

## ADMINISTRATIVE SYSTEMS FOR THE RESOLUTION OF COMPLAINTS AGAINST THE POLICE : A PROPOSED REFORM

### Introduction

An area of increasing concern for lawyers, politicians and policemen is that relating to the resolution of complaints by members of the public against policemen about police misconduct. This paper concerns the administrative systems, existing and proposed, set up to deal with those complaints. The existing systems in Australia, and, more briefly, those in the United States and England, will be examined and their defects discussed. An alternative system will then be proposed and considered. As the area under discussion has wide ranging ramifications, many issues cannot be dealt with in as much detail as the subject might bear. Nonetheless, the system recommended in this paper for the disposition of citizen complaints against police misconduct is intended to provide a considerably improved method of policing a community. For convenience of analysis the systems for resolution of complaints have been divided into primary, secondary and tertiary stages. The primary stage deals with reception of complaints, investigation, informal discussions and all matters preliminary to a hearing before a tribunal. The secondary stage deals with that hearing and its incidents, and the functions and powers of the relevant tribunal. The tertiary stage deals with the imposition of penalties and the available appeal structure.

### I. Existing Systems

#### (A) THE PRIMARY STAGE

In various Australian police forces, the form of reception of complaints against the police follows the same basic pattern. All States require that the complaint be in writing and be signed by the complainant. Hence, in practice, the usual procedure is that the complainant goes to police headquarters and signs a written statement<sup>1</sup>. Anonymous complaints are ignored<sup>2</sup>. No State guarantees that all complaints will be considered or investigated<sup>3</sup>.

There are varying criteria controlling the appointment of the investigating officer.

- (i) In South Australia<sup>4</sup>, Victoria<sup>5</sup> and New South Wales<sup>6</sup>, the matter is generally referred for investigation to the officer in charge of the

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\* LL.B.(Hons.) (Adel.).

1. See Regulations made under the Victorian Police Act (e.g. Regulation 99) (hereinafter referred to as Victorian Regulations), or Regulations made under the Tasmanian Police Regulation Act, Regulation 42(2) (hereinafter referred to as Tasmanian Regulations).

2. This must follow from e.g. Regulation 99 (Vic.). See also Harding "Police Disciplinary Procedures in England and Western Australia" (1972) 10 *W.A.L.R.* 195,210.

3. Harding, *supra* n.2, 210.

4. S.A. Police Regulations made under Police Regulation Act, 1952-1972 (S.A.), Regulation 40(2) and (3).

5. Victorian Police Regulations, Regulation 98.

6. See Harding, *Police Killings in Australia* (Penguin Special, 1968), at 238n.

accused's division. In Western Australia<sup>7</sup> the practice is, however, that the investigator should not be a superior in the same line of command as the accused<sup>8</sup>.

- (ii) In Tasmania<sup>9</sup> and in the Commonwealth force<sup>10</sup>, the complaint statement is referred to the Police Commissioner who may appoint any officer to investigate the complaint. In the Tasmanian force, it appears that this officer is usually the direct superior of the accused.
- (iii) In Queensland<sup>11</sup>, the investigating officer is appointed by the Minister for the Police.

In all States the method of investigation takes the same basic form—interviewing the accused, the complainant and witnesses, and generally gathering evidence. Normally, a report and recommendations are sent to the Police Commissioner, who must make a decision as to further action. In Queensland, no report is made since the investigating officer performs the functions of both investigator and judge and it is he who makes all the relevant decisions<sup>12</sup>.

#### (B) THE SECONDARY STAGE

After investigation, the Commissioner (except in Queensland) has several possible courses of action, depending upon the results of the investigation.

- (i) If a criminal offence is disclosed, the Commissioner will refer the matter for police prosecution<sup>13</sup>.
- (ii) If a serious disciplinary offence is shown, the Commissioner will set into motion certain procedures which are detailed below.
- (iii) If a trivial disciplinary offence is shown, the Commissioner appears to have two alternatives:
  - (a) The matter may be disposed of at that stage. In this event, a charge as such is never laid<sup>14</sup>. The complainant is, however, generally informed of this decision and of the reasons for it<sup>15</sup>.
  - (b) Alternatively, the policeman may be dealt with informally, by caution or reprimand<sup>16</sup>. This appears to be largely a matter of discretion and derives from the Commissioner's statutory power of command<sup>17</sup>. Again, the complainant is generally informed of this decision.

In a case where a disciplinary charge is to be laid, the procedure varies in detail from State to State. In South Australia, the charge is heard by the Police Inquiry Committee which consists of a Special Magistrate as Chairman

7. See Harding, *supra* n.2.

8. But note that this is not so in country areas. (Cf. Harding, *supra* n.2, 210, n.55.)

9. Tasmanian Police Regulations, Regulation 43.

10. Regulations made under Police Act, 1957 (C'th), quoted in a letter from Commissioner Davis 20/12/71.

11. Rules made under the Police Act 1937-1972 (Qld.) (hereafter referred to as Queensland Regulations). Regulations 78, 82, 84.

12. Queensland Regulations, Regulation 84.

13. As a matter of practice, this is always the case.

14. This again is a matter of practice, coming within the Commissioner's control of the force. However a specific instance is Victorian Police Regulations No. 6338 of 1958, Regulation 88(2) (a), which allows charges to be dropped if the officer is of previously good character. See also Queensland Regulations, Regulation 78(c).

15. See Harding, *supra* n.2, at 211, re Western Australia.

16. *Id.*

(appointed by the Governor), a Justice of the Peace (appointed by the Chairman) and a Commissioned Police Officer appointed by the Police Commissioner<sup>18</sup>. The practice of the tribunal is controlled by Regulation 44, made under the Police Regulation Act, 1952-1972. Subsection (1) provides that the practice and procedure of the committee shall be the same as a court of summary jurisdiction when hearing a charge of a simple offence<sup>19</sup> and that, as far as possible, the tribunal should use similar rules of evidence<sup>20</sup>. Subsection (2) gives to the policeman charged a right to counsel<sup>21</sup>. Regulation 46 provides that the proceedings be held *in camera*<sup>22</sup>.

The variations in other States are as follows:

- (i) In New South Wales, the charge is heard by an officer not below the rank of Superintendent, and the officer in charge of the district where the offence occurred<sup>23</sup>.
- (ii) In Victoria, the charge may be heard by a retired magistrate appointed by the Governor in Council<sup>24</sup>, or the Commissioner himself<sup>25</sup>, or an officer not below the rank of Superintendent<sup>26</sup>. The appropriate forum is within the discretion of the Commissioner, but the main criterion is the severity of the charge.
- (iii) In Tasmania, the accused officer may elect to be dealt with by the Commissioner<sup>27</sup>. The accused is permitted to make an unsworn statement<sup>28</sup>, which appears to be contrary to the rules of evidence in summary courts<sup>29</sup>, and may only be represented by counsel with the permission of the Commissioner<sup>30</sup>.
- (iv) In Western Australia<sup>31</sup> (and also in the case of the Commonwealth Police<sup>32</sup>) the charge is heard by the Commissioner. The quantum of

17. See e.g. s.21 Police Regulation Act, 1952-1972 (S.A.).
18. Regulations under the Police Regulation Act, 1952-1972 (Government Gazette 15/3/73 at 953), Regulation 39(1). Note Regulation 39(2) which provides that the police member of the board must have no connection with the investigation of a charge.
19. Accord: Victorian Regulations, Regulation 117; Tasmanian Regulations, Regulation 43(7); Western Australia—Harding, *supra* n.2, 212-3.
20. Accord: Victorian Regulations, Regulation 117-125; Tasmanian Regulations, Regulations 43(7), 43(11), 43(14); Queensland Regulations, Regulation 84(10); Western Australia—Harding, *supra* n.2, 213.
21. Accord: Victorian Regulations, Regulation 113; New South Wales Regulations, Regulation 47; Queensland Regulations, Regulation 84(14); Western Australia—Harding, *supra* n.2, 213.
22. The position in all States is similar: see e.g. Victorian Regulations, Regulation 110; Queensland Regulations, Regulation 84(13).
23. See Harding, *Police Killings in Australia*, at 238.
24. Pursuant to the *St. Johnston Report* (1971).
25. Regulation 88(2) (Vic., No. 6338 of 1958).
26. *Id.* Under Police Regulations, Regulation 128, the matter shall not be referred to such officer or Commissioner if: (a) he is prosecutor or witness for the prosecution, (b) he investigated the charges, (c) he prepared the case for the prosecution, (d) he has seen the case for the prosecution, (e) he has a personal interest in the case.
27. Tasmanian Regulations, Regulations 31(2), 43(1).
28. Regulation 43(15).
29. See e.g. *Lavender v. Petherick* [1960] S.A.S.R. 108, at 112 per Napier C.J.
30. Tasmanian Regulations, Regulation 43(12).
31. See Harding, *supra* n.15.
32. See *supra* n.10.

proof required of the prosecution in that State is only "satisfactory proof"<sup>33</sup>.

- (v) In Queensland, the regulations are unclear, but it seems that the investigating officer determines the case<sup>34</sup>.
- (vi) In all States there are miscellaneous regulations dealing with various aspects of the hearing. For example, some States have detailed rules relating to the production of the accused's record sheet<sup>35</sup>, the power to summon witnesses<sup>36</sup> and similar matters.

### (C) THE TERTIARY STAGE

In South Australia, the Committee forwards its decision and reasoning to the Commissioner, who alone has the power to fix penalty<sup>37</sup>. The Commissioner may reprimand, admonish, fine, reduce in rank or, with the approval of the Chief Secretary, dismiss the guilty officer<sup>38</sup>.

Part V of the Police Regulation Act, 1952-72 (S.A.) allows a right of appeal by the sentenced policeman to a Police Appeal Board against either the sentence of the Commissioner or the reasons on which it was based<sup>39</sup>. The Board consists of a special magistrate appointed by the Governor, and two policemen, one appointed by the Commissioner and the other elected by the members of the force<sup>40</sup>. A quorum is constituted by the magistrate and one other member<sup>41</sup>. The decision and penalty imposed by the Appeal Board are forwarded to the Commissioner who adds his own opinion and sends it on to the Chief Secretary, who must adopt the decision<sup>42</sup>, and whose own decision is final. There is no provision for appeal by the complainant.

In those States where the Commissioner is empowered to hear the charge, such a procedure for reporting to the Commissioner is, of course, unnecessary<sup>43</sup>. All States except Victoria insist that only the Commissioner may impose a penalty on the guilty police officer. In Victoria, the charge may be heard by the retired magistrate, the Commissioner, or a senior police officer<sup>44</sup>. Each has the power to impose a penalty, but the limits vary. The senior police officer may reprimand, reduce in rank or fine up to \$60<sup>45</sup>. The magistrate may reprimand, reduce in rank, fine up to \$100 or recommend dismissal of the accused from the force<sup>46</sup>. The Commissioner may reprimand, reduce in rank, recommend dismissal of the accused, or fine up to any amount which may be fixed as a maximum in the regulations. The policeman has a right of appeal to a superior board. The appeal procedures are similar from State to State.

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33. Ss. 23, 24, Police Act (W.A.).

34. Queensland Regulations, Regulation 84.

35. E.g. South Australian Regulations, Regulation 44(8); Victorian Regulations, Regulation 123.

36. E.g. South Australian Regulations, Regulation 44(19); Victorian Regulations, Regulation 124; Tasmanian Regulations, Regulation 43(18).

37. South Australian Regulations, Regulation 44(5).

38. Regulation 38(1).

39. S.44 Police Regulation Act (S.A.).

40. S.38(2).

41. S.42.

42. Ss. 47, 48, 49.

43. Accord: Tasmanian Regulations, Regulations 31(2), 43.

44. See *supra* notes 25, 26.

45. Regulation 88(4) (Vic., No. 6338 of 1958).

46. Regulation 88(5) (Vic., No. 6338 of 1958).

## (D) THE UNITED STATES

There are two reasons why there is less similarity between the various jurisdictions in America. First, the plethora of highly localized and often quite small American police forces makes it certain that, with lack of centralization and co-ordination, the variety of possible systems is limited only by the number of police departments. Secondly, the fact that control of American police forces is tied inextricably to the political platform leads to quick and wide changes from election to election. For these reasons, only general comments will be made about the American systems<sup>48</sup>.

More than in Australia, the American police complaint systems are characterized by varied and complex requirements, many of which have the effect of delay and tend to frustrate complainants<sup>49</sup>. The following features are common.

- (i) There are no simple procedures for having a complaint "registered"<sup>50</sup>.
- (ii) There is a general policy that all complaints be taken under oath<sup>51</sup>.
- (iii) Bargaining takes place, as where the police promise to drop all charges if the complainant will drop his complaint<sup>52</sup>. This practice encourages the police to formulate fictitious "cover" charges in order to gain bargaining power<sup>53</sup>.
- (iv) It has been found that the police are, on some occasions, at least, actively hostile to complainants and give rise to fears in the complainant of retaliation by such practices as harassment<sup>54</sup>.
- (v) There is a general policy of not giving publicity to complaint systems, where they exist<sup>55</sup>.

Once the complaint has been "registered", there are three main methods of investigation.

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47. The N.S.W. Board is set up under the public service regulations. See also Victorian Regulations 91-92; Harding, *supra* n.2, 213.
  48. E.g. *The President's Commission on Law Enforcement and Administration of Justice* (1967), and *The Task Force Report—the Police*, (hereinafter referred to as *Task Force Report*); Beral and Sisk "The Administration of Complaints by Civilians against Police" (1963) 77 *Harvard L.R.* 502 (hereinafter referred to as *Harvard Survey*).
  49. *Task Force Report*, at 195; Campbell, Sahid and Stang, *Law and Order Reconsidered: Staff Report by the New York Times to the National Commission on the Causes and Prevention of Violence* (1970), 408 (cited hereafter as *Law and Order Reconsidered*); *Harvard Survey*, 502; Neiderhoffer "Restraint of the Police: A Recurrent Problem" (1968) 1 *Conn. L.R.* 288, 295.
  50. *Ibid.* See also Note, "Police Misconduct" (1969) 55 *Virginia L.R.* 909, 935; Barton, "Civilian Review Boards and the Handling of Complaints against the Police" (1970) 20 *U. Tor. L.J.* 448, 454.
  51. No anonymous complaints at all: *ibid.* See also Civil Liberties Union, National Capital Area, District of Columbia, *A Proposed Revision of the System for Processing Complaints against Police Misconduct* (1964), 17, (hereinafter referred to as *D.C. Report*).
  52. *Task Force Report*, 195; Barton, *supra* n.50, 454. See also *D.C. Report*: "One method of receiving an instant reprisal is that of laying a fake charge against the complainant and then not prosecuting it if the complaint is later withdrawn."
  53. See generally Chevigny, *Police Power*.
  54. E.g. Neiderhoffer, "Restraint of the Police: A Recurrent Problem" (1968) 1 *Conn. L.R.* 288, 295.
  55. *Ibid.*

- (i) In the first, the investigation is conducted by the commander of the accused officer's division, who refers a report and recommendation to headquarters. About half the American police departments adopt this procedure<sup>56</sup>.
- (ii) In the second, the investigation is done in the same way, but a report is made to a special "Civilian Complaints Supervisor" who has power to review the investigation, and to order complete or partial reinvestigation. He reports to Headquarters<sup>57</sup>.
- (iii) In the third, the system is the same as in the second, but the Civilian Complaints Supervisor has power to conduct his own reinvestigation<sup>58</sup>. A reinvestigation is usually conducted randomly, to keep a check on the standard of police investigation.

The position in the United States with respect to the hearing of the complaint may be generally summed up in the following terms. Commonly, the complaint is heard by a Police Commissioner and he alone has power to discipline<sup>59</sup>. Some 70% of police departments have no hearing procedure at all; about half of the remainder hold hearings in secret. In 20% of hearing procedures, the complainant is unable to examine witnesses, nor may counsel be used by either accused or complainant. In only 5% may the complainant gain access to the investigation report<sup>60</sup>.

#### (E) THE UNITED KINGDOM

In the United Kingdom, there are now proposals to bring the police force complaints system under the jurisdiction of the ombudsman<sup>61</sup> or under the jurisdiction of a completely independent review tribunal<sup>62</sup>. Generally, however, the present system is similar to the Australian ones<sup>63</sup>, subject to certain significant exceptions:

- (i) The Police Act, 1964, states that the Secretary of State may require any Chief Constable to submit to him a report on such matters as are specified in the request, provided that they are concerned with the policing of his area<sup>64</sup>.
- (ii) The Secretary of State may cause a local enquiry into any matter connected with the policing of any area<sup>65</sup> to be held by a person appointed by him. This enquiry may be held privately or in public<sup>66</sup> and is conducted with powers to examine and summon witnesses under

56. *Harvard Survey*, 502 (Cincinatti).

57. *Ibid.* (New York).

58. *Ibid.* (Los Angeles).

59. *Task Force Report*, at 196; *Harvard Survey*, 503; Weiler, "Who Shall Watch the Watchman?" (1969) 11 *Crim. L.Q.* 420, 431; and Barton, *supra* n.50, 456.

60. *Task Force Report*, 196. See also *Harvard Survey*.

61. "The Guardian" June 2, 1973, p.6, col. 1-2.

62. Paling, "The Police Acts (Amendments) Bill 1973" (1973) *Crim. L.R.* 282.

63. For comparisons see Harding, *supra* n.2, 195. See generally on English procedures, *Royal Commission on the Police* (1962) Cmnd. 1728; and Paling, *supra* n.62.

64. S.30(1) Police Act, 1964.

65. S.32(1).

66. S.32(2).

penalty<sup>67</sup>. The enquiry may be kept secret or not as the Secretary of State feels fit<sup>68</sup>. Costs may be defrayed out of the police fund<sup>69</sup>.

- (iii) It is a clear principle that all complaints must be immediately recorded and must be investigated, no matter how trivial they appear to be<sup>70</sup>.
- (iv) It appears to be a clear principle that the investigating officer must not be a superior in the accused officer's line of command<sup>71</sup>. Indeed, specific provision is made for investigation by a police officer of another force or area<sup>72</sup>.
- (v) The complainant has a definite right to appear at and participate in the hearing<sup>73</sup>.
- (vi) If, at any stage, the complaint discloses a criminal offence, the police must refer the matter to the Director of Public Prosecutions<sup>74</sup>.

## II. Principal Criticisms of the Existing Systems

### (A) THE PRIMARY STAGE

#### (i) Reception

Tedious or frustrating formalities generally tend to discourage a timorous complainant<sup>75</sup>. No system of review of police misconduct should discourage complaints about the police. An atmosphere which does not discourage complaints and which allows the complaints system to be fully used, permits that system to act as a "safety valve" for the community. Perhaps the Philadelphia Police Advisory Board put it best when it reported, in relation to its own system of review, that ". . . no longer is it necessary for a citizen who felt himself wronged by police actions to harbour resentment within himself or to spread his hostile feelings throughout the community"<sup>76</sup>.

One practice which may have a disadvantageous effect is that of insisting that the complainant make a statement on oath. The mere formality of such a proceeding is discouraging. In addition, the practice may give rise to the fear that the police will use the statement as evidence with respect to a charge of giving false information to the police if, for any reason, the police decide that the complaint is unproven or unproveable<sup>77</sup>.

67. S.32(3).

68. S.32(4).

69. S.32(5).

70. S.49(1). See also *Civil Liberty: The N.C.C.L. Guide* (1971).

71. Harding, *supra* n.2, 199.

72. S.49(1) Police Act, 1964.

73. Harding, *supra* n.2, 204, n.37.

74. S.49(3) Police Act, 1964.

75. *Task Force Report*, 195. See also Niederhoffer, "Restraint of the Police: A Recurrent Problem" (1968) 1 *Conn. L.R.* 288, 296; and Note, "Grievance Response Mechanisms for Police Misconduct" (1969) 55 *Virginia L.R.* 909, 936.

76. Philadelphia Police Advisory Board, Annual Report, 1962, 4.

77. Barton, *supra* n.50, 455, n.47: "The danger here is that the document may later be used as evidence in a prosecution for filing false charges to the police". Here see s.62(1) Police Offences Act, 1953-1972 (S.A.). The *Task Force Report* found that 40% of complainants were so charged in relation to complaints against the police as opposed to 0-3% when the false complaint was against a non-police-man (at 195). See also, Note, "Grievance Response Mechanisms for Police Misconduct" (1969) 55 *Virginia L.R.* 909, 936.

It is always stated, as the correlative of the requirement of a statement on oath, that anonymous complaints will *not* be investigated<sup>78</sup>. While anonymous complaints *may* prove harder to investigate, this need not always be so; certainly, it is totally unjustifiable to consider all anonymous complaints as the work of mere cranks. An honest police force has little to fear from a *bona fide* investigation. Small wonder that the United States President's Commission on Law Enforcement and Administration of Justice (1967) recommended in its Task Force Report on the Police that anonymous complaints should be treated like any others<sup>79</sup>.

A further aspect of the reception procedure which could be improved concerns the place where the complaint is received. A complaint should be taken in an environment in which the complainant will feel least alienated—his own home or some neutral ground. The prospect of complaining at a police station may easily daunt a nervous complainant<sup>80</sup>.

A fear which is often expressed in response to proposals which seek to minimize the discouragement of complaints is that a lack of sanctions together with easy reception will give rise to a multitude of dishonest or crank complaints<sup>81</sup>. While it is clear that there should be no sanction attached to *bona fide* but mistaken complaints, this does not imply that there should be no penalty for dishonest or malicious complaints. This penalty should not be available until the complaint is investigated fully and found to be malicious. The guiding principle should be that all complaints are to be regarded as *bona fide* until proven otherwise.

#### (ii) Investigation

Characteristic of many of the investigation procedures described above is that the investigation is done by the police, often by the commander of the unit to which the officer belongs. In such a case the local unit commander is in a unique position in being able to clear a working comrade and keep himself free of any implied reflection upon his command.

As an American commentator notes<sup>82</sup>:

“Accordingly, the investigation may be purposely haphazard, the complainant may be harassed into dropping his charges or a potential witness may be brow-beaten into not testifying. Special units would face less conflict of interest than local units in dealing with a policeman’s conduct. An outwardly more objective inquiry might reduce grounds for public suspicion of police investigation of their own misconduct.”

78. *Task Force Report*, 195.

79. *Ibid.*

80. The N.S.W. Council for Civil Liberties, in a report on the investigation of complaints against the police, has recommended that the complaint be made in writing, and delivered to the Public Solicitor with \$200 lodged as evidence of good faith, such money to be remitted in the case of poverty. Sworn complaints are also to be used. Such requirements are unacceptable for the reasons given above and because such a procedure could only discourage bona fide genuine complaints from those most likely to suffer from police misconduct.

81. E.g. *The Guardian*, June 2, 1973, page 6.

82. Note, “Grievance Response Mechanisms for Police Misconduct” (1969) 55 *Virginia L.R.* 909, 937. See also Note, (1970) 118 *U.Pa. L.R.* 1023, 1027-1028: “[Police investigation] tends to be defensive of the police and slanted against complainants . . .” “Only the most blatant offence, supported by incontrovertible evidence could induce investigators and superiors to abandon the fellow officer”.



The Task Force Report on the Police<sup>83</sup> also came to the conclusion that local unit commanders were often haphazard when investigating complaints and projected their own attitudes and interests into the investigation of the alleged offence. Not only may such investigators free themselves of all guilt as commanders, but, if the specific malpractice complained of is not contrary to general law enforcement policy or to the investigator's opinions, it may be unlikely that the investigation will reveal that a complaint is justified.

The Task Force Report<sup>84</sup> recommended the use of a special police investigation unit as necessary both to organizational control and good community relations, and as vital to ensure adherence to police regulations. However, a special police investigation unit does not fully meet the brunt of criticism that may be levelled at investigation procedures. If the malpractice complained of is common practice in the force, or accords with departmental policy or the attitudes of the special unit, police investigation may suffer from a conflict of interests. On this score, particular mention may be made of police attitudes. It has been pointed out that a norm of secrecy and mutual protectiveness pervades most police departments<sup>85</sup>. Goldstein, for example, found that an allegation of misconduct elicits the same kind of unified defence as any of the other factors which bind police officers together: "As a result, an almost inflexible code develops that prevents any officer from testifying as to the actions of another that might be considered improper or illegal"<sup>86</sup>. If special police investigators feel bound by the general police code, the aim of a full and objective investigation is likely to be frustrated. If, on the other hand they do not feel bound by the code, the investigation will be equivalent to an outside one, although the general police code will tend to block effective enquiry<sup>87</sup>.

Of other objections to the existing systems of investigation, the most important is the inaccessibility of the investigation report to the complainant<sup>88</sup>. This appears to be the case in all Australian systems whether the complaint is substantiated or not. There seems no good reason why the complainant or his solicitor cannot have access to a document which is, after all, crucial to his cause.

## (B) THE SECONDARY STAGE

### (i) *The Policeman as Judge*

The crucial issue at the hearing of the complaint relates to the rôle of the police in that hearing. Should the police play any rôle in judging a charge

83. At 196.

84. *Ibid.*

85. See Berkeley, *The Democratic Policeman* (1970), 141; and Niederhoffer, "Restraint of the Police: A Recurrent Problem" (1968) 1 *Conn. L.R.* 288, 296.

86. Goldstein, "Administrative Problems in the Control of Police Behaviour" (1967) 58 *J.C.L.C. and P.S.* 160, 166.

87. See *Harvard Survey*, 515; Berkeley, *The Democratic Policeman*, 140; Chevigny, *Police Power*, 263-265; Gellhorn, *When Americans Complain*, 185; Coxe, "The Philadelphia Police Advisory Board" (1965) 2 *Law in Trans. Q.* 179; Goldstein, *supra* n.86, 170; Note "Grievance Response Mechanisms for Police Misconduct" (1969) 55 *Virginia L.R.* 909, 942; Note, (1970) 118 *U. Pa. L.R.* 1023.

88. Barton, *supra* n.50; and Note, (1970) 118 *U. Pa. L.R.* 1023, 1033. Consider also *St. Johnston Report* (1971), chap. 14, para. 15: ". . . I recommend that wherever convenient the police should adopt the system of calling on the complainant to discuss his complaint with him after the complaint has been investigated."

brought against a policeman by a citizen? In the account of existing systems above, it was indicated that commonly the Police Commissioner, or his nominee, hears and judges the complaint. In his dissent from the majority report of the English Royal Commission on the Police, Goodhart faced this issue directly, agreeing with ". . . the major criticism against the present system . . . that it violates the basic principle of justice that no man shall be judge in his own cause"<sup>89</sup>.

This issue has been considered in three reports on the police, in Australia, England and the United States<sup>91</sup>. The English Royal Commission and the Victorian St. Johnston Report both clearly stated the conclusion that a majority of the public was satisfied with the present system<sup>92</sup>. The attitude of the author of the St. Johnston Report is shown in the following extract:

"It is my experience that the great majority of complainants are satisfied with the actions taken by the police to deal with their complaint. There are, however, in society, some who wish to denigrate the police and who are never prepared to believe that the police are honest and objective. It will never be possible to satisfy such people who are usually articulate and voluble. It is never possible to appease the unappeasable and I do not believe that one should try to do so by altering a well established and well tried system which satisfies the majority"<sup>93</sup>.

The attitude of the majority in the English Royal Commission Report was similar, except in the important respect that it conceded the need for some change to be made to the present system in order to ensure not *actual* impartiality of investigation, but public confidence in that impartiality<sup>94</sup>. The Royal Commission based its finding of public satisfaction on statistical information that half of those persons making complaints to police departments were satisfied<sup>95</sup>. A better approach would surely have been to concentrate on the fact that half of the complainants were dissatisfied, and to seek to discover reasons for this dissatisfaction. The attitude and approach of each report may be seen to be less than satisfactory.

The St. Johnston Report answered criticism of the "police judge" in the following manner:

". . . it has to be remembered that if it is alleged that a police officer has committed a crime, the only and proper organization to investigate the alleged crime is the police, just as it is if it is alleged that some member of the public has committed a crime, and it is the proper duty of the police, and of no one else, to decide whether the results of an enquiry justify a prosecution"<sup>96</sup>.

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89. *Royal Commission on the Police* (1962) Cmnd. 1728, para 63 (dissenting report).  
 90. Australia: *St. Johnston Report on the Police* (1971) (Victoria); England: *Royal Commission on the Police* (1962) Cmnd. 1728; U.S.A.: *Task Force Report*.  
 91. However, the Commission found that only 50% of those who complained were satisfied by the treatment of their complaint. *Id.*, para. 426-427, and recommendation 91. These figures do not support that conclusion. See Chappell and Wilson (ed.), *The Australian Criminal Justice System* (1972), 317-318.  
 92. *St. Johnston Report on the Police*, para. 25.  
 93. *Royal Commission on the Police* (1962), para. 473.  
 94. *Id.*, para. 426-427, and recommendation 91.  
 95. *St. Johnston Report on the Police*, para. 21.

This answer clearly misses the point of insisting upon an impartial judge. It is just because it is a member of the public who has been charged with a crime, that it is proper for the police—an independent investigative body—to investigate the charge. When on the other hand, the alleged offender is himself a member of the force, the police can no longer be regarded as an independent investigative body. If it is alleged that a company has committed an offence against the Restrictive Trade Practices Act, could it seriously be suggested that the company directors should themselves investigate the charge?

The American Task Force Report revealed dissatisfaction with the existing hearing procedures in the United States, but was cautious in its recommendations for reform. The report did not go beyond recommending a reassessment of hearing procedures in general: "Certainly, such reassessment should determine whether departmental hearing officers are properly screened to ensure against decisions which are based upon prejudice or preference"<sup>97</sup>. While that is a step in the right direction, the report's recommendation does not follow through the clear doubt as to impartiality<sup>98</sup> which flows from a system in which the police are judges in their own cause<sup>99</sup>.

Goldstein<sup>100</sup> has identified a specific conflict of interests which is inherent in a system in which the police fulfill the rôle of judge. This conflict has three aspects.

- (i) Given the emphasis on the prevention of crime in most modern police forces, individual police officers are left in the ordinary day-to-day routine to define the limits of their own preventive activities. The conflict then, is this: "A police chief who feels that the effectiveness of his preventive efforts is dependent upon the degree to which he can motivate his men to be vigorous in their patrol activities is hard put to review a complaint alleging overly aggressive behaviour"<sup>101</sup>.
- (ii) It is a truism that the police regard themselves as being involved in a "war"—a war against crime, a war against law breakers. In this way, it becomes increasingly easy for the policemen to justify his means by reference to the ends they achieve. There are pressures on the lower echelon police, particularly, to employ illegal measures to win their "war". The police chief, being involved in that war, being responsible for it, and agreeing with the ends to be achieved, is in a difficult position if he must himself check and report on the use of illegal means.
- (iii) The police, like most employees, place great importance on the willingness of their chief to defend his men against public criticism. This

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97. *Task Force Report*, at 196.

98. *Ibid.*

99. It is often suggested that the police are best fitted to investigate and hear charges against the police (see, e.g. Hudson, "Police Review Boards and Police Accountability" (1971) 36 *Law & Contemp. Prob.* 515 at 519), and that only the police have the necessary expertise to judge police misconduct properly. Barton, *supra* n.50, 462. See also *Harvard Survey*, at 518. But impartiality is more important than an expertise which has not been demonstrated to be indispensable to the functioning of the tribunal! It has also been argued that the police-administered system focusses responsibility for dealing with police misconduct on those best able to cure it. *Ibid.* But only the *representation* of police interests is thereby supported. Gellhorn, *When Americans Complain*, 184.

100. Goldstein, *supra* n.86, 166-7.

101. *Ibid.*

becomes a very delicate matter for the police chief when he must adjudicate upon a complaint by an "outside" complainant, and the result may well be an undermining of police morale and police discipline.

The job of the high-ranking police judge is, therefore, a very difficult one, and the police judge cannot remain unaffected when he adjudicates upon a citizen complaint<sup>102</sup>. This conflict of interest would not be inherent in a system of independent assessment.

It will be remembered that the English Royal Commission recognized that justice must be seen to be done and acknowledged that perhaps this was not always achieved under the existing system. The majority recommended<sup>103</sup> that a complaints book be kept by every force, and that complaint reception and complaint disposition be recorded therein. The report also commented that "a failure to perform these important duties [of complaint disposition] effectively and impartially will raise the question of the fitness of the Chief Constable for office". While these are steps in the right direction, they clearly fall short of the ideal in certain fundamental respects<sup>104</sup>. For example, to deny the public access to the complaints book is to preserve the undue secrecy common in present systems of complaint resolution.

#### (ii) *Procedural Defects*

Defects in the secondary (hearing) stage deserve careful consideration. It has been noted that most Australian systems provide that the court shall observe the rules of evidence and procedure of a summary court<sup>105</sup>. Nonetheless, because the police disciplinary systems were designed for police internal discipline and *not* for the resolution of complaints from outside the force, there are exceptions which operate in favour of the accused. For example, most regulations provide that the accused member of the force may supply to an officer the names and addresses of witnesses whom he desires to call on his own behalf, and that officer is thereby obliged to take steps to see that these witnesses attend<sup>106</sup>. Such a facility is not only beyond the reach of an accused in a summary court; if available to the police accused, it should equally be available to the complainant against the police<sup>107</sup>.

The main criticisms of the present systems are as follows:

- (i) Many systems do not allow the complainant to be present, to be represented, or to examine or cross examine witnesses<sup>108</sup>.
- (ii) No system discloses the investigation report to the complainant<sup>109</sup>.

102. See Barton, *supra* n.50, 456

103. *Id.*, and see s.30(1) Police Act, 1964.

104. See, e.g., *Royal Commission on the Police*, (1962), Goodhart's dissent, para. 64 "... it is of little comfort if there is nothing which can be done about a finding that the complaint has been dealt with unjustly". Presumably it would take a great deal to displace a chief constable, and many individual cases would be disposed of before dismissal could occur.

105. See *supra* n.19.

106. E.g. Tasmanian Regulations, Regulation 43(10).

107. "The Michigan State Survey found that the trial board in one city is ineffective because of the lack of subpoena powers . . .": *Task Force Report*, 196. See also Barton, *supra* n.50, 455.

108. *Law and Order Reconsidered*, 409; Note, "Grievance Response Mechanisms for Police Misconduct" (1969) 55 *Virginia L.R.* 909, 937-938.

109. *Ibid.*

- (iii) At present, no Australian system is an "open" one. Closed courts tend to breed suspicion and rumour. The proceedings and the impartiality of decision making should be open for all to see.
- (iv) There is a common failure to publish decisions and reasons for those decisions<sup>110</sup>.

It should also be remembered that, while the charge is not a criminal one, it is quasi-criminal in nature, in that it involves a disciplinary offence. Hence, a watchful eye must be kept on the rights of the accused, in respect of such questions as whether he should be entitled to keep silent.

### (C) THE TERTIARY STAGE

#### (i) *Sanctions*

A major problem of internal review is pointed out in the Staff Report by the New York Times to the National Commission on the Causes and Prevention of Violence:

" . . . internal review . . . seldom produces meaningful discipline of persons guilty of police misconduct. Even when an officer is disciplined, the punishment is often so light as to be a token that aggravates rather than satisfies the grievant. By contrast, many departments impose relatively severe penalties for violations of minor internal regulations . . . The frequency of rigorous internal discipline for minor departures from departmental regulations magnifies the relative failure of police departments to discipline an officer for abusive treatment of a citizen"<sup>111</sup>.

The simple fact is that because the power to discipline a police officer lies invariably with the head of the police force, this first criticism of the sanctions applied proceeds upon the same basis as the earlier criticisms concerning the police judge. In the U.S.A., police control over sentencing has given rise to much adverse comment. Berkeley<sup>112</sup> found that police impose relatively minor punishments when complaints against them had been sustained<sup>113</sup>. The Task Force Report found that when complaints were sustained, the offending police were punished too lightly or not at all<sup>114</sup>, as reflected in a Michigan finding that "probably the strongest criticism that can be offered is that seldom is meaningful disciplinary action taken against officers guilty of one or more forms of brutality"<sup>115</sup>. But there were also cases at the opposite extreme, where minor breaches of regulations were punished too severely.

The Report concluded:

"Clearly, police departments must take steps to insure that punishments more suitable to the offence committed are given. This will require that all departments examine penalties to determine whether

110. *Law and Order Reconsidered*, 409; Note, "Grievance Response Mechanisms for Police Misconduct" (1969) 55 *Virginia L.R.* 909, 937.

111. *Law and Order Reconsidered*, 408-410; Note, (1970) 118 *U. Pa. L.R.* 1023, 1031.

112. Berkeley, *The Democratic Policeman* (1970), 140.

113. *Task Force Report*, 197: "The most frequently used disciplinary tool is the transfer."

114. *Ibid.*

115. *Ibid.*

they are effective in deterring future misconduct and whether they are justified when the nature of the offence is considered"<sup>116</sup>.

Apart from the apparent need for an independent sentencing authority it is also clear that the *types* of sanction presently available are not those best fitted for the satisfactory disposition of a proven citizen complaint. Although the principally job oriented police sanction can and does deter efficiently<sup>117</sup>, no provision exists within the police internal system to compensate the complainant in any way. Remedies such as compensation in money terms or replacement of property, expungement of illegal arrest records or fingerprints<sup>118</sup>, and letters of apology<sup>119</sup>, should also be considered.

(ii) *Appeals*

Briefly, most systems provide for an appeal by the policeman, but not by the complainant. The reason for this is clearly that the system was not designed for the resolution of civilian complaints. This should be remedied, and the grounds for appeal fully specified<sup>120</sup>.

### III. Civilian Review Boards—A Proposed System

#### (A) THE CONCEPT OF A CIVILIAN REVIEW BOARD : AN INTRODUCTION

In the United States, and more recently in England, dissatisfaction with the existing systems for reviewing complaints against the police has led to the discussion, and, in some cases, the institution, of what may be termed civilian review boards. The basic concept is a citizen dominated tribunal with a duality of purpose. First, the board hears complaints by citizens against the police and judges the specific issues involved. Secondly, and in a more general sense, the board functions as an adviser to the government and the police on policy questions concerning law enforcement, and also as a channel of communication between the police and the public.

The concept of a civilian-led or guided police force is not new. In England, until recently, regional police forces were under the control of bodies known as "police authorities"<sup>121</sup>. These were local bodies, with four main duties—to provide an adequate police force in the area; to be a body of citizens concerned with the local standing and morale of the force, able to give advice on local matters; to appoint, discipline or remove senior officers of the force<sup>122</sup>; and to play an active rôle in police-public relations. Due to various factors, most notably that the civilians were mostly, if not all, local councillors, and therefore themselves subject to a conflict of interest<sup>123</sup>, these authorities failed effectively to achieve the kinds of function envisaged.

The civilian review board, as introduced in some U.S. jurisdictions, has been designed to overcome the basic disadvantages of police-dominated review mechanisms. The board represents an attempt to provide a system of unbiased

116. *Ibid.*

117. Chevigny doubts this: *Police Power*, 270. See also Berkeley, *The Democratic Policeman*, 196ff.

118. See Neier, "Have you ever been arrested?", *N.Y. Times*, April 15, 1973, p.16.

119. Goldstein, *supra* n.86, 171-2.

120. Compare appeal provisions from summary courts to superior courts.

121. See generally *Royal Commission on the Police* (1962), chap. 6.

122. E.g. *Ridge v. Baldwin* [1964] A.C. 40.

123. Principally, the civilians were local councillors, subject to conflict of interest and political pressure. See Goode, *Legal Controls on Police Misconduct*, unpublished thesis, University of Adelaide, 84-84c.

and impartial controls whereby police powers involving a wide discretion, the use of physical restraint, and a wide ambit of permissible conduct, can be appraised and kept within permissible limits. Another aim has been the external control of matters closely connected with police discipline. Police systems, it has been thought, should be open to impartial review in the better interests of justice, policy, and police-community relations.

There are of course other arguments for civilian review boards. One is that they enable review of high ranking officers as well as those lower in the hierarchy:

“An internal system may be constructed which provides strong safeguards against dishonesty and the disingenuous exoneration of officers by low echelon officials. But in any complaint system entirely within the police department, the only protection against such faults in the high command is the integrity of the commanders themselves. An independent board, on the other hand, can operate as a check on high as well as low officials”<sup>124</sup>.

Another argument runs as follows. As foreshadowed, distinctions must be drawn between the abuse of authority by a policeman in three different situations: first, where the department as a whole regards the conduct as being a fit subject for corrective discipline; secondly, where the same is true, but where generally fellow officers would have done the same thing in similar circumstances; and thirdly, where the conduct is itself illegal, but is consistent with the instructions and expectations of the senior police officers. Police internal review may work well in the first case, it may not work at all in the third case, while in the second case its value is marginal, depending on the attitudes of the senior police officers rather than on the merits of the case. The civilian review board is designed to remedy these deficiencies.

Although considerable criticism has been levelled at civilian review boards the worth of such an approach has been far from disproved. Generally, the politics of police complaints have played a large part in the United States. Where the civilian review boards have failed, the reasons have been largely political, as is evidenced by the experience in Philadelphia, where the mayor's control over the Board and the ascension to mayoralty of Police Commissioner Rizzo led to its abandonment<sup>125</sup>. Furthermore, several reactions on the part of American police associations have been extreme, and do not warrant any counter-argument:

“How can law and order be maintained if policemen are bound in chains — if policemen are deprived not only of their necessary powers, but also their ordinary rights as citizens? The answer is that there are those who are hidden far in the background in the push to set up review boards do not want law and order maintained. Their purposes would be served by a breakdown in law enforcement . . . Review Boards undoubtedly can and do serve as a secret weapon for the Communist Party”<sup>126</sup>.

124. *Harvard Survey*, 517.

125. See Hudson, “Police Review Boards and Police Accountability” (1971) 36 *Law & Contemp. Prob.* 515, at 525-7. Several prominent boards in the U.S. have been disbanded.

126. “Police Review Boards—A Threat to Law Enforcement” 3-4 (undated but distributed 1965), quoted by Gellhorn, *When Americans Complain*, 172.

"Russia, if they want to take over any country, they have to immobilize the Police Department and knock out the religion of the country. You put in a police review board throughout the country, you immobilize the Police Force"<sup>127</sup>.

However, some criticisms of the American experience are valuable indicators of problems which require consideration in the development of an adequate civilian review system. For example, in relation to the Philadelphia Board, the Task Force Report on the Police concluded that a considerable portion of the Board's problems were due to lack of staff and delays in receiving reports from police departments<sup>128</sup>. Further, few complaints were filed with the Board. This may in part have been attributable to limited press publicity and a non-existent publicity budget<sup>129</sup>. The Philadelphia Board was, in fact, largely ignored by the community<sup>130</sup>.

Two other factors may have contributed to the lack of use made of this Board. First, there is a suspicion that some policemen, activated by hostility to the Board, may have discouraged complaints<sup>131</sup>. Secondly, it may be that citizens were suspicious about the impartiality of the Board, due to the bad handling of a previous complaint by the superseded police system. Lack of publicity about the Board would contribute to such fears<sup>132</sup>. Moreover, there is evidence that the Board was hampered by its reliance upon police investigation<sup>133</sup>.

A further line of criticism is that leaving police conduct to be judged by unsympathetic civilians will destroy the morale of the force, hamper recruitment, and hamper police effectiveness in enforcing law and order<sup>134</sup>. An argument to the contrary is simply that this has not happened where such an approach has been tried. A Harvard Survey found that, with respect to the Philadelphia Board, there were no such effects<sup>135</sup>. The Task Force Report quoted Philadelphia Police Commissioner Gibbons as saying: "The Board has not only aided me but has aided the Police Department." He added that the police had not been inhibited in the performance of their duties<sup>136</sup>. Barton quotes a Californian survey finding much police hostility and misunderstanding, but indicating that morale was good<sup>137</sup>. The point is that it is hard to see how

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127. *New York Times*, February 21, 1966, p.47, col. 2, quoted by Gellhorn in that same paper on May 9, 1966, p.29. Boards were accused of being communist tools and by innuendo, as promoting the rape of white girls by night. See Niederhoffer, "Restraint of Police: A Recurrent Problem" (1968) 1 *Conn. L.R.* 288, 298.

128. *Task Force Report*, 201.

129. *Law and Order Reconsidered*, 414; Coxe, "The Philadelphia Police Advisory Board" (1965) 2 *Law in Trans. Q.* 179, 184; Note, (1969) 55 *Virginia L.R.* 909, 942.

130. *Ibid.*

131. Note, (1969) 55 *Virginia L.R.* 909, 942.

132. *Ibid.* See also *Harvard Survey*, 514.

133. E.g. Coxe, "The Philadelphia Police Advisory Board" (1965) 2 *Law in Trans. Q.* 179.

134. Barton, *supra* n.50, 462.

135. *Harvard Survey*, 517.

136. *Task Force Report*, 202, quoting the transcript of the Philadelphia Court of Common Pleas No. 2 (1959) No. 207, at 75-76.

137. That survey is: Hohmann and Misner "The University of California at Berkeley: Field Survey IV, Volume 2: "The Police and the Community" (1967) 196, 197. See also Coxe, "Police Advisory Board: The Philadelphia Story" (1961) 35 *Conn. B.J.*, 153.



*legitimate* law enforcement is hampered—if it is legitimate, then it will not normally come before the Board—and if it does, its legitimacy will be publicly affirmed. It is easy to see how illegitimate law enforcement is deterred, but that is the object of the exercise.

It is also hard to see how proper morale is impaired. It is desirable after all, that the police be aware of the likelihood of punishment for misconduct. Berkeley<sup>138</sup> does give one explanation of how morale may be damaged. The policeman will see himself singled out as subject to special scrutiny and control. He alienates further from society, which enhances police solidarity, and leads the police to cover up for each other even more than before. There seem to be two possible answers to this. First, to say that a review board will lead to police concealing misconduct and being basically dishonest, is to admit that the power exists which allows the police to behave in this way, and also that they do, in fact, behave in this way. To admit this is to defeat the proposition that the police internal review system is a better one, since far more scope for such activity exists under that system than under a civilian review board.

A second possible answer is that it is hard to see why the police object to being singled out for special observation and control. The police have an extensive power to use physical restraints, a power which warrants close scrutiny. Furthermore, the police are unique in many respects, and to say that they should not be singled out for special controls is to imply that there are other people or institutions requiring similar scrutiny.

A related argument concerning police morale, and advanced by opponents of a civilian review board, is that the impression is created that the police commissioner and the police hierarchy cannot be trusted to discipline their own personnel<sup>139</sup>. That, of course, is not the point. The conflict of interest, for example, between the police commissioner and the lower echelon officers, has nothing to do with “trust”. It is a fault in the system which makes it very hard for the police chief to adjudicate a complaint fairly.

It is also argued that it is inappropriate for high ranking officers to be held responsible for discipline, while authority to exercise punishment is to be vested outside the force. This argument is hardly sustainable. As will be explained later, under a civilian review board, the police need not forfeit any of their powers to discipline their own officers as they please. If a charge is brought by a complainant to the board, then the police have a chance to express their views. If the board, in the police opinion, over penalizes the accused, then that is subject to appeal. The police view should also be represented on the board at the decision-making level. If the accused is under-penalized the police may bring their own disciplinary action and make up the difference. Generally, it must be seen that in terms of disciplinary action not initiated by the public, the police remain in full control and may discipline their force as they please<sup>140</sup>. In any case, a civilian system need not be a gratuitous insult to the police chief. Even if one concedes that the police do not

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138. Berkeley, *The Democratic Policeman*, 146.

139. *Harvard Survey*, 517.

140. *Id.*, at 518 where it is also stated: “Moreover, police supervisors retain authority to discipline for infractions not involving citizen complaints, and they retain a great deal of power over their men outside the complaints review system through promotions and changes of assignment.”

abuse their quite considerable powers, it must be recognized that the possibility of bias is still present.

#### (B) A PROPOSED SYSTEM

It is proposed to outline a recommended system for the satisfactory resolution of complaints against the police. It must be stressed that this system has three interests to fulfil: first, an interest in seeing that a wrongfully injured complainant obtains appropriate redress; secondly, that a policeman accused of misconduct is dealt with fairly and justly; and thirdly, that the community be satisfied that police misconduct is generally minimized and that the police force is of the highest possible standard. It is submitted that the following system would adequately reflect these interests.

##### (i) *Reception*

Ordinarily, a complaint should be reduced to writing, but need not be made on oath, nor signed. Formalities should be kept at a minimum to prevent discouraging timorous complainants. Anonymous complaints should always be received and investigated as far as possible. As the board would need sufficient information to begin investigation, the object at the time of reception of the complaint should be fact-gathering preliminary to that investigation. Any forms which may be required should be simple and easy to complete. On no account should a complaint given in good faith be subject to sanction. The complaint should not be received at a police station unless the complainant so desires, but rather at a local office of the board. It should be possible for complaints to be filed in person, by telephone or by post, anonymously or otherwise; adverse reaction to anonymous complaints may discourage the presentation of legitimate grievances<sup>141</sup>.

The importance of the secretary to the board can hardly be overestimated. He is the reception official, and a central part of the board's function, although he does not participate in actual hearings. It is proposed that the ombudsman, where that office exists, could act as secretary, thereby providing a clearing house for all complaints. This has advantages in terms of experience, staffing, public image and influence. At any informal conciliation meeting, these attributes of the ombudsman could be of great importance.

##### (ii) *Primary Action*

The following is a brief indication of the kinds of action that should take place at or just after the reception of a complaint about the police. At the reception of the complaint the complainant should be informed of alternative complaint mechanisms, and the possible results of using those mechanisms. He should be informed of the board's procedure, and what may be expected of him. While the exact nature of non-police complaint procedure is not the province of this discussion, it is submitted that the secretary's office should also re-direct all other complaints against "authority". In this event, personnel at the office should have knowledge of departments in the government other than the police, and should automatically direct non-police complaints to the appropriate department.

The complainant should be advised as to the wisdom or otherwise of obtaining legal advice and counsel, and should be referred to legal aid

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141. *Harvard Survey*, 502.

services<sup>142</sup>. After the complaint has been received, a copy should be sent to the police department and to the accused. The process should be kept confidential at this stage, in the interests of both parties.

(iii) *Jurisdiction*

Where proceedings are taken both in the police internal review system and externally before the board, then the external review system should prevail since it ensures a more objective consideration of relevant interests, including those of the complainant, yet preserves the opportunity for a proper review of efficiency and other matters of concern to the internal administration of the police force. However, it is contemplated that officials in both systems should work closely together, co-operate, and compare information and attitudes to the case.

With respect to concurrent civil and board proceedings, the complainant should be compelled to elect in which jurisdiction he will press his suit, but only after advice upon the likely consequences of each course of action, and after an opportunity to obtain legal representation, if desired. Should the complainant elect to proceed in a civil court, the complaint should be referred to the police internal review system in the interests of both the force itself and the community.

With respect to concurrent criminal proceedings, where the complainant initiates prosecution against the policeman, the board should have jurisdiction, but should stay proceedings while the criminal case continues. After the trial, the secretary of the board should confer with the complainant. If the complainant is satisfied, he should drop his complaint. Otherwise, the transcript of the criminal proceedings should be examined by the board to see if further issues arise. If the accused police officer has been found guilty, generally the further issue of compensation for the complainant would arise. The board's hearing should be limited to that matter. If the accused has been found not guilty, the questions before the board should not be limited to the question of compensation alone, and the findings of the board should be forwarded to the police department. Clearly, the aims of a criminal trial differ from those of a police review system, and there seems no good reason, for example, to require proof beyond reasonable doubt in relation to either compensation or unsatisfactory police behaviour. It is unlikely that injustice to the police officer would occur, since the findings of the criminal court would have much influence upon the board.

(iv) *Preliminary Screening and Informal Resolution*

The executive secretary would perform the highly important preliminary functions of screening complaints, and resolving as many as possible informally.

As regards screening, the executive secretary, and, if necessary, any assistants, should assess the complaint at a preliminary stage after investigation, in order to decide whether it is sufficiently grounded, and if it is, whether the board should assume jurisdiction.

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142. Neiderhoffer, "Restraint of the Police: A Recurrent Problem" (1968) 1 *Conn. L.R.* 288, 304: "They explained regulations and laws, referred callers to the proper officials, arranged for further assistance where needed, advised about available procedures for challenging adverse official decisions, and obtained information if it were not already at hand."

The informal resolution of complaints would also be essential. Informal resolution saves time, trouble and expense. It minimizes apprehension and waiting by both parties, and lessens friction between the parties by avoiding the confrontation of the adversary process. For most complaints not disclosing serious abuses a process similar to industrial conciliation should take place between the board secretary, the police force, the complainant, his solicitor, and the accused and his solicitor. Very often such conciliation may be expected to achieve settlement without the need for a further hearing before the board. The Philadelphia Board secretary found that he could use his influence on both parties to effect informal settlements satisfactory to all. Certainly, minor complaints should not go to a full board hearing.

When complaints are resolved informally the decision should be ratified formally by the board, in the manner of consent orders in civil cases.

(v) *Investigation*

Bearing in mind the comments on police investigation of complaints made earlier, it is submitted that the board, through the secretary and his staff, should be empowered to conduct independent investigations. This is important if the board is to appear impartial, to screen complaints adequately and to be a proper source of information for police and political policy makers. Alternatively, two less independent approaches seem available. First, the board could rely upon police investigation while having a power of independent investigation which could be used to investigate random complaints as a means of guarding against bias. Second, the board might have no such power of investigation but only a discretion to order partial or total police re-investigation. However, these two alternatives are but compromises, as is evident from the experience of the Philadelphia Board: reliance upon police investigation detracted from its proper functioning<sup>143</sup>. By contrast, in its proposals for improving the treatment of complaints the New South Wales Council for Civil Liberties has recommended that:

“Investigating officers shall be employed by the Public Solicitor for the purpose of investigating complaints and shall have the same powers as the Commissioner has to interview the police against whom the complaint is made and who are concerned in the facts set out in the complaint. Investigating officers should be chosen from persons not previously members of the New South Wales Police Force and should preferably be persons with legal qualifications”<sup>144</sup>.

The investigation report and recommendations should be made available to each board member, the secretary, the complainant, the accused and their legal representatives, and the Police Commissioner and the Minister responsible for the police. It should also be forwarded to the Attorney-General if a criminal offence is involved. However, if the complainant does not wish criminal prosecution but only minor ancillary relief, then, at the conciliation meeting the question of criminal prosecution in the interests of the police or the public should be raised with the complainant. If he agrees to criminal trial, then all appropriate information should be forwarded to the Attorney-General. However, in those circumstances the police should take such disciplinary action as is necessary.

143. See *supra* n.133.

144. Quoted in Harding, *Police Killings in Australia*, 261.

## (C) THE SECONDARY STAGE

(i) *The Composition of the Board*

The tribunal should consist of a Judge of the Supreme Court, the Commissioner of Police (or an officer not below the rank of Superintendent appointed by him), and two members of the public selected by rotation from a panel of citizens. The panel should be changed at regular intervals. The judge should be president of the tribunal, and should have a casting vote.

(ii) *Procedure and Incidents of Hearing*

The tribunal's function is to hear complaints, find the facts in issue, and to adjudicate on them. If an opportunity to settle or conciliate arises then it should be taken. The board should not, as the Philadelphia Board did, take the part of the complainant if he is unrepresented. If he cannot afford counsel, the complainant may have counsel appointed under legal aid schemes. If he wishes to conduct his own case, he should be allowed to do so and if he wishes a friend to conduct his case for him, then that too should be allowed.

The adversary nature of proceedings before a proposed review board has been criticized as leading the police to bank together to protect "the force" from the board<sup>145</sup>. Goldstein formulates the problem in the following way:

"Because of the adversary relationship between the complainant and the police officer to which the existence of such a board would give emphasis, it is claimed that whatever force or commitment may have developed within a police agency for self discipline would be abandoned in the face of a more compelling desire on the part of police personnel to support a brother officer who stands accused before such a board"<sup>146</sup>.

Gellhorn's attack on police review boards is also based upon this criticism<sup>147</sup>, that the boards cause a polarization between police and public. In this respect, the following points deserve explanation.

First, the operation of the Philadelphia Board does not support this argument. The expected polarization did not materialize, as is evident from the fact that the police chief and the board worked amicably together.

Second, the argument by Gellhorn and Goldstein ignores the fact that this polarization is already a problem<sup>148</sup>. The police do band together to present a united front against complaints from citizens, *however* they may be dealt with. While this attitude by the police persists, and while the evidence of reduction of hostility in the case of the Philadelphia Board is uncontradicted, then Gellhorn's and Goldstein's argument lacks persuasive force.

Third, both Gellhorn and Goldstein concentrate their attack on the full scale board hearing. Both ignore in such a criticism the majority of complaints which would be conciliated informally, and successfully, by the secretary.

145. Berkeley, *The Democratic Policeman*, 140; Goldstein, *supra* n.86, 170.

146. *Ibid.* See also Note, (1969) 55 *Virginia L.R.* 909, 943: "When the complainant and the policeman are pitted against each other in formal opposition, hearings convey the appearance of a battleground."

147. Gellhorn, *When Americans Complain*, 185.

148. See the section "The Police as Judge", *supra*.

This may in fact be one reason why the board and the police in Philadelphia worked so well together. If such "ombudsman-like" informal settlement can be achieved, the criticisms of Gellhorn and Goldstein will be, in large measure, rebutted.

As regards the conduct of cases before the tribunal the following matters are of particular importance:

- (i) The hearings should be in public, and adversary in nature.
- (ii) The power to subpoena is necessary.
- (iii) The power to commit for contempt is necessary.
- (iv) The tribunal should have such powers to examine witnesses as those possessed by a Royal Commissioner.
- (v) The tribunal should have the power to prevent disclosure of any relevant facts, witnesses and so on. Such a case would be exceptional, it being clearly in the interests of the public that the workings and nature of the board<sup>149</sup> be open to scrutiny.
- (vi) The rules as to admissibility of evidence should be flexible, as in the case of many administrative tribunals.
- (vii) The complainant would carry a persuasive burden of proof, the quantum being the balance of probabilities<sup>150</sup>. The degree of proof required in practice to satisfy this burden would then depend upon the severity of the charge; for a serious charge it may be expected that compelling evidence would be necessary.

(iii) *Prosecution*

The police should not be the formal prosecuting agency. It must be seen that it would be unreal to have the police prosecute the case<sup>151</sup>. Rather, the prosecution should be conducted by an official representative of the board, a legal representative of the board, or by the complainant or his solicitor. Perhaps it would be possible to have a roster of volunteer solicitors, to be paid by the Government, who could act as independent prosecutors. Interested parties other than the accused and complainant should be allowed a right of representation. Such a right would seem appropriate in the case of the police department, the council for civil liberties, the ombudsman (if an agency distinct from the board), and the secretary, who would of course represent the interest of the public.

(iv) *Publicizing the Decision*

The complainant and the accused should be notified of the decision of the board, its reasons, and the remedies or sanctions applied. This information should be reported to the public, which should also have access to details of cases. Further, an annual report should be submitted by the board in which the sources of friction between the police and public are identified, and consequential recommendations made. These reports should also be made public.

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149. "A public examination is more effective than a private one." *Harvard Survey*, 507. See also *Task Force Report*, 197.

150. See *supra*, n.33.

151. *Harvard Survey*, 508.

The Philadelphia Board did not publish the reasons for its decisions<sup>152</sup>. Arguably, this was a bad thing, as published reasons do have some advantages. A full and simple explanation of why a particular decision was taken could help both complainant and accused to understand the process they have been through. There is a safeguard against arbitrary judgment, and publicity value for the board. Further, and perhaps more important, published reasons could provide guidelines as to what the board expects as normal police behaviour and minimum police policy standards. The report should evaluate the evidence and show how the decision of the board was reached.

(v) *Costs*

Where the complaint is found to be true in substance, the costs of the complaint should be paid by the police. Costs should be awarded against the complainant only where the complaint is found to be made *mala fide*. Frivolous complaints should never get to the board, and must be sifted out at the preliminary screening stage. Too great a power to award costs against the complainant would deter *bona fide*, but timorous and poor, complainants.

(vi) *The Secretary*

As has been seen, the secretary's function much resembles that of an ombudsman. Consequently, where the office of ombudsman exists it would appropriately embrace the board's secretariat.

(D) THE TERTIARY STAGE

(i) *Sanctions and Remedies*

The sanctions and remedies imposed by the board should serve the three interests which have been outlined: making a more efficient force, deterring the police from misconduct, and compensating the complainant. The type of sanction or remedy such as loss of wages, or demotion, should be more flexible and extensive than at present. Job-oriented sanctions help to achieve the first two aims, but do not serve the fullest interests of the complainant. Thus, new remedies should be made available including letters of apology, destruction of the record of an illegal arrest, replacement of damaged property, or damages as assessed in tortious actions. These remedies should typically be directed against the police department, thereby encouraging improvement of behaviour throughout the organization, and not merely on the part of individual officers directly associated with the incident giving rise to complaint.

In the case of job-oriented sanctions, the enforcement function of the board would be less direct than for remedies directed against the department. Job-oriented sanctions should be administered largely through the police force itself, subject however to the following powers of board supervision:

- (i) a power to recommend to the Police Commissioner a punishment within statutorily prescribed limits;
- (ii) a power to supervise the carrying out of the sanction;
- (iii) a power, in the event of disagreement with the Commissioner, to

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152. Chevigny, *Police Power*, 261; *Harvard Survey*, 515.

refer the question of appropriate sanction to the Minister in charge of the police<sup>153</sup>.

(ii) *Appeals*

It is recommended that there should be equality between complainant and police officer in the sense that a right of appeal should be available to both or neither. Ideally, both should be allowed to appeal to the Supreme Court, the decision of which should be final. The board should also be given power to refer points of law to the Supreme Court, as is now possible in the case of courts of summary jurisdiction.

### **Conclusion**

The introduction of a review board, as outlined, would provide an improved method of dealing with citizen complaints against police misconduct. One general advantage would be the avoidance of many of the failings of existing systems of review in Australia and England, largely as a result of greater external involvement in our policing. More positively, such a system may well lead to significant improvements in several areas, including police-community relations, police administration and efficiency, and, finally, the design of criminal laws and procedures.

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153. The complainant has no further interest in the matter and need not be represented. However, it should be noted that it would be desirable for the results of this process to be communicated to the complainant.