

HOLDING POLICE TO ACCOUNT FOR MISCONDUCT: POLICE-SPECIFIC COMPLAINTS AGENCIES SWATI MEHTA, CHRI

In a democratic society, the police are accountable to a variety of players in the society including the Parliament, the judiciary, the executive, their superiors, and increasingly now to civilian authorities/mechanisms established for the very purpose of overseeing the conduct of the police. These civilian oversight bodies include within their ambit the Human Rights Commissions, the Ombudsmen and other civilian review boards mandated to deal with police complaints specifically. In this chapter we deal with the latter while recognizing that in most parts of the Commonwealth such structures have not been created. So countries including India, Bangladesh, Maldives, Malaysia, Fiji, Solomon Islands and Cyprus do not have such structures.

Civilian Review is a relatively new trend and is still evolving in many jurisdictions. The first civilian review body was established in the United States following recommendations of the 1965 McCone Commission, which examined the causes of major riots in Los Angeles. In fact, special attention has been paid in creating such mechanisms and sustaining their work in post-conflict zones like South Africa and Northern Ireland and in places including UK where community or a section of it has lost faith in police and its investigations against their own brethren. In UK, the recent Independent Police Complaints Commission has been established under the Police Reforms Act 2002 following Scarman's Inquiry into the early 1980s Brixton riots and the more recent MacPherson Inquiry into matters arising from the death of Stephen Lawrence, a black innocent youth killed in a racist attack, whose case was not investigated properly by the police.

Since its inception, civilian review has given rise to a sharp debate since its inception between supporters of internal police review and advocates of civilian review. While the former argue that internal review would be swifter and more effective (because of the way police is structured in a strict hierarchical command structures), those advocating for civilian review argue that civilian review in some manner is essential in a democracy since police are ultimately responsible to the public and not police chiefs¹.

- **Why civilian review?**

Civilian oversight of the police is a complex endeavor in any country and fraught with many tensions. It is now well recognized that "police leadership and professional management are as important as effective oversight²" and that external oversight structures "can never replace police management for ensuring that a police agency operates in an effective and efficient manner." Characteristically, these complaints authorities make recommendations and the discipline decisions are vested with the Chief of the Police. U.K. is an exception

to this, where the recently established Independent Police Complaints Commission (IPCC) is empowered to make binding decisions that are subject to judicial review only.

Importantly, it has been recognized that an attitude and working relationship of mutual respect and cooperation between police management and independent oversight structures is considered one of the ideal situations with regards to civilian oversight of the police³. Walker⁴ puts it the best and states 'The basic goal of citizen oversight is to open up the historically closed complaints process, to break down the self-protective isolation of the police, and to provide an independent, citizen perspective on complaints'.

GARETH NEWHAM⁵ MAKES A CASE FOR CIVILIAN OVERSIGHT

Democracies worldwide are increasingly recognizing the importance of civilian oversight of policing so as to promote public support for and cooperation with police agencies.⁶ The American Civil Liberties Union (ACLU)⁷ argues that civilian review is important because:

- it establishes the principle of police accountability;
- it can be an important source of information about police misconduct; and
- it can alert police administrators to the steps they should take to curb abuse.

While there will always be limitations to what an external civilian oversight body can achieve, it is important to recognize the range of potential benefits that can be realized for different stakeholders⁸.

Police managers have recognized that civilian oversight can⁹:

- Improve the image of the police and its relationship with the public;
- Improve the public's understanding of the nature of police work;
- Promote community policing; Improve the quality of a police agency's internal investigations;
- Reassure the public that the police agency investigates complaints thoroughly and fairly;
- Discourage misconduct amongst police officers, and;
- Improve a police agency's policies and procedures.

Elected officials have indicated that civilian oversight¹⁰:

- Demonstrates their concern to their constituencies about police conduct; and
- Can assist in reducing civil claims against a police agency.

Members of the public have reported that civilian oversight has¹¹:

- Satisfied them that the police agency can be held accountable;
- Helped reassure them that appropriate discipline is being implemented for police misconduct;
- Discouraged police misconduct and;
- Improved their understanding of police work.

- **Classifying review bodies:**

Citizen review bodies have been classified in a variety of ways, mostly focusing on the levels of independence and citizen participation. One of the most respected classifications includes four models of civilian review of police¹² based on the methods employed to deal with complaints against the police.

Model I – Independent investigations:

The civilian oversight structure is empowered to independently investigate any aspect of police activity to examine if police misconduct exists.

A hybrid of this model is a model in which the civilian oversight body audits the investigation and findings of police complaint investigations that are conducted by the police unless the chair of the oversight authority deems it advisable in the public interest to investigate the complaint. Sometimes, the oversight authority may institute an investigation or a public hearing into a matter¹³. In many Commonwealth countries where such civilian oversight structures do exist, usually, there is a distinction drawn between serious cases of misconduct and other misconducts. The Oversight structures maintain the legislative authority to conduct independent investigations (particularly of serious cases) or order additional investigation by the police.

Model II – Review internal investigations:

The civilian oversight authority does not conduct independent investigations into allegations and instead reviews the internal investigations conducted by the police. In some cases, they may monitor police investigations as they proceed but in no case do they have powers to conduct independent investigations. Usually, their function constitutes reviewing reports and records prepared and generated through internal investigations, without any opportunity to verify through investigation or interviews the accuracy of those reports.

Model III – Appellate Authority:

The oversight structures receive appeals of police finding from aggrieved complainants. After police investigation and finding, if the complainant is unsatisfied with the findings of the investigation, the complainant appeals to the oversight authority. The authority hears the complainant and confers with the police and/or the investigative file and makes a recommendation to the chief of the police.

Model IV – Process Audit:

The oversight structure entails an auditor who does not investigate individual citizen complaints but reviews the process by which a police agency accepts and investigates complaints from the public. It makes findings on the fairness and thoroughness of the process and may present recommendations as to how it can be improved if necessary.

These models described above essentially list the four primary methods and manners in which oversight bodies deal with complaints against the police. In most of the Commonwealth countries, it is more likely to find a complaint mechanism that is mix of one or more of these models than one that falls neatly into one of these models. The most prevalent model of civilian oversight within the Commonwealth is some variation of Model I where the civilian oversight has some powers of investigation, particularly in serious matters or matters of high public interest. Even within this model, the bulk of the complaints are investigated by the police who may or may not be supervised by the oversight body.

**A SUCCESSFUL CIVILIAN OVERSIGHT BODY STYLED ON MODEL I:
*The Police Integrity Commission in New South Wales, Australia:***

Experts like Gissiner¹⁴ have regarded the Australian Model that exists in New South Wales (NSW) as one of the best and very effective model of police oversight. The Police Integrity Commission (PIC), a civilian oversight structure, along with the Ombudsman and the NSW Police that deals with the complaints against the police. In NSW, all complaints against the police are divided up into two categories and the Category 1 cases¹⁵, which are basically serious offences, are investigated by the PIC. The NSW police and the Ombudsman are mandated by law to refer all Category 1 complaints to the PIC. Although Category 2 complaints are generally referred to the police and the Ombudsman, the PIC is empowered to oversee the complaint investigation by the police.

Investigative powers

What makes the PIC effective is the scope of powers it has been given while investigating cases of police misconduct. The PIC has full discretion over what matters to take up for investigation.

Also, the Police Integrity Commission is financially equipped to maintain independent investigative cadres, which means it does not have to rely on police or police resources to carry out their investigations on police.

It is also bestowed with traditional police investigative powers and its Commissioner can apply for and be issued search warrants (by an appropriately empowered judicial officer or authorised justice), as well as enter and search public premises.¹⁶ It is also authorized to obtain listening device¹⁷ or telecommunications interception¹⁸ warrants while carrying out its investigations.

The PIC is also endowed with very strong powers to obtain information and documents for the purposes of investigation. It can compel the production of documents and compel attendance before it.

Hearings

The PIC is authorized to hold hearings in relation to any matter.¹⁹ These hearings can be held in public or private – interestingly the only qualifier is that the decision to hold a public hearing must be made based on the public interest.

Witnesses

Protection of witnesses is in-built into the law governing the oversight body, which is a very important component of truly independent external oversight, particularly for bodies such as this with such extensive investigative powers.

Seek action taken report:

The PIC can require the police to submit a report of action taken by the police on its recommendations or in matters investigated by the police. The Commissioner of police is in fact obliged to inform the PIC on what action, if any, has been taken and the reasons for not complying with the directions of the PIC in appropriate cases.

AN INTERESTING MIX OF ALL THE FOUR MODELS

Independent Police Complaints Commission of UK is the most recent oversight structure

The recently established Independent Police Complaints Commission (IPCC) in UK is a mix of all the four models described above and has similar powers of investigation like the PIC of NSW in Australia.

Empowered to investigate, direct and supervise police investigation

In UK also, the police investigates the majority of the complaints, although certain categories of complaints have investigations that are supervised, or managed, or run by the IPCC. The police have a legal obligation to refer certain complaints and conduct matters to the IPCC. Where the IPCC decides that there should be an investigation, it has the power to approve the choice of investigation officer. If it is not satisfied with the choice of investigation officer, the IPCC can require another person to be appointed. In investigations that the IPCC manage, both the control and direction of the investigation is vested in the IPCC - this means that the police investigator will have to do what he or she is told by the IPCC.

Appellate mechanism

The IPCC is also an appellate mechanism where complainants are not satisfied with the police. Complainants have three classes of appeal: against non-recording of a complaint; against the process of local resolution; and arising from a completed investigation. The police have a statutory duty to comply with IPCC findings on an appeal. Where the IPCC recommends that disciplinary action should follow an investigation the police have a duty to comply with it. The IPCC may issue a direction if they do not comply.

Process audit:

The IPCC has responsibility for auditing and inspecting how the police handle the complaints scheme. The IPCC has rights of entry to police stations and access to

documents. The IPCC has the power to issue statutory guidance. Where this happens the police will have an obligation to comply with the guidance.

LIMITED MANDATE OF SOME OVERSIGHT AGENCIES

Oversight structures like the Canadian Office of the Police Complaint Commissioner, British Columbia have a limited mandate as per the law or in practice. The complaints against the provincial police of BC handled by the OPCC are investigated by the police themselves. It is only if the complainant is unhappy with the results of the investigation that s/he can apply to the OPCC for a public hearing. The Commissioner of the oversight body will then consider factors like seriousness of the complaint, the seriousness of the harm done, whether a public hearing is needed to discover the truth, whether there was a flaw in the investigation into the complaint done by the police department, and whether a public hearing is necessary to restore or preserve public confidence in the complaint process and in the police. It is only after these considerations that the Commissioner will approve or deny the request for a public hearing. If approved, the public hearing is conducted before a retired judge, called an adjudicator. Once a decision has been reached at the Public Hearing, the only appeal available is to the BC Court of Appeal on questions of law only.

Proactive approach

Some oversight bodies within the Commonwealth are engaged in a 'proactive role' and are involved in "identifying and resolving underlying systemic problems within the police organizations problems within the police organizations.²⁰" Once again, this proactive role and the role of handling public complaints is not mutually exclusive and the same oversight body that look into complaints may also perform proactive functions. Many oversight bodies while dealing with public complaints against the police also examine trends and patterns of problems – including trends of misconduct, if any, and also the trends in handling complaints etc. – and what these patterns indicate about shortcomings in police policies, supervision and training²¹. The NSW Police Integrity Commission; the Queensland Crime and Misconduct Commission, Australia; the South African Independent Complaints Directorate (ICD); and the IPCC of UK are all examples of oversight bodies that look into systemic problems and suggest changes in police policies in a whole range of matters including handling of complaints. The South African National Secretariats for Safety and Security at the National and Provincial levels are another example of an oversight body created with a purpose of "monitoring police conduct; promoting; democracy, accountability and transparency within the police; investigating complaints against the police; and evaluating the functioning of South African Police Service.²²"

Challenges:

- ***Lack of funding and resources:*** Civilian review can be a very expensive undertaking, particularly the highly independent boards that employ professional investigators and conduct their own inquiries separate from

internal police processes²³. Most of the 'successful' examples of police oversight are found in the developed nations where there is no resource crunch.

- Lack of cooperation from the police: Greater the independence of the oversight structure, less cooperation, it gets from the police. The independent external investigators find it very difficult to access police records and evidence from police. On the other hand, it is the highly independent bodies that receive more complaints. "This prompts some experts to argue that civilian review officials must see themselves as being in a partnership with police. Yet if a review body seeks to work intimately with the police, it can often jeopardize its credibility with the community."²⁴
- Lack of political will: There are many countries where such structures have been set up under international or donor pressure but the lack of political will has meant that these structures are not effective in tackling police misconduct.

INEFFECTIVE OVERSIGHT STRUCTURES IN THE CARIBBEAN

Many Caribbean countries including Jamaica, St. Lucia, Guyana and Trinidad and Tobago have experimented with civilian oversight structures styled on Model I between 1993 and 1999 with the intention of holding the hitherto unaccountable police to account to civilian oversight. These oversight structures have failed to win the confidence of the public in these countries, as they are dependent on the police to investigate the cases and lack independent civilian investigators competent to investigate complaints against the police. There is also no political will to strengthen these structures that are usually highly under-funded.

SPECIAL CASE OF POLICE OVERSIGHT MECHANISM IN JAMAICA²⁵

Police Public Complaints Authority (PPCA) is a state-funded civilian oversight structure that monitors, supervises and investigates allegations of misconduct filed by members of the public against members of the Police. It can:

Problems with its functioning:

1. The PPCA is a chronically under-funded and under-staffed institution and its Executive Chairman has agreed publicly that this hampers the effectiveness of the Authority. He has said that the PPCA ideally should have a complement of thirty-one investigators, but has only fifteen. He also admitted that although it was announced in Parliament that the PPCA would carry out the investigations currently being done by the Complaints Division and the Office of Professional Responsibility of the Jamaican Constabulary Force, that has not materialized because of inadequate funding²⁶.
2. The Authority investigates only a small fraction of the total number of cases of fatal shootings by the Police in any year. Of these cases, the outcomes are inadequate to make any significant impact on Police accountability. For example, with an annual average of 140 fatal shootings by the Police, the 2001-2002 PPCA report indicates that the Authority only investigated 26 fatal shootings, and of this number 14 cases were sent to the Director of Public Prosecutions for a ruling. Of the 14, 1 was referred for

Coroner's Inquest, 1 resulted in criminal charges and 12 were not yet ruled on at the time of writing the report²⁷.

3. Continued housing of the PPCA in a building that also houses Police departments leads to complainants being exposed to members of Jamaica Constabulary Force, against whom the citizens have made their complaints. This results in a lack of credibility regarding the Authority's independence from the JCF;

4. Name of the organization confuses people about the Authority's independence from the Police Force;

5. The oversight body lacks any power to follow up its recommendations and report on whether these are being accepted by the police force;

6. It lacks resources to supervise the BSI investigations and there is an imminent need to improve the level of cooperation exhibited by some of the investigators of the BSI.

These following principles can guide those interested in police accountability in any part of the commonwealth:

PRINCIPLES FOR AN EFFECTIVE CIVILIAN REVIEW BOARD

1. **Independence.** The power to conduct hearings, subpoena witnesses, and report findings and recommendations to the public.
2. **Investigative powers.** The authority to independently investigate incidents and issue findings on complaints.
3. **Mandatory police cooperation.** Complete access to police witnesses and documents through legal mandate or subpoena power.
4. **Adequate funding.** Should not be a lower budget priority than police internal affairs systems.
5. **Hearings.** Essential for solving credibility questions and enhancing public confidence in the process.
6. **Reflect community diversity.** Board and staff should be broadly representative of the community it serves.
7. **Policy recommendations.** Civilian oversight can spot problems and provide a forum for developing reforms.
8. **Statistical analysis.** Public statistical reports can detail trends in allegations, and early warning systems can identify officers who are subjects of unusually numerous complaints.
9. **Separate offices.** Should be housed away from police headquarters to maintain independence and credibility with the public.
10. **Disciplinary role.** Board findings should be considered in determining appropriate disciplinary action²⁸. (ACLU 1997)
11. **Follow up on recommendations.** It should be empowered to follow up on action taken by the police chief on the basis of its recommendations by asking for action taken reports etc.

END NOTES:

¹ Neild, Rachel (2000), *Themes and debates in public security reform: A manual for civil society, external controls*, Washington Office on Latin America, July 2000, http://www.wola.org/publications/pub_security_themesdebates_externalcontrols.pdf (accessed on 10th December 2004)

² Stone, C (2004), *The double demand on police and the role of police oversight in democratic societies: an international perspective*. Address to the Conference for Policing Oversight in Africa: Accountability and transformation, Johannesburg, South Africa, 26-29 January 2004, pg.2

³ Walker, S. (2001), *Police accountability: the role of civilian oversight*, Wadsworth: Belmont, C.A.

⁴ Walker, S. (2001), *Police accountability: the role of civilian oversight*, Wadsworth: Belmont, C.A.

⁵ Newham, Gareth (June 2004), *Local Level Civilian Oversight of the Metropolitan Police Departments in South Africa*, research report written for Centre for the Study of Violence and Reconciliation, (CSVR), Johannesburg.

⁶ Newham, Gareth (June 2004), *Local Level Civilian Oversight of the Metropolitan Police Departments in South Africa*, research report written for Centre for the Study of Violence and Reconciliation, (CSVR), Johannesburg.

⁷ American Civil Liberties Union (ACLU) (1997). *Fighting Police Abuse: a Community Action Manual*. New York, USA: ACLU as quoted in Neild, Rachel (2000), *Themes and debates in public security reform: A manual for civil society, external controls*, Washington Office on Latin America, July 2000, http://www.wola.org/publications/pub_security_themesdebates_externalcontrols.pdf (accessed on 10th December 2004)

⁸ Finn, P. (2001) *Citizen Review of Police: approaches and implementation*, US Department of Justice. Office of Justice Programme. National Institute of Justice: Washington D.C. Pp 6-12, as quoted in Newham, Gareth (June 2004), *Local Level Civilian Oversight of the Metropolitan Police Departments in South Africa*, research report written for Centre for the Study of Violence and Reconciliation, (CSVR), Johannesburg.

⁹ Finn, P. (2001) *Citizen Review of Police: approaches and implementation*, US Department of Justice. Office of Justice Programme. National Institute of Justice: Washington D.C. Pp 6-12, as

quoted in Newham, Gareth (June 2004), *Local Level Civilian Oversight of the Metropolitan Police Departments in South Africa*, research report written for Centre for the Study of Violence and Reconciliation, (CSVR), Johannesburg.

¹⁰ Finn, P. (2001) *Citizen Review of Police: approaches and implementation*, US Department of Justice. Office of Justice Programme. National Institute of Justice: Washington D.C. Pp 6-12, as quoted in Newham, Gareth (June 2004), *Local Level Civilian Oversight of the Metropolitan Police Departments in South Africa*, research report written for Centre for the Study of Violence and Reconciliation, (CSVR), Johannesburg.

¹¹ Finn, P. (2001) *Citizen Review of Police: approaches and implementation*, US Department of Justice. Office of Justice Programme. National Institute of Justice: Washington D.C. Pp 6-12, as quoted in Newham, Gareth (June 2004), *Local Level Civilian Oversight of the Metropolitan Police Departments in South Africa*, research report written for Centre for the Study of Violence and Reconciliation, (CSVR), Johannesburg.

¹² See Finn, P. (2001) *Citizen Review of Police: approaches and implementation*, US Department of Justice. Office of Justice Programme. National Institute of Justice: Washington D.C. p-6; Gissiner, M.A (2001), *An overview of the various police complaints systems of the world*, a presentation delivered at the Independent Police Complaints Council Secretariat entitled 'The Police, The People, The IPPC' held on 8th March 2001 in Hongkong. <http://www.ipcc.gov.hk/en/pdf/Gissiner%20English.pdf> (accessed on 4th March 2005)

¹³ Gissiner, M.A (2001), *An overview of the various police complaints systems of the world*, a presentation delivered at the Independent Police Complaints Council Secretariat entitled 'The Police, The People, The IPPC' held on 8th March 2001 in Hongkong. <http://www.ipcc.gov.hk/en/pdf/Gissiner%20English.pdf> (accessed on 4th March 2005)

¹⁴ Gissiner, M.A (2001), *An overview of the various police complaints systems of the world*, a presentation delivered at the Independent Police Complaints Council Secretariat entitled 'The Police, The People, The IPPC' held on 8th March 2001 in Hongkong. <http://www.ipcc.gov.hk/en/pdf/Gissiner%20English.pdf> (accessed on 4th March 2005)

¹⁵ In a nutshell, Category 1 complaints can be described as:

- behaviour that constitutes corruption and other serious criminality
- matters warranting dismissal from the Police Service
- matters in which it is unlikely that there will be public confidence in an internal police investigation (Police Integrity Commission, Special Report to Parliament, *Project Dresden II: Second audit of the quality of internal investigations*, June 2003, pg. 3)

¹⁶ For the Police Integrity Commission: Section 29 (Enter public premises), Section 45(2) (Issue search warrants) Crime and Misconduct Commission: Section 86 (Search warrant applications), Section 92 (Powers under search warrants)

¹⁷ Listening Devices Act 1984

¹⁸ Telecommunications (Interception) Act 1979

¹⁹ For PIC Section 20 (Evidence and Procedure) and Section 33 (Public and Private Hearings), for CMC Sections 176-183

²⁰ Walker, S. (2001), *Police accountability: the role of civilian oversight*, Wadsworth: Belmont, C.A.

²¹ Newham, Gareth (June 2004), *Local Level Civilian Oversight of the Metropolitan Police Departments in South Africa*, research report written for Centre for the Study of Violence and Reconciliation, (CSVR), Johannesburg.

²² Masuku, Themba (2004), *Accountability systems in the South African Police Service*, draft report written for Centre for the Study of Violence and Reconciliation, (CSVR), Johannesburg.

²³ Neild, Rachel (2000), *Themes and debates in public security reform: A manual for civil society, external controls*, Washington Office on Latin America, July 2000, http://www.wola.org/publications/pub_security_themesdebates_externalcontrols.pdf (accessed on 10th December 2004)

²⁴ Neild, Rachel (2000), *Themes and debates in public security reform: A manual for civil society, external controls*, Washington Office on Latin America, July 2000,

http://www.wola.org/publications/pub_security_themesdebates_externalcontrols.pdf (accessed on 10th December 2004)

²⁵ As noted by Goffe, Susan, *Watching the watchdogs: a Jamaican NGO's experience with lobbying for police oversight and accountability*, a paper presented at the Independent Complaints Directorate Conference for policing oversight and accountability: January 26-29, 2004, Johannesburg, South Africa.

²⁶ Nationwide, Power 106 FM, August 12, 2003, interview with Justice Lloyd Ellis, PPCA Chairman; interviewers Cliff Hughes and Ralston Hyman. Towards the end of the interview it was put to Justice Ellis that "a civilian led Authority is *potentially* a potent instrument, but if it is starved of funding, starved of staffing to really do its job effectively, all we are engaged in is form and not substance." His response was "I am not going to disagree with you. Power and potency without resources to carry it out is empty. You're correct." As reported by Goffe, Susan, *Watching the watchdogs: a Jamaican NGO's experience with lobbying for police oversight and accountability*, a paper presented at the Independent Complaints Directorate Conference for policing oversight and accountability: January 26-29, 2004, Johannesburg, South Africa.

²⁷ .Jamaicans For Justice (2003), *Jamaica's Human Rights Situation*, 2003, p.5 www.jamaicansforjustice.org

²⁸ 1-10 are drawn from American Civil Liberties Union (ACLU) (1997). *Fighting Police Abuse: a Community Action Manual*. New York, USA: ACLU