Police Act Review

Building for a modern New Zealand Police

Issues Paper 5: **Powers and protections**

October 2006

BUILDING FOR A MODERN NEW ZEALAND POLICE

1. Introduction

Views are being sought on how Police powers and protections are dealt with in the Police Act review

This is the fifth in a series of *Issues Papers* designed to stimulate ideas on how to construct a modern legislative framework for New Zealand Police. It follows earlier *Papers* on the principles of policing, governance and accountability issues, employment matters and engaging with communities.

This latest *Issues Paper* examines powers and protections available to Police. Police's ability to tackle crime and disorder, and to contribute more broadly to community safety, relies on access to effective and proportionate powers. Just as important is the ability for Police staff to discharge their duties with the backing of certain protections.

The approach taken is to invite debate, rather than seeking to lead it

Like its predecessors, this *Paper* seeks to promote thinking about the extent to which new policing legislation could and should address the issues under discussion. It does not try to examine every possibility, because this would start to lead the debate rather than opening it up in a more neutral fashion. Having said this, *Issues Paper 5: Powers and protections* does go into more depth than other *Issues Papers*. This is appropriate given the need to convey the many opportunities presented by the Police Act Review, and the chance to bring together thinking about powers and protections as part of a wider discussion about policing.

The *Paper* is divided into sections to allow for easier access to the issues. Questions are organised under the following main headings:

This Issues Paper *has a somewhat different look and feel from previous* Issues Papers

- Background information on police powers and protections (pages 2-5)
- Improving understanding of police powers (pages 6-8)
- Options for modernising current Police Act powers (pages 8-12)
- Options for modernising police powers in other areas (pages 12-18)
- Assignment of policing powers (pages 18-22)
- Protections, including Police-specific offences (pages 22-25).

The Issues Paper *poses questions about how new legislation might best support Police through access to specific powers and protections*

While ideas are put forward for improving Police's operational effectiveness through strengthened powers and protections, there is no presumption in favour of increased Police powers. *Issues Paper 5* raises the possibility some existing powers might be transferred to other agencies. It also highlights the chance to promote transparency, by making provision for policing practices which presently operate without any direct legislative backing.

Issues Paper 5 also recognises the importance of not cutting across existing work with implications for police powers and protections. Notable here is the Law Commission's project on entry, search and seizure. This project is reviewing current powers to search people, places and vehicles, and to seize relevant items. It is also considering the use of technology in relation to search and seizure of computer data, interception of communications, tracking, and audio-visual surveillance. Started in 2001, the Commission's project is nearing the stage where a final report can be brought forward, including recommendations for legislative change. For obvious reasons, it would be unwise to duplicate work being progressed through this channel.

In doing so, there is an awareness of not 'muddying the waters', given other work being done in some related areas

2. Background

Before getting to those questions, an important context is Police's current powers/protections

The term "police powers" can conjure up images from popular culture of struggles during arrests, officers with search warrants knocking at doors, and brightly lit interview rooms in which detectives seek answers from unwilling suspects. Recently, these stereotypes have been joined by high-tech images of police involved in forensic examination of crime scenes or fighting crime in the electronic world (like bank ATM scams and identity theft 'phishing'). These extensions of traditional police work see Police staff now using powerful computers and other sophisticated tools like DNA typing in addition to the handcuffs and fingerprint dusting kits from earlier times.

This part of the *Paper* will help put this evolving environment into context by touching on issues such as how often formal powers are used in policing, where the legal authority for these powers comes from, and the extent to which developments in offending (and also policing) stretch existing powers.

How often are police powers used?

It is important not to over-state the place of powers and protections in the Police Act Review. Although highlighted in media portrayals, use of formal legal powers is not always the dominant feature of day-to-day policing. An average working day for operational Police staff may not involve chasing offenders or making arrests. A typical shift for many frontline patrol units will involve responding to a miscellany of requests for service - to follow up reported disturbances or suspicious activity, to help people in distress, to attend traffic crashes, and so forth.

An early point to emphasise is that much police work is done without formal recourse to legal powers

Even when responding to reports of fights, it is often possible for police to resolve the situation by simply talking to people, letting tempers cool and restoring calm. Some low level offending can also be dealt with most effectively by officers' on-the-spot interventions, without the need to invoke enforcement powers. Indeed, even when it is necessary to take action, a significant amount can be achieved by consent, without the need to use physical force or other types of coercion. Police powers are nevertheless valuable in a symbolic and practical sense. The knowledge that an array of legal powers can be invoked (if required) encourages people to voluntarily comply with officers' instructions, without being compelled to do so by the existence or assertion of particular powers.

The availability of coercive powers, if needed, is widely understood though

Broad public support for Police, and a willingness for members of the public to lend police a hand and accede to officers' requests, means police powers are less contested in New Zealand than in some other parts of the world. New Zealand Police's reputation has not been stained by findings of systemic corruption or acts of brutality, as some overseas forces have. Kiwi police are widely regarded as non-corrupt, and New Zealand Police holds a proud position internationally as one of the very few largely unarmed police organisations. Against this backdrop, proven cases where powers have been misused by police (e.g., through excessive/unjustified use of force) are rare exceptions which prove the general rule.

The subject of police powers does not seem to be as intensely contested in New Zealand as some other places

These are key points to keep in mind as part of the Police Act Review. They remind us that police in New Zealand do not face a crisis of legitimacy over their (mis)use of powers. There is no pervading sense that New Zealand's approach to this area is somehow broken, or in need of radical overhaul. As such, it might be appropriate to focus less on principles or mechanics than to explore ways police could be empowered to do their jobs even more effectively than now.

This is likely to be related to the fact the overwhelming majority of Kiwi police use powers lawfully, ethically and sensitively

However, this *Issues Paper* necessarily has a modest reach. In part, this relates to the fact the Police Act 1958 contains relatively few powers, meaning a truly comprehensive treatment of this topic does not fall within the scope of the Police Act Review. It also responds to the philosophical point that the Police Act contains so few powers for a reason. From this point of view, a similar conservatism should apply when discussing police powers as part of the Police Act Review. Having said this, it is still important to offer at least some focus on the powers which the law provides police, given police ultimately source their authority from the law (as well as the community).

Nevertheless, the Police Act Review is a useful prompt to run the ruler over police powers and protections

Where does the legal authority for police powers come from?

It is sometimes assumed police powers principally derive from the oath of office constables take when they join Police (contained in section 37 of the 1958 Act). From a legal perspective, though, it is fairly well-settled that the constabulary oath does not provide an independent source of any particular police power. The influence of the common law is also seen as fairly limited, with just a small residue of judicially-recognised powers and privileges surviving the trend towards codification. As Justice Hardie-Boys commented in the Court of Appeal case of *R v Jefferies* [1994] 1 NZLR 290, 313:

Most police powers have been codified in legislation

> [I]n our constitutional model police powers are conferred expressly and specifically. There is no conferment of general authority. A police officer stands in no different position from any other citizen, save in so far as powers or authorities are conferred on him by particular enactment.

Comparatively few of these powers and protections are spelt out in the present Police Act

So where in statute are the main police powers spelt out? As mentioned earlier, very few are contained in Police's own legislation. In *R v Jefferies*, Justice Hardie-Boys drew attention to just four such powers in the 1958 Act:

- section 38 enables sworn members of Police to execute all lawful summonses, warrants, orders and other Court processes (including warrants for arrest);
- section 53 entitles sworn members in the lawful execution of their duties to call for assistance from any over-18-year-old to apprehend or secure any person in their charge (and makes it an offence not to provide help, if called upon to assist);
- section 57 authorises taking particulars of identification from people in custody (including the person's photograph, fingerprints, palmprints and footprints), and specifies that Police staff "may use or cause to be used such reasonable force as is necessary to secure these particulars";
- section 57A authorises the searching of people who are to be locked up, again with empowerment to use reasonable force, if necessary.

While some specific issues relating to these powers could be addressed in the Police Act rewrite - examples of which are provided in section 4 of this *Issues Paper* - the broader point is that most powers exercised by police are conferred by legislation other than the Police Act. For example, the following statutes have the effect of extending search powers to Police staff:

In fact, the vast majority of police powers arise from provisions in other legislation

- Crimes Act 1961 (sections 202B and 317AA: search people and vehicles for weapons; search powers incidental to stopping a person for arrest);
- Misuse of Drugs Act 1975 (section 18 and 18A: search people, places and vehicles for drugs);
- Misuse of Drugs Amendment Act 1978 (sections 13A-M: detention and search for internally concealed drugs);
- Arms Act 1983 (sections 60, 60A, and 61: search of people and places for arms-related offences);
- Summary Proceedings Act 1957 (section 198: general search warrant);
- Immigration Act 1987 (section 137: powers of entry and search).

The Crimes Act contains several other commonly-accessed police powers. Key provisions include Part 11A (obtaining evidence by interception devices), sections 314B and 314C (power to stop vehicles and powers incidental to stopping vehicles), section 315 (power to arrest without warrant), section 317 (power of entry) and section 317A (power to stop vehicles for the purpose of making an arrest).

A number of statutes allow for powers of arrest without warrant. Examples include section 40 of the Arms Act 1983, section 59 of the Immigration Act 1987 and section 50 of the Domestic Violence Act 1995.

A large number of statutes extend the power to take particular action to members of Police

Various pieces of legislation also authorise police to take particular action in defined circumstances. By way of example, the Land Transport Act 1998 spells out powers to stop and search vehicles; the Summary Proceedings Act 1957 details powers to use tracking devices; the Criminal Investigations (Bodily Samples) Act 1995 offers a framework to obtain DNA samples from suspects and other relevant people; the Aviation Crimes Act 1972 provides a power to search passengers and their baggage at airports; and the Children, Young Persons and Their Families Act 1989 extends police various youth justice powers, as well as providing for care and protection functions.

Other legislation extends powers to police so they can help minimise harm

A range of other statutes offer constables the power to prevent harm or assist people unable to care for themselves. Examples include section 37A of the Alcoholism and Drug Addiction Act 1966, which provides a power to detain those found intoxicated in public, and section 109 of the Mental Health (Compulsory Assessment and Treatment) Act 1992, which states:

> (1) If any person is found wandering at large in any public place and acting in a manner that gives rise to a reasonable belief that he or she may be mentally disordered, any member of the Police may, if he or she thinks that it would be desirable in the interests of the person or of the public to do so, —

(a) Take that person to a Police station, hospital, or surgery, or to some other appropriate place; and

(b) Arrange for a medical practitioner to examine the person at that place as soon as practicable

The already fairly complex map of police powers is further complicated by some Acts giving police officers the ability to exercise certain functions as a back-up to primary enforcement agents. An example here is the ability to execute search warrants, which is a power vested in various officers of the Crown under specific pieces of legislation. By virtue of their definition as warranted enforcement officers under the different Acts, or because "any member of Police" is included as an additional category of authorised agent, constables are given co-extensive powers to execute search warrants under the Reserves Act 1977, Wild Animal Control Act 1977, Marine Mammals Protection Act 1978, Radiocommunications Act 1989, Biosecurity Act 1993, Films, Videos and Publications Classification Act 1993, and the Hazardous Substances and New Organisms Act 1996.

In many instances, police powers are there as a fall-back option, or to enable Police support for other enforcement agency staff

The over-lapping nature of some of these statutory references is neatly illustrated by section 111(3) of the Biosecurity Act, which reads as follows:

> Every warrant ... shall be directed to and exercisable only by—
>
> (a) A member of the Police specified in the warrant; or
>
> (b) An inspector [or authorised person] specified in the warrant, if accompanied by a member of the Police; or
>
> (c) Any member of the Police; or
>
> (d) Any inspector [or authorised person], if accompanied by a member of the Police.

The fact "member of the Police" gets four mentions in one sub-section demonstrates the extent to which reliance can be placed on making sure police are given at least a secondary role to exercise enforcement powers.

The end result can be a very complex and over-lapping set of powers and protections

What is the most appropriate statutory home for police powers?

One response to the complexities of the current statutory environment for policing powers might be to call for more of them to be brought together in one place. However, the possibility of consolidating commonly-used law enforcement powers in a single statute has been defined as 'out of scope' for the Police Act Review. It is also debatable whether any moves to bring greater coherence to policing powers would result in more powers being located in the Police Act. Arguably, there are sound reasons why commonly-used police powers might not end up being included in a statute Police itself administers. If police powers are spelt out in legislation administered by other agencies, the contention is that these agencies can act as a 'constitutional watchdog' over any proposals to extend the powers which are available to Police staff.

A solution to this problem may be to seek opportunities for more coherence in legislation

Consolidating some of the main police powers may be worthwhile, but is 'out of scope' for our purposes

Taking this point further, some might argue that a Police Act should contain *no* powers at all, but instead focus on operational policing matters and the governance and administration of Police. Alternatively, it might be argued that if powers are to be included, their scope should be narrowly defined (e.g., only addressing safety and security needs of police stations and personnel, as well as members of the public who are in police-controlled environments).

It remains a moot point whether more powers should be included in a new Police Act, anyway

Perspectives on these issues will inevitably vary. The Police Act Review is an opportunity to identify a basis for deciding which police powers are included or excluded from the Police Act. In saying this, even if a narrow view is taken (i.e., a Police Act should contain no powers or only minimal powers), an appropriate statutory home for commonly-accessed policing powers will still need to be found.

Some may oppose anything other than a very narrow set of policing powers being included in a Police Act

Question 1: Do you agree that the Police Act is an inappropriate place to locate most police powers? If so, why? If not, why not?

3. Improving public understanding of Police powers

Understanding of police powers could be promoted in new policing legislation

The issue arises whether the current widely-scattered approach is the best way for police and/or the public to understand what Police's powers are.

As things stand, few people (including many police officers) would be able to readily list all the powers available to police. Not only is there a dispersed set of statutory provisions, a number of common law powers also need to be factored in. This even includes Police's ability to commence criminal prosecutions; a power for which there is no specific statutory authorisation.

The disparate state of police powers and protections can frustrate the ability to readily describe the limits of Police authority to act

Without going so far as to argue the case for a full-blown Police Powers Act, collating the powers and protections available to New Zealand Police may improve the visibility and understanding of those powers and protections. One possibility might be to introduce a new Schedule to the Police Act that cross-references to all the different statutory powers Police staff can access. Tabulating existing powers in this way might not seem especially significant (as it would continue to leave the operative provisions scattered throughout the statute book), but making the array of police powers more transparent may help to encourage reflection and debate about the scope of the powers, potentially contributing to future consolidation and/or rationalisation.

Question 2: **Can you suggest any ways that enhanced understanding of police powers could be achieved (e.g., consolidating statutory powers police can access in a single Act; or cross-referencing to statutory powers police can access in a Schedule to a new Police Act)?**

Testing whether particular powers are necessary and/or desirable

The Police Act Review creates space for questions to be asked about the appropriateness of current powers

The idea of rationalising some currently available powers is not a new one, nor should it be seen as somehow threatening. A rationalising instinct can be healthy in an environment marked out by what seems like an ever-growing volume of laws. With the 1958 Act itself, Police has already taken some small steps towards rationalisation by volunteering to give away some anachronistic powers. An example here is the old power under section 50 to seek a warrant to seize Police property that may be in the possession of a former employee. Viewed in a modern light, Police agreed there was simply no need to retain such a specific power. Section 50 was repealed as part of the Police Amendment Act 2003.

To illustrate other possibilities in this regard, experts like Dr Andrew Geddis have recommended the power to prosecute offences under the Electoral Act 1993 should be assigned to an agency other than Police. This would possibly be a new office holder, equivalent to the Commissioner of Canada Elections, which since 1993 has taken over responsibility for investigating alleged electoral offences from the Royal Canadian Mounted Police.

It might be thought best for Police to allow others to take on certain powers

The ability for the Commissioner of Police to step aside from prosecutorial decisions in certain cases is a subject that will be picked up in more detail in a later *Issues Paper* on relationships. For present purposes, the Electoral Act example illustrates how a discussion about powers may invite thinking about possible streamlining of Police powers in certain areas.

Question 3: **What (if any) current powers available to police do you think might usefully be transferred to other enforcement agencies, or dispensed with altogether?**

Opportunities for greater clarity about policing practices

Opportunities are also available to shine greater light on some areas of policing practice

Another area the Police Act Review might open up to discussion is whether a new Act could promote greater visibility of policing practices that currently have no statutory underpinning. Putting such practices on a firmer legal footing would make them more transparent and allow for wider public input to the way Police staff are empowered to make use of such approaches.

Two brief examples may serve to illustrate opportunities offered in this area.

VOLUNTARY FINGERPRINT SCHEME

The voluntary fingerprint scheme is one such practice that may benefit from being codified

First, the collection of voluntary fingerprints from children and young people could be put on a statutory footing in the new Police Act. At present, the scheme operates according to a detailed Practice Note, involving a written Consent Form [a standard Police document known as a POL545], under the authority of a *General Instruction* issued by the Commissioner of Police.

The rationale for maintaining such a voluntary fingerprinting policy is strong. Many fingerprints identified at crime scenes are able to be matched to prints previously volunteered to Police (e.g., Police's Fingerprints Section attributes 20% of resolved burglaries to the voluntary fingerprint scheme). In addition to crime solving successes, fingerprints obtained with consent from children and young people can enable Police to more quickly and correctly identify offenders, and to deter offending by those who have submitted fingerprints.

This would build on good work that has already been done to strengthen the safeguards around how it operates

Police has worked closely with key government departments, agencies like the Office of the Commissioner for Children, and figures such as the Principal Youth Court Judge, to ensure the voluntary fingerprinting policy appropriately safeguards the interests of children and young people. One way to reinforce these safeguards and give the voluntary fingerprint scheme greater visibility would be to provide it with legislative backing. This could also be interpreted as consistent with New Zealand's international treaty obligations under the United Nations Convention on the Rights of the Child.

Given section 57 of the 1958 Act already enables Police staff to take fingerprints in defined circumstances, any carry-over provision in a new Act might also be looked to as a place to clarify the ability to obtain fingerprints from children and young people under the voluntary fingerprint scheme. An alternative view would be that legislation is unnecessary; it being better to explore other ways of boosting visibility of the scheme (and its safeguards).

USE OF ASSUMED IDENTITIES BY POLICE OFFICERS

Infiltrating organised criminal networks can be an important way for police to disrupt serious offending against the community, especially sophisticated operations involving crimes like manufacturing and trafficking of illicit drugs.

Another possible candidate for codification is Police's undercover (UC) programme

For obvious reasons, law enforcement agencies carefully guard details of their covert work to penetrate criminal networks. This secretiveness extends to legislation, which offers few clues about the existence of undercover (UC) programmes, any checks or balances on them, or legal protections it is appropriate to extend to enforcement personnel who work as UC operatives. Similarly, statute sheds little light on Police's involvement in facilitating access to new identity information for people who require witness protection.

Current legislation contains limited reference to UC officers' use of assumed identities

Currently, the only statutory reference to Police's UC programme is section 13A of the Evidence Act 1908. It allows Courts to receive anonymous evidence from UC officers, based on the Commissioner certifying the officer is part of the UC programme. Section 13A(6) provides that officers who act as prosecution witnesses are generally not required to state, or provide any details likely to lead to the discovery of, his or her true name or address.

While the Evidence Act offers some level of protection for Police UC officers, it is far from comprehensive. Interests of transparency and certainty may be better served by giving police access to a more complete statutory regime, similar to those that exist in several overseas jurisdictions. The Regulation of Investigatory Powers Act 2000 (UK), and

equivalent legislation in Scotland, offers one of the most comprehensive examples of such a statutory regime.

This contrasts with the approach taken in some overseas jurisdictions

Closer to home, and building off state legislation like New South Wales' Law Enforcement (Controlled Operations) Act 1997, in 2001 a new Part IAC was added to the Commonwealth Crimes Act 1914 to expressly mandate the use of assumed identities in policing work. There are now clear rules in place which: allow for authorised enforcement officers to acquire and use false identities; clarify immunities from liability for actions during UC operations; provide for actual issuing and cancelling of evidence of assumed identities (e.g., passports); and put in place record-keeping and reporting protocols to allow public and parliamentary accountability for use of assumed identities.

Mindful of these precedents, the Police Act Review might be seen as a path by which to formalise the use of assumed identities by Police UC personnel, and possibly also witness protection, surveillance and human source officers.

The Police Act Review allows for a more certain and transparent approach to the use of assumed identities - both for Police UC officers, as well as for people on the witness protection programme

There remains a strong case for UC officers, in particular, to continue using false identities, as they enable the officers to be accepted in criminal circles. To ensure their safety and effectiveness, it is vital that covert police can make use of authentic documentation to evidence their assumed identities. Experience suggests criminals are increasingly looking to verify commonly used forms of identification (e.g., driver licences and passports), hence the importance of robust arrangements to allow UC police officers to obtain and use such evidence of identity documents from the issuing agencies (i.e., Land Transport New Zealand and the Department of Internal Affairs).

Current arrangements work by agreement between Police and the relevant agencies. An opportunity presented by the Police Act Review is to lift these arrangements up into legislation, with or without strengthening the accompanying powers and protections. This would put Police's ability to use assumed identities on a solid legislative footing.

Question 4: **Do you support the new Police Act giving statutory recognition to police practices that currently have no legislative backing? If so, are there any particular policing practices you would like to see included in statute (e.g., use of assumed identities to help safeguard personal and public safety)? Do you think further protections should also be incorporated in legislation?**

4. Options for modernising current Police Act powers

As well as seeking views on general directions, we also invite feedback on specific proposals

This next section of the *Issues Paper* offers concrete suggestions for how Police's powers and protections might be modernised through a Bill leading to a new Police Act. It does not run through every possible option; it offers a taste of what could be done. This may inspire other suggestions. The team managing the Police Act Review would welcome any such suggestions.

Aspects of powers in the current Police Act could usefully be updated

A useful starting point is the limited number of powers contained in the present Police Act. While some might object on principle to any such powers being contained in Police's legislation (preferring instead to see police powers spelt out in a standalone piece of legislation, or incorporated into a generic criminal procedure statute), this should not deter consideration of whether currently-available powers under the Police Act could be updated.

Section 57: Identifying particulars

The ability to verify a person's identity under section 57 of the current Act is an important power

As noted earlier, section 57 of the current Act authorises taking identifying particulars from people in Police custody, including the person's photograph, fingerprints, palmprints and footprints. Thresholds for invoking this power are that the person "is in lawful custody on a charge of having committed an offence", and "the person in lawful custody is at a police station, or on other premises, or in any vehicle, being used for the time being as a police station". Section 57 goes on to provide that particulars taken from detainees under this provision are in most cases to be destroyed if they end up acquitted of the charge(s).

From a Police perspective, section 57 has functioned relatively well over the years, with case-law decisions helping to clarify its parameters. Nonetheless, a number of opportunities can be identified to further strengthen section 57.

APPLICATION TO PEOPLE "ON A CHARGE"

For instance, section 57 is unusual in requiring detainees be "on a charge". Linking the ability to take particulars with being "on a charge" is potentially unhelpful, because the word "charge" does not have a fixed legal meaning in New Zealand, and in everyday speech is fairly loosely applied to a number of steps leading up to prosecution (*R v Gibbons* [1997] 2 NZLR 585, 593). Rather than invite any uncertainty, it may be preferable to make the trigger for section 57 simply that a person is in lawful custody for questioning. The definitive factor here would be a person's detention in a Police-controlled environment, instead of hinging on the stage the person is at in the prosecutorial process. If this approach were followed, section 57 would align more closely with equivalent powers in comparable overseas jurisdictions (e.g., section 18 of the Criminal Procedure (Scotland) Act 1995).

Questionable limits on the use of this power, and areas of uncertainty, could be resolved in an updated provision

Indeed, section 57 could be extended to situations where people are issued with a summons to answer charges in Court. This would remove the current perceived incentive to arrest alleged offenders, in order to obtain particulars (e.g., in relation to historical fraud offences). It may also be a more efficient way to confirm identifying details of prisoners charged with other offences, rather than physically removing them from prison (as provided for currently under regulation 27(v) of the Corrections Regulations 2005).

Modernising section 57 would also give an opportunity to address some gaps in the current law

A further issue concerns section 57(3), which provides that particulars taken from detainees are in most cases to be destroyed if the person is ultimately "acquitted", thus implying they may be retained if the person is convicted. A number of considerations arise. First, while the language of acquittals may have been appropriate for 1950s New Zealand, when almost all defendants facing charges came before the Courts, it is increasingly at odds with the way cases can be resolved today. This raises tricky questions. For instance, does an offender's case that ends in diversion, a Family Group Conference, or some other resolution trigger section 57(3), thereby requiring destruction of his or her particulars? What happens if matters do not go that far, and a case does not proceed because a complainant or a witness is unable or refuses to give evidence? As section 57 is currently drafted, the particulars taken from the alleged offender would have been lawfully obtained, but section 57(3)'s destruction provisions will not come into play, because the case never gets prosecuted.

To give greater certainty, it might be better to recast section 57(3). If this is the agreed way forward, it may be as simple as providing that all particulars must be destroyed following a decision not to institute criminal proceedings, or at the end of such proceedings; unless the person is convicted, an alternative resolution is imposed, or any other listed exemptions apply.

Question 5: Do you support amending the current section 57 power to clarify when particulars can be retained or must be destroyed? If so, what are your reasons for seeking such amendments?

WHAT PARTICULARS CAN BE TAKEN?

If section 57 is to be updated, there would also be an opportunity to recognise the availability of new technologies to confirm people's identities. This could clarify Police's ability to collect a wider category of biometric information, sourced from passive technologies like facial recognition (made possible by photographs); impressions taken from the exterior of a person's body (e.g., fingerprints); and non-intimate samples (e.g., hair or oral fluid) which allow DNA to be used as an identifier.

There would also be an opportunity to look at potentially expanding its reach

In jurisdictions like England and Wales, police powers to acquire identifying particulars have been extended to include the ability to take DNA samples from people while in detention following an arrest for recordable offences (see section 63 of the Police and Criminal Evidence Act 1984 [PACE], as amended by section 10 of the Criminal Justice Act 2003). Similarly, Scottish police can take a DNA sample from anyone arrested or detained for an

By way of example, the requirement to take DNA samples from arrestees is standard in some overseas countries

imprisonable offence. If there is no conviction or the case against the alleged offender does not proceed, the profile is removed from the Scottish DNA Database.

Developments like these suggest the possibility that, subject to more detailed policy work and consultation, there might be similar empowerments for New Zealand Police.

Question 6: Do you favour amending section 57 to allow a wider range of biometric data to be used for identity confirmation purposes? If so, what added safeguards might need to accompany such amendments?

WHERE CAN PARTICULARS BE TAKEN?

'Future-proofing' section 57 to allow new fingerprinting technology to be deployed is another possible area of advancement

In a similar vein, any updating of section 57 could help ensure police are able to make full use of advances in technology to quickly confirm identities. Currently, section 57 only allows identifying particulars to be taken at a (deemed) police station.

An example of the practical need to address section 57's current limitations is the emergence of Livescan fingerprinting. Mobile fingerprint scanners have been introduced by a number of police forces around the world, and New Zealand Police will soon introduce similar technology here. Hand-held Livescan devices allow electronic fingerprint images to be taken anywhere and uploaded for comparison with Police's national fingerprint database.

Use of hand-held fingerprint readers offer real efficiency savings and crime fighting benefits

These new technologies promise to reduce the amount of time police spend on administration, and increase time spent on frontline operational duties. It is important any new Police Act reflects these developments in policing, and that powers such as those in section 57 are 'future-proofed' if at all possible.

There may be support for revamping the current section 57 power to enable police officers to require a person to provide identifying particulars (biometric data) outside of a police station, in situations where:

- the person is reasonably suspected of having committed an offence; and
- the officer has reasonable grounds for believing the identity given by the person is false, or it cannot satisfactorily be verified by other means.

Any extension of such police powers should be balanced with appropriate safeguards

If there is general support for extending police officers' powers in such areas, suitable safeguards could be designed to protect the rights of individuals. For instance, the extended power might come with a specific requirement that, once used for their intended purposes, biometric data like electronic images of fingerprints cannot be retained or added to any Police database. Further protections might seek to take account of people's privacy interests, to provide parameters around how police might physically collect such data.

Question 7: Do you support amending section 57 to enable police to require production of identifying particulars (biometric data) outside of police stations? If so, why; and what additional safeguards (if any) do you think may need to be provided for?

FUTURE BENEFITS OF NEW TECHNOLOGY

It is possible to imagine ways such technology could be used in a number of different settings

Taking this line of thinking a step further, it may be felt appropriate to ensure police powers under related legislation supports modern technology when it is deployed in the field. Again, Livescan fingerprinting offers a good case study. For example, under section 114 of the Land Transport Act 1998, enforcement officers are empowered to require the drivers of vehicles to give their name, address, date of birth, and other such particulars; with a matching power to arrest any drivers who are suspected of giving false or misleading information. If enforcement officers were also provided with the power to conduct on-the-spot checks of drivers' fingerprints, using mobile scanning devices, it should be possible to reduce the need to make arrests, in order to take drivers back to the station to confirm their identities.

Roadside checks of drivers' identities might be one use for new generation fingerprint readers

As further developments like Automatic Number Plate Recognition (ANPR) start to take effect, the need for police to be able to quickly confirm drivers' identities will become even greater. (Again looking to United Kingdom experiences, around 60% of disqualified drivers

are providing false details to police during targeted vehicle stops, following the use of ANPR information.) Awareness that roadside Livescan checks may be conducted should help deter drivers from offering false details, especially those seeking to avoid recognition as recidivist offenders. In turn, this should help to support the integrity of the Traffic Offence Notice system used to police illegal driving.

In the future, biometric data submitted for comparison with Police's central database from the roadside may also allow for matches against biometric data recovered from unsolved crime scenes. Any matches achieved in this way would guide officers whether to detain a suspect for further questioning, or to escort him or her to a police station to conduct more detailed inquiries. This would provide direct benefits to both Police and the wider community in terms of detecting, apprehending and bringing offenders to justice.

Identity verification at the roadside may also yield matches with biometric data from the scenes of unsolved crimes

In all such cases, the rights of the individual could be safeguarded with a requirement that any biometric data taken in a roadside context would not be retained or added to Police's national database. In other words, it could not become a 'catch and release' exercise, whereby ever-greater biometric data holdings could be added to Police's database. However, if a person is summonsed or arrested for an offence after initial checks are carried out, then a full set of biometric information would be taken, as part of the normal investigative and detainee handling process.

Again, any potential extension of police powers in this area would need to be accompanied by agreed protections

Question 8: Do you have any suggestions on how to ensure police powers like section 57 under other legislation might most effectively support modern technology? Do you have any suggestions for how the rights of individuals would properly be safeguarded?

Section 57A: Searching detainees

The other Police Act power routinely used by Police staff derives from section 57A, which authorises searches when a person "is taken into lawful custody and is to be locked up in Police custody". Section 57A was introduced in 1979 as an adjunct to the common law power constables have to carry out searches incidental to making an arrest. It was intended to confirm the legality of searching all arrestees who were taken to Police cellblocks (e.g., for concealed weapons or drugs), whereby all personal property is removed pending the person's release.

Another provision under the current Act that is routinely used is section 57A

A parallel piece of work being led by the Law Commission is expected to confirm the scope of this statutory ability to search arrestees brought into Police cellblocks, which is viewed as a necessary and common-sense power.

Section 57A allows searches of people detained in Police holding facilities

The Law Commission is currently finalising its proposals, and its published report is likely to contain recommendations on codifying the purposes of a search, as well as the authority to search people upon arrest and when received into Police custody. If the Law Commission's project results in new or amended legislation, it seems likely to strengthen the statutory framework within which Police staff carry out 'section 57A type searches'.

It is interesting to reflect on progressions in this area internationally. Matters which have been explored in other jurisdictions include the purpose of searches conducted in the custodial areas of police stations, and parts of police stations members of the public can access (e.g., there is provision for police to use electronic screening devices for entrants to buildings under section 332 of Queensland's Police Powers and Responsibilities Act 2000).

A more expansive approach could also be taken

In a different context, sections 5 and 6 of the Drugs Act 2005 (UK) give police forces in England, Wales and Northern Ireland the power to require a person believed to have swallowed a Class A drug to undergo an x-ray or ultrasound scan in certain circumstances. Such a procedure may only be carried out by a suitably qualified person, and only at a hospital, a registered medical practitioner's surgery, or some other place used for medical purposes. While the decision whether to submit to such an x-ray or ultrasound scan ultimately rests with detainees (who can refuse consent), specific provisions allow a Court or jury to draw an adverse inference where a person refuses, without good cause, to consent to an x-ray or ultrasound.

The Drugs Act 2005 (UK) offers food for thought in this area

While this power was only activated on 1 January 2006, initial reports from the United Kingdom suggest it has been a worthwhile addition to the search options available to staff working in police custody suites.

This power in the United Kingdom to check for internally-concealed drugs sits alongside long-standing police powers to require arrestees to undergo drug testing for 'trigger offences' (e.g., burglary), which commonly have a connection to illicit drugs [see section 63B of PACE]. If the tests return positive results for heroin, cocaine or crack cocaine, the individual concerned can be required to undergo an assessment by a drugs worker, to see if they might benefit from treatment to break the drug-crime cycle. The results of the test can also be taken into account when a bail decision is made about the person.

Precedents such as these challenge us to think about how appropriately police are positioned here in New Zealand

These examples of different search powers available to police in the United Kingdom offer a useful counterpoint to the present situation in New Zealand. They also reflect advances in technology, changes in crime patterns, and heightened awareness of the need for robust safety and security practices. It would be interesting to understand whether such roles for police staff are seen as constructive, and worth exploring further in a New Zealand context.

Question 9: What (if any) aspects of the current section 57A power do you support being updated?

5. Options for modernising police powers in other areas

While advances could be made solely by addressing the existing powers in the 1958 Police Act, arguably the greatest potential exists if a wider frame of reference is employed.

Aside from current powers under the Act, the Police Act Review allows for 'thinking outside the square'

It is appropriate to recall that some streams of work are already underway which may be expected to help position Police more strongly into the future. The Law Commission's project on entry, search and seizure is one example. Within the bounds of this project, Police officials have been advocating for strengthened electronic search powers to tackle crime in the intangible world of cyberspace. The Law Commission's carriage of this significant project will hopefully lead to separate legislation in due course.

Beyond these existing strands of activity, the Police Act Review presents an opportunity to bring other ideas forward. The appetite or ability to complete detailed policy/legislative development work on these ideas may be limited, which counsels against going into too much depth or breadth at this stage. But to convey a sense of the possibilities that may exist, the next part of the *Issues Paper* offers a selection of topics which could be taken further. In doing so, it is understood a new Police Act is unlikely to be where any such possibilities are realised, precisely because most police powers are contained in legislation administered by the Ministry of Justice.

A more certain environment for the use of Police equipment

For instance, there might be support for using legislation to provide a more formal framework around the use of Police equipment

One area that might benefit from specific legislative provisions concerns the use of standard Police-issue equipment. Indeed, some might wish to go further, and take the discussion into the way legislation may influence the environment in which the Police Commissioner decides what use (if any) Police staff can make of non-standard equipment, like the X26 Taser device currently being trialled in certain parts of the country.

Some might even want to extend this to equipment which is not standard issue, such as the Taser

This would not necessarily mean eroding the Commissioner's ability to make a professional judgment about what general/specialist equipment Police staff require, to allow them to properly discharge their operational responsibilities. It might simply involve specifying a set of principles to take into account, or a particular process to follow, before making such an operational judgement.

For present purposes, however, the point is sufficiently well-illustrated by using handcuffs and batons as case studies.

HANDCUFFS

At present, there is no specific statutory authority for the use of handcuffs by police officers. Handcuffing someone is clearly a use of force. As Chief Justice Elias recorded in *Wallace v Abbott* (2002) 19 CRNZ 585, police in New Zealand do not have any general authorisation to use force. Except for statutory justifications in sections 39 to 48 of the Crimes Act (covering arrests, preventing escapes or breaches of the peace, and self-defence), use of force by police is not mandated by legislation. As a consequence, use of handcuffs by police must be justified as reasonable in the circumstances.

Legislation could clarify the basis on which Police staff use handcuffs

The threshold for police use of handcuffs has been considered by the Courts in the context of claimed breaches of the New Zealand Bill of Rights 1990. In the main, decided cases have turned on the admissibility of evidence obtained after the use of handcuffs. Some of these cases have highlighted the potential value of a statutory presumption in favour of handcuffing being a reasonable use of force in defined situations. An example is *Clark v Police* (Unreported, 26 July 2005, High Court, Auckland, CRI 2004-404-521), where Justice Keane ruled against the handcuffing of a person in the rear seat of a Police car, who was being driven back to the station for an evidential breath test. The Judge held there was no objective basis for the police officers to fear for their personal safety, which otherwise would have made the use of handcuffs in this situation a lawful use of force.

One option is to look at deeming the use of handcuffs to be a reasonable application of force in general policing

Given the difficulty of assessing danger to officer safety on a case-by-case basis, weighed against what might be viewed as minimal use of restraining force (especially in closely-confined settings, such as Police vehicles), there may be support for a carefully-worded presumption in favour of handcuffing being a reasonable use of force in certain situations.

BATONS

Although used defensively by police when confronted with violence, a baton is an offensive weapon, and section 202A of the Crimes Act makes it an offence to possess a baton without lawful authority. Currently, though, there is no statutory provision giving police express authority to carry or use batons. This is despite the fact that, since the earliest days of policing, constables have carried truncheons.

There could also be clearer provision in legislation to cover police use of batons

Although there is no specific legislative authority for police to carry batons, at common law police are accepted to be acting with "lawful authority" when carrying a baton in the course of their duties. This lawful authority is sourced partly in statutory justifications for use of force (e.g., sections 39 to 48 of the Crimes Act); partly in the Crown's prerogative power to do all that is necessary to keep the peace and maintain law and order; and partly from Police's unique constitutional status within society. Implicit support is also provided by section 3(2)(iii) of the Arms Act 1983, which provides for lawful carriage of firearms and other restricted weapons by members of Police.

While it is generally accepted police are acting with "lawful authority" when carrying and using batons ...

An option presented by the Police Act Review is to consider whether greater certainty might be provided through legislation for the types of equipment available to police in New Zealand. This is a matter which some, but not all, overseas Police Acts deal with. One example is section 53 of the Police (Northern Ireland) Act 2000, which enables Ministerial guidance to be issued "on the use by police officers of equipment designed for use in maintaining or restoring public order". There are also some precedents for New Zealand legislation to address use of force considerations. Notably, sections 83 to 88 of the Corrections Act 2004 provide a framework for prison officers to use physical force in dealing with prisoners, including approved equipment (batons, mechanical restraints and handcuffs are specifically mandated for use in Part VII of the subordinate Corrections Regulations 2005).

... a more certain environment for the use of equipment by police could be provided in primary and/or secondary legislation

Question 10: Are you in favour of providing more certainty in legislation around the use of equipment by police? If so, do you have any suggestions as to how this might be achieved?

Regulating and/or removing existing powers

Legislation could also be used as a means of regulating existing police practices, or removing powers which are currently exercised

Putting aspects of policing on a statutory footing should not assume any 'creep'. As Professor Dixon points out, "one effect of legislating on police powers may be to control police power .... If a legislature provides formal legal powers, these may authorize less than what was previously common practice" (David Dixon, *Law in Policing: Legal Regulation and Police Practices* [Oxford: Clarendon Press, 1997], p 80). Opening up discussion on police powers may invite thought about whether there are any powers police currently have which might be better regulated or even removed altogether.

By way of example, a question some commentators have raised is whether Police's use of visual surveillance (e.g., with video cameras) should come under a legislative framework, especially where the surveillance involves activity in a private building. The Law Commission has this issue under review as part of its ongoing project on entry, search and seizure, and it may be the Commission recommends the introduction of a specific regulatory regime to deal with police use of visual surveillance. There are certainly precedents available in other jurisdictions which could usefully be drawn from in this regard. Indeed, some policing statutes even go so far as to contain detailed provisions around the use of visual surveillance tools like closed circuit television (CCTV) cameras - see, for instance, the rules around operating and installing CCTV cameras set out in section 38 of Ireland's Garda Síochána Act 2005.

A range of possibilities in this area could be imagined

The larger point is some people may believe that modernising police powers would mean regulating and/or removing certain currently-available powers. The Police Act Review Team would be interested in receiving any such suggestions. A specific question was posed earlier [question 3] which asked what, if any, current powers available to police might be dispensed with. A later question [question 14] will ask whether people support any reduction of current powers. If there are ideas about current police powers which might be better regulated or done away with, these would be appropriate places to bring them forward.

Extensions to existing powers and entirely new powers

Equally, new or extended police powers might be imagined

On the other side of the coin, there are a number of examples where legislation could potentially strengthen Police's powers, either as extensions to existing responsibilities or in whole new areas. Any law changes would be unlikely to result in new provisions in a Police Act, but the Police Act Review is a convenient way of canvassing opinion about any opportunities that may be seen in this area. As a way of inviting debate, four scenarios will be briefly introduced.

STRENGTHENED INFORMATION SHARING PROVISIONS

High quality information and intelligence are vital to effective policing work, both at a 'problem solving' level in local neighbourhoods through to tackling transnational organised crime. Ensuring good flows of information between law enforcement partner agencies is especially important. The virtues of strong co-operation between Police and organisations like the New Zealand Customs Service, New Zealand Immigration Service, and so on, are obvious in areas like preventing drug trafficking and people smuggling.

Not all such powers would necessarily involve the way Police staff interact with citizens

While, by and large, the information sharing arrangements Police has with partner agencies work well, opportunities are recognised to further support effective inter-agency information flows.

One area holding significant potential is the ability of other agencies to share information with Police

To take just one example, there is room to strengthen the Department of Corrections' ability to provide Police with information about the release of offenders from prison. From Police's perspective, pre-release information is a key resource. Importantly, it can help identify reasons for offending 'spikes' (e.g., a sharp increase in dwelling burglaries in an area a recidivist burglar has been released to from prison), and allow re-offending to be prevented by enabling specialist Police staff to pre-plan work with the Community Probation Service to support prisoners' re-integration.

Particularly in family violence cases, early notification to local police that a prisoner will be released back into a community can allow concerted efforts to be made to ensure Protection Orders are not breached. Conversely, when such information is not made available, serious risks to personal and public safety can arise.

Despite these and other benefits from routine sharing of the actual release dates of prisoners, recent legal advice indicates such information can only be provided to Police *after* releases occur - unless there is a good reason to do otherwise, on a case-by-case basis, as allowed by the Privacy Act 1993. This is one of many possible examples where more effective inter-agency sharing of information could be facilitated by careful legislative amendments.

The Police Act Review might also enable constraints to current sharing of information to be resolved

Strengthened intelligence sharing and data mining arrangements in other areas could also improve Police's ability to prevent crime or detect offences. This might include the existing relationships Police already has with agencies as diverse as the Department of Inland Revenue and the Ministry of Health. The Police Act Review Team would be interested in receiving suggestions on positive steps in this direction.

We welcome views on the general idea of strengthened information sharing

Question 11: Do you support legislation strengthening the ability to share information between Police and its partner agencies? What are the pros and cons that affect your thinking on this issue? If there was to be greater information sharing with Police, what (if any) additional safeguards would you expect to see?

CHANGING THE ABILITY FOR POLICE TO ENFORCE PARTICULAR OFFENCES

Another way Police's powers could be strengthened is to extend existing police responsibilities to enforce certain offences.

To illustrate this potential, since 1999 police have had the option of proceeding against certain alcohol offenders through either the District Court's summary jurisdiction, or issuing an on-the-spot Liquor Infringement Notice (LIN). The LIN option:

- Delivers swift, simple and effective justice that carries a deterrent effect;
- Reduces the amount of time police spend completing paperwork and attending Court, while simultaneously increasing the amount of time police can spend on the streets dealing with more serious crime;
- Reduces the burden on the Courts of dealing with low-level offending, while simultaneously freeing up the Courts to deal with more serious offending.

The ability of police to enforce offences (e.g., use of fake ID in licensed drinking environments) is another area that might be explored during the Police Act Review

Issuing LINs is seen as a positive alternative to prosecution which maintains accountability for behaviour. But there are limits on police's ability to issues LINs. For example, LINs cannot be issued to minors attempting to illegally gain entry to licensed premises with 'fake ID'. Police can take proceedings against youth who make false representations to licensees, managers or employees of licensees, under section 172(1) of the Sale of Liquor Act 1989 – an offence which carries with it a maximum penalty upon conviction of a fine not exceeding $2000. Rather than having such matters dealt with by the Courts, use of fake IDs to access licensed premises might be better dealt with using the LIN system. This option is currently precluded, however, because section 172(1) offences are not defined as "infringement offences" for the purposes of the Sale of Liquor Act. Amending section 162A of the Act would allow LINs to be used to deal with fake ID offences.

A separate review of the entire infringement system, led by the Ministry of Justice and begun in March 2004, may generate recommendations for legislation which could progress such an amendment. Another possible vehicle would be a Bill leading to a new Police Act. Given its police-specific characteristics, some may prefer to include such a consequential amendment in a Bill dealing with inter-related policing issues that implements a broad vision for New Zealand Police.

Proposals for law reform may come out of parallel work by others, but there may be advantages to police-related amendments being wrapped up in a new Policing Bill

Indeed, if there was enthusiasm to include such measures in a Policing Bill, various other long-standing proposals could be brought together into a package, all aimed at strengthening Police's ability to take decisive action against alcohol offenders (e.g., amending section 272 of the Children, Young Persons and Their Families Act 1989 to remove non-payment of LINs from the Family Group Conference/Youth Court

environment). Several of these proposals are with the Ministry of Justice for consideration, as part of its *Review of Sale of Liquor and Liquor Enforcement Issues* [August 2005].

As with the earlier example of information sharing, such proposals are put forward simply to illustrate the range of possibilities. Many opportunities exist. To highlight just three from the transport arena, these might include:

- clarifying the ability to act against parties to infringement offences (e.g., passengers egging on drivers in illegal 'drag races' or 'burn outs');
- simplifying proof of convictions when drivers are charged with a third or subsequent offence for excess breath/blood alcohol offending (including allowing fingerprint evidence to be used to confirm drivers' identities);
- boosting the current 'incapable of proper control' offence with a new offence of driving while impaired by non-alcohol drugs, accompanied by a compulsory roadside impairment testing regime to detect drug driving.

Views are welcome on the relative merits of extending police powers to enforce offences under other Acts

The Police Act Review Team is interested to receive views on whether such opportunities should be explored in the context of drafting a new Police Act.

Question 12: Do you support new legislation for Police extending police enforcement responsibilities for some offences? If so, do you have specific suggestions in mind? Do you have any views on possible safeguards that should accompany such extensions?

INTRODUCING WHOLE NEW POWERS

Another way Police's powers could be strengthened would be to extend into entirely new areas. Detailed policy work would need to precede any such developments, but for present purposes, it would be useful to run a quick 'pulse check' on whether there is support for such work to be undertaken - either as part of the Police Act Review, or in some other context.

Extending police powers into whole new areas is also a possibility raised by the Police Act Review process

To illustrate the sort of thing that might be put on the table, two quick examples are provided. As appropriate for an *Issues Paper* such as this, they are brief outlines only.

First, in the realm of general policing, several jurisdictions have moved to strengthen the hand of officers to disperse individuals or groups who are behaving in a threatening manner; behaviour which can often escalate to intimidation or violence, requiring stronger police intervention. In most instances where such provisions apply, police already have authority to arrest (e.g., for nuisance offences, disorderly behaviour, breach of the peace, obstructing a police officer in the course of duty, etc.), but the statutory 'move on' power gives police the ability to require people to leave a particular place without relying on arrest as a first or only option.

By way of example, so-called 'move on' powers have been a valuable addition to police repertoires in some jurisdictions

As well as enabling police to more efficiently deal with incidents of loitering that could impact on public safety and public order, these enhanced powers can also be used by officers in situations where a person interferes with a police investigation in a public place. This includes motor vehicle crashes, brawls, crime scenes and other incidents where interference may impact on the way an investigation is conducted, or where the interference may impact on the safety of victims or other innocent people within the vicinity.

There are a number of Australian examples of such 'move on' powers. For example, section 15B of Tasmania's Police Offences Act 1935, introduced in 2001, gives police the authority to direct people to disperse from public places for a set period:

Section 15B of Tasmania's Police Offences Act 1935 offers a precedent for such a dispersal power

15B. Dispersal of persons

(1) A police officer may direct a person in a public place to leave that place and not return for a specified period of not less than 4 hours if the police officer believes on reasonable grounds that the person –

(a) has committed or is likely to commit an offence; or

(b) is obstructing or is likely to obstruct the movement of pedestrians or vehicles; or

(c) is endangering or likely to endanger the safety of any other person; or

(d) has committed or is likely to commit a breach of the peace.

(2) A person must comply with a direction under subsection (1).

To allay any perceived concerns about the use of this dispersal option, the Tasmanian Police Commissioner has issued binding instructions to his staff about how the section 15B power is to be used. The Commissioner's instructions include a requirement to inform people of officers' reasons for giving a direction to disperse, and that failure to comply is an offence which may lead to arrest and prosecution. Having given a direction to a person to disperse, a police officer must also repeat the warning. Only after a person fails to comply a second time can an arrest be made.

It would be useful to hear whether an equivalent type of power would be seen as worthwhile for New Zealand

A possibility created by the Police Act Review is to explore introducing a similar power in New Zealand, as a less heavy-duty alternative to action for breaching the peace (under section 42(2) of the Crimes Act), obstructing a public way (under section 22 of the Summary Offences Act), or other public order offences. Alternatively, current policing powers may be considered adequate.

Question 13: Do you favour new legislation for Police extending general police powers in particular areas? If so, do you have specific suggestions to offer (e.g., a statutory 'move on' power)? Do you have any concerns about extending the powers of police?

Beyond generalist policing, the Police Act Review suggests further avenues of inquiry. Importantly, it invites consideration of whether New Zealand Police's powers are appropriate to deal with national security needs, emergency situations or large-scale public events.

Thinking outside the realm of general policing might also surface suggestions for enhanced powers

An important backdrop here is the array of powers police already have to respond whenever the security of the country is threatened, or to help cope with the impact of natural disasters or technological failure. For instance, members of Police already have extensive powers under the Civil Defence Emergency Management Act 2002 during times of crisis, including powers conferred by warrant to obtain information, evacuate premises and places, and control roads and other public places. Under section 342A of the Local Government Act 1974, a senior police officer may also temporarily close a motorway or road where public disorder exists or is imminent, or where danger to the public exists or is reasonably expected.

Any suggestions in this area should be put into context by considering the fairly extensive set of current powers

Police also have a range of powers to deal with threats to national security, including powers in the Arms Act 1983, the Chemical Weapons (Prohibition) Act 1996, the Hazardous Substances and New Organisms Act 1996, and the International Terrorism (Emergency Powers) Act 1987. Further, police may be authorised to act under the Biosecurity Act 1993, and may enforce the offence provisions of legislation like the Terrorism Suppression Act 2002 and New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987. In addition, police can be empowered to assist Medical Officers of Health to deal with health emergencies in certain circumstances (e.g., see sections 79 and 112 of the Health Act 1956). The Law Reform (Epidemic Preparedness) Bill, currently before select committee, also proposes extra powers to deal with an outbreak of an infectious disease capable of becoming an epidemic.

New Zealand's multi-agency approach to emergency management counsels against any isolated look at these police powers under existing laws. The inter-connected nature of Police's contributions to areas like emergency management is also more appropriately dealt with in the later *Issues Paper* on relationships. However, it may still be worth gauging support here for any expansion of powers for specialised policing operations.

It would also be a mistake to consider Police's powers in complete isolation for those which are available to Police's partner agencies

By way of example, should New Zealand officers have powers to police special events similar to those available to their counterparts in Queensland, which were used to help ensure the safety of Brisbane's Olympic soccer matches in 2000 and Commonwealth Heads of Government Meeting in 2001?

Chapter 9, Part 2, of the Police Powers and Responsibilities Act 2000 (Qld) contains detailed provisions relating to the management of "special events" which can be activated by Ministerial declaration. Included is the ability for police to search people in designated special event sites to confiscate things that might be used as a weapon. Police are also empowered to confiscate items capable of emitting a noise loud enough to disrupt the event and anything capable of concealing or disguising a person's identity (e.g., balaclavas

Nevertheless, ideas to explore might include enhanced powers to ensure the safety of events like the 2011 Rugby World Cup

or crash helmets). Less controversially, police are given statutory powers to require any would-be entrants to special event sites to proceed through a walk-through detector, pass their belongings through an x-ray machine, and be screened by a hand-held electronic scanning device.

Question 14: What are your views on the adequacy of current police powers in specialised areas? Do you support any extension of these powers (e.g., to enhance the safety of high-profile events)? Conversely, do you support any reduction of current powers?

6. Assignment of policing powers

Other important issues concern how and to whom police powers are assigned

Two further dimensions of police powers are the issues of *who* should have access to such powers and *how* access to any powers should be facilitated.

Who should exercise police (and police-like) powers?

Under the current Police Act, there is a default position that virtually all police powers are limited to sworn members of Police

At present, the vast bulk of police powers can only be discharged by sworn officers, due to the default provision in section 6(1)(a) of the 1958 Act which provides that any reference in legislation to "member of Police" is not to be read as referring to a civilian staff member. Section 6(2) allows for a limited form of empowerment, stating that any non-sworn member may, on being authorised to do so under warrant from the Commissioner, exercise any particular power, function, or duty of a member of the Police under any other enactment, except a power to arrest or to search a person. This ability has been sparingly used, however, with recent examples limited to some back-office functions (e.g., authorising the issue of infringement notices for speed camera offences) and occasional operational support roles (e.g., helping uniformed officers conduct roadside evidential breath testing).

Some specific powers are also conferred on non-sworn staff by the current Police Act itself. Notably, non-sworn staff have specific statutory authority to take particulars of identification of people in custody [section 57]; to search people in custody [section 57A]; and to appear in Court in place of another staff member, other than as a witness (e.g., as a prosecutor) [section 40].

ALLOWING FOR GREATER TARGETED EMPOWERMENT OF NON-SWORN POLICE STAFF

To effectively rise to the challenges of modern policing, a much more flexible approach is likely to be required

A theme developed in *Issues Paper 3: Employment arrangements* was that Police's operational environment is far more complex than in the 1950s, with many new policing services and techniques demanding special skill sets. It was noted that police forces internationally are looking to meet these challenges with a greater mix of employees; where police staff, with and without designated powers, support sworn officers more seamlessly. This was said to represent a shift towards a more sophisticated team approach to policing, that seeks to apply the requisite skills and powers to any given task.

Such flexibility is already evident in some overseas jurisdictions, like the United Kingdom

Particular opportunities are seen in New Zealand to empower non-sworn specialists with technical know-how in key investigation skills, such as electronic crime, forensic sciences, financial crime and intelligence analysis. It is interesting to reflect on how similar opportunities have been grasped in overseas jurisdictions. In the United Kingdom, for example, section 16(2) of PACE has long authorised police officers executing a search warrant to take civilians with them. The Criminal Justice Act 2003 expressly allowed accompanying civilians to have police powers during searches, although they can only be exercised under the supervision of the constable executing the warrant. This enables unsworn police staff to help their sworn colleagues with search and seizure operations, especially when specialist knowledge is required (e.g., when searching financial or computer records).

Within the context of the Police Act Review, a question facing New Zealand policymakers is whether similar sorts of developments should be embraced.

To this end, *Issues Paper 3* also introduced the United Kingdom model of Police Community Support Officers (PCSOs). In London, the powers of PCSOs include: the

ability to issue infringement notices for offences such as underage drinking or anti-social behaviour; the power to detain someone for up to 30 minutes pending the arrival of a constable; and the power to enter premises to protect life or limb, or prevent serious damage to property. Since January 2004, PCSOs have also been empowered by section 30 of the Anti-social Behaviour Act 2003 to disperse groups within designated areas and remove under-16-year-olds to their place of residence.

Police Community Support Officers (PCSOs) represents one of the more ambitious attempts to tap the value of limited power roles

Again, the question raised is whether these sorts of initiatives might usefully be explored in a New Zealand context. In some senses, there are already signs the time may have come to formalise such limited powers roles here. The value of being able to deploy targeted personnel to perform functions like scene guards, prisoner escorts, and other operational support roles where a narrow range of powers is needed, is increasingly being recognised. It has spurred the use of 'Temporary Constables' and creation of hybrid roles, such as the Crime Scene Attender function. Non-sworn staff are also being used successfully in Northland and Auckland as electronic monitoring bail assessors. Similarly, streamlining projects like the Criminal Justice Support Unit being piloted by Counties-Manukau Police seem sympathetic to the use of unsworn "Detention officers" and "Investigating officers" in the United Kindgom. These staff, recognised under section 38 of the Police Reform Act 2002 (UK), take forward arrest processing and case preparation, thus enabling fully-warranted staff to return to frontline operational duties.

Developments in some parts of the country seem to be moving in broadly similar directions

Provided suitable training was provided for specific operational functions, there would seem to be a number of roles currently restricted to sworn officers that could appropriately be undertaken by less-than-fully-sworn staff. To take just one example, there seems no reason why the power to inspect records that must be kept under the Secondhand Dealers and Pawnbrokers Act 2004 should not be able to be carried out by less-than-fully-sworn members of Police.

A question for local policymakers is the extent to which such developments should be embraced

Question 15: Do you agree new policing legislation should allow for a greater range of powers to be exercised by staff who are not fully-warranted constables? If so, do any particular powers suggest themselves as suitable or unsuitable for support staff to exercise?

ENABLING SPECIAL POWERS TO BE USED BY A SELECT GROUP OF STAFF

As well as potentially allowing for a greater range of generalist police powers to be exercised by a wider range of staff, the Police Act Review also raises the possibility that some current or future powers might be reserved for use by a smaller number of staff. The concept here is what might called the supra-warranted officer, who holds a special authorisation to access powers above-and-beyond those available to regular constables or other Police staff.

An openness to new models might also invite consideration of supra-warranted police officers

This may seem a novel idea, but the concept is already firmly embedded in Police's organisational practices, and also has some echoes in legislation. Specifically, the Commissioner uses his delegated authority under section 30 of the Police Act to issue *General Instructions*, which all members of Police "must obey and be guided by". Included in these *General Instructions* are rules around units like the Armed Offenders Squad, as well as more general rules that limit the ability to draw weapons to those members with up-to-date firearms accreditation who have completed staff safety tactical training.

It is possible to see some support for such an innovation in Police's current deployment practices

There are also precedents within existing legislation effectively limiting the ability to discharge certain police powers. At one end of the spectrum, the operational deployment of a police dog is reserved to those members who have successfully completed the approved dog handlers' training course at the Royal New Zealand Police College (see section 2 of the Police Act 1958). Also within this spectrum is legislation conferring powers on particular ranks. For example, under section 61 of the Arms Act 1983 searches of land or buildings for firearms or other restricted weapons must be authorised by a Commissioned Officer (i.e., Inspector or above). In a similar manner, section 236 of the Children, Young Persons, and their Families Act 1989 requires detention of a young person in Police custody to be certified by a Senior Sergeant or Commissioned Officer.

Current laws also includes examples of where certain powers can only be exercised by a set category of staff

Working from this starting point, one option in any Police Act rewrite would be to include provision for certain powers to be exercised only by designated staff who have been

specially trained, or who might follow special protocols. A scenario where supra-warranted officers might be able to take advantage of special powers could be during an investigation of transnational offending.

It might not be too much of a stretch to look forward to 'ring-fencing' of special policing powers

Mindful of some long-standing examples of special empowerments (e.g., general search warrant powers under section 67 of South Australia's Summary Offences Act 1953), and sweeping new powers made available to Serious Organised Crime Agency investigators in the United Kingdom, it is possible to imagine extraordinary 'ring-fenced' powers being made available to a small cadre of specialist New Zealand Police investigators in the future. Some inspiration here could perhaps be derived from the inquisitorial powers provided for under the Serious Fraud Office Act 1990.

Question 16: Do you support new policing legislation making allowance for special 'ring-fenced' powers to be used by supra-warranted officers? If so, do any particular powers suggest themselves as suitable for 'ring-fencing' in this way?

ALLOWING FOR POLICE (AND POLICE-LIKE) POWERS TO BE EXERCISED BY OTHERS

Policing powers might also be made available to people outside of Police

A final set of related issues it would be useful to gain a steer on is whether police (and police-like) powers should be exercised by non-Police personnel.

An obvious starting point would be the extension of police powers to officers seconded from overseas

For instance, one of the possibilities raised in *Issues Paper 3* was that there might be a clear empowering provision which clarified the status of officers seconded from overseas forces to serve in New Zealand Police. The more challenging idea put forward in *Issues Paper 3* was that overseas police officers might be mandated to exercise certain policing powers in New Zealand on a temporary basis. A hypothetical suggestion in that earlier *Issues Paper* was that requests might be received from overseas forces to temporarily post officers to New Zealand to help safeguard foreign nationals in the context of events like the International Rugby World Cup during 2011.

Accrediting staff of partner agencies to exercise particular police powers may also be seen as a possibility

Issues Paper 4: Community engagement went further, introducing the idea of community accreditation schemes which operate in England and Wales, under the Police Reform Act 2002 (UK) [in particular, see section 40]. The schemes allow Chief Constables to extend a limited set of police powers to accredited persons, in order to deal with low-level offences and incivilities - such as dog fouling, cycling on the pavement, and littering offences. The types of people accredited under such schemes thus far include council parking wardens and other authority figures with a presence on the streets. In a New Zealand context, equivalent models might involve the targeted extension of police powers to local authority city safety officers, such as the Walkwise 'yellowcoats' who help patrol Wellington's central business district.

In fact, a version of this sort of empowerment already exists. As pointed out in *Issues Paper 4*, the Fire Service Act 1975 allows for constabulary powers to be exercised by non-Police personnel, in the form of volunteer "fire police". Section 33 of the Act reads:

To an extent, this model already operates without particular difficulty, in the shape of volunteer fire police

> **33. Volunteer fire police—**
>
> (1) With the consent of the senior officer of the Police in the district, any Chief Fire Officer… may establish a volunteer fire police unit and enrol any person as a member thereof and may in like manner disestablish such a unit or for just cause remove any person from the roll.
>
> (2) Every person enrolled under this section shall be sworn in before a Justice of the Peace, and during the period of his service as a member of the fire police and while so acting shall be deemed to be, and shall have all the power and authority and responsibility of, a constable.
>
> (3) In the performance of their duties at any fire or other incident to which a fire brigade is called, volunteer fire police shall carry out their duties under the direction of the person in charge of the fire brigade.

Fire police are generally responsible for tasks such as traffic control, cordoning areas, protecting a scene, and salvage; they do not participate directly in fire fighting (except for dealing with minor motorway accidents where small fires are involved). They wear the same general uniform as the professional fire service, but with a different coloured helmet

and the words "FIRE POLICE" prominently displayed. At last count, there were 76 fire police units operating around the country, ranging from three-person teams available for call-out in smaller stations, up to an authorised establishment level of a 58 person unit in Auckland, and a 50 person unit in Wellington.

"Fire police" are deemed to have all the powers of a constable

The only responsibility Police appears to have in relation to fire police is to complete pre-appointment security vetting checks of applicants for such roles. Police does not have any training obligations to upskill fire police in the exercise of relevant constabulary powers, yet the law deems fire police to have "all the power and authority and responsibility of a constable". Indeed, fire police swear an oath of office adapted from the constabulary oath in section 37 of the Police Act 1958 - even though there is no statutory basis for this oath in the Fire Service Act or Fire Service Regulations 2003.

The volunteer fire police model may seem out-moded in certain respects…

The volunteer fire police model is an interesting one because it illustrates how a policing role can be performed by non-Police personnel, facilitated in part by extending them police powers. What remains debatable is the appropriate relationship between such auxiliaries and Police (are they subject to potential/actual supervision by Police, or are they 'free agents' under the direction and control of fire service managers?), and the scope of the powers which are made available to carry out their job (should it be a limited cache of relevant powers or all constabulary powers?).

If a supervisory, limited powers, future were imagined, it may be possible to conceive of a time when a discrete set of police powers are even extended to private security staff working as part of a police-supervised operation (e.g., a fixture at a sports stadium). Another possible future might include the networking of some government departments' in-house investigation units under Police management. In concept, this might take a form equivalent to section 34(1) of the Serious Fraud Office Act, which provides:

> **34. Exercise of powers by outside investigators**
>
> (1) Any person ... who is appointed by the Director to investigate the affairs, or any aspect of the affairs, of any other person may be authorised by the Director—
>
> (a) To exercise, in the company of a designated member of the Serious Fraud Office, all or any of the powers conferred by ... this Act:
>
> (b) To obtain ... a search warrant under this Act:
>
> (c) To assist any constable or designated member of the Serious Fraud Office to execute any search warrant issued under this Act.

…but taking the model further suggests several potentially valuable ways that a specific cache of policing powers might be extended beyond Police

Such satellite units could continue to develop their unique areas of specialisation (e.g., investigating and prosecuting particular types of fraud) yet draw on the greater infrastructural support possible from being formally connected to a distributed family of Police professionals.

Some of the subtleties in this area will be dealt with more fully in a coming *Issues Paper* on relationships. But for now, any views would be welcome on whether this would be a constructive area to explore.

Question 17: What are your views on the prospect that police(-like) powers could be exercised by other than New Zealand Police staff? Do any possible extensions of police(-like) powers make more sense than others?

How should access to police powers be facilitated?

In the discussion thus far, we have seen several ways in which policing powers are made available

The discussion above has circled the issue of how police powers are made available to different individuals. Several means of empowerment have been highlighted, including:

- The current statutory environment within the Police Act, which reserves most police powers to sworn members of Police, enables appointment of 'Temporary Constables' with full powers, and allows for some powers to be extended to non-sworn staff under warrant from the Commissioner;
- The example of the Fire Services Act 1975, which extends police powers to another agency's volunteers by legally defining them as "constables";

The optimal model for New Zealand Police is something that will be poured over in policy work down-the-track

- Overseas models, such as deeming provisions to allow imported officers to exercise constabulary powers in the host jurisdiction, tiered policing arrangements that allocate a targeted set of powers to particular roles, and accreditation schemes that use the same approach to assign powers to non-police personnel.

In the development of a new Police Act, much thought will need to go into the best approach to assigning the right set of powers to the right people. Final decisions are likely to be guided by legal advice, to ensure whatever mechanisms are chosen are legally robust. To the extent these are largely internal considerations for Police, there is arguably less need to test ideas externally than in other spheres.

In the meantime, there is one issue it would be good to get feedback on ...

There is at least one core question on which a wider range of responses is welcomed, though. This relates to continuation of the office of constable.

... that is, what role should the office of constable perform?

Powers available to police are scattered throughout the statute books, with different language used to describe the recipient. In many places, reference is made to "member of the Police" or "member of Police", while elsewhere (e.g., the Crimes Act) powers are conferred on "any constable". In a technical sense, there is a fairly complex relationship between the legislative provisions under which a person becomes a constable and a sworn member of Police. While such sequencing problems could be ironed out in a new Police Act, another option would be to phase out references to constable in favour of something more contemporary. For instance, under the Australian Federal Police Act 1979 all employees are understood to be "federal agents", with statutory language referring to the common term "member", and provision for other categories of staff like "protective security officers".

Were such a modernisation to occur in New Zealand, the historical connection to the office of constable would need to be broken. As outlined in *Issues Paper 2: Governance and accountability* and *Issues Paper 3: Employment arrangements*, the office of constable holds a central place in Police's constitutional and human resources environments. On swearing the constabulary oath set out in section 37 of the Police Act, staff access the common law powers of a constable; recognised as an original authority, rather than being delegated from another source.

Breaking links to the historical office of constable may not be favoured

Historical linkages to the office of constable are deeply valued in Police, and any loss of these deep connections may be viewed as a step too far. While it would seem feasible to dispense with the office of constable as a channel for assigning police powers - designing instead a clearer allocation system, which could potentially allow for greater sophistication and flexibility to activate or deactivate certain powers for specific categories of personnel - there may be more enthusiasm to retain the traditional office of constable.

Clearly, any move to start down this track would require considerable policy development. But as with other opportunities presented by a rewrite of the Police Act, now is a good time to explore options to provide the strongest platform for Police into the future.

Question 18: Do you wish to see the office of constable maintained as an access point to general police powers, or would you prefer to see a new pathway established which is based in legislation? In forming your view, are any factors particularly significant?

7. Protections

It is also important to spend some time looking at the sorts of protections that apply in policing

To complete this overview of issues relating to police powers, it is necessary to touch on the ability to discharge policing duties with the backing of certain protections. This, too, operates along two dimensions. First and most obviously, there are legal and other protections which apply to Police staff who are acting in the lawful course of their duties. Secondly, there are the protections which apply to citizens who interact with police. This final section of *Issues Paper 5* will briefly canvas options in these two areas.

Protections for Police staff

Police enjoy a number of protections in the exercise of their duties which are not generally available to ordinary members of the public. For example, when making an arrest without

warrant, section 32 of the Crimes Act provides that a constable is protected from criminal and civil liability where he or she believes, "on reasonable and probable grounds", the person being arrested committed the offence. Elsewhere, there is a recognition that sometimes police may not be able to comply with generally-applicable laws. For instance, rule 5.1(3) of the Land Transport (Road User) Rule 2004 provides a defence to a police officer who exceeds the normal speed limit if the driver proves that, at the relevant time, the vehicle was being used "on urgent duty and compliance with the speed limit would be likely to prevent the execution of the officer's duty".

A natural starting point is the fairly comprehensive set of legal protections for Police staff

While the legal protections for police staff in New Zealand are thought reasonably comprehensive, clearer and/or more extensive protections are sometimes seen to be available to police personnel in overseas jurisdictions.

Changes surrounding police liability demonstrates the capacity of legislation in this area to evolve, prompting scrutiny of whether the right balance has been struck for 2006 and beyond. It was only in the late 1980s, for instance, that the statute-bar on taking proceedings against a constable was removed.

There has been some flux in this area over the years

In recent years, attention has focussed on the possible merits of limiting private prosecutions against police officers who cause death or injury in the lawful course of their duties. Options identified included pre-trial measures before a case gets to Court (e.g., a requirement that a private citizen gain consent before being able to initiate a private prosecution) and processes invoked after a prosecution is launched (e.g., clarifying the ability of the Attorney-General/Solicitor-General to take over and terminate proceedings).

This propels questions about the best arrangements for Police in the future ...

The Police Complaints Authority (Conditional Name Protection) Amendment Bill, introduced to the House in late 2002, drew attention to the linked issue of interim identity suppression for police officers in certain circumstances. In part, the Bill was a response to the decision in *Abbott v Wallace* [2002] NZAR 95, which declined an application for interim name suppression by an officer involved in a fatal shooting (on the grounds that the officer's arguments about the presumption of innocence, and risk to himself, his family, and his career, were not sufficient to outweigh the public interest in favour of freedom of expression and open reporting of Court proceedings). The Bill did not proceed because media conventions exist around publicising the names of police officers involved in fatal incidents. As a result, legislation was not considered necessary.

... and this includes asking whether there might be value in re-looking at previous ideas

POLICE-SPECIFIC OFFENCES

Another form of protection for police is the existence of specific offences which apply to policing. Awareness of such offences, including from publicity after any prosecutions for such offences, could deter offending against police. To this extent, retention and/or strengthening of some of these Police-specific offences might be advocated.

Police-specific offences can play a part in creating a protective envelope for policing ...

Conversely, it might be argued at least some of the current offences are anachronistic, serve no practical purpose, and could just as well be repealed. Others may question the need for Police-specific offences, arguing instead for more-encompassing provisions, such as the protections against assault contained in the Emergency Workers (Scotland) Act 2005. The workers covered by the measures in this statute include police, fire and ambulance staff, medical practitioners, nurses and midwives in hospitals, coastguards, rescue vessel crews, social workers performing enforcement roles, mental health professionals and prison officers responding to emergency situations.

... although some may query whether police should have separate offences, or be dealt with in the same way as other emergency services workers

The current list of Police-specific offences range from fairly outward-looking to more inward-looking provisions. For the sake of convenience, this range is neatly captured in the following excerpt (excluding footnotes) taken from paragraph 49 of the standard text, *Laws of New Zealand - Police*:

> It is an offence to assault a police officer acting in the exercise of his or her duty. It is also an offence to resist or intentionally obstruct a police officer acting in the exercise of his or her duty, or to incite someone else to do so. Specific statutes have obstruction provisions in similar terms. It is a crime to assault a constable with intent to obstruct the constable in the execution of his or her duty. Bribing or attempting to bribe a member of the Police with intent to influence the officer in respect of any official act or omission, or to forgo any duty, is also a crime. Specific offences under the Police Act 1958 include: inciting a member of the Police

The current list of Police-specific offences is a bit of a 'mixed bag'

to act in a manner contrary to duty; conniving at any act whereby any regulation or instruction in relation to the Police may be evaded; communicating or attempting to communicate with a prisoner in the custody of a member of the Police; personation of a police officer; unlawful possession of police property; unlawful use of a police uniform, item of uniform, or other specified article; and gaining admission to the Police by false pretences.

The Police Act also contains a specific offence for killing, maiming, wounding or otherwise injuring a police dog without lawful excuse [see section 44C].

Nevertheless, there is a fair degree of consistency in this area amongst the police legislation of different countries

While some of these offences may look out of place in a modern statute, it is notable equivalent police legislation in overseas jurisdictions - even Acts of a much more recent vintage - often contain similar types of offences. For instance, Part 10 of New South Wales' Police Services Act 1990 provides for specific offences of bribery or corruption [section 200], admission as a police officer under false pretences [section 202], unauthorised wearing or possession of police uniforms [section 203] and impersonation of police officers [section 204]. Similar types of offences are specified in Part VII of the Royal Canadian Mounted Police Act 1985.

LOOKING FORWARD

The Police Act Reviews gives us a chance to pause and consider what is most appropriate

The Police Act Review provides an opportunity to take stock of the existing protections for police in New Zealand, and to double-check that the current environment is appropriate to address trends such as the perceived increase of civil litigation against police (see Nadia Boni, *Issues in civil litigation against police* [Adelaide: Australasian Centre for Policing Research, 2002]). It may be there is a degree of comfort with the environment as things stand but it is timely to ask whether any enhancements could or should be made. By way of example, there might be consideration of a new offence for unauthorised release of information about the witness protection programme, to reinforce the secrecy needed to preserve the integrity of the initiative.

There are a range of specific and more general possibilities that might be worth exploring

More expansively, thought could be given to a clear statement about the limits of liability that apply to Police staff acting in the course of their duties, rather than this being a matter interpreted in light of the Crown Proceedings Act 1950 and relevant case-law. Explicit Crown indemnities for police acting in performance of their duties are a common feature of Police Acts overseas (e.g., section 123 of Victoria's Police Regulation Act 1958). Indeed, some policing statutes even offer clarity about matters such as members' access to legal aid if they need to defend proceedings (e.g., section 49 of Ireland's Garda Síochána Act 2005).

As part of its project on entry, search and seizure, the Law Commission is presently reviewing the extent of the immunities that should be available for police exercising search powers. The Commission's proposals in this area are likely to form the basis for any legislative changes, so it may not be necessary or desirable to consider such issues further as part of the Police Act Review. By the same token, in advance of any firm proposals, it would be interesting to receive any views on this general topic, as they may assist thinking about the overall legislative framework for policing in New Zealand.

Question 19: Can you see any opportunities to strengthen the current set of legal protections which apply to police work? Alternatively, if you believe police in New Zealand are over-protected now, what would you like to see changed, and why?

Protections for people who interact with Police staff

A related area of inquiry might be the protections that apply when police deal with citizens

Another opportunity afforded by the Police Act Review is to clarify the sorts of protections that might apply to citizens who come into contact with police.

The presenting opportunity here is not to review the jurisdiction of the Police Complaints Authority to receive complaints about police actions, or the ability members of the public might have to seek remedies in the Courts. To the degree such matters are relevant to the Police Act Review, they are more appropriately raised in the later *Issues Paper* on conduct and integrity. Rather, discussing 'protections' in this context is a way of seeking feedback on whether new Police legislation might usefully clarify duties of care police owe to any particular groups or individuals. It would also be useful to get views on the adequacy of

protections which exist for members of the public who help police carry out their duties. Under current legislation, people who are called on to provide assistance to constables have certain statutory protections to use reasonable force when making an arrest [sections 34(1) and 39 of the Crimes Act], preventing a breach of the peace [section 42 of the Crimes Act], and suppressing a riot [section 45 of the Crimes Act].

The focus here is the duties of care which police owe to particular members of the community ...

To illustrate what might be possible, the Police Commissioner already has a statutory responsibility under section 9(a) of the Corrections Act 2004 for "ensuring the safe custody and welfare of prisoners detained in police jails". Consideration could be given to extending a similar responsibility to all people detained in Police cells, not just remanded or sentenced prisoners. Indeed, specific statutory duties of care might be considered for detainees who may have particular vulnerabilities, such as people with mental health disorders or those who have been put into safe custody for detoxification under section 37A of the Alcoholism and Drug Addiction Act 1966 (ADA Act).

... as well as special protections which exist for people who assist police

In the latter scenario, it is fairly common for police to come across people who are so intoxicated that action must be taken under the ADA Act in order to safeguard them. In fact, there has been roughly a 30% increase in the number of section 37A incidents dealt with by police in the last five years. Faced with a growing volume of grossly drunk people 'sobering up' in cells, it is important Police seeks to minimise the risks for all concerned. A number of suggestions in this regard were made by the Rotorua Coroner in February this year, following an inquest into a 2002 case where a detainee's medical conditions were masked by intoxication. These recommendations included amending section 37A(3) of the ADA Act, which states that:

Population groups for whom specific statutory provisions might be positive include detainees, especially those with any particular vulnerabilities ...

> If, after being detained under ... this section for a period of 12 hours, any person is still, in the opinion of any Constable, so intoxicated as to be incapable of properly looking after himself, the Constable may take that person or cause him to be taken to a temporary shelter or detoxification centre.

Without a network of such temporary shelters or detoxification centres to be able to take still-intoxicated people to, police lack the legal authority to continue to safely detain such people under the legislation. Unfortunately, in a number of cases, it will still be inappropriate to release alcohol-impaired people onto the streets even after 12 hours of 'drying out', particularly in the early morning hours. Scenarios can be imagined if police release such people, and they subsequently injure themselves (e.g., stumble in front of a vehicle), potentially opening Police to civil proceedings. On the other hand, there are legal risks for Police if a severely inebriated person is detained without lawful authority beyond the 12 hours provided for in the ADA Act.

... a compelling example here is the large (but hidden) population of drunk people who have to be held in Police cells to 'detox'

On balance, there may be agreement that 37A(3) of the ADA Act should be amended to provide durable authority for still-intoxicated persons to be detained by Police under the Act, perhaps on the prior recommendation of a medical practitioner, until it is considered safe to be able to release them.

Question 20: Are you in favour of new legislation for Police clarifying the duties of care police owe to particular members of the public (e.g., people incapable of properly looking after themselves due to intoxication) and/or addressing statutory protections for members of the public who provide assistance to police?

8. Conclusion

This Issues Paper *has posed a number of questions about how new legislation might best support Police via access to particular powers and protections*

When used with the support and confidence of communities, legal powers and protections are important tools to help police tackle crime and disorder. Legislation can also clarify the protections citizens have when police powers are exercised. Indeed, the process of codifying police powers in legislation itself provides an important measure of protection for citizens, as it makes clearer the boundaries of legitimate Police action. It is therefore fitting that they should be the focus of sustained discussion as part of the Police Act Review.

A central question is whether ideas for amending non-Police legislation should be wrapped up in the Police Act Review

Reflecting the breadth and depth of police powers and protections as a topic, this *Issues Paper* has inevitably needed to cover a lot of ground. It asks some searching questions. One of the biggest questions is the extent to which a Bill leading to a new Police Act should be a catalyst for discussion about other aspects of the legal powers of police. While there may be enthusiasm to bring about such desired law changes through the Police Act Review, equally it might be thought better to make reforms through a separate and/or parallel exercise. Examples of possible opportunities - regardless of the route chosen - have been highlighted throughout *Issues Paper 5: Powers and protections*.

Feedback is invited on the questions listed in the Paper, *but unprompted feedback would be just as valuable*

More specifically, *Issues Paper 5* suggests various ways Police's operational effectiveness might be improved by strengthening powers and protections available to police. However, there is no presumption in favour of increased powers. The *Issues Paper* has also highlighted the chance to promote additional transparency, by making provision for policing practices which presently operate without any particular legislative backing.

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

The many possibilities in this area are being put forward with an open mind. This and other *Issues Papers* are designed to test the waters. We hope to generate discussion on key topics, and to identify any general consensus around how they could be presented in subsequent phases of the Police Act Review. So if you have any suggestions or reactions, we encourage you to let us know. Options for how to make the Police Act Review Team aware of your views are set out on the back page of this document.

How to make your views known

We are inviting written responses to this *Issues Paper* by 1 December 2006.

They 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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