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Selected examples of

Foreign experience

in the investigation of

Complaints against

Police Personnel

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5. Experience in other jurisdictions

It is worth devoting some space to experience in other countries partly because information from abroad is often the factor that persuades public, legal and political opinion that a change in the law is desirable, and partly because, in the particular matter of complaints against the police, there has now been built up a considerable amount of experience exhibiting a wide range of devices for involving civilians and very varying histories of failure or success which are highly instructive.

The CAJ does not have the resources to undertake a comprehensive investigation on a world scale but has been fortunate in obtaining some information about the arrangements adopted in several police departments in the United States and also in Australia, Canada and New Zealand.

We begin with a few words about the systems in place in England and Wales and in the Republic of Ireland.

England and Wales

In England and Wales the system for dealing with complaints against the police is virtually identical to that in Northern Ireland. It is governed by Part IX of the Police and Criminal Evidence Act 1984, which creates a Police Complaints Authority to carry out more or less the same functions as Northern Ireland's Independent Commission for Police Complaints. The main differences are, first, that England and Wales has no equivalent to article 8(2) of the Police (NI) Order 1987, which allows the Secretary of State or the Police Authority to refer to the Independent Commission for Police Complaints any matter which, although not the subject of a complaint, appears to the Secretary of State or the Police Authority to indicate (a) that a police officer may have committed a criminal or disciplinary offence and (b) that it is desirable in the public interest that the Commission should supervise the investigation of the matter. This is an extra power which the CAJ advocated during the early 1980s but unfortunately, as far as we are aware, it has not so far been used.

The second main difference is that in England and Wales not all complaints have to be referred to the PCA, whereas in Northern Ireland they do all have to be referred to the ICPC (though as regards complaints which are informally resolved the ICPC simply looks at the files to make sure that the criteria for using the informal resolution procedure have been properly complied with). In England and Wales the complaints which must be referred to the PCA are those alleging that death or serious injury has been caused by a police officer (section 87 of the PACE Act 1984) and those alleging assault occasioning actual bodily harm, corruption or a serious arrestable offence (the Police (Complaints) (Mandatory Referrals Etc) Regulations 1985). In addition a chief constable can refer any other complaint to the PCA if he or she so wishes.

As Table 1 shows, the PCA is not, relatively speaking, as busy as the ICPC. The population of England and Wales is roughly 30 times that of Northern Ireland but the workload of the PCA in terms of cases referred, supervised or completed is between two and four times as great as that of the ICPC. The PCA's budget, however, is between five and six times as great as that of the ICPC. In 1992 the PCA spent £4,540 per case supervised while the ICPC spent £1,570; the amounts spent per case completed were, respectively, £374 and £243.

Table 1: A Comparison of the PCA and ICPC for 1992

	PCA	ICPC
Cases referred	4,476	2,547
Cases supervised	757	396
Cases completed	9,200	2,556
Investigations continuing at end of year	464	184
Formal disciplinary charges	252	39
Ratio of charges to cases supervised	1:3	1:10
Ratio of charges to cases completed	1:37	1:66
Govt. grant received	**£3,436,900**	**£622,000**

The English system, like that in Northern Ireland, has been criticised for not employing completely independent investigators. The Chairman of the PCA said in its Annual Report for 1989 that no one has produced a blue-print for an alternative and viable independent scheme. Such a claim, however, depends on one's assessment of viability. The CAJ believes that its own proposals for an independent scheme are viable and that schemes which are working well in other countries do display a much greater degree of independence than that enshrined in the British and Northern Ireland systems.

The English PCA has, however, appeared to be more active than the ICPC in dealing with controversial aspects of the police complaints sytem. Its annual report always contains a chapter on legal matters, where recently issues such as public interest immunity certificates, confidentiality of letters to complainants and delay in hearing a disciplinary case have been discussed. The ICPC's annual reports, by way of contrast, despite the generally more contentious context in Northern Ireland, tend to avoid taking a position on these and other issues. In its Triennial Review 1988-1991 the PCA recommended that an investigating officer's report and the witness statements obtained should not be disclosed to the lawyers who are instructed by a force to defend civil proceedings arising from an incident complained about. The disclosure of these documents is a very significant problem in Northern Ireland, leading many complainants to refuse to co-operate with any investigation of their complaints, yet the ICPC has not echoed the PCA's recommendation. It is only in the past year or so, moreover, that, in the absence of a formal complaint, the ICPC has nevertheless been involved in the investigation of incidents where lethal force has been used by police officers.

This involvement, however, has been at the request of the Chief Constable under article 8(1) of the Police (NI) Order 1987: there is no evidence that the ICPC has itself gone looking for involvement. It adopted a similar head-in-the-sand approach during the Stevens Inquiry into allegations of collusion between members of the security forces and loyalist paramilitaries.

The English complaints system also benefits from regular appraisal by the Home Affairs Select Committee in the House of Commons. In recent years this committee has issued three reports on the subject: HC 583 (1987-88), HC 395 (1988-89) and HC 179 (1991-92). The last of these looked at the progress that has been made in ironing out problems identified by the PCA's first Triennial Review and considered the need for further change; in particular it responded to the Review's proposals for reform of the disciplinary case procedure.

The CAJ would agree with several of the recommendations made by the Select Committee. These include the following:

- (a) that the PCA should conduct a regular survey to monitor progress in achieving public awareness of the Authority's work;
- (b) that all police forces should adopt the so-called Statement of Intent regarding delays (this would set targets of 120 days for the completion of investigations and a further 120 days for the holding of disciplinary hearings)
- (c) that Authority members should not sit on disciplinary tribunals but should be replaced by a strong independent presence; and
- (d) that not all cases currently falling within the disciplinary system require a standard of proof beyond a reasonable doubt.

We note with interest that in its official response to the Select Committee's report the government has accepted the first three of these recommendations (see Cm 1996, July 1992). It is regrettable, that as far as Northern Ireland is concerned, the government is proving much less amenable. It has not adopted any of these Select Committee recommendations, even that, (c), which is also one recommended by the ICPC.

Republic of Ireland

The concept of independent scrutiny of citizen complaints against the police was introduced in the Republic of Ireland by the Garda Siochana (Complaints) Act 1986. The central elements of the machinery are a Garda Siochana Complaints Board (modelled closely on its counterparts in Northern Ireland and Great Britain) and the establishment of the Board's Chief Executive as a statutory office in its own right. Although the Board's primary role is to provide independent scrutiny in the investigation and disposal of complaints its membership includes the Commissioner of the Garda Siochana as well as eight other members, at least three of whom must be practising barristers or solicitors of not less than 10 years' standing.

A complaint may be lodged directly by the complainant, or an authorised person, with the police or at the Board's office. Either way all complaints will be presented to the Board. To be admissible for formal investigation a complaint must allege behaviour of a type traditionally associated with internal disciplinary codes, such as discourtesy or abuse of authority. An interesting exception is the inclusion of an offence of breaching the regulations governing the treatment of suspects in police custody. Other admissibility requirements are that: the complaint must be lodged within 6 months after the relevant incident and it must not be frivolous or vexatious. In 1991, out of a total of 759 complaints lodged plus 972 carried forward from the previous year, 773 (47%) were rejected as

inadmissible. Of these 46% failed because they did not constitute a recognised offence while 36% were deemed frivolous or vexatious.

Minor complaints can be disposed of informally by the Commissioner at the request of the Board. Of the 294 complaints actually dealt with in 1991, 28 (10%) were disposed of in this manner. Fifteen (54%) resulted in the officer being advised or warned about his or her behaviour. The other admissible complaints will be investigated formally, almost invariably by an officer of the rank of Superintendent or higher. In 1991 174 such investigations were completed. A further 91 (31%) were withdrawn.

The Board's input in any individual case begins with the power to prescribe general principles which must be followed by the Commissioner of the Garda Siochana when appointing an investigating officer. Thereafter, this officer reports to the Board's Chief Executive who, in turn, keeps the Board informed on the progress of the investigation. The Board does have the power to direct independent investigation of a complaint where it considers that that is required in the public interest or that the police investigation has not been, or is not being, carried out properly. However, it has not exercised this power to date. There is also provision for the Board, in certain circumstances, to direct an officer to answer a question, furnish information or produce a document or thing where he or she has otherwise refused to do so in the course of an investigation. Failure to comply with the direction is a disciplinary offence in itself.

If the complaint discloses a possible criminal offence the Board must refer it to the DPP for a decision on prosecution. Apart from that, if the Board feels that a breach of discipline is disclosed, and that breach is not amenable to informal resolution, it must refer it to a Tribunal. Only 5 cases were referred in 1991 while a further 3 were carried over. The Tribunal will consist of three people. Two of these must be members of the Board who were not involved previously in the case, while the third must be an officer of the rank of Chief Superintendent or higher. At least one of the Board representatives must be a solicitor or barrister.

The object of the Tribunal proceedings is to make a determination on whether or not the officer in question was guilty of a breach of discipline and, if so, what disciplinary action should be taken. The proceedings are held in private and, broadly speaking, follow an adversarial and accusatorial approach. Only one case was completed in 1991 and that resulted in the officer being cleared of the disciplinary charges. In the event of an adverse decision against the officer there can be an appeal to an Appeal Tribunal consisting of three people and chaired by a Circuit Court judge.

Since the creation of the Garda Complaints Board in 1987 almost 5,000 complaints have been lodged. During this period at least 26 gardai have been dismissed from duty, but only one as a result of a complaint. Complaints have led to two other officers having their pay reduced, three being cautioned and one reprimanded.

As regards civil actions taken against the Garda for assault, false imprisonment and damage to property, the reports of the Comptroller and Auditor General in Ireland reveal that from 1987 to 1991 a total of £635,477 was paid in settlements to 65 people. The figure for 1992 is expected to be about £750,000, largely because of a settlement of £375,000 in favour of Mr Derek Fairbrother who was allegedly assaulted at Finglas garda station. Negotiations are still in progress over the compensation to be awarded to Nicky Kelly, wrongly convicted of involvement in the Sallins Mail train robbery.

The United States

In the U.S. a number of attempts were made in the late 1950s and subsequently to introduce a civilian element into the management of policing. These varied widely, some being solely concerned with complaints while others were experiments in introducing outsiders into the formulation of policy. Most have been abandoned, either because they were faulty in design, or because of a change in political fortunes or because they were not properly negotiated with the police before being introduced and so attracted unrelenting police hostility. Four however remain and are worth examining.

Detroit

In Detroit a Board of Police Commissioners was established after some civil disturbances in the 1960s. It is a body of five civilians appointed by the Mayor and approved by the City Council and may be regarded as roughly the equivalent of a UK Police Authority, though its powers are considerably greater since they include the establishment of policy, rules and regulations, approval of the budget and reviewing and imposing discipline, as well as the examination of complaints. The board has, of course, its own staff and the equivalent of our procedure for the informal resolution of minor complaints is conducted by their Executive Secretary. Most other complaints - about 90% - are investigated by the police themselves, either the section complained against or the Professional Standards Section. The remaining 10% of serious cases are investigated either by the Board's own staff of civilian investigators or by mixed teams of these investigators and police officers. Reports of investigations are submitted to the Board which then makes recommendations for settlement to the Chief of Police.

This arrangement in Detroit is regarded as an important step in civilian involvement in police work because it has created a link between the examination of complaints and the general control of police work which, by definition, includes observing patterns of malpractices and taking steps to abolish them. The arrangement has worked, perhaps primarily because it was extensively negotiated with the police union and in the process a number of concessions to the police were made.

Perhaps the main query concerning the Detroit experience relates to the fall in the number of complaints made in recent times. It is not known whether for some unsatisfactory reason public confidence in the complaints system has fallen off or whether, on the contrary, public confidence in policing generally has increased and so there is less cause for complaint. If this is the case it could be due either to the successful elimination of some malpractices (which is after all one of the Board's objectives) or to a different emphasis in police work, embodying a greater element of co-operation with the public. These are matters which could well be worth exploring in some detail if and when the resources become available.

Berkeley

In Berkeley there is a Police Review Commission (PRC) which also has power to review policies, practices and procedures, and to make appropriate recommendations, in this case to the City Council and the City Manager, but its interest in complaints is limited to appeals from the police department's own complaints procedure. Here again the Commission has its own investigators who report to the Commission.

The PRC jurisdiction is very broad, allowing for review of virtually any aspect of police operations, as well as the investigation of individual complaints of misconduct. The Commission holds twice

monthly public meetings, with the Chief of Police or other ranking officers in attendance, in which public comment is received and any topical matter of interest can be pursued at the Commission's initiative.

It is important to note that the PRC process is an extraordinarily public one - with the complaints, hearings, investigation reports, findings and City Manager response all open to the public. The PRC is able to maintain this level of public disclosure in part because it is not directly involved in imposing or recommending disciplinary action.

Berkeley's commitment to an open PRC process meets several important objectives. It provides meaningful access to citizens for the ongoing review of police operations; it enhances officers' compliance with community standards of conduct; and it maintains the credibility of the PRC with the community it serves.

A summary of features of the PRC process is listed below:

- Provides for independent, civilian investigation of allegations of misconduct against members of the Berkeley Police Department - including excessive force allegations - as well as civilian review of any aspect of police practices, policies and procedures.
- Has been in existence since 1973, created as a result of a citizen initiative, with nine Commissioners, appointed by the Mayor and City Council, staffed by civilian, non-police City employees.
- Has subpoena power which, under City Manager policy, compels officers to cooperate with investigations and testify at public hearings as a condition of employment.
- Has the authority to render public findings on the merits of allegations of miscounduct, which do not include disciplinary recommendations.
- Has advisory power to recommend policy changes on any aspect of police operations to the Chief, City Manager and City Council.
- Is developing mediation as an option for handling citizen complaints where appropriate.

As in Detroit the Berkeley system provides a link between investigating complaints by independent investigators and some control over police policy and practice. The fact that the only complaints which come before the Commission are those which are the subject of appeals may be thought to limit the effectiveness of this system in so far as, human nature being what it is, there will probably be some cases where the complainant is dissatisfied with the handling of the complaint by the police department but yet does not have the energy or determination to go through with the further hassle of an appeal. Nevertheless the Berkeley System, which dates from 1973, must be regarded as a very important example of what can be achieved in this field.

Chicago

The system operated in Chicago presents yet another design. There the Office of Professional Standards (OPS), which was established in 1974 in response to public and internal concern about the integrity of excessive force investigations, is not concerned with police policy and, though its investigative staff are civilians, they are employed by the police department and cannot therefore be regarded as wholly independent. However this modification is probably made up for, at least to some extent, by the presence on the staff of the Office of some administrators and supervisors who are mostly lawyers. Moreover the police department's attitude to the Office is that the investigative staff are, by order of the Superintendent of Police, completely independent of the normal police chain of command. No officer of any rank can impede an OPS investigation, and complainants can

speak to an investigator anywhere they like. On the other hand the investigators can use the full resources of the police department and are equipped with police vehicles and radios. It would therefore seem that their relationship with the police, whatever the reality, must appear to some complainants to be somewhat ambivalent.

As in Detroit most complaints are dealt with by the police themselves and the Office of Professional Standards, though it acts as the recipient and registrar of all complaints, is mainly concerned with charges of flagrant police brutality. It also reviews cases involving dismissals as well as all cases where an officer shot someone, whether fatally or not, even when no allegation of misconduct is made. The investigators are carefully chosen to be ethnically representative of the Chicago population and speak Spanish and other languages. They live all over the city and about half of them are women. They are required to have a college education and must go through a pre-service training.

One early achievement of the OPS was a relatively high rate of dismissals - 30 in each of the successive years, 1976 and 1977, which for a city the size of Chicago, large as it is, must be regarded as something of a clearing out of dead wood. This, combined with the rate of substantiation of complaints rising from 3% under the previous system to 8.4%, earned the Office increasing praise from the public.

New York City

In New York City a Civilian Complaint Review Board was created in 1986 and began functioning in 1987. The Board has 12 members, six appointed by the Police Commissioner from among his senior executive non-uniformed employees and six appointed from the general public by the Mayor with the advice and consent of the City Council. Five of the mayoral appointees represent the five boroughs of New York, while the sixth is "at large".

In addition to the public representatives on the Board itself, six civilian investigators from the Police Department's staff were selected in 1987 to work for the Board. They received extensive training in law and in police procedures, some of the instruction being supplied on the job by supervisors and peers. According to the Board's 1987 Annual Report this civilian input was a great success:

> *"The civilian investigators have performed admirably and have earned the confidence of both complainants and co-workers. Testament to the success of the program is the fact that three of the original six investigators were hired away from us by other governmental agencies within six months of their appointment. Notwithstanding this attrition, the program is alive and well, and progress has ben made in developing a career and promotional track for civilian investigators."*

By 1992 the Review Board had 59 investigators of whom rather under half were civilians. It appears at the time of writing that the New York City arrangements are about to be altered as the result of an agreement reached in October 1992. In future there will be 13 members of the Board instead of 12. All will be appointed by the Mayor but five will be nominees of the City Council and three of the Police Commissioner. None of the members except those three will have had any experience as police officers or FBI agents but they may be selected from people with other law enforcement experience such as prosecuting lawyers or assistant district attorneys. Rather curiously those appointed by the Police Commissioner must be civilians with past experience either as police officers or in other law enforcement work. To judge by some of the comments emanating from people in New York with knowledge of these matters this new arrangement will not satisfy everyone, despite

the fact that it is itself a compromise, and it may throw up problems which have not yet been addressed. Further change is therefore a possibility and certainly it remains to be seen how well the new system will work. That may well depend to a large extent on the Board's staff of investigators. The agreement apparently says nothing about them so presumably that will be a matter for the Board itself to decide and control.

Conclusions from these four jurisdictions

These four American examples have been quoted because of their (differing) merits and considerable degrees of success. It must however be emphasised that they are somewhat exceptional cases in a country where many attempts were made to introduce some civilian element into police work and most were abandoned as failures. It seems that this overall experience points up the following lessons.

1. No scheme will succeed which is not thoroughly negotiated with the police before it is adopted. This is so obvious that one would think it need not be stated but in fact a number of the abandoned schemes failed for this reason.

2. There needs to be a delicate balance between the powers of the complaints review body and those remaining with the police. It is important not to sap the police department's control of its own affairs to the point where the chief of police feels he or she no longer has authority over subordinate officers.

3. On the other hand there is clearly great value to be derived from a link between the machinery for dealing with complaints and that for determining police policy and practice. The CAJ has for a long time (and without knowing until now of this American experience) insisted on the importance of the complaints machinery being able both to deal satisfactorily with the individual case and to observe patterns of police practice which give rise to a number of similar complaints. If these patterns in police work, which are usually what concern the public most and therefore govern public confidence (or lack of it), are to be rectified the arrangements in Detroit and Berkeley, where both functions are in the hands of the same people, offer the simplest and most logical solution. There may be a lesson here for us in Northern Ireland.

4. In the U.S., as here, the police are very wary of any form of control operating from political motivation and a number of the American schemes failed for this reason. In the nature of things any activity which is motivated by a particular section of society will be opposed by those who distrust and disagree with that section, and it has long been agreed that is important for the success and stability of any police service that it should not be subjected to changes of policy determined by considerations which have little or nothing to do with policing.

5. At the same time the need for an independent investigation of complaints to be just that and not a window-dressing exercise is obvious enough. Any system which gives the impression that the investigators, though civilian, are too closely associated with the police will tend to be looked at askance by a cynical public.

Overall U.S. experience

Before leaving the American continent, it is worth looking briefly at the overall US experience during the 30 years in which that country has tried to tackle the subject of civilian review. There are so many separate police departments in the US that a thorough study would run to several volumes, but it is possible to detect different climates of opinion in different periods with resulting

differences in the prevailing arrangements and it is worth describing these briefly because they serve to illustrate what we have already pointed out, that a responsive democracy tends to produce the kind of system that it wants at the time, albeit sometimes not without delay or pain.

The 1960s

The early experiments with civilian review boards in the 1960s cannot be counted a success. Perhaps it was inevitable that that should be so because it was a new idea that needed time to become acceptable to the police. Certainly the opposition that it generated was intense and, in the absence of a degree of support comparable to that revealed in Toronto twenty years later, there was a general decline in the fortunes of the boards towards the end of the decade.

The 1970s

By the 1970s however the climate of opinion had changed and a number of new ventures were begun, taking a variety of forms, showing that no one design is sacrosanct but that what is essential for success is a sound legal foundation and sufficient support, not merely from disadvantaged minority groups who regard themselves as particular police targets and so tend to be to the fore in advocating civilian review, but from the public generally.

The 1980s

This period of relative success extended also into the 1980s and more systems were established, again exhibiting a diversity in organisation, legal standing and the degree of civilian involvement in the complaints process. Of the 25 largest US cities 13 now have some sort of civilian oversight board or agency monitoring their police departments, several having been created in the last 6 years. In the nature of things the police have continued to be wary of such schemes but have not fought against them with the ferocity and resourcefulness exhibited in Victoria and Toronto. Moreover police management has very properly responded to the stimulus which civilian involvement provides by tightening up the efficiency and reliability of their own internal systems of investigation and review.

The present position

The latest development in the US is a reasoned debate among commentators and students of both public administration in general and police work in particular. There is a school of thought among such people which argues that in the technological age in which we live most problems of organisation are technical by nature and require technicians to resolve them. By going on to argue from the general to the particular - a sin in the world of philosophy - these people conclude that lapses in police work resulting in complaints must, in the interest of efficiency, be examined only by police because only they will understand the issues. This view of course overlooks the fact that some management problems are not essentially technical and some patterns of human behaviour can be found almost anywhere and are best judged by people of independent mind. Perhaps this is a debate that will go on for a long time; it certainly exhibits the fact that the issue is not simple and that people who feel strongly on a subject will have recourse to all sorts of unexpected arguments.

Australia

New South Wales

The New South Wales approach is very different from any of the American models, being in effect something of a hybrid between, on the one hand, the present British and Northern Irish system of an external authority supervising and controlling police investigations into complaints and, on the other, the operation by the external authority itself of a system of re-investigating cases which have already been investigated by the police. The mechanism used in New South Wales is that of the state Ombudsman who has extensive powers and deals with complaints against all departments of the state. In the case of complaints against the police, as with complaints against other departments, the first stage of investigation is left to the department complained against, though it is significant that at the point of receipt of the complaint it is the office of the Ombudsman that decides which complaints require police investigation and which, for various reasons, do not.

As the police internal investigations proceed, some cases are dropped, some dealt with by conciliation, some declared sustained and some declared not sustained (this being accepted by the complainant). Of the remaining ones which the police are unable to determine, some are deemed by the Ombudsman to be not sustained and some others fall by the wayside through lack of the complainant's desire to pursue the matter further. Of those where a re-investigation is asked for the Ombudsman will decline the request in some cases without further investigation and will proceed with the remainder. It is the method of handling this relatively small number that provides the interest in the New South Wales practice. It should perhaps be said that at any point where a case is dropped on the initiative of the Ombudsman, - i.e. is deemed by him or her either at the beginning not to merit investigation by anybody or, later, not to need any further study than a reading of the police report - there does not seem to be any reason to fear a faulty procedure or the likelihood of injustice. There could however be some fear, either towards the end of the first stage, or at the point where the police declare they are unable to determine the case, that complaints may be dropped through improper pressure by the police on the complainant.

The Ombudsman's staff

These people are partly civilian (since complaints against departments other than the police will normally not require police investigation) and partly police officers chosen by the Ombudsman and seconded to him or her from the New South Wales police. For investigating complaints against the police the Ombudsman is now able to use both civilians and seconded police as he or she thinks best in each case, though originally the legislation did not allow the use of civilians. The Ombudsman's reports speak extremely highly of both the quality of the seconded police officers and of their expertise.

Hearings

The hearings conducted by the Ombudsman are described in his special report to Parliament in the following terms:

> *"After the appropriate steps have been taken by the Ombudsman's seconded police officer a matter is usually set down for hearing. In conducting hearings the Ombudsman is given Royal Commission powers under Section 19 of the Ombudsman Act, and for most practical purposes the Ombudsman exercises the powers of a Royal Commissioner.*

He may, if he wishes, compel witnesses to attend and to produce documents. He may compel witnesses to answer questions.

"Hearings conducted by the Office of the Ombudsman are usually heard either at the Sydney Office of the Ombudsman or at a civic centre in a country or regional centre, if all of the relevant witnesses live in that area. The Ombudsman prefers not to use court houses or police buildings in order to assure civilian witnesses that the hearing will be both impartial and relatively informal.

"Hearings are conducted by the Ombudsman, the Deputy Ombudsman, or either of the two Assistant Ombudsmen. They are assisted by the seconded police officers responsible for the matter.

"The usual order of witnesses at a hearing is the complainant, civilian witnesses, police witnesses and, finally, police officers the subject of complaint. Although there is no rigid or formal procedure, witnesses are usually questioned extensively by the seconded police officer: the person hearing the matter asks such further questions as he or she chooses.

"The proceedings are tape recorded but they are quite informal. Everybody present sits at the same level around a table and no judicial dress or formality is adopted. Evidence is usually taken in a conversational manner. Evidence is not taken on oath.

"Witnesses are told at the outset that they may interrupt and make comments or statements at any time during the proceedings. If they are represented, the same invitation is extended to their lawyers. At the end of their evidence, each witness and their lawyer is asked if they wish to add anything to the evidence they have given or if they feel any matter has been overlooked or not covered in sufficient detail.

"The procedures are designed to make all witnesses, including those without experience of court rules and processes, as comfortable and relaxed in giving their evidence as possible.

"All of the procedures used at hearings are in accordance with the advice of eminent counsel. If necessary the Ombudsman will use his Royal Commission powers to ensure that every witness believed to be of assistance to the Inquiry, other than police officers the subject of complaint, is required to attend.

"An important feature of the Ombudsman's Royal Commission hearings is that police officers the subject of complaint are not required to attend; they are merely invited to do so. Although the Ombudsman has power to require such police officers to attend, he takes the view that it is a matter for individual police officers to decide whether to attend and give evidence at an Ombudsman's Inquiry. This is done in an attempt to make the proceedings as fair as possible to police the subject of complaint and to ensure that there can be no complaint that police have been compelled to give evidence against their will. In nearly all cases police have responded to the invitation to attend and given evidence."

The Ombudsman's powers

The power to subpoena witnesses has already been mentioned. The following passages reveal comparable powers to obtain the relevant papers and to bring any unsatisfactory matters to the attention of Parliament and the public:

> *"Seconded police officers also obtain all relevant documentation. Again, where possible, this is done with the co-operation of those concerned. But where it is recommended by a seconded police officer, the Ombudsman will exercise his Royal Commission powers and require the production of documents. If the documents are held by a New South Wales Government Department, the Ombudsman can use the power in Section 18 of the Ombudsman Act to require production of the documents.*
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> *"It is the policy of the Ombudsman to treat the New South Wales police force in the same way as any other New South Wales public authority; that is, where the Police Department itself has been unable to resolve a complaint by a member of the public or investigate it to the satisfaction of the complainant, to re-investigate complaints against the police force and produce detailed, well reasoned and fair reports about the conduct of individual police officers and the practices of the force as a whole. It is up to the Commissioner of Police to implement the Ombudsman's recommendations as a result of being convinced by the Ombudsman's report of the correctness of the course recommended.*
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> *"In cases where the Commissioner of Police does not follow the Ombudsman's recommendation, the Ombudsman believes a report to Parliament should be made, as would be the case if any other public authority failed to follow an Ombudsman's recommendation. This is the traditional approach of the Ombudsman system both here and overseas. The making of a report to Parliament brings the matter into the parliamentary and public arena. Such a report to Parliament is, rightly, the ultimate sanction under the Ombudsman system."*

Issues that have arisen in New South Wales

No system, however good, ever develops without some difficulty or problem being encountered. In the case of the Ombudsman's responsibilities in relation to complaints against the police it is evident from the record that there were the following problems.

(a) Career structure for seconded police officers

Police officers seconded to the Office of the Ombudsman were concerned that the Police Department regarded their secondment as of no consequence in terms of promotion and future career prospects. The number of seconded officers dropped, with several of them applying for transfers. The Ombudsman therefore recommended that the Police Department should assess seconded officer positions and rank them at a level commensurate with the work done and the responsibilities discharged.

(b) Harassment of seconded officers

As soon as seconded police officers began to investigate complaints vigorously and impartially the Police Association of New South Wales started a campaign against them. They were called "spies" and were themselves the object of complaints. The Ombudsman consequently wrote to the Minister

responsible for the police to protest against the conduct of the Association and of the Commissioner of Police.

(c) Opposition to the Ombudsman's powers

The Police Association argued that New South Wales should abolish the system of police internal investigations and Ombudsman scrutiny and instead establish a separate Police Complaints Authority; but the Ombudsman has successfully countered that the existing system rightly places the police in the same position as all other public servants and achieves efficiency and economies of scale. Maintaining a separate Authority is expensive and wasteful.

Assessment of the New South Wales experience

The New South Wales Ombudsman was first given a role in the investigation of complaints against the police by the Police Regulation (Allegations of Misconduct) Act 1978. It was in 1984 that his office was granted the power of direct re-investigation of complaints. Since then the annual reports of the Ombudsman have expressed a high degree of satisfaction with the system. In the report for 1986-87, for example, this passage occurs:

> *"In the view of the Ombudsman after three years of operation of the system, the New South Wales system of investigating complaints about police is one of the best of its kind in Australia, or indeed, the world."*

The Ombudsman regularly reports on general issues arising out of particular incidents and makes numerous recommendations on how police practices could be improved. He has, for instance, highlighted the inappropriate use of arrest powers, the need for proper guidelines on strip-searching and the special problems experienced by aboriginal people. Occasionally the Ombudsman recommends that the police service should make an ex-gratia payment of compensation to complainants. In the report for 1990-91 it is noted that:

> *"The past two years have seen spectacular and widely publicised episodes where the New South Wales Police have come under searching public scrutiny...The fact that such matters are opened up for public debate generally encourages confidence in the mechanisms to deal with complaints and appears to have an influence on the increasing numbers [of complaints]."*

In 1989 a Select Committee of the New South Wales Legislative Council issued a report on the role of the Ombudsman in relation to police complaints. It found that there were massive and widespread misconceptions among the police about what the Ombudsman did, how he did it and why, that there was a need to reduce delays in the handling of complaints (though by statute police investigations must be concluded within 180 days) and that greater efforts should be made to conciliate complainants. The Ombudsman took steps to address these points and made a special report to Parliament on the matter in July 1991. That same month the Parliamentary Joint Committee on the Office of the Ombudsman set up a Review of the Ombudsman's role in investigating complaints against the police. This Review was published in April 1992; it makes numerous recommendations in relation to the conciliation of complaints and other matters but in no way seeks to diminish the role of the Ombudsman in this context.

Victoria

The history of the attempt to introduce a civilian element into the handling of complaints against the police in the Australian state of Victoria is not a success story. Indeed it makes extraordinary reading but the details of a long battle between the Police Complaints Authority and the police, with the state government failing to support its own creation, would take more space to rehearse than we could justify here. However the story does provide at least two very clear lessons about how not to attempt to deal fairly with complaints against a strong police force without adequate backing.

An early confrontation

The Authority was set up in 1986 and though its powers have been criticised as vague they did include the ability to conduct its own investigations instead of always letting the police do an internal investigation first. An incident which occurred very early in the life of the Authority started a saga that was to prove disastrous. Hampered at the outset on the purely practical level by the government's failure to provide their own creation with a proper office, the Authority, in an attempt to establish some basic facts about the complaints it had received, advertised locally that its members would be available at certain times in two hotels to receive first hand information from anyone able and willing to give it. This seemingly natural and proper action stimulated the Police Association to take the extraordinary step of seeking an injunction in the courts to prevent the members of the Authority doing any such thing. Even more extraordinarily the injunction was granted and it was not until a year later that the Authority persuaded the Supreme Count of Victoria to reverse the judgement, by which time of course the point of the information-seeking exercise had been lost.

This rather dramatic episode at the beginning of the Authority's life set the tone to the relationship between the Authority and senior police in the months that followed. A number of complainants were discontented with the way the police dealt with them and the Authority irritated the police by selecting a number of such cases for further study by themselves. Any resulting recommendations for disciplinary action were rejected by the police who exhibited antagonism towards both the complainants and the Authority.

Lack of political support

Similarly the Authority, in pursuit of its remit to make recommendations for changes in police practices and procedures, was instrumental in running a number of seminars but the Chief Commissioner forbade his senior officers to attend and the Minister for Police even tried to persuade the Authority to dissociate itself from this attempt to stimulate informed discussion about reform of policing in Victoria.

The influence of the press

This sort of thing inevitably attracted the attention of the press and an investigative journalist ran a series of articles which were regarded by senior police as a vendetta against them. It did in fact put the issue of relationships between the Authority and the police unmistakably in the public domain and the Minister felt it politically necessary to set up an inquiry into what was becoming for the government an increasingly embarrassing public wrangle. He accordingly appointed Professor Richardson, the former Ombudsman for the whole of the Commonwealth of Australia, to report on the workings of the Internal Investigation Department. His report largely supported the Authority's criticisms of the department but expressed concern about the bad relationships and suggested that if matters did not improve the Authority might be wound up and its functions given to the (Victoria) Ombudsman, with a Deputy Ombudsman specifically in charge of overseeing the

review of police complaints. This in fact was what happened a few months later after further confrontations; see below.

Mistaken tactics

With hindsight it may be concluded that the PCA made two major mistakes in deciding how to play its hand in the face of determined opposition to its very existence from the senior police command. In essence its first mistake was to take its remit very seriously and pursue it energetically. It was determined to unearth police corruption and biased internal investigation of complaints, and in the process it found good opportunities to advocate changes in practices and procedures. This was altogether too much for the police: they had begun to accept the idea of their investigations into individual complaints being overseen by outsiders because they knew this was a phenomenon occurring elsewhere and there was no particular reason why Victoria should expect to be exempt from this trend, but they thought it wholly wrong in principle that civilians, whom they regarded as being, by definition, ignorant of the problems of police work, should contemplate teaching them lessons in organisation and method, and even in the attitudes they should adopt.

The PCA did in fact debate within itself how energetically it should pursue its tasks. In effect it had to choose between a gentle and slow approach in an attempt to give the police time to become adjusted to new ways and new standards and, on the other hand, a forceful approach based on the belief that the police would never change unless forced to do so by publicly aired pressure. There was a great deal of sensible reasoning, in the prevailing atmosphere of the time, and indeed in actual experience, to support this latter policy and in fact it is difficult to criticise the PCA for adopting it except on the ground that in the event it failed and they were abolished. It is difficult to say whether, if they had adopted the longer-term tactic and been more pragmatic and tactful, they would have been able to win over such determined opposition or would merely have been accused of letting down complainants whose cases they regarded as valid and so betraying their trust and failing to give the public any confidence in the system, which was after all the reason for the authority's appointment in the first place.

Political judgement

The PCA's second mistake was one of political judgement. It took the government which created the Authority at its word when it expressed its support, and failed to realise that it is an occupational hazard in political life that politicians not infrequently say what they think will be agreeable to their hearers in preference to being completely honest. In this case it is evident that the government in power in Victoria saw some votes in creating the PCA but not - and especially not in the run-up to an election - in supporting a forceful confrontation with a strong police senior command and a powerful and militant Police Association willing even to go to the length of entering candidates in the election. The significance of what the Victoria government did is worth spelling out clearly, for governments the world over tend to subordinate all considerations to that of political advantage. If the balance of political advantage appears to indicate that a statutory authority should be wound up if it refuses to act against its conscience in a politically acceptable way then wound up it will be.

The need for political will

The experience of Victoria is therefore only one example among many of the fact that attempts to reform police malpractices are dependent for their success on the political will of the government of the day, which is in turn dependent on what it sees as the level and nature of public disquiet. If the public is chiefly concerned about the level of crime and instinctively supportive of the law and

order lobby for a strong police force there will be few votes in a programme of police reform which will tend to be regarded as possibly beneficial but only in the long term future: but if the public is sufficiently outraged by stories of police abuses and sees such stories as constituting an immediate and urgent problem, as happened in Queensland, it then becomes possible for an official enquiry to recommend the complete abandonment of the internal investigation model on the ground that the police service is so corrupt that it simply cannot be trusted with that function and, rather than grafting onto it an external supervisory and monitoring system, the creation of something altogether different and altogether external with the police having no role in the investigation of complaints. These two descriptions of the public's choice of priorities and what logically follows from the choice made serve to illustrate the full length of the scale that exists in the relationship between the degree of change that can be expected to succeed and the political desire for it in a democracy.

The system in Victoria today

The functions conferred upon the Deputy Ombudsman are twofold: to oversee and review police internal investigations and to conduct investigations. Both functions are carried out quite independently of the police. By 30 June 1990 the Deputy Ombudsman had conducted 58 independent investigations as well as 74 further investigations of complaints already investigated by the police. Of the 58 independent investigations, 16 (28%) were substantiated. In his annual report to 30 June 1991 the Deputy Ombudsman reveals that "approximately 200 matters have been investigated by me by way of primary investigation" and he argues convincingly that his office is now more independent of the police than was the former Police Complaints Authority. Unlike in New South Wales, the Office of the Ombudsman in Victoria does not use seconded police officers for independent investigations. In recent years these investigations have included "public interest" matters such as the conduct of police raids, the use of firearms and conditions in police cells.

Queensland

Since 22 April 1990 all complaints against the police in Queensland have been investigated by the Criminal Justice Commission, which was established following a Commission of Inquiry that revealed organized corruption within the police force. Investigations of complaints are conducted by police officers seconded to the Commission, some of these being from other States in Australia. The Commission often makes recommendations to the Commissioner of the Police Service that measures be taken to obviate the recurrence of certain complaints, for example in relation to the holds used by officers when conducting arrests. Judging by the rise in the number of complaints in 1991-92 compared with 1990-91, the new Commission is having a measurable impact on the public's awareness of the complaints system. A determined effort is being made to "clean up" the police in Queensland and this new complaints system is seen as a crucial element in the reform process.

Canada

Toronto

The experience of Metropolitan Toronto equals that of Victoria in showing the lengths to which opposition to a hated reform can go, but there are significant differences of detail and, for reasons that will be explained, the outcome was entirely different. In order to draw attention to the significance of what happened it will be necessary to go into more detail than in the case of Victoria.

The office of the Public Complaints Commissioner was established in 1981 with the following powers:

- 1. monitoring the police handling of complaints
- 2. reinvestigating and reviewing police decisions when the complainant was not satisfied
- 3. when necessary referring cases to a civilian tribunal with disciplinary powers
- 4. in special cases conducting his own initial investigations
- 5. making recommendations to the police or the government about policing issues arising out of complaints.

Thorough preparation

The Act creating the office was passed as a result of a substantial crisis in police - community relations in the 1970s so that there was a public acceptance of the existence of a problem and the need to do something about it. Perhaps because of this and the debate that it generated the system devised was the result of thorough negotiation with police management and the Police Association; the checks and balances written into the system were numerous and well thought out and there were good safeguards against injustice being done to an accused officer. Above all, and in contrast to the situation in Victoria, the legislation was detailed and clear. The overall effect appeared to be as good as anything either the advocates of reform or its potential opponents could reasonably have asked for and both sides recognised the considerable advantages they stood to gain. The reformers got a system incorporating extensive civilian investigation, substantial rights for complainants and hearings before a civilian tribunal. The Police Association thought that the system would give more protection to accused officers than the internal discipline system and that police morale would improve because public hostility would evaporate, while this was also seen by police management as a relief from the persistent debilitating criticism they were accustomed to.

Intensity of police opposition to power of dismissal

There was however one element in the system which gave rise to the extraordinary quarrel that followed and which, it is fair to say, was quite out of character with the even-handedness of the system as a whole. The tribunals were given disciplinary powers unmatched in any other police jurisdiction in Canada except possibly two and, so far as we know, not tried anywhere else in the world. They could themselves impose penalties including dismissal whereas the norm in the field of discipline is for any civilian authority, of whatever nature, to have only the power to make recommendations about disciplinary penalties to the chief of police. In passing we feel it right to say that in our view that norm conforms to an important principle of good organisation, namely that, subject to the overall jurisdiction of the courts or any special authority established by law for the purpose, such as the industrial tribunals in the UK, the authority in charge of any organisation, be it an individual or a corporate body, must be in control of its own house. At any rate, whatever the rightness or wrongness of principle, it was certainly this provision that started a long battle in which the police used every device of which they could think to redress the situation, including not merely an appeal to the Divisional Court against the decision of a tribunal and, on getting an adverse judgement, a further attempt to appeal to the Ontario Court of Appeal, which refused leave to appeal. Having exhausted the legal processes available the Police Association at once decided on a partial strike to be maintained until the officer concerned, who had been forced to resign, was reinstated and the law amended so as to abolish the office of Public Complaints Commissioner. Police management took no steps to condemn or to discipline this withdrawal of services to the public and

the public were further made very much aware of the issue by public demonstrations and a media campaign.

This was followed by further recourse to the courts in a way that must be unique. The Association's representative in the dismissed constable's division charged him, with his full cooperation, with the criminal offence of assault, clearly on the calculated assumption that he would be acquitted, the officer bringing the charge having publicly stated that he was convinced the accused man was innocent. In the event this device was not allowed to run its full course because the Attorney General stayed the proceedings.

Wide ranging debate

The final step taken by the opposition was for police management and the Police Association both to submit recommendations to the Government for changes in the law. This attracted both public attention and public response. Not only did a number of community organisations spring to the defence of the law as it then was but so did the Criminal Lawyers' Association, and the Canadian Bar Association went so far as to urge that the Metropolitan Toronto system with some modifications be extended to the whole province of Ontario with its 117 separate police forces. Since this was the idea that won the day the outcome in this case was that the challenge to the system was not in the end supported by the courts, the media or the public and therefore not by Government. Indeed the Federal Government of Canada has amended the Act governing the Royal Canadian Mounted Police so as to include a number of the provisions originating in Toronto.

Assessment of the Toronto experience

If an attempt be made to assess why the result in Toronto - and indeed in Canada - was so different from that in Victoria two observations are perhaps called for. The first is that, with the one exception of the offending provision that caused all the trouble, the Toronto system was very thoroughly negotiated before being set-up and, as a result, was very detailed, very clear and very fair. In the end this was recognised by police rank and file, police management and the public and this was what preserved it when under attack.

The second is that when a system is under attack the defenders need both restraint, which was absent in Victoria though it had been canvassed and duly considered, and resolve. Restraint is needed to give the attackers time to adjust to new ideas and to the fact that they have public support, though it must not of course be carried to the length of emasculating the essentials of the system. This was what the PCA in Victoria was determined to avoid but in doing so they missed the opportunity of finding a middle way. And resolve is needed too when faced with such determined opposition as was brought to bear in Toronto. Had the government not stood firm when faced with a police strike and public demonstrations by the police the outcome would have been very different, but the government not only knew of the decisions of the Courts but it correctly assessed the wishes of the general public.

Ontario

A more recent Canadian development has been the establishment in the province of Ontario of a Special Investigations Unit in the department of the Solicitor General (though it may soon be transferred to that of the Attorney General). This unit is empowered, on the initiative of its director, to investigate "circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers" (s 113(5) Police Services Act 1989). The director of the

SIU cannot at any stage have been a police officer; his or her investigators cannot be current police officers nor, significantly, can they investigate a member of a police force in which they previously served (s 113(3), (6)).

This is a significant development in that the initiative to take action lies with the director and does not need the stimulus of a complaint from a member of the public. However the future of this reform is not entirely certain as the two largest police unions in Ontario are both opposed to it.

New Zealand

The experience of civilian investigation of complaints in New Zealand is an altogether happier one, though admittedly it is short compared with the other police jurisdictions and it may be premature to formulate firm conclusions derived from what has happened so far. Some people may be tempted to think that New Zealand, having a relatively peaceful and contented society, is not a fair test of how to introduce a civilian element into the examination of complaints, but the country has its indigenous Maori population whose traditional life style does not mesh easily with that of people of European descent, and the police service, though generally of a very high standard, is not immune from the temptations, which afflict the police everywhere, to take short cuts in order to achieve what they want to achieve. It is therefore of considerable interest to see how a small country, with a population just over twice the size of Northern Ireland's, has created an authority which has managed to do the work entrusted to it while securing the cooperation and respect of the police and a satisfactory degree of confidence from the public.

The Authority's functions

The New Zealand Police Complaints Authority was established in 1988 with the functions of

- 1. Monitoring all complaints and satisfying itself that those dealt with entirely by the police were properly handled and that the decisions were correct.
- 2. Where necessary supervising the police conduct of the investigation.
- 3. Where necessary conducting its own investigations, either from the very beginning because of the seriousness of the case, or later where the Authority is itself dissatisfied with the police investigation.
- 4. Reviewing cases where complainants are dissatisfied with the handling of their cases by the police. So far these have been about 10% of all complaints received. Of those that the Authority reviewed 17% in the first year of the Authority's work and 23% in the second achieved some change in the outcome as a result of the review.

The Authority and his deputy and staff

In New Zealand the Authority is an individual, a respected former High Court Judge. He has a deputy who is a senior lawyer with long experience in criminal work for both prosecution and defence and some 12 years experience as a judge of the High Court of the Cook Islands as well as in the appellate jurisdiction of various Pacific islands. The Authority's office employs three investigating officers. The senior officer was formerly a senior partner in a large Wellington law firm with a wide experience of enquiries and investigations. The second officer is not a lawyer but has had wide experience in various parts of the world in military policing, investigative work and counter-intelligence. The third officer is a woman, employed part-time, who previously worked for the Auckland District Law Society investigating defaulting lawyers. It will therefore be seen that the Authority, his deputy and his staff are all civilians with experience of either the law or

investigative work or both. The Act establishing the Authority stipulated that he himself must be qualified as a barrister or solicitor of the High Court and that he will be appointed by the Governor - General on the recommendation of the House of Representatives.

The methods employed

The annual reports of the Authority submitted to the House of Representatives make interesting reading. Among other things they reveal

- 1. His judicious use of methods, most interviews being quite informal but evidence on oath being taken at formal hearings especially when there are interested parties in the conflict.
- 2. His awareness at the beginning of what was at stake in terms of public confidence and the success of the steps he took to achieve it. The debates in Parliament during the passage of the Bill seeking to establish the Authority revealed strenuous and repeated objections by the opposition based largely on police fears and apprehensions. The Authority instructed his deputy and all his staff to read the parliamentary reports of those debates so that they would all be aware of the fears that had been expressed. As a result they have been very largely dispelled by the way the office approached its task.
- 3. His willingness to use his powers fully but not to attempt to go beyond them. Where an investigation reveals a shortcoming not merely of the performance of the officers complained against but of police policies, practices or procedures he has the power to make recommendations for improving the situation to the Commissioner and has had occasion to use that power but has not felt it right to interfere in matters of general police practice not giving rise to a complaint. Where a number of complaints of a similar nature reveal a pattern which appears to call for alteration or even for additional training the Authority has drawn attention to the matter in his report to Parliament.
- 4. His understanding of the value of good communications. At the start of his work he arranged with the police that all notifications of the results of investigations should include a paragraph saying that if the complainant was not satisfied he or she could refer the matter to his office. Also where he or his office conducts an investigation the requirement in the Act that the complainant should be informed of the result does not result in a one page letter, as is the practice in some police forces elsewhere; a full copy of the report is sent to the complainant and the Commissioner is likewise asked to give a copy to the officer complained against. This evidence of an attitude of fairness has contributed to police acceptance of his work.
- 5. His understanding that Parliament's intention was to discover the truth if possible about each complaint, resulting in his use in most cases of inquisitorial rather than adversarial procedures.
- 6. His practice of never commenting on the use by the police of a discretion that was theirs by right unless it appears to have been improperly exercised i.e. on a wrong principle or by taking into account irrelevant matters or omitting to take account of relevant matters.

It would appear from the reports generally,and especially from the passages to which we have drawn particular attention, that the effectiveness of the PCA in New Zealand and the respect it has won from the police and the public are due partly to good drafting of the legislation and partly to the wisdom and fairness with which its work has been done.

Conclusions from foreign experience

As we said at the beginning of this chapter, the CAJ does not have the resources to undertake a comprehensive survey on a world scale of all the ways in which other countries handle complaints against the police. This could possibly be a project worth the undertaking if the necessary funding was available but in the meantime the lesson from the information we have collected seems to be clear that the bogey of the difficulties supposedly attached to using civilian investigators is not anything like as daunting as some of the critics fear, provided the mistakes which we have highlighted are avoided. Indeed those people who allege that civilian investigation of complaints against the police is not practised anywhere in the world are quite clearly misinformed. It is practised in enough countries and in enough different ways to give any government willing to examine the evidence plenty of information on which to base a system suitable to its own conditions.