



## **Chapter 6**

# **EXTERNAL ACCOUNTABILITY**



ountries across the Commonwealth have sought to augment government and internal accountability systems with other external or civilian - meaning non-police - oversight mechanisms. As governments increasingly embrace the philosophy of democratic policing, attempts are on to make policing more transparent, involve outsiders, build public confidence, allay fears of bias, assure impartiality of investigation, make the receipt of complaints easier, reduce abuse of power and misconduct, change the internal culture and ensure ever better performance. It is hoped that new external civilian oversight systems will complement existing mechanisms and together create a web of accountability from which it is increasingly difficult for police misconduct to escape without consequences.

Some of the best practice in civilian oversight comes from within the Commonwealth. Various named<sup>202</sup> and designed, such bodies fall into two broad categories: organisations exclusively dedicated to investigating, reviewing and monitoring police related complaints; and agencies such as ombudsmen and national human rights institutions with broader mandates that embrace oversight of police as well. Thirty-six countries in the Commonwealth have ombudsmen<sup>203</sup> and twenty jurisdictions have national human rights institutions<sup>204</sup> but there are fewer specialised police complaints agencies.

Ombudsmen primarily investigate cases of maladministration by government bodies but are increasingly expanding their scope to broader issues, including human rights and corruption, and hence intensifying their scrutiny of the police. In the Fiji Islands, the link between the Ombudsman and human rights protection is very clear - the Ombudsman is also the constitutionally mandated Chairperson of the Fiji Human Rights Commission. In Ghana, the Commission on Human Rights and Administration of Justice is actually a combination of a National Human Rights Institution and an Ombudsman. In Papua New Guinea, the office of the Ombudsman has recently established a specific Human Rights Unit, and it appears police complaints will be a key area of its work. In Malawi, the Ombudsman is mandated to investigate and take legal action against government officials responsible for human rights violations, including police brutality.

National human rights institutions, usually known as human rights commissions, investigate complaints against the police as part of their overall mandate to promote and protect human rights. Apart from the general power to investigate cases of human rights violations, many Human Rights Commissions, such as in Sri Lanka, India, Tanzania, Uganda and Malaysia, also have the right to visit and report on places of detention.

### **Special Powers: Human Rights Commission of Mauritius**

While other Human Rights Commissions investigate complaints about police officers as part of their broader role, the mandate of the Mauritian National Human Rights Commission provides it with strong oversight powers over the police. It is explicitly authorised not only to investigate complaints against the police, but also to supervise their internal complaints management system. Notably, whenever anyone complains about an act or omission of a police officer, the Chief of Police must forward the complaint to the Human Rights Commission, and inform it of any criminal or disciplinary proceedings taken or intended. The Commission can ask for more information and if the police decide not to take any criminal or disciplinary proceedings, the Commission itself can enquire into the matter.<sup>205</sup>

Civilian police complaints agencies that exclusively investigate complaints against the police have often been set up in response to policing problems that arose during long periods of violence. In Northern Ireland and South Africa for example, police-community relations were completely eroded by the conflict. In countries such as Sri Lanka, systemic discrimination against minorities, poor policing and egregious human rights violations that were highlighted by the international community have prompted governments to create these bodies. Elsewhere, as in Trinidad and Tobago and Guyana, the civilian oversight agencies were put in place following instances of brutal and abusive police practices rose.

The track record for establishing such agencies varies across the Commonwealth. Many countries with documented poor policing, such as Bangladesh, Swaziland and Mozambique, have none of these mechanisms while others like Malaysia and Maldives have opted to have just one. India has a National Human Rights Commission as well as separate state human rights commissions<sup>206</sup> but does not have a single dedicated civilian oversight mechanism for its 35 police forces, many of which are frequently cited for excessive violence and abuse of power. On the other hand, some countries that have adopted democratic policing practices have these agencies at national or sub-national levels or both. In Canada, for instance, each police service (except in Prince Edward Island) has a dedicated civilian oversight agency in addition to an oversight agency for the federal Royal Canadian Mounted Police.

Where multiple oversight agencies contribute to police accountability, a system of coordination and referrals carves out jurisdictions and protects against overlapping, duplication, and contradictory recommendations. In South Africa, which has both a Human Rights Commission and an independent police complaints agency, the Commission refers all police-related complaints to the latter. New South Wales, Australia, has a system of classifying and managing complaints that allocates specific roles and responsibilities to the Police Integrity Commission, the Police Service and the Ombudsman. The state Police Service retains first responsibility for investigating most complaints "to foster high standards of professionalism and integrity, and to make it primarily responsible for its own discipline."<sup>207</sup> The Ombudsman oversees these investigations and can ask the Commissioner of Police to review the outcome or can directly investigate the complaint. Meanwhile the Police Integrity Commission is mandated to address serious matters of corruption and misconduct, particularly if these are systemic. This may involve establishing joint inquiries with the police or referring cases back for investigations - in such cases, it also monitors police investigations.

Complaints to oversight bodies can come through many channels: from the public, referred from the police establishment itself, or additionally as in South Africa, from the Minister in charge or even Parliament. Complaints authorities may also initiate their own inquiries independently of any specific complaint being made. Elsewhere, as in New South Wales, certain categories such as deaths in custody and those involving racism within the police are compulsorily referred to the civilian oversight body.

Much of how effectively complaints authorities, ombudsmen's offices and human rights commissions perform their functions depends on how truly separate they are from police and executive influence, and how autonomous and well embedded their status is in the country's legal architecture. Their effectiveness also depends upon the width and clarity of their mandate, the scope of their investigative powers, the composition and competence of their leadership and staff, and the adequacy and sources of financing. A particularly crucial



factor is their ability to compel obedience to their recommendations and the attention and clear support their reports and findings receive at the hands of the government and police. These minimum requirements have been internationally recognised and summed up in the Paris Principles<sup>208</sup> for National Human Rights Institutions, but they also apply equally to any oversight agency. The Commonwealth has also compiled National Human Rights Institutions Best Practice. Unfortunately though, not all civilian oversight agencies in the Commonwealth abide by even these very basic standards.

#### **Minimum Requirements for a Successful Oversight Body**

- Independence: should be independent of the executive and the police and empowered to report directly to Parliament.
- Sufficient powers: should have the authority to independently investigate complaints and issue findings. This requires concomitant powers to conduct hearings, subpoena documents and compel the presence of witnesses including the police. It should also be able to identify organisational problems in the police and suggest systemic reforms.
- Adequate resources: should have sufficient funds to investigate at least the more serious complaints referred to it. Skilled human resources to investigate and otherwise deal with complaints should also be available.
- Power to follow up on recommendations: should be empowered to report its findings and recommendations to the public, and to follow up on actions taken by the police chief in response to its recommendations. It should also be able to draw Parliament's attention to instances where police take no action.

## **INDEPENDENT MOORINGS**

The main purpose of setting up civilian oversight mechanisms is to ensure that complaints against the police will not be influenced in an untoward or biased manner, particularly by the executive. Independence is determined by the extent to which the body is at arms length from the executive and the police. Firm constitutional or statutory underpinnings that clearly lay out jurisdiction, purpose and parameters, such as in South Africa and Ghana, protect the body from political whim. In contrast, the Human Rights Commission in the Maldives was until recently based on Presidential decree and therefore wholly subject to executive control. It is hoped that its new statutory status will make it an effective mechanism for oversight.

Even when oversight agencies are legally independent, political pressure can be applied in other ways. Starving voices critical of the government of financial resources is one effective way of hobbling their activities. In Cameroon, for example, the Human Rights Commission's funding was dramatically reduced for two years after it criticised government abuses in a confidential report in 1992. Similarly, Zambia's Human Rights Commission lost the government premises it was promised after it commented on the torture of coup detainees in 1996.<sup>209</sup> Financial independence is ensured when budgets are approved by parliament not the executive, and then administered by the commission itself without interference. One of the reasons that some human rights commissions, like in Uganda, are autonomous, critical of government and have been able to address cases of police brutality, is that the

law mandates the parliament - not the executive - to allocate adequate resources and facilities for the Commission to function effectively.

Independence and credibility are also improved when the oversight body comprises leadership and staff drawn from outside government and police, such as the Independent Police Complaints Commission in England and Wales, which is staffed entirely by civilians.<sup>210</sup> Elsewhere, the closed processes and narrow pool from which leaderships and staff are chosen have seriously eroded perceptions of impartiality. In India, where policing is seen to be particularly malleable in the hands of the political executive, the nomination of a previous head of a federal police organisation as a member of the National Human Rights Commission has recently been challenged in the highest court.

Lack of skills can hamper the work of oversight bodies, particularly in small countries. In one case in Sri Lanka in 2003, the Human Rights Commission found allegations of torture of a minor to be false. When the case was reviewed by the Commission following international criticism, it found that not only were the torture allegations well-founded but also that the Commission's investigator had been biased towards the police, and appeared to lack necessary training.<sup>213</sup> In such cases where the skill pool is small, oversight agencies sometimes second skilled police investigators. However, without civilian superiority in staffing, the perceived bias that police personnel may hold towards their own networks and culture, particularly if they then return to the police establishment following their secondment, may, in the public mind, offset the benefits of their investigative skills.

## **STRONG POWERS**

Strong investigative powers are a key factor for the success of oversight agencies. The most effective oversight bodies require not only powers to investigate independently but also to call for evidence and compel police co-operation. They must also be able to make recommendations about individual cases as much as systemic improvements that will be acknowledged and acted upon. Apart from the power to compel the presence of witnesses including police, as well as subpoena documents, the Police Integrity Commission of New South Wales, Australia, has the right to obtain search warrants, listening device or telecommunications interception warrants, and ensure witness protection.<sup>214</sup>

It is almost inevitable that there is a tension between the police establishment and an oversight mechanism but when this tension turns into outright disobedience and disregard, it undermines accountability. For example, in 2004 several staff of Sri Lanka's Human Rights Commission were threatened and manhandled when they visited a police station to

## **Shining a Light on Corruption**

Strong leaderships can come out on top even in unsupportive environments. Vanuatu's first Ombudsman enjoyed tremendous public confidence because of her fierce campaign against corruption. Her success created enough political upset for the Cabinet to think of repealing the Ombudsman Act and the Prime Minister even argued that Melanesian culture did not allow women to criticise men.<sup>211</sup> Undeterred by this, not only did the Office of the Ombudsman vigorously publish public reports, it used innovative ideas to ensure that their findings were disseminated widely. Given that only about half of Vanuatu's population is literate, she used radio and public appearances to criticise police<sup>212</sup> for persistent slackness, indiscipline, arrogance and ignoring their legitimate duty. Every new Ombudsman report was followed by a press release and a radio interview with the official(s) implicated in the report. In campaigning against domestic violence she encouraged women to report any police inaction to the Ombudsman's Office. Despite public support for her work, the government of Vanuatu did not renew her contract when her term ended in 1999.

investigate complaints of torture.<sup>215</sup> In Guyana, despite a statutory requirement to submit a Criminal Investigation Department file to the Police Complaints Authority when an officer has unlawfully killed or wounded a citizen, the police consistently failed to do so. In 1991, the police submitted 29 such reports, a year later this was down to only nine and in the five years between 1995 and 2001 they submitted just two files - despite increased reports of police abuses.<sup>216</sup> In order to deter such behaviour, in countries such as Uganda and Tanzania, wilful obstruction and interference is an offence.<sup>217</sup>



In some jurisdictions, the law itself restricts the investigative abilities of oversight agencies. In Tanzania, the President can direct the Human Rights Commission not to investigate if there is a real and substantive risk of "prejudicing national defence or security".<sup>218</sup> Similarly, in Botswana, the Ombudsman cannot investigate "action taken for the purpose of protecting the security of the state or investigating crime". The Ombudsman is also forbidden to investigate "action taken with respect to orders or directions to the...Police Force or members thereof."<sup>219</sup>

In a few countries, oversight agencies have no powers at all to undertake investigations of their own and can only review police investigations into complaints. In Trinidad and Tobago, this has led the Police Complaint Authority's chairperson to lament that public confidence in the Authority is lacking because "complainants... view the role of the Authority merely as a 'post box', receiving complaints, forwarding them to the Police, receiving reports and forwarding them to the complainants."<sup>220</sup>

### An Improved Approach To Public Complaints

Some countries that are committed to democratic policing practices continuously seek to improve their policing by ensuring increased accountability at all levels. In England and Wales, the Independent Police Complaints Commission, which has investigative powers, recently replaced the earlier Police Complaints Authority, which did not have these powers and had suffered criticism for its apparent lack of effectiveness.

Established in 2004, the Commission has wide powers to oversee the functioning of the police and investigate complaints. Although the primary role of investigating wrongdoing remains with the police, the Commission can supervise or direct these investigations and approve the police's choice of investigator. The police have an obligation to refer all very serious cases to the Commission, which can either investigate a case itself, or control and direct the police's handling of it. The Commission has already carried out 29 independent investigations and managed 120 other serious complaints against the police.<sup>221</sup>

For those not satisfied with the outcome of the police investigations, the Commission acts as an appellate mechanism. Police must comply with its findings on appeal matters, including taking disciplinary action if instructed. It has upheld more than 20% of appeals by the public about the way a complaint was dealt with by a local police force.<sup>222</sup> The Commission also audits how the police handle complaints, can issue statutory guidance on this, and has already set new improved standards for the police on handling complaints.

Experience indicates that nowhere do oversight agencies investigate all public complaints against the police. Most agencies have a system for categorising complaints and retain powers to investigate those that are either serious (involving death, torture, or racial bias) or in the wider public interest. Others are usually sent back to the police for investigation but supervised by the agency. However, some agencies such as the Police Complaints Authorities in Jamaica, Guyana and New Zealand, and Sri Lanka's National Police Commission, delegate all investigation of complaints back to the police. Whether done for practical reasons of staff shortage or on the more philosophical rationale that the police must retain primary responsibility to ensure their own internal systems work, total delegation can erode credibility. Where police are perceived as corrupt, brutal or biased, total delegation - especially when not accompanied by rigorous supervision of competence and progress - decreases the rationale for even having an external civilian agency.



Best practice indicates that apart from investigating individual complaints, oversight bodies also need to be able to review patterns of police behaviour and the functioning of internal discipline and complaints processing systems. Without these powers to monitor and review trends, they may end up receiving repeated individual complaints about similar forms of police misconduct, without being able to identify and address their root causes.

In New South Wales, Australia, the Police Integrity Commission in 1998 expressed concerns about how the Police Service was investigating Category 1 complaints.<sup>223</sup> This category includes cases that involve corruption, serious criminality or warrant dismissal, as well as those in which it is unlikely that there will be public confidence in an internal police investigation. The Police Integrity Commission investigates most such cases, but it can refer them back to the police for investigations. Based on a qualitative audit of 81 internal investigations, the Commission recommended that the Police Service change its existing complaints management system. As a result, the police organisation has set up Complaint Management Teams tasked with allocating resources for investigations, as well as monitoring and evaluating the quality of investigations in every local area command (where the bulk of investigations are done). An internal Complaints Management Unit has also been set up to monitor and approve all Category 1 investigations prior to these being finalised and reported to oversight agencies.

## ADEQUATE MONEY

Even with a plethora of powers, oversight bodies are constrained in their ability to hold the police accountable without sufficient financial resources. Even if not being withheld for illegitimate political reasons, shortage of funds can be a serious limiting factor. Executives baulk at the costs of maintaining multiple agencies, but the costs of a civilian oversight agency often amount to no more than a small fraction of the whole policing budget. Even small states like Lesotho have decided that creating a specialist agency to deal with police complaints is worth the investment when examined against the cascading benefits that can result from better policing. In many small states where resources do not permit the creation of a specialised agency, existing bodies like the office of the ombudsman or national human rights institutions with wider human rights or good governance mandates can play a valuable role in improving overall police accountability. Experts argue<sup>224</sup> that creating a specialist division within these multifaceted bodies, solely dedicated to dealing with the police, would be the most effective approach.

### Starved of Funds...

The chronic under-funding of Jamaica's Police Public Complaints Authority has prompted its chief to agree publicly with radio commentators 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."<sup>225</sup> The Authority investigates a small fraction of the total cases of fatal police shootings in any year, insufficient to make any significant impact. Despite an annual average of 140 fatal shootings by the police, the Authority only investigated 26 fatal shootings in the 2001-02 year.<sup>226</sup> Though armed with the powers to do so, it lacks resources to oversee police investigations and struggles to obtain co-operation from police.

## MAKING RECOMMENDATIONS

Experience shows that even independent oversight agencies with sufficient resources and strong investigative powers have proven ineffective if the police and governments routinely ignore their recommendations. Yet there are very few civilian oversight mechanisms like the Ugandan Human Rights Commission<sup>227</sup> and the Independent Police Complaints Commission in England and Wales<sup>228</sup> that can make binding decisions.

Even where these agencies cannot make binding decisions, impact is felt if they have strong powers to monitor police implementation of recommendations and to call for explanations from government when recommended remedial steps or reforms are not acted upon. Sadly, most of the police complaints agencies in the Commonwealth (including those in New Zealand, Jamaica, St. Lucia, Guyana and Trinidad and Tobago) lack effective powers to follow up on their recommendations, with the result that the police may choose to disregard them. A similar situation prevails with most ombudsmen and national human rights institutions, causing public hopes of effective remedies to be quickly lost.

In a few Commonwealth jurisdictions, however, the law requires the concerned Minister or police department to publicly respond to the recommendations of the external agency, making delays or inaction by the police and executive more difficult. In Tanzania, the police organisation has three months to advise the Human Rights Commission in writing about what it is going to do, while in India the government has one month to react to Commission reports. In Canada, the chief of the police must report on action taken on recommendations by the Commission for Public Complaints Against the RCMP (Royal Canadian Mounted Police). If the police reject the Commission's findings, a reasoned response must be sent to the Commission and to the concerned Minister, who also receives the Commission's response. Along with the Commission's annual report to Parliament, this ensures that the differences between the police and the Commission are statutorily brought to Parliamentary attention. This approach has been effective: about 80% of the Commission's adverse findings and recommendations are accepted by the police.<sup>229</sup> A similar approach in New South Wales, Australia, to seek a report about action taken has been successful in delivering results: of the 56 recommendations made prior to 2002-2003, over 90% were supported by the New South Wales Police and nearly half had been implemented.<sup>230</sup> Where the police have failed to comply with its recommendations, the Commissioner of Police must provide reasons.<sup>231</sup>

Where the government fails to abide by or inordinately delays implementation of recommendations, some Human Rights Commissions (including Tanzania and India) are empowered to approach the courts to get their recommendations enforced. After police had been strongly indicted for complicity in anti-Muslim violence in the state of Gujarat in 2002, the Indian National Human Rights Commission recommended that the police organisation and state government properly investigate cases, but the state government failed to do so. The Commission approached the Supreme Court in a particularly grave case where eye-witnesses had been threatened and so changed their testimony, resulting in the acquittal of the accused. On the basis of statements and investigations of the Commission, the Court ordered the state government and the police to review around 2,000 cases that had been closed by the police.<sup>232</sup>

Commonwealth countries are increasingly aware that the presence of at least one external, independent civilian agency to ensure independent and unbiased investigations into allegations of police abuse and non-performance can send the message that the police will be held accountable for wrong doing. Civilian agencies that are solely dedicated to dealing with complaints against the police have been the most successful in holding the police to account because as single focus agencies, they can develop expertise in policing issues and investigative techniques and, with greater knowledge, have increased capacity to analyse patterns of police conduct and performance. In any case, how ever independent oversight is structured, political will and strong leadership of both the police and the independent bodies is essential for building a truly accountable and responsive policing system.