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THE IDEA OF THE POLITICAL “INDEPENDENCE” OF THE POLICE: INTERNATIONAL INTERPRETATIONS AND EXPERIENCES

By
Philip Stenning¹

“Science must begin with myths, and with the criticism of myths”

- Karl Popper, in “The Philosophy of Science” (1957)

Abstract

This chapter serves to clarify some of the key concepts. By graphically illustrating the relationship between degrees of ‘control’ and degrees of accountability it is argued that the two concepts are not incompatible. The term independence is then used in the chapter to refer only to decision-making that falls in what is pictured as the fourth quadrant: ‘full accountability’ with ‘no control’. The chapter then outlines the scope or range of the potentially ‘independent’ decision-making tasks.

Stenning discusses the growth of the ‘doctrine of police independence’. It is argued that what we might assume is a widely held value favouring police independence is in fact unique to certain jurisdictions and the United Kingdom ‘roots’ to the Canadian police services are more questionable than many writers assume.

The main task of this chapter was to present an international perspective. The chapter provides an overview of police independence in England and Wales, Australia and New Zealand. Regarding England and Wales, the chapter concludes that the scope and practical implications of police independence remain ‘unclear and open to contestation and debate’. In Australia police independence tends to be limited by the way in which the Australian police services are organized—on a state and Commonwealth governmental level rather than having local or municipal forces. In New Zealand there is one single national police service and therefore no local authorities that could make demands or issue instructions to the police. The NZ police are governed directly by the central government. However, three recent factors have expanded the discussion in NZ regarding the issues that surround police-government relations: a governmental review of the administration and management of the New Zealand Police; controversy over the state visit of the President of China to NZ in 1999; and the introduction of a Bill to amend the existing Police Act.

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Introduction - the concept of “independence”

The concept of “independence” in governance has a number of dimensions, and it is important to identify these before considering how it has evolved in the context of policing in different jurisdictions.

Essentially, “independence” refers to autonomy in decision-making - that is, freedom from control, direction or undue influence by others. It may be considered as a feature of the *internal management* of an organization - as reflected, for instance, in the idea, which is sometimes floated, that a police constable is not subject to direction from superiors in deciding whether to arrest and charge someone² - or as a feature of the *external relations* of an organization - as reflected, for instance, in the idea that, with respect to certain policing decisions, the police should not be subject to direction by a police governing authority such as a police services board or a Minister. Independence thus always implies some kind of constraint on a particular relationship.

Independence and accountability

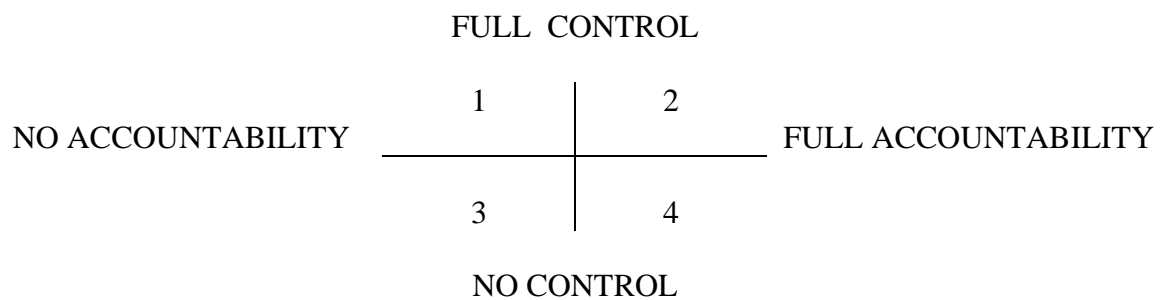
While independence is usually alluded to in terms of freedom from control or direction, there are some (especially in the policing context) who use the term more broadly to refer to freedom from requirements of *accountability* as well as freedom from control or direction. It is important, therefore, to be clear as to the relationship between the two concepts of independence and accountability. In this paper, I adopt a

² An idea that received judicial support from Lawton, L.J. in *R. v. Chief Constable of Devon and Cornwall, ex parte Central Electricity Generating Board* [1982] Q.B. 458, at 474, and more recently by Lord Steyn in *O’Hara v. Chief Constable of the Royal Ulster Constabulary* [1997] 1 All E.R. 129 [H.L.]. This notion was implicitly rejected, however, in the New Zealand case of *Police v. Newnham* [1978] 1 NZLR 844. See also Hogg & Hawker, 1983, and footnote 44, below.

formulation of this relationship that I have elaborated elsewhere, and which is derived from an observation by Goldring & Wettenhall in an article published in 1980:

"When we speak of the responsibility of statutory authorities, we are referring to two parallel and interlocking mechanisms. The first is the mechanism of control, which extends from the controlling person or institution to the controlled statutory authority. The second is the mechanism of answerability or accountability. The control mechanism provides a means for ensuring that the statutory authority acts, or refrains from acting, in certain ways. The answerability mechanism provides information to the controller, and may indicate the occasions in which the control mechanism is to be brought into play."
(Goldring & Wettenhall, 1980: 136)

Graphically the relationship between these two "parallel and interlocking mechanisms" may be displayed as follows:



From this it can be seen that when people speak of "independence" as freedom from both control and accountability, they are speaking of decision-making as being in quadrant 3 of this diagram, whereas when they use the term to refer only to freedom from control or direction, they are speaking of decision-making as being in quadrant 4. The distinction is critical, as I shall discuss further later, so it is important to keep it in mind in any discussion of "independence". For what it critically indicates is that independence and accountability need not necessarily be considered to be incompatible or inconsistent characteristics of an office or organization³. *Throughout*

³ In a 1978 article, Geoffrey Marshall usefully distinguished between two possible "modes" of accountability - what he called the "subordinate and obedient" mode (in which accountability is directly linked to direction and control, and what he called the "explanatory and co-operative mode" (in which it is not). Marshall argued that the "explanatory and co-operative" mode (quadrant 4 in my diagram, at p. 3, above) is more appropriate for police, at least with respect to their law enforcement functions. In particular, he wrote that: "If...in the field of law enforcement we have to give a calculated and

this paper, I use the term “independence” in its more limited sense to refer only to decision-making that falls within quadrant 4 of the above diagram, and so regard independence as entirely compatible with substantial accountability requirements.

The scope of independence

Of course, independence may be claimed (or conceded) with respect to *all or most* of an organization’s or official’s decision-making (as is the case generally, for instance, with judicial independence), or with respect to only certain (more or less clearly specified) areas of decision-making. In this respect, it may be helpful, in discussing the *scope* of independence, to differentiate between the following subjects of decision-making:

1. Resourcing - how much, and what kinds of, funds, equipment, staffing etc. will be made available to an organization
2. Organizational structure and management - how the organization will be structured, organized and managed
3. Organizational policies - general policies that the organization will be expected to adhere to in its operations
4. Priority-setting - the determination of priorities with respect to how the resources of the organization will be deployed
5. Deployment - how the organization will deploy the resources available to it, either generally or in particular circumstances
6. Specific operational decision-making - how a particular operation will be handled and managed

The dividing line between the last two of these is certainly the most difficult to delineate with any precision, and doing so has been one of the most common stumbling blocks in achieving any consensus on the scope and limits of any concept of “police independence”. In democracies at least, it is rare that any official or

unprejudiced answer in 1977 to the question whether civil liberties and impartial justice are more to be expected from chief constables than from elected politicians (whether on police committees or in the House of Commons or in ministerial departments) many liberal democrats would feel justified in placing more trust in the former than in the latter” : Marshall, 1978: 61-63.

organization is recognized as enjoying “independence” with respect to all these areas of decision-making. Determining to which of these areas the “independence” of an official or organization relates, therefore, is very important to understanding what that official’s or organization’s “independence” implies for its external relationships.

The concept of “police independence”

As in other areas of governance, the concept of “police independence” embraces a number of different ideas. First, as noted above, it may be applied to relations *within* a police organization (e.g. between a constable and his or her superior officers) or to an organization’s *external* relations with others (e.g. with a governing authority, or with “government” more generally). *In this paper, I consider police independence only as it may apply to the external relations of police.*

Secondly, even limiting one’s attention to police independence as a feature of the police’s external relations, a variety of external relationships may be considered. Thus, for instance, one might consider relations between the police and their governing authority, relations between the police and ministers or other elected officials or their “political” staff or assistants, relations between police and other public servants, relations between the police and the courts, relations between police and prosecutors, relations between the police and the media, relations between the police and members of the general public or representatives of special interest groups, etc., etc. *In this paper, because of the particular concerns of the Inquiry in commissioning it, my attention is focused almost exclusively on the **political** independence of the police - that is, on the external relations between the police and elected officials and their “political” staff or assistants, and other public servants such a departmental staff.* Other aspects of external police independence - in

particular the relations between police and the courts - will also occasionally be referred to.

The doctrine of “police independence”, to the extent that there is any agreement at all about its content, intent and implications, amounts essentially to a proscription against certain kinds of external (especially political) intervention in, or influence over, decision-making by police with respect to a limited range of matters. It is identifiable not so much as a clear-cut set of rules with self-explanatory application, as a broad legal principle expressed typically in rather general terms, the precise content, meaning, scope and application of which have been the subject of little or no consensus in the various jurisdictions in which it has been recognized.

Contrary to the claims of some commentators, it is not a long-established legal doctrine with an accepted or undisputed pedigree. Rather, the historical-legal pedigree claimed for it by its most committed proponents has been effectively discredited by almost every legal scholar who has carefully examined it.

The kinds of decisions to which the doctrine has been said to be applicable have variously been described as “quasi-judicial” or “law enforcement” decisions in “particular cases” (what, under the categories I itemised earlier, would be considered specific operational law enforcement decisions). The precise meaning, scope and application of such terms, however, have remained matters of debate, particularly when invoked in reference to the kinds of tactical decisions that police may find themselves having to make in undertaking public order policing in circumstances such as those that prevailed at Ipperwash in September 1995. Furthermore, as I shall illustrate, some formulations of the doctrine claim a much broader scope for it including, for instance, “law enforcement” policy, priority-setting and general deployment decisions.

An idea with a quite restricted passport

It is important to note at the outset that the doctrine of police independence is unique to certain common law jurisdictions and, at least until very recently, has been entirely the creation of judicial pronouncement (either from the bench or through the reports of commissions of inquiry), having no clear constitutional or statutory basis. In fact, in Canada and in many other common law jurisdictions, as I shall illustrate, it has not been easily reconcilable with apparently clear statutory language concerning the governance of police.

Equally important to note, is that the doctrine is by no means equally recognised in all common law jurisdictions. One can search case law and relevant literature in the United States largely in vain, for instance, for any significant recognition of, let alone commitment to, the doctrine of police independence as it has been articulated in countries such as England and Canada. The same is to a lesser extent true for Scotland⁴. Interestingly, one of the features of police governance that distinguishes these two jurisdictions from those common law jurisdictions in which the doctrine has been recognised is the relationship between police and prosecutorial authorities. Specifically, in both the United States and in Scotland, the tradition has been that with respect to the conduct of criminal investigations (i.e. with respect to those “quasi-judicial” decisions to which the English Royal Commission on the Police referred as the foundation for the doctrine of police independence), the police are subject to direction by, and are accountable to, prosecutors (the District Attorney in the United States, the Procurator Fiscal in Scotland).

⁴ Interestingly, in a recent article about Chief Constables in Scotland, the idea of police independence is mentioned only in passing, and only English references to it (notably the report of the 1962 Royal Commission on the Police, discussed below) are cited: Scott & Wilkie, 2001. For a much earlier discussion of the constitutional position of the police in Scotland, see Mitchell, 1962.

Outside common law jurisdictions, the doctrine of police independence, as formulated in common law jurisprudence, is virtually unheard of. Institutional arrangements for the governance of the police in the Netherlands, for instance, provide a good illustration of the approach to such issues in continental European countries. In that country, the governance of municipal police services is accomplished through what have been described as “three-cornered” or “triangular” discussions, or “trilateral consultations”, between three appointed officials - the police chief, the burgomeister (mayor) and the local prosecutor. In theory at least, the police chief is subordinate to the other two officials with respect to all major police decisions. With respect to criminal investigations and charges, the police chief is subject to the direction of the prosecutor (as in Scotland). Responsibility for decisions concerning public order policing, however, rests firmly and indisputably with the burgomeister, from whom the police chief is bound to accept and follow instructions with respect to such matters. In practice, as might be expected, prosecutors and burgomeisters commonly defer to the professional expertise of police chiefs with respect to routine and non-controversial police decisions, but no-one in Holland would suggest that such practical deference confers any legal “independence” on police chiefs with respect to such decisions⁵.

Of course, there is no less concern to avoid undesirable partisan or special interest influence over police decision-making in the United States or Scotland or continental European countries than in countries like England, Canada, Australia and New Zealand that I will be focusing on in the remainder of this paper. Rather, what the governance arrangements in these countries demonstrate is that the common law doctrine of “police independence” is not the only mechanism through which such

⁵ For a full discussion, in English, of the arrangements for police governance in the Netherlands, see Jones, 1995: Ch. 3 and 7, from which this brief account is derived.

concerns may be addressed and such undesirable influences averted. In fact it is a mechanism to achieve this objective that is only recognised and accepted in a very small minority of countries in the world, and not even in all of those having a common law tradition. I think that this is an important point for the Commission of Inquiry to keep in mind when considering the issue of relations between police and the government.

Doctrinal origins

The doctrine of police independence has historically been associated with the development of modern public police forces in the United Kingdom, subsequently being to a greater or lesser extent adopted and applied to police services in other countries that were modelled on those in the U.K. As I have elaborated elsewhere, police institutions in common law countries are traceable to two quite distinct models that were developed in the U.K. - the Royal Irish Constabulary (RIC) model and the “London Met” model⁶. The former, on which the provincial police services as well as the RCMP and its predecessor, the North West Mounted Police, in Canada were modelled, was characterised by military or quasi-military organization, tradition and rank structures, and was typically under the direct governance of a designated government minister. The “London Met” model, by contrast, was designed as a more civilian institution. While the original example of this model was headed by two Commissioners who were Justices of the Peace and answerable to the English Home Secretary, subsequent municipal and county adaptations of this model featured Chief Constables or Chiefs of Police as the heads of police organizations, and various kinds of local “police authorities” or “police commissions” (later “police services boards” in

⁶ For useful discussions of these two models, see King, 1956 and Stenning, 1996: Ch. 2.

Ontario) as the principal governing authorities to whom such Chief Constables and Chiefs of Police were primarily accountable. Most of the police forces that Britain established in its overseas colonies during the nineteenth and early twentieth centuries were originally based on the RIC model rather than the London Met model, and in many of those countries (such as New Zealand) there is still only one, national police service accountable directly to the national government.

This is an important distinction to keep in mind because the earliest (19th Century) judicial decisions that have been identified as having provided the juridical foundation from which the modern doctrine of police independence later emerged were almost all concerned with the civil and administrative relationships between local municipal police forces and their local governments or local police authorities or police commissions. Only later, in the 20th Century, notably in Australia, did legal principles developed in these early decisions come to be invoked and applied in cases involving police forces based on the RIC model (i.e. those, such as the Ontario Provincial Police, headed by Commissioners who were directly answerable to designated government Ministers). Principles that were originally developed to govern legal relations between local police forces and their local employers, in the context of claims of civil liability and employment relations⁷, were thus questionably applied to relations of governance and accountability between members of state, provincial or national police forces and the government ministers responsible for them. And, as I noted earlier, and will illustrate further below, such principles were commonly, on their face, incompatible with apparently clear statutory language delineating such relations.

⁷ The concern here was that although locally employed, such police were subject to law enforcement duties that were determined by state or national laws. It was felt to be inappropriate for local authorities to be held civilly liable for the performance of such duties by the police.

Experience with the doctrine in three common law jurisdictions

Despite all the questionable aspects of it to which I have referred, the doctrine of the political independence of the police has flourished and received almost totemic and enduring recognition and respect in several common law jurisdictions, including Canada. In what follows, I consider the history of, and recent developments with respect to, the doctrine in Britain (at least, England and Wales), Australia and New Zealand. In each case I focus on developments during the last 30 – 40 years.

(1) England and Wales

As I noted earlier, the modern doctrine of police independence was a creation of the English judiciary, and originated in judicial decisions in cases in which the extent to which the police were subject to political direction or control was not the principal concern. Rather, the legal issue involved in these cases was whether the relationship between a police officer and the government that hired and paid him was the legal relationship of “master and servant” for the purposes, respectively, of the liability of the corporation for the wrongful actions of the police officer⁸, and a suit for compensation for the loss of his services when he was injured. In these cases it was held that a police officer is not to be considered a “servant” for these purposes⁹. Geoffrey Marshall, in his 1965 book *Police and Government*, has exhaustively examined and critiqued this earlier case law, and there is no need for me to repeat his

⁸ The main cases are: *Enever v. The King* [1906] 3 C.L.R. 969; *Fisher v. Oldham Corporation* [1930] 2 K.B. 364; and *Attorney General for New South Wales v. Perpetual Trustee Company* [1955] A.C. 477. Relevant North American cases are reviewed in Stenning (1982), Ch. 4. See also (re Australia) *Chapman v. Commissioner of the Australian Federal Police* (1983) 76 FLR 428, and *R. v. Commissioner of Police, ex parte Ross* [1992] 1 Qd. R. 289. The idea that a police officer is not a “servant” of the Crown for the purposes of vicarious liability was rejected in the South African case of *Sibiya v. Swart* (1950) S.A.L.R. 515.

⁹ One of the Australian judges (Dixon, J.) in the *Perpetual Trustee* case indicated that he felt constrained to follow and apply the court’s earlier decision in *Commonwealth v. Quince* (1944) 68 CLR 227 (which involved a member of the armed forces, rather than a police officer), but that were the matter to be decided afresh, he would hold that the relationship between the Crown and a sworn staff member was an employment one: (1952) 85 CLR 237, at 244. Similar sentiments were expressed by Marshall, J., in the later Australian case of *Konrad v. Victoria Police* (1998) 152 CLR 132, at 143-144.

analysis here. Suffice it to say that he concluded that certain judicial *obiter dicta*¹⁰ in these cases that were subsequently cited as the basis for a doctrine of the political independence of the police were neither doctrinally sound nor necessary for the decisions in these earlier cases.

In its 1962 report, the Royal Commission on the Police, having reviewed some of these earlier cases, concluded that: “These judgments establish the legal status of the constable today beyond doubt”, and noted that in submissions to it, police witnesses had “relied upon them in asserting the immunity of all ranks of the police service from interference or control by a police authority or anyone else in the discharge of their police duties.” The Commission commented that “[t]his claim leads to some odd and awkward consequences which it is our duty now to examine” (U.K., Royal Commission on the Police, 1962: 24).

Remarking that “it appears odd that the constable enjoys a traditional status which implies a degree of independence belied by his subordinate rank in the force”, the Commission argued that this “anomalous situation” is justified by the fact that

"the constable, in carrying out many of the purposes we described at the beginning of this chapter, ought to be manifestly impartial and uninfluenced by external pressures. For much of the time he is not acting under orders and must rely on his own discretion and knowledge of the law. This consideration applies with particular force to police activities that are sometimes described as “quasi-judicial”, such as inquiries in regard to suspected offences, the arrest of persons and the decision to prosecute.¹¹ In matters of this kind it is clearly in the public interest that a police officer should be answerable only to his superiors in the force and, to the extent that a matter may come before them, to the courts. His impartiality would be jeopardised, and public confidence in it

¹⁰ Most particularly, the following *dicta* of Griffith, C.J. in the Australian case of *Enever v. The King* [1906] 3 C.L.R. 969: “the powers of a constable, *qua* police officer, whether conferred by common law or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself....A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority...”

¹¹ There was no independent public prosecution service in England and Wales at the time (and indeed until the establishment of the Crown Prosecution Service there in 1985). Prosecutorial decisions were largely the responsibility of the police.

shaken, if in this field he were to be made the servant of too local a body.”

This passage from the Commission’s report provides a good illustration of how easily essential concepts become confused in the debate about police independence. For while the passage seems to start out with a concern about “external pressures” (such as direction, control, influence, etc. - the indicia of *control*), the Commission concludes that the public interest in avoiding such pressures justifies that a police officer should be “answerable” only to his superiors in the force and to the courts in “matters of this kind” (thus referring to a constable’s *accountability*). As I have pointed out earlier, however, there is no logical inevitability in such a conclusion (that protecting a person from unwanted control necessarily requires limiting his or her accountability). In fact, an opposite conclusion (that the greater a person’s independence, the greater and more transparent should be his or her accountability for its exercise in a liberal democracy - a position that the Commission actually eventually took) may well be preferable. Yet such conceptual confusion has unfortunately permeated much of the debate over police independence, both in England and elsewhere, as I shall illustrate further in this paper.

The Commission went on to consider the position of chief constables and whether (and if so in what respects) it was or ought to be different from that of constables generally. After noting that the position of chief constables vis-à-vis their police authorities was “unsatisfactory and confused”, the Commission also noted that:

"The duties which it was generally agreed in the evidence should be performed by chief constables unhampered by any kind of external control are not capable of precise definition, but they cover broadly what we referred to earlier as “quasi-judicial” matters, that is, the enforcement of the criminal law in

particular cases involving, for example, the pursuit of inquiries and decisions to arrest and to prosecute.”¹²

On this, the Commission concluded:

"We entirely accept that it is in the public interest that a chief constable, in dealing with these quasi-judicial matters, should be free from the conventional processes of democratic control and influence. We therefore recognise a field, wider in England than in Scotland¹³, in which the present legal status of the chief constable is clearly justified by the purposes of his appointment, namely the field of law enforcement in relation to particular cases."

The Commission then went on to consider the position of chief constables with respect to "other matters than the enforcement of the law in particular cases", which it described in the following terms:

"The range of these activities is wide, and the present legal status of the chief constable is widely regarded as providing him with unfettered discretion in their exercise - although, as we said earlier, the Association of Municipal Corporations question this. Thus he is accountable to no-one¹⁴ and subject to no-one's orders, for the way in which, for example, he settles his general policies in regard to law enforcement over the area covered by his force, the disposition of his force, the concentration of his resources on any particular type of crime or area, the manner in which he handles political demonstrations or processions and allocates and instructs his men when preventing breaches of the peace arising from industrial disputes, the methods he employs in dealing with an outbreak of violence or of passive resistance to authority, his policy in enforcing the traffic laws and in dealing with parked vehicles, and so on."

It will be noted that this list includes many of the categories of decisions that I listed earlier in this paper (above at p. 3).

¹² The Commission noted that even with respect to these kinds of decisions Chief Constables were statutorily subject to the powers and authority of the Director of Public Prosecutions in the case of "certain grave offences".

¹³ The Commission noted that the police in Scotland "a decision to prosecute, and the prosecution itself, are the concern of a judicial officer, the public prosecutor; and chief constables are required by section 4(3) of the Police (Scotland) Act, 1956, to comply with such lawful instructions as they may receive from a public prosecutor in relation to the investigation of offences."

¹⁴ Note that here once again the Commission confounds issues of control and accountability.

The Commission concluded that: “It cannot in our view be said that duties of the kind which we have described require the complete immunity from external influence that is generally acknowledged to be necessary in regard to the enforcement of the law in particular cases.” Accordingly, the Commission canvassed three options with respect to decision-making by chief constables on such matters. Under the first option:

“While the chief constable would continue to enjoy immunity to orders, he would nevertheless be exposed to advice and guidance of which he would be expected to take heed. If he persistently disregarded and flouted such advice his fitness for office would be in question. In this manner an element of supervision would be exercised over the chief constable’s actions, but there would be no interference with law enforcement in particular cases.”

The second option that the Commission considered as “another way of improving the control over chief constables without altering their present legal status” was “to increase the cohesion of separate forces by strengthening the links between them, and by superimposing over the whole police service a more effective system of Government inspection.”

The third option was “to place chief constables under the direct control of either the local or the central government, and so to convert their present legal status to the status of local authority or Crown servants.”

The Commission rejected outright the option of subordinating chief constables to the direct control of local authorities, as this would not, in the Commission’s view, “make for the preservation of the impartiality of the police in enforcing the law.” What it recommended instead was a combination of the first and second options.

Specifically, The Commission recommended that local police authorities should be recognised as having legitimate authority to call for confidential reports from their chief constables on “other matters than the enforcement of the law in

particular cases”, and to offer “guidance and advice” to the chief constable on such matters. By way of a check on possible abuse of this authority, the Commission recommended that a chief constable should have the right to refuse to submit a report to the police authority “on police activities concerned with law enforcement”¹⁵, subject to a determination of the matter by the Home Secretary. The Commission describe the relationship it thus envisaged between a police authority and its chief constable in the following terms:

“...the authority’s role cannot, under the arrangements which we propose, extend beyond the giving of advice; and it will not be entitled to give orders or instructions to a chief constable on matters connected with policing. Thus the relationship between a police authority and its chief constable will in this field differ from that between other council committees and their chief officers. In the latter case the role of the official is to advise the committee and to implement its decisions on matters of policy; but the decisions themselves are the responsibility of the elected body. In the case of the police these positions will be reversed. The role of the police authority will be to advise the chief constable on general matters connected with the policing of the area; but decisions will be the responsibility of the chief constable alone. However, the lack of local control which this relationship implies will be offset by increasing a chief constable’s accountability for his actions, and also by improvements in the cohesion of separate police forces, in ways we discuss in the next chapter, designed to make the police function more effectively as a national body.”

In addition to this advisory role, a police authority would also have a role, in conjunction with the central Home Secretary, in removing a chief constable from office on grounds either of personal misconduct or “because he has ceased to be effective and no longer enjoys its confidence in his ability to command the force properly.”

¹⁵ It is not clear from the report whether this language was intended to refer only to what the Commission had referred to as the “quasi-judicial” law enforcement decisions respecting investigation, arrest and prosecution in “the enforcement of the law in particular cases”, or to a broader subset of “activities concerned with law enforcement”.

While the Commission thus recommended that chief constables should enjoy a very substantial and broad measure of political independence vis-à-vis their local police authorities, it also recommended that they be subject to a much greater degree of control, other than with respect to matters of law enforcement in particular cases, by the Home Secretary with the assistance of inspectors of constabulary. The Commission summarized these recommended powers of the Home Secretary in the following terms:

"...Ministers will not merely be entitled to intervene in the local administration of the police where they have reason to suspect inefficiency: they will have a duty to do so. The administrative attitude of the central Departments towards police affairs will thus become positive. Their responsibility will be not merely to correct inefficiency, but to promote efficiency. With the advice of a strong professional element, incorporating a central research unit, they will for the first time be in a position to raise standards of equipment and of policing uniformly throughout the country. The development of a comprehensive manpower policy will promote the most economical and effective deployment of men. Forces too small to be thoroughly efficient will be amalgamated with others to make larger units. All forces will be commanded by chief constables appointed with the full approval of the Secretary of State, and their continued tenure office will also be subject to his approval. There will be effective arrangements to secure the collaboration of groups of forces and to provide ancillary services. All this activity will have the backing of statutory powers; and with these, and the power to call for reports, the Secretaries of State will be accountable to Parliament for the efficient policing of the whole country."

Although the details are not always self-evident from the Commission's report, let me now try to summarize the idea of "police independence" that seems to emerge from the Commission's report, in terms of the six categories of decision-making that I listed earlier (above, p. 3):

1. **Resourcing:** together, the police authority and the Home Secretary would have ultimate control over these decisions (i.e. no "police independence" here).

2. **Organizational structure and management:** within the resources available to him or her, a chief constable would enjoy a large measure of independence from control over such matters by the police authority, but would be subject to considerable direct and indirect control on such matters by the Home Secretary.
3. **Organizational policies:** the police authority would have no power of control over these, but the Home Secretary could set general policies to be adhered to by all police forces.
4. **Priority-setting:** same as for organizational policies, but the chief constable's independence with respect to such decisions would likely be somewhat greater.
5. **Deployment:** the police authority would have no control over these decisions, but the Home Secretary could, I think, exercise considerable influence, if not direct control, over *general* deployment decisions. The chief constable would enjoy complete independence with respect to deployment decisions in particular circumstances.
6. **Specific operational decision-making:** the chief constable would enjoy complete political independence with respect to "quasi-judicial" law enforcement decisions (i.e. decisions re investigation, arrest and prosecution in individual cases). With respect to other operational decision-making, the Commission's report is not specific.

The Commission drew a clear distinction, however, between direction and control ("orders" or "instructions") on the one hand, and "guidance and advice" on the other. Specifically, chief constables could be called upon to provide reports (accountability) to their police authorities, and would not be immune to "guidance and advice" from them, on any matter in categories 2 to 5 with respect to which police authorities were precluded from giving orders or instructions. The Commission's report is not clear, however, as to whether police authorities would be permitted to call for such reports or offer such guidance and advice with respect to matters other than "quasi-judicial law enforcement decisions in particular cases" in category 6.

I have described the recommendations of the Royal Commission on the Police on these matters in considerable detail because it can fairly be said that they more or

less set the broad contours (although not always the more precise details) of the idea of “police independence” in Britain ever since its report was presented in 1962, and have had enormous influence over the development of the concept in other common law jurisdictions.

Within six years of the publication of the Commission’s report, in fact, the idea of “police independence” that it had explored so carefully had become deeply and seemingly irrevocably entrenched in the thinking of police leaders, politicians, judges, academic commentators and others interested in matters of police governance in Britain. The main “tripartite” structure of police governance (chief constables, police authorities and the Home Secretary) that the Commission had recommended was legislated, with some modification, in the *Police Act, 1964*. Other than by implication, however, the Act did not spell out the scope and limits of “police independence”.

The following year, Geoffrey Marshall published his seminal and influential book, *Police and Government*, in which he disputed the doctrinal authenticity of the idea of police independence that the Commission had embraced, argued against it as a sound basis for police governance, and referred to it as a thesis that “exaggerated and inconsistent as it is, remains a hardy one and it has almost taken on the character of a new principle of the constitution whilst nobody was looking” (Marshall, 1965: 120). He also argued that the 1964 Act had not even successfully implemented the Commission’s recommendation that police policies should be subject to effective local challenge, guidance and advice. On the issue of “the proper limits of intervention by police authorities in policing and law enforcement”, however, Marshall offered the following conclusions and suggestions:

"First: an obvious limitation is that they cannot without exceeding their powers issue instructions which would involve a chief officer in a breach of statutorily imposed duty or which would amount to a conspiracy on their own part to pervert the course of justice.

Secondly: in matters affecting the institution and withdrawal of prosecutions their powers as police authority should not be regarded as essentially different from those of the Home Secretary as police authority for the metropolitan area. As a matter of sound administrative practice, intervention in routine prosecution matters should be excluded. There may, however, be exceptions which cannot be set out in any simple formula. They may relate to particular policies adopted in the prosecutions of offences or exceptional particular cases. In all except the most extreme cases intervention would be expected to take the form of advice rather than a specific instruction. In extreme cases, however, instructions ought not to be ruled out, and no general legal principle does rule them out.

Thirdly: in matters, other than the institution of prosecutions, which affect the disposition of police forces, the methods used in policing and the enforcement of the law, administrative morality ought to restrict the intervention in a chief constable's sphere of decision. But it is in this sphere, particularly, that executive decisions may be made and policies followed which ought on at least some occasions to be open to an effective challenge by the public and their elected representatives issuing where necessary in police authority directions." (*Ibid.*: 119-120)

Marshall's heretical views¹⁶ however, found no favour with police leaders, the judiciary or the government of the day, although a lot of support from left-wing local and national politicians, academics and social activists. Within three years of the publication of his book, the English Court of Appeal was to expound a doctrine of police independence that was far broader even than that which had been advocated by the Royal Commission in its report. In the case of *R. v. Metropolitan Police Commissioner ex parte Blackburn*, the Master of the Rolls, Lord Denning, expressed the doctrine in the following terms:

¹⁶ However, as indicated in footnote 2, above, his views on this later changed.

"I have no hesitation, however, in holding that, like every constable in the land, [the Commissioner of the London Metropolitan Police] should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State, save that under the Police Act 1964 the Secretary of State can call on him to give a report, or to retire in the interests of efficiency. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone." (*R. v. Metropolitan Police Commissioner, ex parte Blackburn*, [1968] 1 All E.R. 763, at 769 - *per* Lord Denning, M.R.)

Despite the fact that one of the many critics of this statement (e.g. Marshall, 1978; Stenning, 1983; Orr, 1986; Centre for Comparative Constitutional Studies, 1997¹⁷) has commented that it deserves quotation in full "because seldom have so many errors of law and logic been compressed into one paragraph" (Lustgarten, 1986: 64), Lord Denning's exposition of the doctrine of police independence in the *Blackburn* case remains today the most oft-quoted statement of the doctrine by its proponents in Britain, Canada, Australia and New Zealand, to the point that the doctrine is now not infrequently referred to as "the *Blackburn* doctrine", and the *Blackburn* decision itself as the "police chief's bible"¹⁸. If he had had copyright over his statement, Lord Denning would have been able to retire a lot sooner than he did.

Although he provided an illustrative list of decisions with respect to which

¹⁷ In this Australian document, Lord Denning's view was described as "an extreme view, not consistently accepted by the bench nor by subsequent judicial inquiries": Centre for Comparative Constitutional Studies, 1997: 5.

¹⁸ One English Chief Constable, who had earlier been invited to conduct a review of the administration of the Victoria, Australia, Police Force (St. Johnston, 1971), wrote that "in operational matters a Chief Constable is answerable to God, his Queen, his conscience, and to no one else" (St. Johnston, 1978: 153)

every chief constable enjoys complete political independence, Lord Denning's statement of the doctrine seems to suggest that chief constables enjoy such independence with respect to every aspect of "law enforcement", and that "law enforcement" embraces almost every aspect of policing policy, priority-setting and deployment. Furthermore, his statement, like the formulation of the doctrine by the Royal Commission before him, completely confounds the concepts of control and accountability. According to Lord Denning, a chief constable's independence with respect to "law enforcement" not only renders him immune to political direction on such matters, but also to any requirement for political accountability ("he is answerable to the law and to the law alone") for such matters.

Despite its obvious shortcomings, Lord Denning's statement of the doctrine of police independence in *Blackburn* has effectively become the *locus classicus* on the subject in common law countries around the world, as well as in England itself, thus seemingly ensuring continued disagreement and confusion about the scope, application and implications of it. In England, the statement has been cited and endorsed in several subsequent judicial decisions. In 1981, Lord Denning himself cited his own earlier statement in declining to issue *mandamus* against the Chief Constable of the Devon and Cornwall Constabulary, in *R. v. Chief Constable of the Devon and Cornwall Constabulary, ex parte Central Electricity Generating Board*¹⁹. Seven years later, a differently constituted Court of Appeal cited the statement with approval in *R. v. Secretary of State for the Home Department, ex parte Northumbria Police Authority*²⁰. And in 1999 the statement received approval from the House of Lords in *R. v. Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.*²¹.

¹⁹ [1981] 3 All E.R. 826, at p. 833.

²⁰ [1988] 1 All E.R. 556, at p. 566.

²¹ [1999] 1 All E.R. 129.

It can thus be stated with confidence that, in judicial minds at least, the Denning statement currently represents the law on this topic in England and Wales.

During the thirty-six years since the *Blackburn* case was decided, discussion of the doctrine has largely been focused on political contestation (particularly over the respective roles of the three participants in the “tripartite” arrangements for local police governance in England and Wales) over the practical application and implications of the doctrine. The context in which such discussion mainly occurred in the 1980’s was the conflict between the Thatcher Conservative government and, on the one hand, Labour-controlled local authorities and, on the other, the unions. The “Denning Doctrine” was strongly criticised by Labour Party spokesman Jack Straw and other left-wing union, civil liberties and academic supporters (see e.g. Jefferson & Grimshaw, 1984; Spencer, 1985; Lustgarten, 1986) as giving chief constables too much power, for which they were not democratically accountable, especially with respect to the policing of industrial disputes, of which the miners’ strike in 1984 provided the emblematic example. Straw himself introduced private member’s bills in Parliament designed to increase the powers of local councils and police authorities to exercise control over, and demand accountability from, their chief constables, and exert more influence over policing policies. The idea of enhancing local *consultation* over, and input into, policing priorities had received significant support from the report of the Scarman Inquiry into the Brixton riots of 1981 (Scarman, 1981)²², as well as from the Chief Constable of Devon and Cornwall, John Alderson, who had been promoting the then relatively novel concept of “community-based policing” (see Alderson, 1979). It was resisted, however, by other chief constables, notably the

²² In his report, Lord Scarman commented that: “Community involvement in the policy and operations of policing is perfectly feasible without undermining the independence of the police or destroying the secrecy of those operations against crime which have to be kept secret.” He added, however, that: “there will, of course, be some operational aspects of policing - such as criminal investigations and security matters - which it would be wrong to make the subject of consultation and discussion with representatives of the community” (Scarman, 1981: para 5.56).

Chief Constable of Greater Manchester, James Anderton, who argued that “genuine efforts by reasonable people at local level currently to devise a more meaningful involvement in police affairs are unwittingly preparing the foundations for political mastery of the police” which, he wrote, “is now a positive threat” (Anderton, 1981: 10).

The Conservative government, however, was in the process of introducing its Financial Management Initiative and Citizens’ Charters, as part of its more general commitment to supply-side economics, neo-liberalism and the “new public management”. These initiatives subjected all public services, including the police service, to increasing central controls, fiscal constraints (requiring them to do “more with less”), and regular audits. While the legal/constitutional status of chief constables remained unchanged, their effective autonomy over policing policy and management was undoubtedly gradually eroded through these central government initiatives and demands²³. With the eventual ascendancy to government of the Labour Party in the 1990’s (with its slogan of “attacking crime and the causes of crime”), these central government policies intensified rather than abated. Straw, as the new Home Secretary, however, also introduced reforms to the *Police Act* in 1996 that were designed to give local authorities a greater say in policing policy and priorities. Section 10 of the *Police Act, 1996*, Ch. 16, replacing the provisions of the 1964 Act, provided that:

"10. – (1) A police force maintained under section 2 shall be under the direction and control of the chief constable appointed under section 11.

(2) In discharging his functions, every chief constable shall have regard to the local policing plan issued by the police authority for his area under section 8."

²³ It is important to note that in the U.K. 50% of funding for local police services is provided out of the national Treasury, but is dependent on satisfactory performance reports by inspectors employed Her Majesty’s Inspector of Constabulary (HMIC) who reports to the Home Secretary. This, of course, gives the central government considerable leverage over local policing policies and priorities.

In 1999, Section 314 of the *Greater London Authority Act, 1999* established, for the first time, a local Metropolitan Police Authority for the Metropolitan Police, severing the historical governance relationship between the Metropolitan Police Commissioner and the Home Secretary, which had been in place since the force was established in 1829. A new section (Section 9A) was inserted into the *Police Act* which defined the role of the Police Commissioner in identical terms to that of provincial Chief Constables, and similarly required him to “have regard” to the local policing plan issued by the new Metropolitan Police Authority “in discharging his functions”.

Local policing plans were required to include “a statement of the authority's priorities for the year, of the financial resources expected to be available and of the proposed allocation of those resources, and shall give particulars of (a) any objectives determined by the Secretary of State under section 37, (b) any objectives determined by the [local police] authority under section 7, and (c) any performance targets established by the authority.” Within the constraints of national objectives determined by the Home Secretary, local police authorities were thus empowered and required to play a significant role in setting objectives, priorities and performance targets²⁴ to which their chief constables were required to “have regard” in discharging their duties.

Meanwhile, the Labour Government's *Crime and Disorder Act, 1998*, Ch. 37, imposed further duties on local councils, in collaboration with chief constables, police authorities, probation committees, health authorities and other local persons or bodies designated by the Home Secretary, to undertake studies of crime and disorder in their areas and develop and provide for the implementation of “crime and disorder strategies”, thus giving a mandate to a much wider range of local authorities and

²⁴ Section 7 of the Act required police authorities to set objectives, and Section 38 authorized the Home Secretary to require them to set performance targets.

interests to exert influence over policing policies, objectives and priorities. As I noted, however, despite these legislative and administrative reforms, the House of Lords still felt able in 1999 to endorse (albeit in *obiter dicta*²⁵) Lord Denning's now famous very expansive formulation of the doctrine of police independence in the 1968 *Blackburn* case.

Another document that has had an important influence over recent discussions of police governance in the United Kingdom has been the 1999 report of the Independent Commission on Policing for Northern Ireland (which has come to be known, after its chairman, as the Patten Inquiry). The Commission recommended radical changes to the governance arrangements for the Royal Ulster Constabulary (the name of which it recommended should be changed to the Police Service of Northern Ireland). It recommended the establishment of a Northern Ireland Policing Board which would have broad powers to determine policing objectives, priorities and policies for not only for the police service, but also taking into account all other possible state or non-state resources for accomplishing policing objectives in the province. In addition, it recommended the establishment of local "District Policing Partnership Boards" that should be empowered to determine more local policing objectives, priorities and policies, and which should be allocated funding that it would be free to spend as it sees fit to accomplish local policing objectives (United Kingdom, Independent Commission....., 1999). These recommendations were implemented, with some important modifications and qualifications, by the *Police (Northern Ireland) Acts of 2000* (Ch. 32) and 2003 (Ch. 6).

In its report, however, the Patten Inquiry recommended that the idea of the "operational independence" of the police should be abandoned in favour of a concept

²⁵ It should be noted that, technically speaking, Lord Denning's statement in *Blackburn* was itself *obiter*.

of “operational responsibility” which would more clearly differentiate the concepts of control and accountability. Given the novelty and significance of this recommendation, the Inquiry’s argument on it deserves to be quoted in full here:

“6.19 One of the most difficult issues we have considered is the question of “operational independence”. Some respondents urged us to define operational independence, or at least to define the powers and responsibilities of the police. The Police Authority and the Committee on the Administration of Justice both advocated this. The Authority told us that under the present arrangements if a chief constable decided that a matter was operational, and therefore within the scope of police independence, there was nothing that they could do to pursue it. We have consulted extensively in several countries, talking both to police and to those who are responsible for holding them accountable. The overwhelming advice is that it is important to allow a chief constable sufficient flexibility to perform his or her functions and exercise his or her responsibilities, but difficult if not impossible to define the full scope of a police officer’s duties. The term “operational independence” is neither to be found in nor is it defined in any legislation. It is an extrapolation from the phrase “direction and control” included in statutory descriptions of the functions of chief constables. But, however it may be defined, it is not acceptable that scrutiny of the police should be impeded by the assertion, valid or otherwise, that the current legislation empowering such scrutiny is limited to matters outside the scope of operational independence.

6.20 Long consideration has led us to the view that the term “operational independence” is itself a large part of the problem. In a democratic society, all public officials must be fully accountable to the institutions of that society for the due performance of their functions, and a chief of police cannot be an exception. No public official, including a chief of police, can be said to be “independent”. Indeed, given the extraordinary powers conferred on the police, it is essential that their exercise is subject to the closest and most effective scrutiny possible. The arguments involved in support of “operational independence” – that it minimises the risk of political influence and that it properly imposes on the Chief Constable the burden of taking decisions on matters about which only he or she has all the facts and expertise needed – are powerful arguments, but they support a case not for “independence” but for “responsibility”. We strongly prefer the term “operational responsibility” to the term “operational independence”.

6.21 Operational responsibility means that it is the Chief Constable’s right and duty to take operational decisions, and that neither the government nor the Policing Board should have the right to direct the Chief Constable as to how to conduct an operation. It does not mean, however, that the Chief Constable’s conduct of an operational matter should be exempted from inquiry or review after the event by anyone. That should never be the case. But the term “operational independence” suggests that it might be, and invocation of the concept by a recalcitrant chief constable could have the effect that it was. It is important to be clear that a chief constable, like any other public official, must

be both free to exercise his or her responsibilities but also capable of being held to account afterwards for the manner in which he/she exercises them. *We recommend that the Chief Constable should be deemed to have operational responsibility for the exercise of his or her functions and the activities of the police officers and civilian staff under his or her direction and control.* Neither the Policing Board nor the Secretary of State (or Northern Ireland Executive) should have the power to direct the Chief Constable as to how to exercise those functions.” (*Ibid.*: 32-33)²⁶

There is evidence now that the thinking of the Patten Inquiry has begun to influence approaches to police governance of senior public servants in the English Home Office, if not Home Secretaries themselves. A consultation document published by the Home Office in November 2003, entitled *Policing: Building Safer Communities Together*, includes a foreword by the current Home Secretary, David Blunkett, in which he wrote:

"We understand that public services, including the police, can no longer be seen as services ‘done unto’ people; they can only be successful if they are conducted *with* people. This means integrating policing activity into the daily life of every community. In short, we must transcend our traditional notions of policing by consent, and establish a new principle of policing through co-operation.” (United Kingdom, Home Office, 2003: i)

In the body of the document appears the following discussion of police independence:

“5.15 In terms of officers ultimately in charge of their police forces, the Government is clear that in wanting to clarify and strengthen accountability arrangements, it is not seeking to interfere in operational decisions which are the right and duty of chief officers to take – a position which is enshrined in law. Police forces are under the ‘direction and control’ of their chief officer – not politicians. The political impartiality of the police is absolutely vital for public confidence.

5.16 But the Government is similarly clear that chief officers and their forces are accountable to the communities they serve. Like the authors of the 1999 Report on the future of policing in Northern Ireland, we believe that the often-used term ‘operational independence’ is in fact a stumbling block in

²⁶ Section 33 of the *Police (Northern Ireland) Act, 2000*, Ch. 32, however, defines the “functions of the Chief Constable” of the PSNI in more or less identical terms to those used in Section 10 of the English *Police Act, 1996*, Ch. 16, quoted above.

talking about accountability of the police service. We believe that instead we should begin focusing on the *operational responsibility* of chief officers – because to say ‘independence’ suggests a lack of accountability. Chief officers are in charge of, and have responsibility for, day to day operational decisions. The police exercise important powers and must be capable of being held to account for the way in which they are used. But more than this, chief officers should be accountable, and be seen to be accountable, for reform of the police service, the positive development of policing in general and working with police authorities in terms of the performance of their particular force. This is what we mean by *operational responsibility*.” (*Ibid.*: 16)

The most recent chapter in this development of police governance in England and Wales came with the passage of the *Police Reform Act* in 2002 (Ch. 30). This Act further enhances the authority of the Home Secretary in exercising control over policing in England and Wales. Specifically, it authorises the Home Secretary to promulgate a “National Policing Plan”, to order inspections of provincial police services to ensure that their policing complies with the objectives of the national plan and, in the event of a finding of non-compliance, to give directions to local police authorities and require them to prepare “action plans” (which must be approved by the Home Secretary) to bring their local policing into compliance²⁷. The Act also empowers the Home Secretary to make regulations “requiring all police forces in England and Wales (a) to adopt particular procedures or practices; or (b) to adopt procedures or practices of a particular description.” Finally, and most significant for the topic of this paper, the Act empowers the Home Secretary to issue “codes of practice relating to the discharge of their functions by the chief officers of police” of

²⁷ Section 41A of the 1996 *Police Act*, as inserted by Section 5 of the 2000 *Police Reform Act*. Interestingly, in the original 2000 *Police Reform Bill*, this section authorized the Home Secretary to give directions to chief constables rather than to police authorities. This provision sparked an outcry, with claims that it was an attack on police independence, as result of which the provision was changed by the government: see Jones, 2002 and Letwin, 2002.

police forces in England and Wales. So far, only one code of practice - on the subject of police use of firearms²⁸ - has been issued under this authority.

Section 42 of the 1996 Act was amended by the 2002 Act to include a power in the Home Secretary to require a police authority to suspend a Chief Constable when “he considers it necessary for the maintenance of public confidence in the force in question” (Section 42(1A)). Most recently, the Home Secretary has exercised this power, in the face of resistance from the local police authority, with respect to the Chief Constable of the Humberside Police, in the wake of a highly critical report into the handling of the investigation of the murder of two small children in Soham, Cambridgeshire²⁹. The local authority challenged the Home Secretary’s exercise of this power in this case on the ground that the “public confidence” referred to in Section 42(1A) should be interpreted as the confidence of the public in the police force’s specific area, rather than of the public more generally. It maintained that it and the Humberside public continued to have confidence in the Chief Constable. In ruling against the police authority and upholding the Home Secretary’s exercise of the power, Burnton, J., commented that:

"The power of a Home Secretary, in a sense, is a default power. It is exercised on a national basis having regard to the need for the maintenance of public confidence at large in all the police forces in the country. The wording of the statute confers a large element of discretion on the part of the Secretary of State. The question is whether he considers it is necessary for the maintenance of public confidence in the force in question that the Chief Constable be suspended."³⁰

In support of this conclusion, Burnton, J. commented that: “It would be somewhat surprising if the real question for the Home Secretary were whether there were local

²⁸ See http://uk.sitestat.com/homeoffice/homeoffice/s?docs2.useoffirearms&ns_type=pdf.

²⁹ The Bichard Inquiry Report: see <http://www.bichardinquiry.org.uk/10663/report.pdf>.

³⁰ *The Queen on the application of the Secretary of State for the Home Department v. Humberside Police Authority and Westwood* [2004] EWHC 1642 (Admin) [Burnton, J., Queen’s Bench Division], at paragraph 12 of the judgment (released 2nd July, 2004).

public confidence in the force in question given that Parliament has conferred a power on Central Government, or a Minister of Central Government, rather than only the Police Authority in question which, of course, is local.”³¹ This incident represents just the most recent example of the struggle over local versus central control and influence over the police in Britain.

Summary - England and Wales

In terms of its legal definition, the idea of police independence in England and Wales is currently defined by the much contested statement of it by Lord Denning in the 1968 case of *R. v. Metropolitan Commissioner of Police, ex parte Blackburn*, quoted above. This statement recognises a very wide sphere of political independence (that is, independence from both political direction *and* political accountability) for chief constables with respect to the more or less undefined area of “law enforcement”. This formulation of the doctrine of police independence, however, is based on a series of *obiter dicta* in previous English and other Commonwealth cases, as well as the discussion of this topic by the English Royal Commission on the Police in its 1962 report, and is itself *obiter dicta*³².

Since Lord Denning’s statement in the *Blackburn* case, major practical, administrative and legislative developments with respect to police governance have occurred, in which the practical (and likely legal) autonomy of chief constables with respect to matters of policing and law enforcement has undoubtedly been substantially reduced. Given these developments, and the questionable legal pedigree, correctness and authority of Lord Denning’s statement in the first place, there is good reason, despite the endorsement of it by the House of Lords as recently as 1999, to question

³¹ *Ibid.*, at paragraph 11.

³² The issue is *Blackburn* was not whether politicians can or should give directions to the police, but whether the court could and should issue *mandamus* to compel the Police Commissioner to enforce a particular law.

whether the statement is still (or for that matter ever was) what lawyers refer to as “good law”.

In sum, the content, scope and practical implications for police governance of the idea of “police independence” in England and Wales remains today, as they always been, unclear, and open to contestation and debate. Most recently, following recommendations of the Patten Inquiry in Northern Ireland, there has been some evidence that, in the English Home Office at least, there may be a preference for the term “operational responsibility” over the term “operational independence” with respect to the status and political autonomy of chief constables vis-à-vis the local police authorities and the central Home Secretary. As defined by the Patten Inquiry, and more recently in a Home Office consultation document, the term “operational responsibility” has the advantage of more clearly differentiating the concepts of control and accountability discussed at the beginning of this paper, ensuring that increased “independence” does not necessarily imply increased immunity from accountability as well as from direction and control (i.e. quadrant 4 rather than quadrant 3 in the diagram on p. 3, above).

(2) Australia

"Further examples of such *ad hoc* intervention [by governments]...demonstrate the absence of any clear consistent or principled stance in relation to police/government relations on the part of either major political party, with the possible exception of the Dunstan Labor Governments in South Australia and the Bjelke-Petersen Governments in Queensland. Rather, the vagueness in legal and administrative arrangements, and their lack of visibility, are exploited opportunistically as the need arises, but this rarely if ever entails an explicit political renunciation of the principle of independence. More often it occasions an ideological affirmation of it, in the face of its

blatant distortion or evasion on the occasion in question.”
(Hogg & Hawker, 1983: 163)

As I noted previously, two of the cases that have been commonly cited as providing the judicial foundation for the modern doctrine of police independence were Australian cases³³. The *Enever* case involved the question of whether the Crown in Tasmania could be held civilly liable for a wrongful arrest by a police officer, while in the *Perpetual Trustee* case the issue was whether the Crown could claim compensation for the loss of services of a police officer who was injured in a road accident. In both cases, therefore, the courts had to determine whether, in law, the police officers concerned could be regarded as in a master and servant relationship with those who employed them (and in both cases the courts held that they were not). In neither case was the question of the political independence of the police directly in issue, and judicial comments on that issue in each case were certainly *obiter dicta*³⁴. The fact that the two cases were subsequently invoked in support of the idea of the political independence of the police, however, undoubtedly created a judicial climate in Australia that was more receptive to the police independence doctrine³⁵.

Somewhat surprisingly, there appear to have been very few judicial decisions in Australia in which the idea of police independence has been addressed. In two

³³ *Enever v. The King* (1906) 3 C.L.R. 969 [Austr. H.C.] and *Attorney General for New South Wales v. Perpetual Trustee Co.* [1955] A.C. 457 [J.C.P.C.].

³⁴ For a more detailed analysis of these two cases and their relevance for the doctrine of police independence, see Marshall, 1965: 42-45.

³⁵ Interestingly, the case that was relied upon in both of the Australian cases to support the conclusion that a police officer is not the “servant” of those who employ him or her was an English case, *Stanbury v. Exeter Corporation* [1905] 2 K.B. 838, in which the court had to consider whether an inspector appointed under the *Diseases of Animals Act, 1894* was to be considered a “servant” of the local authority that appointed him. In that case, the court commented that the position of the inspector was analogous to that of a police officer in that his authority was not delegated to him by the local authority but conferred on him directly by the statute, and that his duties thus transcended his local appointment. While this may arguably have been true of a locally appointed inspector (or even a constable) it is difficult to see how it could be true of a police officer appointed by the very state that enacts the legislation conferring authority on him, as was the situation in both of the Australian cases. For although there were once local municipal police forces in Australia, they had been replaced by state police forces, modeled on the Royal Ulster Constabulary, by the time these two Australian cases were decided.

cases in the early 1990's³⁶ applicants sought the issue of writs of *mandamus* to compel police to enforce the law, as had been done in the English *Blackburn* cases, and in each case passing reference was made to the idea of police independence. As in the *Blackburn* cases, however, in neither of these cases was the question of the alleged immunity of police from political direction with respect to law enforcement directly in issue, nor was *mandamus* granted in either case.

Modern support for the doctrine of police independence in Australia has come, interestingly, primarily from state police commissioners, the reports of commissions of inquiry and some academic commentators, rather than from the courts, as in England. A significant explanation for this may well be that police services in Australia are not locally based and subject to the governance of a local police authority, as in England, but are accountable directly through state and federal ministers. In this respect, of course, they are much more similar to the RCMP, OPP, QPF and RNC in Canada. Indeed, as with those Canadian police services, the doctrine of the political independence of the police has been less easily reconcilable with statutory provisions concerning the governance and accountability of the state and federal police services of Australia, most of which, until relatively recently, stipulated that police commissioners had the control and management of their police forces subject to the directions of the relevant government minister³⁷.

³⁶ *King-Brooks v. Roberts* (1991) 5 W.A.R. 500 [W.A.S.C.] and *R. v. Commissioner of Police, ex p. North Broken Hill Ltd.* (1992) 1 Tas.R. 99 [Tas. S.C.]. In the latter case, Lord Denning's *Blackburn* statement was directly cited with approval (at p. 517); in the former case, Wright, J. only alluded to the fact that the police "are not subject to the direction or control of any outside organization" (at p. 111).

³⁷ In 1970, Section 6 the Queensland *Police Act* provided that the Commissioner "shall, subject to the direction of the Minister, be charged with the Superintendence of the Police Force of Queensland." Section 9 of the Western Australian *Police Act* provided that the Commissioner "may make regulations, with the approval of the Minister for general management and discipline of the police force". Section 8 of the Tasmanian *Police regulation Act* provided that the Commissioner "shall, under the direction of the Minister, and subject to the provisions of this Act, have the control and superintendence of the police force." Section 5 of the Victorian *Police Regulation Act* provided that the Commissioner "shall have, subject to the direction of the Governor in Council, the superintendence and control of the Force." And Section 4 of the New South Wales *Police Regulation Act* provided that the Commissioner "shall, subject to the direction of the Minister, be charged with the superintendence of the police force." Section 5AAA of the *Police Ordinance* of the Australian Capital Territory provided that the Commissioner "shall, under

South Australia

Interestingly, South Australia - which is where the modern debate over police independence in Australia really began, as I shall detail in a moment - was the exception in this regard. Section 21 of its *Police Regulation Act* provided that the Commissioner of Police had “control and management” of the police force “subject to this Act”. While his authority in this respect had to be exercised in conformity with regulations made by the state Governor under the Act, nowhere in the Act was a power of any minister to give directions to the Commissioner explicitly conferred or recognized.

In September of 1970, opponents of the Vietnam War, and of Australia’s participation in it, in South Australia decided to organize a mass protest demonstration in downtown Adelaide, the State capital. The Labour state government was sympathetic to the anti-war cause³⁸, and while the Premier had stated in Parliament that “There is no question of the Government’s not backing the police in maintaining peace and order” during the demonstration, in a private meeting with the police commissioner before the demonstration took place, he had expressed his desire that, should the demonstrators take over a particular intersection and impede the flow of traffic, the police should not intervene. After considering this request for a few hours, the Commissioner wrote to the state’s Chief Secretary indicating that he was unable to agree to the Premier’s request since “if there is any serious disruption of traffic or interference with citizens going about their lawful business, by the

the direction of the Minister, be charged with the general control and management of the Police Force.” Section 8 of the *Police and Police Offences Ordinance* of the Northern Territory provided that the Commissioner “shall be charged and vested with the general control and management of the Police Force of the Territory and....shall exercise and perform all powers and functions...in accordance with such instructions as are given....by the administrator.”

³⁸ The Premier was listed as a member of the General Committee of the Campaign for Peace in Vietnam which had supported the demonstration (South Australia, Royal Commission..., 1971: 58).

demonstrators taking over a busy intersection, the police will have no alternative than to take the necessary action to uphold the law.” Although the letter was not made public at the time, the Commissioner gave a statement to the press that included this view.

The next day, the Premier made the following statement in Parliament:

"The Government has no power to direct the Commissioner of Police in this matter. The Commissioner has made a decision which, in my view, does not entirely accord with what has happened in relation to other demonstrations which have held up public traffic, including the farmers' demonstration, in which I took part. However, that is the expression of view of the Commissioner of Police, and over him we have no control... [T]he matter is now out of the hands of the Government; we have no power legally or administratively to take further action than we have taken. We have expressed the view that the utmost tolerance and understanding must be shown and prudence and care taken to see to it that the peace is kept, and I hope that that will occur. Unfortunately, the Commissioner of Police has communicated with me in these terms, and he will carry out his duties, as will members of the Police Force, in the terms that he and they believe to be right. In these circumstances, the responsibility will rest there."
(South Australia, Royal Commission..., 1971: 57)

In testimony before the inquiry into the handling of the demonstration that the government established, however, the Premier told the Inquiry Commissioner that “although the Government had no power legally to direct the Commissioner in terms of the Police Regulation Act it had always previously been the practice in his experience in government that directions had from time to time been given to the Commissioner and that he had always followed them and deferred to ministerial advisement” (*Ibid.*: 58).

After reviewing the entire circumstances of the demonstration, its handling by the police, and the various communications between the police and the government, the Inquiry Commissioner, Mr. Justice Bright, reached the following conclusions in his report:

"The police force has some independence of operation under the Police Regulation Act...but it is still a part of executive operation. In a system of responsible government there must ultimately be a Minister of State answerable in parliament and to the parliament for any executive operation. This does not mean that no senior public servant or officer of State has independent discretion. Nor does it mean that the responsible minister can at his pleasure substitute his own will for that of the officer responsible to him. The main way in which a minister and an officer of State become identified with an important decision is by a process of discussion and communication. The minister enquires of his officer, the officer provides information and advice to his minister, the minister, perhaps also drawing on a different field of information, provides information and advice to the officer. From there on, the officer will be the "field commander". He will carry out the decision, acting reasonably and using his own discretion in circumstances as they arise. But ultimately, he will be responsible, through the minister, to the parliament - not in the sense that he will be subject to censure for exercising his discretion in a manner contrary to that preferred by the majority in parliament, but in the sense that all executive action should be subject to examination and discussion in parliament." (*Ibid.*: 79-80)

Commenting that if the kind of decision that had to be made in this case is made solely by the Commissioner "the process of polarization is almost inevitable", Bright, J., wrote:

"I do not think that the Commissioner of Police and his force ought to be placed in a situation where they have to take sole responsibility for making what many reputable citizens regard as a political type of decision. The Commissioner of Police ought to have the right, in any such case, of obtaining general advice from the Chief Secretary but the Commissioner of Police ought not to be bound to initiate such discussions. The Chief Secretary ought to be willing to advise and direct the Commissioner of Police in any such case, to make public that he has done so, and to take the burden of justifying the decision off the shoulders of the Commissioner of Police and on to his own shoulders in Parliament." (*Ibid.*: 80)

Referring to statutory provisions in other police legislation in Australasia, Bright, J. added the following important comments:

"I am not impressed by the need for uniformity, but the fact that in so many places there can be executive intervention is

significant. It is not only politically correct, but it is also in the long term best interests of the police force in this State, that there should be a power of executive intervention.

The relationship between senior officers and the executive is not spelled out in detail in statutes. To a great extent it is a matter of convention, of arrangements well understood, of limits not transgressed. One such convention is, I believe, firmly established in this State now. It provides that in matters of ordinary law enforcement the minister will seldom, if ever, advise the Commissioner, although he may consult with him. It is in the area of law enforcement in which there is a political element that advice and occasionally direction are to be expected from the minister. It should therefore be in writing and should, at the appropriate time, be tabled in Parliament. I say "at the appropriate time" because I can envisage circumstances in which it would not be appropriate to publicize a proposed course of action before the event had occurred." (*Ibid.*: 81)

Bright, J., consequently recommended that Section 21 of the South Australian *Police Regulation Act* should be amended to read "Subject to this Act and to any directions in writing from the Chief Secretary the Commissioner shall have control and management of the police force", and that there should be a requirement for publication of any such ministerial direction "at the appropriate time". He also recommended that "a convention should be established...with regard to the limits within which any such written direction may properly be given" and commented that "the Chief Secretary and the Commissioner of Police ought to be able to reach an understanding which would form the basis of this convention" (*Ibid.*)

Bright, J.'s, recommendations in this respect were implemented through an amendment to the South Australian *Police Regulation Act* in 1972 whereby Section 21 was changed to read: "Subject to this Act and the directions of the Governor, the Commissioner shall have the control and management of the Police Force." The Police Commissioner, J.G. McKinna, who had been in office at the time of the demonstration and the inquiry into it, retired in the same year. He was replaced by

Harold Salisbury who, immediately prior to arriving in South Australia to take up the post of Commissioner, had been Chief Constable of the York and North East Yorkshire Police in England. There is little doubt, therefore, that he brought with him the attitudes and beliefs about police independence that were common among English Chief Constables at that time, four years after the decision in the *Blackburn* case had been handed down. Unfortunately, he was in the job as Commissioner of Police in South Australia for just five years before he, like his predecessor, came into conflict with the Labour State government, still presided over by the same Premier.

The conflict this time revolved around the issue of accountability rather than that of control or direction as such. Questions had arisen about certain activities of the Force's Special Branch, and the files that they maintained on "political dissenters" who had not been convicted of any offence in South Australia. The Chief Secretary (the minister responsible for police in South Australia) requested answers to a set of questions about these activities and files, to which the Commissioner provided a written reply in which he stated at the outset that the Police Force considered that "some of these questions from the press are improper, even impertinent, and that they should not be answered" (South Australia, Royal Commission....1978: 50). In response, the government established an independent inquiry to examine the activities of the Special Branch, the report of which, in the government's view, indicated that Commissioner Salisbury had misled the government in his written answers to the Chief Secretary's request for information. The government called upon the Commissioner to resign, and when he refused to do so, dismissed him. A further inquiry was then set up to look into the circumstances of the Commissioner's dismissal and advise whether it had been "justifiable in the circumstances"³⁹.

³⁹ For a contemporary journalist's account of this case see Cockburn, 1979. For more academic accounts and analyses, see Plehwe & Wettenhall, 1979, and Waller, 1980.

In testimony before the inquiry, echoing the sentiments of Lord Denning in the *Blackburn* case ten years earlier, Salisbury maintained that his duty as Police Commissioner was “to the law...to the Crown and not to any politically elected government” (*Ibid.*: 36). With respect to this argument Madam Justice Roma Mitchell, the Inquiry Commissioner, responded in her report that “That statement, in so far as it seems to divorce a duty to the Crown from a duty to the politically elected Government, suggests an absence of understanding of the constitutional system of South Australia or, for that matter, of the United Kingdom” (*Ibid.*: 19). Salisbury also maintained that the amended Section 21 of the *Police Regulation Act* did not entitle the government to give him, as Commissioner of Police, a direction with regard to the Special Branch - an argument to which Mitchell, J., responded: “No argument to this effect was put forward by [Salisbury’s] counsel and, in my opinion, any such argument would have been untenable” (*Ibid.*).

In her report, Mitchell, J., concluded that Salisbury had indeed misled the government and that his dismissal was justifiable. Commenting on the Commissioner’s “duty to the law”, Mitchell, J., wrote:

"Of course the paramount duty of the Commissioner of Police is, as is that of every citizen, to the law. The fact that a Commissioner of Police “is answerable to the law and to the law alone” was adverted to by Lord Denning, M.R., in *R. v. Commissioner of Police of the Metropolis; ex parte Blackburn*. That was in the context of the discretion to prosecute or not to prosecute. No Government can properly direct any policeman to prosecute or not to prosecute any particular person or class of persons although it is not unknown for discussions between the executive and the police to lead to an increase in or abatement of prosecutions for certain types of offences. That is not to say that the Commissioner of Police is in any way bound to follow governmental direction in relation to prosecutions. Nor should it be so. There are many other police functions in respect of which it would be unthinkable for the Government to interfere. It is easier to cite examples⁴⁰ than to formulate a

⁴⁰ She did not, however, choose to do so.

definition of the circumstances in which the Commissioner of Police alone should have responsibility for the operations of the police Force.” (*Ibid.*: 20)

On the issue of accountability, Mitchell, J., wrote:

"It is one matter to entrust the Commissioner of Police the right to make decisions as to the conduct of the Police Force. It is quite another to deny the elected Government the right to know what is happening within the Police Force. Of course there are some matters of detail into which the Government should not inquire⁴¹. In the context of Special Branch work the South Australian Government has recognised that situation I that it has never sought to identify the persons who are the subject of records. But it believes itself entitled to know the general nature of the work done by Special Branch and of its relationship with outside agencies including ASIO⁴². That view, in so far as it relates to the association with ASIO, is shared by Hope J.⁴³ I believe it to be correct.

Clearly under the Police regulation Act 1952 as amended the South Australian Government must have the right to be informed generally as to the operations of any particular section of the Police Force.” (*Ibid.*)

Noting that the *Police Regulation Act* authorised the Governor to make regulations concerning the “division of the Police Force into groups, branches divisions or sections”, Mitchell, J., concluded that:

"If the Governor in Council may make such regulations it follows that executive Council is empowered to know the nature of the work that is being undertaken by any section of the Police Force. By that I mean that the Government has a right to know the general duties and the general operations of the various sections of the Police Force.” (*Ibid.*)⁴⁴

The Mitchell Report, I think, nicely illustrates the importance of differentiating between control and accountability when thinking about police independence. Clearly, she recognized that a substantial measure of independence

⁴¹ Again, beyond what follows, Mitchell, J., gave no specific examples.

⁴² The Australian Security Intelligence Organisation, a Commonwealth agency.

⁴³ Hope, J., had chaired a Royal Commission into the Australian security services.

⁴⁴ In support of this conclusion, Mitchell, J., quoted the comment in the final report of the English Royal Commission on the Police in 1962 that: “The Commissioner of Police acts under the general authority of the Home Secretary, and he is accountable to the Home Secretary for the way in which he uses his Force.” (United Kingdom, Royal Commission....1962: para. 91, p. 31)

need not in any way be incompatible with an equally substantial requirement of accountability.

In 1992, prompted by the experience in New South Wales of the interposition of a Police Board into the governance of the police in that state (discussed further below), and in response to a recommendation in a National Crime Authority report that a similar Board should be established in South Australia, the government had a discussion paper on the subject prepared for consideration by its Heads of Agencies Committee⁴⁵ (Lawson, 1992⁴⁶). This paper constitutes the most extensive exploration of arguments for and against a Police Board as an element in the governance of state police services in Australia since the idea was first proposed in the report of the New South Wales Lusher Inquiry in 1981, and adopted in that state (discussed below). Arguing that “In the final analysis the main objective is to establish arrangements which maintain the statutory independence of the Police Commissioner, but also provides [*sic.*] the necessary checks and balances required of all public sector organisations” (p. 9), the paper canvassed various possible models and roles for such a board, citing extensively from the literature on police commissions and boards in Canada (Stenning, 1981 and Hann *et al.*, 1985). It would reward close reading by anyone contemplating such a board for the governance of the Ontario Provincial Police. The South Australian government, however, has never established such a board for the governance of the South Australian Police.

Before leaving South Australia⁴⁷, I should note that in 1998 a new *Police Act*⁴⁸ was enacted in the state, Section 6 of which now provides that: “Subject to this

⁴⁵ Comprised of the Commissioner of Police (who had expressed opposition to the establishment of such a board in the state), the Commissioner for Public Employment, and the Chief Executive Officer in the Attorney-General's Department.

⁴⁶ For a critical reaction to this paper, see Stevens, 1995.

⁴⁷ The idea of establishing a Police Board, similar to those established in New South Wales and Victoria (discussed below) was apparently considered in South Australia in the early 1990's, but not adopted: see Lawson, 1992, and Stevens, 1995.

Act and any written directions of the Minister, the Commissioner is responsible for the control and management of S.A. Police”. Section 7 stipulates that “No Ministerial direction may be given to the Commissioner in relation to the appointment, transfer, remuneration, discipline or termination of a particular person”, and Section 8 provides that any ministerial direction must be published in the *Gazette* within eight days of being given, and laid before each House of Parliament within six sitting days of its date if Parliament is sitting, otherwise within six sitting days of the beginning of the next session.

Queensland

While these disputes between the police commissioners and the government were going on in South Australia in the 1970’s, other disputes between a police commissioner and the government were brewing in the state of Queensland. In this instance, the situation was in many respects the very opposite of that which had transpired in South Australia in 1970, as it involved a state premier who believed that the police, with the support of the Minister of Police, were not being “tough” enough in enforcing certain laws against certain people in the state while being too tough on police officers who were suspected of corruption and other misconduct. Joh Bjelke-Petersen had been Premier of Queensland for many years and had governed the state with what can only be described as a very sure hand. There had been persistent allegations of corruption within the Queensland Police Force, and in 1969 the Minister of Police had commissioned McKinna, the South Australian Police Commissioner, to undertake a study of the force and to make recommendations with respect to training and administration. The following year, the position of

⁴⁸ No. 55 of 1998.

Commissioner of Police became vacant and, at McKinna's suggestion, the Minister of Police persuaded the cabinet to appoint Ray Whitrod, a career policeman, as the new Commissioner.

Whitrod, who was described in a subsequent inquiry report as "a dignified, intelligent and honest man" (Queensland, Commission of Inquiry... 1989: 35), had previously served in the South Australian, Papua New Guinea and Commonwealth of Australia police forces, the latter two as commissioner, and was a former assistant director of ASIO. He had obtained a Bachelor of Economics and a postgraduate diploma in Criminology from Cambridge University in England, where he had doubtless heard and read about English views of "police independence"⁴⁹.

With the support of his Minister, Commissioner Whitrod set about the difficult task of "cleaning up" the Queensland Police Force that he now headed, and improving its educational and ethical standards. Not surprisingly, he encountered considerable resistance from within the force, some of whose members seemed to be particularly politically well connected. Shortly after his arrival, Whitrod announced his view that henceforth promotion should be based on merit rather than seniority. Within a year of his appointment the Queensland Police Union had passed a vote of no confidence in him, as an "academic" unable to communicate with non-academics. At the same meeting, the Union passed a vote of confidence in the Premier's leadership.

By September 1971, Whitrod had formed a new Crime Intelligence Unit (CIU), staffed by trusted officers, to collect, record and disseminate intelligence about organized crime and corruption. Underfunded and facing constant resistance from the police union, this Unit faced great difficulties in performing its tasks effectively. Furthermore, Whitrod's policies and the minister's efforts to get them approved in

⁴⁹ See his Barry Memorial Lecture on this topic, delivered in 1975 (Whitrod, 1976).

cabinet, were being opposed by the Premier, and by the mid-1970's Whitrod was becoming increasingly concerned by what he perceived to be the Premier's interference in police operational matters which he felt was contrary to his understanding of the proper relationship between a police commissioner and the government.

At about the same time, an Inspector in the Force, Terry Lewis, who apparently thought that he had been denied promotions by Whitrod to which he was entitled, began meeting with the Premier and passing him documents which he had prepared and which, in addition to promoting himself, cast aspersions on the Commissioner (including allegations that he was linked with the Australian Labor Party).

In July 1976, allegations were made that police had used excessive force in policing a student march that had been undertaken without a permit. Whitrod ordered an internal police inquiry into the incident, which the Premier promptly intervened and stopped. The Police Union wrote to the Premier expressing its gratitude and pledging its support for his government. Shortly afterwards, the Premier replaced the Police Minister and Whitrod lost his only powerful supporter in government. The Union continued to send letters of support to the Premier, in which potential successors to Whitrod were mentioned, including Lewis. The head of the CIU was called before the new Police Minister for what a later Inquiry report referred to as a "dressing down", during the course of which he was advised that the Premier had ordered that there be no more charges laid against police officers.

In August 1976, further allegations of police brutality surfaced in connection with a police raid of a "hippie colony" at Cedar Bay. The Premier publicly supported

the police. Despite the Premier's instructions, Whitrod directed an internal inquiry as a result of which charges were laid against some of the police officers involved.

Appointments to the rank of inspector and above were made by cabinet in Queensland, but normally from a list of candidates provided by the Commissioner. In October 1976, Whitrod submitted a list of suitable candidates for appointment to the position of Assistant Commissioner. Lewis was not on the list, but in November Whitrod was advised by the Police Minister that the cabinet had decided to appoint Lewis (over 100 hundred more senior officers in the Force). Whitrod had made it perfectly clear that he did not regard Lewis as a suitably qualified candidate for the position. He sought an opportunity to speak to the cabinet, but was refused. He resigned the same day. In his resignation speech he made the following comments:

"The Government's view seems to be that the police are just another Public Service Department, accountable to the Premier and Cabinet through the Police Minister, and therefore rightly subject to directions, not only on matters of general policy, but also in specific cases. I believe as a Police Commissioner I am answerable not to a person, not to the Executive Council, but to the law." (quoted in Hogg & Hawker, 1983: 164)

The influence of Lord Denning's formulation of the idea of police independence in the *Blackburn* case, with its characteristic confusion between the concepts of control and accountability, could hardly be more clear.

At the next cabinet meeting a week later, Lewis was appointed Commissioner in his place. As an inquiry subsequently noted: "The only missing Cabinet notes over a period of many years relate to the Cabinet meeting dealing with Lewis' appointment as Commissioner" (*Ibid.*: 46).

I have described the circumstances of Whitrod's resignation in some detail in order to provide some sense of the political climate in Queensland in which it occurred. A full public airing of it, however, had to await the election of a Labour

government in Queensland more than a decade later, which immediately set up a Commission of Inquiry (the Fitzgerald Inquiry) to investigate corruption, including police corruption, in Queensland (Queensland, Commission of Inquiry...1989)⁵⁰. In its report, the Fitzgerald Inquiry had some comments to make about relations between the police and governments:

"It is anticipated that the Commissioner remain answerable to a Minister of Police for the overall running of the Police Force, including its efficiency, effectiveness and economy. Under no circumstances should the Department be included in the responsibilities of the Attorney-General.

The Minister can and should give directions to the Commissioner on any matter concerning the superintendence, management and administration of the Force.

The Minister may even implement policy directives relating to resourcing of the Force and the priorities that should be given to various aspects of police work and will have responsibility for the development and determination of overall policy.

Priorities determined would have to include the degree of attention which is to be given to policing various offences. The advice sought by the Minister in deciding these matters and the process by which such decisions are made will depend on the circumstances at the time, and cannot be defined or rigidly laid down in legislation. Nor should they be left to the discretion of the Police Commissioner or Police Union. They should be properly reviewed and determined in the immediate future by the Criminal Justice Commission and approved by the Parliamentary Committee.

The proposed Criminal justice Commission has a much wider role than that proposed for a Police Board which was suggested by many submissions to the Inquiry. It will not remove the need for a Commissioner of Police, nor diminish the responsibility of that Commissioner for the superintendence of the Force, however, it would take particular responsibility for oversight of the reform process, and report to Parliament upon it.

In the interests of open and accountable Government, and the proper independence of the Police department, a register should be kept of policy directions given by the Minister to the

⁵⁰ The preceding account is based on the account of these events in the Inquiry report (Queensland, Commission of Inquiry...1989: 35-46). Accounts by Whitrod and the Police Minister at the time, Allen Hodges, are reproduced in Pitman, 1998: Ch. 8.

Commissioner; and recommendations provided by the Commissioner to the Minister. In the case of staff appointments, the register would also record the instances where the Minister or Cabinet chooses not to follow recommendations put forward. The register would be tabled in Parliament annually by referral through the Chairman of the Criminal Justice Commission to the Criminal Justice Committee.

The Commissioner of Police should continue to have the independent discretion to act or refrain from acting against an offender⁵¹. The Minister should have no power to direct him to act, or not to act in any matter coming within his discretion under laws relating to police powers.” (*Ibid.*: 278-279)

Following the presentation of the Fitzgerald Inquiry report, the legislation governing the Queensland Police Force was radically overhauled. Section 4.8 of the new *Police Service Administration Act, 1990* included detailed provisions setting out the responsibilities of the Police Commissioner, which are to be discharged, among other things, with due regard to Ministerial directions given pursuant to Section 4.6. Section 4.6 requires the Commissioner to provide reports and recommendations in relation to the administration and functioning of the police service when required by the Minister to do so and otherwise when the Commissioner thinks fit. It also authorizes the Minister, “having regard to advice of the commissioner first obtained”, to give directions in writing to the Commissioner concerning “(a) the overall administration, management, and superintendence of, or in the police service; and (b) policy and priorities to be pursued in performing the functions of the police service; and (c) the number and deployment of officers and staff members and the number and location of police establishments and police stations.” The section also requires the Commissioner to comply with all such ministerial directions duly given. Section 4.7 requires the Commissioner to keep a register of all reports and recommendations made to the Minister and all directions given by the Minister under Section 4.6, and to

⁵¹ The Commission also recommended that the exercise of such powers by individual police officers should be subject to review by senior officers (*Ibid.*: 279-280).

furnish a copy of the register to the chairperson of the Crime and Misconduct Commission (CMC), “with or without comment of the commissioner” [of police], which the chairperson of the CMC is to pass on to the chairperson of the Parliamentary Crime and Misconduct Committee of the Legislative Assembly. Within fourteen sitting days of receiving it, the Committee chairperson is required to table it in the Legislative Assembly.

The Federal jurisdiction

As far as I have been able to determine, no comparably detailed legislative provisions governing the relationship between a police commissioner and a police minister have been enacted anywhere else in the Commonwealth. They were not entirely without precedent in Australia, however. A year after Madam Justice Roma Mitchell handed down her report in South Australia (discussed above), the commonwealth Parliament passed legislation to establish the Australian Federal Police. Section 13 of the *Australian Federal Police Act, 1979* provided that:

"(1) Subject to this Act, the Commissioner has the general administration of, and the control of the operations of, the Australian Federal Police.

(2) The Minister may, after obtaining and considering the advice of the Commissioner and of the Secretary⁵², give written directions to the Commissioner with respect to the general policy to be pursued in relation to the performance of the functions of the Australian Federal Police.

(4) The Commissioner shall comply with all directions given under this section."⁵³

⁵² i.e. the Secretary (departmental head) of the Police Department.

⁵³ This provision has since been amended, broadening the power of ministerial direction to include written directions “(either specific or general)...in relation to the use of common services”: see now Section 37 of the Act. For examples of recent directions issued by the Minister under Section 37, see <http://www.afp.gov.au/page.asp?ref=/AboutAFP/Legislation/ministerial.xml> and <http://www.afp.gov.au/page.asp?ref=/AboutAFP/Legislation/supplementary.xml>

New South Wales

Problems of corruption and in relations between police commissioners and their governments have also been experienced in New South Wales over the last thirty years, and have been the subject of a number of official inquiries. In 1981, the report of a commission of inquiry into the administration of the New South Wales Police Force gave lengthy consideration to the issue of the governance arrangements for the Force (New South Wales, Commission....1981). The inquiry commissioner, Mr. Justice Lusher, examined at length the case law and literature on the concept of police independence and, on the basis of the evidence he had heard, concluded that the relationship between the Commissioner of Police and the State government required both an improved oversight capacity for the Minister and a greater degree of distance in order to reduce the likelihood of improper political interference in the administration of the Force. His recommendation for achievement of these objectives was to interpose a three-member Police Board between the police force and the minister:

"The proposed Board would be subject to the Minister's direction and be responsible to the Minister for certain functions and responsibilities hereinafter set out⁵⁴. The Inquiry considers that the membership of the Board would comprise three persons, one of whom would be the Commissioner of Police; the other two members would be government appointees from outside the New South Wales Police Force, one of whom would be the Chairman. The Inquiry considers that the Commissioner of Police should, subject to the direction of the Minister, be responsible for the superintendence of the Police Force in the sense of its operational command and have the further function of implementing within the Force and complying with the policies of the Board of which he is a member. In this latter function, the Commissioner in substance, would be in no greatly different position in principle than he is now in implementing government or ministerial policies:

⁵⁴ Lusher, J., identified the main functions of the proposed Board as: "1. The implementation of such of the recommendations of this report as are accepted by the Government. 2. The planning for and provision of a comprehensive planned police service in the State. 3. The oversighting of the resources employed in the provision of this service." He then listed thirteen more specific functions. (New South Wales, Commission....1981: 791-793).

indeed he would have the additional advantage of having taken part in their formulation as a Board member.” (*Ibid.*: 789)

The Inquiry’s recommendations were adopted and the recommended Police Board was established by the *Police Board Act, 1983*⁵⁵. It was specified to be “subject to the control and direction of the Minister” in the exercise of its functions, which were specifically listed in Section 7 of the Act. None of these countenanced supervision of any operational matters as such. Section 7 specified that “the Commissioner shall implement, by the exercise of the Commissioner’s functions in accordance with law, decisions of the Board”, but also that, subject to this requirement, “nothing in this Act affects the responsibility of the Commissioner for the superintendence of the police force and its operational command and day-to-day management.”

The new Police Board, with a new Commissioner as one of its members, worked to improve the professionalism of the police force and root out corruption, but soon found itself confronting opposition from the Police Association and some political quarters. It is not necessary here to detail the growing concerns about corruption which emerged during the next ten years; it is sufficient to say that were so pervasive and serious that by 1988 an Independent Commission Against Corruption had been set up⁵⁶, and in 1994 another Royal Commission (under the chairmanship of Mr. Justice James Wood) was established to investigate corruption in the police service. The Royal Commission sat for three years, handing down its final report in May 1997.

While the Commission was in the midst of its hearings, a new Police Commissioner, Mr. Peter Ryan, was recruited from England and appointed in 1996 with a mandate, like Commissioner Whitrod before him in Queensland, to “clean up” the New South Wales Police Service and raise its professional and ethical standards.

⁵⁵ Act No. 135, 1983.

⁵⁶ *Independent Commission Against Corruption Act, 1988.*

Steeped in the English tradition of police independence, Ryan was evidently unenthusiastic about sharing what he saw as his responsibilities with a politically appointed Police Board which was subject to ministerial direction and control, and shortly after his arrival in Australia persuaded the government to abolish it⁵⁷.

Ryan lasted six years as Commissioner, and the story of his tenure has an eerie resemblance to that of Whitrod twenty-five years earlier⁵⁸. In his 1997 report, Wood, J., expressed concern about the statutory provision concerning the relationship between the Commissioner and the Minister:

"3.26 This Commission remains concerned at the terms of s. 8(1) [of the *Police Service Act, 1990*]. In the course of round table discussions it was said that there is a recognised convention that the Minister is concerned with matters of 'policy' and not with 'operational' matters. If this is so, then it seems to the Commission that the statute should reflect that situation, defining what is policy and what is operational, and providing for resolution of any overlap. The problem can be illustrated by asking whether the following matters are operational or policy:

- the particular location of a number of police officers;
- the opening or closing or relocation of a police station;
- the creation of a Task Force;
- the targeting of a particular category of conduct and the means by which it should be achieved.

3.27 In the view of the Commission it is difficult to see why any of these matters is other than an operational matter, in respect of which the Police Commissioner should retain independence. Otherwise a risk remains that:

- by reason of political or electoral considerations, decisions might be forced on a Commissioner by a Minister, which intrude into the responsibility of the former to deploy the Service to meet its operational needs;
- decisions will be made spontaneously and in circumstances where those advising the Minister are not well informed as to the facts; and

⁵⁷ *Police Legislation Further Amendment Act, 1996*, No. 108, Section 34.

⁵⁸ It is told well, and in great detail, in Williams, 2002.

- conflicts of the kind seen in the past between the Commissioner and a Minister will continue.

3.28 The Commission acknowledges that ministerial accountability to Parliament is an important principle. It is not suggesting for a moment that the Commissioner of Police should be unaccountable or that the Minister should not be kept informed by the Commissioner. However, it is desirable in principle that the Police Service not be subject to undue political direction, and that the ministerial role be confined to one of policy.” (New South Wales, Royal Commission...1997: 244-245)

Wood, J. accordingly recommended that Section 8 of the New South Wales *Police Service Act, 1990* should be amended along the lines of the comparable provision (Section 13) in the *Australian Federal Police Act, 1990* (quoted at pp. 45-46, above). This recommendation, however, has not been implemented in New South Wales⁵⁹, and another of the conflicts between Police Commissioners and Police Ministers to which Wood, J., alluded in his report with concern that they not continue in the future, eventually led to Peter Ryan’s termination as Commissioner in 2002, as the newly appointed Police Minister was perceived to be increasingly involving himself, sometimes without even consulting the Commissioner beforehand, in the kinds of decisions that Wood, J., had argued were clearly “operational” matters⁶⁰.

Victoria

Compared with South Australia, Queensland and New South Wales, the issue of police independence seems to have been much less discussed in the other Australian jurisdictions⁶¹. Although allegations of corruption have surfaced in both

⁵⁹ Section 8 currently provides: “(1) The Commissioner is, subject to the direction of the Minister, responsible for the management and control of NSW Police. (2) The Responsibility of the Commissioner includes the effective, efficient and economical management of the functions and activities of NSW Police.”

⁶⁰ For an account of Ryan's final days as Commissioner, see Williams, 2002: 305-324. Ryan's own list of “operational” matters that the Police Minister had taken decisions on is reproduced at pp. 318-319.

⁶¹ Milte & Weber, 1977, however, cited some examples of ministers invoking the doctrine of police independence (and its corollary of ministerial non-intervention in operational matters) in Commonwealth

Victoria and Western Australia⁶², and have been the subject of inquiries in both states⁶³, the reports of neither of those inquiries have addressed the issue of police governance generally, or police independence in particular⁶⁴. In 1970, a former Chief Inspector of Constabulary for England and Wales, Col. Sir Eric St. Johnston, was commissioned to undertake a review of the “administration and organization” of the Victoria Police Force. His review and report (St. Johnston, 1971), however, was concerned only with the Force’s internal administration and organization, and did not touch at all on the relationships between the Force and the state government, or between its Chief Commissioner and the responsible Minister.

A wide-ranging review of the Victoria Police Force was undertaken in 1985 by a Committee of Inquiry under the Chairmanship of T. Neesham, Q.C. (Victoria, Committee of Inquiry....1985). The relationship between the police and the government was considered only briefly in the Committee’s substantial (three-volume) report, however. Having cited the famous Denning *Blackburn* statement in a brief history of the London Metropolitan Police (*Ibid.*: 12-13), the report mentions that the original legislation establishing the Victoria Police Force “imposed no requirement upon the Chief Commissioner to comply with the direction of the Executive Government”, but that this requirement was added to the legislation in

and Victorian Parliamentary debates during the 1970’s (at pp. 212-219). Other examples of conflicts between Police Commissioners and their Police Ministers in Australia are referred to in Finnane, 1994: 43-44.

⁶² Western Australia is currently the only Australian jurisdiction where the legislation does not explicitly specify that the Police Commissioner’s exercise of his functions is subject to some executive direction. In 2003, this state established a Corruption and Crime Commission, headed by a Corruption and Crime Commissioner who now shares with the Police Commissioner responsibility for the investigation or corruption and organized crime in the state: *Corruption and Crime Commission Act, 2003*.

⁶³ The current Chief Commissioner of the Victoria Police Force, however, who previously served in the New South Wales Police during the Wood Royal Commission in the late 1990’s, has recently argued strongly against the need or desirability of a royal commission to investigate current allegations of corruption within the Victoria Police Force: Nixon, 2004. She has been supported in this argument by the current Minister of Police: see Bachelard, 2004.

⁶⁴ See Victoria, Board of Inquiry..., 1976; and Western Australia, Royal Commission....2004.

1873 (*Ibid.*: 14)⁶⁵. Commenting on the Chief Commissioner's current status, the Committee wrote:

"The position of a Chief Commissioner in Victoria may be ambiguous as the resignations and dismissals of police commissioners in Queensland and South Australia seem to indicate. While possessing the original authority of a constable (Section 11), the Chief Commissioner is administratively accountable for the overall efficiency of the force and the use of resources entrusted to him. As for more operational (as distinct from administrative) decisions, we regard it as not only desirable but essential that the police should not be or be seen to be tools of the Executive. We received a number of submissions emphasising this. The need for police independence was one of the strongest statements of the Scarman report which followed the 1981 riots in Brixton. The need for independence was one of the principal reasons why we ultimately rejected the creation of a Police Board." (*Ibid.*: 19)

Despite this recommendation, a Police Board was in fact established by the Liberal state government seven years later in 1992⁶⁶. The main function of the Board, which was composed of three persons appointed by the Governor in Council and the Chief Commissioner, was to "advise the Minister and the Chief Commissioner on ways in which the administration of the force might be improved", and it was given substantial powers of investigation for this purpose⁶⁷. The Labour government that was elected in 1999, however, immediately abolished the Board, replacing it, and a Police Review Commission that had also been established, with a "Police Appeals Board"⁶⁸. When the Labour leader announced his party's intentions in this respect before the 1999 election, the Liberal state Premier issued a press release entitled "Labor Launches Assault against Police Independence", in which he argued that the

⁶⁵ The provision inserted in the *Police Regulation Act* in 1873 provided that "The Chief Commissioner shall have, subject to the directions of the Governor in Council, the superintendence and control of the Force". Section 5 of the Act is in identical terms today.

⁶⁶ Sections 4A – 4G of the *Police Regulation Act*, inserted by the *Police Regulation (Amendment) Act*, 1992, No. 72 of 1992.

⁶⁷ A more detailed description of the Board and its functions can be found at <http://www.uplink.com.au/lawlibrary/Documents/Docs/Doc56.html>.

⁶⁸ *Police Regulation (Amendment) Act*, 1999, No. 61 of 1999. See now Section 88 of the *Police Regulation Act* for the functions of the Police Appeals Board.

Labour leader's proposals would "effectively see him take over the operational running of the Victoria Police Force" by "announcing that he would restructure the operational squads of Victoria Police, dictate the type of equipment issued to members and determine the placement of police stations." "All of these matters", the Premier wrote, "have traditionally been the domain of Police Command who are the only ones in a position to best make such decisions"⁶⁹. By way of response, the Labour leader apparently wrote to a member of parliament committing himself to "a Government that recognises the independence of the Office of the Chief Commissioner of Police and does not interfere with the operational functions of the Victorian Police Force"⁷⁰

Once in office, the new Labour state government established, in 2000, a Ministerial Administrative Review into Victoria Police Resourcing, Operational Independence, Human Resource Planning and Associated Issues. Its terms of reference included the following rather revealing term of reference:

"To consider and recommend appropriate protocols between Government and Victoria Police which better establish the operational independence of Victoria Police whilst preserving the role of Executive Government to determine State policy objectives for Victoria Police, including overall policing objectives, organisational governance requirements and associated resource allocation, as well as financial management, budgetary and employee relations policies."
(Victoria, Ministerial Administrative Review...2001: 30)

Chapter 2 of the Review's report (*Ibid.*: 29-79), entitled "Towards Greater Certainty and Transparency in the Relationship Between Government and Victoria Police" explores this term of reference in great detail and, because it is the most recent and comprehensive official discussion of these issues in Australia, deserves to be read in full. It includes a set of fifteen recommendations, including recommendations for a

⁶⁹ Kennett, 1999.

⁷⁰ Quoted in Victoria, Ministerial Administrative Review...2001: 36.

complete overhaul of the state's legislation governing its police force. The most important of these from the point of view of this paper is Recommendation 7:

"Recommendation 7 - Ministerial Direction Power

[a] **Ministerial Direction Power:** In view of the governance principles, which emphasise transparency and accountability, police legislation include a Ministerial direction power with the following key features:

- a broad definition of the scope of matters on which the Minister may direct, e.g., along the lines of the general formula of 'general policy in relation to the performance of the functions of Victoria Police' contained in s.13(2) of the *Australian Federal Police Act 1979* [Cwlth]. As an alternative, a more prescriptive formula could be prepared, for example, based on that contained in the *Police Service Administration Act 1990* [Qld] but qualified to safeguard the operational independence and accountability of the Chief Commissioner⁷¹;
- the Minister be required to obtain and consider the advice of the Chief Commissioner before issuing any direction;
- such directions be in writing;
- the Chief Commissioner be required to give effect to any such direction;
- such directions as a minimum be tabled in Parliament. In addition, or as an alternative, such directions should be notified to the public, for example in the *Victoria Government Gazette*, including information of how to obtain a copy of the direction; and
- the *Victoria Police Annual Report* could contain a Schedule setting out any directions issued during the relevant year and afford the opportunity for the Chief Commissioner, should he/she wish, to comment upon them.

[b] **inclusion of Non-exhaustive List:** Consideration be given to also incorporating with the proposed Ministerial direction power a non-exhaustive list of matters on which the Minister cannot direct the Chief Commissioner including, for example, decisions to investigate, arrest or

⁷¹ In its report, the Review commented that: "The Queensland provision would need some qualification in a Victorian context in order to safeguard the operational independence and accountability of the Chief Commissioner. For example, a restatement of Queensland paragraph (c) to refer to 'the broad deployment of police numbers in accordance with policy objectives' would be consistent with the Reviews [later] recommendations in Chapter 3" of its report (concerning human resource planning): Victoria, Ministerial Administrative Review....2001: 55).

charge in a particular case; or to appoint, deploy, promote or transfer individual sworn staff members.” (*Ibid.*: 56)⁷²

The Review’s recommendations on this term of reference have not so far been implemented in Victoria⁷³.

Finally, in terms of the experience with the idea of police independence in Australia, I should note that many of the same kinds of public service reforms that I noted in the discussion of England and Wales above, have also been occurring in the Australian jurisdictions, with similar potential implications for the realities of police independence. In particular, most Australian jurisdictions have now moved to fixed term contracts for Police Commissioners and other senior command positions, as well as “purchase agreements” for policing services and performance reviews⁷⁴. Since these latter innovations have also been introduced in New Zealand in recent years, I will leave further discussion of them to the following section of the paper on New Zealand.

Summary - Australia

There is no doubt that the idea of police independence has had currency in Australian law and conventions for some time. Its relatively recent reception and recognition in Australia has largely reflected the influence of English case law and governmental practice there, and has in particular been fostered by a few senior

⁷² Interestingly, the Force Command, in its initial submission to the Review, opposed giving such directive power to the Minister, rather than to the Governor in Council, as the current Victorian legislation provides, on the ground that: “if resort is had to the direction power, ‘the relationship between the Minister and the Chief Commissioner has probably become unworkable’. In addition, as the current arrangements necessitate the Minister making a recommendation on the direction to the Governor in Council, they create an intrinsic safeguard, which accommodates ‘Ministers’ historical caution about taking action that could be interpreted as “political interference” in the administration of justice’.”: *Ibid.*: 52.

⁷³ As noted above, however, serious allegations of corruption within the Victoria Police have recently surfaced, so it may well be that the state government is waiting until these are adequately addressed before proceeding with any overhaul of the state’s police legislation.

⁷⁴ See Chan, 1999. The Labour government in Victoria, however, has committed to ending contracts and performance bonuses for senior police officers in the Victoria Police: Victoria, Ministerial Administrative Review....2001: 30.

English police officers who have been recruited to senior police executive positions in Australia over the last thirty to forty years. The context in which it has been recognised, however, differs in important ways from that in its country of origin, the United Kingdom. Importantly, Australian police services are organized on a state and federal level, rather than on a more local level. The governance arrangements for these police services, therefore, involve direct relationships between the police services and state and Commonwealth governments, without the kind of “tripartite” arrangements out of which the idea of police independence originally developed in the United Kingdom.

It would be fair to say, I think, that there has been considerably more reluctance on the part of governments in Australia to embrace any very expansive conception of police independence than has been the case in England and Wales. Specifically, many state governments in Australia have successfully insisted on maintaining quite broad powers of direction and control over their state police services, acknowledging only a quite limited area of police decision-making (specific law enforcement and prosecutorial decisions in particular cases - those “quasi-judicial” decisions of which the 1962 English Royal Commission wrote) that is recognised as immune from executive direction. Some influential commentators in Australia (e.g. Mr. Justice Bright in his 1971 report in South Australia) have not even been prepared to concede that all of these kinds of decisions ought necessarily always to be immune from governmental direction or influence.

Unlike the situation in England and Wales, the scope and limits of police independence in Australia have been defined and clarified more in the reports of commissions of inquiry than by judicial decisions, and there has been a trend, since the late 1980's towards attempts to define and clarify the governance relationship

between police commissioners and government ministers through legislative provision, rather than simply through recognition of constitutional convention⁷⁵. Sections 4.6 – 4.8 of the Queensland *Police Service Administration Act, 1990*, currently constitutes the most detailed of such legislative provisions. A critical aspect of such provisions has been the requirement that ministerial directions that are given, must be in writing and must be published, and/or laid before the legislature for scrutiny and debate.

Similar public service and other more general governmental reforms as have been taking place in England during the last twenty years in the United Kingdom, have also been occurring in Australia, with likely similar implications for the realities of the relationships between police commissioners and their governments, and hence for the day-to-day realities of the reach and scope of police independence.

3) New Zealand

Since 1886, New Zealand has had a single, national police service headed by a Commissioner of Police and governed directly by the central government. Consequently, the kinds of discussions about the relative roles of local and central authorities in the governance of the police that have provided the backdrop for discussions about police independence in the United Kingdom, have not had any role in the discussions of this idea in modern new Zealand. This likely explains too why, in New Zealand as in Australia, judicial discussion of, and pronouncements about, the idea of police independence have been quite rare. The starting point for consideration of this idea in New Zealand are the legislative provisions for the governance of the

⁷⁵ See in particular Bersten, 1990.

New Zealand Police in the *Police Act, 1958* and the *Police Regulations, 1992* promulgated pursuant to it.

Current statutory delineation of the relationship between the Commissioner and the Minister in New Zealand

Somewhat unusually, the current legislative provision concerning the relationship between the Minister of Police and the Commissioner of Police in New Zealand is to be found not in the principal statute governing the police, the *Police Act, 1958*⁷⁶, but in Section 3 of the *Police Regulations, 1992* made pursuant to Section 64 of the Act:

“3. Responsibility and duty of Commissioner - (1) The Commissioner shall be responsible to the Minister for -

(a) The general administration and control of the Police; and

(b) The financial management and performance of the Police.

(2) The Commissioner shall take all reasonable steps to ensure that all members of the Police discharge their duties to the Government and the public satisfactorily, efficiently, and effectively.”

This provision has been criticised not only because it is in the Regulations rather than in the Act, but also because it does not specify clearly enough what the relationship between the Commissioner and the Minister is supposed to be, and what are the boundaries of their respective roles in governing the New Zealand Police. One critic has also argued that the language of subsection (2) of this provision of the Regulations is inappropriate, taking what some might consider to be a somewhat extreme position that “police do not owe any duties to the government” since, under the Act, they are required to “swear to serve the Queen and to uphold the Queen’s Peace” (Joseph, 2000: 153). Joseph has consequently argued that “reference to “the government”

⁷⁶ Section 3 of the *Police Act, 1958* provides that: “The Governor General may from time to time appoint a fit and proper person to be the Commissioner of Police, who shall have the general control of the Police.”

ought to be replaced by reference to “Her Majesty the Queen” which imports symbolic reference to the Queen’s Peace” (*Ibid.*)⁷⁷

Until quite recently, there has been relatively little discussion in the academic literature of the police-government relationship in New Zealand (e.g. Cull, 1976; Barton, 1978; Orr, 1986; Arnold, 1986; Dunstall, 1999). What these studies suggest is that, as in other common law countries, the police enjoy practical autonomy with respect to “routine” policing decisions, but that at critical moments government involvement in (or at least influence over) police decision-making sometimes becomes quite intense. While some of these critical moments are more or less routine (e.g. annual budget approval, selection of a new Police Commissioner, etc.), most of those which spark public debate about police-government relations arise in relation to the policing of particular events or circumstances (such a political unrest, labour disputes, visits of controversial foreign dignitaries, etc.).

Dunstall’s fourth volume of the history of the New Zealand Police (Dunstall, 1999) provides ample evidence of very close relations between the police and government during the first half of the 20th Century, in the early years of which there appears to have been an attitude that the police, like all other elements of the public service, were subject to government control and direction. He quotes the Minister of Justice, speaking on the introduction in Parliament of a Bill in 1913 to reform the “obsolete” *Police Force Act* of 1886, as having said that “it is absolutely necessary in the interests of the public, in the interests of the Force, and in the interests of discipline that Ministers of the day should have unfettered control of the Force” (*Ibid.*: 12). Dunstall adds, however, that:

⁷⁷ This argument was subsequently supported by a parliamentary committee in its report on an incident that was alleged to have involved improper interference in police operations by the Prime Minister and a government official. The Committee commented in its report that “regulation 3 appears to confuse the constitutional status of the Police” (see New Zealand, House of Representatives, Justice and Electoral Committee, 2000, discussed further below).

"In New Zealand, between 1898 and the First World War, there began an erratic shift from direct ministerial supervision and control towards the 'modern fiction'⁷⁸ that the police were the servants of the law rather than of the state. New Zealand Commissioners of Police, from Tunbridge onwards⁷⁹, had a hand in establishing the concept of their 'independence' from ministerial direction. In doing so they drew upon the degree of managerial autonomy apparently achieved by the early Commissioners of the London Metropolitan Police and the doctrine of police independence of the executive espoused later by the courts." (*Ibid.*: 13)

Just how "erratic" this shift was over the ensuing seventy years or so is well illustrated by the accounts which follow this statement in the next six pages of Dunstall's book (*Ibid.*: 14-20)⁸⁰.

Within four years of the *Blackburn* decision in England, Lord Denning's statement of the doctrine of police independence was being cited by a New Zealand judge⁸¹, and there is not doubt at all, as will be evident from what follows, that it has had significant influence in shaping views about the police-government relationship in New Zealand ever since. As in Australia, court decisions in which the doctrine of police independence has been considered have been rare. During the last thirty years, however, there have been numerous occasions in which Police Ministers have indicated in parliamentary debates that it is not appropriate for them to intervene in "operational matters". The following remarks of the Minister of Police in 1981 are typical of such assertions:

"I know the police entered the factory following a complaint from the owners. The purpose was to inform the occupants that they had no legal right to remain there and that if they continued to do so they would be liable for trespassing. The

⁷⁸ Cull, 1976: 154.

⁷⁹ Tunbridge served as Commissioner from 1898 to 1903.

⁸⁰ See also Orr, 1986.

⁸¹ *Osgood v. Attorney General* (1972) 13 M.C.D. 400; *Cullen v. Attorney-General and Commissioner of Police* [1972] NZLR 824; *Auckland Medical Aid Trust v. Commissioner of Police and Another* [1976] 1 NZLR 485. All of these cases involved the issue of vicarious liability for police wrongdoing. In the third of these cases, the court held, distinguishing *Blackburn* and the earlier decisions cited therein, that for the purposes of the infringement of copyright action involved, the police officers in this case could be considered "servants" of the Crown.

issue for police is an operational one in which it would be improper for me to intervene.”⁸²

Similar sentiments were expressed in Parliament by the current Minister of Police twenty years later:

"I consider it my duty as Minister to be well briefed on current issues in order that I can make informed decisions on matters of policy, resources and administration. However, in matters concerning investigative practice, law enforcement decisions, or any of the responsibilities, authorities, or powers within the office of constable, I have no direct involvement in operational policing matters. Those are quite rightly the domain of the Commissioner.”⁸³

A critical event that ignited public discussion of the police in New Zealand was the tour of the South African Springbok rugby team in 1981. The tour sparked enormous controversy in New Zealand, occurring in the context of the continuing regime of *apartheid* in South Africa, to which most New Zealanders were strongly opposed. Their opposition to that regime, however, sat uncomfortably with their historic passion for the game of rugby as a focus of national identity, so the proposed visit of the Springboks caused deep and damaging divisions within New Zealand society. The National government of Prime Minister Muldoon (or at least the Prime Minister himself) was determined that the Springbok tour should be allowed to go ahead. This insistence, however was in the face of massive public protests throughout the country. The police, inevitably, were caught in the middle. Despite the best efforts of the police to prevent them, violent confrontations between the police and the protesters, and between the protesters and rugby fans who supported the decision to allow the tour to go ahead, not surprisingly ensued. Because the protesters included New Zealanders from every walk of life and every class, the public outrage which was voiced against the force that was inflicted on demonstrators by the police was

⁸² 441 *New Zealand Parliamentary Debates*: 3433 (1981).

⁸³ 596 *New Zealand Parliamentary Debates*: 13080-81 (14th November 2001).

almost certainly greater than it would have been if the police could have characterized the protesters as an unrepresentative “radical” fringe. In the recriminations and public debates that ensued, questions inevitably arose as to whether, and if so to what extent, the police had been directed or influenced by the government in their policing of the demonstrations.

No definitive (or even tentatively certain) answers to such questions were ever to be forthcoming, however, as no subsequent official inquiry with a mandate to pose such questions was ever established⁸⁴. What is clear from subsequent interviews with the former Commissioner involved, however, is that he met with the Prime Minister and other ministers more than once to discuss the arrangements for the policing of the tour⁸⁵, and this was not only not considered exceptional or unacceptable, but at that time was clearly expected under such circumstances. While what we know about the policing of the Springbok tour provides scant information about the realities of police independence in New Zealand at the time, therefore, I mention it here because it marks the beginning of a period in which questions about the relations between the police and the government took on particular salience in the public mind.

More recently the issue of police-government relations here has been more closely examined in three contexts - a governmental review of the administration and management of the New Zealand Police, controversy over the policing of a state visit by a foreign head of state, and the introduction of a Bill to amend the existing *Police Act*. I consider each of these in turn.

⁸⁴ In Chapter 8 of her forthcoming 5th volume of the history of the New Zealand Police, entitled *More Than Law and Order: The New Zealand Police 1945-1992*, however, Susan Butterworth reports that in subsequent interviews, “Retired Commissioner Walton remembers little communication with the government over the tour, and insists that he was never given any specific direction by either his own minister or the prime minister.” (In a more recent interview with former Commissioner Walton, he reiterated this insistence to me.) Chapter 8 of Butterworth’s book (to be published by Oxford University Press later this year) will provide a full account of the policing of the Springbok tour.

⁸⁵ See Orr, 1986: 57-58.

The Review of Police Administration and Management Structure

During the last two decades New Zealand has been at the forefront of what has been described as a “revolution in public management” (Boston *et al.*, 1996: 1), in which almost every aspect and institution of government has been the object of scrutiny and reform. Despite its long-standing claim to an arms-length relationship to government (including the rest of the public service), the police service has not escaped attention in this process⁸⁶. In April 1998, the Minister of Police announced a review of the administrative and management structures of the New Zealand Police, the key objectives of which were to:

“optimise the New Zealand Police's contribution to the Government's public safety objectives; and

ensure the most cost effective administrative and management structures for the New Zealand Police in achieving the Government's public safety (including statutory obligations), without compromising front line capability.”

Interestingly, the review was undertaken by a four-person private-sector team consisting of a management consultant, a constitutional lawyer and former Police Minister and Prime Minister, a company director and a property consultant. The constitutional lawyer prepared a paper for the Review on “Constitutional Issues Involving the Police” (Chen & Palmer, 1998) in which it was argued that:

“There are some decisions made by the Police that have to be exercised on an independent basis free from Ministerial direction. There are other matters where the Police must follow Government policy. The distinction often comes down to the difference between policy and operations.

While the boundary may be difficult to draw in practice, it is clear that the Minister of Police cannot direct the Commiss-

⁸⁶ Concerns over the governance and accountability of the police in New Zealand were also fuelled by a major scandal during the 1990's over huge cost overruns incurred in the course of an unsuccessful project to introduce a new information system for the police during the late 1990's. For an account of this scandal, see Dale & Goldfinch, 2003.

ioner of Police in respect of the Commissioner's duty to enforce the criminal law either in particular cases or classes of cases. The Minister can however impose binding requirements in respect of matters of administration and the level of resources." (*Ibid.*: 4)

Palmer argued that the current provisions in the *Police Act* and the *Police Regulations* inadequately delineate the desired relationship between the Commissioner and the Minister, and recommended "that the line between policy and operations not be [statutorily] defined⁸⁷, but its workings made transparent by amending the Police Act along the lines carried out in Queensland⁸⁸, with appropriate adjustments for New Zealand circumstances." He noted that "such a change would allow the Minister of Police to give written directions to the Commissioner and these would be tabled in the House of Representatives" (*Ibid.*)⁸⁹.

In its report, the Review noted that "Policing is a core function of the State, and as such the New Zealand Police, as an organisation closely resembles a Public Service department", and that "a number of the practices and processes adopted in the

⁸⁷ Although Palmer did not explicitly say why he thought this should not be attempted, his reason may perhaps be surmised from his conclusion that an approach that sought to identify the "components" of police independence "still does not provide finite guidance as to the whereabouts of the split between those policy matters which might be considered to be matters for Ministerial direction and operational matters for which the Commissioner is solely responsible" (Chen & Palmer, 1998: 35).

⁸⁸ Sub-section 4.6(2) of the Queensland *Police Service Administration Act, 1990* provided that: "The Minister, having regard to advice of the commissioner first obtained, may give, in writing, directions to the commissioner concerning - (a) the overall administration, management, and superintendence of, or in the Police Service; and (b) policy and priorities* to be pursued in performing the functions of the Police Service; and (c) the number and deployment** of officers and staff members and the number and location of police establishments and police stations." Sub-section 4.6 (3) provided that: "The commissioner is to comply with all directions duly given under subsection (2)." (* Somewhat paradoxically, however, paragraph 4.8(2)(a) of the Act provides that the commissioner's responsibilities include responsibility for "determination of priorities". ** It will be noted that in Lord Denning's formulation of the doctrine of police independence (quoted above), deployment of officers is considered to be a matter exclusively for the commissioner, with respect to which political direction is not permitted.)

⁸⁹ In connection with this recommendation, Palmer also referred to the report of Wood Royal Commission on the Police in New South Wales, in which the Royal Commissioner stated that "it is desirable in principle that the Police Service not be subject to undue political direction, and that the ministerial role be confined to one of policy" (New South Wales, Royal Commission...., 199 : , para. 3.28). The report also cited the provisions of subsections (1), (2) & (4) of the *Australian Federal Police Act, 1979*, which provided that: "(1) Subject to this Act, the Commissioner has the general administration of, and the control of the operations of, the Australian Federal Police. (2) The Minister may, after obtaining and considering the advice of the Commissioner and of the Secretary, give written directions to the Commissioner with respect to the general policy to be pursued in relation to the performance of the functions of the Australian Federal Police....(4) The Commissioner shall comply with all directions given under this section."

State sector for assigning accountabilities also apply to the New Zealand Police”⁹⁰ (New Zealand, Review of Police Administration & Management Structure, 1998: para. 90). The report went on to note that notwithstanding this, “the New Zealand Police is distinguishable from a Public Service department in a number of respects.” Specifically in this respect it reiterated *verbatim* Palmer’s account of the constitutional constraints on the power of the Minister to direct the Commissioner, and commented that

“the difficulty in precisely defining the boundary between Government policy and Police operations has the effect of diluting the accountability of the Commissioner and the New Zealand Police, and has meant that the responsibilities of the Commissioner and the New Zealand Police have been defined in the broadest terms only” (*Ibid.*: para. 91).

It noted too that “whilst some parts of the State Sector Act⁹¹ regime apply to the New Zealand Police, others do not, most notably, the appointment processes for Chief Executives, and the procedures for reviewing the performance of Chief Executives” (*Ibid.*).

The report noted too that the Police “manage assets of very substantial value, including a significant property portfolio” and mentioned the “risk” that this entails⁹². The report adopted Palmer’s view that the “central issue” with respect to governance arrangements for the police is “how to strengthen the accountability of the Commissioner of Police consistent with their constitutional independence on law

⁹⁰ The report mentioned particularly that “(i) the contribution of the New Zealand police to the Government’s Strategic Result Areas is specified, and given operational effect through the six Key Result Areas”, and that “(ii) leading from (i), the Commissioner of Police and the Minister negotiate an annual Purchase Agreement specifying the amount and quality of the outputs to be delivered by the New Zealand Police. The Purchase Agreement is reasonably specific, and does create the potential for the Minister to alter law enforcement priorities consistent with the limits on Ministerial direction incorporated in the Memorandum of Understanding between the Minister and the Commissioner; and (iii) the financial accountabilities and associated reporting requirements specified in the Public Finance Act apply to the New Zealand Police” (New Zealand, Review of Police Administration & Management Structure, 1998: para. 90).

⁹¹ The *State Sector Act, 1988* is the principal legislation governing the public service in New Zealand.

⁹² Cf. footnote 2, above.

enforcement” (*Ibid.*: para. 93). Its recommendations in this respect bear quotation in full:

“The existing accountability arrangements could be strengthened and extended in a variety of ways:

- i) whilst it is not possible to clearly define the line between Government policy and New Zealand Police operations, it is possible to make its workings more transparent. This could be achieved by way of an amendment to the Police Act to prescribe a process for dealing with an impasse between the Minister and the Commissioner. Specifically where the Minister and the Commissioner are unable to agree on whether an issue falls within a Minister’s role for decision-making, or the Commissioner’s independent role, and where the Minister feels strongly enough to direct the Commissioner, then the Minister would be required to give that direction in writing and table it in the House of representatives.
- ii) the Police Act should be amended to clearly set out its purpose, to define the role of the Police, and to more clearly specify the responsibilities of the Commissioner;
- iii) the Police Act could be brought more into line with those provisions in the State Sector Act which would enhance accountability including:
 - clarification of the appointment process for the Commissioner and Deputy Commissioners including issues of tenure and removal;
 - empowering the State Services Commissioner⁹³ to review and report on the performance of the Commissioner of Police;
 - requiring the Commissioner of Police to report each year to the Minister on the financial performance of the Police;
 - requiring the Commissioner to furnish a report on the operational components of New Zealand Police activities, and on issues which are subject to Ministerial direction; and
 - the Commissioner’s rights and responsibilities in dealing with issues of staff performance and discipline should also be lined up with the State Sector Act as appropriate.” (*Ibid.*: para. 95)

Finally, the report recommended that, “given the magnitude of the Crown’s ownership interest in the New Zealand Police” and the risk associated with this, it

⁹³ This official is the head of the Public Service in New Zealand.

would be advisable for the Minister of Police to appoint a “Management Advisory Board, comprising persons with business skills and experience, to advise the Minister on the New Zealand Police’s corporate intentions, including capital investments and divestments. This advice could also extend to assessing the adequacy of the business practices adopted by the New Zealand Police in managing its resources, and which in turn could feed into the State Service Commissioner’s review of the Police Commissioner’s performance” (*Ibid.*: para. 96).

Just over a month after the Review submitted its report, other events transpired which were to significantly influence debate over the police-government relationship in New Zealand.

The President of China’s State visit to New Zealand, September 1999.

The President of China’s visit to New Zealand in September 1999 was marked by public protests over China’s alleged human rights abuses in Tibet. Under the pretext of ensuring that the President did not come to any harm from the protests, the police attempted, under threat of arrest, to disperse protesters and move them far away from sites that the President was visiting, including a hotel in Christchurch at which the Prime Minister of New Zealand was hosting a state banquet in his honour. It had been reported that the President had indicated that he would not attend the banquet while protests continued. Having moved the protesters back away from the hotel, the police parked two buses in front of them in such a way that their protest banners etc. could not be seen from the entrance of the hotel, and when the President eventually arrived, police sirens effectively drowned out the shouts of protesters. Several protesters were arrested and detained, but charges against them were eventually dropped. The police were accused of using excessive force and unlawfully interfering with the protesters’ rights of peaceful assembly and free speech.

Some contemporary eyewitness accounts suggested that shortly before the police were deployed against the protesters at the hotel, the Prime Minister was in conversation both with the Chinese military official in charge of presidential security and with an Assistant Commissioner of the New Zealand Police, in the hotel lobby, and that the Prime Minister's Chief of Staff had "remonstrated" with the Assistant Commissioner outside the hotel immediately prior to the police action to remove the protesters (Joseph, 2000: 152).

These allegations were the subject of an inquiry by a parliamentary committee which submitted its report in December 2000 (New Zealand, House of Representatives, Justice and Electoral Committee, 2000). The Committee concluded that some of the police's actions (particularly the use of the buses and sirens) were "unjustified" and constituted a *prima facie* violation of the protesters' rights under the *New Zealand Bill of Rights, 1990*. It found, however, that the allegations of improper interference in police operations by the Prime Minister and government officials were not supported by the evidence it had heard:

"We consider there is no evidence of members of the Government or their officials making either express or implied threats to the Police on this matter...Nor is there any evidence that the Police felt their authority was being overridden. It is clear that the Police always knew that all decisions relating to the protesters were theirs to make, although they were made very conscious of the importance the Government placed on the dinner proceeding.

As concerns the question of whether the then Prime Minister conducted herself appropriately, we consider that there is no evidence that Mrs Shipley attempted to direct the Police in the performance of their duties. Mrs Shipley was anxious about the attendance of the President and about the comfort of her large number of guests. A degree of liaison between Government officials and the Police is both important and inevitable in such circumstances."

Having thus absolved the Prime Minister and government officials of any wrongdoing in this incident, the Committee's report went on to emphasize the importance of appearances and perceptions in such instances:

“We wish to emphasise to all politicians and Government officials that care must be taken when interacting with the Police in a situation such as that which occurred in Christchurch. It is vital to have regard to the appearance to the public of any interaction between Government and the Police and to be alert to the inferences that may be drawn by the Police from any communication with politicians and Government officials. Care must be taken that boundaries are not blurred and that pressure is not unintentionally brought to bear on the Police. It is important that the boundaries between the political arm and the operational arm of the State are observed and maintained.”

The Committee felt that the evidence it had heard about the events at the hotel

“points to the need for clear guidelines, which will allow both the Government and the Police to have certainty about the boundaries of each party's respective authority. Such guidelines would assist the Police to resist anything that may be deemed to be inappropriate pressure. We acknowledge that guidelines can never provide absolute clarity of boundaries. However, we consider that the existence of guidelines would have assisted events on the evening of 14 September 1999.”

Noting that “the powers of government relating to the maintenance of public order must be seen in the context of the relationship between the Government and the Police”, the Committee went on to consider the legislative framework governing this relationship, and in particular “the constitutional status of the police and the implications of the legislative framework for the operational independence of the Police.” The Committee noted that “the legislative framework needs to provide for clear legal boundaries between the Police and the Government.” As a result of its analysis of these issues, the Committee recommended that:

“1. Consideration should be given to clarifying the constitutional status of the police, as it is set out in New Zealand law. In particular, consideration should be given to examining the current legislative framework governing the

Police, namely the Police Act 1958 and the Police Regulations 1992, to establish whether greater clarity⁹⁴ could be achieved in defining the constitutional boundaries between the Police and the Government.

2. Consideration should also be given to enacting regulation 3 of the Police Regulations 1992 in primary legislation, and removing it from secondary legislation. This would be in accordance with the fundamental constitutional principle that regulations should be confined to dealing with matters of implementation and detail, whereas matters of policy and principle are dealt with in primary legislation.”

Two aspects of the Committee’s arguments and conclusions deserve brief comment before moving on to consider the legislative aftermath of its report. In the first place, the Committee’s argument appears to expand the scope of the doctrine of police independence, so that it covers *all* police operations and not just those that may be considered to involve “law enforcement” (however that may be defined). While some may argue that all police operations *do* potentially involve law enforcement, the Committee’s formulation of the doctrine certainly goes beyond the “quasi-judicial” functions (of arrest, charging and prosecution) that some earlier formulations of the doctrine envisaged.

Secondly, the Committee’s acceptance that “a degree of liaison between Government officials and the Police is both important and inevitable” in situations such as that which arose during the Chinese President’s visit, and its implicit acceptance that some direct “interaction between Government and the Police” may be justified on such occasions, provided it is undertaken with “care” and with due regard for appearances and possible police perceptions of government “pressure”, is worthy of note. It does, however, raise the delicate issue of when the expression, in such circumstances, of “legitimate” concerns or desires on the part of government officials

⁹⁴ Earlier in its report, the Committee wrote that the constitutional boundaries between the Police and the Government “should be transparent and unambiguous in the legislation. It is not adequate to say that legal boundaries are observed in practice.”

may cross the line and reasonably be interpreted as inappropriate pressure or influence on the police in the performance of their duties.

The Police Amendment Bill (No. 2)

By the beginning of 2001, therefore, the government had two reports in hand that recommended some legislative clarification of the appropriate relationship between the government and the police, each report having arisen out of quite different circumstances. Its response, in August 2001, was to introduce the *Police Amendment Bill (No. 2)* into Parliament.

The Bill deals with a range of issues⁹⁵, most of which have arisen out of the 1998 report of the Review of Police Administration and Management Structure, and many of which have proven quite controversial⁹⁶. On the issue of the relationship between the police and government, the Bill proposes a number of significant amendments to the *Police Act* along the lines of those recommended by the Review report and the report of the Justice and Electoral Committee. The first group of these provides that the State Services Commissioner shall have a leading role in managing the appointment process for a Commissioner of Police⁹⁷, and in reviewing the Commissioner's performance while in office⁹⁸. The second group addresses specifically the respective roles of the Commissioner and the Minister, and the rights

⁹⁵ The Bill formed the first part of a proposed two-stage reform process dealing with the Police's legislative framework. The second stage is supposed to involve a "first principles" re-write of the *Police Act*.

⁹⁶ The most controversial being a provision that would require a compulsory arbitration to take into account the Commissioner's "ability to fund any resulting police expenditure" when making an award. This provision has come to be referred to in some quarters as the "Sweet F.A." clause, since it would insert a new paragraph (fa) into Clause 24 of the Schedule to the *Police Act*.

⁹⁷ The Commissioner will continue to be appointed by the Governor General "at pleasure". The Bill provides that the conditions of employment of the Commissioner are to be determined by agreement between the State Services Commissioner and the appointee, but only after the agreement of the Prime Minister and the Minister of State Services has been obtained.

⁹⁸ Such review, however, must be limited to those matters on which the Minister may direct the Commissioner under the terms of the Bill (see below).

of the Minister to give directions to the Commissioner. Because of their importance in this respect, they deserve to be quoted *verbatim* here:

“4 Responsibility and independence of Commissioner

- (1) The Commissioner is responsible to the Minister for -
 - (a) the carrying out of the functions, duties, and powers of the police; and
 - (b) tendering advice to the Minister and other Ministers of the Crown; and
 - (c) the general conduct of the police; and
 - (d) the efficient, effective and economical management of the police; and
 - (e) giving effect to any directions of the Minister on matters of Government policy.
- (2) The Commissioner is not responsible to the Minister, but must act independently, in relation to the following;
 - (a) enforcement of the criminal law in particular cases and classes of case;
 - (b) matters that relate to an individual or group of individuals;
 - (c) decisions on individual members of the police.

5 Minister’s power to give directions

- (1) The Minister may give the Commissioner directions on matters of Government policy that relate to -
 - (a) the prevention of crime; and
 - (b) the maintenance of public safety and public order; and
 - (c) the delivery of police services; and
 - (d) general areas of law enforcement.
- (2) No direction from the Minister to the Commissioner may have the effect of requiring the non-enforcement of a particular area of the law.
- (3) The Minister must not give directions to the Commissioner in relation to the following;
 - (a) enforcement of the criminal law in particular cases and particular classes of case;
 - (b) matters that relate to an individual or group of individuals;
 - (c) decisions on individual members of the police.
- (4) If there is a dispute between the Minister and the Commissioner in relation to any direction under this section, the Minister must, as soon as practicable after the dispute arises, -
 - (a) provide that direction to the Commissioner in writing; and
 - (b) publish a copy in the *Gazette*; and
 - (c) present a copy to the House of Representatives.”

A number of features of these provisions are worthy of note. In the first place, this is undoubtedly the most detailed attempt in any jurisdiction so far to legislatively

specify the parameters of the relationship between a Minister of Police and a Police Commissioner.

Secondly, it will be noted that the matters with respect to which the Commissioner is required to act independently (and with respect to which the Minister is prohibited from giving directions to the Commissioner) clearly extends beyond the realm of “law enforcement” to any “matters that relate to an individual or group of individuals”; any attempt to direct the police with respect to the handling of a particular public order situation such as that which transpired during the Chinese President’s visit in 1999, would clearly be prohibited by this provision. A direction that related to the handling of such incidents generally, however (such as a direction that certain kinds of equipment or weaponry not be used in such situations), would presumably be permissible as a direction on a matter of government policy relating to the maintenance of public safety and public order. Given the breadth of the terminology prescribing the areas of the Commissioner’s independence, however, it is less easy to imagine what might be a permissible ministerial direction on a matter of government policy relating to “general areas of law enforcement”. Clearly, there is room for interpretation of some of these provisions (and potential disagreement as to their application).

Thirdly, while the provisions are specific with respect to ministerial “directions”, their implications for less directive communications from the Minister to a Commissioner are not very clear. How forcefully would a Minister be able to express the government’s (or his own) “views” or “suggestions” about a situation before such expression (which might have considerable influence over a Commissioner whose appointment is “at pleasure”) could be interpreted as an attempt at “direction”?

Fourthly, it will be noted that while directions by the Minister of Police are covered by these provisions, directions or communications by other ministers (including the Prime Minister) or government officials are not. Perhaps, however, the fact that the Commissioner “must act independently” in relation to those matters with respect to which ministerial directions are prohibited, can be interpreted to imply that directions from any source on those matters would be equally unlawful.

Fifthly, it is noteworthy that ministerial directions are only required to be reduced to writing if there is some dispute about them between the Minister and the Commissioner. This means that there need be no record of (and hence little or no accountability for) how frequently (or with respect to what matters) ministerial directions to the Commissioner are given.

Finally, although the provisions are not explicit on this point, it may be implied from them that any ministerial direction in contravention of subsections 5 (2) or (3) would be unlawful, and that a Commissioner would have a *duty* not to allow him- or herself to be influenced by such a direction (since it would concern a matter with respect to which the Commissioner “must act independently”). Would acquiescing in such a direction (assuming that this could be verified) amount to misconduct on the part of a Commissioner? What recourse could there be against an overly submissive or compliant Commissioner?⁹⁹

Introducing the Bill on Second Reading in Parliament, the Acting Minister of Police was at pains to emphasize that the Bill was not an attempt to achieve inappropriate government control over the police:

“This bill acknowledges the need for the police to work in a non-partisan way, free from suggestions of political control and interference in operational matters. The bill enhances the

⁹⁹ Could it, for instance, be a defence to a criminal charge (e.g. of obstructing or assaulting police) or, in the case of a police officer, to a disciplinary charge of disobeying the order of a superior, that the police had been acting pursuant to an unlawful government direction?

constitutional separation between the police and politicians, putting the independence of the Commissioner on a statutory basis for the first time. In the future, the independence of the head of our police service will not simply rely on custom, convention, or case law; it will be spelt out in the Police Act. This bill puts the independence of the police on a clearer footing.

...The bill does not affect the role of the Commissioner of Police as this country's most senior law enforcer. It is absolutely essential that the police retain their operational independence. Nothing in the bill erodes that independence. Future commissioners will continue to have a strong operational policing background, and to be drawn from a pool of competent officers with New Zealand policing experience. The Government is committed to seeing that the police continue to be led by a credible and experienced Commissioner of Police."

The Opposition parties, and several of those who testified at committee hearings on the Bill (including two former Commissioners), however, were not convinced, one of the Opposition spokesmen referring to the Bill as "a constitutional outrage, in the truest sense of the words." After receiving forty-two submissions, holding hearings that lasted just over three hours, and deliberating for a further six hours, the Law and Order Committee reported that it had been "unable to reach a recommendation as to whether the bill should be passed"¹⁰⁰ Since then, the Bill has remained on Parliament's agenda, but has gone nowhere¹⁰¹.

Summary - New Zealand

¹⁰⁰ New Zealand, House of Representatives, Law and Order Committee, "Report on the Police Amendment Bill (No. 2)", No. 145-1. The Opposition parties released a separate report opposing passage of the Bill ("Police Amendment Bill (No.2)", n.d., 6 pp.)

¹⁰¹ In early 2004 some allegations of very serious historical and contemporary police misconduct resurfaced, in response to which a Commission of Inquiry into Police Conduct has now been established, which is not expected to report until later this year or early 2005. Under these circumstances, it seems unlikely that the *Police Amendment (No.2) Bill* will be proceeded with, if at all, before the Commission's report is forthcoming. A spokesman for the Minister of Police was recently quoted in the press as saying that the Bill was "still good to go, but had been eclipsed by other, more urgent legislation" ("Code of conduct still in draft form", *Dominion Post* 25th May, 2004, p. A2).

As with Australia, the idea of police independence has had currency in New Zealand for quite a while, and it has been discussed mainly in the context of inquiries and legislative and broader government reform initiatives rather than in judicial decisions, as in England. The English *Blackburn* decision, however, has definitely had an important influence on recent thinking about police independence in New Zealand. Unlike in Australia, however, allegations of corruption have not provided an important context for discussions about police independence in New Zealand. Indeed the main “driver” for consideration of the issue recently has been the implementation, government-wide, of major public service reform (the “new public management”).

Like Australia, and unlike England, New Zealand is now exploring possibilities for legislative clarification of the relationship between the Commissioner and the Minister of Police (and hence the scope of police independence). Indeed, if enacted, the current proposals in this respect in the *Police Amendment (No. 2) Bill* will be the most detailed and specific anywhere.

Governments in New Zealand do not seem to have been as reluctant as some governments in Australia to recognise, in theory at least, a quite wide range of decision-making with respect to which the police ought to be free from political direction. As in Britain and Australia, however, the autonomy of the Commissioner is probably significantly limited in practice by the expectations of the new public management initiatives. There is a recognition in New Zealand that widely defined independence must be accompanied by equally wide accountability requirements; in this respect, the very broad formulation of police independence in the *Blackburn* statement of it is not accepted.

The discussion around police independence in New Zealand, unlike in Australia, has generally focused on the relationship between the Commissioner and

the Minister, rather than between the Commissioner and the Prime Minister or other government ministers. Although there have certainly been many instances of quite significant government intervention in operational policing matters in the past, there does seem to be a broad acceptance by all political parties in New Zealand now of a presumption against such intervention. There is not yet all-party agreement, however, that the proposed new legislative provisions in this respect provide the right delineation of the acceptable parameters of the Commissioner-Minister relationship.

Conclusion

This review of the development of the idea of “police independence” in the United Kingdom, Australia and New Zealand demonstrates very clearly how much variability there is in these jurisdictions about the content, scope, application, acceptability and presumed implications of the idea. Noteworthy from the point of view of the concerns of the Ipperwash Inquiry is the fact that consultation between police commissioners and government ministers, including state premiers and prime ministers, prior to and during the course of public order policing operations does not seem to be regarded as untoward or unacceptable either in Australia or in New Zealand, and in fact seems to be positively expected in some of these jurisdictions.

Despite the variabilities that I have described, a common trend is discernible in all these jurisdictions, in which considerations and implications of more general public service reform are probably now having a much greater impact on the practical realities of the police-government relationship than purely legal doctrinal arguments. This, of course, is not a trend that is unique to the police, but can be discerned in almost all areas of government.

There is also a clear trend, at least in Australia and New Zealand towards a preference for legislative rather than judicial enunciation of the acceptable parameters of this relationship. It is too soon, however, to be able to determine what the implications of this trend may turn out to be for the degree of consensus about, and adherence in practice to, those parameters in those jurisdictions. But an important element of the trend is the insistence that whatever the scope and limits of ministerial direction and control are settled upon, there must be more transparency (public accountability) - through the requirement that directives be in writing and published etc. - to the relationship between the police and the government.

At all events, the experiences with the idea of “police independence” in these three countries provide a rich array of choice of ways to think about, define and implement the concept.

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