* and *Statement of Intent*. This contrasts with specific obligations to report on the exercise of certain policing powers scattered throughout the statute book - covering road blocks [section 65(4) of the current Police Act], interception warrants and emergency permits [section 29 of the Misuse of Drugs Amendment Act 1978 and section 312Q of the Crimes Amendment Act (No 2) 1987], call data warrants [section 10R of the Telecommunications (Residual Provisions) Act 1987) and bodily samples [section 76 of the Criminal Investigations (Bodily Samples) Act 1995].

Should a mismatch of reporting duties continue?

It is hard to understand the continuing logic behind a legislated requirement to report on these particular powers, as opposed to a range of other coercive/intrusive powers at Police's disposal (eg. deploying 'pepper spray'). This suggests an argument for rationalising the current specific reporting requirements, or perhaps amalgamating them in a new Police Act.

Question 18: What are your thoughts on the appropriateness of Police's existing statutory reporting obligations?

Provision for inquiries

A final matter worth considering under the general heading of Police's governance and accountability regime is whether to maintain (or enhance) the ability to launch an inquiry into any issues of concern.

A reserve power to call for an inquiry is fairly standard in most Police Acts, including our current legislation

Under section 56 of the current Act, the Minister may appoint a Committee of Inquiry, consisting of a District Court Judge and one or more Police staff, for the purpose of investigating and reporting to the Commissioner on any matter connected with Police (so long as it is not a remuneration or employment related matter that may be determined by a Court).

An option would be to carry over this reserve power into a new Police Act

In principle, this seems a useful power to retain. It echoes equivalent powers to set up inquiries in many overseas police statutes. Differences between these international models include who is empowered to conduct the inquiry (eg., section 42 of the Garda Síochána Act specifies that a single person is to be appointed), and whether the ability to call for an inquiry rests solely with the responsible Minister, or whether it is extended also to the chief police officer. For example, section 24.1(1) of the Royal Canadian Mounted Police Act 1985 reads as follows:

> The Minister or the Commissioner may appoint such persons as the Minister or Commissioner considers appropriate as a board of inquiry to investigate and report on any matter connected with the organization, training, conduct, performance of duties, discipline, efficiency, administration or government of the Force or affecting any member or other person appointed or employed under the authority of this Act.

If so, it may be a good idea to revisit who calls for such inquiries, as well as who conducts them

In recent years, where it has been accepted there should be an independent inquiry into a policing matter, Commissioners have typically appointed a Queen's Counsel to lead the inquiry. If a more sweeping examination and report is called for, the practice has been to convene a broader inquiry with formal terms of reference, often involving senior police from overseas in a peer review capacity. (An example of the latter model was the 2004/05 expert review panel that reported on the Police Communications Centres.)

This tradition of police leaders acting swiftly to set up arms-length inquiries into issues of concern may suggest any statutory power to establish independent inquiries under a new Act should extend to the Commissioner.

Even if just carried into new legislation as a reserve power for the portfolio Minister, it may be better to be less prescriptive about who conducts the inquiry. Having current Police staff involved certainly seems questionable, raising issues of perceived independence. A better approach may be to provide for a person or persons with policing experience, thus allowing for senior overseas officers to be included in any inquiry team.

This may help explain why the section 56 inquiry power in the current Act does not appear to have ever been used. Indeed, in historical cases where it might have been expected it would have been invoked, governments have chosen other platforms

for independent inquiries. This includes a previous Attorney-General, "for some undisclosed reason", appointing a Queen's Counsel to conduct an inquiry and report to the Minister of Police, all the while "acting under no specific statutory authority" (Warren Young, Investigating Police Misconduct, in N Cameron and W Young (eds.), *Policing at the Crossroads* [Wellington: Allen & Unwin, 1986], 107-133, p 131).

Updating the basis for any statutory inquiries may encourage the power to be used

Question 19: Do you support retaining the power to set up an independent inquiry in a new Police Act? If so, what are your views on who should be able to convene such an inquiry, and whether the legislation should specify who conducts the inquiry?

4. Conclusion

This *Issues Paper* highlights governance and accountability options for New Zealand Police. In particular, it promotes discussion on whether there should be clarification of the relative areas of authority of the responsible Minister and the Commissioner, and mechanisms to better integrate Police with wider public sector management and accountability systems and processes.

There are some good springboards for thinking about Police's governance and accountability arrangements

One way to understand these options is to contrast them with Police's current governance and accountability environment. A theme that emerges in this *Issues Paper* is the benefit of more certainty and transparency in legislation, rather than necessarily changing fundamentals of the status quo. To think about Police's governance and accountability arrangements in this way naturally means to look to the past - to convention and to case law - as the inspiration for how to put things on a clearer, stronger, statutory footing.

While certainly a valid way of looking at these issues, it is important not to rule out new or different approaches. Governance and accountability models continue to evolve, including developments in policing. This includes non-legislative developments, like recent moves to establish a National Policing Board to strengthen the governance of policing in England and Wales. Tapping into such innovations can help us to understand what may be possible here in New Zealand.

But there might be valuable ideas about Police governance and accountability arrangements which have not yet come forward

Question 20: Apart from those already discussed, are there any other ideas around Police's governance and accountability framework which you think should be explored in the Police Act Review?

If you have reactions to any of the questions posed in this *Issues Paper*, we encourage you to let us know.

So, before we take things any further, we want to hear what you think

Options for how to make the Police Act Review Team aware of your views are provided on the back page of this document.

How to make your views known

We are inviting written responses to this *Issues Paper* by 15 September 2006.

Responses can be sent by post, fax, or by using the web form provided on the Police Act website [www.policeact.govt.nz/consultation.html].

Faxes should be sent to: (04) 474 2342. Responses can also be posted to:

Police Act Review Team
Police National Headquarters
New Zealand Police
P O Box 3017
WELLINGTON

Consultation on this *Issues Paper*, together with consultation on all further *Issues Papers* during this project, is a public process. Responses provided will be subject to the Official Information Act 1982, so please identify any information in your response which you would like treated as confidential.

If you have any questions relating to this *Issues Paper* or the consultation process, these may be emailed to the Police Act Review Team using the dedicated channel on the www.policeact.govt.nz website, or you can ask to speak to a Police Act Review Team member by calling (04) 474 9499.

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