POLICE DISCIPLINARY PROCEDURES IN ENGLAND AND WESTERN AUSTRALIA

It is now a well-documented phenomenon that the criminal justice systems of Australia have not always, in recent years, responded effectively and promptly to possible criminal misconduct by police themselves.[1] Why this has been so is a complex question to which there is no single answer: poor pay, low educational entrance standards, strong ethnocentricity, low morale, etc., are some of the factors put forward as partial explanations.[2] Whatever reason or combination of reasons seems best to explain it, one can be quite sure that if the ordinary internal disciplinary procedures had been operating effectively, these would have fed apparently criminal situations into the criminal justice system "voluntarily", rather than leaving them to be forced into the system by the intervention of outsiders. In other words, whatever factors produced paralysis in the ordinary criminal justice system insofar as criminal misconduct of police was concerned also produced paralysis in the internal machinery.

Now, in late 1972, the internal machinery seems highly active with regard to both criminal and non-criminal misconduct by police;[3] and it is no coincidence that the ordinary criminal processes are being much more fully utilised by police in policing the apparently criminal

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1 See, e.g., WAINER, IT ISN'T NICE, (Alpha Books, 1972) and HARDING, POLICE KILLINGS IN AUSTRALIA (Penguin Books, 1970).

2 See generally CHAPPELL and WILSON, THE POLICE AND THE PUBLIC IN AUSTRALIA AND NEW ZEALAND (University of Queensland Press, 1969) and WILSON and WESTERN, THE POLICEMAN'S POSITION TODAY AND TOMORROW (University of Queensland Press, 1972).

3 This is particularly true in New South Wales, where a series of disciplinary proceedings during 1972 has resulted in the dismissal of approximately 60 policemen. The offences range from purely internal ones (e.g., making car accident report information available to insurance assessors; revealing that official criminal statistics figures are compiled in a misleading manner) to the traditional criminal ones (car-stealing, jewel thefts). Queensland police disciplinary procedures have also been active; and in July 1972 the Commissioner announced that he intended to implement a system of attaching a member of the police crime intelligence unit to the force in every major centre in Queensland. In South Australia, the Duncan case (May 1972) served also to activate disciplinary procedures.

misconduct of other police.[4] Yet very little is in fact known about the operation of police internal disciplinary procedures.[5] Perhaps the moment is therefore apposite to make what contribution one can—and on the basis of what information is available it is bound to be rather a slight one—with regard to the working of the system in at least one Australian police force, that of Western Australia.

As a backdrop, it is proposed to examine the workings of the equivalent English machinery. This is because much more is known about it, because in my opinion, based upon examination of the working of the London Metropolitan and Bristol police forces during 1969, it represents as good a system as any community can reasonably expect, and because the origins and aspirations of English and Australian police forces are still close enough for it to be fair to compare them,[6] even when that comparison, as on this occasion, will in some respects be a little unfavourable to the Australian model.

1. DISCIPLINARY PROCEDURES IN ENGLISH POLICE FORCES

The Police Act 1964 and the Police (Disciplinary) Regulations 1965 distinguish between four different disciplinary situations:

(i) Those where a complaint emanates from within the force itself and alleges conduct which, if established, would amount to misconduct only by purely internal criteria;

(ii) Those where a complaint emanates from a member of the public and alleges conduct which, if established, would amount to misconduct only by purely internal criteria;

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4 See generally note 3, above; and more specifically the Australian, 27 June 1972; ibid, 12 August 1972 and 15 August 1972; ibid, 26 August 1972. These three examples concern jewel thefts, taking bribes, and murder.

5 The secretiveness of Australian Police Departments is gradually breaking down, but this seems to be the last bastion to fall. Even Wilson and Western (op. cit., note 2, above), with their unique access to the workings of a Police Department, did not cover this area.

I myself have received co-operation from the Western Australian Police Department in preparing material for this article.

6 It would not be as fair to compare an Australian system with an American one, for there the overlay of the 5th and 14th Amendments has a considerable effect on both the substance of disciplinary offences and the permissible procedure for dealing with them. For example, a rule of the Chicago Police Department which made it an offence "to engage in any activity, conversation, deliberation or discussion which is derogatory to the Department" was declared unconstitutional in 1970. It is reasonable to predict that a rule such as operated so as to make revealing true criminal statistics an offence (see note 3, above) would likewise be unconstitutional in the U.S.A.

(iii) Those where a complaint emanates from within the force itself and alleges conduct which, if established, would amount to misconduct by ordinary criminal criteria; and

(iv) Those where complaint emanates from a member of the public and alleges conduct which, if established, would amount to misconduct by ordinary criminal criteria.

(i) INTERNAL COMPLAINT CONCERNING CONDUCT WHICH IS MISCONDUCT ONLY BY INTERNAL CRITERIA

Quantitatively this type of disciplinary matter is by far the most common. This needs to be stressed, for it is the type about which the public hears little—no more, for example, than it hears about the operation of internal job-sanctions in the Public Service or in a major commercial organisation. What type of conduct constitutes misconduct is determined by the structure and purpose of the relevant organisation; in the case of a police force the hierarchical nature of police organisation and the types of duties that must be performed are crucial determinants. Thus misconduct includes: insubordination or oppressive conduct; disobedience to orders; falsehood or prevarication; breach of confidence; unlawful or unnecessary exercise of authority; malingering; absence without leave or being late for duty; uncleanliness; damage to clothing or other articles supplied; drunkenness; drinking on duty; entering licensed premises whilst on duty, except authorised duty; lending money to a superior or borrowing money from an inferior in rank; being an accessory to one of the foregoing or any other disciplinary offence; and discreditable conduct.[7] Complaint about any of these matters may, of course, emanate from a member of the public; indeed, in the case of such an offence as unlawful or unnecessary exercise of authority, it more typically does so. But by and large proceedings concerning such offences as these emanate internally.

Of course, no more than a small proportion of such matters are dignified by formal investigatory procedures, let alone by the subsequent laying of disciplinary charges. Trivial matters—for example, being a few minutes late for duty—would normally just be noted in the policeman's pocket-book by his superior. Only if there were a substantial number of such notes of similar conduct in the policeman's pocket-book might the superior decide to report the matter formally, because of its cumulative significance. But apart from these very few

[7] Police (Disciplinary) Regulations 1965, 1st Schedule, paragraphs 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18 and 1.

occasions which come to the surface, there is no way of knowing how many such notes—which are in some sense "disciplinary proceedings" —are made; in a large force such as the Metropolitan police force it must be many thousands each year.

If, for whatever reason, the superior decides to make a report about the matter, it is to the Chief Superintendent of the Division.[8] He in turn reports the matter to the Deputy Chief Constable,[9] but it is important to understand that he may well do so in terms which will almost certainly forestall a full investigation of the matter. Regulation 2(1) of the Police (Disciplinary) Regulations 1965 provides as follows:

> Where a report, allegation or complaint is received from which it appears that a member of the police force may have committed an offence, the matter shall be referred to an investigating officer who shall cause it to be investigated:
>
> Provided that, *where the matter arises other than from a complaint received from a member of the public,* it shall not be so referred if the chief constable concerned decides that no disciplinary proceedings shall be taken.

Thus, if the Chief Superintendent recommends in his report that he himself deal with the matter informally, the Deputy Chief Constable would normally accept such a recommendation, mark the papers accordingly, and return them to the Chief Superintendent. The latter would then deal with the policeman informally, by warning or exhortation or occasionally by transfer.[10] Matters dealt with in this

8 Because of its size, the organisation of the Metropolitan police force is different from that of other English police forces. A division might be as large as a thousand men—the size of quite an important force in the provinces—and accordingly a rank of Commander of a Division exists. This rank seems to be approximately equivalent to that of an Assistant Chief Constable. Chief Superintendents are in charge of sub-Divisions, and, where there are Units within sub-Divisions, Superintendents are in charge of these. A report of the sort described in the text would be made to the Chief Superintendent of the sub-Division.

9 Reg. 5, Police (Disciplinary) Regulations 1965.

10 This purely administrative device is not, of course, formally linked in any way at all to discipline. But every policeman realises that it is sometimes used as a disciplinary measure, rather than simply as a means of distributing manpower in the most efficient way. Two examples I know of bring this point out.

In the first, a policeman drank too much off-duty with some colleagues, went around to the local station and took a police car. His colleagues came with him, and he drove them all out to London Airport for breakfast. He was not actually picked up until returning the car, by which time his colleagues had gone their separate ways. He himself obviously was disciplined, by way of formal charges; but there was no evidence that his colleagues

way do not appear on the policeman's record, whereas matters dealt with formally do, at least if the charge is proved and the penalty imposed is anything greater than a caution.[11] Practices vary from force to force, but it is probably true to say that more matters about which reports are made are dealt with informally than formally.[12]

Where it is decided that the matter should be dealt with formally, the next step is the appointment of an investigating officer. In a small force, he will invariably be a senior officer from another Division or even from another force;[13] in the Metropolitan police force, where a single Division is often the size of a whole provincial police force, the investigating officer need only be from a different unit within the same sub-Division.[14] But the principle is constant—that *the investigating officer should never be a superior in the line of command over the policeman whose conduct he is investigating.*[15]

The investigating officer's first step is to notify the policeman concerned in writing that a complaint has been received about his conduct, from whom it has been received, and that he is investigating it. This written notification will contain the information that the policeman is entitled at this stage either to make a statement in writing or to remain silent.[16] Unless the complaint is of such a nature that, if established, would probably lead to dismissal from the force, the policeman will remain on normal duties during the subsequent investigation, though the chief officer has a legally unchallengeable administra-

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had gone with him or which colleagues had been involved. Nevertheless, the authorities had a pretty shrewd suspicion and all the colleagues were transferred to other stations, thus involving them in inconvenience.

In the second, which is a common example, a young single policeman was having an affair with the wife of a man who lived in the district that the policeman was stationed in. The man complained, and the policeman was transferred to the other side of London..

The use of this device in these sorts of circumstances is resented by the rank and file, but it is unappealable, being part of the discretionary administrative power of the chief officer.

11 Reg. 12, Police Regulations 1968.

12 For example, during 1969 in the Bristol police force 7 matters were dealt with formally as against 14 informally.

13 Reg. 2, Police (Disciplinary) Regulations 1965.

14 See note 8, above, as to the organisation of the Metropolitan police force.

15 A more articulate acknowledgement of this principle is found in the Home Secretary's announcement of revised procedures early in 1972: see below, p.

16 A view expressed to me by several policemen was that only the regularity with which policemen ignore this right to silence makes the system workable. The policeman's statement shortens, by focusing, the investigating officer's task. As it is his burden is formidable enough, but it would otherwise be overwhelming.

tive discretion to suspend a policeman pending the completion of an investigation. Suspension would be on two-thirds pay, and if the policeman is not subsequently dismissed or reduced in rank his full pay will retrospectively be made up.[17]

Once he has received notification that a complaint against him is being investigated, the policeman would normally contact his branch of the Police Federation for advice.[18] Not that the Federation representatives can, at this stage, play any direct role in the matter; only if the investigation results in the laying of formal disciplinary charges does this become possible. This fact is symptomatic of what cannot be stressed too much—that an investigation is not in itself a charge but merely a prerequisite which enables a charge to be laid when it is appropriate to do so.[19]

The investigating officer now gathers evidence about the matter, and then makes his report to the Deputy Chief Constable.[20] In doing so, he will state whether he considers that disciplinary charges should be laid or not. As he himself will be responsible for presenting the case if charges are laid, his opinion is obviously given great weight; but it can be, and sometimes is, overruled.[21] Assuming that it is decided that a charge will be laid, however, it is formulated in accordance with Regulation 4, and the policeman (who will henceforth be re-

17 Reg. 17 (4), Police (Disciplinary) Regulations 1965.

18 The highest rank of police eligible for the Federation is that of Chief Inspector. Superintendents and Chief Superintendents have their own Association, and presumably if they are charged under the disciplinary Regulations they would draw their friends from their Association. Chief Constables, Deputy Chief Constables and Assistant Chief Constables have no equivalent to the Federation, since the Conference cannot really be described in this way; and they are in any case within a separate framework of disciplinary provisions,, the Police (Discipline) (Chief Constables, Assistant Chief Constables and Deputy Chief Constables) Regulations 1965, as amended in 1967. Any proceedings taken under these Regulations is one at which both sides are entitled to be represented by solicitor or counsel: Reg. 6 (1), 6 (4).

19 No figures seem to be available to show what proportion of investigations into internally-made complaints result in charges being made; but one can be sure that it is more than the approximately 2% figure of charges following complaints by members of the public. As to this latter figure, see below p. 204.

20 In the Metropolitan police force, the report would be made to the Divisional Commander. He will minute it, and send it on to the Disciplinary Branch at Scotland Yard. It is there that the effective decision whether or not to bring disciplinary charges is made.

21 No figures are available to indicate the frequency with which this happens and whether the overruling is by way of veto or by way of positive recommendation.

ferred to as the defendant) is notified by the Discipline Form in use in his force.[22]

Two important procedural safeguards now come into play. First, the defendant is entitled to a copy of every statement which the investigating officer obtained in the course of his investigation, *whether or not that statement is to be used as part of the evidence against him;* he thus not only truly knows the nature of the case against him but also may discover aspects of the matter which are in his favour.[23] Second, the defendant is entitled to be assisted in the preparation of his case and represented at the hearing itself by a "friend", who must be a serving policeman. Invariably the defendant takes advantage of this right, and almost always his friend will be an experienced representative of the Police Federation. This representative may, of course, be a member of the same force as the defendant, but much more often he will be a member of another force.[24] The defendant indicates on the Discipline Form whom he wants to appear as his friend, and also whom he wishes to call as witnesses.[25] The fullest co-operation is normally forthcoming to enable the friend and the witnesses to be available; indeed, "attendance at disciplinary hearing" is technically just as much part of "duty" as being on patrol, in court, on point duty, etc.

A date and time of hearing is now arranged. The person hearing the charge will be the Chief Constable, not his Deputy. Though he will obviously have known in advance that a charge was to be laid and broadly what it is based upon, he will not, if he has delegated the earlier functions to his Deputy,[26] have the detailed sort of know-

22 The matters that this form must contain are set out in the 2nd Schedule to the Police (Disciplinary) Regulations 1965.

23 Reg. 6 (1), Police (Disciplinary) Regulations 1965.

24 It should be remembered that the national officials of the Police Federation are in effect full-time union representatives (though they probably would not welcome such a description). They soon become highly expert in this sort of matter.

25 But the accused is not bound to nominate his witnesses on this Form if he does not wish to do so. From his point of view the disadvantage of doing so is that his Deputy Chief Constable, rather than he himself or his friend, will arrange for those witnesses to be interviewed. Though he and his friend would be present at such interviews, the fact of the matter is that his defence would become known before the hearing. Also the evidence of witnesses whose testimony in fact turns out not to assist the accused's case will become known to the prosecution. The accused policeman, therefore, frequently prefers to make his own arrangements.

26 A Home Office memorandum of 1967 apparently requires that the Chief Constable should normally delegate his earlier functions.

ledge that arguably would be prejudicial to the defendant. His role is a curious one; as apex of a hierarchical system he has to bear personal responsibility for maintaining discipline within that system, yet he must try to maintain an almost judicial objectivity as well.

Proceedings normally begin with the presentation of the case against the defendant by the investigating officer. But before this is done, a plea that "the facts alleged in the charge are not such as to constitute the offence charged" may be made.[27] This is equivalent to a motion to quash the indictment in a criminal case. Most typically such a plea would be made where there has been some procedural mistake at an earlier stage; thus, the original notification that an investigation is to be undertaken has to specify some particular alleged facts as the basis for possible charges, and if, as sometimes happens, different facts emerge during the course of investigation which amount to a different (or even the same) offence they cannot be relied upon unless the accused has been notified anew.[28] Another occasion for this plea might be to challenge the utilisation of the catch-all offence of discreditable conduct.[29] At any rate, if such a plea is made and upheld, that is the end of the matter; otherwise proceedings continue.

The defendant, either personally or, normally, through his friend, may cross-examine the witnesses introduced in support of the charge,[30] may call and examine his own witnesses, and may make submissions to the Chief Constable. A verbatim record of proceedings is made. The Chief Constable will usually reserve his decision, and the defendant will be notified of it in writing later and also of the punishment, if he has been found guilty. Somewhat oddly, neither the Act nor the Regulations prescribe a standard of proof;[31] presumably it was in-

27 Reg. 8 (5), Police (Disciplinary) Regulations 1965.

28 The investigation is not confined to what is set out in the original notification, and further Disciplinary Forms may be served upon the policeman as new matters emerge.

29 In the Metropolitan police force the use of this offence tends to be frowned upon and it is virtually redundant. Instead, conduct it is wished to prohibit is set out in Standing Orders, and if the policeman breaks a Standing Order he can then be charged with the distinct disciplinary offence of disobedience to orders.

The offence is apparently still in use in some provincial police forces, however.

30 If he is represented by a friend, both the friend *and* the accused may cross-examine prosecution witness: Reg. 8 (6), Police (Disciplinary) Regulations 1965.

31 See Reg. 12 (1), Police (Disciplinary) Regulations 1965: "The chief constable concerned, at the conclusion of the hearing, . . . shall decide either to dismiss the case or to impose one of the following punishments. . . ."

tended to leave some room for local standards to operate inasmuch as discipline is, partially, an aspect of the command function. My impression is that the standard typically applied is something at least as onerous as the civil one of balance of probabilities but short of the criminal one of beyond reasonable doubt, and that how far short of the latter is likely to depend upon the nature of the charge and the probable consequences of a finding of guilty. Possible punishments range from a caution to dismissal from the force.[32]

An appeal may be brought by the defendant if he has been convicted, though not by the prosecutor if the charge has been dismissed. It lies to the Home Secretary, and normally would be a paper appeal only. Thus there would be no re-hearing, and the question of legal representation is irrelevant. The prosecutor and the accused or his friend make written submissions to the Home Office legal branch, and upon the advice of the responsible civil servant the Home Secretary would make his decision. He may affirm or reverse the decision or vary the punishment,[33] for appeal may be against conviction or sentence or both. As with the original proceedings, no standard of proof is prescribed.[34]

Occasionally, if the matter seems particularly difficult or important, the Home Secretary may establish a tribunal of enquiry to deal with the matter and report to him. The proceedings of the tribunal will be by way of re-hearing, and both sides may be represented by counsel.[35] Once more, the Home Secretary has wide powers of disposition of the case.

(ii) COMPLAINT BY MEMBER OF THE PUBLIC CONCERNING CONDUCT WHICH IS MISCONDUCT ONLY BY INTERNAL CRITERIA

The procedure described above is the basic one applicable to the investigation of all complaints. Where they emanate from a member of the public, however, there are certain differences. The most important one is that *such complaints must be formally investigated,* however trivial they prima facie are.[36] There is thus no room for the flexible and expeditious machinery whereby the Chief Superintendent would report to the Deputy Chief Constable in terms which recommend that the matter be dealt with informally. The only other procedural difference concerns the hearing of the charge, if one is laid.

32 Reg. 12 (1), Police (Disciplinary) Regulations 1965.
33 Police Act 1964, s. 37 (2).
34 Ibid.
35 Police Act 1964, 5th Schedule, paragraph 3 (2).
36 S. 49 (1), Police Act 1964.

The complainant has a right to attend the hearing and to have certain questions asked, subject to safeguards against his interfering directly in proceedings and against his hearing evidence which it is not in the public interest that he should hear.[37]

Complaints by members of the public are rather frequent and constitute a considerable workload. The following figures, relating to 1969, illustrate this.

Force	Actual Strength	Complaints received	Complaints substantiated	Formal charges[38]
Bristol	1037	104	27	2
Metropolitan	20695	3296	253	55

The complaints which were substantiated but which were not followed by the laying of formal charges—i.e., 25 in Bristol and 198 in the Metropolitan area—were dealt with informally, by caution, exhortation, etc.

The striking thing about these figures is how many complaints (92.3% for the Metropolitan force) were, in the view of the police investigator, unjustified. Does this high figure indicate that the investigators are in fact examining and judging the behaviour of members of their peer group less critically than is proper or that the public is prone to make complaints recklessly? It is an important question, for in the answer to it lies an important factor in police-public relations.

A typical police viewpoint would be that members of the public are liable to complain about essentially private incidents involving policemen where the same incident would be accepted as part of the give-and-take of life if it involved another member of the public—for example, in the exchange of mutual recriminations following some kind of driving incident. Also, in recent times there has been "a general tendency for members of the public to be more articulate regarding their rights—though not always regarding their obligations—and more militant in their actions."[39] There is certainly a great deal of truth in both these points, but whether they provide the whole explanation is extremely difficult to know. What soon becomes overwhelmingly clear when one has access to files concerning a random

37 Regs. 11 (2), (3) and (4), Police (Disciplinary) Regulations 1965.

38 These figures are derived, for the Metropolitan force, from the Report of the Commissioner of Police of the Metropolis for the year 1969, (Cmnd. 4355), p. 11, and, for Bristol, from interview with the senior officer responsible.

39 Report of the Commissioner of Police of the Metropolis for the year 1969 (Cmnd. 4355), p. 11.

sample of complaints, however, is that the investigation is always thorough, indeed painstakingly so on occasion. It is apparent that the police are prepared to devote valuable time and manpower to investigating all complaints, even though many of them turn out to be utterly trivial. This very fact, whilst not disposing of the issue, significantly supports the police view that complaints are investigated with fearless integrity.

Of course, this opinion, reached through having had access to official sources, is not one that the general public, having no such access, can necessarily be expected to share; it is understandable for people to view with scepticism any manifestation of the principle that persons or groups shall be judge in their own cause. What the public needs to be convinced about is that the huge majority of investigating officers would in no sense regard the cause as their own. The disciplinary structure existing in 1970 when this study was made went some way towards institutionalising this point by ensuring that the investigating officer would never be a superior in the line of command of the policeman whose conduct was being investigated.[40] But as he could, and much more often than not did, come from the same police force, this point was perhaps institutionalized a little too subtly. Moreover, the terse note that a complainant would typically receive from the Chief Constable if his complaint had been rejected after investigation[41] might lead him to suppose that an equally terse investigation had taken place. In sensitive areas such as this, where public disquiet is so readily aroused, a little bit of public relations goes a long way.

Early this year, the Home Secretary disclosed the findings of a working party appointed to examine the procedure for dealing with complaints from members of the public. It was recommended that all serious complaints should in future be investigated by members of other forces; it was also suggested that more care should be taken to inform complainants of the procedure which had been followed in investigating their complaints, rather than merely the outcome of the investigations.[42] Although there is no legal obligation on any police authority[43] to follow these recommendations, they should come fairly soon to represent normal practice. This is particularly likely in view of the fact that the Home Secretary, who is himself the police authority for the Metropolitan police district, announced that these practices

40 See above, p. 199.

41 And in London more than 90% are rejected: see above, p. 204.

42 [1972] Public Law 84-5.

43 The local governmental unit responsible for police organisation. It is now typically the county or the county borough: see ss. 2, 3, Police Act 1964.

would in future be followed in the Metropolitan force. In addition he announced that the handling of all complaints, and the investigation of all bar "serious" ones, would be concentrated in a single specialist disciplinary unit directly responsible to the Deputy Commissioner.[44]

With these improvements, I believe that the present British system for investigating complaints by members of the public balances the competing interests within the community as well as can reasonably be expected. This is more so when one considers the difficulties which any of the possible alternative systems would cause.

For example, if outsiders were the actual investigators, there would undoubtedly be reluctance on the part of some police to co-operate fully. It is no good deploring this; it is simply one of the facts of life around which one must build one's structure. Reluctance to co-operate would be especially paralysing in this area, for I gather that, although the policeman is warned that he need not make any statement to the investigating officer and although he will be receiving advice from the Federation representative, he does in fact make one much more frequently than not. But for this, the system would function far less smoothly than it in fact does. Furthermore, a system of outsider investigation would tend to dignify complaints so that almost nothing was treated as if it were trivial; peanuts would be cracked with sledge-hammers with depressing frequency. This is already a real danger with the present system, and it would probably be increased under an alternative system. Thirdly, the expense would be tremendous. Taking just the Metropolitan police force, it would probably cost something approaching £250,000 a year,[45] a figure which is unlikely to be acceptable in the community. Finally, it would diminish the prestige within the hierarchical system of the head of that system. However much one might wish that human organisations did not depend upon hierarchical assumptions, the fact of the matter is that most do, and some particularly so. There is no point in undermining that assumption unless one can put something more socially constructive in its place; and acceptability to members is one of the criteria of what is socially constructive.

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44 [1972] Public Law 84-5.

45 This calculation is made as follows. In 1969 the Metropolitan disciplinary system took up 10,000 man-days, most at the level of Inspector or Chief Inspector. The effect of the modifications to the system has been to increase the load, so that a full-time staff of 80 is now engaged in this work. (This includes secretarial and support staff.) At current pay rates, and adding in a notional figure for rent, equipment etc., a figure of £250,000 p.a. is not excessive.

All these points would also be true, though less acutely so, if the alternative system were one where outsiders merely monitored police investigations. There are various possible ways of doing this—by random checks of particular investigations, by systematic checks of all of them, by some sort of appeal at the instance of the complainant—but they would all seem to have the drawback of increasing the complexity whilst confusing the responsibility. By contrast, the present system whereby the police authority may call upon the Chief Constable to retire in the interests of efficiency,[46] and where one element in assessing his efficiency is the manner in which disciplinary procedures operate in his force,[47] seems preferable.

(iii) and (iv) COMPLAINTS ALLEGING CRIMINAL CONDUCT

The one area where the advantages of outsider participation in investigations might well outweigh the disadvantages is that where the alleged conduct would amount to a criminal offence. The English system, at any rate, proceeds upon this assumption. Section 49 of the Police Act provides—

> (1) Where the chief officer of police for any police area receives a complaint *from a member of the public* against a member of the police force for that area he shall (unless the complaint alleges an offence with which the member of the police force has then been charged) forthwith record the complaint and cause it to be investigated.
> (3) On receiving the report of an investigation *under this section* the chief officer of police, unless satisfied from the report that no criminal misconduct has been committed, shall send the report to the Director of Public Prosecutions.

The italicised words admit of no ambiguity; yet I gather that in practice this procedure is followed for *all* complaints alleging criminal conduct, not just those emanating from members of the public. This voluntary practice may well be indicative of police anxiety not to be, nor to appear to be, their own judge in this sort of cause.[48]

Indeed, another interpretation of the same section which is by no means compelled by the words used seems also to indicate this same

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46 S. 5 (4), Police Act 1964.

47 See the speech of the Home Secretary in introducing the Second Reading of the Police Act 1964, 685 PARL. DEB. (H. of C.) 95.

48 From the point of view of a chief constable, extreme conservatism is politic. With the police authority always watching his handling of disciplinary matters, with inspectors of constabulary also liable to report on this, inter alia, to the Home Secretary (Police Act 1964, s. 38), and with the omnipresent possibility of a local inquiry into the force (s. 32), there is every incentive to be over-fastidious in these matters.

anxiety. The practice of chief officers apparently is to interpret the words, "unless satisfied from the report that no criminal offence has been committed", to mean "if there is any evidence at all of the commission of a criminal offence." This is tantamount to saying that whenever the original allegation, however discredited it is by subsequent evidence, remains unwithdrawn the papers will be sent to the Director for advice. Thus, during 1969, there were 1169 cases in the Metropolitan police force in which the conduct investigated was allegedly criminal, and 1163 of these were sent on to the Director's office. In 1073 of these cases, the Director advised that no criminal proceeding should be taken. Of the remaining 90 cases, one-sixth resulted in acquittals, and those which led to convictions were predominantly, though not exclusively, traffic cases.[49]

The Director's role of giving advice should be explained. In reality it is tantamount to a direction, and no chief officer would ignore it. The advice may be that the Director's office should handle a prosecution, or that the police themselves should do so, or that no prosecution should be brought and the complainant left to his ordinary right of private prosecution.[50] This practice of referring reports to the Director does not preclude charges being laid directly and expeditiously by the police, and in fact this was done in 12 cases in the Metropolitan police force in 1969. What were the distinguishing features of such cases I do not know; presumably, the clearness of the prima facie case would be one.

The above procedure has not been affected by the recent changes announced by the Home Secretary except to the extent that all disciplinary investigations have been affected. Thus, if the complaint is "serious" (and it would be wrong to think that all allegations of offences against the criminal law would fall into this category[51]) it will fall within the recommendation that it should be investigated by an officer from another force; otherwise, it will be dealt with in the normal way.

Relationship of the criminal sanction to the job sanction

In principle there should be none, and in practice there is not.

49 Report of the Commissioner of Police of the Metropolis for the year 1969 (Cmnd. 4355), p. 28. The figures are approximate, because at the time of the report 27 of the 90 cases were still uncompleted.

50 It would be instructive to know how often such a right is utilised, and how often the power to enter a nolle prosequi is then used.

51 Minor traffic infringements, e.g., would hardly merit such heavyweight treatment.

The point of the job-sanction is to determine the suitability of a member to continue in his job, and upon what terms. Obviously, conviction for a criminal offence may well indicate unsuitability; but equally, depending upon what the criminal offence is, it may not. Thus a convicttion for taking bribes or for perjury or burglary would support a disciplinary charge leading to the ultimate job-sanction, dismissal. On the other hand, a conviction for a morally neutral sort of offence—for example, parking too near a fire-hydrant, failing to notify the local Gas Board of an impending change of address, etc.—would prima facie not merit, and indeed not receive, a job sanction, even though technically constituting the disciplinary offence of "having been convicted of a criminal offence."[52] There are some sorts of offence, however, about which there can be genuine disagreement as to the appropriateness of a further sanction. Drunken driving (not whilst on duty) is a good example; there is certainly a moral connotation to it, but it is one of a class of offence which society as a whole tends to condone. Whether a further sanction would be sought depends upon policy in the local force.

Just as a criminal conviction does not inexorably lead to a job sanction, so too a decision not to prosecute does not preclude the utilisation of internal disciplinary procedures. Thus, out of the 1073 cases sent in 1969 to the Director of Public Prosecutions in which there was some evidence of criminal conduct but concerning which the Director advised that no criminal charges should be laid, 27 were subsequently made the subject of disciplinary charges.[53] Innocence by one criterion had no bearing on innocence by the other, for the two procedures are designed to answer different questions.

2. DISCIPLINARY PROCEDURES IN THE WESTERN AUSTRALIAN POLICE FORCE

A notable feature of the Western Australian framework is that all complaints, from wherever they emanate or whatever they allege, are treated alike. The subtle variations in the English system find no parallel in the Police Act (W.A.) and the Standing Orders made in pursuance of it. As the presence of these variations seems to be one of the strengths of the English system, it might be anticipated that their absence here will be a weakness. But whether this is actually so

52 Police (Disciplinary) Regulations 1965, 1st Schedule, para. 17.

53 Report of the Commissioner of Police of the Metropolis for the year 1969 (Cmnd. 4355), p. 28.

can only, of course, be judged after the system and its operation have been described.

An internal investigation will only be set in motion following a *written* complaint;[54] and although there is no formal provision saying so, all written complaints made by members of the public are in fact investigated. Assuming that the complaint relates to a constable or non-commissioned officer stationed in the Metropolitan Police District —and the majority would fall into this category—the procedure is as follows.[55]

The Chief Superintendent, who is part of the Administration branch and fourth in line of command in the force, will organise an investigation of the complaint by a commissioned officer. The important English principle, that the investigator should never be a superior in the line of command over the policeman whose conduct he is investigating, is not formally written into the applicable provisions, but I gather that every effort is made in fact to adhere to that principle. In a small force covering such an enormous area,[56] it is inevitable that sometimes the form of this principle is observed more than the substance; if a homicide officer from the C.I.B. is appointed investigator into a complaint about a member of the Vice Squad, it is literally true that one is not in the same line of command as the other. But he might well be a colleague in much more than a nominal sense, and thus possibly likely to investigate a little less rigorously than he otherwise might. However, this is, as I say, inevitable in such a small force, there is keen awareness at command level of the desirability of avoiding this, and nothing has come to light to suggest that this slight theoretical weakness has actually led to defective investigations. The only comprehensive safeguard—investigation by a member of another force—would be quite disproportionately expensive in such an isolated

54 Standing Orders 609, 610, W.A. Police Force. These Standing Orders are made by authority of the Police Act 1892-1972.

55 Complaints relating to commissioned officers are dealt with differently: see s. 25 Police Act 1892-72. The English procedure has been described in its application to lower ranks—see note 18, above. The point of differentiation occurs higher up the scale in England than in Western Australia, but that does not seem an important difference.

As regards complaints relating to police stationed in country areas, the disciplinary responsibility in such cases is put on the officer in charge of the district rather than the Chief Superintendent; but the ultimate responsibility remains that of the Commissioner: Standing Order 602, ss. 23, 24 Police Act 1892-72.

56 The actual strength of the force in 1972 is approximately 1650; the area of Western Australia is almost a million square miles.

State, even if it were, as in England, confined to investigations of serious cases.[57]

When the investigation has been completed, the Chief Superintendent must recommend to the Commissioner[58] what course should be taken. His recommendation will take one of three forms: that no action be taken, that the matter be dealt with informally, or that a disciplinary charge be laid. As in England, his recommendation will normally be followed; but, discipline being an aspect of command, the Commissioner is quite at liberty to overrule the recommendation.

If it is decided that no action shall be taken, then if the complainant was a member of the public, he will be informed of the outcome at this stage. This will always be done in writing, but sometimes a commissioned officer may call upon the complainant personally to explain more fully and more informally the reasons for the decision. It is not possible to attempt on the information available to quantify this practice; but the fact that it occurs at all is a welcome indicator of police sensitivity.

If it is decided to deal with the matter informally, the policeman may be cautioned or reprimanded. This is not appealable, nor will it be entered upon his personal record. Informal action may also, as in England, take the form of transfer, either from a particular duty or from a particular geographical area. For example, a policeman stationed in a country town which has a large aboriginal population may well be transferred to the Metropolitan district if there are complaints about his treatment of aborigines, or a traffic policeman may well be shifted to a City beat if there are complaints about his overbearing manner in dealing with motorists. Command personnel would always deny that such transfers occur as punishment; they occur in the exercise of normal administrative discretion to utilise personnel for the overall benefit and good of the Police Department.

Before going on to describe the procedure which will be followed if it is decided to charge the policeman with a disciplinary offence, it is apposite to set out the figures of complaints and charges. The figures set out below require some preliminary explanation, however.

57 Occasionally, the dramatic impact of a case may be such as to cause this to happen. Thus the Duncan case in Adelaide in May 1972 (in which a homosexual was thrown into the River Torrens, allegedly by policemen, and drowned) was investigated by two Scotland Yard detectives. The cost of the investigation, which was inconclusive, was $20,000.

58 Or the person exercising this power on the nomination of the Commissioner. In Western Australia this quite often, at the present time, means the Deputy Commissioner.

First, the number of complaints given is that of complaints by members of the public; no figure is available concerning complaints made by other policemen. Second, the figures relating to the number of charges laid concerns charges arising out of complaints made by members of the public *and* by other police; the figure in brackets indicates the probable maximum (based on the nature of the charge) that could have been laid as a result of complaints by members of the public.[59] Third, there is no separate figure for matters dealt with informally, for the Department categorises such matters as matters resulting in no departmental action.

Year	Actual Strength of Force	Number of Complaints Resulting in no Departmental Action	Number of Charges for Disciplinary Offences
1968-69	1410	80	9 (3)
1969-70	1460	164	5 (0)
1970-71	1545	194	15 (5)
1971-72	1650	195	10 (1)

The first step is service upon the policeman of a Defaulter's Sheet, setting out the nature and details of the offence.[60] He enters his plea upon it, and if it is one of guilty he may be dealt with by the Commissioner forthwith. An appeal lies to the Police Appeal Board against the punishment imposed;[61] and if that punishment is dismissal, the Minister for Police must give his approval before it becomes effective.[62] Almost invariably any policeman who is dismissed will already have been suspended without pay from duty;[63] if so, his dismissal is effective as from the date of the original suspension.

If his plea is one of not guilty, the procedure of the Commisisoner (or the Deputy Commissioner as his nominee) in hearing the charge is basically that followed before courts of Petty Sessions. There is a

59 For example, it is a fair inference that "assaulting a civilian" is an offence concerning which complaint would emanate from a member of the public; and that insubordination, submitting false overtime return, absence without leave and making insulting remarks about daughter of Superintendent are offences concerning which complaint would emanate internally.

60 Standing Order 606.

61 Police Act 1892-1972, s. 33E.

62 Police Act 1892-1972, s. 8.

63 Ibid., see also Standing Order 603.

prosecutor—the Chief Superintendent or an officer responsible to him; the accused may be represented by counsel; and the onus is upon the prosecutor to establish his case.[64] As in England, the standard of proof seems to be something less than the normal criminal standard, for the Police Act merely requires "satisfactory proof".[65] Unlike in England, the accused has no advance notice of what witnesses called by the prosecutor are likely to say, though he is informed on the Defaulter's Sheet who they will be.[66] As in England, however, he will receive every co-operation in calling witnesses on his own behalf.[67] If he is found guilty, he may appeal to the Police Appeal Board against conviction and/or punishment. This is not a right which is often invoked; during the period 1968-72 there was only one such appeal, and it was unsuccessful. As mentioned above, if the punishment is dismissal from the force, this is subject to the approval of the Minister.

Relationship of Disciplinary Action to Criminal Prosecutions

This leads one to a broader consideration of dismissal. If the ordinary prosecutorial decision-making process—i.e., not the special internal investigation process already described—has operated so as to cause a policeman to be criminally charged, then, upon conviction in the criminal proceedings, the policeman may be dismissed following what is known as a Departmental Inquiry. This procedure, used where the result of disciplinary proceedings would be a foregone conclusion, obviates the need for the rigmarole of such proceedings to hear a charge of "conviction of any offence by a Court of Justice."[68] The result would not be a foregone conclusion with regard to all criminal offences, of course; thus, a conviction for drunken driving may well result merely in a small fine being imposed at subsequent disciplinary proceedings and one for refusing to take a breathalyser test in a reduction in rank.[69] On the other hand, offences involving dishonesty or violence are exceedingly likely to result in dismissal at subsequent disciplinary proceedings, and the less rigid procedure would probably be used. An example may clarify this.

64 Standing Order 606 (e).

65 Police Act 1892-1972, s. 23. This section relates to non-commissioned officers, and s. 24, relating to constables, merely speaks of "proof". As all the disciplinary provisions are common to the two groups, however, it is probably correct to regard the standard of proof as the same also.

66 See Standing Order 606 (b) and the Defaulter's Sheet itself.

67 Standing Order 606 (f).

68 Standing Order 601.

69 These are actual examples: the first from 1971-72 (fine $10) and the second from 1970-71 (reduction in rank from Sergeant 1st class to Sergeant 2nd class).

A policewoman stole a dress from a shop. The shopkeeper saw her do so, detained her, and called the police. She was immediately suspended, then charged with stealing. The case was heard at the petty sessions five days later, she was convicted and fined. Within the day she was dismissed from the force, her dismissal being with the approval of the Minister.[70]

This point concerning political responsibility for dismissal needs to be stressed. If the Minister will not approve any particular dismissal, then the policeman will have to be reinstated;[71] and, of course, if he will not approve dismissal following a Departmental Inquiry he is unlikely to approve it following formal disciplinary proceedings. Accordingly, they would certainly not be brought in such circumstances. The wisdom of creating a framework which permits opportunity for political lobbying with regard to this ultimate job-sanction may be doubted. The Police Union is quite a strong union; and the views it puts forward are likely to be more protective of the interests of members as individuals than those put forward by command personnel. Yet it is the command personnel, much more than the Minister, who have to live with the consequences of a refusal to approve a dismissal.

One case where the Minister ordered reinstatement of a policeman who had been suspended, presumably because the Commissioner regarded the disciplinary outcome of his situation as a foregone conclusion if his criminal guilt were established, will illustrate this. A police sergeant killed a youth, in a "private" or non-duty situation. He was charged with manslaughter. At the first trial, he was convicted and sentenced to one year's imprisonment with a minimum period of three months before becoming eligible for parole. He appealed, and a new trial was ordered because of misdirection at the first.[72] At the second trial he was also convicted; and this time he was placed on a $100 three-year good behaviour bond. During this sequence of events, he had spent approximately two months in gaol, and he had been suspended from the police force for eight months. A month after his conviction, however, the Minister for Police announced, in terms which uncompromisingly accepted responsibility for the decision, that he was to be reinstated.[73]

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70 See The West Australian, 19 August 1972.
71 Police Act 1892-1972, s. 8.
72 Ward v. R. [1972] W.A.R. 36.
73 See The West Australian, 4 February 1972.

Of course, it is not known what the Commissioner's recommendation to the Minister was. But in view of the whole history of the incident, it would be somewhat surprising if it were not in favour of dismissal. The utilisation of the suspension device plus the unusually assertive statement of the Minister when announcing the reinstatement make this inference not unreasonable. Yet it is, as I said, the command personnel who have to live with the decision at a day-to-day level. In this case, it was predictable that, sooner or later, a person being arrested by the sergeant would allege that he had used excessive force; and within three months this in fact happened. The point is not whether the allegation was true or not (and in fact the magistrate rejected the allegation at the subsequent trial of the person who had been arrested); it is that such allegations are likely to be made and to receive disproportionate attention in a relatively small and isolated community such as Western Australia. It is difficult to see how, in the short run or the long run, this benefits the Police Department.

Be that as it may, this mode of dismissal has been utilised ten times during the period 1968-72. In addition, nine policemen have resigned whilst a Departmental Inquiry was pending, i.e. between the time that a criminal charge was laid and the time that it was heard.[74] The flexibility which departmental action of this kind lends to the disciplinary structure is welcome; it is a pity that it contains any overlay of political control.

Relationship of private prosecutions to disciplinary action

The suspension and dismissal/resignation procedure described above would only in fact be utilised with regard to a criminal prosecution brought by the police themselves, though no formal source confines it to such situations. Where a private prosecution is brought against a policeman, the Department has a sort of watching brief, and a commissioned officer responsible to the Chief Superintendent attends the court hearing.[75] The Chief Superintendent will then decide in the usual way whether to recommend no action, informal action or formal action.

Neglect of duty

This is both a criminal and a disciplinary offence.[76] The Commissioner may direct which way it should be dealt with.[77] Factors which

74 Resignation with less than three months' notice requires the permission of the Commissioner: Police Act 1892-1972, s. 12.
75 Standing Order 612.
76 Police Act 1892-1972, s. 19; Standing Order 601.
77 Standing Order 604.

would influence his exercise of discretion in this regard are: reluctance of the prejudiced member of the public to participate in criminal proceedings; seriousness of the neglect; previous record of the policeman; and, generally, the whole surrounding circumstances.

EVALUATION OF THE WESTERN AUSTRALIAN SYSTEM

In its current operation the system is probably as good for Western Australian conditions as the English one is for English conditions. The Achilles heel may lie, however, in the fact that its strengths derive more from convention and practice than from law. As long as the type of disciplinary matter that arises is the sort that has tended to arise in the past, there is no reason to suppose that the system will not continue to function well. But new situations may find it wanting. For example, although the Western Australian police force obviously has had and will continue to have the odd criminal in its midst, there has not yet arisen a situation where a substantial number of police are systematically participating in a particular type of criminal activity. If such a situation were to arise—and one is not forecasting it, merely acknowledging that, once a community achieves a certain size and wealth and a police force becomes too large for tight supervision by senior command personnel, then there is an increased likelihood of police corruption—the purely internal means of investigation might well prove inadequate. A system of outsider-monitoring of investigations into allegations of criminal misconduct would, in my view, improve the Western Australian system. The Crown Law Department would be a suitable outside body to play such a role. It would be better to introduce such a system at a time when there is no urgency to do so than to delay and find oneself goaded by events, as happened in Victoria with regard to the Abortion Inquiry.[78]

Apart from this, the main problem with the system is one common to all systems of internal investigation by impersonal government departments into complaints against their own members—public confidence. It is not necessarily enough that the particular task was performed honestly and efficiently; the citizen needs to be convinced of this. And because, demonstrably, some tasks will not have been performed honestly and efficiently, the citizen will tend to be a little

78 A police departmental inquiry exonerated the Victoria police force from involvement in the Abortion racket. Because of this, the situation was forced to be dealt with at a public level; by the release of more information and the utilisation of the media, Dr. Bertram Wainer virtually compelled the setting up of a Royal Commission. See generally WAINER, IT ISN'T NICE (Alpha Books, 1972), and particularly pp. 88-95.

sceptical about an assurance from the department concerned that it has investigated his complaint and has exonerated itself. As was said with regard to the English system, the disadvantages of outsider participation in investigations (other than those alleging criminal misconduct) outweigh the benefits which would accrue by way of credibility; the best approach is by way of improved explanatory procedures, and in Western Australia they are already quite good. But the new world-wide trend towards creating ombudsmen could develop here so as to give the best of both worlds—police investigation, with occasional outsider checking of the mode of investigation.

THE POSSIBLE ROLE OF THE OMBUDSMAN IN WESTERN AUSTRALIA

The potential scope of the Ombudsman's jurisdiction in this area is problematical. Section 14(1) of the Parliamentary Commissioner Act 1971 provides as follows:

> Subject to this Act, the Commissioner shall investigate any decision or recommendation made, or any act done or omitted, that relates to a matter of administration and affects any person or body of persons in his or its personal capacity in or by any government department or other authority to which this Act applies in the exercise of any power or function conferred by, or arising under, any enactment.

The Police Department is a government department to which the Act applies,[79] and the acts of individual members of the force are acts of the department.[80] Three main problems seem likely to arise in the application of the section to police disciplinary procedures: (a) what is a matter of administration; (b) when is a power or function conferred by, or when does it arise under, an enactment; and (c) when is a person affected in his personal capacity?

(a) *A matter of administration* This concept has never been satisfactorily defined in this, or any other, context. In its broadest sense, it would cover the authority of the State in the exercise of its political

79 See the Schedule to the Parliamentary Commissioner Act 1971.

80 Parliamentary Commissioner Act 1971, ss. 13(3)(a), 13(4)(c), 13(4)(d).
During its passage through Parliament, the Bill was amended by removal from the Schedule of references to "the Commissioner and the Deputy Commissioner of Police" and "members of the Western Australia police force". In the view of the Opposition, such provisions were discriminatory; and debate upon this point excited considerable emotion: see (1971) 192 PARL. DEB. (W.A.) 128, 161, 821-822. Because of the effect of the sections cited above, the amendments made no practical difference to the legislation, however.

powers, be they executive, legislative or judicial;[81] and in its narrowest sense it would cover the mere detailed implementation of policies or decisions made by the executive, the legislative or the judicial arms of the State. The overall statutory intent is certainly to create a narrower rather than a wider notion,[82] but beyond that it is difficult to generalise. This is an area where, par excellence, a concept means what it is made to mean; so we must await delineation of the Ombudsman's practice. In the particular area of police disciplinary procedures, however, one could probably make a few predictions with a reasonable chance of success.

At one end of the scale, one could fairly confidently anticipate that the procedures adopted in disciplinary matters—as opposed to the particular outcomes of the utilisation of those procedures—would amount to "a matter of administration". If, for example, a future Commissioner instituted a practice whereby complaints from members of the public would be internally investigated only if they were made on oath (not merely in writing), the Ombudsman would surely be able to investigate the lawfulness or reasonableness of that practice.

On the other hand, it would seem equally clear that if a complainant alleged, for example, that he was beaten after arrest, or that he made a statement because of threats or inducements, the Ombudsman could not investigate such allegations. By no stretch of the imagination could either of these matters be said to be "matters of administration"; indeed, it may be a good rule of thumb to regard any act done by a policeman in exercise of traditional common law powers as a peace officer as not being "administration". The allegation that such powers were being abused or exceeded, rather than exercised, should not disturb this rule. The Ombudsman's functions in such a case would probably be best confined to seeing that proper procedures for internal investigation were in fact honestly followed. This middle position has been taken by the British Ombudsman.[83]

Some aspects of misconduct by individual policemen arguably occur in the course of administration. For example, a desk sergeant dealing with members of the public as they notify accidents, seek licence forms, lodge complaints, etc. would seem to be involved in matters of administration. If he is abusive in the course of doing so, could the

81 Webster's Dictionary.

82 The investigation of judicial proceedings is beyond the Ombudsman's jurisdiction (ss. 13 (2) (a), (b), (c), (d), 14 (4) (a), (b)) and also of executive decisions (s. 14 (3)).

83 Second Report of the Parliamentary Commissioner for Administration, Session 1968-69, Case No. C. 442/68, summarised on pp. 45-6.

Ombudsman investigate a complaint about this by a member of the public? In a sense, certainly, it is mal-administration by the policeman; but it may be that "a matter of administration" should be construed to mean a decision or a procedure rather than an attitude or a posture. For him to investigate would render nugatory the existing, statutorily-authorised provisions for dealing with such complaints; so perhaps the more conservative view—that the Ombudsman can investigate the police mode of investigating a complaint, but not the complaint itself—would turn out to be also the more workable one.[84] The fact that the Western Australia Ombudsman, unique amongst Ombudsmen, is liable for negligence in the discharge of his duties[85] should provide an incentive for him to interpret his jurisdiction conservatively; moreover, such a matter—and any others concerning his jurisdiction with regard to the conduct of the police—is one about which he might well exercise his right to seek guidance from the Supreme Court.[86]

(b) *Arising under any enactment* Some powers of a policeman clearly arise under an enactment in the fullest sense—that they did not exist before the enactment and were created by it. Two typical examples are the power of the officer in charge of the local police station in relation to firearms' licensing[87] and the powers of the Commissioner in relation to drivers' licences.[88] In principle, these sorts of function—or some of them[89]—would seem to be within the jurisdiction of the Ombudsman, so that as long as the aspect which the aggrieved party complains about constitutes administration he could investigate it. But taken too literally this view would render his office unworkable. For example, is a policeman involved in a matter of administration when he conducts a driving test? If he is—and it is difficult to see

84 The New Zealand Ombudsman has taken a more liberal view of his jurisdiction and has, without regard to the limitation suggested in the text, investigated allegations of police brutality and not merely the way in which such allegations have been internally investigated: see, e.g., the Special Report to the New Zealand House of Representatives concerning police violence at the time of demonstrations during the visit of Vice-President Agnew to New Zealand, 18 August 1970. It is difficult to see a formal justification for this practice.

85 Parliamentary Commissioner Act 1971, s. 30.

86 Parliamentary Commissioner Act 1971, s. 29.

87 Firearms and Guns Act 1931-71, ss. 5, 6, 10.

88 Traffic Act 1919-1970, s. 23, 23A, 23B, 23C, 23D, 24.

89 i.e. those in relation to which there is no remedy by way of appeal, review, etc. in a court of law: s. 14(4), Parliamentary Commissioner Act 1971. An example concerns refusal of a firearms' licence: see s. 10(3), Firearms and Guns Act 1931-71.

how else to characterise the function—the Ombudsman might soon find himself a sort of appellate driving tester, a proposition so absurd that it indicates, once more, that his role was probably intended to be that of investigating whether proper procedures were honestly followed.

One matter which the Ombudsman has already held does not arise under an enactment is that of the discretion not to proceed with a prosecution. A complaint was made by a deaf student that the police behaved unreasonably in continuing to press a charge under section 50 of the Police Act (refusing to give name and address to a constable on demand) after it had become clear that he had had his back to the policeman when the demand was made. In such circumstances, the prosecution could not, in law, succeed. By the time he was duly acquitted, he had incurred $150 legal expenses. The Ombudsman held that the discretion not to prosecute arises, if at all, under the common law, and accordingly held he had no jurisdiction in the matter.[90]

(c) *Complainant affected in his personal capacity* The aim of ombudsman legislation could not realistically be to eliminate error or inefficiency which is intra-departmental in effect. The philosophical fount of such legislation is protection of the individual against the State, not of the State against itself. Intra-departmental inefficiency must be controlled by internal checks, media publicity, questions in Parliament, etc.

The Police Department is no more immune than any other from making decisions that, to outsiders, seem unwise. Particular deployments of personnel, for example, often attract public notice; but in the nature of things a complaint that a disproportionate number of men are engaged in the pursuit of one escapee or that the number and placing of police at an anti-Vietnam demonstration is likely to be provocative of violence is not something that the Ombudsman can investigate. No citizen is affected any more than any other; and it is the job of the Commissioner of Police to run the Police Department, not that of the Ombudsman.

Other limitations on the jurisdiction of the Ombudsman

(i) His inability to investigate any decision made by a Minister of the Crown or to question the merits of any such decision[91] means that he could not investigate, at the instance of a dismissed policeman,

90 The only publicly available report of this case is in the Nation-Review, September 2nd-8th 1972. This report may, however, be incorrect to the extent that it suggests that the decision turned upon the matter not being one of administration.

91 Parliamentary Commissioner Act 1971, s. 14 (3).

the decision to dismiss him. Nor could he investigate a decision to reinstate a suspended policeman, as in the case described earlier;[92] an additional reason for this is that no citizen is affected in his personal capacity by such a decision.

(ii) Section 14(4) of the Parliamentary Commissioner Act 1971 provides as follows:

> Subject to subsection (5) of this section,[93] the Commissioner shall not conduct an investigation under this Act in respect of any of the following matters, that is to say—
> (a) any action in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted under any enactment or by virtue of Her Majesty's prerogative; and
> (b) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law.

Subsection (a) does not seem to undermine my thesis, namely that the Ombudsman's jurisdiction will generally extend to investigating the mode of decision-making rather than the decision itself. No citizen has any *right* to bring disciplinary proceedings against a policeman; he merely has the liberty of requesting the Commissioner of Police to set in motion procedures for determining whether this will in fact be done. Nor are the matters which the Ombudsman may, in my view, investigate matters with regard to which the person aggrieved "has or had a remedy by way of proceedings in any court of law". If, for example, his complaint relates to an alleged assault, he can sue or prosecute the individual policeman in the normal way; but the assault is not the matter which the Ombudsman can investigate, only the mode in which his allegation has been internally investigated. There is thus no overlap.

Where recourse to a court is specifically authorised—for example, appeal to a stipendiary magistrate with regard to a refusal to grant a firearms' licence[94]—it is not possible to maintain the above distinction and say that the Ombudsman can still investigate the manner in which the decision was made, though not the decision itself. Obviously an assumption of the Act is that, once a matter is injected into the

92 See above, p. 214.

93 Subsection 5 provides that "the Commissioner may conduct any investigation, notwithstanding that the person aggrieved has or had such a right or remedy as is referred to [in subsection (4)] if he is satisfied that, in the particular circumstances, it is not reasonable to expect him to resort, or to have resorted, to it."

94 Firearms and Guns Act 1931-71, s. 10(3).

judicial system, the procedures followed will be proper ones. It would be inappropriate to let the Ombudsman review them.

From the point of view of a policeman who has been the subject of disciplinary proceedings, the effect of section 14(4) is straightforward. His right of appeal to the Police Appeal Board forecloses investigation by the Ombudsman.[95]

It would be exceedingly bold of one to predict the role that the Ombudsman might come to play in the area of police disciplinary proceedings. He would by no means be stretching his statutory authorisation, however, if he treated it as permitting him to monitor, on appropriate occasions, the suitability of the procedures that have been followed. If so, this small degree of outsider participation would be beneficial to the operation of police internal disciplinary proceedings in Western Australia.

R. W. HARDING*

95 There is a view, however, that section 14(4), set out at p. 221 above, would not prevent recourse to the Ombudsman by an aggrieved party who *has actually exercised* a right of appeal. This view derives from arguing that "has a right of appeal" refers to the present right, and that "had a right of appeal" refers to a right which has been extinguished by effluxion of time rather than by utilisation. This distinction seems unduly fine and is certainly against the spirit of the legislation.

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