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POLICE ACCOUNTABILITY IN IRELAND:

An Analysis of the Problems Posed by the Legal, Constitutional and Political Dimensions and how They Might be Addressed.

volume: 2 of 3

By

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Ch.8 CITIZEN COMPLAINTS AGAINST THE POLICE

1. Introduction

(a) The Need for a Complaints Procedure

The nature of the police function is such that individual police officers will be interacting with individual citizens daily up and down the country. Many of these interactions will consist of the police officer attempting to curb the freedom of the individual; often by the use of summary force. It is inevitable in these circumstances that individual citizens will feel that they have been treated unfairly or even oppressively to the point where they feel compelled to seek a remedy. The review of the existing legal remedies reveals, however, that the law cannot always provide a remedy for such individuals. The broad powers vested in a police officer, coupled with the resources at his disposal, ensure that he can act coercively, perhaps even oppressively, without necessarily giving rise to a cause of action in law for the victim. Furthermore, when a police officer's actions do stray beyond the limits of the law there may still be a significant doubt about the victim's capacity to call him to account through the legal process. Given the nature of the police function it will often happen that either the victim was engaged in criminal activity or the police had grounds to view him with suspicion. In these circumstances the outcome of any legal action against the police would be fraught with so much uncertainty, except in the most cut

and dried cases, that very few victims would be prepared to risk the cost in terms of finance, time, emotional energy and possibly alienating the police.

For the most part it would seem that grievances would comprise relatively minor matters which were not sufficiently serious to constitute a crime or a tort. If they were left unresolved, however, they would accumulate and fester to the point where public confidence and support for the police would be displaced by dissatisfaction and resentment. There is no single prescription which can provide a complete antidote to this problem. There can be no doubt, however, that a suitable administrative or quasi-judicial complaints procedure capable of providing a speedy and inexpensive remedy in such cases would make a huge contribution. That approach may not be consistent with Dicey's concept of the rule of law. It is submitted, however, that the rule of law would be under much greater threat from unremedied minor abuses of police power than it would be from an administrative procedure designed to plug the gaps left by the legal process in such matters.

(b) <u>The Police versus other Public Servants</u>

It can be argued that it is unfair to single out police officers and subject them to a special complaints procedure. Many other public servants also exercise powers and discharge responsibilities which can cause severe hardship to individuals in circumstances where the criminal

or civil remedies are not a viable response. If they are not controlled by a special citizens complaints' procedure, why should the police? The justification for this differential treatment begins with the fact that, apart from the judiciary, the police are unique in the range of public servants. It is true that they share a lot in common with other law enforcement officers such as revenue officials, customs officials, department of trade inspectors, traffic wardens etc. Their differences, however, mark the police out as a special category. The most obvious distinction is that all the other officials are confined to very specific powers and duties while the police officer carries a responsibility to enforce the law generally, has a very wide range of powers to enable him to do so and, usually, is the first public servant to be called upon by a citizen in need of help. Nowhere is this illustrated more sharply than where the other officials need to use force against the person to do their duty. In this event they must seek the assistance of the police officer as only he will have the power to use the necessary force. It is much more likely, therefore, that he will come into confrontation with citizens in situations with potential for complaint than is the case with the other officials.

Another important attribute which marks the police officer out from the rest is the fact that he enjoys his powers solely by virtue of the office he holds. Although

he is a member of a hierarchical, disciplined organisation it is still up to him and him only to decide whether or not to exercise his powers in any particular case, subject to the jurisdiction of the High Court. Most, if not all, of the other public servants exercise a delegated power only and, as such, are subject in the exercise of that power to the directions of their superiors. In so far as a citizen has a legitimate grievance about how he has been treated by one of these officials, it is more likely than not that his complaint will be against a decision which can be overturned or varied by a higher official and ultimately the relevant minister or a statutory authority on whom the power was conferred. It follows that the decision is in reality the mere application of a policy formulated by the competent authority. Complaints about policies are not amenable to resolution through procedures designed to remedy misconduct.[1] Insofar as the complaint is about specific misconduct on the part of the official, specific disciplinary procedures are normally available.[2] In the case of the police, however, the individual responsible for the substance of the complaint is more likely to be the officer on the ground who made the relevant decision or took the relevant action. Given the number of officers on the ground and the frequency of contact btween them and citizens there is clearly scope for a much greater volume of citizen complaints against the police than is the case for most other public servants who deal directly with citizens. The failure to provide a remedial procedure for

such complaints, therefore, would represent a major gap in police accountability. It follows that to compare the position of other public officials with that of police officers for the purpose of considering the need for a special complaints procedure is not to compare like with like.

2. Should the Procedure Be Independent of the Police

(a) The Traditional Internal Disciplinary Model

(i) Introduction

Once the need for a special complaints procedure is accepted the first question that arises is what form it should take to enhance accountability. Traditionally, the practice has been to rely heavily on the machinery that was already available, namely internal disciplinary procedures. Since modern police forces function as highly disciplined organisations it follows that each of them must have a procedure to deal with breaches of internal discipline. Since organised police forces were devised as strictly disciplined bodies it followed that they incorporated machinery to enforce the disciplinary standards on their own members. The Dublin Police Act, 1786, for example, was not untypical when it made specific provision for any one of the three Commissioners of the force to hold a sworn inquiry into allegations that a constable had refused or neglected to obey any lawful direction given by his superiors[3]. Accordingly, the chief officers developed detailed codes of offences against discipline and

procedures for enforcing them.[4] Typically they would prescribe the conduct and standards expected of the rank and file and would lay down procedures to be followed in the investigation, prosecution and punishment of shortcomings. Although they could accommodate complaints from citizens there was no mistaking the fact that their primary function was the maintenance of internal discipline. This was conveyed most clearly by the content and style of the offences and by the absence of any external or independent dimension in the procedures.[5]

(ii) The Code of Offences

The disciplinary code of offences was dominated invariably by offences which related solely to matters of internal discipline as opposed to misconduct in dealing with members of the public. The first code promulgated for the Garda Siochana in 1924 is a typical example.[6] It contained 26 separate offences. Of these 17 can be described as pure, internal, disciplinary matters while a mere 3 concerned the treatment of members of the public, with the other 6 straddling both categories. This bias is emphasised even more clearly by the inclusion of offences such as "marrying without leave"[7] and "violating any order or regulation issued by the Commissioner for the guidance of the force".[8] Even those offences which are most likely to arise from citizen complaints are defined from the perspective of internal discipline. The clearest example is "unlawful or unnecessary exercise of

authority".[9] Its definition confines it to situations where the member, "(a) without good and sufficient cause makes any unlawful or unnecessary arrest, or (b) uses any unnecessary violence to any prisoner or other person with whom he may be brought into contact in the execution of his duty, or (c) is uncivil to any member of the public". There is no doubt that these would all constitute undisciplined conduct by a member of a disciplined police force. It is significant however, that "abuse of authority" was not defined in broad enough terms to include conduct that a citizen would find oppressive or unacceptable but which would not necessarily be contrary to the requirements of internal discipline. The reason must be that the code was aimed primarily at enforcing internal discipline and only served the accountability needs of the citizen incidentally.

(iii) The Procedure

The absence of any external or independent element in complaints procedures also emphasised their internal disciplinary focus. The decision whether or not to prefer charges, the choice of what charges to prefer and the sentencing were all determined by members of the force; as were the prosecution, defence and the composition of the tribunal. Again, this can be illustrated by the 1924 Garda Siochana regulations. They provided that the officers in charge of the relevant district and division must record all reports of complaints (other than an anonymous

allegation unsupported by evidence) alleging the commission of an offence against discipline by any member of the force stationed in his district or division together with particulars of the action taken by him with respect to it.[10] Where the allegation was serious and was denied by the accused member a sworn inquiry had to be held.[11] It consisted of an officer or officers senior in rank to the accused, and witnesses could be summoned to appear before it. Normally the case against the accused was presented by the superintendent of the district in which the inquiry was held. He prefered the charge, examined the witnesses in support of the charge and cross-examined witnesses for the defence. The accused was responsible for the cross-examination of witnesses against him and could call and examine his own, but could not give evidence himself. He could only have the assistance of a solicitor with the prior consent of the Commissioner. Any question as to the admissibility of any evidence tendered or as to the propriety of any question proposed was decided by the presiding officer. At the conclusion of the hearing each member of the tribunal made a decision of guilty or not guilty and this, together with the record of the proceedings was sent to the Commissioner who had the final say on the finding and what sentence, if any, to impose. Apart from the possibility of the accused officer being assisted by a solicitor, therefore, there was no provision for outside involvement at all.[12] That, of course, is

what one would expect in a procedure designed to meet the needs of internal discipline.

Although concern over the handling of citizen complaints against the police became prominent in Britain and the USA in the early 1960's it had no impact in Ireland until the 1980's. Accordingly when the Garda Siochana regulations were revised in 1971[13] the exclusive preoccupation with internal discipline survived.[14] The revised list of disciplinary offences retained their marked emphasis on internal matters while the procedure itself, although more sophisticated, made no concession to any meaningful outside involvement. The very text of the regulations talked only of a breach of discipline and made no reference to a citizen complaint. It stipulated, for example, that the procedure shall be initiated "where it appears that there may have been a breach of discipline".[15] There was no need for a citizen to complain and, indeed, no special significance would attach to a complaint from that source. The exclusive focus was on internal discipline. The Irish procedure retained this form right up until 1986.[16] This was by no means unusual, however, because both Britain[17] and Northern Ireland[18] showed the same internal disciplinary focus in their procedures up to 1976 and 1977 respectively despite the fact that from a much earlier date there was a greater awareness in these two jurisdictions about the special problem of citizen complaints.

(b) The Case for the Internal Model

(i) Introduction

The fact that citizen complaints have been dealt with as if they were purely internal, disciplinary matters for so long is testimony partly to the level of public confidence in the police and partly to the strength of the police lobby. Traditionally the police have been strong advocates of retaining complete control over their own discipline and, by extension, the handling of citizen complaints against them.[19] From the 1960's onwards, however, as the relationship between the police and sections of the public began to deteriorate the volume of citizen complaints began to grow.[20] Not surprisingly this focussed more and more attention on how the complaints were handled. The result was a growing suspicion that they were not being dealt with fairly behind the closed doors of the police station. This was the genesis of the debate in Britain between the advocates of the internal, disciplinary model and the proponents of a more independent model for dealing with citizen complaints against the police; a debate which has been continuing ever since.[21]

(ii) The Police Chief's Responsibility for Internal Discipline

The advocates of the internal model base their arguments on very practical considerations. They start from the premise that a modern police force is designed to be an organised, hierarchical and highly disciplined unit

under the direction and control of a chief officer. It's primary responsibility is to enforce the law without fear of, or favour to, any individual or group no matter how politically powerful or economically underprivileged. If a police force is to fulfil these expectations a basic requirement is that its chief officer must be the sole, independent disciplinary authority for the force.[22] Since citizen complaints are viewed from the police perspective as being primarily a matter of internal discipline it follows that they must be the responsibility of the chief officer alone.[23]

This view is epitomised by Sir Robert Mark's reaction to the introduction of the independent police complaints board to the complaints procedure in England and Wales in 1976.[24] Since the board consisted of members appointed by a political authority he felt that his independence in the control of his police force was being compromised. If he wanted to discipline members for what he viewed as unprofessional police conduct he could be overruled by the complaints board if their actions had the support of the political establishment. Equally so, his refusal to discipline members on the ground that their behaviour was in accord with the best standards of professional policing could be overruled by the board, simply because the police action did not meet with the approval of the government of the day.[25] For Mark, the choice was between internal handling of citizen complaints or the risk of improper

political interference in policing. Interestingly this perspective does not seem to exclude the option of independent investigators under the control of the chief officer or, indeed, under the control of a single individual appointed in the same manner, and vested with the same independence, as the chief officer himself.

(iii) Police Commmitment to High Standards

Perhaps the most powerful argument for the internal model is based upon the premise that the police, as much as anyone else, have a paramount interest in ensuring that individual members of the force perform their duties in a diligent and disciplined manner with full respect for the needs and rights of the citizens whom they serve. A corrupt, inefficient or over zealous policeman poses as great, if not an even greater, irritant to his own force as he does to the members of the public whom he abuses. If the police were given full responsibility to enforce within their own ranks the standards that are expected of them they will do so rigorously. Indeed, they already have the resources and specialist expertise necessary for this difficult task. If left to it, therefore, not only would they be more successful than an independent body at resolving genuine citizen complaints, but they would also hand out much tougher penalties than their civilian counterparts.[26] An inevitable consequence would be a more marked improvement in disciplinary standards within the force than anything that could be achieved by

conferring responsiblity for the handling of citizen complaints on an outside body. Indeed, it is significant that many chief officers, such as Frank Rizzo, formerly of the Philadelphia city police, and Sir Robert Mark, formerly of the LMP, combined the reputation of being strict disciplinarians with outright hostility to the whole concept of civilian review.[27]

It is also said that the deterrent effect of disciplinary procedures is greatest when officers are held directly responsible to their superiors for the transgressions of those under their immediate command. Not only do complaints against a subordinate cast a shadow over the officer's leadership capabilities but they also mean a significant increase in paperwork for him. It follows that he has a strong incentive to crack down hard on misconduct and that, of course, applies all the way up the force. This contrasts with the situation where the responsibility for pursuing complaints rests with an external body. Under that arrangement it is felt that because senior officers no longer enjoy sole, disciplinary authority they will lose some of their sense of urgency in preventing misconduct.

(iv) <u>The Nature of Policework</u>

Another argument occasionally heard in support of the internal model is that policework is of such a professional, technical and difficult nature that only the police themselves, under the direction of the chief

officer, can deal effectively and fairly with allegations that a member has failed to live up to the required standards.[28] This view is premised on the notion that civilians, through lack of experience and familiarity with police work, might view police conduct in individual situations as unacceptable whereas in fact there was no practical alternative open if the police were to perform their function effectively in those situations. From this perspective two adverse consequences flow from civilian involvement in the handling of complaints.

First, it is likely that an "us and them" mentality will develop. Members of the force will view civilian involvement as hostile to and ignorant of their position. Consequently they will identify and sympathise more with the accused member, who will be able to shelter behind this support in refusing to co-operate with the investigation or to respect its outcome.[29] At its worst it will fuel the police perception of themselves as a beleagured minority working in a hostile environment under constant attack, not just from criminal and anti-social elements in society, but also from politicians, lawyers and the courts.[30] The inevitable result will be hostility and obstructive tactics against the complaints procedure, coupled with a greater laxity towards the degree of misconduct that will be tolerated within the force. This contrasts with the situation where citizen complaints are handled internally. The accused member will have much greater confidence in the

internal procedure affording him a fair hearing. Fellow policemen will be much more sympathetic and understanding of his predicament than a body of civilians who know nothing about the complexities of police work. Accordingly, he is much more likely to respect and accept the outcome of an investigation and make an effort to live up to the standards of the force in the future. Failure to do so will engender little sympathy from his colleagues. The net result should be not only more accurate resolutions in individual cases but also a general improvement in both police conduct and efficiency.

Second, civilian involvement leads to police personnel exercising undue caution in their law enforcement activities.[31] They face the danger that exercising their discretion in accordance with professional standards of policing might not always accord with the partisan views of a civilian body. The safest option in a difficult situation, therefore, might be to do nothing. At its worst a police officer could be deterred from taking prompt action in circumstances where that is necessary to protect his own life or that of others. If he knew that his actions would be reviewed subsequently by professional police officers who would be much more in tune with his dilemna the liklihood is that he would have opted to act. To leave control of citizen complaints in the hands of civilians, therefore, would be counterproductive to good

policework and contrary to the best interests of citizens and police alike.

(v) Malicious Complaints

Occasionally, it is alleged that a civilian input into the citizen complaints procedure encourages malcontents to lodge malicious and unfounded complaints to embarrass the police. The police federation for Northern Ireland has been particularly vociferous on this point to the extent that they claim it is a major problem in Northern Ireland. Unfortunately, no evidence has been presented to substantiate that claim.[32] In the absence of such evidence there is no reason to believe that this should be a significantly greater problem for independent investigation than it is for the internal procedure.

(c) The Need for an Independent Input

(i) The Accountability Needs of the Citizen

Although the police arguments in favour of an internal model can be criticised on several fronts[33] it is irrefutable that there is at least some substance to them. Indeed, when dealing with matters pertaining purely to internal discipline the case for an internal model is convincing. It is tailor made for the purpose of maintaining discipline in a large, hierarchical, disciplined organisation. The problem arises when exactly the same model is applied to citizen complaints. Surprising as it may seen, complaints from citizens account

for only a minority compared to those generated from within the police.[34] Whereas the police can be relied on to deal satisfactorily with the complaints they lodge against themselves it does not follow that they will be able to satisfy the needs of the complainant and the public in the matter of citizen complaints. The internal model makes no concession to the possibility that the public's or the complainant's perspective towards a complaint might well differ in some respects from that of the police.[35] An assumption is made that because it is particularly well adapted to deal with internal complaints it must also be the most suitable for resolving citizen complaints. Such an assumption ignores the fact that a citizen's complaint represents not just (sometimes not at all) a complaint that an officer has breached the disciplinary standards imposed within the force, but also that his actions have left the citizen feeling dissatisfied with his treatment at the hands of the police. If the complaints procedure is to succeed in his case it must persuade him that he is not helpless in the face of police power and bureaucracy. In other words, a citizen's complaint represents a problem of accountability not just to the chief officer but also to the complainant and the public at large.

The public accountability dimension of citizen complaints presents a problem which cannot be catered for adequately by an internal model. It is no coincidence that lack of confidence in the police handling of citizen

complaints has grown over the past two to three decades as both the volume and gravity of such complaints have increased. For the most part this concern has been focussed on the absence of any independent check on how thoroughly and fairly the police are dealing with citizen complaints.[36] The spectacle of a police member being the accused, the investigator, the prosecutor, the judge, the jury and the sentencer is hardly one to inspire confidence outside of the force itself. Public scepticism is reinforced by the fact that a member is found guilty in only a very small minority of cases where he is the subject of a citizen complaint in contrast to the much higher rate of conviction in cases where the complaint is internally generated.[37]

(ii) <u>The Police Response</u>

The police, however, would refuse to accept that an internal model does not make them accountable. They would point out that the chief of police will have to answer to his political masters and, through them, to the elected representatives of the people for the overall discipline of the force. If complaints are not being investigated and dealt with scrupulously this will become apparent eventually in the form of an upsurge of undisciplined behaviour in the force. The chief will be held responsible, and if he cannot demonstrate his ability to counteract it he will lose the confidence of the electorate and the government and will face dismissal.

There are at least two major weaknesses in this argument. The first is that it fails to deal adequately with the accountability needs of the individual complainant. One of the fundamental reasons for having a special procedure to deal with citizen complaints is because the individual who has suffered from police misconduct cannot always get an adequate remedy. Once he has lodged the complaint under the internal model he drops out of the picture and the complaint becomes an internal matter to be dealt with in the context of maintaining a certain standard of discipline in the force. It is treated as having no greater significance than a possible breach of discipline reported by another member or emanating from any other source. Accountability to the complainant, therefore, is incidental or peripheral to the primary concern of internal discipline. Under the internal model the complainant can never be sure that his specific complaint was dealt with fairly in the event of its being unsuccessful.[38] So long as standards are maintained generally in the force the presence of democratic accountability will be of little direct value to him.

The second weakness concerns the treatment of minorities and is a variation on the first. In a national police force like the Garda Siochana the chief of police will be appointed by the government which, in turn, holds office only because it is composed of elected members of that party or parties which command majority support in the

elected chamber of parliament. It follows that if the police force is regularly engaging in undisciplined conduct towards people represented by that party or parties it will not be long before the chief of police will come under pressure from the government to do something about it. If, however, the errant behaviour is directed against communities which have very little representation in parliament or, perhaps, none at all then the chances of their pleas getting through to the government are slim and the likelihood of the government taking up the cudgel on their behalf even slimmer. In Ireland this accountability problem is particularly acute because not only is there a number of significant disaffected, unrepresented minority groupings such as gay people, Sinn Fein supporters and itinerants but the constitutional representatives of the poor and underprivileged, the Labour party and the Workers party, are almost peripheral in parliament because of their small share of seats. Unfortunately the potential for confrontation between police and citizen is highest in these minority communities.[39]

When a valid complaint does arise the minority citizen may well get the impression that the police are not concerned about it simply because the matter is dealt with behind closed doors by the police themselves.[40] Even if he does accept that his complaint is treated seriously there is always the danger that although it discloses heavy-handed policing methods from a citizen's perspective,

it would not be viewed as a breach of discipline from the police perspective.[41] The potential for this conflict is always present because the nature of policework is such that a member will occasionally have to exercise coercive power over a citizen in order to protect the broader public interest. In this event, no matter how thorough the investigation under an internal disciplinary model such a complaint must be judged unfounded. This will leave the complainant more disgruntled than ever. When this is experienced over and over again by complainants from a small close-knit community it will not be long before that community comes to the conclusion that the police can behave as they like. Ironically, the internal complaints procedure would be fuelling this perception rather than combating it.

(iii) Two Procedures

If police accountability to the complainant and the public is to be satisfied it would appear that two complaints procedures, instead of one, are required. The internal model could, and should, be continued for all complaints which emanate from within the force.[42] Where an incident is the subject of a citizen complaint, however, the procedure must not only be fair and capable of getting to the truth, but must be seen to be so. From the perspective of the complainant and the public this must entail at the very least an independent element somewhere in the procedure. The only question is what form that

independent element should take. The obvious answer from a pure accountability perspective is that the whole procedure should be totally independent from start to finish.

Any proposal to take the handling of citizen complaints out of police hands altogether is destined to provoke the determined opposition of the police establishment. It will be argued that, for the reasons outlined earlier, the inevitable result will be a significant drop in police morale and internal discipline leading ultimately to a serious decline in policing standards and efficiency. Of what value is a complaints procedure which satisfies the demands of accountability at the expense of a lower standard of police service and a higher incidence of police misconduct?

Although this argument has been very fashionable in certain quarters there would appear to be little substance behind it in reality. It implies that police personnel would be distracted from the diligent performance of their duties simply because they are subject to a complaints procedure which is not under their control. If such was the case in a police force then the problem of maintaining standards in that force would run much deeper than the presence or absence of independence in the complaints procedure. This is supported by the fact that independent elements have been introduced in various degrees to police

forces all round the world over the past few decades and, so far, there is no cogent evidence to suggest that they have had a significant, deleterious effect on standards or morale.[43] It is submitted that factors such as the quality of leadership, recruitment standards, training, pay and conditions are the real factors determining morale and efficiency. Complaints procedures would only become a factor if they were designed or operated in a manner which was unfair, or seen to be unfair, to the accused officer.[44] The challenge, therefore, is to construct a procedure which has sufficient independence to satisfy the accountability needs of the complainant and the public without, at the same time, jeopardising the accused officer's right to fair procedures.

(d) Independent Elements in other Jurisdictions

This challenge has provoked a wide variety of responses in police forces all over the world. Some like the Pennsylvania State Police have managed to hold on to the internal model[45] while others like the Washington D.C. police have been subjected to a substantially independent procedure.[46] The majority, however, have been content to retain the basic internal model and experiment by introducing different forms of independent elements into it.

Britain

When Britain first introduced an independent element in 1976, for example, it opted for a very limited approach. This consisted of a Police Complaints Board comprised of 20 part-time and full-time members,[47] representing a range of interests, appointed by the Prime Minister. To emphasise their independence from the police there was a prohibition on any person who was or had been a constable in any part of the United Kingdom being a member.[48] The role of the Board was confined essentially to scrutinising the decisions of a chief or deputy chief constable[49] not to prefer charges, with the object of directing him to do so where it disagreed with his decision.[50] It could also prevent charges being withdrawn after they had been preferred. To these ends it could request the relevant deputy chief officer to furnish it with such addtional information as it reasonably required. In exceptional circumstances, such as where the Board had directed disciplinary action contrary to the advice of the deputy chief constable, the disciplinary tribunal consisted of a chief officer plus two members of the Board, and the decision was by a majority.[51] In the matter of punishment in such cases, however, the Board members only had a consultative role. Finally, the Board could make a report to the Secretary of State in any matters which came to its notice and which it considered sufficiently grave or exceptional.[52]

Clearly this arrangement was designed to have a very limited impact on police control over the handling of citizen complaints. The investigation stage remained firmly in the grip of the police as did the composition of the disciplinary tribunal in most cases. Perhaps it is not surprising that the Board was burdened from the outset with the unhappy distinction that it satisfied neither those who resisted nor those who sought change.[53] It was not long before the British government was forced to embark on a search for alternative arrangements which would encapsulate greater support.[54] The result was the abolition of the Police Complaints Board and the creation of the Police Complaints Authority by Part IX of the Police and Criminal Evidence Act 1984.

Most of the criticism heaped on the Board revolved around its inability to act or to appear to be acting independently of the police.[55] The British government responded by conferring an expanded role on the new, independent Police Complaints Authority.[56] Nevertheless this still fell very far short of taking responsibility for handling citizens' complaints out of police hands. The major new role entrusted to the Authority was that of supervising the investigation into all serious cases of death or personal injury and any other specific cases where it considered it desirable in the public interest that it should do so.[57] To this end it must receive copies of all such serious complaints automatically and any other

specific complaints that it demands.[58] Its' supervisory function entails approving or, if necessary, appointing the investigating officer[59] who, in turn, must submit his report to the Authority.[60] No further action can be taken until the Authority has issued a statement to the police chief and, if practicable, the complainant specifying whether or not the investigation was conducted to its satisfaction.[61] In all complaints where the chief officer has decided not to prefer disciplinary charges he must send a memorandum to the Authority setting out his reasons for not doing so.[62] In cases not supervised by the Authority this must be accompanied by the relevant complaint and investigation report.[63] From there on the procedure is essentially the same as that for the old Police Complaints Board.[64] The whole arrangement, therefore, conforms to the original concept of leaving the primary responsibility in police hands but subjecting it to a measure of independent scrutiny.

USA

Britain was not the first nor, indeed, the last to resort to this hybrid approach. Philadelphia was first off the mark in 1958 with the establishment of its Police Advisory Board consisting of five (later increased to eight) civilians directly appointed by the Mayor.[65] It had the power and the duty to receive and resolve, either through conciliation or a hearing, complaints concerning a wide range of police misconduct. The initial

investigation, however, was still performed by serving police officers from the community relations unit, and punishment remained the preserve of the chief officer, although the Board could recommend specific sanctions. Minneapolis and New York followed suit in 1960 and by 1966 no less than 19 out of 57 police departments surveyed by the President's Crime Commission[66] had some form of independent element in their complaints procedures. In his survey of civilian review in the USA David Brown provides copious examples of how varied the procedures were.[67] On the whole, however, they were more adventurous than the British approach in that the independent Board almost invariably had the power to adjudicate while, in some cases, it even had its own investigative staff. That is not to say, however, that the internal model disappeared. On the contrary, it is still as vibrant as ever, with some forces even having abandoned civilian review to return to it.[68]

Canada

Another interesting approach, based on an Ombudsman type figure, is to be found in Canada. In 1981 the municipality of Toronto embarked on an experiment with the use of independent components.[69] Their approach, in common with most others, retained the primary, police responsibility for investigating complaints against themselves. The innovation consisted of the establishment of two independent bodies: the Police Complaints Board and

the Police Complaints Commissioner. The former was composed of civilians appointed by the Lieutenant Governor while the latter, although chairman of the Board, constituted an independent office in itself. Of the two, the Commissioner was vested with much greater potential to have an impact on how complaints were handled. Indeed, his input brought the new procedure very close to a wholly independent model. His general responsibility was to monitor the handling of complaints by the force's own internal investigative unit and to evaluate the effectiveness of the procedure. However, he could also request the internal unit to carry out further investigations in any particular case and could even go so far as to take over the actual investigation where there had been undue delay or in exceptional cases. Where a dissatisfied complainant requested the Commissioner to review the matter this could also result in him carrying out a full investigation into the substance of the complaint. When doing so he could enter into any police station to examine books, papers, documents or anything else there related to the complaint. Where such matters were located on private property he could acquire the same powers by seeking and getting a warrant from a justice of the peace.

The Board's contribution was confined primarily to conducting hearings. This could happen in three situations: firstly, where the chief of police referred a

complaint to it on receipt of an investigation report; secondly, where the Commissioner felt that a hearing was necessary in the public interest; and thirdly, where a police officer appealed from the decision of an internal disciplinary hearing. When conducting a hearing in any of these cases the Board not only had the power to make a finding of guilty or not guilty but, in the case of the former, it also had the power to impose a penalty. Penalties ranged from dismissal to reprimand. Taking both the roles of the Commissioner and the Board together, therefore, it is clear that police responsibility for handling citizen complaints against the police has been severely curtailed in Toronto.

Australia

Another common law jurisdiction to embrace an independent input is Australia.[70] The procedure for handling complaints against the Australian Federal Police was reformed in 1981 along lines very similar to Toronto. In the case of the former, the Commonwealth Ombudsman took on the mantle of the latter's Police Complaints Commissioner, while the role of the Police Complaints Board was discharged by a Police Disciplinary Tribunal. The essential difference between the two procedures is that the Commonwealth Ombudsman is not just as powerful as the Commissioner. Although he does have the power to investigate complaints directly and to see that charges are preferred it is by no means an absolute power. If the

police chief disagrees with his decision in either an investigation or with respect to charges the matter must be decided by the responsible minister in the case of the former or the Attorney-General in the case of the latter. Nevertheless, the emphasis on independent scrutiny is clear and indisputable.

3. A Complaints Procedure for Police Accountability

(a) The Basic Requirements

There are many explanations for the fact that the universal problem of how to render the police accountable for citizen complaints of misconduct has attracted, and continues to attract, so many different solutions.[71] Matters such as: the strength of the police lobby, the nature of police powers, the public perception of the police function, the level of public confidence in the police, the sophistication and/or affluence of the population and the presence of minorities must have an impact and these, of course, will differ from one jurisdiction to another. It is only to be expected, therefore, that the make-up of complaints procedures should differ at least to some degree. Even if the basic requirements to satisfy accountability can be agreed with respect to a specific police force there will still be room for argument over how those requirements should be implemented so as not to endanger standards. With that in mind an attempt will be made now to prescribe the

requirements and how they should be implemented in a complaints procedure for the Garda Siochana.

The first element that such a complaints procedure must incorporate is the capacity to provide the victim of police misconduct with a means through which he can get a determination that he was a victim and an appropriate remedy. At the very least this will require: an accessible means of filing the complaint, a code of disciplinary offences which is broad enough to cover all matters that the citizen is likely to interpret as unacceptable police conduct, impartial and capable investigators and decision-makers, fair procedures designed to elicit the truth, a wide range of remedies to suit the injury and a speedy resolution. Even if the procedure satisfies all these requirements it is unlikely that it will satisfy most complainants. This is because all these requirements could be satisfied in theory by an internal model and, as explained earlier, that will never satisfy the majority of unsuccessful complainants. They will always suspect that the complaints were not dealt with fairly and thoroughly and will come away with the feeling that they cannot call the police to account.

It will be difficult also to convince the general public that an internal model is sufficient to render the police accountable in individual cases of misconduct. Since the public cannot have a first-hand knowledge of the

facts at the root of what appears to be a genuine complaint in every case it will require a procedure which not only is fair but is seen to be fair. This will be particularly important in the case of minorities who for one reason or another lack confidence in the police. No matter how thorough or impartial an investigation may have been in fact, if it has the appearance of being biased in favour of the police then a decision against the complainant will simply reinforce anti-police prejudice. This will require, in addition to the ingredients already mentioned, that the code of offences and remedies are published, the investigators and decision-makers are seen to be impartial and that the investigation and inquiry procedures are seen to be fair to the complainant. If these matters are dealt with satisfactorily then neither an unsuccessful complainant nor the public can have grounds for feeling that the procedure is deficient from an accountability perspective.

(b) <u>The Code of Offences</u>

(i) <u>Introduction</u>

The first and most basic component that must be considered is the range of offences which can be the subject matter of a valid complaint. There is little point in a citizen seeking redress through the procedure if the police conduct which he is challenging does not fall within one of the offences in the code. From a pure accountability perspective, therefore, it is important that

the range of offences covers all the examples of possible police behaviour which will affect the average citizen and which he is likely to view as unacceptable.

(ii) The Internal Disciplinary Code

Traditionally, under the internal disciplinary model the code of offences was framed from the perspective of internal discipline. Typical examples would be: neglect of duty; disobedience of orders; breach of confidence; untidiness on duty or in uniform and neglect of health.[72] Clearly these are not the sort of offences about which the citizen would feel the need to complain. They are the sort of matters, however, that the managers of a disciplined police force would be keen to combat by strict supervision and enforcement, and that is why they are there. Nevertheless, it is inevitable that the code will also contain offences which consist of police conduct about which a citizen is likely to complain. If, for example, a member uses unnecessary force when dealing with a member of the public it is likely to generate a complaint from the victim. At the same time it constitutes a clear example of undisciplined behaviour that the member's superiors would be keen to combat even in the absence of a citizen's complaint. Its appearance in the code is primarily for the latter reason. Other similar examples would be: corrupt or improper practices; abuse of authority; intoxication; identifying actively or publicly with a political party; and conduct prejudicial to discipline or likely to bring

discredit on the force.[73] It is unavoidable, therefore, that the range of offences in the internal disciplinary model should make some concessions to the needs of accountability. Its capacity to satisfy those needs fully, however, is deficient on three counts.

The first deficiency stems from the fact that the perspectives of internal discipline and accountability are not identical. Admittedly, as explained above, there will be considerable overlap in the offences that each embrace, but it is unlikely to be large enough to satisfy all the requirments of accountability. This can be illustrated by comparing the police and the public attitude to a criminal investigation. Both have a vested interest in seeing that it is brought to a successful conclusion by apprehending the culprits as quickly as possible, but their priorities in this enterprise will differ. The immediate burden of securing the common objective falls on the police. From the outset they are under pressure to produce results. Their priority is to catch the criminals. It follows that they will feel justified in using whatever lawful powers and resources they possess to conclude the investigation as quickly as possible. Since these are defined in very broad terms it follows that they can resort to many forms of trickery and coercion without breaking the law. Examples would include: lawfully arresting a suspect in his own house solely for the purposes of questioning him in the more forbidding atmosphere of the police station;

threatening to arrest a suspect's parents, spouse, children etc. if he does not cooperate; subjecting a lawfully detained suspect to oppressive treatment short of an unlawful assault; and threatening to arrest an individual on some trivial matter unless he agrees to cooperate on some other matter. These are methods which police personnel use regularly when attempting to break down the resistance of a suspect or a reluctant witness in the course of a criminal investigation. So long as they are not used by a member in a manner which breaks the law or a specific prohibition issued by the chief officer they would not be viewed as a threat to internal discipline from a police perspective.[74]

Unlike the police, the public stands far removed from the heat of the action and so can afford to adopt a more detached perspective. It will be concerned not only with the result but also with the manner in which it was obtained. Interest in the latter will be sharpened by the fact that any innocent citizen could find himself the target of similar police methods at any time in the future. The public's priority, therefore, is shared equally between the police success in catching the culprits and the protection of the individual against unfair or heavy handed treatment by the police in the process. It is unlikely that the methods described above would be viewed as acceptable from the public perspective. In the case of an individual who is an innocent victim of such methods they

are virtually certain to be unacceptable. A code of offences limited to what the police see as important, therefore, is hardly likely to satisfy the need for accountability.

The second deficiency is the other side of the coin from the first. Just as there are many necessary offences missing from the internal disciplinary code so also does it include many that would be superfluous from an accountability perspective.[75] This gives rise to the problem of whether to hive them off to form part of a separate procedure or to allow them to remain as part of a new code expanded to cater for the needs of accountability. If the latter option is chosen it means that purely internal, disciplinary matters such as disobedience of orders will be processed through a procedure which, in all likelihood, will be at least partly independent of the police. One of the problems with this is that the police chief's ability to exercise full control over the heart of internal discipline in his force would be limited despite the fact that he is charged with the leadership of what must be a highly disciplined organisation. When this argument was raised in opposition to the introduction of an independent element in the handling of citizen complaints it was countered by the argument that internal discipline would not be so seriously undermined as to outweigh the accountability benefits that an independent element would bring. Here, however, the issue is not the handling of

citizen complaints, but matters which have no purpose or significance beyond the maintenance of internal discipline. For example, if complaints of insubordination against members are handled through a procedure wholly internal to the police it is unlikely that they would give rise to an accountability problem in any individual case simply because such complaints would not normally emanate from members of the public. If, however, the police chief does not exercise full control over such machinery his authority to enforce strict, internal, disciplinary standards will be undermined. As a result he will find it more difficult to maintain high standards of integrity, obedience, appearance and efficiency down through the ranks. The ultimate losers would be the public who would have to be satisfied with a lower standard of policing. It would appear, therefore, that retaining purely internal, disciplinary matters in the new code designed to meet the needs of accountability would jeopardise the maintenance of an efficient, disciplined police force without any consequent improvement in accountability.

The simple alternative is to hive off all the purely internal, disciplinary offences to a separate procedure which is purely internal to the force. This has much to commend it. As has been seen it avoids unnecessarily undermining the police chief's control over the internal discipline of the force. Indirectly it could actually enhance the ability of the citizen complaints procedure to

promote the objectives of police accountability. Given the nature of the police organisation and the environment of modern policing there is always the danger that police personnel will see themselves as members of a select club banded together by, inter alia, rules and standards which set them off from the public at large.[76] This perception can only be reinforced by the fact that transgressions are dealt with through a procedure dominated by the objective of enforcing internal discipline. Citizen complaints would be viewed as having importance only to the extent that they represented a failure to live up to the internal standards of the force. If, however, citizen complaints are handled through a procedure wholly separate from that for purely internal disciplinary matters that would signify that the former have an importance over and above the latter. It would be a constant reminder to members that in the performance of their functions they are answerable not only to their immediate superiors and the internal norms of the force but also to the public at large.

The third deficiency in defining offences from a disciplinary perspective is the fact that they focus exclusively on conduct and take no account of superior orders. All the offences in the 1971 Garda Siochana regulations, for example, are worded in such a way that they are confined to the specific actions or inactions of members in certain circumstances. The possibility that an order given by a senior officer could or should be capable

of constituting an offence, does not seen to have been envisaged. To take a specific example, abuse of authority is defined under the current Garda Siochana disciplinary regulations,[77] to include making an arrest without good and sufficient cause. If a member effects an arrest in such circumstances then clearly he will be guilty of this offence. If, however, a senior officer orders him to arrest in such circumstances the senior officer will not be guilty. Indeed, the existence of the order might even be accepted as "good and sufficient cause" so that the member who effected the arrest would not be guilty either. This is what one would expect in a code drawn up from the perspective of internal discipline. The emphasis would be on what is done or not done as opposed to what is or is not ordered by senior officers. If a complaints procedure is to satisfy the needs of accountability, however, it is important that it should be able to reach the guilty source of misconduct rather than an innocent agent. This will require that the code of offences includes ordering a member to act in a manner which, if done on his own initiative, would amount to an offence.

(iii) A Code of Offences for Accountability to the Public

Bearing in mind these criticisms of the internal disciplinary approach an attempt will be made now to give an outline of the sort of offences that should be contained in a procedure designed to serve the needs of accountability. The overall aim must be to produce a code

which prohibits all those examples of police behaviour which members of the public are likely to experience at first hand and consider unacceptable. It will be tempered, of course, by the need to ensure that the police are not unduly hampered in the task of discharging their duties in an adequate and efficient manner. Clearly the precise contents of such a code will differ from place to place and from time to time in accordance with the local and temporal swings in the balance between the demands of accountability and the needs of an adequate and efficient police force. What is being attempted here, therefore, is simply a broad outline of how the problem might be approached.

General Offences

The first essential is to prohibit unacceptable conduct which is not confined to the performance of any particular police duties. This would include such things as: the use of unnecessary violence or threats towards any member of the public; the use of insulting or abusive language, signs or demeanour to any member of the public; soliciting or receiving any gifts or rewards or services from members of the public unless specifically authorised by the Commissioner; failing to perform his duty without good and sufficient cause in any situation that comes to his notice; performing his duty negligently; being unfit for duty owing to the effects of intoxicating liquor or drugs or a combination of both either while on duty or while not on duty but wearing a uniform in a public place;

failing to exercise proper care over property belonging to a member of the public and which has come into his custody; making or procuring the making of any false or misleading statement with intent to deceive; identifying actively or publicly with a political party or any organised interest group in such a manner and in such circumstances as to give rise to a reasonable apprehension among members of the public in relation to impartiality in the discharge of duties; any act or omission which is an offence under the criminal law; being an accessory to conduct prohibited by the code.

Many of these offences are recognisable in one form or another from the traditional disciplinary codes; but that is entirely understandable given that they also represent conduct prejudicial to internal discipline. Specifically excluded are the very broad offences such as conduct which a member knows or ought to know would be reasonably likely to bring discredit on the force.[78] Such catch-all offences do little to enhance accountability because if a citizen is sufficiently aggrieved about police conduct to make a valid complaint then that conduct should be the subject matter of a specific offence. From the police point of view there is an element of unfairness in a member being charged with such a broad offence. It will be difficult for him to avoid the conclusion that the authorities are out to get him and are scraping the bottom of the barrel to do so. Fellow members are likely to

sympathise with him, leading to increased hostility towards the whole procedure and a loss of morale. It would be better all round if such offences were excluded.

Offences Governing Specific Powers

If the code is confined to the sort of offences listed above it will be very limited in its capacity to influence police conduct in specific situations. For example, if a member detained a lawfully arrested suspect and refused to pass on his request to see a solicitor the only suitable offence listed above would be failing to perform his duty without good and sufficient cause in any situation which comes to his notice. This will provoke a dispute over the actual scope of a member's duty and, in particular, whether it includes an obligation to pass on a detained suspect's request for access to a solicitor. Clearly these offences are too broad to give members clear guidance on what constitutes unacceptable conduct in specific situations. More detail is required.

This can be approached on two levels. Firstly, each of the standard police powers should have a separate code setting out basic rules on how it should and should not be used in situations where it is lawfully available.[79] In the case of arrest, for example, this might include such measures as: the decision to use the power should be taken only as a last resort where it is necessary to bring the suspect to a police station in order to protect him or

members of the public, or to secure his co-operation; in particular it must not be influenced by the colour, race, nationality, religion, opinions, appearance, demeanour, life-style or criminal record of the suspect; the suspect must be told clearly the reasons why he is being arrested and under what power as soon as possible; he must also be told how his arrest affects his legal position and what his rights are; where two or more powers are available only that one which applies most directly to the circumstances, as known at the time, should be used; force or handcuffs should not be used unless there is reason to believe that the suspect will attempt to escape, even then the force used must be in proportion to the consequences of failing to detain him; the arresting officer must make a record as soon as possible of the time, place, reasons for and circumstances of the arrest including the power used and what the suspect was told.

The content of the codes for each of the other regularly used powers such as: the use of force, detention, search, seizure, the stopping of motor vehicles in the context of the road traffic laws, interception of communications etc. will all be different. The object of defining what is and what is not acceptable conduct in the exercise of these powers, however, will be the same. The police will then be in a position to know what the public expect of them at that level of their operations and will be able to act accordingly. By making it an offence to

break any of the codes members of the public will have a remedy if they can establish that they were victims in any particular case.

Offences Governing Defined Operational Situations

The second level that must be provided for covers situations where members of the public are affected by specific police operations. This can, but will not necessarily involve, the exercise of powers by an individual member of the force. Examples are: general intelligence gathering, pre-arrest investigations into criminal offences, the policing of public demonstrations, the management of road vehicle checkpoints, providing information which they have acquired as a result of their investigations, answering calls for assistance from the public etc. These are all situations which will produce complaints from citizens about how they have been treated by the police. Unless they take the form of an abuse of a specific power or come within one of the general offences discussed earlier there will be no prospect of a remedy for the victim through the complaints procedure. There is no reason, however, why each of these operational situations cannot be the subject of a list of do's and don'ts for members in much the same manner as suggested for police powers.[80] As things stand some of them are governed by detailed provisions in the confidential code issued to many police forces. These, however, are written purely from the internal police perspective. If they were revised to reach

an accommodation between what the public would view as acceptable methods of policing and the needs of the police then the specific rules that would result could be enforced through the complaints procedure simply by making a breach an offence. This would further the purpose of keeping the police informed in as much detail as possible of what the public expects of them and would provide members of the public with a remedy when they have been the victim of a failure to live up to these standards.

(iv) Conclusion

If the definition of all the offences which could be the subject matter of a valid complaint was approached in the manner suggested the accountability potential of the complaints procedure would be greatly enhanced. Under the traditional approach the offences were worded in a style that disclosed very little about what constituted unacceptable police conduct when dealing with members of the public. Accordingly, when a citizen lodged a complaint he would often have no idea against what standards it was being judged. Not only would this fuel the perception that the citizen had no contribution to make to what constituted acceptable standards of policing practice, but it would also act as a disincentive to lodging a complaint in the first place. If, however, the offences were presented in the style suggested here, including the publication of the proposed codes of practice as part of the complaints procedure, the public would be in a position to know what

is officially held to be acceptable or unacceptable police conduct in most relevant situations. It would also be in a position to judge whether it was happy with the official standards. If any section of the public felt that the standards laid down in the codes were deficient in any respect it would be in a position to pin-point its grievance and mount a campaign through the normal democratic process, including the courts, to have the necessary alteration made. Furthermore, the formulation and publication of the codes of practice would not only enable victims of police misconduct to lodge complaints in many more situations than they could before, it would also encourage them to do so. Armed with the knowledge of how they should be treated they will have much more confidence and motivation to complain. An added bonus is the satisfaction that they have been entrusted with a role in the maintenance of acceptable police practices through their capacity to complain.

(c) Lodging the Complaint

(i) The Internal Model

The next stage in the complaints procedure is lodging the complaint itself. Under the internal, disciplinary model there was no need to make specific provision for this. The task of policing compliance with the disciplinary code would normally be delegated to a discipline branch. Since its responsibility embraced the enforcement of discipline generally it acted simply when a

possible breach of discipline came to its notice irrespective of the source.[81] Where the procedure is being used primarily to provide individual citizens with a remedy in cases of police misconduct, however, it is clearly necessary to have a formal mechanism for initiating the procedure. This raises the question of who should be permitted to lodge a valid complaint and how.

(ii) Third Party Complaints

Naturally complaints from the victim or someone duly authorised to complain on his behalf must be admissible. Objections have been made to proceeding beyond this and permitting complaints from third parties primarily on the ground that it would encourage frivolous and vexatious complaints. If, however, the success of the procedure is left to depend on the actual victim lodging complaints it is likely that much police misconduct will not be reported and, therefore, not controlled. This would happen where, for example, the life-style of the victim is such that he would not interpret the police conduct as abnormal or unacceptable, or, if his background is such that there is no point in complaining because the policeman's word will always be accepted before his. It could also happen that the victim would not want to risk antagonising the police by complaining in case they make life unbearable for him in retribution. If genuine complaints are not forthcoming for these or other reasons the inevitable result will be a growing feeling among the police and sections of the public

that the police can do whatever they like and get away with it. That in itself will act as a restraint on the reporting of police misconduct.

Whatever the reasons for victims failing to complain there are genuine reasons why third parties would wish to complain. They may, for example, be so incensed by the police conduct in a particular case that they feel compelled to see that something is done about it or, more generally, they may recognise that they have an interest and a role to play in seeing that the highest standards are maintained in the force. Even the mere knowledge that they can complain if they wish is valuable in assuring them that the police can only do what they want and get away with it if the public lets them. In other words, allowing third parties to lodge complaints promotes greater police accountability. Confining the procedure to complaints from the victim and from another member of the force locks it into the internal, disciplinary role. Undoubtedly there is the danger that police time, resources and morale will be drained by the generation of a greater volume of frivolous and vexatious complaints. It will be seen later, however, that this danger can be averted by other mechanisms without significantly affecting the accountability potential or efficiency of the overall procedure.[82] With such mechanisms in place there would appear to be no compelling reasons why third parties such as: someone duly authorised by the victim, a member of the victims family or a witness

to the relevant incident should not have locus standi to complain.[83]

(iii) Where to Lodge the Complaint

The next issue that arises is where, and to whom, the complaint should be lodged. There was a time when the only place where a complaint could be lodged was at a police station. Not surprisingly this requirement attracted considerable criticism as aggrieved citizens were often reluctant to complain directly to the police about the behaviour of a member of the force.[84] From the police perspective, of course, the complaint only had significance to the extent that it disclosed a breach of discipline and so where else would such a complaint be made but to those responsible for internal discipline. As complaints procedures have become more sophisticated, however, the fears of the complainant and the needs of the citizen have been recognised and it is permissible now in many jurisdictions to lodge complaints with designated bodies or agencies independent of the police.[85] Clearly this is a pre-requisite for any complaints procedure designed to enhance accountability. If the citizen feels intimidated from lodging the complaint the whole purpose in allowing him to complain is lost.

(iv) To whom the Complaint should be Referred

The Chief Officer

The question of who is authorised to receive notice of the complaint would appear in some respects to be a mere formality. It is a formality, however, which can have significant implications not just for setting the character of the procedure but also for preserving public confidence in it. In most police forces, even today, the normal practice is for all complaints to be referred to the chief officer. This is the case irrespective of whether they are made in the first instance to an authorised agency independent of the police or directly to a member of the force. There is no obvious, practical benefit to be derived from this (beyond the chief officer's need to be aware of what is happening in his force) as the chief officer rarely supervises the investigation in person. One possible justification is that all complaints will be investigated by officers under the direction and control of the chief officer thereby ensuring a uniformly high standard in all cases. The prospects of him actually supervising the investigations, however, is remote. It would probably happen only in cases where the complaint is against his immediate deputy or assistants. The invariable practice in larger forces is for him to delegate his responsibilities in these matters.[86]

A more credible explanation for the requirement to refer emerges when the complaints are viewed essentially as internal disciplinary matters. Since the chief officer is normally the disciplinary head of the force it follows that

all complaints should be referred to him in formal recognition of his status. While this is understandable and probably desirable where the substance of the complaints are confined to matters affecting internal discipline alone, it is not absolutely necessary in the case of citizen complaints of misconduct. If the latter, in common with the former, are automatically referred first to the disciplinary head of the force the impression will be given that they are to be interpreted primarily as matters affecting internal discipline and that would be counterproductive to the interests of accountability. A more satisfactory approach would be to refer the complaints first to the independent complaints authority (discussed later) which would then, as a matter of courtesy, send copies to the chief officer.

(v) An Independent Authority

A further, more substantial problem will arise if the chief officer is the only authority to whom complaints must be referred. One of the fundamental requirements from the accountability perspective is for all citizen complaints to be investigated and to be seen to be investigated. In many cases, particularly those which are found to be "unsubstantiated," the only direct evidence that a complainant has of the investigation of his complaint is the actual taking of his statement and the subsequent notification through the post that his complaint is "unsubstantiated". Since this is the extent of most

complainants' first hand experience of the investigation process it would be understandable if the public perception was that the police did not bother to investigate the vast majority of citizen complaints. The inevitable result would be a decline in public confidence in the role of the complaints procedure.

One way of overcoming this problem is to have the complainant accompany the investigating officer throughout the investigation. Since this would be impractical other measures must be adopted. In some jurisdictions the law has been amended in recent times to place the police under a legal obligation to investigate every formal citizen complaint against themselves.[87] Inevitably this will enhance the prospects of all such complaints at least being investigated. An additional safeguard which has been adopted in British and Irish police forces is the establishment of the independent review boards. They have the potential to inspire confidence that complaints will be investigated. This can be realised by imposing a legal obligation on the police to supply them with copies of all citizen complaints made directly to the police. If the Boards are placed under a statutory obligation to review how each complaint is investigated that should force the police to carry out at least a formal investigation.[88]

An alternative approach which has yet to be fully tried in Ireland or Britain is to place the actual

investigation of the complaints in the hands of an independent body. This would avoid the suspicion that the investigators are reluctant to pursue the investigation. If it was coupled with a legal obligation to investigate all admissible complaints it would be difficult to conceive of any further practical step that could be taken to engender confidence that complaints will be investigated. Just like independent review boards this option has many broader implications which will be pursued later.[89] At this stage, however, it is clear that in the interests of accountability some mechanism must be included to assure the complainant and the public generally that complaints are actually investigated.

(d) The Investigation

(i) Internal Investigation

The investigation is probably the most crucial part of the procedure. Traditionally it was under the exclusive control of the police themselves. The typical practice was for the chief officer, or someone delegated by him, to appoint an officer to investigate a complaint once it had been formally received. If it was likely to be a major investigation he would have a number of assistants to help him. Invariably, however, the investigators would all be fellow police officers of the accused member. The most that was conceded to the need to appear unbiased was that the investigating officers would be members of a special, discipline branch, or would be appointed from a different

division from that of the accused member. In Britain it was possible to go further in very sensitive cases and appoint officers from another police force.[90] Such an option clearly was not available in a jurisdiction with only a single, national force. When the investigation was complete the report would be submitted up through the relevant chain of command to the officer or officers whose responsibility it was to decide whether or not a formal hearing was warranted. If the complaint involved a possible, criminal offence the likelihood was that the DPP would get the opportunity to decide whether or not criminal charges should be pursued. Apart from that, however, there was no scope for independent checks and balances under this internal disciplinary model. The whole investigation process was conducted behind closed doors by the police themselves.

Question-Mark Over Quality

The evidence on the quality of police investigations of fellow police personnel is contradictory. On the one hand many of the official bodies who have had the opportunity to review them have declared themselves impressed by their thoroughness.[91] On the other hand an unpublished report of the British Home Office Research Unit is known to be highly critical of what it found in studies of investigations by the LMP into complaints against themselves during the seventies.[92] In particular, it found that there was a tendency for the reports to offer

implausible explanations of how injuries came to be suffered by complainants and a tendency for a failure to seek statements from some or all of the independent witnesses who were named. In some cases more effort was put into establishing the criminality or untrustworthiness of the complainant than into establishing the facts.

Public Scepticism

Whether police internal investigations are, or are not, conducted in a thorough and painstaking manner is not really the issue. The fact of the matter is that there is, and probably always will be, a significant public scepticism over the capacity of a police force, or indeed any such body, to investigate complaints against its own members objectively, thoroughly and fairly in the interests of all.[93] If a complaints procedure is to fulfil an accountability, as opposed to a mere disciplinary function, it follows that the actual investigation stage must be taken out of police hands and put into the hands of a body on which the public will have confidence. This should not be interpreted as a claim that the substance of investigations will be of a higher quality as a result. It is merely a recognition of the distinctive requirements of accountability and discipline when it comes to dealing with citizen complaints.

(ii) Independent Investigation

Availability of Personnel

Although independent investigation would appear to be a sensible strategy for achieving accountability it is one that has proved most difficult to get accepted in many jurisdictions. Some police forces have accepted it but as yet they constitute a small minority.[94] In the others police and government opposition has proved too strong even in those jurisdictions where the handling of police complaints is an issue of public concern.[95] In Britain, for example, it has been accepted, at least since the early seventies, that it is not satisfactory to leave the police to handle complaints against themselves. Nevertheless, after no less than two attempts in ten years to inspire public confidence in the complaints procedure by introducing a limited degree of independent involvement the British government has refused to grasp the nettle of independent investigators.

The strength of this opposition is all the more difficult to comprehend when the reasoning behind it is considered. One of the most frequent arguments trotted out is that it would not be possible to recruit a sufficient number of suitably qualified personnel outside the police force to do the job.[96] Implicit in this is the notion that only a police officer is equipped to handle an investigation into a complaint of misconduct against another police officer. No cogent evidence, however, has been presented to support this. The fact is that the public and private sectors already employ a large number of

investigators for a wide variety of purposes including: social security fraud, tax evasion, customs fraud, the enforcement of health, hygiene and environmental regulations, insurance investigations etc. There is, therefore, a ready pool of talent available. Further training will be required, of course, for the particular nuances associated with investigating citizen complaints against the police, but that is hardly an insuperable obstacle. Contrary to what is sometimes suggested[97] there will be no need to confer the full range of police powers on the civilian investigators nor to train them in techniques of policing. They will not be investigating the sort of offences nor operating in situations where such powers or techniques will be necessary. Indeed, there is no reason why a training programme for recruits with no experience at all cannot be devised and implemented to ensure a steady supply of personnel.

Police Chief's Responsibility for Internal Discipline

Another argument often heard in this context is that the use of civilian investigators would undermine the police chief's responsibility for internal discipline. The general weaknesses in this argument have been presented already in the broad context of introducing an independent element into the overall procedure. There are more specific reasons, however, why it should not prevent the introduction of civilian investigators. What is being proposed here is that civilians should be used only in the

investigation of complaints which are likely to be of direct concern to citizens; i.e. those contained in the code of offences outlined earlier. Offences concerned only with the maintenance of internal, disciplinary standards would continue to be investigated by the police themselves in the context of a separate, internal procedure fashioned on the traditional disciplinary model. Admittedly there will often be an overlap and in this eventuality it is suggested that the needs of accountability should be given priority by leaving them to the civilian investigators where the complaint was lodged by a citizen. Even that should not prejudice the maintenance of internal discipline as the real disciplinary decisions will not be taken until much later in the procedure. What is at issue here is merely who should carry out the investigation. In the absence of any clear evidence that the use of civilians would be prejudicial to the maintenance of an adequate and efficient police force it seems that they should be used to investigate citizen complaints in order to promote confidence in the ability of the complaints procedure to call the police to account.

Form over Substance

It is also argued that the use of civilian investigators is tantamount to opting for form over substance. This is a variation on the notion that allegations of wrongdoing by a police officer can only be investigated effectively by another police officer. It

implies that the use of civilians will give the appearance that the complaints are being investigated thoroughly but the reality will be that they will be incapable of producing the results that would be produced by police investigators.[98] They will never enjoy the confidence or respect of members of the force and because of this they will receive very little co-operation in their investigations either from the suspect members or their colleagues. No matter how well trained they will never be able to overcome this obstacle. Certainly this argument should not be dismissed lightly. Even police investigators have found themselves defeated in some major cases when confronted by a "wall of silence" thrown up by those under investigation and their colleagues.[99] The prospect of this becoming the norm as opposed to the exception under a regime of civilian investigators is something that must be avoided; if not, the appearance of accountability will be purchased at the cost of an increasing number of "unsubstantiated" findings. If this happens often enough in serious cases even the appearance of accountability will be recognised as a sham.

Individuals Obligation to Co-operate

Confronting this problem does not necessarily mean surrendering the use of civilian investigators. Indeed, such a response would be tantamount to bending to police blackmail. It is a problem which will have to be confronted irrespective of whether the investigators are

civilian or police[100], and there are a number of ways in which it can be tackled. The most direct would be to subject members of the force to a legal duty to co-operate with an investigation.[101] Failure or refusal to do so could be made a serious disciplinary offence in itself. The duty to co-operate would have to be defined to include giving a full and true account of the member's role in the incident or situation that gave rise to the complaint; in the case of a witness, a full and true account of all that he has seen and heard plus an obligation to deliver up any documents or any other matter which is evidence or contains evidence of what happened. The giving of false information or holding back information or other evidence could also be made a serious disciplinary offence. The combined effect of these measures would not ensure that the truth is discovered in every case, but by prohibiting the tactic of non co-operation it should work in that direction.

Undoubtedly, these measures would provoke a storm of protest from the police.[102] Some of it should be deflated by pointing out that they would not be applicable to criminal investigations. Where a member is the subject of a criminal allegation he would and should be entitled to all the usual protections and privileges afforded the citizen and, of course, subject also to all the usual obligations.[103] To contemplate otherwise would be to treat individuals differently under the criminal law simply because of their lawful occupation. While this might be

acceptable in special cases where the effect would be to protect the individual against criminal sanction it is difficult to conceive of any situation where it would justify harsher measures against him. Being a police officer acting in the course of his duty might on occasions be good reason to come within the former but surely it would never be grounds to satisfy the latter. What is being suggested here is that the special measures should be applicable only to investigations which will not result in criminal proceedings. This can be achieved either by rendering evidence obtained as a result of using the special measures automatically inadmissible or simply by postponing the administrative investigation until the question of criminal proceedings has been settled. The broader issue of the relationship between the administrative and the criminal processes in handling citizen complaints against the police will be discussed later.

The question still remains whether it can be justified to subject police personnel to a complaints procedure in which they would lose the right to silence which they would otherwise enjoy at the investigation stage if the proceedings were criminal. There is no doubt that it can be justified from a pure accountability perspective. If they were not under an obligation to co-operate the whole purpose in having civilian investigators could be defeated. The real issue is whether it is so unfair to the police

that it could result in a serious loss of morale within the force. It is difficult to see how the answer to this should be yes. The fact is that a member of the force subject to a citizen's complaint is in an entirely different position from an individual (including a member of the force) subject to a criminal accusation. The latter is in a much more serious position. He is suspected of committing a criminal offence. A guilty verdict will result not only in a punishment that can be as severe as imprisonment but also a declaration that he has failed to live up to the basic norms of behaviour expected of all citizens in a civilised society. Not surprisingly, therefore, he is surrounded by many protections to ensure that he is not unfairly disadvantaged throughout the procedure as a result of his weakness relative to the power of the State. Under the common law, for example, the citizen is born legally free to do what he wishes unless it is specifically prohibited by law.[104] It follows that there is no onus on him to assist the State in any matter unless he is placed under a specific, legal obligation to do so. This is reflected in criminal procedure not only by the general presumption that the suspect is innocent until proven guilty but also by its corollary that he is under no obligation to assist the State in any way in its attempt to prove a case against him; he can remain silent throughout.[105] In-roads have been made on this but as yet the general principle remains intact.[106]

There is no basis for claiming that a member of the force should enjoy the same presumption in the complaints procedure. He was not born with the status, power and resources that he enjoys as a member. These were conferred on him by the public for the specific purpose of deploying them efficiently and fairly in the discharge of the duties also imposed upon the police. Failure to live up to these expectations could have serious consequences for individuals and the public as a whole. It follows, therefore, that the public has an overriding interest in ensuring that the member lives up to the special trust that it has reposed in him. That is precisely what the complaints procedure is for. It cannot result in a criminal conviction for a guilty member. On the contrary the worst that can happen is that he will be found unfit to remain a member of the force. There is no reason, therefore, why he should not be placed under an obligation to co-operate (at least at the investigation stage) with an inquiry into allegations that he has failed to fulfil the trust placed in him. His status and role as a member of the force and the need for the public to have full confidence in him and his colleagues is too important to allow the investigation to be frustrated by technicalities borrowed from criminal procedure.

General Police Obligation to Co-operate

The use of civilian investigators will also necessitate co-operation from the police force as a whole

where evidence relating to the substance of the complaint is in police hands. This has particular relevance to those complaints which consist of assault on a suspect in police custody. Material or forensic evidence of the assault may be present at the scene of the incident which may be a police cell or vehicle. If the police have primary responsibility for the investigation of such complaints immediate steps can be taken to preserve the scene for investigation as soon as a complaint is received. Under a totally independent procedure, however, the time that it takes to appoint an investigator to the case plus the time it will take for him to gain access to the scene will be such that the evidence is in real danger of being lost either due to deliberate concealment or simply because no immediate steps were taken to preserve the scene. To avoid this problem it will be necessary to impose a statutory duty on each member of the force to take whatever lawful measures he considers necessary or expedient to preserve evidence relating to the substance of a complaint when he becomes aware that the complaint has been or is likely to be made.[107] A general provision such as this should be supplemented by more detailed guidance from the chief officer on what steps should be taken pursuant to this duty in specific situations. In addition, the investigators should also have the right of immediate access to relevant police records such as: police time sheets, beat assignments, criminal case reports etc.[108]

This proposal should not be interpreted as falling back on the police when the circumstances get beyond the resources of the civilian investigators. It is simply a recognition of the reality that many complaints against the police will arise in places under their direct control. A refusal to avail of the obvious advantage that the police enjoy in this respect would be to stick blindly to the concept of independent investigation to the obvious detriment of a full and fair investigation of the complaint. In any event, it does not pose any real threat to the principle of independent investigation. It merely relies on the police to preserve the status quo until the investigation can commence.

Co-operation from outside the Police

In the course of the investigation it will be necessary to question non-police personnel and, perhaps, to examine documentary or other material evidence which are not in the possession of the police. It would be undesirable and probably unnecessary, however, to confer coercive powers on the civilian investigators for these purposes. Not even the police enjoy a general power to coerce the active co-operation of victims or witnesses in the course of their criminal investigations.[109] There would not appear to be any compelling reason why civilian investigators should be able to do so in the course of investigating a complaint against the police. If charges are preferred the witnesses can always be subpoenaed to

give evidence on oath at the hearing or the trial. It would seem reasonable, however, to give the investigators a means of access to relevant, material evidence in private hands just as they should have access to such material in police hands. This would require only the passive as opposed to the active co-operation of those who had possession of the evidence. Admittedly it would mean giving the investigators a limited right of access onto private property to inspect or take possession of the evidence but that could be justified on the ground that the evidence is vital to satisfy the broader public interest in ensuring a full and fair investigation of the complaint. The right of the individual to be protected against unnecessary intrusions into his private affairs could be safeguarded by the inclusion of a requirement that the investigators should have the power and the duty to seek a search warrant from a judicial authority in cases where co-operation was not forthcoming. Such a warrant would not be issued unless the judicial authority was reasonably satisfied that the evidence being sought was where it was alleged to be and that it was necessary to reach a conclusion in the investigation. This should prevent investigators going off on fishing expeditions to bolster their case.

The Investigation Report

The overall objective of the investigation must be to produce a report which can be used to establish whether or

not there is any substance in the complaint. It should contain full details of the complaint and all the evidence which might support it plus all the evidence that might contradict it in the event of it being denied. It would also be worthwhile to include a list of the witnesses interviewed with an indication as to the extent of co-operation from each, a list of witnesses who could not be found or who did not co-operate, with an indication as to the potential importance of each, a list of material evidence that was examined and that which was considered important although not examined and the reasons for not examining it. There would appear to be no purpose in the investigator stating his conclusion on whether he felt that the complaint was substantiated or not. His function is not to make a judgment on the complaint but to provide another body with as much relevant information as possible to enable that other body to decide whether any further action is required. If his report contains the material suggested he will have exhausted his role.

(e) The Relationship between the Administrative and Criminal Investigations

(i) Investigating Criminal Complaints

The investigation stage of the complaints process reveals an uneasy relationship between the administrative and criminal procedures. If the police become aware that a criminal offence might have been committed they will feel under a responsibility to see that it is investigated

irrespective of whether the suspect is a police officer acting in the course of his duty or an ordinary citizen. Indeed, if the suspect is a police officer they will feel that it is their particular duty to carry out the investigation, not just because they must enforce high standards of discipline within the ranks, but also because they feel that police personnel should not be treated under the criminal process any differently from other citizens. The arguments for and against the use of independent investigators to handle complaints against the police have already been canvassed and the conclusion reached that there are special reasons why they are necessary. Even if these arguments are accepted, however, it is necessary to clarify how independent investigation can function without resulting in the creation of a special criminal process for the police.

One possibility is to leave those complaints which warrant a criminal investigation in the hands of the police. These, however, will tend to rank among the more serious allegations and, consequently, will generate more public attention and concern. If they are left to be dealt with by the police in common with all other criminal complaints and few convictions result, public confidence in the ability of the police to investigate themselves will be damaged much more severely than would be the case if they were minor, administrative complaints. The statistics reveal that those citizen complaints which are referred to

the DPP for consideration, following police investigation, are no more likely to result in conviction than those which the police decide to deal with internally.[110] The option of leaving the investigation of the criminal complaints in police hands, therefore, is a non-starter from the accountability perspective.

Where independent personnel are responsible for the investigation of both administrative and criminal complaints alike the first problem that will arise concerns the rights of the suspect member. It was proposed earlier that he should be placed under a legal obligation to co-operate with an administrative investigation but he should be afforded exactly the same protection as the ordinary citizen in the case of a criminal investigation. The difficulty is that it is not always certain at the outset whether the complaint should result in administrative or criminal proceedings. The solution, however, is fairly simple. In all cases where the complaint discloses the possibility of a criminal offence the investigation should be treated from the outset as criminal and the member should be afforded all the appropriate safeguards and be subject to all the usual obligations. If it is decided not to pursue criminal charges the administrative investigation can take up where the criminal left off. In practice this means that the member will be questioned a second time, only this time he will be subject to the more stringent requirements of the administrative investigation.[111]

(ii) Preferring Criminal Charges

The other problem that can arise in this context is the matter of who should decide whether criminal charges should be preferred. Normally, this will be done by the DPP on consideration of a police investigation report. The question is whether he should continue to perform this function on the basis of a report submitted by independent investigators or whether it should be transferred to the investigators' supervisory authority. The latter's claim lies in the fact that, as will be proposed later, he will decide whether or not charges should be preferred in the administrative procedure. The DPP's claim, however, appears much stronger. His office is the independent authority vested with the responsibility not only of deciding whether or not criminal charges should be pursued against the police but also for all indictable offences irrespective of who the accused is.[112] He, therefore, is in a better position to know whether criminal charges are appropriate in any particular case and is uniquely placed to ensure that all cases are assessed to a uniform standard. If those cases in which the accused is a police officer are hived off to another authority it would give the appearance of a special criminal procedure for the police.

The only argument that can be used against leaving the matter in the hands of the DPP is the possibility that he will appear biased in favour of the police on account of

his close working relationship with them. Even if there was any substance to this point, which is doubtful given the independent status of the DPP's office, there is no reason why the same suspicion should not fall on the independent complaints authority. The fact is that the DPP is in a position to be, and appears to be, as independent as anyone in the performance of his functions. It follows that complainants and the public should feel confident that the matter is left in his hands.

(f) Decision-making

(i) The Internal Disciplinary Approach

The question of who should decide what should be done on foot of the report is another contentious issue which has provoked a variety of responses. Under the traditional disciplinary model the typical practice was for the report to be sent to a senior officer who had the power and responsibility to take overall direction of the investigation.[113] If he felt that no further action should be taken or that a hearing was justified he would recommend accordingly. This report plus his recommendation would be sent to the chief officer who would take the final decision. There are variations on this within the internal model but they all keep the matter firmly within police hands, reflecting their preoccupation with internal discipline. Many of those procedures which have accepted an external input, short of a completely independent procedure, allow some independent scrutiny of this

decision. This can vary from a civilian review board having the power to recommend that disciplinary charges should be preferred in cases where the chief officer has refrained from doing so, to the board having primary responsibility in the preferring of charges.[114]

Both approaches fall short of what is required from an accountability perspective. Clearly if the decision is left to the police themselves there will always be a suspicion that a full and frank adjudication of citizen complaints is being frustrated at this point. The situation is not helped by the fact that most complaints do fall at this hurdle in practice.[115] Interestingly, it would appear that the power of civilian review boards to second guess the chief officer has not made any major impact on the statistics.[116] Although there may be other very genuine reasons why this should be so, a credible explanation is that the board members do not feel sufficiently qualified or confident to second guess a decision already taken by the chief officer. Whether or not this is an accurate explanation is not really an issue. The point is that the input of the board appears to be overshadowed by that of the chief officer and that in itself is sufficient to condemn its potential to assure the complainant and the public that the decision-making is above board.[117]

(ii) <u>An Independent Decision-maker</u>

The solution from an accountability perspective would be to put the decision in the hands of a body wholly independent of the police. To some extent this is an inevitable consequence of adopting a policy of independent investigation. The independent investigators must work under the direction and control of some supervisory authority. This authority could, of course, be the chief police officer, but that would run contrary to the primary objective in having independent investigators in the first place. If public confidence is to be protected, the supervisory authority must be completely independent of the police. In those systems which rely on independent supervision of police investigators the supervision is often provided by a body composed along the lines of the old police complaints board for England and Wales.[118] The thinking behind this approach was that it would enhance public confidence in the investigation and, as such, would promote accountability. It is submitted, however, that not only does that approach represent a misconception of what accountability requires in the handling of complaints, but also that it presents practical problems of its own.

Problems with the Complaints Board Model

Dealing first with the accountability issue, it must be noted that traditionally the board members are appointed by political authority to reflect a broad spectrum of interest groups. In practice, however, a government appoints individuals from the various interest groups who

are most likely to be sympathetic to its own political outlook. Not surprisingly this creates the opportunity for, and appearance of, politically motivated decision-making in individual cases. Sir Robert Mark was quick to spot the potential for this in the old Police Complaints Board in Britain.[119] He felt that its decisions in individual cases would be motivated to suit the political complexion of the government of the day and, as such, would be seriously damaging to professional standards of policing and internal discipline. In the event his fears proved unfounded largely because the political make-up of the board was very sympathetic to the police and had only a very limited input into the complaints process. Under a scheme of independent investigation in which the board is a primary decision-maker, however, the prospect of unwarranted political interference is much more real. It is not difficult, for example, to imagine a politically appointed board exerting its influence at the completion of the investigation stage. Those complaints which found favour with the political ethos of the board would be proceeded with vigorously to the next stage, while those which did not would be blocked.

Political interference of this nature is not consistent with the primary function of the complaints procedure. The procedure is designed to enable a citizen complainant call a police officer to account for his conduct using the code of offences as the standard for what

is, and what is not, acceptable conduct. It is aimed at providing police accountability to the individual citizen in those situations where his interests have been directly affected by police action or inaction. Admittedly the complaints procedure serves a broader accountability function in that its existence and operation is supposed to assure the public that the police can be called to account in individual cases. To that end there must be some mechanism to convince the public that complaints will be investigated thoroughly and impartially. That, however, does not require that a body representing sectional interests should have a say in which complaints should proceed beyond investigation and which should not. Indeed, such participation could be counterproductive to real accountability.

Complete public confidence in the complaints procedure can be secured only if individual complainants are satisfied that their complaints are being processed satisfactorily. Since many of these will come from disadvantaged and marginalised sections of the community it is likely that they would view the involvement of a board representing mainstream political interests as being hostile to their situation. The prospect of genuine complaints being rejected for politically motivated, as opposed to objective, reasons would destroy any hope of the complaints procedure achieving its accountability potential in those communities which need it most.

Nor could the problem be solved by weighting the board in favour of disaffected minorities. A likely consequence of this would be to undermine the confidence of the majority in the procedure. A further consequence would be outright hostility from the police. Such a move would convince them beyond all doubt that the complaints procedure was less concerned with accountability and more concerned with placating criminal and anti-social elements at their expense. Inevitably this would lead to a serious drop in police morale. Their self perception as a beleagured minority working in a hostile environment would be reinforced and their style of policing would be adapted accordingly. The ultimate losers would be the public, and particularly the disaffected minorities.

The conclusion must be that politically appointed boards, of whatever persuasion, have no role to play in the handling of individual complaints. That is not to say that they cannot contribute at the policy level. They may have a very useful input into matters such as the content of the code of offences and changes needed to take account of complaint patterns etc. That, however, is quite different from participation in the processing of individual cases.

On a practical level also the police complaints board model presents difficulties. Because of its multiple membership it would either have to be part-time or else it would be very expensive to maintain. If it was part-time

it would require a chief executive to perform the real supervisory function. Its' role, therefore, would be largely concerned with supervising him. This, in turn, would mean the board was two stages removed from the investigation in any particular case. If it was full-time, presumably each member would perform as a chief executive supervising his share of the investigations. This would require the appointment of a senior chief executive to co-ordinate and ensure uniformity across the board. Either way, therefore, there must be a chief executive officer on whose shoulders will fall the real burden of ensuring that investigations are carried out thoroughly and fairly.[120] This prompts the question whether an office occupied by a single individual would not be a more suitable vehicle for taking control of the investigation. Indeed, this approach is adopted in some jurisdictions.[121]

An Ombudsman Model

What is envisaged here is the establishment of an office in the same mould as the ombudsman. The single appointment would avoid the practical problems thrown up by multiple membership. The reality and appearance of political interference could be avoided by establishing the ombudsman as an independent body appointed purely for his professional competence; just like the DPP. The independent investigators would constitute his staff. He would employ them, appoint them to individual cases, supervise them in the course of their investigations, and

receive their interim and final reports in each case. It would be his responsibility to decide whether or not all leads had been followed up satisfactorily in any case and, of course, he could direct further enquiries in any case.

There would have to be minor modifications in the office and role of police ombudsman from the office of ombudsman which has become established as part of the administrative machinery in many countries.[122] Because the police ombudsman would be dealing with criminal and disciplinary offences his powers and duties would have to be spelt out with much greater precision and in much greater detail. For the same reason he would have to function with a greater degree of formality than is customary with ombudsmen whose remit is administrative inefficiency. There would be no opportunity, for example, to negotiate a compromise settlement in individual cases unless such an option was specifically provided for in the legislation.

Apart from these differences the proposed office should function with the same status and in a similar manner as the traditional ombudsman. Given that he has been functioning successfully at different levels of public administration in many countries[123] for many years there is every reason to believe that he is equally capable of handling citizen complaints against the police. With civilian investigators as his staff he should be able to

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command full public confidence in that phase of the police complaints process which, even today, is most hidden from the public view. The police objections to placing the investigation in independent hands have already been considered. The only possible objection to an independent body taking the decision whether or not charges should be preferred is the traditional one that it is prejudicial to the maintenance of a disciplined force in that it encroaches upon the chief officer's disciplinary authority. This is no more persuasive here than it was earlier in the procedure.[124] The ombudsman's role will be confined to citizen complaints, he will have no input at all into pure, internal, disciplinary matters. In any case the decision at this stage is not whether there has been a breach, or what punishment to impose, it is merely a decision whether or not to proceed with a hearing. That can hardly be described as an exercise of disciplinary authority.

(iii) Taking the Decision

When the ombudsman comes to make his decision on the report it seems fair that he should base it solely on whether the evidence suggests that it is more likely than not that an offence was committed. If he feels that a formal hearing is not warranted he should make a decision to that effect. In that eventuality the complainant and the public generally would have to accept the outcome. Realistically, nothing more could be done to ensure that the investigation was full and fair and seen to be so.

(iv) Dissatisfied Complainants

Unfortunately, it is unlikely that most complainants, and therefore the public generally, will be satisfied. The reality is that even an independent complaints procedure will not produce a significantly higher rate of substantiated citizen complaints than the pathetically low rates associated with the internal model.[125] The reason for this is that most incidents which give rise to citizen complaints occur in circumstances where there are no independent witnesses and no other objective evidence. In these circumstances a complaint will take the form of a specific allegation by the complainant, supported by his associates, and an equally specific rebuttal by the police officer, supported by his colleagues. Even if the standard of proof is on a balance of probability there would be no grounds for proceeding with such a complaint. Undoubtedly, some of these unsubstantiated complaints can be explained by complainants deliberately fabricating them in order to embarrass the police or to concoct a technical defence to a criminal charge which the complainant is facing himself. However, if only half of them are genuine, and there is no reason to believe that they are not, they reveal a level of police malpractice which is worrying in both its gravity and frequency.

Clearly this situation exposes a serious flaw in the accountability potential of the complaints procedure. It may be that the unsubstantiated complaints suggest a

pattern or patterns of malpractice which, in turn, points to an underlying problem. For example, the same officer might be the subject of several similar complaints from a number of independent citizens in circumstances where colleagues doing similar work were complaint free. Another example would be the blind application of an unsatisfactory force policy which was generating complaints against several officers. The traditional complaints procedure can never tackle these problems because it focusses on each case in isolation from all the rest.[126] If there is evidence to suggest that a complaint is either substantiated or unfounded[127] then the procedure can cope with it. All other cases, however, are banished to the limbo of the unsubstantiated and simply forgotten about. This is unsatisfactory for both the genuine complainant and the honest police officer. The former will feel insulted that he was not believed and will conclude that the procedure is clearly not capable of fulfilling its promise, while the latter will feel that he is still labouring under a cloud of suspicion.

It is difficult to conceive of any fair procedure which can resolve these problems once they have already happened in a particular case. It should, however, be possible to take steps which would make it less likely that the same genuine complaint will be lodged in the future. If the complainant felt satisfied that his complaint could have this effect, then the disappointment of having a

complaint declared unsubstantiated might not deter him from using the complaints procedure in the future in order to call the police to account. The question is how can the procedure be designed to accommodate this objective?

Acting on Complaint Patterns

The immediate requirement is for the remit of the complaints procedure to include the identification of patterns of complaints.[128] This could be achieved by the ombudsman drawing up quarterly reports which would set out detailed statistical analyses of complaints and their progress through the various stages of the complaints procedures.[129] In these reports he should highlight patterns in both the unsubstantiated and the substantiated complaints. It is not being suggested, however, that the ombudsman should take any action with respect to any patterns that might emerge. His function would be confined to identifying the patterns and bringing them to the attention of the chief police officer and the appropriate political authority. If it transpired that certain officers were the subject of a pattern of complaints the chief officer would be expected to target them for closer supervision. If this supervision revealed evidence of malpractice then they should be processed through the internal disciplinary procedure on the basis of that evidence. Alternatively, they might be given appropriate counselling or assigned to other duties which did not afford the opportunity for the particular malpractice.

Similarly, if either the unsubstantiated or the substantiated complaints revealed an unsatisfactory force policy the ombudsman would be expected to bring this to the attention of the chief officer and the relevant political authority with a view to its being amended. In this way the independent complaints procedure could be of direct assistance to the chief officer in his task of enforcing discipline and maintaining high professional standards of policing within the force.[130]

(v) Informing the Complainant

Finally, there is the question of what sort of communication should be sent to the complainant in the event of his complaint being found unsubstantiated. For the genuine complainant the contents of this communication can have a dominant influence on his confidence in the complaints procedure. A curt sentence which simply stated that it is unsubstantiated is guaranteed to persuade him that the police are beyond accountability. It is submitted, therefore, that the communication should at least explain the meaning of "unsubstantiated" and give brief reasons why it was not possible to proceed with the particular complaint. It should go on to say that the substance of the complaint would be kept on file for the purpose of establishing whether or not there is a pattern of such complaints. The complainant should also be told that in the event of a pattern being revealed appropriate steps would be taken to tackle the underlying cause and

prevent its recurrence. There is a danger in this, of course, that it might encourage some individuals to mount a campaign of complaint against specific officers. In practice, however, the proposed measures should guard against this in that such campaigns would show up as a pattern in the statistics. In cases of doubt increased supervision of the officers in question should be sufficient to determine whether or not there is any substance to the pattern. In any event an individual officer should never be prejudiced merely by the fact that there are a number of unsubstantiated complaints on his file.

(g) The Hearing

(i) Internal Disciplinary Approach

If the ombudsman decides that a formal hearing is necessary the next contentious issue that arises is what form it should take. Under the traditional, disciplinary model[131] the tribunal adjudicating upon the charges would usually consist of one or more senior police officers. The case against the accused would be presented by a police officer while the accused would be assisted, if at all, by a fellow member. The citizen complainant would take no part in the proceedings apart, from appearing as a witness, and the proceedings themselves would be held in private. Again the preoccupation with internal discipline is dominant.

Clearly this procedure makes little concession to the needs of accountability. Even if the tribunal was successful in reaching the truth in every case that comes before it public suspicion that justice was not being done would be kept alive by the spectacle of the police sitting in judgment of themselves. It is also likely to be unduly sympathetic to the accused in practice. Police officers hearing a case against fellow member can hardly avoid being unconsciously biased. They would be inclined to approach the situation which gave rise to the complaint from the narrow perspective of the police rather than a broader perspective which would embrace not just that but also the concerns of the individual citizen and the public generally.[132] If the needs of accountability are to be satisfied, therefore, something more than a tribunal composed of plice officers is required. In order to assess what would satisfy the needs of accountability and how that can be squared with the interests of the police it is necessary, first of all, to get a clearer picture of what role the tribunal is expected to play.

(ii) <u>The Adversarial versus The Inquisitioral approach</u>

<u>Problems with the adversarial approach</u>

The central obligation on the tribunal will be to reach a determination on whether the complaint is sustained or unfounded. A more difficult question is whether it should approach this task from an accusatorial and adversarial basis or whether it should adopt an

inquisitorial mode. The former represents the traditional method of adjudication in the courts of common law countries.[133] There might be an inclination to adopt it in such countries on the ground that the task of the complaints tribunal is analogous to that of a court. The analogy, however, is not a sound one. The courts are in the business of determining legal rights and liabilities between citizens, and between the citizen and the State. The complaints tribunal on the other hand is confined to making determinations on whether a member of the police force has complied with the standards expected of him, as a member of the force, by the force itself and the public as a whole. Its decision will not affect the legal rights and liabilities of anyone. If the member is found guilty he will be subject only to internal police sanctions. A closer analogy, perhaps, would be with the internal, disciplinary procedure of a private profession where the object is to ascertain whether a member has fallen below the professional standards expected of him in his practice. There is no compelling reason why an accusatorial and adversarial procedure should be used for this purpose. Indeed, there are sound reasons why it would be unsuitable.[134]

The adoption of an accusatorial and adversarial approach is likely to result in the proceedings taking on many of the trappings of a court.[135] The accused member, with the backing of his union or representative body, will

employ a lawyer to argue his case almost as a matter of routine. The complainant will feel compelled to do likewise otherwise he may be at a significant disadvantage. If he cannot afford the services of a lawyer he might feel intimidated from proceeding with his case. Since most complainants would fall into this category the inevitable result would be that many genuine complaints of misconduct would go unaired and unremedied. The solution would be either to prohibit the use of lawyers altogether or else provide legal aid for the complainant. Given the fact that the majority of complaints are relatively minor and unsensational it would seem an unjustifiable waste of financial resources both for the police and the public to be employing the expensive services of lawyers.

Another problem with the accusatorial and adversarial approach is its requirement for fairly rigid and complex rules of evidence. If both parties are left to assemble and present their own case, with the onus being on the complainant to prove his case against the accused, basic principles of fairness dictate that they should know in advance what evidence can be used and what tactics will be allowed. This means that set rules on procedure and on the admissibility of evidence must be formulated and followed. Inevitably this will result in the proceedings becoming more formal, complex and lengthy with no corresponding guarantee that they are more likely to lead to an accurate determination of what happened.[136]

Traditionally, this approach has resulted in the practice of each party using the rules to hide as much as possible from the other. In the case of a policeman against a citizen it is likely that the former would be much more adept at this than the latter. It would seem, therefore, that the use of lawyers on both sides is almost unavoidable if a balanced contest is to ensue. Certainly, the complainant would require the services of a lawyer to guide him on how to use the rules to present his case in the best light. All this seems totally out of proportion to the nature of the complaints that will be handled by the tribunal. Neither of the parties is attempting to enforce or defend a legal right. It is difficult to see, therefore, how the time, cost, police resources and the anxiety of the parties associated with an accusatorial and adversarial approach can be justified, particularly since the accuracy of the determination in any case would not be beyond question. An inquisitorial approach would appear to have much more potential to provide what is needed.

The Inquisitorial Approach

Both the police and public share the common, overriding objective of ascertaining the facts which gave rise to the complaint and assessing whether they amount to an offence. The complainant and the accused member cannot quarrel with a procedure which is designed to satisfy this objective so long as it is fair to each of them. The obvious solution would appear to be a tribunal which has

the necessary power and responsibility to take the primary role in ascertaining the facts in dispute. This would entail providing it with the investigation report and leaving it to decide which witnesses should be called to appear, what evidence should be produced and what further lines of enquiry should be pursued. It would also require the power to subpoena witnesses[139] and the production of material evidence, to determine procedure and the rules of evidence and, where necessary, to visit and inspect relevant locations on State or private property. What is envisaged is that the complainant and the member would retain the traditional role of presenting their own case, including the examination and cross examination of witnesses and the production of relevant evidence. The tribunal, however, would adopt a much more active and positive role by doing its own additional examination and cross-examination where necessary and even calling for the production of other relevant evidence and for other witnesses to appear. This would have the double benefit of dispensing with the need for lawyers and, at the same time, ensuring that neither party is prejudiced by their inepititude in establishing all the facts favourable to their case. A suitable role model might be the Small Claims Court in Northern Ireland.[138] The result should be a determination which is at least as accurate as that likely to be produced by an accusatorial and adversarial procedure and one which is produced much more quickly, efficiently and economically.

(iii) Composition

Police versus Civilian

The function of the tribunal is not confined to ascertaining the facts. It must also determine whether the facts amount to an offence under the code. It is this aspect of its role which makes its composition contentious. Needless to say, the accountability perspective would require a suitably qualified civilian tribunal. If it consisted purely of police personnel, no matter how well qualified or fair, it would always be stigmatised by the appearance of bias. On the other hand the police would claim that the power to determine whether or not a member is guilty of an offence under the code amounts to a straightforward exercise of the disciplinary power which has been and should be entrusted to the chief officer. He, or his delegatee, should decide whether or not a member has infringed the standards of discipline prescribed by him. Certainly there is much more weight to this argument at the determination stage than there was earlier. Although many of the offences contained in the proposed code have little or nothing to do with internal discipline the fact remains that many of them do. When the tribunal is making a determination with respect to the latter, therefore, it is effectively making a decision not only that the member has failed to live up to the standards expected by the public but also that he has infringed the internal disciplinary standards imposed by the chief officer. If this task was

left to a civilian the disciplinary authority of the chief officer would be seen to be undermined.

There is more to this problem than appearances, important as they may be. If a civilian and a police tribunal adopted a strictly literal approach to the interpretation of the code of offences in every case, both should make identical determinations in all cases. The prospects of this, however, are slim. Much more likely is that when deciding whether a given set of facts come within a particular offence the civilian tribunal would be influenced by whether it felt that the behaviour constituted acceptable policing from a public point of view, while the police tribunal would be influenced by whether it represented a threat to police discipline. In borderline cases, of which there may be many given the nature of the proposed code of offences, this could result in opposite determinations.[139] If this happened frequently enough under a civilian tribunal it would not be long before the police would conclude that their fears had been confirmed, and vice versa for the public and a police tribunal.

A Compromise

There is no obvious solution to this problem which does not involve making a policy choice to favour the immediate interests of one party over the other. Since the primary purpose of the proposed complaints procedure is to

make the police more accountable to the public the balance would seem to favour a civilian tribunal. This is supported by the fact that many of the offences in the proposed code have little or no real relevance for internal discipline. The interests of the police can be catered for to some extent, however, by designing the tribunal so that it consists of a chairman and two other members, one a civilian and the other a police representative. If the chairman is to play the role proposed for him it seems preferable that he should be a legally qualified individual who has practised as a barrister or a solicitor for a number of years or who is otherwise qualified to act as a magistrate, district justice or chairman of any of the quasi-judicial tribunals that proliferate in public administration. Such an individual would be able to approach a case unswayed by ingrained sympathy for the police or the citizen and would be well qualified to control the proceedings, weigh up the evidence and come to a sound decision. The civilian and police members would not be expected to play an active part in the course of the hearing; that would be the preserve of the chairman. Their function would be to assist him in coming to a decision on the evidence.[140] The presence of the police member should help persuade the police that they will not be judged by a body which has no knowledge of the nature of policework and the sort of dilemmas in which members can find themselves. The inclusion of the civilian member is to preseve a balance in the eyes of the public. At the end

of the day, however, the determination will be a matter for the chairman alone having first listened to and considered the views of the other members of the tribunal.[141]

(h) The Determination

(i) Standard of Proof

More often than not the outcome will depend on whether the evidence in support of the complaint sufficiently outweighs that in rebuttal. This raises the issue of what standard of proof should apply. The obvious choice is that between the criminal burden of beyond a reasonable doubt and the civil burden of a balance of probabilities. In all likelihood the police will opt for the former while the complainant and the public will favour the latter. Once again the balance of the argument would seem to lie with the latter. What is at stake is not whether the member has broken the law, it is simply a question of whether he has complied with the standards expected of him in the discharge of his policing responsibilities. Given the strength of both the police and the public interest in ensuring that only fit and proper persons are conferred with the status, powers, resources and responsibilities of policing it would seem that a case proved on a balance of probabilities should be sufficient. To require proof beyond a reasonable doubt would run too high a risk of allowing unsuitable personnel to remain in the force. As for the individual accused, the worst that can happen him is that he would be found to be unsuitable for a police

career. There is no question of a determination that he has fallen below the standards of behaviour expected generally of citizens in society. He does not have the same claim, therefore, to the standard afforded a criminal suspect.[142]

(ii) Reasons

When the chairman has made his determination it would seem reasonable and fair to both the complainant and the accused that he should give brief reasons for it. This need not involve a lengthy analysis of the evidence. Where he concludes that the facts presented by the plaintiff do not satisfy any of the offences alleged he should state briefly his interpretation of the relevant offences and indicate how the facts proved are insufficient to satisfy it. Similarly, when he feels that the complainant has not presented sufficient evidence to establish his case he should give a brief indication of what he felt the shortcomings were. Finally, if there is a conflict of evidence on any crucial matter he should make clear which version he accepted and why. Where the tribunal decides that a complaint is unfounded the giving of these reasons would make a major contribution towards satisfying the complainant and the public generally that the complaint was given a full and fair hearing.[143] When a member is found guilty they will permit him and the police to accept the fairness of the outcome or, in the case of the former, to

make an informed judgment on whether an appeal is warranted.

(I) Information Rights of the Accused and Complainant

(i) The Rights of the Accused

One issue which has been glossed over so far is what information should be made available to the complainant and the accused. This issue arises at two stages in the procedure. First, the question of what information should be given to the suspect member will arise when the complaint has been received and a decision taken to investigate. Under an internal model the suspect member is normally entitled to be informed that he is being investigated for a possible breach of discipline. Thereafter, the situation varies from jurisdiction to jurisdiction. In Ireland, for example, the only additional information he must be given is the identity of the investigating officer, and the usual warning that he need not make a statement but if he does make one in writing it may be used in a disciplinary inquiry.[144] Implicit in this is that the member must be told the general nature of his suspected offence. The British regulations are more specific. They stipulate that the suspect member should be given a written notice of the report, allegation or complaint against him, in addition to the usual warning.[145] In his case, however, even an oral statement may be used in a subsequent disciplinary hearing. By contrast, in some American police departments it is normal

practice to give the member not just the full details of the complaint and who is investigating it, but also to inform him of the identity of the complainant.[146] In Philadelphia suspect members were even allowed to observe the initial questionning of complainants and witnesses.[147]

The second point at which the issue arises is the hearing. Under the internal model there is a considerable divergence between those documents supplied to a suspect member in Ireland and a member in England and Wales. The former is entitled only to receive: two copies of the relevant discipline form duly completed, a copy of each statement intended to be used in an inquiry relating to the matter, and an indiciation in writing of the nature and source of any information relating to the matter which has come to notice in the course of the investigation which may be favourable to the member concerned and of which he may be unaware.[148] Although the wording is different, it seems that the British regulations make similar provision. In addition, however, the suspect is entitled to a copy of the report, allegation or complaint on which the charge is founded and any reports thereon, even if they are confidential.[149] Excluded, however, from both the British and Irish provisions is the right to a copy of the investigating officer's report.

Where proposals to introduce an independent element into the handling of citizen complaints were considered, they almost invariably provoked police fears of an escalation in the volume of malicious complaints. In most jurisdictions, therefore, the police demanded a greater facility to sue malicious complainants for defamation as a quid pro quo for their acceptance of an independent element. Such demands have been catered for in different ways. In Britain, for example, it has been common practice for an officer's legal expenses in such defamation actions to be met out of the appropriate police authority's fund. Also, it is common practice to include, in leaflets explaining the complaints procedure, a warning that a police officer may sue the author of a malicious complaint. A leaflet published by the Northern Ireland office explaining the procedure introduced there in 1977 includes a statement that:

> "A police officer against whom a complaint has been made will be given a copy automatically if he is charged with any disciplinary offence as a result of the complaint; if he is not charged he can ask for a copy when the case is closed. A police officer who is the subject of a false and malicious complaint may bring legal proceedings for defamation."

The position of the member subject to a citizen's complaint has also been improved to some extent by greater access to information about the complaint at an earlier stage. In Ireland, for example, the member is entitled to be informed in writing, by the Commissioner, not only that he has been the subject of a complaint, but also the nature of the complaint and the identity of the complainant.[150] This

is so even if the complaint does not progress beyond the investigation stage. In Britain the member is entitled to receive, on request, an actual copy of the complaint although this may be refused by the appropriate authority if it is of the opinion that it might prejudice any criminal investigation or pending proceedings, or that it would be contrary to the public interest and the Secretary of State agrees that it should not be supplied.[151]

Clearly the suspect member's right to information is considerable. There is little chance of his being taken by surprise. It is, of course, in the interests of justice and fair procedures that an individual accused of either a criminal or a disciplinary offence should be given the fullest possible information, consistent with the proper investigation of the matter, to assist him in the preparation of his defence.[152] It must be asked, therefore, whether the rights of the suspect police officer go too far or do not go far enough where he is being investigated on a citizen's complaint. It seems that in the British and Irish procedures, by the time of the hearing, he is in receipt of all the information he could possibly need to prepare his defence. The only document he is missing is the investigating officer's report. It is difficult to understand why this should be withheld. The accused will already have copies of all witness statements and most other relevant information. Since the report will be based on this material there seems little point in

keeping it back. Presumably the justification for the current practice is that the report may not be as full and frank, as it otherwise would be, if the investigating officer knew in advance that it would be available to the accused. This argument, however, loses much of its cogency if, as is proposed, the report is confined to a summary of the evidence for and against the substance of the complaint, without any statement of opinion by the investigating officer as to whether the complaint is substantiated. If the report was released to the suspect it should assist him in his decision whether or not to admit any charges preferred and, in the event of a hearing, to prepare his defence much more efficiently. It would also be useful in deciding whether or not to sue for defamation in the case of a malicious complaint.

While it may be desirable that an accused is given all relevant information to prepare his defence against charges preferred, it does not follow that he should have a similar entitlement at the outset of the investigation. In Ireland the principles of constitutional justice do not automatically require that an individual should be fully informed of all matters relevant to his case before a decision is taken to commence an investigation against him.[153] It is quite sufficient that this be done prior to the hearing in order to enable him prepare his defence. Indeed, there are good reasons why he should not have this right at the investigation stage. A successful

investigation often depends on keeping the accused in the dark about the extent of information in the hands of the authorities. If the suspect is fully aware of how much the investigator knows he will be in a position to tailor his response so that it does not increase the amount of incriminating evidence against him. If, however, he is given only the briefest details of the complaint against him there is always the chance that he will provide more useful information under skilled questionning. In the interests of an effective investigation, therefore, it is submitted that the suspect member should be told only that he is the subject of a citizen complaint, that it is being investigated by the Ombudsman's office, and he should be given a brief outline of the nature of the complaint. The right to complete information on the case against him must wait until the decision whether or not to charge has been taken.

(ii) Access to Legal Advice

Associated with the right to information is the right of access to a solicitor while under investigation. Although this issue arises primarily in the context of a citizen suspect in police custody, it is just as relevant to a police officer under investigation. In particular, if the complaint involves an allegation of a criminal offence it would be anomalous and unjust if the right of access to independent legal advice depended on whether the suspect was a police officer or a citizen. Irish law now

recognises an absolute, constitutional right of access to a solicitor for a suspect in police custody.[154] It is submitted that a similar right should be extended to a police officer under investigation. This should hold good even for an administrative investigation under the citizen complaints procedure as the suspect member will need advice on the extent of his legal obligation to co-operate.

(iii) Rights of the Complainant

The suspect member's entitlement to information is in marked contrast to that of the complainant. Under the internal model this can be explained by the fact that the focus of the whole proceedings is whether or not the member has fallen below the standards of discipline imposed internally within the force. In this context the complainant has importance only to the extent that he may have brought an infringement of the code of discipline to attention. Where the procedure is aimed at providing police accountability to the complainant and the public generally, however, other considerations must be taken into account. It is quite possible, for example, that the complainant is also considering a civil action against the police. Even if he is not, he will have a common interest with the suspect member in not being defamed in the course of the investigation. For either or both of these reasons it is submitted that, just like the suspect member, the complainant should have a right of access to the investigation report and witness statements. This right of

access could be policed by the Ombudsman, who would grant it only on application and where he was persuaded that the complainant needed access to decide on the merits of initiating a civil action.

(iv) Public or Private Sittings

Before considering the issue of punishment it is worth saying something about whether the tribunal should sit in public or private. In Ireland and Britain the regular practice has been for it to sit in private. There is no clear explanation as to why this should be so. Presumably, it is a consequence of the complaints procedures originating as internal, disciplinary processes. By contrast in some of the larger American police departments, which have adopted special citizen complaints procedures, the norm is for the tribunal to sit in public.[155] In practice, it is rare for any member of the public to attend. Nevertheless, the mere fact that they are open demonstrates that there is nothing to hide and that, in itself, is a useful contribution to accountability. Private sittings inevitably convey the image that the authorities are determined to prevent the public from making an informed judgement on the impartiality and integrity of the hearings. In some cases they may even give rise to speculation of a cover up. It is difficult to understand, therefore, why public sittings have not been adopted in either Ireland or Britain, particularly when many of the complaints are matters which could just as

easily have been prosecuted in the magistrate's or district court. Furthermore, there have been no reports of adverse consequences from those American police departments which have public sittings. It is proposed, therefore, that the tribunals should sit in public unless the chairman is satisfied that there are compelling reasons why all or part of a case should be heard in camera.

(j) Corrective Action

(i) Chief Officer's Position

If the accused member is found guilty the question of punishment arises. Not surprisingly this is a very sensitive issue for the police as it strikes at the very heart of the disciplinary authority of the chief officer. If he does not exercise full and unequivocal power to determine and apply the punishment for a member who has failed to live up to the standards of behaviour expected from all members his status as disciplinary head of the force would be severely impaired. As against that, if he was left to fix the penalty in cases coming from the citizen complaints procedure there is always the danger that complainants or the public would feel that he was being unduly lenient because of bias in favour of the accused member. Whether or not there was any substance to this fear the fact remains that the requirements of accountability are often threatened more in appearance than reality. Nevertheless, since a choice has to be made it would seem that, at this stage of the procedure, the

disciplinary concerns of the chief officer should be given priority over the need to maintain the appearance of accountability.

If the chief officer loses his control over punishment there is a very real danger that he will come to perceive his overall responsibility for police behaviour which leads up to citizen complaints as nominal, as opposed to substantive and primary. Such a perception would be reinforced by the fact that he had already lost his traditional responsibility in the earlier stages of the procedure. When police conduct which has given rise to citizen complaints comes to his notice he will find that his hands are tied in the matter and that he can do little more than refer them to the independent ombudsman and tribunal for investigation, adjudication and corrective action. Apart from purely internal, organisational matters his position will be reduced from a leader and motivator of his force to that of a bureaucrat. His ability to command the respect and obedience of the rank and file will be undermined to the extent that individual officers and members will feel under less pressure to follow his guidance and direction in operational matters. Neither the ombudsman nor the tribunal will be able to fill this vacuum of disciplinary authority. The most that the rank and file need fear from them is being the subject of a complaint which, in practice, would not be a regular event. These bodies are simply not in the position to exercise day to

day supervision and control over them. In any event even if errant members are brought before the tribinal and found guilty of a complaint the general consensus among policemen appears to be that they fear the punishment of their chief officers much more than they do that of civilian bodies since the latter tend to be more lenient.[156]

The net result, therefore, of stripping the chief officer of his authority over punishment is likely to be a slackening of disciplinary standards in operational matters. The ultimate losers will be the public generally and, in particular, potential complainants. It will be small consolation for them that their complaints will be processed through a procedure which adheres strictly to the appearance of accountability. To leave primary responsibility for the imposition of punishment in the hands of the chief officer would secure the inestimable benefit of retaining his crucial role and authority in the maintenance of high policing standards and it would confer increased legitimacy and respect on the procedure in the eyes of the rank and file. The problem of the appearance of accountability would still remain. This could be reduced, however, by requiring the tribunal to recommend a suitable punishment in each individual case, from a minimum of advice right through to dismissal, while leaving the final decision in the hands of the chief officer. In the event of the latter constantly imposing a much lighter punishment than that proposed, or doing so in a very

serious case, the tribunal should have the power to submit a special report on the matter to the appropriate political authority. In this way the appearance of accountability would not be given priority but at least there would be a means through which to channel public concern when it arises.

(ii) Choice

Finally there is the question of what punishments should be available. Traditionally, police disciplinary procedures have focussed on the guilt or innocence of the accused. A consequence was that if the officer was found guilty he received a punishment as retribution and that was the end of the matter. If a complaints procedure is designed to serve the needs of accountability, however, the emphasis on guilt or innocence, punishment or retribution is surely misplaced. The primary issue is whether a member has complied with acceptable standards of policing in his dealings with a member of the public. In the event of his being adjudged to have fallen below these standards it is necessary to determine what needs to be done to ensure that the same member and all other members do not repeat the infraction in future. In other words, the consequence must be remedial as opposed to retributive.

Clearly, the traditional civil and criminal remedies are unsuitable for this purpose. In any event, if the matter constitutes a civil or criminal offence the

complainant will always have the extra option of purusing these remedies through the appropriate procedures. In the complaints procedure quite different remedies are called for. In minor cases of discourtesy, for example, the remedy could consist of a reprimand from a senior officer. If the offence is repeated a number of time it might consist of the member being required to undergo a short period of appropriate training outside his duty hours.[157] In more serious cases such as oppressive behaviour towards a detained suspect it might take the form of an entry on his record which would have a negative effect on promotion or, if the conduct was more serious, actual demotion. In very serious cases such as abuse of powers or fabrication of evidence it might be suspension or dismissal depending on the circumstances. The important feature about these suggestions is that they do not involve the use of civil or criminal sanctions; they all revolve around the member's position and future in the force. In that way they serve the interests of accountability and the promotion of good policing without having to venture into the territory of the civil or criminal process.

It may even be desirable to have the option of imposing no penalty at all despite the fact that the tribunal found that a provision of the code had been infringed. This could happen where the tribunal was satisfied that the substance of the complaint breached a provision of the code, but felt that the conduct in

question should not be an offence. In such a case it could inform the chief police officer that an offence had been committed but it was recommending no punishment because it felt the conduct in question should not be penalised. At the same time it should recommend to the appropriate political authority that the code should be amended accordingly. In the event of the code not being amended then the tribunal should recommend an appropriate penalty when the relevant conduct arises on subsequent occasions.

(k) Appeals

(i) The Internal Disciplinary Approach

Internal disciplinary procedures normally make provision for an appeal from a decision that a member was in breach of discipline, or from a decision to impose disciplinary action. Typically this will take the form of a right of appeal for the member concerned to a specially constituted appeal board.[158] Although the tribunal which hears the case at first instance will be composed of police officers, the same is not always true of the appeal board. In Ireland, for example, the board must be chaired by a person who is not a member of the Garda Siochana and is a justice of the district court, or a barrister or solicitor of at least seven years standing.[159] He sits with two members of the force, one of whom can be of the rank of superintendent while the other must be a more senior rank.[160] The inclusion of the independent, legally qualified chairman is not designed to serve the purpose of

accountability to the public, but to ensure fair procedures for the benefit of the member concerned. Having said that, however, this approach is by no means universal. In Britain, the appeal board consists of the member's chief officer.[161] This emphasises the primacy of internal discipline.

A further difference between the Irish and British procedures is revealed in the remit of the appeal board. Under the Irish provisions it seems that there is nothing to prevent the board from embarking on an inquiry de novo.[162] By contrast, the British provisions envisage the hearing being confined to oral and written representations, plus evidence which could not have been adduced or, for other satisfactory reasons, was not adduced at the original hearing.[163] Further divergence between the two jurisdictions is evident in the matter of what decisions the appeal board can take. In Britain the board can either affirm or set aside the original deicsion or vary the punishment.[164] The Irish board can do all these things and has the additional option of finding the member guilty of a less serious breach than that found by the tribunal at first instance.[165] It is evident from the foregoing that it is difficult to make any substantial generalisations about the appeal procedure in the internal disciplinary model.

(b) <u>The Citizen Complaints Approach</u>

(iv) A Right of Appeal

Although a right of appeal from a judicial decision at first instance is usually desirable in the interests of fair procedure, it does not follow that it is necessary in the complaints procedure under discussion. Admittedly the consequences for the member concerned can be severe in that he is vulnerable to demotion or dismissal in serious cases. This would suggest that, at the very least, he is entitled to a second opinion in the event of an adverse decision against him. On the other hand, it must be remembered that the primary function of the whole procedure is simply to determine whether a member has abused his privileged position as a police officer in his dealings with the public and, if so, what sort of response is needed. It does not involve a determination that either party acted unlawfully. Given these facts, it is clear that the situation does not warrant a long, drawn out cumbersome and expensive apparatus. Speed, efficiency and economy are what is required. The availability of a full-blooded right of appeal would run counter to those requirements given that the allegations would already have been subjected to independent investigation, followed by a review by the Ombudsman, followed again by a judicial hearing in an independent tribunal whose chairman must be legally qualified to a high standard. In the case of disciplinary action being recommended the final decision will rest with the chief officer. It might be argued with some

justification that the procedure already suffers from overkill, without adding on another appellate tier.

(iv) Procedure

If, however, the availability of an appeal is considered necessary to guarantee fair procedures to the member concerned, two further problems arise. First, what form should the appeal take, and second, should the right of apppeal be confined to the member or should it extend to the complainant? On the first problem it is submitted that, given the elaborate procedure leading up to the appeal and the need for speed, efficiency and economy in these matters, there is no justification for a full re-hearing of the case. It would be sufficient for the appeal hearing to be confined to matters of law and procedure. If, for example, the member concerned felt that incorrect procedure had been followed, or that the tribunal had addressed itself to the wrong issue, or that it had misinterpreted an offence, or reached a conclusion which was unsupportable on the evidence, he would have grounds for appeal. Given such limitations it is appropriate that the respondent should be the State as opposed to the complainant. The hearing itself can be confined to the written record of the tribunal proceedings and submissions based upon it. It would not involve the recalling of witnesses or the examination of evidence anew. That should ensure that the proceedings are relatively short and inexpensive. Given the legal emphasis, however, the

inclusion of lawyers would be desirable. In this respect it is submitted that the appeals should be made to the Circuit Court, with the member concerned and the State being entitled to legal representation. The procedure would be that which normally applies in the Circuit Court.

(v) Complainants Right of Appeal

The issue of a right of appeal for the complainant will arise if the tribunal finds against him in circumstances where correct procedure might not have been followed, or if a relevant offence had been misinterpreted. If the matter is closed at that point there is a very real danger that public confidence in the tribunal and the whole procedure will be undermined by a succession of such cases. This can be avoided by conferring the same limited right of appeal on the complainant as that proposed for the member concerned. There are, however, some difficulties with this proposition. From the accountability perspective the complainant is acting not just on his own behalf but also on behalf of the public in the sense that the public has a very definite interest in seeing that police misconduct is rooted out. This is reflected in the overall procedure to the extent that the State takes a leading role through the ombudsman's office and the inquisitoral tribunal. The private interests of the individual are not forgotten in that it is proposed that he should be permitted the right to present his own case to the tribunal. By invoking the procedure, however, the complainant has implicitly accepted

the State's overriding interest in the proper resolution of his complaint. The State's interest will extend beyond that of the individual complainant to include the public interest in the finality of litigation and the avoidance of excessive delay and expense in the resolution of disputes. Obviously, it will be a matter of concern for both the complainant and the State where the procedure has not functioned as fairly and efficiently as it should have done in any particular case. It is submitted, however, that the decision whether or not to test the matter by the further expense and delay of an appeal should rest with the State, in the person of the Ombudsman, as opposed to the individual complainant. The ombudsman can be expected to exercise this power judicially taking the interests of the complainant and the broader public into account. The complainant, on the other hand, will be concerned only with his own sense of victimisation and, as such, might be inclined to appeal in circumstances where it is simply not warranted. The danger with this is that the overall length of time and expense it will take to finally dispose of a case will grow and gradually call into question the viability of the whole procedure.

(l) Miscellaneous Matters

It is necessary now to consider a number of matters which do not fit neatly under any of the headings considered so far.

(i) Unmeritorious Complaints

The Problem

There seems to be a general consensus among those operating existing complaints procedures that many complaints are unmeritorious or vexatious. The typical situation is that the substance of the complaint does not disclose a possible offence under the code. A group of teenagers, for example, might complain that an officer forced them to move on from a street corner even though they were not doing anything, or a publican might complain that the local sergeant was being over zealous in the enforcement of the licensing laws to the detriment of his business. Both situations disclose genuine grievances but neither would disclose a readily identifiable offence under most existing codes. Even if the code is expanded along the lines suggested earlier it is unlikely that complaints which fall outside it will disappear. Although it is impossible to predict an accurate percentage figure for them, past experience suggests that they will be sufficient to constitute a significant waste of manpower and financial resources if each of them has to be processed in the same manner as serious, legitimate complaints. Indeed, their numbers might even be such that they would clog up the whole procedure with expense and delay to the extent that it would be self-defeating. Some mechanisms must be devised, therefore, to sift them out as a preliminary to the investigation proper.

A Preliminary Review

The simplest solution to the problem would appear to be to permit the Ombudsman to make a preliminary consideration of each complaint with a view to establishing whether or not it would disclose a breach of the code of offences if substantiated. In most cases this could be done without having to go beyond the text of the complaint itself. In a minority it might necessitate making further enquiries of the complainant to clarify a few ambiguities. Either way it would not require the initiation of a full-blooded investigation involving the interviewing of the accused member and other witnesses etc., unless, of course, the preliminary review disclosed a legitimate complaint.

In those cases which were judged unmeritorious the Ombudsman's office should inform the complainant to this effect and, most importantly, give a clear explanation of the reasons. Even that should not be an end of the matter. It could be that the complaint, although unmeritorious in the normal context of the complaints procedure, is genuine and does disclose individual or general policing problems which should be brought to the attention of other authorities. The most likely situations to arise in this context are complaints about matters which are exclusively concerned with internal discipline, or complaints which have their basis in local or national policing policies. In this event the Ombudsman should be empowered to refer the matter to the chief officer or relevant political authority, whichever is appropriate.[166] In such cases he

should also inform the complainant that he has taken such action in case the impression is given that the Ombudsman was defeating genuine grievances by hiding behind technicalities.

The benefit of this sifting out process is obvious but it also carries some risks from an accountability perspective. There is always the danger that it will give rise to the suspicion that the complaints procedure was being manipulated to protect the police rather than call them to account. A factor which would work in this direction is the volume of complaints sifted out continuing to account for a significant percentage of all complaints lodged. The suspicion could well develop into a lack of confidence in the whole procedure if the sifting out was done by police personnel. No matter how professionally they approached the task they would always be dogged by the appearance of self interest in curtailing a full investigation. Much of this problem should be avoided, however, if the process was performed by the independent investigators of the Ombudsman's office. Not only would they be motivated by professional considerations but they would be seen to have no personal interest in frustrating the investigation of genuine legitimate complaints. Their involvement, therefore, should protect all the advantages of the sifting out process while minimising the risks.

(ii) <u>Conciliation</u>

What it entails

The practice of conciliation is becoming an increasingly popular addition to citizen complaints procedures. Essentially what it consists of is an informal arrangement whereby the complainant is given the opportunity of meeting the accused member face to face to state his grievance and receive an explanation or apology. Implicit in this procedure is an acceptance on the part of the member that the substance of the complaint is well founded. Two things follow from this. First, he must be left free to decide whether or not he will accept conciliation and, second, once he has accepted it, the acceptance must act as a bar to any further punitive measures being taken against him in respect of the complaint.

Advantages and Disadvantages

Needless to say there are benefits and drawbacks associated with conciliation. The obvious advantage for the complainant is that he is given the opportunity of calling the police to account in the most direct form possible. Both the police and the State benefit from being spared the expense and delay of an investigation and hearing. There are serious potential drawbacks, however. If the conciliation process is left in the hands of the police there is always the danger that they will see the situation which gave rise to the complaint through police eyes only. What often happens, apparently, is that the

accused member and the conciliator adopt the attitude that the complainant is being most unreasonable in lodging the complaint in the first place, and although there might have been a technical infringement of the discipline code it was most understandable in the circumstances. This is frequently coupled with the accused adopting a demeanour which conveyed the message that the substance of the complaint was admitted, but if the situation arose again he would be happy to behave in exactly the same manner. The inevitable result is that the complainant comes away with a feeling of total dissatisfaction.

A further problem is knowing exactly where to draw the line between those complaints which are eligible for conciliation and those which are not. If the cut-off point is fixed too low the full benefits of the procedure might be frustrated, whereas if it is fixed too high there is a very real danger that members, who have committed offences in the suspension or dismissal league, could use it to avoid the punishment they deserve. The problem is complicated further by the fact that a specified offence can be minor or serious depending on the circumstances in which it was committed. In these cases the fixing of a dividing line between offences classified according to their gravity in the abstract will lose much of its significance.

(iii) <u>A Conciliation Procedure</u>

Independent

There is no simple solution to these problems. There are some measures, however, which can be taken from an accountability perspective to secure most of the advantages of conciliation while minimising the drawbacks. The most important requirement is that the conciliation process should be in the hands of competent officials wholly independent of the police. It is crucial that a genuine complainant should not be sucked into conciliation by the superficial attraction it offers only to come away with the feeling that it was nothing more than a concerted police effort to make him feel apologetic for having complained at all. In the heightened tension associated with the complaint it would take a wholly independent conciliator to educate the complainant on the police function, the particular hazards of policing and the factors which render the member's behaviour at least understandable, if not acceptable. His capacity to mollify the complainant should be further enhanced by the fact that he would not feel under any collegiate pressure to align himself with the accused, and the force as a whole, and so try to persuade the complainant that the complaint was much more trivial than it was. Mere independence, of course, would not be enough. The conciliator would also have to be professionally competent to cope with the demands expected of him. Suitable candidates for the role, presumably, could be found among the investigative staff of the Ombudsman's office. If they were specially trained in the

process of conciliation their experience of policing and police complaints should make them suitable for the task.

Scope

On the question of which offences should be eligible for conciliation and which should not, it would seem that there is no alternative but to leave it to the discretion of the Ombudsman to decide in each individual case. The arbitrariness inherent in fixing the cut-off point at a particular level in a hierarchy of abstract offences permits no viable alternative. That the Ombudsman should be entrusted with this responsibility seems sensible in view of his central role in the investigation of complaints, his expertise and his independence. It is important to note, of course, that he would only be called upon to make a decision in those cases where both the citizen and the accused member agreed to conciliation. The essential purpose of conciliation would be defeated if one or both of the parties did not consent to it from the outset. Finally there is the safeguard of judicial review where the Ombudsman exercised his discretion to refuse conciliation in any case without reasonable grounds for doing so.

(iv) Double Jeopardy

The issue

The availability of an administrative procedure for handling complaints against the police in addition to the

normal criminal process means that a policeman may find himself being the subject of both in respect of the same complaint. This can happen because police misconduct which amounts to a criminal offence and, at the same time, affects a citizen sufficiently to prompt a complaint will almost inevitably constitute an offence within the discipline code. In the normal course of events the criminal issues will be disposed of first before the question of whether or not to proceed with the administrative action will be considered. If it is decided to proceed with charges under the citizen complaints machinery, or internal discipline, and their substance is identical to that for which the accused member has already been acquitted in a criminal trial, or for which the DPP has decided against prosecution, then the issue of double jeopardy arises.[167] The police claim that this exposes them to the risk of punishment twice for the same conduct and as such it is oppressive and unfair. At first sight the police position seems perfectly reasonable. A closer analysis, however, will reveal not only that it is flawed conceptually but also that, if applied rigorously, it would have the effect of totally undermining the administrative, complaints procedure.

Confusion between Administrative and Criminal Processes

On the conceptual level the police argument is flawed in that it confuses the role and outcome of the complaints procedure with that of the criminal process. The latter's

general function is to promote compliance with the basic norms of behaviour required in society as laid down in the criminal code. The citizen complaints procedure under consideration here, on the other hand, is primarily concerned with ensuring that members of the police force live up to the standard expected of them by society in their chosen career. In other words, the criminal process functions at the general level and is compulsory for all, while the complaints procedure is specific to a particular career which is compulsory only for those who choose it. There is no reason, therefore, why an individual who has opted to join the police service and who engaged in behaviour which infringes both the criminal and the complaints codes should not be amenable to action under both. There is no question of the former automatically subsuming the function of the latter - both are operating at different levels and for different purposes. This is emphasised by the nature of the outcome where a member is found guilty under both. In the criminal process a guilty verdict is followed by punishment in the true sense of the term. In other words, the primary ingredient is retribution although, more often than not, this is coloured by a secondary desire to rehabilitate where possible. In the complaints procedure the outcome is also referred to as punishment, and may even be felt as such, but in fact it is aimed primarily at improving the capacity of the force as a whole to live up to the standards expected of it. This is illustrated by the range of options available: advice,

reprimand, delayed promotion, demotion, suspension and dismissal. Clearly their first priority is to repair the damage done by the unsatisfactory conduct to the image and standards of the force, and the fact that the individual culprit also suffers is secondary. It is only when the complaints procedure includes the option of a fine that the dividing line between its objective and that of the criminal process becomes blurred.

Undermining the Administrative Process

The other major flaw in the double jeopardy argument presented by the police is its potential to seriously undermine the accountability function of the complaints procedure. This stems from the fact that many, perhaps the majority, of citizen complaints will disclose a possible criminal offence. The obvious examples are all the minor assaults alleged in the context of policing demonstrations, maintaining the peace, arresting a suspect and questionning a detained suspect. If all these are referred to the DPP for the consideration of criminal charges the effect may be to rule out the possibility of administrative action through the complaints procedure.[168] The DPP, however, will be extremely reluctant to prefer charges in such cases partly because most of them will be more technical than substantive assaults and partly because he knows that it is difficult to secure convictions against police officers in court for alleged assaults committed in the course of their duty. Not surprisingly, the available statistics reveal

that the DPP decided not to prosecute in the vast majority of such cases.[169] The referral of these cases to the DPP, therefore, effectively frustrates the complainant's chances of getting redress in situations where he genuinely feels that he was the victim of a police assault.[170]

A fine example of this action is provided by the RUC. They were placed under a statutory duty to refer all citizen complaints which involved a possible, criminal offence to the DPP for Northern Ireland for his consideration.[171] The objective was to avoid the appearance of RUC members being protected against the possibility of criminal action in cases where such action might be warranted. The RUC interpreted this as imposing an obligation on them to refer every complaint which, if substantiated, could constitute a criminal offence. Needless to say, the DPP decided that prosecution was not warranted in the vast majority of such cases. The RUC, in turn, interpreted the double jeopardy principle as constituting a bar to any further disciplinary action in these cases.[172] Not only does this represent a failure to distinguish between the respective functions of the criminal and administrative process but, arguably, it also constitutes a misinterpretation of the double jeopardy principle. The decision by the DPP not to prefer charges is not the equivalent of an acquittal. The double jeopardy principle, therefore, is not infringed by a decision to process a complaint through the administrative procedure

after the DPP has decided not to prefer charges in respect of that self same complaint. The accused member has not actually been placed in jeopardy of being punished for it. By their interpretation the RUC have conveyed the impression that they were manipulating the duty to refer to the DPP, and the principle itself, in an attempt to frustrate their accountability through the administrative complaints procedure.

Ombudsman's Discretion

Although the double jeopardy principle should not prevent the possibility of criminal and administrative action in respect of the same offence it does not follow that there should automatically be an administrative hearing in cases where there has been an acquittal or where the DPP has decided against prosecution. It may be that further proceedings would not be in the interests of the police or the public. The sensible solution to this problem would seem to be to confer a discretion on the Ombudsman to decide whether or not charges should be pursued through the complaints procedure in such cases. From his vantage point he should be in a position to weigh up the accountability needs of the individual complainant against the needs of the police. The former will want to be satisfied that some tangible effort has been made to take action on his complaint, while the latter will want to be relieved of the extra burden of valuable manpower being subjected to the stress and strain of administrative

hearings in what they see as relatively trivial cases. Inevitably the Ombudsman will decide to puruse administrative hearings in some cases and not in others. His independent status and expertise and the fact that his decisions would be subject to judicial review should be sufficient to leave the police and complainants with little room for grievance in those cases which do not go their way.

(m) Serious Incidents

(i) The Problem

If often happens that incidents of alleged police misconduct, which provoke very deep public concern, cannot be resolved satisfactorily through the standard criminal, civil or administrative procedures. In the case of the complaints procedure this must seem somewhat paradoxical in that it is these very incidents which focus public attention on the complaints procedure and instigate demands for reform. However, even if it was reformed in the manner proposed in this thesis, it would still prove unequal to the challenge in many cases. A simple explanation for this is that although the allegations themselves may be substantiated, it often happens that the police personnel responsible cannot be identified. Additionally, it may happen that, for one reason or another, there is insufficient admissible evidence to secure either a conviction or a substantiated finding, but enough to leave a strong suspicion that the police, or some police

officers, have behaved, and may continue to behave, in an unacceptable manner.

(ii) Examples

Northern Ireland, over the past twenty years, has been a productive breeding ground for such cases,[173] but it is by no means unique. The circumstances in which they occur are familiar to all police forces. Most typically they will take the form of police conduct on the street or in custody, which has resulted in death or serious bodily injury. It might occur in the context of a single confrontation between the victim and the police in circumstances where the victim cannot identify the officers involved, there are no independent witnesses and the police uniformly deny any knowledge of the incident.[174] Alternatively it might occur in the context of a public demonstration where the police used excessive force but it was impossible accurately to connect identifiable police officers with specific acts of violence.[175] Less regular, but no less real examples, would be police fabrication or suppression of evidence on a large scale, accepting pay-offs from criminal syndicates [176] and the failure to protect life or property on racial or religious etc. grounds.[177] Where such practices emerge and are not resolved satisfactorily through the standard channels there must be some other response. A practice of simply ignoring the allegations until public concern has died down will be counterproductive. As one unresolved incident follows

another the inevitable result will be a significant loss of public confidence, not only in the machinery of accountability, but also in the police themselves. The problem is how to construct a procedure which can facilitate appropriate remedial action by getting to the bottom of these allegations without, at the same time, jeopardising the rights of accused police personnel, imposing an intolerable burden on police resources or being prohibitive in terms of financial cost or delay.

(iii) Responses

The first step must be to process the allegations through the normal criminal procedure, followed by the administrative procedure if the former does not produce a satisfactory conclusion. If the latter also fails to resolve the matter the next step must be some sort of judicial or public inquiry. Demands for a judicial or public inquiry are a standard reaction in the wake of serious allegations of police misconduct. More often than not these demands are refused and that in itself often fuels public concern as allegations of a cover-up gather momentum. There are, however, very sound reasons why those inquiries are not always the most suitable response. Because of their subject matter they will have the potential to threaten not just the careers and reputations of those police members directly involved, but also those of their superiors all the way up to the chief officer. It follows that they tend to be very formal, solemn affairs

with affected parties being represented by counsel. This in turn means that they impose an enormous strain on the State, the police and private individuals, in terms of finance and personnel. For those directly affected there is the added tension and anxiety about the outcome. Furthermore, in order to enhance the ability of the enquiry to get to the truth it is often necessary to grant immunity from prosecution to key witnesses. If the enquiry reveals that they were criminally culpable it will be difficult to avoid the conclusion that accountability has been achieved only at the expense of justice.

(iv) Inquiries

Purpose

It should not be concluded that judicial or public enquiries have no merit in this context. Their primary advantage is that by conducting a thorough and impartial investigation in the full glare of publicity, they go as far as it is possible to go in satisfying the public that the full facts surrounding specific allegations have been unearthed. Armed with such information, individuals, communities and the public generally can make an informed judgement on where the fault lies and what corrective action is needed. This, surely, is accountability at its purest. The challenge is to design the procedure so that it secures this accountability objective without producing the concomitant drawbacks.

Remit

A useful place to start is with the remit of an inquiry. Traditionally public and judicial inquiries have been burdened with the onus of making recommendations to avoid the repetition of the matter they are investigating. Whereas this may be desirable and necessary in some situations it is, nevertheless, a key factor contributing to the expense and delay associated with this procedure. In a police matter, for example, it would necessitate the enquiry going beyond the narrow facts of the incident to look at broader aspects of policing, such as: functions, powers, management, accountability and political control. These, of course, are the ongoing responsibility of the police themselves and their political masters. While it is essential that they should be the subject of constant review it is not necessary, nor even desirable, that this should be done by a tribunal whose primary concern is establishing what happened in a specific incident and who was responsible. If these facts disclose more deep-rooted problems, as often they will, that is a matter for the police and the political authorities to take up in whatever manner is most appropriate. It may mean calling in a firm of management consultants to identify ways of improving management efficiency; it may mean the consideration of changes in the standing orders for the guidance of police personnel performing particular duties; it may mean taking another look at the channels of political accountability governing the police, or whatever. The point is that if

the inquiry was charged with the responsibility of getting to the root of these matters and making appropriate recommendations, inevitably it would get bogged down in expense and delay. Not surprisingly the government would be reluctant to accede to public demands for such an inquiry everytime a police matter of serious public concern arose.

From an accountability perspective the first priority of an inquiry should be to establish the facts. If the facts of a matter are not brought out into the open it is very difficult, if not impossible, to secure effective accountability with respect to that matter. It follows that an enquiry which is confined to establishing the facts, and who was responsible, has a major contribution to make to effective accountability. Such an inquiry could also be conducted with much more haste and less expense than that associated with the traditional inquiries. Accordingly, it should be more feasible to establish one as often as it is needed. Admittedly, it would not be able to identify structural or underlying problems which have contributed to the incident or police practice, much less make recommendations on how they might be remedied. These, however, are matters consequential to accountability. If the inquiry provides the public with the facts that will enable it, or pressure groups within it, to lobby the government for appropriate corrective action. It is proposed, therefore, that the remit of an inquiry should be

limited to unearthing the facts and who was responsible. It should have no responsibility to make recommendations.

Composition

The structure and modus operandi of the tribunal would be shaped by its narrowly defined purpose and the fact that it would function quite regularly. A suitable model would be a standing tribunal of inquiry which could be activated at short notice. It would consist solely of a part-time chairman who should be a senior counsel or a circuit court judge. A small panel of chairmen should be maintained to ensure that one would be available when needed. The tribunal, of course, would have to function in an inquisitorial manner. The chairman, therefore, would have to ensure that all allegations and counter-allegations are fully investigated. He would have to see that, as far as possible, all witnesses are called and their evidence fully tested, that all relevant material evidence is produced and thoroughly examined, that all necessary forensic tests are carried out and that all leads are followed up.

Powers

Clearly the chairman will require certain powers and assistance. From the outset he should have a full record of the criminal and administrative proceedings, if any, which preceded the reference of the matter to the tribunal. He should also be vested with such power to subpoena and question witnesses, to order the production of material

evidence, and to carry out any further investigations that he deems necessary. The procedure and rules of evidence to be observed at the inquiry should be matters for him, subject to the basic rules of natural justice, and he should enjoy the contempt powers of the High Court to enforce his authority in this regard. It is also proposed that he should have the power to grant immunity from prosecution to witnesses in respect of the evidence they give to the tribunal (subject to an exception for perjury and contempt). This can be justified on the grounds that the overriding concern of the tribunal is to establish the facts, and the facts may not be forthcoming from witnesses who have most to tell if they are afraid of incriminating themselves. It must be remembered, too, that the possibility of prosecution would already have been considered and discounted, or tried and failed, before the tribunal would have been activated.

The nature and extent of the chairman's duties will require that he has the assistance of counsel appropriate to the scale of the inquiry. Counsel's function will be to perform the actual questionning of witnesses and examination of the material evidence with a view to establishing the facts. This, of course, would not prevent the chairman from putting further questions of his own. In addition, counsel could be expected to assist the chairman in assessing the relevance of evidence and in identifying what leads should be followed up.

Legal Representation

The need for counsel in the tribunal proceedings raises the question of legal representation generally. Should witnesses to the inquiry, or parties directly affected by it, be entitled to legal representation? It can be argued that the answer to this question should be yes, at least for those whose rights, liabilities or reputations might be adversely affected by revelations or the outcome. In Irish law there is some judicial authority for the proposition that a denial of legal representation in such circumstances would constitute a breach of natural justice.[178] It is submitted, however, that to permit legal representation in the sense of examining and cross-examining witnesses through counsel is to misunderstand and to undermine the essential purpose of the tribunal.

In the tribunal proceedings there is no prosecution and defence, plaintiff or defendant. There is merely the tribunal and the witnesses. All the witnesses share the same status in law. They are not there as witnesses for the State, the accused or the victim; they are there merely to give evidence, and to be subject to cross examination by the tribunal on what they know about the matter under investigation. None of them will get the opportunity, let alone be called upon, to cross-examine each other. The need for each witness to be represented by counsel, therefore, is misplaced. There is no objection, of course, to a witness seeking legal advice on how to

present what he knows, or even having a lawyer present to object to questions that might invite an incriminating answer for those to whom immunity has not been granted. That, however, is a far cry from permitting full legal representation.

Admittedly, evidence given to the tribunal, or the tribunal's findings, will have the potential to cause embarassment and, perhaps, even destroy reputations. It does not follow from that alone that legal representation must be allowed. The rules of natural justice are not absolute, nor are they interpreted and applied in isolation; what they require in any particular case is influenced by the surrounding circumstances.[179] In the case of the proposed tribunal, for example, the common good in having a procedure which can establish the truth, and thereby help defuse public concern, over serious allegations of police malpractice in a speedy and economical manner must be taken into account. If full legal representation is allowed it will have the effect of making the search for the truth slower, more tortuous and much more expensive to the extent that the viability of the whole process will be in jeopardy.[180] When the right to legal representation is weighed in the balance against the benefits of having the tribunal, it is submitted that the latter must be given priority. In any event, the protection of judicial review will always be available to ensure that the tribunal's procedure, or its findings of

fact, were not such as to upset that balance in any individual case.

Initiation

The final question that must be considered is who should have the responsibility for initiating a tribunal inquiry. Should it be the chief officer, the ombudsman or a political authority? The ombudsman can be discounted immediately. His jurisdiction is confined to the investigation of complaints and their resolution through the administrative procedure. Although he might be concerned about the effectiveness of the procedure generally and how it might be improved it is not part of his function to make judgements on whether public concern has been mollified in individual cases. Even if it was, his capacity to do so would be severely impaired by the fact that he has no role to play in the criminal option (beyond the investigation) and that he is not equipped with the expertise or resources to assess how the public are feeling about a particular incident.

The chief officer can also be ruled out. Just like the Ombudsman it would involve him in issues which are outside his primary responsibility. Furthermore, every time he decided not to initiate an inquiry, even for the most impeccable reasons, there would always be a suspicion that he was protecting the force. There is, of course, nothing to prevent him from carrying out internal inquiries

into any aspect of the force, its personnel or practices if he feels that it is warranted. There have been several examples of such inquiries in various police forces in the United Kingdom in recent years.[181] These will continue to be of immense value to chief officers, even if a standing tribunal of inquiry is established, because an independent inquiry will not always satisfy all the needs of the chief officer; it will be concerned primarily with accountability while he will be concerned primarily with internal discipline and operational efficiency.

The last option is the political authority, and it would seem the most appropriate. Once the administrative and criminal processes have run their course it is essentially a political decision whether further action is necessary to satisfy the demands of accountability. It does not follow, however, that the matter should be left in the hands of a Minister for Justice. He is a member of the government of the day and, as such, will be influenced by considerations which have little to do with the immediate interests of police accountability. For example, he must be concerned with his own image for electoral and promotion purposes. Since he is responsible for the police, the last thing he will want in this regard is a series of inquiries which reveal serious police abuses. He must also be concerned about his relationship with the police. Given their power, resources and function, they are in a particularly strong position to embarrass him politically

if he is over zealous in initiating inquiries against their wishes. Another factor he must cope with is the financial wrangling at the cabinet table. Like every other minister he must fight his corner to get as big a share of the overall budget as in possible for his department. Inquiries, however, cost money and if he was initiating too many of them it would not be long before this would attract criticism from his colleagues thereby undermining his status in the cabinet. These are only some of the factors that the minister would have be bear in mind when deciding whether or not to activate the tribunal of inquiry in any individual case. It is likely, however, that they would make him more conservative in this matter than the needs of accountability would require. A political authority, independent of the police and the government of the day, would appear to be the most appropriate body to be entrusted with this task. The need for such an authority, along with its role, structure and powers is discussed in chapter 11.

1. Background

The Irish procedure for dealing with complaints against the police remained wholly internal until 1986. Insofar as complaints originated from members of the public they were handled in exactly the same manner as allegations of indiscipline emanating from within the force itself; in other words they were treated purely as internal, disciplinary matters. The Garda Siochana (Complaints) Act, 1986, however, provided for a separate, additional apparatus for handling citizen complaints. The internal procedure remains to cope with complaints alleging breach of discipline, whereas complaints from citizens[1] will normally be processed through the new apparatus.[2] The 1986 Act, therefore, represents an acceptance, for the first time in this State, that citizen complaints against the police present special problems which cannot satisfactorily be resolved through the internal procedure. While this brings Ireland into line with many other jurisdictions there are certain factors peculiar to Ireland which not only prompted the introduction of the new procedure here, but which also have had a significant bearing on its shape.

In the late seventies and early eighties Ireland witnessed a sustained increase in both the volume and gravity of crime.[3] In Dublin, and to a lesser extent in

the other cities, this took the form of burglary, robbery, muggings, joy-riding and drug-pushing. A particular feature was the more frequent resort to firearms in the course of major robberies which were believed to have been carried out by a small number of major criminal gangs based in the Dublin area. In the rural areas the increase in crime was associated in the public mind with attacks on defenceless elderly people living in remote areas. The motive invariably was robbery but, on occasions, the victims suffered serious injuries and death. The media coverage of these attacks coupled with what was happening in the cities generated a public perception of crisis in law and order. In these circumstances the Garda and various interest groups found a sympathetic audience throughout the country when they laid the blame at the door of the criminal justice system. In a nutshell, the basis of their argument was that when dealing with suspects the hands of the Garda were tied due to their narrowly circumscribed powers and the excessive rights afforded the suspect, that the rules of evidence and criminal procedure were so heavily biassed in favour of the criminal that many hardened criminals, apprehended at great cost to the Garda, were walking free on technicalities, and that much of our criminal law was so outdated that it was not capable of responding to the more sophisticated activities of today's professional criminals.[4]

The government responded with the publication of the

Criminal Justice Bill, 1983 which sparked off a major public debate on the whole subject of police powers versus civil liberties. The Bill provided for some far-reaching and fundamental changes in the balance of the criminal justice system. For the first time in the history of the State, gardai would enjoy a general power to detain an arrested suspect for up to a maximum of twenty hours before releasing him or bringing him before a judicial authority.[5] Other provisions included a police power to search, photograph, fingerprint, palmprint and to take skin swabs and hair samples from an arrested suspect,[6] a criminal offence of withholding information about firearms[7] or stolen property[8], a duty on an arrested suspect to account to the police for his presence at any particular place[9] or for any object, substance or mark found on certain persons, items or places.[10]

Clearly these provisions heralded a major realignment in the balance of the Irish criminal process.[11] If enacted into law gardai would enjoy powers over all citizens which, previously, they enjoyed only over subversive suspects. It was that prospect, perhaps, more than anything else which explains the intensity of opposition which key parts of the Bill encountered in its passage through the Oireachtas.[12] While there was general agreement on some rationalisation of police powers there was also deep concern that the new powers might become a vehicle for oppressive police practices.

Concern over Garda methods can be traced back to the mid-seventies and the general belief that a heavy gang was operating within the force at that time. This, allegedly, comprised a group of members who specialised in the interrogation of subversive suspects arrested under section 30 of the Offences Against the State Act.[13] Although they did not constitute an officially recognised squad, such as the murder squad, they could be found interrogating suspects at very diverse locations throughout the country. Their reputation was based on the belief that they resorted to the use of violent and oppressive treatment on suspects in order to get the confession or intelligence that they wanted. Belief in the existence of this gang was fuelled by a number of highly publicised cases which were lost due to the courts not being satisfied that alleged confessions in garda custody were voluntary.[14] If this happened in another jurisdiction, such as Northern Ireland, it would have instigated a crisis of confidence in the police force. In Ireland, however, public support for the Garda was so widespread and strong, compared with that for subversives, that the government was able to defuse the situation by the appointment of an inquiry into the treatment of persons in Garda custody.[15] Nevertheless, suspicion of Garda methods did not entirely disappear. Indeed, it was kept alive throughout the eighties by an increasing number of sucessful civil and criminal actions against gardai, and such well publicised cases as the Kerry Babies,[16] the Shercock[17] and the Bunratty[18] cases. Accordingly, when

the Criminal Justice Bill was published in 1983 it provoked fears of the normalisation of abuses which were associated with the Garda war against subversives. To assuage these fears the government was forced to postpone the introduction of a number of key provisions in the Bill until an independent complaints procedure was in place, along with regulations governing the treatment of suspects in police custody. Although the Bill was enacted in 1984, the complaints procedure and the custody regulations were not in place until 1987.

The content and style of the new complaints procedure have been heavily influenced by the circumstances in which it was introduced. Its focus, for example, is on satisfying the public that allegations of abuse by the police in the exercise of their new powers, particularly those with respect to the detention of suspects, will be resolved fairly. Furthermore, the blueprint would appear to be based heavily on the new procedures introduced in Britain in 1984 (and in Northern Ireland in 1987). Insofar as there are significant differences between them, it would appear that these have resulted from the Irish borrowing some features from the procedures introduced in other common law countries during the eighties.[19] The consequence is that insofar as the new procedure is designed with police accountability in mind, it is accountability with respect to a relatively narrow range of police activities. The government did not approach the

issue from the broad perspective of how a complaints procedure can assist in the general task of calling the police to account. On the contrary, it confined itself to the task of producing a procedure which could be used by a citizen to call individual members to account for the manner in which he, or they have, exercised their powers or behaved in certain limited situations. It is submitted that, although the new procedure has much to recommend it, this narrow perspective contributes to a number of weaknesses which will emerge in the following assessment of how it compares with the complaints procedure proposed in this thesis.

The major innovation effected by the Garda Siochana (Complaints) Act, 1986 is the establishment of the Garda Siochana Complaints Board and its chief executive. The Board is intended to be independent of the police and is designed primarily to play a close supervisory role over the investigation of citizen complaints against gardai. Although the investigations will continue to be performed by Garda personnel there is provision for the Board to carry out an independent investigation through its chief executive in certain circumstances. The Board also has the power to receive complaints and to set up disciplinary tribunals to adjudicate on complaints which it feels disclose a possible breach of discipline.

With this basic structure in mind it is proposed to

consider each stage in the new complaints procedure, using the equivalent stages in the procedure proposed in this thesis for comparative purposes.

2. Code of Offences

The new complaints procedure is provided with its own code of offences, totally separate from that in the 1971 internal disciplinary regulations. Although the offences are taken almost verbatim from the 1971 Regulations an attempt has been made to include only those offences which might be the subject matter of a citizen's complaint and to exclude those which relate solely to internal discipline. This is a commendable recognition of the fact that the two procedures are serving two distinct objectives. Unfortunately, the contents of the new code suffer from a number of defects which prevent the new procedure from fulfilling its full accountability potential. First, there is the fact that it omits a number of offences which might legitimately be the subject matter of a citizen's complaint. Examples are: identifying actively or publicly with a political party[20] and ordering another member to act in a manner which infringes a provision of the code. These omissions are a reflection of the fact that the new procedure was designed to serve a very narrow accountability function. They are also a pointer to the limited accountability potential of that procedure.

The second defect in the code is the fact that it

gives little guidance to gardai and the public on what is and what is not acceptable police practice. In particular, no attempt is made to define how standard police powers should be employed in particular situations. A valuable and commendable exception is the power of detention. The Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations, 1987 set out in detail the rights of a suspect in police custody, and how he should be treated. Although these regulations were introduced subsequent to the complaints procedure, they stipulate that a breach of their provisions is an offence within the scope of that procedure. There is no compelling reason why this approach cannot be adopted for other primary police powers. An associated matter is the absence of any guidance on how the police should treat citizens in commonly encountered operational situations. If a citizen feels aggrieved about how he has been treated in such matters he can only be advised to lodge a complaint and wait to see if such general offences as: discourtesy, neglect of duty, abuse of authority or discreditable conduct will be interpreted to cover his situation. This does little to develop police accountability beyond the scope of the internal disciplinary model. It can equally be criticised as being unfair to police personnel in that it exposes them to offences which are unnecessarily broad and uncertain in scope.

A third defect is the inclusion of any entry in an

official document or record which is, to the members knowledge, false or misleading.[21] This is essentially a matter of internal administrative procedures. It is most unlikely that a citizen would have either the inside knowledge or motivation to make such a complaint. Its inclusion in the code, however, helps to convey the undesirable impression that the new procedure is still predominantly concerned with the enforcement of internal discipline with accountability to the public being a convenient, but secondary, consequence. This is reinforced by the style in which the code is written. The offences are presented as a list of prohibitions exactly as if they formed part of an internal discipline code. In fact, each offence in the new code is taken directly from the 1971 disciplinary code with very little, if any, alteration in the wording. It might have been more conducive to effective accountability if the new code was framed in terms of do's and don'ts, rights and obligations, in the style of the 1987 regulations on the treatment of persons in custody.

3. Lodging a Complaint

The new procedure makes a significant contribution to effective accountability by facilitating the making of complaints. The 1987 Act permits complaints to be lodged by anyone who witnesses the police conduct. This can be done in person or through a solicitor or, in the case of a person under the age of 17, through a parent or guardian

or, in the case of a person who is mentally handicapped or mentally ill, through a parent or guardian or some other person interested in his welfare.[22] Furthermore, there is no necessity to lodge the complaint at a Garda station or with a garda. It is permissible to make it orally, or in writing, to the Complaints Board.[23] This must be done within six months of the date of the conduct. The option of complaining directly to the Board is essential for complainants who would feel intimidated from complaining in the Garda station. Unfortunately, however, it does not cater adequately for the complainant who is not capable of expressing himself clearly and legibly in writing, has no practical access to someone who can do it for him and is not in a position to go personally to the Board's office. This need not be a very unusual situation given that the Board's office is located centrally in Dublin. The problem could be overcome easily if the authorised channels for complaints were extended to include citizens advice bureaux, county councillors and members of the Oireachtas.

4. Receiving a Complaint

The issue of who is authorised to receive complaints is handled diplomatically by the new procedure. It authorises both the independent Complaints Board and the Commissioner to be recipients. If an admissible complaint comes first to the Board it must send a copy to the Commissioner,[24] while complaints made at a Garda station[25] or to a garda above the rank of Chief

Superintendent[26] must be referred both to the Board and the Commissioner. In this way the needs of accountability to the public are recognised without unduly treading on the sensitivities of the Commissioner. The fact that all complaints must be received by the Complaints Board also assures the complainant and the public that they will be investigated.

5. The Investigation

(a) Independent Input

The investigation stage in the new procedure contains a marked divergence from the approach advocated in this thesis. The new procedure opts to retain the concept of gardai carrying out the investigations themselves, in contrast to the notion of employing civilian investigators. It requires the Commissioner to appoint a garda not below the rank of Superintendent[27] to investigate an admissible complaint which has not been resolved informally.[28] If the investigating officer thinks fit he can have the assistance of additional members.[29] The government felt, and this was accepted by the Oireachtas, that public confidence in the new procedure could be protected by subjecting the police investigation to independent supervision. This takes the form of the independent Board having a general duty to supervise the investigation of complaints, equipped with the power to give whatever directions to the investigating officer as it considers necessary or expedient.[30] An investigating officer must

comply with such directions.[31] The Board's input begins with its power to prescribe general principles which must be followed by the Commissioner when appointing an investigating officer.[32] After the investigation has commenced the Board is kept informed of its progress through the Chief Executive.[33] To this end the investigating officer must submit interim reports,[34] such supplementary reports as are requested, and the final report on each investigation[35] to the Chief Executive[36] who will transmit these reports, together with his written comments and recommendation for action, to the Board.[37] Furthermore, there is provision for independent investigation in exceptional circumstances[38] where the Board considers that the public interest requires it or that the standard investigation has not been, or is not being, carried out properly. An independent examination is put in motion by the Board requesting the Chief Executive to investigate the complaint himself or have it investigated by some other person. When introducing this measure to the Seanad, the Minister for Justice explained that he did not expect the power to be used very often.[39]

A limitation on the potential of independent supervision is contained in a most awkwardly constructed provision which is designed to exclude from the investigation report information which would be liable to affect the security of the State or which would constitute a serious and unjustifiable infringement of the rights of

some other person.[40] The general thrust of the provision is that the Minister for Justice, at the instigation of the Commissioner, can direct the exclusion of such information from an investigation report and thereby prevent it coming to the attention of the Board.[41] The significance of this provision will depend on how "the security of the State" and "serious and unjustifiable infringement of the rights of some other person" are interpreted by the Minister. If they are interpreted very broadly the supervisory role of the Board will be seriously compromised. Interestingly, the legislation permits the Board and the Commissioner to devise an alternative procedure to deal with such situations either in an individual case or more generally.[42] The danger inherent in this is that if the Board did make such an arrangement with the Commissioner whereby certain information would be omitted from reports, it would be seen to be compromising its' independence and supervisory role of its' own accord.

It must be acknowledged that, superficially, this investigation procedure represents a major improvement, from an accountability perspective, on the arrangements traditionally associated with the ex post facto review of police investigation. Indeed, it even represents an advance on its' current British counterpart to the extent that it permits more direct independent supervision. Under the British provisions the independent police complaints authority can only withhold its approval for the choice of

an investigating officer,[43] as opposed to laying down principles which must be followed in the appointment; its power to issue directions to an investigating officer is dependant on the Secretary of State issuing regulations conferring such power on it;[44] it has no power to order interim or supplementary reports from the investigating officer; it cannot authorise the independent investigation of any complaint; the most it can do is withhold its statement of satisfaction with the investigation;[45] and, finally, it does not have the benefit of a statutory chief executive.

Despite the attractions of the Irish procedure the fact remains that it does not provide the full accountability benefits attached to independent investigation. When introducing the Complaints Bill in Parliament the government offered three reasons for keeping the actual investigation in the hands of the police. The reasons were that: criminal offences should be investigated by gardai, it would be difficult to recruit civilian investigators with the requisite experience for the task, and the size of the investigation team would be too small to provide adequate career prospects for the members.[46] These reasons were not elaborated on and were accepted by the Dail and Seanad at face value. This is unfortunate because they collapse even under the most cursory examination. Why, for example, must all criminal offences be investigated by police personnel? There are

many examples of conduct prohibited by the criminal law being investigated by others such as: officials from the Department of Trade, the Revenue Commissioners and the Director for Consumer Affairs and Fair Trade. Even the new complaints procedure itself provides for the possibility of criminal allegations against the police being subject to investigation by non-police personnel. The alleged difficulty in finding suitable investigators can be resolved by training and recruitment from investigation personnel in other fields. It must be remembered in this respect that the police complaints team would not be large owing to the relatively low level of complaints against the police in Ireland. Between 1983 and 1985 they averaged out at 400 per annum.[47] Even the question of career advancement should not be a problem as experience gained in the police complaints team should be an advantage towards appointment at a senior level in other fields of investigation. The official reasons for not adopting the principle of independent investigation fully, therefore, appear weak and unconvincing. A more plausible explanation is that, in this matter, the government did not wish to alienate the police establishment.

(b) Duty to Co-operate

Although the Irish procedure does not fully embrace the principle of independent investigation it does recognise that members of the Garda should be under an obligation to co-operate with the administrative

investigation of a citizen's complaint against a garda.[48] The measure in question, however, is rather cumbersome. It provides that when the Board has considered an investigation report, and it has been decided that criminal proceedings should not issue, it may give a direction for further investigation where the member concerned has refused to answer a question, furnish information or produce a document or thing, relevant to the investigation.[49] When such a direction is given the investigator[50] may require a member to answer a question, furnish information or produce a document or thing relevant to the further investigation of the complaint.[51] Failure to comply is a disciplinary offence in itself.[52]

There are four qualifications. First, a direction cannot be given unless the complaint concerns the conduct of a member in the exercise, or purported exercise, of his functions or powers as a member.[53] Under the original proposals it was feared that a member would find himself compelled to answer questions about his private or family life. The Minister responded by announcing his intention "to confine the requirement to furnish information....to matters arising out of a member's performance of his official duties and to move an amendment to this effect at the committee stage".[54] The amendment was introduced and written into the Act. It is doubtful, however, that it achieves its objective. It merely requires that a direction cannot be given by the Board unless the conduct alleged in

the complaint arose in connection with the member's exercise, or purported exercise, of his functions as a member. Once a direction is given the investigator can require a member to answer a question, furnish information or produce a document or thing, relevant to the further investigation of the complaint. There is no corresponding requirement that these matters should relate only to the activities of the member in his official capacity. Seemingly, questions relating to his private or family life would have to be answered if they were relevant to the subject matter of the complaint. Although this may not have been the intention of the government or the legislature it is submitted that it is necessary if the obligation to co-operate is to have the desired effect.

The second qualification is that a member who is the spouse of a member cannot be required to answer a question concerning a complaint against his or her spouse.[55] The third qualification is that answers or matter submitted pursuant to the requirement shall not be admissible in evidence against the member or his spouse in any proceedings other than disciplinary proceedings.[56] The last qualification is that the member's failure to comply with the requirement will not amount to a breach of discipline unless the investigator has informed him in writing that he is acting in accordance with the relevant statutory provisions and has brought the substance of those provisions to the notice of the member.[57]

The cumbersome and complex nature of the provision throws up some problems of interpretation which have serious implications for its scope. In particular, there is some ambiguity about which members can be subjected to a requirement to answer questions. Section 7(9)c stipulates that the investigator may require "a" member to answer a question etc. This suggests that the power is not confined to the member under investigation. However, section 7(9)f makes specific provision for the situation in which the investigator is questioning another member, consequent to a direction having been issued to the member under complaint, and the former to answer a question etc. It provides that if it appears to the investigator that there is a possibility that this other member may have committed an offence he may require that member to answer a question etc. so long as the DPP has decided that no criminal proceedings should issue against that member. The need for this special provision, and its wording, suggest that a member who is not initially under investigation, pursuant to a citizen's complaint, cannot normally be required to co-operate in an investigation against any of his colleagues who are being investigated pursuant to a citizen's complaint. Further support for this view can be deduced from section 7(9)d which provides that a member is under a duty to answer etc. at the requirement of the investigator but such answers are not admissible against that member in any proceedings other than disciplinary proceedings. The clear implication is that the member

under a duty to answer etc. pursuant to section 7(9)c is the member under investigation.

If section 7(9)c is interpreted in the light of section 7(9)f and section 7(9)d it follows that there is a major loophole in the requirement to co-operate.[58] Clearly, if the colleagues of a garda under investigation cannot always be compelled to say what they saw or heard, or produce relevant evidence that they possess, with respect to the subject matter of the complaint the investigation of many cases will be seriously hampered. In particular, it will severely curtail the capacity of the chief executive or anyone appointed by him to carry out an independent investigation. If they cannot compel the delivery of documents and material evidence from members not under investigation they may find it impossible to get access to internal Garda records such as time sheets, beat assignments and criminal investigation reports which may be critical to the completion of a comprehensive investigation. Ideally the independent investigators should be specifically conferred with the right of access to such materials and onto police property for the purposes of an investigation. Surprisingly, however, the Irish legislation does not confer any investigative power on them beyond those in section 7(9).

It is submitted, therefore, that in order to advance the overall objective of the complaints procedure section

7(9)c should be interpreted literally so as to place all members of the garda under an obligation to co-operate with an investigation when required, and section 7(9)f should be viewed as merely a cumbersome method of dealing with a very special situation. Section 7(9)d, however, would have to be amended to make clear that the evidence could be used in disciplinary proceedings against any other member of the force.

(c) Preserving Evidence

The proper investigation of a complaint will often require immediate steps to be taken to preserve relevant evidence. The Irish provisions to this effect are commendable. They oblige the Commissioner and any member, on becoming aware of a complaint, to take any lawful measures that appear to him to be necessary or expedient for the purposes of obtaining or preserving evidence.[59] The Commissioner is also permitted to postpone notification of the complaint to the member until any such measures have been taken.[60] This is a sensible measure which will make a practical contribution to an effective investigation in some cases.

(d) Rights of the Suspect Member

The rights of the member under investigation are dealt with in a piecemeal fashion under the new procedure. The first protection he enjoys is the right to information. When the Commissioner is notified that a member is the

subject of a complaint he must, as soon as may be, notify in writing the member concerned. This communication must inform him not only that he is the subject of a complaint, but also on the nature of the complaint and the identity of the complainant.[61] Such a provision was criticised in the immediately preceding chapter on the ground that it may result in the interview of the member being less productive than it otherwise might have been if the member had been less knowledgeable about the extent of the information at the disposal of the investigator. The fact that the Commissioner has a power to postpone this communication in certain circumstances does not meet this criticism fully as the subjection of the member to surprise questionning does not seem to be one of these circumstances.

The second protection arises where the complaint alleges conduct which the investigator believes may constitute a criminal offence. In this situation the investigator must follow the law and practice applicable to the investigation of a criminal offence.[62] In other words the police suspect is entitled to all the protection afforded any criminal suspect; and that is as it should be. There is no further protection prescribed, however, for the member who is being investigated solely for an administrative offence. It is not at all clear why this should be so. The most that is specified is the right to be informed in writing that he is under an obligation to co-operate in certain matters when those matters arise. At

the very least, it is submitted, the member should be entitled to the services of a solicitor given the immense complexity of the procedures through which he is being processed.

6. The Complaints Board

(a) Composition and Structure

The Garda Siochana Complaints Board is established as a body corporate with perpetual succession and power to sue and be sued in its own name and, with the consent of the Minister for Justice, to acquire, hold and dispose of land.[63] The Board consists of a Chairman and eight ordinary members[64] appointed by the government from time to time as the occasion requires.[65] The ordinary members must include at least three practising barristers or solicitors of at least ten years standing[66] and the Commissioner or his nominee not below the rank of Assistant Commissioner.[67] There are no further guidelines or preconditions on who the other ordinary members may be, apart from the fact that no other past or serving member of the Garda Siochana can be a member.[68] The chairman must be a practising barrister or solicitor of at least ten years standing, and is appointed by the government.[69] The proliferation of lawyers on the Board was explained by the government[70] as necessary to ensure that the Board followed fair procedures in its deliberations, and that there would be sufficient personnel available to act as chairmen of tribunals in cases where they had not

participated in the earlier deliberations.[71] The term of office for all members is five years, which is renewable.[72] Although the government has the power to remove members it can be exercised only where the government is of the opinion that the member has become incapable through ill-health of effectively performing his functions, or has committed stated misbehaviour.[73] Casual vacancies must be filled by the government, but a member appointed to such a vacancy holds office only for the remainder of his predecessor's term.[74] Members of the Board shall be paid such remuneration (if any) and such allowances for expenses as the Minister for Justice, with the consent of the Minister for the Public Service, may from time to time determine.[75] Surprisingly, it is not made clear whether the members are appointed to act on a full-time or part-time capacity. The implication, however, is that it is the latter. Apart from the foregoing, the members hold office upon such terms and conditions as the government may determine.

There can be no doubt that the government's powers to appoint, remove and fix the terms and conditions of appointment enable it to exert an influence on the overall impact of the Board. That does not mean, however, that it can interfere with the day to day operations of the Board. Indeed, the legislation prescribes that "the Board shall be independent in the exercise of its functions".[76] Nowhere does the Act give the government, or the Minister for

Justice, the power to give either general or specific directions to the Board with respect to its operations.[77] The most that the Minister can do in this regard is compel the Board to report to him on such general matters relating to its functions as he may specify.[78] He may also compel the Board to submit an estimate of its expenditure in each financial year and keep accounts of all moneys received and expended in such form as he may specify.[79] The Board's independence is also underpinned by its power to appoint its own staff in accordance with the normal civil service requirements.[80] If it had to rely on civil servants seconded from the Department of Justice or any other government department it would risk being seen as another appendage of government rather than an independent authority in its own right.[81] Of particular significance is the provision for a Chief Executive. Not only does the legislation empower the Board to appoint a Chief Executive on the recommendation of the Civil Service Commission, but it also confers a number of very important powers and duties on the office.[82] The effect, in the context of the whole procedure, is to establish the Chief Executive as a substantial office in its own right alongside that of the Complaint's Board.

It must be acknowledged that there are limits to the autonomy which the Board can achieve through its staff. For a start, all appointments are subject to the approval of the Minister for Justice with the consent of the

Minister for the Public Service. Furthermore, all the officers and servants of the Board are classified as civil servants in the civil service of the State. As such the Minister for Justice is the appropriate authority for them under the Civil Service Commissioners Act, 1956 and the Civil Service Regulations Acts 1956 and 1958, although he can delegate this authority to the Board. The most serious limitation by far, however, is finance. The Board's ability to appoint staff is inevitably dependant on its available finance. Clearly a most effective means of restricting its impact is to starve it of finance to the extent that it cannot appoint sufficient staff to perform its functions as thoroughly and efficiently as it otherwise might. This has been illustrated recently when the chairman of the Board felt compelled to complain publicly that, due to underfunding, the Board's work had been reduced to a "dangerous charade" and that from the 14th August 1989 it would not be able to process any new complaints because of the huge backlog. Equally disturbing was his disclosure that "for over a year now the Board has not been in a position to discharge its obligation to supervise investigations" and as a result it was "no more than a rubbery stamp providing the appearance, but not the reality of, independent inquiry".[83] Clearly, the financial controls play a dominant role in the functionning of the Board, and that control rests in the hands of the Ministers for Justice and Finance.[84]

Some basic procedural requirements are included in the legislation. It is provided that the Board shall hold such meetings as may be necessary for the due fulfilment of its functions.[85] The quorum for a meeting shall be three, although the Board can fix a higher quorum if it so wishes.[86] Decisions shall be taken on a majority of members present and voting, with the chairman having a second and casting vote.[87] Provision is also made for the Board to provide itself with a seal.[88] Any member of the Board who is either directly or indirectly interested in any contract which the Board proposes to make must disclose that interest to the Board and take no part in deliberations or voting with respect to that proposed contract.[89] Apart from these measures the Board shall determine, by standing orders or otherwise, its own procedure and business.

(b) Handling Complaints

The Board's disposal of a complaint starts with the report of the investigating officer. The latter is under an obligation to submit his completed investigation report to the Chief Executive, with a copy to the Commissioner, "as soon as may be"[90]. The Chief Executive, in turn, must submit the report to the Board together with his written comments and a recommendation on what action would be appropriate for the Board to take with respect to the complaint. The same procedure applies to interim and supplementary reports, if any. The Chief Executive is also

under a duty to submit a written report on the results of an investigation which he has investigated at the request of the Board.[91] If, after considering the relevant reports, comments and recommendations in any particular case, the Board is of the opinion that no offence or breach of discipline is disclosed, or that the complaint is inadmissible, it must inform the Commissioner, the complainant and the member concerned to that effect, and that will be an end of the matter.[92] A complaint will be admissible only if: the complainant was a member of the public; the complainant was directly affected by or witnessed the conduct alleged; the conduct would constitute a criminal offence or an offence under the code; the conduct was alleged to have occurred on or after the day the new procedures came into effect, and within six months of the date of the complaint; and it was not frivolous or vexatious.[93] If the Board is of the opinion that the complaint may disclose a breach of discipline of a minor nature which is appropriate to be dealt with informally by the Commissioner by way of advice, admonition or warning, it must refer the matter to the Commissioner. Such a reference cannot be made unless the Board has given the member concerned an opportunity to make representations to it in relation to the proposed reference, and it has considered those representations.[94] Both the complainant and the member concerned must be informed if the Board adopts this course.[95] Where the Board feels that a breach of discipline, which is not of a minor nature, may

be disclosed it must refer the matter to a tribunal.[96] In this eventuality the Board must notify the Commissioner.[97]

The Board's disposal of a case is significantly complicated where the conduct alleged in the complaint constitutes a criminal offence. This is true even with respect to the investigation stage. The Board must await the consent of the DPP before giving directions to an investigating officer in a criminal investigation.[98] Furthermore, if the Board has directed the Chief Executive to carry out an investigation in a criminal matter, the Chief Executive must consult with the DPP on how the investigation is carried out.[99] At the decision-making stage, the Board must refer the case to the DPP if it is of the opinion that the complaint is admissible and may constitute a criminal offence.[100] If the DPP decides not to prosecute, the case is referred back to the Board which has the choice of treating it as a breach of discipline, or a breach of a minor nature, or of taking no further action in the matter.[101]

The progress of a complaint can be further delayed by developments elsewhere in the legal process. If civil or criminal proceedings have been instituted with respect to the complaint, and the Board considers that it is likely that in those proceedings the court will determine an issue relevant to the conduct alleged in the complaint, the Board

may postpone taking any further action until those proceedings have been finally determined.[102] If the court proceedings in question are civil, and result in a determination of the issue in favour of the member concerned, the Board can take no further action if those issues are, in substance, the same issues involved in the complaint.[103] Court proceedings are not finally determined for these purposes until the conclusion of any appeal, rehearing or retrial.[104]

(c) Comment

(i) Ombudsman versus a Board

The participation of an independent body in the police complaints procedure is critical in securing public confidence in that procedure. It does not follow, however, that that body must be composed of several members appointed by the government. It was argued earlier that a more suitable approach from the accountability perspective would be an ombudsman-type office occupied by an individual who was generally recognised for his independence, impartiality and ability. The inherent weaknesses of the Board model are present in the Garda Siochana Complaints Board. Out of a total membership of nine there are only four places available to represent the broad spectrum of society. Even if the government was to fill all four places with individuals identified with the disadvantaged sections of the population, which are likely to have the greatest cause for complaints, they will be seen to be in

a minority. Nevertheless, such a move would probably be viewed with alarm by the Garda, who would see the Board as a hostile body to be opposed at every opportunity. For its part, the government has made it clear that in the filling of these places it will appoint: "people who will immediately command the respect and confidence of the general public and of the Garda".[105] That suggests a preference for the interests of the Garda over those of the disadvantaged minorities. From the outset, therefore, the Board will be lumbered with a credibility problem among those sections of the population to whom confidence in the complaints procedure matters most. To make matters worse, one member of the Board must be the Garda Commissioner or his nominee. It is very difficult to reconcile his presence on the Board with the Board's status as the central independent element in the procedure. Certainly, if the Board is intended to enhance police accountability to the public in the handling of complaints against the police it must follow that the police have no place on it.

Another problem with the Board is its inevitable anonymity. Having nine members who function only in a part-time capacity, at two steps removed from the actual investigation, it is virtually impossible for it to develop a public personality or image. This is important both for the confidence of the complainant and the public generally. If they can put a name and a face on whomever they are relying to see that a complaint is investigated thoroughly

and impartially it will do much to encourage their acceptance of the outcome; providing, of course, that they have confidence in the integrity and ability of the individual. The success of the ombudsman in jurisdictions all over the world is testimony to this. It is highly unlikely that a Board of nine members, functionning collectively in a part-time capacity, could develop a public image or profile to which citizens could relate. It is more likely to be viewed as another impersonal, remote institution or body which, like the Garda, is part of the State apparatus, and has an office on the nth floor of an office block in the capital city. Such an image is not conducive to securing the public confidence that is required for the Board to serve an accountability function.

Replacing the Board with an office occupied by a single individual should capture all the advantages of the Board and avoid all the drawbacks, provided that it is given the necessary status and staff to get on with the job. Interestingly, the Irish procedure makes a gesture in this direction which is noticeably missing from its British counterpart.[106] Under the former, specific statutory provision is made for the office of Chief Executive. As will be seen later, in practice the Chief Executive is expected to be the primary independent figure in the actual investigation of complaints and in the determination of what should happen consequent on the investigation. While this is undoubtedly true in Britain as well, the important

difference is that the Irish legislation gives public recognition to the office by conferring certain powers and duties on it. In this respect the Irish approach has more in common with procedures in Toronto or Australia than in Britain.

A peculiar feature of the Irish procedure is that it retains the investigation responsibilities of the Board that are enjoyed by its counterpart in Britain. The obvious effect is to make the procedure slower and more cumbersome. In the most straightforward cases a police officer will carry out the investigation, he will be supervised by, and will report to, the Chief Executive; the Chief Executive, in turn, will report to the Board and the Board will decide whether further action is necessary. The inclusion of the Board is aimed at encouraging public confidence in the investigation.[109] Given, however, that the Chief Executive occupies a public office with all the necessary powers and duties to function as the independent supervisor of investigations and to take whatever decisions need to be taken as a result, it would appear that the Board is an expensive and unnecessary duplication. This view is strengthened by the fact that the Board depends heavily on the Chief Executive to discharge its responsibilities. Indeed, in a procedure based on civilian investigators the Board would be seen clearly to be redundant. It is submitted, therefore, that accountability would be enhanced if the Board was abolished and its

investigative functions transferred to the Chief Executive's office. The incumbent of the office should be someone with a high public profile with a reputation for independence, ability and integrity.

(ii) Notifying the Complainant

Even if the Complaints Board is accepted as a suitable model there is still room for improvement in the Irish procedure from an accountability perspective. One such example is where the Board decides to take no further action on the complaint. If this results from the complaint being inadmissible no problem should arise. The Board should be able to identify clearly the ground of inadmissibility and inform the complainant accordingly. If, however, it is because the complaint does not disclose "an offence or a breach of discipline on the part of the member concerned"[108] the matter is not so straightforward. The wording suggests that the Board should proceed only if it feels that the member may be guilty of the offence. There is, of course, nothing objectionable about that in so far as it goes. The problem arises from the fact that the Board could have come to this conclusion for one of many different reasons. It could be that the report clearly exonerates the member, or that there is an irresolvable conflict of evidence between the complainant and the member, or that the complainant was mistaken in his interpretation of Garda powers and duties or whatever. The point is that if the Board simply

notified the complainant that it has decided not to proceed with his complaint, the complainant will come away with the impression that the Board did not believe him. If the complaint is genuine this will convey the impression to the complainant that the whole procedure is heavily biassed in favour of the police. Much of this problem could be averted if the Board gave specific reasons to the complainant why his complaint was not pursued further. It is submitted, therefore, that the legislation should impose a specific obligation on the Board in each case to formulate specific reasons why it should not proceed further, and to convey these reasons to the complainant.

(iii) Delay

The other major problem is delay. The procedure leading up to the Board's decision gets off on the right foot by implying that speed is of the essence. The investigating officer must complete the investigation "as soon as may be"[109] and, if unable to do so within thirty days, he must submit an interim report to the Chief Executive. After that, however, the progress of an investigation gets bogged down in convoluted procedure. The Chief Executive must consider the report and append his comments and recommendation before sending it on to the Board.[110] The Board must then consider whether or not the report discloses a criminal offence. If it concludes that the report does, the Board must refer it to the DPP.[111] The DPP will carry out whatever further

investigations he considers necessary. If he decides not to prosecute he must send the report back down to the Board.[112] The Board may carry out further investigation before deciding what to do.[113] Further serious delay will be occasioned if the report will contain material that would be liable to affect the security of the State or to constitute an infringement of another person's rights.[114] In that event the Commissioner must be notified and he can make further inquiries, report to the Minister and consult with the Board on the matter before the report can be finalised.[115] Finally, the coup de grace is given where the complaint is the subject of criminal or civil proceedings. In this case the Board may, in certain circumstances, postpone a decision on the report until the completion of those proceedings;[118] that, of course, may take years.

The cumbersome nature of this process must, in itself, operate as an obstacle to accountability. The delay that it must trigger in serious cases is such as to call into question the government's good faith in presenting the procedure as a serious accountability measure. In this respect it is pertinent to recall that a former Irish Minister for Justice is purported to have said that "in his view the way in which complaints by members of the public were dealt with by members of the Garda Siochana was to use the tactic of delay, that the way the problem was solved was to postpone it until everyone got bored and tired and

then it became irrelevant as a result of passage of time. The procedure was strung out until such time as sufficient distance existed between the events which gave rise to the complaint and the actual action arising therefrom, that even if the complaint was upheld, the discipline taken was very small compared with the seriousness of the complaint." That view, apparently, was based on his experience as Minister for Justice.[117] When it is considered that the measures addressed so far constitute only the investigation stage of the procedure it is difficult to avoid the conclusion that the former Minister's views on how the Garda Siochana handled citizen complaints have now been enshrined in the new procedure.

It is easy to be critical of the convoluted procedure while ignoring the factors which contribute to it. A major factor, of course, is the uneasy relationship between the criminal and administrative investigation. There is a very strong case for the preferring of indictable offences against police personnel to remain the preserve of the DPP; and that is not being questioned here. It would appear, however, that the Irish procedure goes much further than necessary, or even desirable, in retaining the primacy of the DPP over the investigation of all criminal matters against the police. It is submitted, for example, that there is no practical reason why the Board should have to secure the prior approval of the DPP before giving directions to the investigator in a criminal complaint. In

most cases it would be quicker if the Board could pursue the investigation on its own initiative. Subsequently, if the DPP feels that further inquiries should be made there would not appear to be any insurmountable obstacle to giving him the power to issue the necessary directions to the investigator. Presumably, that would occur only in a small number of cases compared to the number of cases where the Board may feel it necessary to give directions in the course of the initial investigation.

Another serious, but unnecessary, delaying factor is the obligation on the Board to refer all reports to the DPP where they disclose a possible criminal offence. Given the nature of citizen complaints against the police, the vast majority of these will constitute minor offences in which the DPP will advise that it would be more appropriate to proceed administratively. Considerable time would be saved if the Board retained the power to deal with these cases itself; that is, it would decide whether or not to institute summary proceedings instead of administrative proceedings. There is no reason why the Board could not discharge this task capably given that many other statutory authorities are vested with the power to prosecute summary offences in specific situations,[118] and even private citizens can do so.[119]

The implications of criminal or civil proceedings being instituted with respect to the complaint present a

more formidable challenge. Certainly it would be most undesirable if the Board decided not to pursue a complaint because of its findings of fact, and then a court of law subsequently came to a different conclusion on the same facts. A similar, and perhaps, more embarrassing, problem would arise if the adjudicative tribunal had made the findings of fact which were later contradicted by a court of law. There are, therefore, some grounds for postponing the Board's decision on a report until the completion of relevant court proceedings. Unfortunately, this may result in the final disposal of the complaint being postponed to a time so far into the future that all the benefits of accountability will be lost. It may even encourage police personnel to pursue litigation in the hope that the delay will frustrate the administrative process. Indeed, it is the case that the disposal of some allegations of indiscipline under the internal procedure have taken an excessively long time to be concluded on account of court action. In one celebrated case, albeit in special circumstances, it took eight years for a case to be concluded; and that is by no means unique.[120] Effective accountability to the public depends, of course, on a speedy resolution or at least the appearance of a speedy resolution to a complaint. It is submitted, therefore, that it would be better to allow the Board and the tribunal to continue their work irrespective of ongoing criminal or civil litigation. Police personnel could be protected, in the event of a civil court reaching a different finding on

the facts, by permitting the accused member to seek a rehearing of his case on the basis of the facts found by that court. Different considerations apply in the case of a criminal court, and they are discussed under double-jeopardy.

7. Informal Resolution of Complaints

The Irish procedure does not contain any provision for the informal conciliation of complaints. It does, however, provide for the informal disposal of minor complaints by the Commissioner. Section 4 stipulates that if the Board is of the opinion that the investigation report may disclose a breach of discipline by the member concerned, but that any such breach is of a minor nature appropriate to be dealt with informally by the Commissioner by way of advice, admonition or warning, it shall refer the matter to the Commissioner. This can be done only if the member concerned has been given the opportunity to make representations to the Board on the matter, and the Board has considered those representations.[121] For his part, the Commissioner must consider, first of all, whether the complaint is suitable for informal resolution.[122] A complaint cannot be resolved informally if the conduct alleged either constitutes an offence with which the member has been charged or is one which would, if there was sufficient evidence of its commission, be likely in the opinion of the Commissioner to lead to the member being charged.[123] Furthermore, both the complainant and the

member concerned enjoy a veto over this option; it cannot proceed unless each of them consents in writing to it.[124] If the Commissioner is satisfied that the complaint is suitable for informal resolution, he shall inform the Board accordingly and proceed with it.[125]

The Act does not lay down exactly how the resolution should proceed, nor exactly what its objective should be. It is implicit in the combination of section 7(4)a and section 5, however, that it is intended to be a form of conciliation. The worst that can happen the member is that he will receive advice, admonition or a warning. Presumably, the intention is that this should be enough to satisfy the complainant without resorting to the full panoply of the formal procedure. Although there is no provision for the complainant and the member concerned to meet face to face it is implied that the complainant's views on an acceptable outcome in the matter will be sought. This is suggested by the fact that any statement made by the complainant or member concerned in the course of the resolution will not be admissible as evidence in any proceedings whatsoever.[126]

The informal resolution of a complaint is conducted solely by the police. That is not to say, however, that there is no independent safeguards against the process being abused. In the first instance it is a matter for the Board to decide whether or not a complaint should be

forwarded to the Commissioner for the consideration of informal resolution. The Board also has the power to lay down procedures to be observed in the informal resolution.[127] Furthermore, where complaints are resolved informally the Board must be informed of the outcome and the manner in which it was reached.[128] The Board's ultimate control is highlighted by the fact that it can request the Commissioner, at any stage, to have a complaint formally investigated. The Commissioner is under an obligation to comply with any such request even if the complaint is in the course of informal resolution or has already been resolved informally.[129]

The inclusion of this informal resolution procedure is commendable. There is no doubt that a considerable volume of citizen complaints are minor and can easily be disposed of to the satisfaction of police and citizen alike without having to resort to the full force of the complaints procedure. Sifting these complaints out the informal mechanism allows resources to be concentrated on the more important and difficult complaints. The only criticism of the mechanism is that it leaves the resolution of complaints in individual cases to the police themselves. Admittedly, this will not often pose a problem for accountability in that the complaints in question will be minor and the Board can act as an independent check. If, however, the resolution was conducted by an independent body it would encourage more complainants to opt for

informal resolution, and could even be permitted to deal with more substantial complaints.

8. The Tribunal

(a) Composition, Structure and Role

If the Board is of the opinion that a breach of discipline on the part of the member is disclosed (and has not referred it to the Commissioner for informal resolution) it shall refer the matter to a tribunal.[130] The tribunal is specifically provided for in section 8 and the second schedule to the Act. Section 8 stipulates that the Board may appoint a tribunal to consider a possible breach of discipline on the part of a member of the force. More than one tribunal can be established in any one period. It is worth pointing out at the outset that the wording of this section does not actually require the tribunal to make a determination on the alleged breach. That is left to section 9 which specifies that the tribunal shall hold an inquiry into those breaches of discipline drawn up by the Chief Executive. The tribunal must determine whether the member concerned has or has not been in breach of discipline as alleged, or that the facts constitute another breach of discipline. This last finding can be entered only if the breach is less serious than the one alleged and that it would not be unfair to the member concerned.

The tribunal consists of three persons.[131] Two of

them must be members of the Board who have not been concerned with the investigation into the case at an earlier stage, and one of the two must be a practising barrister or solicitor of at least ten years standing.[132] Neither of the two members from the Board can be a member of the Garda Siochana.[133] The third member, however, must be a member of the Garda Siochana, other than the member who sits on the Board, who has the rank of Chief Superintendent or above, has not been involved in the investigation of the case before the tribunal and has been nominated by the Commissioner.[134] The chairman shall be determined by a majority of the tribunal members.[135]

The tribunal must hold sittings, which must be held in private,[136] and may take evidence and receive submissions by or on behalf of the persons concerned.[137] The chairman may direct, in writing, the attendance of the member concerned[138] and any other person whose evidence is required.[139] The latter can also be compelled to give evidence and to produce any document or thing in his possession or power.[140] Any person who fails, without just cause or excuse, to obey such a direction or who does any other thing in relation to the proceedings which, if done in relation to proceedings before a court by a witness in the proceedings would be contempt of court, shall be guilty of a summary offence carrying a maximum sentence on conviction of a £700 fine and six months imprisonment.[141] If a person gives false evidence before a tribunal he will

be guilty of perjury if he would be guilty of perjury if he gave that evidence before a court in such circumstances.[142] The other side of the coin is that witnesses before the tribunal are entitled to the same privileges and immunities as a witness in court.[143]

Very little detail is devoted to the procedure that must be followed before the tribunal. It is specified that the Chief Executive shall draw up the particular breaches of discipline alleged,[144] and that he shall present the case against the member to the tribunal.[145] He is also responsible for notifying the tribunal of the witnesses whom he wishes to attend.[146] Apart from that, however, the legislation does not lay down any clear rules on the procedure to be followed. What it does do is empower the Board to make rules for the tribunal procedure, subject to the consent of the Minister for Justice. These rules must cover matters such as: notification of sittings, information to be given to the accused, representation for the accused, the admissibility of written statements, examination and cross-examination of witnesses, administering the oath, the announcement of tribunal decisions and making a record of the proceedings.[147] It is implicit in the wording of this list that the accused member will be entitled to legal representation, at least in certain circumstances.[148] It is also clear, however, that the tribunal will have a power to examine witnesses.[149] The legislation, therefore, has not locked

the tribunal into either an adversarial or an inquisitorial mode. It is really a matter for the Board to decide whether it wishes the tribunal to be active in the pursuit of the facts or merely function as a disinterested umpire.

(b) Comment

Overall, the composition, powers and functionning of the tribunal are designed to facilitate public confidence in its adjudication. It is submitted, however, that there are a few areas in which it could be improved. In the matter of composition, for example, it is by no means clear why two of the members must come from the Board, especially when the intended complement of the Board had to be increased to accommodate the tribunal.[150] This matter would not arise where, as proposed, the independent investigation authority is an individual. Even in the case of a Board it is not clear what purpose is served by reserving places on the adjudication body for members of the investigation authority. If anything, it would appear undesirable. Even if the members of the Board who sit on the tribunal have not been involved at an earlier stage of the investigation, the mere fact that they are members of the Board will give the appearance of such involvement. This, surely, is sailing unnecessarily close to the common law maxim of nemo iudex in causa sua.[151] It is submitted that instead of increasing the membership of the Board the government should have made provision for a totally independent tribunal.

A further minor point on composition concerns the position of chairman. It is submitted that it would have been preferable to specify that the chairman should be a practising barrister or solicitor of at least ten years standing. By leaving it to a vote of the tribunal members there is a very real danger that the police member could find himself being chairman in some cases. This could easily happen where the individual in question has an excellent reputation for integrity and ability among those who know him. It could very easily be mistaken by the complainant and the public, however, as bias towards the police.

It is contended that the tribunal's role could also be strengthened by emphasising the onus on it to seek out the truth. This could be achieved by encouraging it to act in a more inquisitorial manner. To this end it should automatically be supplied with the investigation report, and its rules of procedure should specifically enable it to direct further investigations or analyses and to make outside visits and inspections where appropriate. These measures, in conjunction with its powers of subpoena and implied power to examine witnesses, would put the tribunal in a position to make an active contribution to seeking out the facts as opposed to merely reaching conclusions on the facts as presented by the Chief Executive and accused member.

A further problem arises with respect to the crucial role in the hearing attributed to the Chief Executive. On his shoulders rests the burden of presenting the case against the member to the tribunal. In some respects this makes sense as he is in a position to be conversant with the details of the case; given his important responsibilities at the investigation stage. From an accountability perspective, however, this may not be the most appropriate approach. With the Chief Executive acting as the prosecution, and the member concerned being the accused, there is a very real danger of the complainant being sidelined as just another witness. He will find that he has no power to control how the case is handled generally or, more particularly, what issues are raised or dropped, what witnesses are called and what concessions are made. Indeed, he may even find it impossible to be kept informed on such matters. While there may be very good reasons for this in a criminal prosecution it is surely out of place in a procedure of this nature. The complainant is aiming to call the police to account for how they treated them. He is not even necessarily seeking to have them punished; merely an acknowledgement that their action was wrong and should not be repeated. While the public will have a general interest in seeing that the matter is resolved fairly, the substance of the complaint is unlikely to be such that the public interest in the matter should take precedence over that of the complainant. It is submitted, therefore, that the complainant should be left

in control of his own case. The danger of his not being sufficiently articulate, or self-confident, to do so could be overcome partly by permitting a friend to present it for him and partly by the tribunal's active role in seeking out the facts. As a last resort, at the discretion of the tribunal, the complainant could be permitted to authorise the Chief Executive to present his case for him.

Finally, three disparate matters deserve comment. First, the fact that the tribunal must sit in private unnecessarily creates an air of secrecy about it. Public sittings are the norm in some big American police forces and no adverse consequences have resulted. There is no reason why it cannot be the norm here. It would help to emphasise the accountability dimension. Second, nothing is said about the standard of proof. Presumably, the Board can make provision for this in the rules. However, it is submitted that such an important ingredient affecting the outcome of a case should be enshrined in the legislation, and that it should be on a balance of probabilities. Third, no provision is made for the tribunal to give reasons for its decisions. Again this is something that the Board may provide for in the rules, but there is no obligation on it to do so. It might have been better to include a legislative provision stating specifically that the tribunal should give reasons, and what form those reasons should take. How else can the soundness of its decisions be judged?

9. Corrective Action

Where the tribunal finds a member in breach of discipline or, if the member admits a breach, the tribunal must decide what corrective action, if any, should be taken.[152] If it decides in favour of disciplinary action the options open to it are: dismissal, forced retirement or resignation, reduction in rank, reduction in pay[153] and caution.[154] It is by no means clear whether the tribunal's choice of disciplinary action must be implemented by the appropriate authority. The power to dismiss a member above the rank of inspector, for example, rests only with the government.[155] Where the tribunal decides to dismiss such a member it must notify the Commissioner and the Minister to that effect. The Minister, in turn, must notify the government.[156] In the absence of a specific provision compelling the government to implement the tribunal's decision it must be assumed that the government retains its discretion in the matter. The same must apply to a tribunal's decision to dismiss a member not above the rank of inspector or to impose any other disciplinary action on any member.[157] In this event the Commissioner enjoys the necessary disciplinary power.[158] In the absence of any specific provision compelling him to implement the tribunal's decision it must be assumed that he also retains his discretion in the matter.

Overall, these provisions appear satisfactory. In

particular, it is submitted that the combination of the tribunal and the appropriate disciplinary authority achieves the optimum balance between the needs of accountability and the maintenance of strict internal disciplinary control. The perception of accountability could have been strengthened further, without affecting this balance, by the inclusion of a specific provision enabling the tribunal, or the independent Complaints Board, to submit a special report to an appropriate political body where it feels that the Commissioner, or the government, is ignoring tribunal recommendations, either generally or in individual serious cases. The range of corrective actions available could also be improved by the options of further training outside duty hours, and an entry on the record which, all other things being equal, could prejudice promotion prospects. The inclusion of such measures would emphasise the accountability focus of the procedure. For the same reason it might be as well to drop the option of a reduction in pay. Since it sounds too much like a fine in criminal procedure, it might convey an image of punishment as opposed to accountability.

10. The Appeals Board

(a) Composition, Structure and Role

There is provision for an appeal from a tribunal decision. A member can appeal from a decision of a tribunal finding him in breach of discipline or from a tribunal decision that disciplinary action should be taken

against him, or from both.[159] To this end a Garda Siochana Complaints Appeal Board is established.[160] The Appeal Board consists of a chairman and two ordinary members[161] appointed by the government from time to time as the occasion requires.[162] Each member holds office for a term of five years and is eligible for re-appointment.[163] They are paid such remuneration and allowances as the Minister for Justice, with the consent of the Minister for Public Service, may determine from time to time.[164] The government may remove from office any member who, in the government's opinion, has become incapable through ill-health of effectively performing his functions, or who has committed stated misbehaviour.[165] The chairman of the Appeal Board must be a judge of the Circuit Court and at least one of the ordinary members must be a practising barrister or solicitor of at least ten years standing.[166] The legislation makes no stipulation as to the occupation or background of the third member apart from the fact that he cannot be a member of the Garda Siochana past or present.[167]

If a member wishes to appeal he must notify the Appeal Board in writing of his intention within 21 days of the tribunal decision, and must specify the particular decision of the tribunal to which his appeal relates.[168] The Appeal Board must see that he is provided with a copy of the record of the relevant tribunal proceedings at least 21 days before the appeal hearing commences.[169] The appeal

must be grounded on this record,[170] although the Appeal Board can admit any other evidence it things fit, including submissions by the "persons concerned" and the Chief Executive.[171] Presumably, "persons concerned" in this context would embrace the victim and any other witnesses. The Appeal Board can also request the tribunal to furnish any observations the tribunal may have made on matters arising on the record.[172] In addition to the foregoing the Appeal Board has the same powers of subpoena[173] and the same powers to regulate its procedure as the tribunal.[174] Witnesses directed to appear at the appeal hearing possess the same privileges and are subject to the same obligations as those directed to appear at the tribunal hearing.[175] Further similarities with the tribunal are that the Appeal Board sits in private[176] and it decides on a majority vote.[177]

The possible outcomes of the appeal hearing depend on which decision the member appealed. If he appealed against a finding that he was in breach of discipline the Appeal Board can affirm that finding, set aside that finding or find him to be in breach of a different disciplinary offence.[178] In a case where the tribunal has decided that no disciplinary action should be taken (this might arise on appeal where the tribunal has found him to be in breach and he has appealed that finding) the Appeal Board can affirm that decision or, indeed, impose any disciplinary action that would have been available to the

tribunal.[179] If the member has appealed against the disciplinary action imposed the Appeal Board can affirm the imposition, set it aside or impose disciplinary action other than that specified by the tribunal.[180]

Finally, if the tribunal has found the member to be in breach of discipline and has imposed disciplinary action and the member, for some reason, only appeals against the decision that he is in breach, the appeal board can set aside the specified disciplinary action and impose any of the other available sanctions.[181] I must admit that this last one has me baffled. It is also provided that the Appeal Board's decision on disciplinary action must be communicated to the appropriate disciplinary authority; that is the Commissioner and the government, or the Commissioner alone depending on the nature of the disciplinary action in question and the rank of the member concerned.[182] The disciplinary authority has the power to implement them.[183] This suggests, as with the tribunal, that the Appeal Board's decision on corrective action is merely a recommendation which may or may not be implemented at the discretion of the appropriate disciplinary authority.

(b) Comment

The need for an appeal procedure in a police complaints procedure of this nature is open to question. It must be remembered that a citizen's complaint will have

already been subjected to a thorough investigation, followed by a review by the Chief Executive and by the Complaints Board, followed by a judicial hearing in the tribunal. In the case of corrective action being imposed there is a further review of the suitability of that action by the relevant disciplinary authority. Admittedly, the needs of accountability would not necessarily be served by a procedure which could not correct wrong decisions at the tribunal stage. The needs of accountability, however, could also be seriously threatened by an appeals procedure which encourages expense and delay. In this context the Irish appeal provisions are open to at least three criticisms. First, where the appeal is against a finding that a member is in breach of discipline it is quite clear that the hearing could easily develop into a virtual re-hearing in every case. This will not be avoided by the stipulation that the appeal must be grounded on the record of the tribunal proceedings as it is likely that the parties will make ample use of the Appeal Board's power to subpoena the attendance of witnesses and the production of material evidence. It might have been wiser to confine the scope of an appeal to a point of law or procedure. Not only would this reduce the length and volume of appeals but it would also help to narrow the focus of the issues in an appeal. It would also make more efficient use of the legal skills present in the Appeal Board's composition. Indeed, the composition of the Appeal Board invites the second criticism to the effect that it is unnecessarily elaborate.

There seems no obvious reason why it could not have been confined to a Circuit Court judge. The third criticism is that it is not at all clear why there should be an appeal against the corrective action imposed. Any decision to this effect by the tribunal is merely a recommendation to the appropriate disciplinary authority. The decision at the end of the day is for the disciplinary authority alone. Given that this will normally be the member's chief officer it is difficult to see why there should be a right of appeal.

A fourth criticism concerns the right of appeal being confined to the police member concerned. This suggests that the object of the procedure is to convict the member of the equivalent of a criminal offence when that is patently not the case. It also prevents the State from rectifying a legal or procedural mistake which may have affected the outcome. If the member concerned has the right to seek a remedy when a decision goes against him in such circumstances it is difficult to see how public confidence can be maintained without a similar protection for the complainant. Any unfairness to the police member concerned in an individual case could be avoided by permitting the complainant to appeal only through the proposed office of ombudsman. Before deciding to appeal, the ombudsman would be required to take account of the interests of all parties concerned, including the broader public interest in the matter.

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Finally, it is worth remarking that there is nothing specific in the legislation which requires the Appeal Board to give reasons for its decision. The Appeal Board is empowered to lay down its own rules of procedure. It is possible, therefore, that the Board would impose an obligation on itself to give reasons for its decisions in a specified form. It is difficult to understand why such an important matter should be left to the general discretion of the Board. Clearly the interests of accountability would be served better if it was under an obligation to state, even briefly, the reasons which led to its decision in each case. There is no other way that the complainant, the police and the public generally can be assured that justice is being done.

11. Miscellaneous Matters

(a) Unmeritorious Complaints

The 1986 Act makes specific provision for the sifting out of unmeritorious complaints. Before a complaint can be proceeded with, it must satisfy an admissibility test.[184] In order for a complaint to be admissible it must fulfil the following conditions:

(i) the complainant is a member of the public; (ii) the complainant was directly affected by or witnessed the conduct alleged in the complaint; (iii) the said conduct would constitute a criminal offence or a disciplinary offence listed in the fourth schedule to the Act; (iv) the

date on which the said conduct was alleged to have occurred was on or after the day in which the Act was brought into force and within six months before the date on which the complaint was made; (v) the Commissioner or the Minister for Justice has not appointed someone to hold an inquiry into the alleged conduct, under their respective powers, before the complaint was made; (vi) the member concerned has not been dismissed by the Commissioner, or has not been dismissed or reduced in rank by the government, in the exercise of their respective powers;[185] (vii) the complaint is not frivolous or vexatious.[186] The question of admissibility is decided by the Chief Executive,[187] although he can be overruled by the Board if he decides that a complaint is inadmissible.[188]

On the whole these are very sensible measures for dealing with the problem of unmeritorious complaints. The key decisions are those which determine whether the alleged conduct could not constitute a criminal or disciplinary offence, and whether the complaint is frivolous or vexatious. If allegations which come within these categories are excluded at the outset it will permit the full resources of the complaints procedure to be focussed on complaints which deserve formal investigation. That can only be to the benefit of complainants and the public alike. The possibility that this mechanism might be open to allegations of abuse is avoided by the fact that the decision to exclude is taken by an independent authority as

opposed to the police themselves. There are, however, a few minor criticisms that can be levelled against this sifting out process from an accountability perspective.

First, there is the issue of keeping the complainant informed on why his complaint was categorised as inadmissible. The legislation does require the Chief Executive to inform the complainant on the ground of admissibility. That, however, is hardly sufficient. It may mean, for example, that the complainant will be told simply that his complaint did not constitute an offence or that it was frivolous or vexatious. That will not do much to further the aims of accountability. After all, many complaints that fall outside the ambit of the complaints procedure may be motivated by very genuine concerns and may disclose serious issues of policing. They do not all emanate from cranks or emotionally disturbed people. What is needed is the Chief Executive to be put under an obligation to notify the complainant of his reason for coming to his conclusion. Such clarification should do much to neutralise the feeling of resentment and powerlessness that might otherwise result form the curt notification required by the legislation. Furthermore, if the substance of an inadmissible complaint discloses a serious criticism of police practice or policy the Chief Executive should be under an obligation to refer it to the appropriate authority and inform the complainant to this effect.

The other weakness in this procedure concerns the frustration of a complaints investigation by the Commissioner taking prompt action to appoint an investigating officer under the disciplinary regulations.[189] If he has done this prior to the complaint being formally lodged the handling of the complaint must remain within the internal procedure and cannot be transferred to the citizens' complaints procedure.[190] The irony of this feature is that it is most likely to arise in those complaints which have generated media attention and, therefore, public concern. Such complaints inevitably will come speedily to the attention of the Commissioner through channels other than a formal complaint. It is likely that he would act immediately to investigate the matter. Indeed, his failure to act promptly could expose him to criticism and might even contravene his duty to take whatever lawful measures are expedient or necessary to preserve evidence. When the complainant lodges his complaint formally, even within the six months period, he will find that it is inadmissible because the Commissioner has already appointed an investigating officer. The complainant, and the public generally, will have to be satisfied with the outcome of an internal disciplinary inquiry which is designed to serve a substantially different objective from the independent procedure. The independent procedure, therefore, will find itself redundant in many of the cases where it has most to offer.

A simple solution to this problem would be to permit the independent procedure to take over an internal investigation once an otherwise admisible complaint has been lodged. Indeed, specific provision is made to this effect in the Act with respect to cases where a complaint was lodged with respect to the conduct of a member in circumstances where that conduct was being, or had been, investigated internally, but the Commissioner had not formally appointed a member to hold an inquiry. It is provided that such a complaint should be investigated under the 1986 Act and any statement made in connection with the internal investigation shall be deemed to have been made for the purposes of an investigation under the Act.[191] It is submitted that this provision should be extended to include the investigation of otherwise admissible complaints where the Commissioner has appointed an investigating officer.

(b) Double Jeopardy

The Irish legislation makes specific provision for the danger of double jeopardy, although it does not refer to it by that term. It is provided in section 7(7)a that where a member has been convicted or acquitted of an offence he shall not be exposed to a tribunal hearing, or informal resolution, for an alleged breach of discipline which is in substance the same as the offence of which he has been convicted or acquitted. Unfortunately this very clear measure is rendered almost unintelligible by a

qualification in section 7(7)b(i) which stipulates that section 7(7)a "shall not be construed as applying in relation to a breach of discipline which consists of conduct constituting an offence in respect of which there has been a conviction by a court." A literal interpretation would suggest that it is possible to proceed with a disciplinary charge against a member even though that charge is in substance the same as an offence for which the member has already been convicted by a court. That would make a nonsense out of much of section 7(7)a. It is possible that section 7(7)b(i) is meant to keep alive the possibility of charging a member with the disciplinary offence of having been convicted of a criminal offence. That is a standard feature of the corresponding British rule against double jeopardy. It is difficult, however, to see how the words of the Irish provision could be strained to achieve this result. In any case, the code of offences in schedule 4 to the Act does not include such an offence.

The only other possibility is that section 7(7)b(i) is referring to the situation where someone else, other than the member concerned, has been convicted of an offence by a court in connection with the relevant conduct. The conviction of that other person, therefore, would not be sufficient for section 7(7)a to prevent the member concerned from being charged with a disciplinary offence with respect to the same conduct. It would seem that this is the only interpretation which can effect any

reconciliation between the two provisions. Having said that, however, the fact still remains that the most literal interpretation of section 7(7)b(i) suggests that there is nothing to prevent a member from being charged with a disciplinary offence the substance of which is the same as an offence for which he has already been convicted by a court. Protection against double jeopardy, therefore, would appear to be confined to the situation where the member has been acquitted of substantially the same offence by a court.

The legislation does clarify some aspects of the double jeopardy rule which have given rise to confusion in Britain and Northern Ireland in the past. Of particular importance in this context is the meaning of the word acquitted. The Irish measures do not provide an extended definition. They do stipulate, however, that the acquittal of a member in summary proceedings will only protect him against administrative proceedings in respect of the same conduct if the charge was dismissed on the merits. An acquittal on a technicality, it seems, will not be sufficient.[192]

More troublesome is the question of the DPP's decision not to prosecute. Can that be treated as an acquittal for the purposes of double jeopardy? In this regard it is provided that when the DPP has decided whether a prosecution should or should not be instituted the Board

has a discretion to proceed with the administrative process, either formally or informally, or to take no further action in the matter.[193] A decision not to prosecute, therefore, is not tantamount to an acquittal. Indeed, a notable feature of this measure is the fact that the Board may proceed with disciplinary charges even if the DPP has decided in favour of prosecution. At first sight this seems to be inviting the risk of double jeopardy. Elsewhere in the Act, however, it is provided that if criminal proceedings have been instituted and the Board considers that it is likely that the court will determine an issue relevant to, or concerning the conduct alleged in the complaint, the Board must postpone taking further administrative action until the resolution of those criminal proceedings.[194] This functions as a protection against double jeopardy. If the court decided the issue in favour of the member concerned that, presumably, will be a weighty factor which the Board will take into account in deciding how to exercise its discretion in continuing the administrative proceedings. A similar provision is made for the situation where the issue is likely to arise in civil proceedings.[195] Indeed, with respect to civil proceedings it is further provided that if the court decides issues in favour of the member concerned and those issues are in substance the issues involved in the complaint, the Board must not take any further administrative action in the matter.[196]

The Irish approach to the double jeopardy problem is a significant advance on its British counterpart.[197] In particular, the fact that a clear onus is placed on the independent authority to judge each case on its own merits will prevent much of the confusion that has arisen in Britain in the past. At the same time it considerably enhances the accountability potential of the whole procedure. Experience has shown that the DPP is very reluctant to prosecute in relatively minor criminal allegations against the police. Presumably he is heavily influenced in this matter by the availability of the internal police disciplinary procedure to cope with such allegations, and that it would be disproportionate to resort to the criminal process. This approach is also encouraged by the fact that the Irish courts do not regard police accountability as one of the primary objectives of criminal procedure.[198] Given this background it is clear that if a decision by the DPP not to prosecute was interpreted as an acquittal the criminal process could be used as a convenient mechanism for frustrating accountability through the administrative process. It is to the credit of the Irish provisions on double jeopardy that they guard against this outcome.

(c) Standard of Proof

A significant weakness in these provisions is their failure to address the standard of proof issue. This has implications for the scope of the double jeopardy principle

and the general character of the complaints procedure. The standard of proof to be applied by the tribunal is not specified in the Act. Admittedly, it could be dealt with in the tribunal rules of procedure to be drawn up by the Board. That, however, is hardly satisfactory given its importance. It is submitted that it should be specified in the Act. If, for example, the tribunal operates on the civil burden of proof it would follow that even an acquittal in a court should not necessarily be sufficient to bring the double jeopardy principle into play. Since the standard of proof in criminal cases is proof beyond a reasonable doubt it follows that there is still scope for a tribunal, operating on the civil burden of proof, to reach a different conclusion on the facts. An appropriate analogy would be a criminal court finding a driver not guilty of the criminal offence of driving without due care and attention, and a civil court finding him guilty of negligence on the same facts. It is submitted further that the standard of proof to be applied by the tribunal should be the civil burden. The task of the tribunal, and the whole procedure, is to determine whether or not the member concerned has lived up to the standards that the community expects from the police force when dealing with individuals. The corrective action imposed, if any, will be chosen with that perspective in mind. There is no question of the member being accused of having failed to live up to the standards expected of all citizens in society, with all the consequences that that entails.

Finally, it is worth repeating what was said earlier about the Board's power to postpone the administrative proceedings where civil or criminal proceedings have been instituted and the Board considers it likely that the court will determine an issue relevant to the conduct alleged in the complaint.[199] Although the Board is not compelled to postpone the administrative proceedings in such circumstances there is no doubt that it will be under severe pressure to do so everytime the issue arises. The inevitable consequence will be an excessive delay in the disposal of these cases. If accountability is to be effective delay must be avoided as much as possible, consistent with fairness in the disposal of a case. Bearing this in mind, it is submitted that if the administrative complaints procedure functions on the civil burden of proof there is no justification at all for postponing the conclusion until the completion of any relevant criminal proceedings. If it so happens that relevant new evidence comes to light at the criminal trial or appeal then, in the interests of fairness, provision could be made for a member concerned to apply to have his case re-opened by the administrative tribunal. The same should apply with respect to civil proceedings with the addition that a member concerned can apply to the tribunal to have his case re-opened where the civil court has come to a different conclusion from the tribunal on the relevant facts. This approach should help ensure that the administrative process can proceed in an expeditious

fashion and, thereby, enhance its accountability potential without, at the same time, jeopardising fair procedures.

(d) Serious Incidents

The Irish citizen complaints procedure is no more capable of resolving the public concern provoked by the more serious incidents of police malpractice than its' counterparts elsewhere. This should not be interpreted as a criticism. The Irish procedure, with a few adjustments, is very well suited to cater for the large bulk of citizen complaints against the police. Indeed, its design is clearly influenced by the general pattern and substance of citizen complaints. The vital contribution that it can make to police accountability by coping with these matters should not be dismissed or underestimated simply because it is not also equipped to deal satisfactorily with some categories of serious malpractice. These categories would include situations where a major police operation has resulted in death or serious physical injury to individuals, or serious damage to property, or which pervert the course of justice, discriminatory policing practices which occasion serious loss or injury to individuals and serious examples of police corruption. The powers and expertise of the investigators will often be insufficient to respond to such circumstances. It must be remembered that the normal workload of these investigators will consist of minor allegations of assault, abuse of authority and discourtesy. These are not the sort of

matters that would prepare then for a major investigation which may involve police policy-making and decision-making at high levels, the detailed examination of voluminous police, court and private records, the lack of, or disputed, identification evidence and a large number of possible culprits. What is needed in these situations, which would be relatively rare compared with the volume of standard complaints, is an investigator with the sort of powers, duties and obligations described earlier. The American special prosecutor would be a useful role model.

Unfortunately, there is no specific provision in Ireland for the sort of judicial investigator envisaged. As with police forces everywhere the Commissioner can establish a special internal inquiry into any matter affecting the force. Indeed, it would not be unusual for him to do so in respect of police incidents which have given rise to serious public concern. While such internal inquiries might satisfy accountability to the Commissioner they do not satisfy the needs of accountability to the public. The government, or the Minister for Justice, also have the power to set up a judicial inquiry, public or private, into any aspect of policing. There have been occasions in the past where they have done so in response to public concern over police practice. The latest example, however, highlights the weaknesses in this approach. In that case, known generally as the Kerry Babies case, a judicial enquiry was set up to establish how

an unmarried mother came to make a false confession to gardai about how she murdered her newly born infant. The enquiry sat for 82 days between 7 January and 14 June 1985, it heard from 109 witnesses and cost £1,645,000 before it reported one and a half years after the event. Although the report[200] effectively exonerated the gardai involved from any wrongdoing it did little to clarify how the situation had come about and how such situations could be prevented in the future.

The case for a standing tribunal of inquiry such as that advocated in this thesis is illustrated by a recent Garda operation that provoked some public disquiet. The incident concerned an armed bank robbery. The Garda were aware that it was going to happen on a certain day. The area around the bank was staked out by a special Garda emergency response unit. Although members of the Garda serious crimes squad were tracking the robbers, the emergency response unit was taken by surprise when the robbers arrived and entered the bank. The driver of the getaway car was challenged by gardai and shots were fired when he drove the car backwards and forwards against two Garda cars which had hemmed him in. Further shots were fired when the robbers emerged from the bank using one of the bank employees as a shield. In all, one of the robbers was shot dead, two others were injured, one of them seriously, and the remaining two were arrested. In addition, one bank employee was seriously wounded, while

another employee, two gardai and a passer-by suffered minor gunshot wounds. The disturbing feature about the whole episode is that all the shots were fired by Garda weapons which included: an uzi sub-machine gun, a rifle, a shot-gun and a variety of hand-guns.

The whole operation obviously raises serious questions about the use of the special emergency response unit to cope with a bank robbery in the centre of a busy, provincial town. The nature of the firepower deployed by this unit and the fact that it is specially trained to respond to major hostage taking and seige situations engineeered by terrorists calls into question its suitability for a "run of the mill" bank robbery. There is also a question-mark over the efficiency of the unit in this particular incident. How could a unit which was so extensively trained in the use of firepower cause so much injury not just to themselves, but also to other innocent parties? Why had they fired so many shots when the robbers did not fire at all? These questions raise the further issue of the rules governing the use of firearms by gardai. Were they followed in this particular operation and, if so, do they require revision or clarification? These matters are not at all suitable for resolution by the citizen complaints procedure. At the time of writing, an internal Garda inquiry is ongoing. While such an inquiry is undoubtedly necessary for the internal operational efficiency and discipline of the force, it cannot cope

satisfactorily with the accountability dimension. Such an inquiry can look at the operation only through Garda eyes. It is just not equipped to address public conerns over such police practices. This is indicated by the defensive attitude adopted by some of the Garda representative bodies and some senior gardai in the immediate aftermath of the incident. The AGSI described the Garda operation as "successful, in that the bank raid was prevented".[201] The General Secretary of the GRA strongly defended the operation and said: "Criminals don't ring us up and let us know where they are going to carry out a raid. If we are to say that we won't take them on in populated areas then the populated areas will become the common ground of the criminal".[202] Other senior gardai are reported as saying that there were no grounds for disciplinary action arising out of the incident.[203] Such comments only serve to undermine the credibility of an internal inquiry and render it less likely to encourage public confidence in Garda policy and practice.

It is submitted that the proposed standing tribunal of inquiry would have a much more beneficial role in this situation. It should enjoy the confidence of both the public and the Garda in establishing the facts of the incident and how it happened. Its report could then become the focal point for open debate on what, if anything, is needed to make Garda policy and practice in such operations more acceptable to the public. The result may well be no

different from that of the internal inquiry but at least accountability would be seen to function, and that can only benefit the police - public relationship.

12. Conclusion

There can be no doubt that the very existence of the citizens' complaints procedure compensates for many of the shortcomings in the capacity of the law to secure effective police accountability in Ireland. This is evident from the fact that it covers many forms of unacceptable police behaviour which is not penalised by the law, coupled with the fact that it relieves the citizen of the whole financial, time-consuming and emotional burden of pursuing a complaint to its' final conclusion. Unfortunately, much of its' potential is undermined by its' lengthy and convoluted procedure and its' failure to establish itself as fully independent of the police.

Delay in the resolution of complaints poses a major threat to the procedure's potential. If it takes anything up to 18 months to reach a conclusion on a relatively minor assault claim the whole purpose of the procedure will have been defeated even in the event of the complaint being upheld. Effective accountability demands the determination of a complaint within a short time of its' being lodged. In the case of minor transgressions there is no reason why this cannot be satisfied without subjecting the garda in question to unfair procedures. Furthermore, the complainant

is likely to interpret any such delay as evidence that the relevant authorities have done all in their power to avoid reaching the determination.

The inclusion of the Garda Siochana in the procedure poses similar problems. These will be most apparent in the more serious complaints which have attracted public concern. The spectacle of the investigation being carried out by themselves, albeit under independent supervision, coupled with Garda representation on the tribunal will hardly inspire confidence in the event of an outcome favourable to the Garda. While the Irish procedure reflects a greater commitment to respond to this problem than its' British counterpart it is doubtful that it goes far enough.

1. The Democratic Process

At its most basic democracy can be defined as government by the people in contradistinction to government by a monarchy or aristocracy or some other source of recognised authority. The vagueness inherent in this definition becomes apparent when an attempt is made to distinguish models of government which qualify as democratic from those that do not. As Held points out, today political regimes of all kinds in, for example, Western Europe, the Eastern bloc countries and Latin America make a virtue out of claiming to be democratic. [1] The earliest record of democratic government, however, is still accepted as the purest model. In Athens and the Greek city states power rested in the hands of the people who assembled publicly to exercise legislative and judicial functions. It was at these assemblies that public officers were elected and called to account personally for the exercise of their office. [2] Such personal and direct accountability is just not practicable in our heavily populated, highly mobile and complex society. Accordingly, the concept of democracy in the Western world is expressed today, of necessity, through the principles and machinery of representative government. These can be traced back to the utilitarian school of thought in the eighteenth century and, particularly, to the writings of Bentham and James Mill in the nineteenth century. [3] They perceived

government as a necessary tool to create and maintain the basic conditions in which each individual could be permitted to maximise his own wealth without, at the same time, compelling society to degenerate into a state of anarchy. Government also carried with it, however, the potential to impose unnecessary or undesirable burdens on the citizens. The citizens, therefore, also had to be protected against government. The solution was representative democracy. The basic ingredients were that: sovereignty ultimately lay with the people but vested in representatives who would exercise it on their behalf; the representatives would be elected by universal manhood suffrage; the representatives would be elected periodically and, therefore, would be replaceable periodically; the representatives would elect an executive government which would be accountable to them; and State powers would be legally circumscribed and divided among a representative legislature, executive and judiciary.[4]

The imprint of the utilitarian model of democracy is clearly to be seen in the government structures of all western liberal democracies; even if the philosophy behind it is considerably diluted. Bunreacht na hEireann, for example, provides for a broad separation of powers among a legislature, an executive and a judiciary all of which function in a limited State. [5] The central chamber in the legislature consists of members directly elected by universal suffrage and the executive derives all its

authority, and virtually all its members, from the elected chamber to which it is directly accountable. If the executive loses the confidence of the elected chamber it must resign; while the elected chamber itself must be dissolved and re-elected at least every five years.

It would be a mistake. however, to believe that these structures will ensure that the legislature and the executive will always be keenly sensitive to the wishes of the people in the discharge of their functions. There are several factors which tend to undermine the potential of the democratic process to render government accountable to the people. First, individuals or minorities are virtually closed out as the whole system favours rule by the dominant elites. [6] Second, as will be seen later, the development of strong cabinet government has contrived to insulate the executive from effective democratic control. [7] Third, the inevitable development of an institutionalised bureaucracy to serve government has meant that the real decisions are taken by faceless bureaucrats who neither have to face the electorate nor answer directly to the public representatives. [8] Finally, the perception that our democratic process might not be all that democratic is strengthened by the emergence of the model of participatory democracy in the latter half of the twentieth century. [9] In essence its proponents suggest that the existing democratic process does not allow equal participation to all as all are not equal. Those who are in a position to

use the process effectively can use it to ensure that the State becomes locked into the maintenance and reproduction of inequality. If the marginalised sections of society are to be given an opportunity to break out of their disadvantaged situation the democratic process will have to become less hierarchical and more open and accountable. In short it will have to positively encourage the active participation of those who otherwise are not in a position to participate effectively.

The primary and fundamental contribution of the police to the maintenance of a peaceful, civilised and orderly society makes it a natural topic of importance for elected representatives at both local and national level. Even in Britain where policing remains a statutory responsibility of mostly local authorities it is commonplace for it to feature as a subject of debate in the national parliament. Members of parliament are anxious to ensure that the police forces are equipped with the necessary powers and resources to discharge their vital responsibilities. Equally, they want to ensure that the police organisation does not develop into such a powerful institution that it is effectively immune to democratic supervision at either national or local level. In Ireland these issues are much more acute for the national parliament. The fact that the Garda Siochana is a national force established, regulated, empowered and resourced by the State to discharge, on behalf of the State, one of the most essential public

services at a current cost of about £400m per annum means that the nationally elected representatives of the people must be keenly interested in how it discharges its responsibilities. The key question is how is the democratic process organised and equipped to pursue this interest.

2. The Oireachtas

(a) Structure

The structure and theory of Irish government enshrined in the 1922 and 1937 Constitutions bear close similarities to the parent Westminster model. Broadly speaking, there is a separation of powers between the three major organs of State. The Oireachtas enjoys the sole and exclusive power to make laws for the State,[10] the government is vested with the effective power to exercise the executive authority of the State,[11] while the judicial power is in the hands of judges appointed in accordance with the terms of Bunreacht na hEireann.[12] The Oireachtas consists of three bodies. The Lower House, or Dail,[13] can be described as the counterpart of the British House of Commons. It is elected by the people through a proportional representation system based on the single transferable vote. Its superiority in the Oireachtas is clearly expressed by its dominant role in law making, its formal controls over the government and its special responsibility in matters of the public finances. The Upper House, or Seanad,[14] is the nearest equivalent of

the British House of Lords. Although it does have an input into the making of legislation, its role can be accurately summed up as a discussion and advisory body which functions in a relatively less partisan manner than the Dail. Since 1925 the election of its members has been the preserve of the Oireachtas [15] or, as is currently the position, of members of the Oireachtas plus county and county borough councillors. The third component of the Oireachtas is the President,[16] formerly the governor-general. Although s/he does enjoy a few discretionary powers, for the most part he is a figurehead who acts on the advice of the Taoiseach. His input into the legislative process is confined to signing Bills into law after they have passed through the Dail and Seanad procedures.

(b) Legislative Function

Art. 15.2 Bunreacht na hEireann designates the oireachtas as the sole law-making authority for the State. Inevitably, therefore, law-making must be marked down as one of the primary functions of the Oireachtas. Unlike the Westminster parliament, however, it does not enjoy absolute authority over the contents of its legislative product. Art. 15.4 stipulates that no law may be enacted which is "in any respect repugnant to [the] Constitution". It follows that the Acts of the Oireachtas will be amenable to challenge in the courts on the basis of a substantive conflict between their contents and the contents of Bunreacht na hEireann. Procedurally the oireachtas sticks

closely to the Westminster model with the Dail and Seanad performing almost equal roles in the legislative process. However,there are some notable differences which emphasise the Dail's superiority. First, Art. 23 Bunreacht na hEireann stipulates that in the event of a disagreement between the two Houses, the Dail can override the Seanad simply by passing a resolution. Second, in the case of a Money Bill the Seanad's input is subordinated to that of the Dail. Third, Art. 24 enables Bills which are necessary to deal with an emergency to be passed through the Seanad quickly. In addition to these formal differences there are some factors which indirectly emphasise the importance of the Dail in the legislative process. Not the least of these is the fact that the Dail speaks with the direct mandate of the people. As such it epitomises the people making laws for themselves. In practice, of course, it is the government that exercises the real power in law-making [17]. Nevertheless the Dail retains its dominant profile as most of the members of the government must also be members of the Dail [18].

(c) Finance Function

The role of the Oireachtas in matters of public finance revolves around the fact that legislative authority is required for the purpose of raising taxes and for the purpose of allocating public money to particular uses. Again it is the Dail that is dominant. Bunreacht na hEireann stipulates that money Bills must be introduced in

the Dail.[19] The Seanad's input is confined to making recommendations only [20], and it has a maximum period of 21 days in which to do so. [21] Once the time limit has expired a Money Bill is deemed to have been passed by both Houses even if the Seanad has not considered it, or if it has made recommendations which have not been accepted by the Dail.[22] The Dail's pre-eminence in financial matters is also reflected in the fact that it can authorise the imposition of taxation in advance of the enactment of the relevant Finance Act.[23] This normally happens in the context of the budget statement where the Dail is asked to vote on a resolution permitting the speedy implementation of specified taxation measures.[24] The Dail resolution will provide temporary lawful authority for the measures so long as the appropriate legislation is enacted within a given time period. The Dail also plays a major role in the allocation of public moneys to particular uses. This commences with the constitutional obligation for estimates of government expenditure to be laid before the Dail.[25] Each estimate will be the subject of a vote consequent on a wide-ranging debate on the services covered by the vote. The Dail vote on an estimate constitutes lawful authority for the spending of the amount voted on the relevant services.[26] It is primarily through these debates on the budget statement and the estimates that the Dail discharges its distinctive watchdog function over the public finances.

(d) <u>Supervisory Function</u>

The Dail's scrutiny of public finance matters can be viewed as a part of its wider role as the public's watchdog over the government. The basic idea, borrowed from the late nineteenth century Westminster model of parliamentary democracy, is that the government ministers are accountable to the elected chamber of parliament, and through that chamber to the nation as a whole.[27] Whereas this supervisory role survives in Britain only as a Constitutional Convention, in Ireland it is written into Bunreacht na hEireann as follows:

> 1. "The Government shall be responsible to Dail Eireann."
> 2. "The Government shall meet and act as a collective authority, and shall be collectively responsible for the Departments of State administered by the members of the Government."[28]

Unfortunately, Bunreacht na hEireann does not provide comprehensive machinery through which this supervisory function can be effected. Not surprisingly, therefore, the manner in, and extent to, which the Dail fulfils its supervisory function has been influenced heavily by the British Convention and practice.[29] The machinery consists primarily of debates and questions on the floor of the House. Debates can arise in a wide variety of situations including: legislative proposals, a white paper on government policy, estimates, the budget statement, issues or incidents of public concern etc. In any or all of these situations the opposition will seek out and amplify alleged shortcomings in the government's policies, decisions or administration with a view to embarrassing the

government and/or portraying it as unfit to govern. On the other hand the government, and its supporters, will aim to defend and present its policies, decisions and administration in the best possible light. Questions from individual members of the House to individual government ministers can also provide a forum for political point scoring between the government and opposition. In practice, however, questions are used primarily to elicit information on: the contents or application of current government policies or schemes, government plans to tackle general or specific problems, aspects of administration and statistics. It is impossible to be any more precise as these questions can range from the peculiar circumstances of an individual constituent to government plans to combat an upsurge in crime and vandalism. It must be said, however, that much of the information acquired from the answers to these questions can be used to keep a check on the impact of government policies and administration in the public services.

Although the notion of parliament exercising a supervisory control over the executive remains an orthodox part of our constitutional structures it is doubtful that it has ever fulfilled the trust placed in it by some.[30] There are at least two factors which have led others to conclude that:

> ". . . under modern conditions of responsible government, parliament could not always be relied on to check excesses of power by the Crown or its ministers."[31]

First, the party whip system has enabled governments to exercise control over parliament to an extent which would have been unrecognisable even in the mid-nineteenth century.[32] For a government to remain in power it must command majority support in the Dail. This, in turn, means that the government party or parties will normally account for about 50% or more of the members of the Dail. The party whip system will ensure that these members will support government policy in the House. The net effect is that the task of criticising and challenging government policy or administration will fall on the shoulders of, perhaps, less than half of the democratically elected representatives of the people. Furthermore, the government will normally rely on its majority to ride out any challenge or criticism. The second factor is lack of information and expertise. Full information about a general situation or specific incident is a pre-requisite for informed criticism on the government's handling of that situation or incident. Opposition criticism of government policies or actions may prove seriously counterproductive if the government can demonstrate that the criticism was based on a lack of understanding or knowledge of the facts. Similarly, opposition criticism will appear feeble unless it is accompanied by alternative policies or strategies for dealing with the problem in question. Devising viable and sensible alternatives, however, will require not only a full understanding of the problem but also the expertise and resources to formulate a suitable response. Again, the

opposition will be exposed to the risk of its criticism appearing misinformed and misguided if the government can show that the opposition either was not capable of forming an alternative approach or that its alternative would have made the situation worse.

Access to information and expertise, therefore, is at a premium if the Dail is to discharge its supervisory function vigorously and effectively. Unfortunately, it is the government that enjoys a near monopoly on both. With the immense legal, financial and executive resources at its disposal the government can ensure that all the relevant facts about an incident or general issue are made available to it quickly. Equally, it can avail of the best expertise to advise it on what responsive policies or strategies may be appropriate, what the strengths and weaknesses of each are, and which would be most conducive to achieving the government's objectives. The permanent civil service being at the disposal of the government is a key resource in this scenario. The effect is that when controversy has arisen over a particular incident or general situation requiring government action the government can confront the Dail and the media armed with all the necessary information and expert advice. Using this information and expertise it can present or defend its adopted policies or actions in the best possible light and, at the same time, identify and castigate the deficiencies in the alternatives mooted by the opposition. Because the opposition must rely on its

own resources to gather information and acquire expertise, in addition to what the government chooses to make available, it will rarely be able to challenge the government from a position of equal strength. This inequality must undermine the Dail's capacity to function in a supervisory capacity.

It is likely that a fully fledged committee system would alleviate some of the disadvantage suffered by members of the Dail in access to relevant information and expertise. What is envisaged here is a number of standing committees of the Dail with the power to send for persons, papers and records from relevant departments and public bodies. The persons appearing before a committee, such as senior civil servants or senior Garda personnel, would be under an obligation to answer questions on the functionning of the branches of administration or public services under their administrative or operational control. There would, of course, be restrictions on the scope of such an obligation in order to protect legitimate interests such as State security or confidentiality. The committees would also have the authority and resources to employ the services of independent experts relevant to their terms of reference. The aim of these committees would be to subject the various branches of the public administration and the public services to much closer scrutiny than is possible at the moment on the floor of the House. The specialist information and expertise gradually acquired by members

through their work on these committees should establish the committees as primary mechanisms of accountability. Furthermore, it should enhance the quality of debates on the floor of the House. Whether a debate is on an estimate, a legislative proposal or a private member's motion members of the House will find that as a result of their experience on relevant committees they do not have to accept government proposals and analyses uncritically. They will have much greater confidence and capacity to put forward alternative, credible interpretations and proposals of their own. That, in itself, would make a major contribution to the Dail's role as a supervisory authority over the executive.

The committee system has become a standard feature of the Westminster parliament.[33] Surprisingly, however, the idea has been slow to take off in the oireachtas.[34] Although both the Dail and the Seanad have made use of committees for various purposes and continue to do so there has been considerable resistance to the institution of a committee system along the lines being discussed here. Ironically, police is one subject that has benefited from a committee under the heading of crime, lawlessness and vandalism.[35] Unfortunately, the full potential of this Committee to galvanise the Dail in its police accountability function is curtailed by several features. First, the terms of reference of the Committee put the emphasis on law and order as it affects the personal safety

of citizens in their homes and in public places. Accordingly, it does not embrace all aspects of policing; nor is it confined to the policing dimension of law and order. Second, no member of the government nor Minister of State may be a member. This deprives the Committee of the benefits of government information and expertise in its deliberations and the opportunity to engage in a full, adverserial discussion of the pros and cons of government policy. It also means that the Committee's work may be treated less seriously by the government. Third, the Committee has no power to call for persons, papers and records. This seriously undermines its capacity to get on top of its subject matter. The fact that it may be permitted to engage independent expertise to enhance its work is no substitute for direct access to the personnel responsible for the administration and operational practices of police. Fourth, the tenure of the Committee is anything but secure. First established in 1983 it fell with the government of the day in 1987. It was not re-established until 1991. Clearly this Committee is not in a position to discharge the supervisory functions which are achievable under a fully fledged committee system. Having said that, it must be acknowledged that the first Dail Committee on Crime, Lawlessness and Vandalism did contribute substantially to the public knowledge and debate about police through a number of very useful reports on the Garda Siochana.[36] The focus of the current Committee, however, is on juvenile crime and, as such, it is doubtful

that it will have the same impact on policing as its predecessor.

The final ingredient relevant to the Dail's supervisory function that must be mentioned is the extent to which Ministers are prepared to answer to the Dail for public administration and public services. This becomes most pertinent in the context of Dail questions to individual Ministers. Morgan draws attention to the fact that there is a fairly complicated catalogue of rules drawn from standing orders, past practice and general constitutional notions which determine whether a question is admissible.[37] One of these, Dail Standing Order 30, reads:

> "Questions addressed to a member of the Government must relate to public affairs connected with his Department, or to matters of administration for which he is officially responsible."

Clearly a Minister would be responsible for the content and implementation of the policies implemented through the medium of the civil servants in his department. However, where policies are developed and applied outside the framework of departmental structures the responsibility of the Minister may be limited or, perhaps, non-existent.[38] This is of particular importance in the case of police. Presumably the Minister would have to accept responsibility for the exercise of his regulatory powers over the internal management of the Garda Siochana and for the provision of financial, material and administrative resources for the

force. The government as a whole would have to answer for appointments and dismissals of all senior officers including the Commissioner. However, both the government and the Minister for Justice could justifiably decline responsibility for operational matters as the general direction and control of the force is statutorily vested in the Garda Commissioner alone. Interestingly, when the Westminster parliament was debating the Report of the Royal Commission on the Police Bill in 1962 the Home Secretary of the day made it clear that he could not answer in parliament for the operational policies or actions of the police. To do so would be to accept responsibility without control.[39] In Ireland, however, the Minister for Justice is prepared to answer to the Dail on a wide range of operational police matters. In doing so, however, he always makes it clear that he is simply relaying the response of the Garda Authorities.

In an effort to assess the strengths and weaknesses of the Dail as an accountability authority for police, a survey was conducted on its proceedings over the calendar years 1985-87 inclusive. These three years were selected for several reasons. They were concurrent with the research for this thesis; they spanned a period in which there were three Ministers for Justice from two parties at opposite ends of the Irish political spectrum; and because they covered several occasions when serious public concern was aroused over policing matters. The survey concentrated

on Dail and Seanad debates and Dail questions on all matters affecting police. The methodology used and the results will be discussed separately for questions and debates in that order.

3. Dail Questions

(a) The Survey

The record of Dail proceedings from 1985-87 reveals about 605 questions on the Garda from individual members of the House. However, 605 cannot be treated as an exact figure because of the subjectivity inherent in deciding what is and what is not a question on the Garda. For the purposes of this thesis the aim was to consider only those questions which related directly to any aspect of the Garda establishment, structure, management, resources, policies, practices and productivity. This would include questions on crime statistics but not questions on any other aspect of the criminal justice process or the public service unless specifically confined to the input of, or impact on, the Garda. While a large majority of the questions were directed to the Minister for Justice a relatively small, but significant minority, were directed to the Minister for Finance.[40] One question each was directed to the Ministers for Education, Public Service, Foreign Affairs, Transport and Defence, while two were directed to the Minister for the Environment. The fact that relevant questions on the Garda were not confined to a single Minister increased the scope for uncertainty in

classification. In the case of the Minister for the Environment, for example, it was always very difficult to decide whether individual questions should be classified under the Garda heading or not; particularly in matters affecting road traffic. Even questions to the Minister for Justice were not free of classification problems given that his remit extends beyond the Garda to include the prison service, the DPP, the Courts and legal aid among others. The figure of 605, therefore, must be accepted merely as the author's subjective attempt to put a definite figure on the number of questions asked on the Garda during this period.

A further factor which renders it impossible to put a precise figure on the relevant questions asked concerns procedure. There are three different types of formal questions covered in the survey: written, oral and private notice. The written question, as its name suggests, is put down in writing by an individual deputy and submitted to the relevant Minister. The Minister, in turn, will deliver an answer in writing to the deputy and that answer will appear on the record of Dail proceedings. This procedure does not permit any immediate discussion on the answer. Accordingly, it is possible to get an accurate count of the number of written questions in any given period; in this case 470. The only confusion that might arise is the occasional practice of answering a number of similar or identical questions together. In computing the figure of

470 each question counted as one irrespective of whether the Minister answered two or more of them together.[41]

Private notice questions are slightly different. Although the Minister is aware of their content in advance, they are put down for him to answer orally in the Dail. His answer is the occasion for further contributions from deputies which often lead to a lively altercation with the Minister.[42] Nevertheless, there is usually no difficulty in treating a private notice question as a single question, unless it has been put down by more than one deputy. In the period concerned there were six private notice questions put down; but they counted as fifteen as some were put down by more than one deputy. Oral questions posed a much greater difficulty. As with private notice questions the Minister will give an oral answer in the Dail based on prior notification of what the question would be. However, the single question usually gives rise to one or more supplementary questions designed to elicit further information, comment or commitments from the Minister. In these situations it is often difficult to determine whether the supplementary questions and debate were merely part of the original question or whether they constitute separate, additional questions in their own right. For the purpose of this thesis an oral question, and its consequent altercation, was counted as one unless a supplementary raised a new issue in the form of a question which required a further ministerial response. In the latter event the

supplementary was counted as a separate question in its own right. Again, this inevitably leaves room for subjectivity which could affect the overall figure of 605. In terms of quantity there is, on average, one session per volume of Dail debates devoted to oral questions on police. Discussion in these sessions ranges from three to thirty-nine columns, with an average of twenty-eight columns.

Despite the impact of these variables it is submitted that the figure of 605 can be accepted as a realistic count of the number of formal Dail questions on the Garda in the three year period from 1985-87. In any event the possibility that someone might reach a count of ten or twenty above or below this figure would have little significance for the contents of this chapter. The primary concern is what the substance of the questions and answers reveals about the contribution that this procedure makes to police accountability. The reason for putting a figure on the number of Dail questions is merely to give the reader some idea of the quantity involved and to permit the working out of percentages which will help to give meaning to the quantities involved.

The largest category of questions in terms of subject content is operational matters. At 39% this category is more than two and a half times as large as its nearest rival. Once again, however, subjectivity enters the

analysis. Just how large or small one category is in relation to another will depend to a significant extent on how the categories are defined. Furthermore, a degree of subjectivity is involved in the decision to assign an individual question to one category as opposed to another. This last problem can be minimised by a clear and detailed description of each category. Unavoidably, however, there will be occasions when an individual question could reasonably be allocated to more than one category. In each of these cases a purely subjective decision was taken to allocate it to one category in preference to any other. It is not felt that this problem arose with sufficient frequency in the course of the survey to have any significant effect on the analysis. With the large majority of questions it was a relatively straightforward decision into which category they should be put.

It is no exaggeration to say that the categories almost defined themselves. The most difficult one was operational matters. The intention with respect to it was to cover all questions which related not just to the content but also to the application of the Commissioner's operational policies, priorities and strategies. Included, therefore, were questions on: the policy for enforcing certain laws, the policy for tackling certain types of criminality, the standard of policing in certain geographical areas, the policy on community policing as well as questions on individual operations and

investigations. All these questions relate to how the Commissioner and individual gardai cope with operational policing matters over which they have direct control. Excluded, however, are questions on general management matters such as: manpower allocations to particular districts or stations, overtime and discipline. The issue of manpower allocation can pose problems in this context as there can be a very close link between that and operational strategies. It was decided, however, to keep a separate category for manpower allocation as a sizeable number of questions (10% of the total) asked solely for statistics or related information on manpower levels at particular stations, districts or divisions. Occasionally these took the form of asking whether an individual vacancy at a named station had been filled.[43] Since these questions were not directly related to the Garda's priorities or policies on specific operational matters, it was felt that they could not be accommodated under the operational heading. However, many questions did ask for manpower statistics in the context of operational matters. Examples would be whether the Minister felt that sufficient manpower had been allocated to a named area in view of the upsurge in crime and vandalism in that area,[44] or whether he felt that the drug unit attached to a named station should be strengthened in order to build on its successes.[45] Given the direct link with operational policies, priorities and strategies such questions were allocated to the operational as opposed to the manpower category.

The other categories were much more clearcut in their subject matter. Taking them in order of size the next after operational matters is statistics on offences. This category accounted for 15% of the total. For the most part it consisted of straightforward questions on the number of reports, arrests, prosecutions and convictions for named offences in named areas over a specified number of years. Also included under this heading were questions on the quantities of goods which had been seized by the Garda in the context of criminal investigations. Questions on Garda stations constituted the next category at 11% of the total. Most of these wanted to know what progress had been made on the plans for, or construction of, a new Garda station in a named area. Also included were questions on the status and repair of named stations. A significant feature of this category is that the majority (about 60%) were directed to the Minister for Finance. Next at 10% was the manpower allocation category which has been mentioned already. Recruitment, at 7%, was concerned mostly with requests for statistics on recruitment intentions. Some were aimed at procedures and, in a few instances, even focused in on the case of a named individual.[46] Close behind, at 6%, was the category on resources. This embraced legal powers and material resources in the form of finance, vehicles and other equipment necessary for the Garda to function as a police service. The questions usually asked whether adequate resources were being made available for the Garda to cope either generally or with

specific problems. Questions on overtime were sufficiently numerous, at 3% of the total, to merit a category of their own. Apart from their number, however, there was nothing especially significant about them. For the most part they were aimed at drawing attention to alleged cut-backs in Garda overtime. The last specific category is discipline, at 2%. A few of these questions sought statistics while the majority concerned disciplinary action in individual cases. The remaining 7% was made up of a motley of questions which could not be fitted easily into the categories outlined above nor form statistically significant subject categories of their own. Questions here ranged from very broad political ones, such as what plans did the Minister have for establishing a police authority, [47] to very narrow pracical ones, such as: where the material for Garda uniforms is manufactured;[48] how much it cost to provide security for bank cash movements;[49] and what could be done about television interference from the Garda radio network.[50]

(b) Accountability Contribution

(i) Non-Operational Questions

The success of Dail questions in calling the Garda to account is compromised from the outset by the fact that the majority of questions on policing are not directly concerned with how the Garda, or individual gardai, are discharging their police function. Only the operational and disciplinary categories consist of questions which

focus in on the policies, priorities, strategies and actions of the Garda and individual gardai. The remaining 59% are taken up with structural or statistical matters which are either outside the immediate control of the Garda or do not impact directly on Garda operational policies or actions. It must be said, however, that there is a very good reason for this situation. Strictly speaking the Minister has no direct control over Garda operational policies or actions. His responsibility is confined to ensuring that the necessary financial, personnel, material and legal resources and management structures are available to provide an adequate and efficient police service. Since he is accountable to the Dail for the manner in which he discharges his functions, it is inevitable that the majority of Garda questions put to him will concern these resource and structural matters. Indeed, the enigma is that so many questions are put to him on operational matters. For the Minister to accept official responsibility for the matters contained in these questions he would require the power to take remedial measures where the contents of the questions reveal that that is necessary. This, in turn, would signal a usurpation of the Commissioner's statutory power of general direction and control over the force. The fact that the Minister is aware of his limitations in this regard is confirmed by the following passage in his reply to a private notice question which asked him what he would do about a spate of violent attacks and robberies on elderly people living in rural

areas:

> "I think it is important to say that the operational control of the Garda Siochana is vested in the Commissioner of the force and that while I am glad to answer the House for the exercise of any functions, I could not agree to be pushed, for reasons of understandable concern for serious crime or otherwise, into improper and politically very damaging interference with the functions of the Commissioner."[51]

Although these non-operational questions cannot function as a direct Garda accountability mechanism it must be accepted that they can and do make an indirect contribution. Many of the questions seek statistics on matters such as crime statistics, recruitment and manpower allocation. While many of such questions may seem fairly innocuous in themselves when viewed in isolation the information gained from the answers can often be used to keep a check on Garda operational strengths and weaknesses. A series of questions on crime statistics, for example, might confirm a perception that the Garda are losing the fight against drugs in certain areas. This, in turn, could lead to operational questions on Garda policy and strategy on drug detection. Perhaps more significantly such information could be used in the course of Dail debates to focus attention on perceived strengths or weaknesses in Garda policies or actions. The information, therefore, may ultimately be used not just to keep a check on how the Minister is discharging his responsibilities, but also to help make the Garda accountable for theirs. Nevertheless, the practice of putting down questions seeking low grade

statistical information on police matters would appear to be an unnecessary waste of parliamentary resources. Surely such information could be made publicly available through channels which would be much less formal, cumbersome and expensive. It is primarily because much of the information is not readily available elsewhere that deputies seek it, on behalf of themselves or others, through the medium of Dail questions.[52]

Questions on manpower allocation make a more significant accountability contribution. Not only do they function as a useful device for keeping a check on how the Commissioner distributes the members of his force around the country, but they can also exert an indirect influence on that distribution. The typical practice is to ask the Minister what steps are being taken to replace a sergeant at a named station or to restore the manpower at a named station to its full complement. Although the Minister regards such decisions as a matter for the Commissioner alone he will answer on behalf of the Commissioner. This allows deputies to keep a check on whether particular localities of interest to them are being fairly served by manpower allocation. In addition, however, it can also serve to gain an advantage for one or some localities over the rest. On the premise that demand for manpower will always outstrip supply, the Commissioner will always need to exercise discretion in favouring the needs of one locality over another in distributing manpower. However,

if a member puts down a specific question on the manpower shortage at a named station that question will be referred by the Minister to the Commissioner. In order to answer it the Commissioner will have to address his mind to the manpower situation in the relevant station or area with a view to improving it if possible. The fact that he knows the Minister is interested in the situation at that station or area will give an added impetus to his efforts. The result may be that the Commissioner may allocate more personnel to that station or area more quickly than would otherwise have been the case had no Dail question been asked. There is a clear incentive, therefore, for deputies to ask questions even about single vacancies in their constituencies. This incentive is further enhanced by the pressure that the proportional representation electoral system imposes on deputies to be seen to be looking after the selfish interests of their constituents. The downside of this procedure is that the Garda accountability may be achieved at the expense of a professionally planned and equitable distribution of manpower resources throughout the State.

(ii) Operational Questions

The most significant Garda accountability dimension of Dail questions is provided by the operational and discipline categories. These questions focus directly on what the Garda, and individual gardai, are doing and how they are doing it. Since the Minister has no statutory

power of control over Garda operational matters the most he can do with these questions is refer them to the Commissioner for an answer in the same manner as the questions on manpower allocation. His Dail reply, therefore, will take the form, "I am informed by the Garda Authorities that . . . ." Nevertheless, this procedure has immense implications for Garda accountability. Most obviously it means that questions can be asked and answered in the Dail on potentially every aspect of Garda activities from the most general to the most detailed and from the most sensational to the most mundane. This is despite the fact that the person who enjoys the statutory power of control over Garda operations is neither a member of the Dail nor appears before it. The result is that the Dail functions as a forum for Garda accountability at a level and in a manner which is quite unparalleled in the case of other non-departmental public bodies. The Minister's willingness to seek answers to these questions also gives the Dail's accountability function the capacity to enhance Garda performance. It sends a message to individual gardai, and the force as a whole, that their policies, actions and general conduct are always liable to be queried publicly at the behest of any Dail deputy from any constituency in the State. Such questions can range from what the Garda are doing about a particular type of criminal activity [53] to when gardai would return a television set which they had seized from the flat of a named individual.[54] Not only does this help to keep them

on their toes but it can also encourage frequent internal reviews of operational policies, priorities, strategies and practices. The fact that this response is instigated by the action of the elected representatives of the people emphasises the contribution that the Dail can make to Garda accountability. It also underpins a very necessary democratic link between the Garda and the community. Having said that, however, there are a number of features which ensure that the procedure falls significantly short of achieving its full accountability potential. It is convenient to consider these features separately for written questions on the one hand and oral and private notice questions on the other.

Written Questions

Primarily because of time constraints the large majority of Dail questions are considered in written form.[55] Given the volume it is almost inevitable that each will receive a one or two line answer which offers the questioner little or no satisfaction. The typical question on operational matters will imply that not enough is being done to combat a particular crime or law enforcement problem generally or, more likely, in a named locality. The standard ministerial response is that he is informed by the Garda Authorities that the problem does not exist or, alternatively, that sufficient resources are being devoted to it and that it is being kept under review. As explained above, the mere fact that the question was asked may result

in the Garda looking again at the specific situation. However, this will not be obvious to the questioner or the general public. The contents of the ministerial response will appear simply as a curt refutation of the concern expressed by the deputy. Since the question and answer are written there is no scope for further clarification. When this pattern is repeated almost ad nauseam it conveys the impression that the Minister actually functions as a barrier against attempts to question Garda operational matters. Given that appearances can often be just as significant as reality in satisfying the needs of accountability it must be clear that the contribution of the written question procedure is seriously flawed.

A further limitation on the accountability contribution of the written procedure is the Minister's selectivity on the sort of questions he will answer. Some of the issues that arise here are also applicable to oral questions. However, they will be dealt with under the written procedure as they have arisen primarily from that source. From the outset it must be accepted that there are some questions to which the Minister is quite justified in refusing a reply. Questions concerning Garda deployment on the border, for example, were regularly refused on the ground that answers might compromise border security. Similarly, the Minister sometimes refused to provide precise details on Garda strategy to combat an upsurge in specific types of criminality in named areas in case such

information would frustrate the success of the Garda strategy. Also, in some questions the Minister has refused to give a full reply because the issues raised were too lengthy and complex to be dealt with satisfactorily through the Dail question procedure. Two examples are: a question asking what measures he would adopt to combat an increase in crime in urban areas,[56] and a question on what proposals he had to tackle the high level of crime, lawlessness and vandalism.[57]

There have been occasions, however, when the Minister has refused to give a satisfactory answer on more dubious grounds. A critical example in the context of Garda accountability was a question on what guidelines had been issued to the force on the enforcement of the law on gaming machines.[58] Unfortunately the Minister refused to answer on the ground that such guidelines were internal to the force. This has immense implications for accountability. The policies that are applied have a huge bearing on the nature and quality of policing in this country. Inevitably, the policies that are applied will be acceptable to some sectoral interests and unacceptable to others. It is surely a fundamental incident not just of police accountability but also of democracy that the people should have an opportunity to air what they would like those practices to be, and to have their wishes taken into account in the formulation and review of those policies. A pre-requisite for that opportunity, however, is the

means to find out what the relevant policies are. The Minister's answer makes it clear not only that he perceives the contents of such policies as a matter for the professional judgement of the Garda alone, but also that the general public have no need or right to know what those policies are. Such a ministerial attitude must operate as a major restraint on serious police accountability in Ireland.

The Minister's refusal to answer some questions also undermines the capacity of the Dail to call the Garda to account for how it has handled individual operations or investigations. In addition to questions which raise issues of national security or which risk compromising the success of Garda operations, the Minister will normally refuse to answer questions concerning the investigation of an identifiable individual or individuals. For example, when the Minister was asked whether gardai had interviewed a journalist who wrote an article based on inside information, prior to the appointment of the PMPA administrator, he responded:

> "Unless there are exceptional circumstances indicating otherwise, it is not the practice for Ministers for Justice to confirm or deny publicly that a particular individual or organisation is, or has been, the subject of a Garda investigation or to confirm or deny that the Garda have had or have sought an interview with particular persons."[59]

This reticent attitude makes it very difficult for Dail deputies to follow up concern that the Garda have not pursued a particular investigation as vigorously as might

have been expected. A more forthcoming response is necessary in such situations so that the public can be satisfied that the Garda response is always dictated by independent professional judgement as opposed to the demands of powerful political or economic interests.

Even more disturbing is the fact that the Minister displays a similar reticence in response to questions on specific Garda operations. A pertinent example was the question which asked the Minister to make a statement on how the Garda had failed to apprehend those suspected of having stolen a valuable collection of paintings known as the Beit paintings. The facts as reported in the media were that the Garda had the gang of suspects under observation and surrounded in the Wicklow mountains but somehow failed to apprehend them. The clear impression given was that the Garda had bungled the operation. The Minister's response to a Dail question on the matter was:

> "It is not the practice for the Minister for Justice to make statements to the House about specific Garda operations except in singular instances when the circumstances of an operation or some particular aspect of it are so exceptional that such a course is deemed to be appropriate."[60]

The only comment that the Minister was prepared to make on this case was that he was "not to be taken as agreeing with any inference contained in the question that the Garda performance in relation to this matter was in any way inadequate."[61] This approach completely neutralises the accountability potential of the Dail question in those

circumstances where it has most to offer; namely the individual operation which has aroused public concern. What is needed is for the Minister openly to give the facts, identify what, if anything, went wrong and what, if anything, needs to be done to prevent a recurrence. Such openness need not be a cause of concern for the Garda. On the contrary, it could even engender public support for the Garda by signalling that gardai, like everyone else, are not invincible and are big enough to face up to their mistakes and learn from them. An added bonus, in those situations where the Garda is not at fault, would be a greater public willingness to accept a ministerial response which corrects initial misleading or misinformed media reports. Ministerial efforts to suppress open discussion on such matters can only increase public suspicion, whether rightly or wrongly, that the Garda have bungled again and that their failings will simply be covered up rather than corrected.

The final aspect of the written question procedure which is worth adverting to because of its special significance to Garda accountability is discipline. On every occasion that a question is asked about a particular incident which has involved, or may involve, the subject of disciplinary proceedings the Minister will refuse to comment. He responds simply that it is a matter for the Garda Authorities to deal with in accordance with the Discipline Regulations, and that it would be improper for

him to interfere.[62] It would appear, however, that the Minister is also using this as an excuse not to deal with the broader policy issues which have given rise to the possibility of disciplinary proceedings in some cases. This applies even where the question of court proceedings and disciplinary proceedings has been settled. For example, at the time of President Reagan's visit to Ireland twenty-eight members of Women for Disarmament were arrested and held in detention until the visit was over. There was no suggestion that the women had been guilty of any offence. The clear implication was that the arrests had been effected for the political purpose of preventing the individuals from organising and participating in public protests during the President's visit. Public concern that Garda powers of arrest should be used for such a purpose was heightened by the cramped and unhygienic conditions in which the women were detained. Although the women successfully sued the State for damages there was no public consideration of why Garda powers of arrest and detention were employed in this manner, who had authorised it and what future policy would be on such matters. The civil action did not fulfil the public accountability requirements as the claim was settled out of court. The disciplinary option was frustrated by the Commissioner's decision not to institute proceedings against the personnel involved. A Dail question should have been an appropriate forum to deal with the serious issues involved but the Minister blocked that avenue on the wholly unconvincing

ground that the matter had been pursued and disposed of through the courts and that the Commissioner had decided against disciplinary proceedings.[63] Inevitably this conveyed the impression not only that the Dail question was inadequate as an accountability mechanism but also that the Garda were beyond the reach of public accountability in such matters.

Oral Questions

The oral question procedure has the potential to overcome some of the obstacles which undermine the capacity of the written question to function as an effective accountability mechanism. Indeed, it would appear particularly attractive in the context of operational matters. It gives deputies the opportunity, through supplementary questions, to dig beneath the surface of the Minister's reply. In this way it may be possible to clarify in much greater detail what the contents of a particular policy or strategy were, how it was implemented, why, if at all, it went wrong and what can be done to improve the situation. As with the written procedure, however, it offers much more than it delivers.

The potential of the oral procedure can be frustrated by the Minister adopting a policy of revealing as little as possible of information which may serve to cause him political embarrassment. Indeed, his standing as a Minister will be influenced by his performance at oral question

time. The more successful he is at deflecting the arrows hidden in the oral question the higher his standing will be within his own party. Unfortunately, this puts a premium on suppressing open discussion on facts or issues which may reflect poorly on the Garda, the department or the government. While it may be more difficult to succeed in this approach in response to oral questions than it would be in response to written questions, it has not been beyond the resources of the respective Ministers for Justice from 1985-87. Given the Speaker's desire to accommodate as many questions as possible at question time the Minister will rarely find himself in a situation where he will be subjected to any serious cross-examination on a single question. It should not be too difficult, therefore, to reveal as little as possible where the Minister perceives that to be in his best interests. Various techniques are used in addition to those described earlier under written questions. Sometimes the Minister openly admits that he is reluctant to answer a question as it might involve causing embarrassment for others. An example occurred in connection with the armed hold-up and robbery of a securicor van and its accompanying Garda escort in Limerick. When questioned about it in the Dail the Minister avoided having to give a full answer by saying that he did not want to apportion blame.[64] On other occasions, without giving reasons and in a barefaced manner, the Minister simply refused to answer. An example was when he was asked whether he knew about the planned

ransom payment in the O'Grady kidnap case.[65] More frequently the Minister will respond readily to a relatively innocuous part of a question and dodge the real issue that was being raised.[66] Whichever of these techniques is used the end result is that the procedure is merely conveying the appearance of accountability and not delivering the substance.

The fact that the Minister can only answer on behalf of the Garda Authorities for operational matters is a feature of the oral procedure just as much as the written procedure. In the case of the former, however, it plays a critical role in frustrating effective police accountability. This stems from the fact that the Minister can convey to the Dail only the information that has been conveyed to him by the Garda Authorities. Attempts to use supplementary questions for the purpose of querying or clarifying aspects of that information will meet only with limited success as the most that the Minister can do is repeat what he has been told by the Garda Authorities. The Minister's knowledge of the subject matter in question will be confined to what is in his script. Because he does not normally have first hand knowledge of the matters in question and is not in full-time executive control over operational matters he is simply not in a position to answer personally for the information he is conveying to the Dail. In other words, for the oral procedure to fulfil its accountability potential in Garda operational matters

it will have to be possible for deputies to put their questions directly to the relevant senior Garda officers. Directing them exclusively at the Minister often achieves no more than the appearance of accountability. A case in point is the series of oral questions, and consequent supplementaries, that were put in response to increasing public concern at the conduct of the Garda nationwide search for IRA arms. Over a ten-day period a total of 50,132 houses were searched, 7,573 under warrant. Given the fact that nothing was found to suggest that major shipments of IRA arms had landed there was a growing perception that the Minister and the Garda were overacting. This feeling was coupled by disquiet in some quarters that gardai were simply using the opportunity to gather low level intelligence information on those who might be in any way sympathetic to Sinn Fein. Complaints were coming in from many quarters about the unnecessary intrusiveness of the Garda searches; and they were not all from persons with Sinn Fein sympathies. In his response, however, the Minister refused to accept that there was any concern about the search. He was content to repeat the assurance from the Garda Authorities that there was tremendous public co-operation and goodwill.[67] The Minister, of course, could not do anything else. In the event of a deputy challenging the views or facts conveyed by the Minister to the Dail, the Minister had no other option only to repeat the views or facts contained in the communication he had received from the Garda Authorities.[68] The whole

accountability value of the supplementary question is belittled in the process.

The limitations on the value of the oral question procedure is also illustrated in the context of operational policies. At the very least it should be possible to engage the Minister in discussion on the content of Garda operational policies, whether a particular policy is the most appropriate for dealing with a specific problem and whether the Minister would consider reviewing the policy. However, not only does the Minister refuse to give an undertaking to discuss a particular policy with the Garda Authorities,[69] but he even declines to discuss policy contents in the Dail. During the questions and answers on the Garda nationwide search, for example, the Minister refused point blank to give details of the criteria used by the Garda to determine who or where to search as these were operational matters.[70] A further example, which also underlines the need for greater openness in this procedure, arose in the context of the Garda policy of using section 30 of the Offences Against the State Act, 1939 as a device for serving and enforcing extradition warrants. That this was an inappropriate use of the power was confirmed by the Supreme Court when it ordered the release of a man who was being extradited to Australia to face serious criminal charges.[71] The release was ordered on the ground that the use of section 30 to arrest him was unlawful. Despite the fact that a previous Minister for Justice had

acknowledged that section 30 was applicable only to subversive cases [72] the Minister of the day refused repeatedly during question time to comment one way or the other on the apparent Garda policy of using it for extradition cases generally.[73]

4. Dail Debates

(a) Accountability Potential

Although policing has featured prominently in many debates during the survey period it must be emphasised from the outset that policing does not capture the imagination of the Dail to anything near the extent of subjects such as the economy, fiscal rectitude, unemployment, taxation and health. In the major debates on Government policies, such as the budget debates or the annual adjournment debates, policing rarely attracts more than a few sentences. In the debate on the 1985 budget statement, for example, references to the Garda amounted to about two columns out of a debate which ran to about 1,000 columns.[74] This lack of interest contrasts with the fact that £244m was allocated to the service for that year. Even King John's castle in Trim, County Meath, received more coverage.[75] Similarly, in a debate on a motion of confidence in the Government in October 1986 [76] no mention was made of policing at all despite the fact that in other, more subject specific, debates throughout 1986 the opposition had highlighted law and order as a major failure of government policy.[77]

The scant coverage devoted to policing in these general debates should not be interpreted as evidence of the Dail's indifference to the subject. Indeed, the period 1985-87 contains no less than 23 debates in which policing was either the primary or a significant topic. The fact that the Garda has its own separate vote ensures that there will be at least one debate on the subject every year. Each estimate debate [78] provides the Minister with the opportunity to expound his policies and principles for the Garda service in the relevant year. He will explain how the funds being voted will permit the Garda to strengthen its community relations programme, devote more resources to combating armed robbery in rural areas, clamp down more heavily on drunk driving, invest in the latest communications technology or whatever. It will also provide members of the Dail with the opportunity to focus the spotlight on gaps or shortcomings in the police service which could be remedied by the allocation of more resources or a rethink on the allocation of existing resources. If the issue is sufficiently serious and of national concern the estimate debates in conjunction with other debates can be used to focus public attention on the matter and thereby galvanise the Minister into taking remedial measures. Such measures may necessitate the introduction of a supplementary estimate as happened in 1986.[79] Theoretically, the Garda estimate debate also provides the opportunity for Dail deputies to raise operational policies or specific Garda operations which they feel ought to be

reviewed in the interests of the public generally or in the interests of minorities. For example, it might be argued that the Garda focus too much attention on border policing and not enough on "white-collar" crime, or that Garda surveillance of members of Sinn Fein was oppressive and unwarranted in a democracy. Sadly the Dail record from 1985-87 does not suggest that the full accountability potential of debates is being realised.

(b) Estimate Debates

Imaginative discussion of operational policing issues is noticeably lacking in the estimate debates. Throughout there is a very marked acceptance that the policing needs of the State will be satisfied if gardai are visible and accessible and devote their energies to combating offences against the person, offences against property and subversives. There is very little inclination to discuss how the Garda should discharge these functions, what the priorities should be or, indeed, whether there should be different functions. Even when the force embarked upon Operation Mallard no significant attempt was made in the relevant estimate debate to question whether the force should have been deployed in this manner or whether the resources involved could not have been spent more beneficially on some other aspect of the Garda function. Another example concerns the investment of over £20m in the Garda computer and communications network to make it among the most advanced in the world. The investment was raised

repeatedly in debates over the survey period. On almost every occasion, however, it was mentioned only as evidence of the government's commitment to maintain and enhance the force's capacity to fight crime. On the few occasions when it was raised by deputies, as opposed to the Minister, the purpose was to enquire or complain about overruns in the estimated expenditure or delay in putting the network into place. No one ever thought to question, let alone discuss, whether this huge investment was necessary or whether the Garda required such sophisticated technology or what the implications for civil liberties and human rights might be when the technology came on stream. The estimate debates convey the impression that the Dail's interest in policing is confined to the issue of whether certain types of crime are on the increase or the decrease. Not all the blame for this can be laid at the Minister's door because in his contributions he has often raised broader issues such as crime prevention strategy in the form of community relations programmes or neighbourhood watch schemes. These leads, however, were never taken up in debate by the Dail.

(c) Other Debates

Although the estimate debates may not be used to their full potential as a forum for reviewing general policing policies and strategies it must be accepted that they do provide a regular opportunity for the elected representatives of the people to focus the public spotlight on policing. Other Dail debates also display great

potential for focusing the public spotlight on specific weaknesses (and strengths) in Garda policies, strategies, organisation and resources. In the period from 1985-87 major public concerns about policing included: violent attacks on elderly people living alone in rural areas, armed robberies in Dublin, vandalism and burglaries in urban areas, joy-riding, the drug problem and subversive activities. Significantly, most of these topics were the focus of special debates either in motions put down in private members' business or in adjournment debates at the end of daily business in the House. Motions in private members' business gave rise to full blooded debates on: crime and lawlessness [80]; breakdown in law and order[81]; larceny [82]; motor insurance and road traffic law enforcement [83]; crime, lawlessness and vandalism [84]; and Garda overtime.[85] Adjournment debates are much shorter affairs with only one, or perhaps two, speakers being given the opportunity to raise a specific matter which he feels should be addressed. It is normal practice for the Minister to give a short reply; but it is not an occasion for a full debate on the matter. Relevant adjournment debates in the three-year period were: the crime problem [86]; joy-riding [87]; the crime problem in Cork [88]; armed robberies in Dublin [89]; safety of prison officers at Portlaoise [90]; Russborough House art robbery [91]; Garda stations in Dun Laoghaire [92]; and why certain provisions of the Criminal Justice Act, 1984 were not in force.[93]

Members of the Dail used these debating opportunities to highlight their constituent's, and the general public's concern about specific weaknesses in the police service. Their primary reason for doing so was to embarrass and pressurise the Minister into taking corrective action. More often than not these debates gave a sharper focus to specific policing matters which would have been covered more generally in the estimate debates. On occasions they would simply comprise a repetition of what was said in the estimate debates. In either event the effect would be to keep the pressure on the Minister and, if possible, to make that pressure more intense. It must be said, indeed, that in the three-year period under review there is evidence of such tactics paying off. The attacks on the elderly in rural areas, for example, were the subject of a special programme to catch the perpetrators; the armed robbery problem in Dublin was tackled by a special programme of intense surveillance on the suspects; while the problem of petty crime and vandalism benefited from a major escalation of the neighbourhood watch and community relations programmes. While these measures would be the immediate responsibility of the Commissioner it is evident from ministerial contributions in Dail debates that the Minister had a major input through consultations with the Commissioner and by ensuring that the available resources were targeted in the desired directions. In 1986 the Minister even secured a supplementary estimate for these purposes. It follows that the Dail's role in reviewing and

criticising shortcomings in the police service can have an impact on the shape of that service.

Unfortunately the Dail debates on private motions and on adjournment suffer from the same limitation that is evident in the estimate debates; they tackle the subject of policing at a very superficial level. Almost invariably the focus is on how the Garda have not been given enough financial and manpower resources to combat attacks on the elderly in rural areas, or to get on top of the joy-riding problem, or to keep rural stations open around the clock etc. No attempt is made to discuss whether these shortcomings could be met by a review of the Garda function. Despite the fact that Ireland has more police per head of the population than any other country in Europe, and a relatively low crime rate,[94] no attempt is made to challenge their functional deployment. The only exception consisted of sustained calls for the employment of more civilians in an effort to release "desk-Garda" for active duty. For the most part, however, it is simply accepted, or assumed, that the role of the Garda is fixed, and if the force is not providing the level of service required in vital areas the remedy is more gardai and more money. Similarly, no attempt is made to review priorities on policing. More money and more members are always preferred as the necessary solution to shortcomings rather than taking a fresh look at the allocation of resources among the various Garda functions.

Also disappointing is the range of subject matter covered in these debates. As with the estimate debates attention is focused on a narrow range of very specific law and order issues that have caught the public attention through sensational media coverage. There is no evidence of a willingness to take time to discuss less sensational, but no less important aspects of policing, such as: Garda appointments procedures, training methods, community relations or the control of garda discretion. Such matters have a critical bearing on the type of police service on offer and will often be at least partly responsible for the shortcomings which provide the substance of the Dail debates. A perusal of Dail debates, however, would convey the impression that policing is primarily a matter of manpower and resources.

It would be misleading to suggest that the Dail never addresses itself to structural and operational policy aspects of policing outside the immediate environs of getting tough on crime. Debates on Government sponsored Bills or White Papers on matters related to policing provide an opportunity for such issues to be discussed. In the survey period a White Paper on the treatment of persons in custody in Garda stations [95] and the Garda Siochana Complaints Bill [96] were occasions for debate on relevant aspects of how the Garda investigate crime, the standards that should be observed in investigations, and how suspects, the general public and the Garda themselves

should be protected against undesirable conditions and practices in this area. Although it falls outside the survey period it must also be said that the passage of the Criminal Justice Bill, 1983 through both Houses of the oireachtas was the occasion for the most comprehensive consideration of the whole subject of policing in Ireland ever experienced in the two Houses. Indeed, the introduction of both the Garda Siochana Complaints Bill and the White Paper on the treatment of persons in Garda custody was a direct response to the demands of the Dail during the debate on the Criminal Justice Bill. Nevertheless, the Dail's commitment and contribution to police accountability at this level should not be over-estimated. The significant contributions that it has made on specific issues have come only in response to detailed proposals drawn up by the government. On no occasion have Dail deputies seen fit to introduce detailed proposals on any aspect of what the police service should embrace, how it should be delivered or how the Garda should be organised and controlled. The closest they have come in this regard is a few sentences by the opposition spokesperson on Justice in an estimate debate where he called for greater managerial autonomy for the force [97], the establishment of a police authority [98] and the use of psychological testing in recruitment [99]. These suggestions have been made before and since by other deputies, but on no occasion have they been introduced in the form of specific proposals for debate. Instead it is left primarily to the government

to decide when and how structural and operational policy matters should be brought up for discussion. Needless to say, the government, under pressure from the Garda, will favour the status quo and avoid interfering in issues that could prove sensitive and controversial. The inevitable result is that the Dail does not utilise its full potential as a forum for police accountability at this level. Even where the government does provide an opportunity for meaningful debate the Dail does not always respond. In the debate on the Control of Dogs Bill [100], for example, a relevant and central issue was the need to avoid using highly trained Garda personnel to enforce the dogs legislation. The deputies, however, did not really address themselves to this issue, let alone the much broader underlying issue of what tasks were and what tasks were not appropriate for the Garda.

(d) Debates on Individual Operations

In the period 1985-87 three events provoked Dail debates on specific Garda operations which aroused public concern. Two of these, the Evelyn Glenholmes case [101] and the Emyvale shooting incident [102], were initiated by way of a ministerial statement on the facts of each to the Dail. The third, the O'Grady kidnapping [103], was initiated by the Dail voting to have an adjournment debate under standing order 30. In none of them, however, can it be said that the accountability potential of the Dail in these situations was fulfilled. In the Emyvale shooting,

for example, a Garda operation to police a republican funeral became badly unstuck resulting in some plain-clothed officers being forced to fire over the heads of a hostile crowd in order to save themselves from serious personal injury or worse. The whole incident was seen nationwide on television and was an acute embarrassment for the Garda. The Minister, however, avoided having to give a full account of how things went wrong and, by implication, accept or apportion blame by pleading possible court proceedings. He even declined a request to state the rules governing the use of firearms by the force.

In the Evelyn Glenholmes case the ministerial statement was designed to conceal more than it revealed and, thereby, to pre-empt any deeper consideration by the Dail. The case arose out of extradition proceedings against Evelyn Glenholmes. When these proceedings failed in the Dublin District Court she and her supporters had to leave the Court by the District Justice's door allegedly because gardai were blocking their exit from the public door. As the party moved along a crowded street plain-clothed gardai fired live rounds over the heads of the public allegedly because they felt that they might be disarmed and that their lives might be in danger. The Minister's statement of the facts totally exonerated the gardai involved of any wrongdoing. It was obvious, however, that the Minister's statement was taken exclusively from the Garda report which, in turn, was based on an

investigation which did not include interviews with the District Court Clerk, Glenholmes' solicitor, barrister, or supporters, or some journalists who were present. Nevertheless, the Minister presented his statement as the facts and did not advert to these omissions in the investigation. Of the three deputies who contributed to the debate one was sharply critical of the gardai, one was mildly critical and the third avoided the issue. What emerged is that this form of proceeding was totally inadequate to get to the bottom of the case. So many questions were left hanging in the air by virtue of the fact that it was not possible to cross-examine the Minister who, in any event, was merely relying on a Garda report which, in turn, was based on interviews with others. Once again the Minister did not see fit to lay before the Dail for its consideration the rules governing the use of firearms by gardai in a public place.

The O'Grady case is even more revealing on the accountability limitations of the Dail in these situations. The frustration of the Dail at the highly publicised operational blunders in the search for O'Grady and his kidnappers was heightened by the disturbing background of the Eksund arms shipment and the Enniskillen bombing outrage. Nevertheless, the catalyst for, and focus of, the debate was the startling allegations that both the government and the Garda had collaborated in an attempted ransom payment to the O'Grady kidnappers despite the

publicly stated official policy that ransom payments would not be permitted in such situations. Even if the government or the Garda had not actually collaborated the question remained as to how a cash shipment of £1 million sterling and £½ million punts could have moved across country from Dublin to Cork without being intercepted at a time when gardai, with the assistance of the army, were conducting a high profile nationwide hunt for the kidnappers. Equally disturbing for the democratic accountability of the Garda is that not only did the Dail debate fail to evoke any answers to these questions, but it did not even succeed in pressurising the Minister to address himself to the key issues. To make matters worse the Minister, in interviews to the media, distanced himself from the Garda on the issue of responsibility for what had happened. The Garda, however, cannot be called to account directly to the Dail. Their accountability can only be secured through the Minister answering on their behalf. If he fails or refuses to accept ultimate responsibility for policing failures, and at the same time fails or refuses to explain how the Garda are responsible for the failures and what action is being taken to effect improvements, the whole structure of democratic accountability over policing will itself fail in the very situations where it is needed most.

(e) Reasons for Dail's Weakness

(i) Introduction

Dail debates provide a national forum in which both general and particular aspects of policing can be debated in public. The value of such debates from an accountability perspective is that they are an occasion for informing the Dail and the public on what policing policies, priorities, practices and procedures are in any general or specific matter and thereby to permit the public, through the Dail, to consider the acceptability of these policies etc and to advocate change where that is deemed necessary. Implicit in this is the opportunity to discuss how the Garda performed in a particular incident which has caught national attention and to commend or criticise that performance as the case may be. From the foregoing discussion it is submitted that Dail debates do not fulfil the accountability burden that is imposed upon them. Several factors can be identified as being responsible for the Dail's failure in this regard.

(ii) <u>The Minister</u>

The Minister for Justice plays a pivotal role in the Dail's contribution to police accountability. In the Dail debates not only does he discharge the primary burden of explaining government policy on policing, but he also provides the target for criticism of inadequate or unacceptable Garda policies, practices, procedures or operations. Implicit in this is the responsibility to convey information to the Dail about those policies etc including where necessary: explanations on why they have

proved unsatisfactory or unacceptable in general or specific instances. The Dail will also look to the Minister to take the necessary measures to remedy both general and specific shortcomings which have been identified in the Garda service. There are, however, several factors which impede the Minister's capacity to fulfil these expectations. It must be remembered that he does not enjoy operational control over the Garda. He only has to answer for the resources that are made available to the force as opposed to the operational policies pursued by the force. Attempts to relate deficiencies in the Garda service or unacceptable Garda policies or practices to inadequate resources are often easily repelled. The Minister can resort to a rehearsal of the government's record in making legal and material resources available to the force and the assertion that these were the maximum consistent with the current state of the national finances and basic liberal democratic values. The inevitable result is that potential debates on Garda policies and practices are diverted into repetitive debates on whether or not the government could or should make more resources available to the force and the consequences of not doing so.

Specific Garda operations which have evoked serious public concern pose a more difficult problem for the Minister. he is normally happy to report to the Dail on such matters by way of providing information. The fact

that he does not enjoy a statutory power to exercise executive control over Garda operations means that he will merely be reporting to the Dail on a report that has been drawn up by the person who does carry the statutory power of control, namely the Commissioner. Since a report will be drawn up by persons directly involved in the operation in question there will be a very human tendency to play down any weakness or failure on their part. It is essential, therefore, in the interests of accountability that the report should be the subject of critical examination in the Dail. The Minister, however, would not be in a position to respond to the queries of Dail deputies. The most he could do is merely repeat what is contained in the report without further elaboration or clarification. Attempts to discover whether there are additional facts which have not been reported or whether the public concern can be traced to policy, procedures or shortcomings on the part of individual Garda officers will be frustrated. What is really required is the presence of the Commissioner himself to listen and respond to the queries and suggestions of Dail deputies which are aimed at establishing exactly what went wrong and identifying measures that would prevent a recurrence. The situation becomes even more unsatisfactory when the Minister himself has been closely involved in a Garda operation which has attracted Dail interest. If the operation has been bungled, as in the O'Grady case, the Minister will wish to distance himself as far as possible from it. That, in

turn, will mean revealing as little information as possible to the Dail. A Dail debate in such circumstances will degenerate into an occasion for opposition deputies to let off steam by firing a string of allegations at the government. The failure of the Minister to respond in any meaningful way to such allegations will deprive the public of an opportunity to learn more about how the operation went wrong, who or what was responsible, and what could and would be done to prevent a recurrence. In short the public will be denied an effective medium for calling the Garda to account.

A striking feature of ministerial contributions to debates in this context is the manner in which he always seems to act as the spokesperson for the Garda. This is reminiscent of the traditional ministerial practice of protecting the civil servants in his department from public criticism by accepting responsibility for shortcomings which would otherwise be attributed to individual civil servants. In the case of the Garda, however, the Minister officially recognises a separation of powers between his responsibility for the provision of adequate resources for the police service and the operational application of those resources which is the responsibility of the Commissioner. One could expect, therefore, that the Minister would stoutly defend his government's record in providing the necessary resources for the Garda, but would adopt a much more even-handed approach to criticism of

Garda operational matters. With respect to the latter it might be reasonable for the Minister to defend the Garda where he felt that that was justified and to criticise the force when he felt that criticism was due. Such an even-handed approach on the part of the Minister would be instrumental in boosting the Dail's accountability potential as he is in a key position to lead informed debate on operational police matters.

In all the debates in the survey period all three Ministers for Justice, as expected, vigorously defended their government's record in the provision of legal and material resources to the Garda. If there were shortcomings in the Garda service neither the Minister nor the government were accepting responsibility for them. However, the reasonable expectation of the Minister leading criticism in operational matters where criticism was due has not been borne out in practice. Indeed, each successive Minister's record is characterised by a policy of praising the excellence of the Garda service. It is not possible to point to one example in the Dail debates over the three year period where the Minister has accepted openly that the Garda service fell below the required standard either in a general matter or with respect to an individual operation. The Minister's role has been clearly that of defender of the force not just against criminal or subversive elements but also against anyone who criticises any aspect of the Garda service. The numerous, widespread

vociferous complaints that the Garda was not responding adequately to violent attacks on the elderly, joy-riding, drug offences, armed robbery, general crime and vandalism and the special needs of rural communities made no common ground with the Minister. Even highly publicised and embarrassing bungles such as the Emyvale shooting or the O'Grady kidnapping could not dislodge the Minister from his posture of defending the Garda in the Dail.

There are some compelling reasons why the Minister resolutely defends the Garda's operational activities even though these are not his statutory responsibility. First, the government, of which he is a member, appoints the Commissioner and has the power to remove him. If the Minister was seen to accept and even participate in criticism of Garda operational matters the opposition deputies might be encouraged to present this as evidence that the incumbent in the Commissioner's office was not suitable for the position. This, in turn, would call into question the political and professional judgement of the Government that appointed him. If the opposition succeeded in turning it into a major issue it might necessitate the replacement of the Commissioner in order to restore public confidence in the force. Given the sensitive nature of the office such an event, instigated at the behest of the opposition, would have a destabilising effect on the government. Of course, this need not be an inevitable consequence every time that the Minister engages in

reasonable public criticism of operational matters. However, the fact that it is a possible consequence will be sufficient reason for the Minister to stifle such criticism rather than provide a focus for it.

Second, if the Minister did adopt a much more even-handed critical approach to Garda operational matters it would dilute the close working relationship that has always prevailed between the Minister's and the Commissioner's offices respectively. Both offices have a common interest in having a police service delivered in an efficient and professional manner. If the Minister leads, or even accepts, criticism in the Dail to the effect that specific Garda operations could and should have been handled better or that certain Garda policies are in need of revision, an immediate result will be embarrassment for the Commissioner. That may be quite beneficial insofar as it would prompt the Commissioner to effect any necessary improvements. The price the Minister may have to pay, however, is a drop in the loyalty and commitment that traditionally he could expect from the Commissioner. In future when the Minister asks the Commissioner, in response to a Dail question, whether resources are adequate to deal with the crime problem in a particular area or to expedite a particular Garda operation, the answer may not always be as politically accommodating for the Minister as it has been in the past. The Commissioner, quite understandably, will feel that if he can be criticised by the Minister in

the Dail for shortcomings in the Garda service, it will not be in his best interests to report to the Minister that his resources are adequate when in fact they are not. To do so would be tantamount to accepting the blame for matters over which he has no control. If the Commissioner adopted a much more self-serving line in response to these questions the Minister would find himself with much less scope that he currently enjoys to deflect Dail criticism about any aspect of the police service. It is in the Minister's political interests, therefore, to act as the defender of the Garda in the Dail rather than as an honest broker between the legitimate concerns of Dail deputies on policing matters on the one hand, and the interests of the Garda on the other.

The third reason is perhaps the most fundamental of all. It is most poignantly summed up in the following contribution from a former Minister for Justice in the Dail debate on the O'Grady kidnapping:

> "There is nothing between us and the dark night of terrorism but that Force. While people in this House and people in the media may have freedom to criticise, the Government of the day should not criticise the Garda Siochana. We all know that there were mistakes made in the operation but it is obscene that the Government and the Minister responsible should be first to lead the charge in the criticism of the Garda Siochana."[104]

The fact that these are the words of a former Minister for Justice lends formidable authority to what they say about the Minister's, and the government's, role in calling the Garda to account. The nub of his thesis is that the

people's elected representatives in government cannot afford to criticise the Garda in public because it is the Garda that they depend on to protect their constitutional and democratic structures. The context in which he was speaking was the general IRA campaign to overthrow the existing constitutional order. His thesis, however, has a much wider relevance. It is equally applicable to attempts to bring down the government of the day by extra parliamentary means such as concerted industrial action, organised street disorders or widespread civil disobedience. While the people as a whole may have a general interest in seeing that such methods are not used as a means of subverting democratic parliamentary procedures, it is in the government of the day that that interest is concentrated. The government bears the primary responsibility for ensuring that the prescribed procedures for the resolution of public dissatisfaction, laid down in the Constitution and at law, are followed. Any attempt to promote a particular grievance by subverting these procedures would pose a threat to the stability of the government and the common good if it got out of hand. The primary means at the government's disposal to prevent such situations getting out of hand is the Garda Siochana. Whether the threat comes from militant strikers on the picket line, disaffected parents who have taken to the streets or supporters of the IRA, it is the Garda Siochana who will form a "thin blue line" to prevent the situation escalating to the extent that it threatens the stability of

the government or the State itself. This dependence of the government of the day on the Garda seriously emasculates its scope for public criticism of the force. To hold otherwise would be tantamount to expecting the government to chip away at one of the basic pillars which support it.

There are grounds to question the assertion that the critical role played by the police in securing the political stability of the State must put the Garda beyond the reach of public government criticism. In Ireland, however, the thesis gains strength from the fact that the Garda is a centralised national force and, most critically, fulfils the role of the State secret service in addition to its normal policing function. Before the government could go public with any criticism of the force or its operations it would have to consider the possible impact of such criticism on Garda morale. If the effect would be to undermine the Garda's confidence and capacity to discharge its vital peace-keeping and security functions, the government would feel compelled to refrain. Indeed, merely to refrain may not be enough. The government may have to go further and publicly defend the Garda against criticism from disaffected individuals or interests. Failure to do so may have the effect of undermining the Garda's capacity to discharge its vital peace-keeping and security functions effectively. It is hardly a coincidence, therefore, that every time the quality of the police service is under attack in the Dail the Minister goes on the offensive not

only to support the government record on the points at issue, but also to champion the quality of the Garda and the service it provides. The dependence of the government of the day on a police force which has, and is seen to have, the morale, capacity and commitment to discharge its vital functions renders the Minister for Justice an unsuitable figure to facilitate the political accountability of the Garda Siochana. Indeed, his role could be interpreted as being designed to protect the Garda against the full rigours of democratic accountability.

(iii) Dail Deputies

To some extent it is unfair to single out the Minister as if he were the only figure responsible for the Dail's failure to function as a prominent mechanism for police accountability. The Dail deputies themselves have a very poor record in seeking to use the chamber as a forum to raise aspects of Garda policies and operations for the purpose of expressing concern at their content or outcome, ascertaining who or what was responsible and advocating measures that should be taken to meet their concerns. As explained earlier there is no reluctance to raise policing matters for discussion; it is the direction and quality of that discussion which fail to fulfil the potential of the Dail as a police accountability mechanism. This failure is expressed most vividly in the marked reluctance of Dail deputies to criticise the Garda. It is as if there is a convention that the Commissioner, Garda management,

specific Garda policies or operations should not be criticised directly. If members are unhappy about any of these matters they address themselves to the Minister in terms which suggest that it is he personally, or the government, that is to blame. If the Garda is having no success in preventing violent attacks on the elderly, tackling joy-riding or getting on top of crime and vandalism deputies attribute this to the alleged failure of the government to provide the force with the necessary resources; and they focus their criticism accordingly. Deputies refuse even to contemplate that perhaps part of the problem may lie with the Garda itself. The following comment is typical:

> "I want to make it clear in highlighting today the unacceptable level of crime and vandalism and the effect which it has on malicious injury claims, that I am not in any way casting a reflection on the Garda who are doing a marvellous job."[105]

Almost no attempt is ever made to address the issue of to what extent, if any, Garda operational policies or structures were to blame and how, if at all, these should be changed.[106] Invariably the Minister responds simply with a recital of the resources that the government has put at the disposal of the Garda and a claim that the Garda are producing results. That effectively exhausts the Dail's accountability input in debates on policing matters which have given rise to public concern. Over the survey period this sterile pattern was repeated again and again in debates on the estimates, attacks on the elderly, joy-riding, armed robberies, crime and lawlessness,

malicious injuries, larceny, law and order and Garda overtime. On none of these occasions did the Dail present the appearance of an institution which was ready, willing and able to get to the bottom of a policing problem and advocate measures to remedy it.

The timidity of Dail deputies in these matters is most vividly illustrated in the context of specific operational incidents which have captured the public attention. Even when the reported facts of these incidents strongly suggest a botched Garda operation Dail members patently take great pains to avoid overt criticism of the Garda. In the Emyvale incident, for example, the Garda decision to adopt a low-key approach during the IRA funeral demonstration with a view to effecting the arrest of the colour party afterwards was under fire in the media. Much public criticism of the softly softly approach was voiced by those who felt that the rule of law would have been better served by the RUC policy of high profile prevention in such circumstances. Furthermore, it was difficult to avoid the conclusion that the Garda plan to arrest the colour party in the circumstances was ill-conceived, poorly prepared and ineptly executed. This was reflected in the fact that the Minister felt compelled to make a statement [107] on the matter which, in turn, led to contributions from other deputies. The most striking feature of all the contributions was the absence of criticism of the Garda. Indeed, it sounded as if each member was vying with the

other to see who could be loudest in their praise of the force. No serious effort was directed at ascertaining what the Garda policy was in the circumstances, why it appeared to have gone so wrong and what was needed to avoid a recurrence. It was as if the Dail itself was closing ranks behind the force to defend it against those who might be of a mind to criticise. Although the Emyvale incident arose out of the subversive activities of the IRA there is good reason to believe that this example of the Dail lining up behind the Garda is representative of the Dail stance in all or most instances where Garda policies or practices are exposed to public criticism. Despite the substantial volume of Dail criticism levelled at the police service in the period 1985-87 it is not possible to point to any debate in which more than one deputy laid any of the blame directly at the door of Garda policies or practices.

At least part of the explanation for the Dail's timidity in these matters must concern access to information. If the Dail is to function as a substantial forum for police accountability it is essential for deputies to enjoy easy access to information on all aspects of Garda structures, management, policies, practices and operations. Clearly some restraints would have to be imposed on the ground of national security and to protect the success of individual operations. Apart from such minimum restraints, however, there would not appear to be any reason in principle why deputies should not have easy

access to the information they would need to discharge their police accountability function effectively. In practice deputies are confined to whatever information the Minister chooses to reveal to them either in Dail debates or in answer to Dail questions, and whatever information they can glean from the Commissioner's annual report and informal or personal contacts in the force. They have no legal right of access to information. This lacuna becomes painfully obvious in the substance of Dail contributions to debates on policing. Almost invariably deputies confine themselves to supporting or attacking the government's record in making the necessary resources available to the Garda. Attempts to highlight weaknesses in Garda structures, management, policies, priorities and operations are conspicuous by their absence from debate. To contribute constructively on these matters deputies would need access to relevant information about them. The only person with such information outside the Department of Justice is the Commissioner. He passes it on to the Minister who, in turn, decides how much of it to pass on to the Dail. Insofar as any of it is passed on to the Dail at all, it will be done in a manner designed to present the best image of the government and the force. This leaves Dail deputies in the predicament that if they attempt to raise matters such as Garda policies or operational practices their lack of factual information will be quickly and sharply revealed by the Minister as a lack of understanding. It is hardly surprising, therefore, that

deputies confine themselves mostly to matters, such as resources, with which they are more familiar. If, for example, violent attacks on the elderly have become an issue of public concern deputies can be seen to be doing something about it by attacking the government for allowing numbers in the force to decline, cutting back on overtime, closing rural stations, not making sufficient funds available to improve Garda equipment, or generally for failing to make available resources compatible with the scale of the problem. The limited information at their disposal on the relevant Garda policies, structures and strategies makes it difficult for them to do much more. This problem could be reduced to some extent if information was accessible in a manner and to an extent which enabled sufficient deputies to develop an expertise on police and policing matters. Until that happens the Dail's capacity to function as an effective police accountability forum will remain undeveloped.

Even if Dail deputies did have access to all necessary information it would not necessarily follow that they would give the lead in calling the Garda to account. Indeed, the simple fact of the matter is that deputies are very reluctant to criticise or to be seen to criticise the Garda. This reticence can be traced back to the same source as the government's commitment to defend the force against all criticism. The Dail, no less than the government, acknowledges that its constitutional stability

is heavily dependant on the labours, and on occasions, the lives of gardai. This is very bluntly expressed by one contributor to the debate on the Emyvale incident who criticised the softly-softly approach of the Garda but prefaced her remarks by saying:

> "Like many Members one is always very wary about being critical of our Garda Siochana. They have a very difficult job to do and many members of the force have tragically lost their lives."[108]

It must be said that she was the only speaker who even dared to direct the mildest of criticism at the Garda in respect of the incident. All other speakers used the opportunity to express sympathy and solidarity with the force and condemnation for the IRA. From this and the general demeanour of the Dail towards the Garda in other debates it is evident that it sees itself as a staunch ally of the force. Its police accountability function is heavily compromised by the knowledge that public criticism of the policies or management of the Garda could undermine morale and its capacity to respond effectively to the exceptional demands that the State will make on it from time to time. On occasions the Minister will even play on this sensitivity to encourage the Dail to desist from saying too much about Garda operations which have not been successful.[109]

Another factor underpinning the Dail's reluctance to criticise the Garda directly is that such criticism is politically wasteful and, sometimes, counterproductive. If there is genuine public concern over any aspect of the

police service or individual Garda operations opposition deputies will gain little by focusing criticism directly at the Garda; even if that is where it belongs. The Garda is not in government, nor will it be competing against the opposition in the next general election. Directing criticism at the force, therefore, will produce little in the way of political capital for the opposition. Indeed, it is much more likely to be politically damaging. The Garda still commands widespread support and affection among the Irish electorate. For most law abiding citizens they are viewed as a body of men and women who do a difficult and dangerous job and who are always available to protect the weak and vulnerable against aggression and fear. That much is evident from the Dail contributions of the people's representatives. Given this background it would be a very brave deputy who would express public criticism of the force on a regular basis. Even if his criticisms were motivated solely by a desire to promote improvement they could so easily be presented by his Dail opponents as evidence of a willingness to favour criminals and subversives against gardai. Few things could be more conducive to undermining a deputy's political power base in Ireland than the reputation for being soft on criminals and hostile to the Garda. Only one deputy in the last few decades has publicly adopted a critical stance with respect to the Garda, and he did not get re-elected once his stance became known. Interestingly this deputy belonged to one of the conservative parties and was a maverick within that

party on many issues. Even the parties and independent deputies of the left have not developed a reputation for being critical of the Garda. It must also be remembered in this context that the proportional representation system means that deputies in the same party are often competing with each other (and other potential candidates of their own party) for the same votes. This coerces them into concentrating on issues which are important to their own local electorate. The need to keep a close check on the national policies, management and operations of the Garda is not likely to be one of them.

Just because it might be prudent for deputies to avoid directly criticising the Garda for shortcomings in the police service it does not follow that they ignore them altogether. Throughout the survey period alleged shortcomings in the police service were a significant feature of Dail proceedings. Reading through these proceedings it is obvious that opposition deputies use public concern at matters such as an apparent increase in the level or brutality of crime or a reduction in the level of police service to gain as much political capital as possible. Instead of focusing their criticism on the Garda, with the attendant political pitfalls that that would entail, they concentrate their attack on the government of the day. In 1985-86, for example, the opposition adopted an alleged breakdown in law and order as one of its main weapons to undermine the credibility of the

government which ultimately resigned in 1986. In this period critical motions on the police service were the subject of four major debates in private members business alone.[110] In addition, the debates on private members Bills on Larceny [111] and on Motor Insurance [112] were occasions for further concentrated attacks on alleged deficiencies in the police service. Four adjournment debates were also directed at this target. The constant theme throughout opposition contributions to these debates was the government's failure to provide the Garda with the necessary resources to function effectively. The image portrayed was that of a police force whose members were ready, willing and able to provide the police service required by the citizenry, and a government whose incompetent policies were frustrating the force from achieving its potential. The standard response of government deputies was to refute opposition allegations as exaggerated or inaccurate and to detail the additional resources that were being made available coupled with assertions that the Garda was winning the war against criminals, vandals and subversives. In short, the debates invariably deteriorated into a squabble over whether or not the government was providing sufficient resources to provide an adequate and efficient police service. In the often heated atmosphere there was little opportunity for, or attempt at, identifying or discussing causes and remedies which transcended the simplistic issue of whether sufficient money was being spent on the Garda. Matters

such as: Garda priorities, law enforcement policies and strategies, structures and management were never addressed. These more technical or sophisticated issues are not conducive to attracting media attention. Consequently there is little political capital to be made out of them for either the opposition or the government. Furthermore, comment on such issues could easily be interpreted as direct criticism of the efforts of the force.

(iv) Procedure

Any criticism of the Dail's contribution to the democratic accountability of the police must take into account the procedural and time constraints under which it works. Since it is the democratically elected tier of the legislature its remit extends far beyond that of keeping a check on the government and the multitude of other bodies and individuals discharging public functions. Two other major responsibilities are legislating and finance. All three areas have become steadily more complex and burdensome in response to the increasing pace of change in the social, economic, moral and international arenas. Our membership of the European Communities alone with its consequent obligations and opportunities is demanding an increasing proportion of Dail time and attention. By contrast the modus operandi of the Dail has not kept pace with this sustained increase in its workload. It still sits for only three days each week and a total of about 96 days in the calendar year. Nevertheless, it continues to

handle the bulk of its business on the floor of the House. While some effort has been made to establish standing committees [113] it remains the case that the workload in most subject areas must seek accommodation on the floor of the House. This in turn means that Dail proceedings must be highly regulated in order to ensure that the deputies have some opportunity to exercise their democratic mandate, and also to satisfy the need to get through the large volume of business.

The inevitable result is that there is very little opportunity on the floor of the House for deputies to thrash out the full details of any particular Garda policy or operation, let alone to formulate alternative proposals for the future. These matters are normally discussed through formal debates. The typical practice is for the Minister for Justice to open the debate in support of government policy and the Garda record. He will be followed by the main spokesperson for the opposition who will deplore the policing situation on the ground and castigate the government as being responsible for it. He will be followed by a succession of spokespersons for one side or the other who often do little more than repeat the substance of what their lead spokespersons have already offered. Normally, the Minister will wind up by answering some of the points that have been raised in debate. There are, of course, variations on this pattern but the substance is basically the same. What is distinctly

lacking is the opportunity to clarify points in cross-examination of the Minister. This is especially evident where the debate is initiated by a statement from the Minister to the Dail purportedly setting out the facts surrounding a controversial Garda operation. Where subsequent speakers offer a different version of events or raise matters which are absent from the Minister's version, the listener or reader is often left perplexed as to what the complete and true facts are. This practice serves only to frustrate rather than to provide accountability. The only occasions on which deputies do get the opportunity to cross examine the Minister on police matters are oral questions and private notice questions. As has been seen, however, the time constraints imposed on supplementary questions to an oral question, coupled with the speaker's hostility to any attempt to expand the scope of an oral question through supplementaries, render it a very weak device for exploring aspects of policing in some detail. In any case, the fact that the Minister is under no positive obligation to offer full and frank answers to such questions practically ensures that they will reveal the least in those circumstances where they are needed the most.

5. Conclusion

The democratic process applicable to police accountability in Ireland is the same as that which applies to any other service provided by the government. Each

individual member of the force can be called to account for his actions by the Commissioner who, in turn, can be called to account by the Minister for Justice and the government who, in turn, are accountable to the people through the democratically elected representatives in the Dail. This arrangement ensures both that the Garda Siochana can be described as democratically accountable and that its' democratic accountability is coloured by all the features of the national political process in Ireland. It is suggested here that this latter aspect accounts for many of the weaknesses apparent in the democratic accountability of the Garda Siochana. Factors such as: the use of the written question procedure to access relatively trivial and mundane information, the ability of the Minister for Justice to stonewall during oral question time, debates focussing on the government record in making resources available instead of on the policies underlying the application of the resources are by no means peculiar to the police service. Similar factors are evident at work in the democratic process applicable to most other government services.

There are, however, two factors peculiar to the Garda Siochana which have a very distinct bearing on its' democratic accountability. The first is the constitutional status of the force. This enables the Minister to stand up in parliament and disclaim responsibility for operational decisions and activities of the force, and to decline any invitation to issue operational instructions to the force.

The most he can do (and even then he is under no, obligation to do it) is convey information on operational matters from the Garda Siochana to parliament. The inevitable result is that parliament finds itself discussing aspects of policing which have given rise to acute public concern in the absence of the only person who can answer directly for the matters in question and who can accept responsibility for taking appropriate remedial measures where necessary. The most that the Minister or the government can accept responsibility for are the powers and resources made available to the force. Accordingly, the focus of parliamentary attention is switched to powers and resources and away from policy and efficiency. A major, and critical, gap in police accountability is exposed.

The second factor is the very sensitive nature of the service provided by the Garda Siochana. Their role in the law enforcement process, for example, ensures that many of the decisions taken by individual members on the ground are quasi-judicial in nature. The decisions to arrest and charge in any individual case, for example, can be viewed as integral parts of the judicial process and, as such, they must be accorded the independence that attaches to that process. It would be inappropriate, therefore, for a government Minister to accept responsibility for, or assume the power to direct, such decisions. Indeed, the desire to avoid even the appearance of political interference in such matters impacts on the Garda law enforcement decisions and

activities which fall short of arrest. Even in situations where there is no quasi-judicial law enforcement dimension to its' role the Garda can usually escape the full glare of democratic accountability that would attach to other public services. This can be attributed to an acknowledgement on the part of the government and public representatives that the Garda Siochana hold the line between order and chaos. Insensitivity in calling it to account could undermine its' capacity to perform this critical role. Since government Ministers and public representatives have a particularly strong vested interest in social harmony they are inclined to adopt a softly-softly approach to the democratic accountability of the police.

The question that arises now is what measures can be introduced to enhance the capacity of the democratic proces to cope with the idiosyncracies of the police in a manner which enhances democratic accountability without hampering the capacity of the Garda Siochana to deliver its' vital service.

1. Political Control

(a) Introduction

Superficially it might seem that a simple solution to the weaknesses in the democratic accountability of the Garda Siochana is to plump for full democratic control over the force. This could be achieved by conferring the Minister with a statutory power to issue binding directions to the Commissioner in all matters affecting the latter's direction and control of the force. Accordingly, if the Minister was not happy with any aspect of operational policing, whether it related to a general policy, a general practice or a specific situation, the Minister could instruct the Commissioner to adopt whatever course of action, within the law, that the Minister felt appropriate. The necessary concomitant of such a power, of course, is responsibility. The Minister would have to answer directly to the Dail for all operational matters affecting the force. No longer would he be able to hide behind the response that such matters are the statutory preserve of the Garda Authorities. When the Dail registers dissatisfaction with some aspect of operational policing he would have to explain not just that adequate resources were being made available, but that the correct operational policies and strategies were being adopted to cope with the problem. His failure to convince the Dail on these matters would undermine his political credibility and, in extreme

cases, could lead to his forced resignation or removal from office.

(b) Accountability Arguments in Favour

For those who wish to see the maximum level of democratic police accountability the attractions of political control are clear. For the first time elected representatives of the people would be able to hold someone directly accountable to the Dail for operational aspects of policing. This, in turn, would facilitate greater openness and public debate about operational policing. A further consequence would be greater democratic input into the contents of operational policies and practices. Given that the Minister for Justice is a member of a government which holds office only because it can command majority support in the Dail, and presumably the country, it can be argued quite forcefully that his control over the police would have a democratic foundation. Certainly his operational control would be much more sensitive to public sentiment than that of an autonomous, unelected Commissioner. The Minister would find it much more difficult to ignore Dail pressure for the adoption or review of particular operational policies and strategies. Indeed, it conjures up an ideal picture of operational policing being under the control of a directly elected authority which, in turn, is directly accountable to the electorate for the manner in which it exercises that control.

In a parliamentary democracy served by a state police force the case for ministerial control over the police does appear convincing. Speaking in the British context, Lustgarten[1] poses the question that if police is a public service why should it not be as subject to democratic control as any other public service such as: health, welfare, education and environmental protection. It is a fundamental tenet of parliamentary democracy that the public can control the delivery of these services through the medium of democratically accountable government. The degree of control that may be exercised, or the mechanism through which it may be exercised, may differ from one service to the next but the concept itself is not in question. In Ireland, for example, where public services or activities are hived off from central government to state-sponsored bodies it is standard practice for the appropriate Minister to be conferred with a power to issue policy directions to these bodies on the exercise of their functions.[2] The mere fact that some of these public bodies or officials may be vested with powers directly by law does not automatically mean that they are beyond the reach of ministerial direction on how they should carry out their duties. It simply means that the body or official in question must use its or his own discretion when deciding whether or not to exercise the powers in any individual case. This is particularly relevant to the police. There may, of course, be some bodies, such as judges or the DPP which, necessarily, are constitutionally or statutorily

immune from such direction. Generally speaking, however, it is an incident of democracy that those vested with the powers, resources and duty to provide public services are subordinate to the public in the manner in which they deliver these services. For central public authorities, this subordination is normally effected through the medium of a government Minister who will be vested with the power to direct the delivery of the service.[3] Indeed, this is such a standard feature of parliamentary democracy that any suggestion that it should not apply to the police will have to be accompanied by very substantial reasons.

Given the steady growth of the convention of police independence in both Britain and Ireland throughout the twentieth century it might be assumed that there are such substantial reasons in the case of the police. In Britain the position has been reached where it is accepted that the police are legally and constitutionally beyond the reach of political direction in operational matters: even where that direction is confined to general policy. A similar view is accepted in Ireland although its status as yet might be described more accurately as one of convention. In Britain, where the issue has been the subject of sustained public debate since the sixties, the primary explanation for police independence would appear to be a desire to retain the traditional constitutional status of the police coupled with a recognition of the special nature of their function.[4] However, the adequacy of these explanations

are not without their critics. In particular, the notion that the police in Britain (and Ireland) have always been constitutionally independent from political direction has been scrutinised closely and found wanting as explained earlier. In any event, to say that the law is, and always has been, that the police are independent from political direction is merely a statement of positive law. It does not offer convincing reasons as to why the law should continue in that vein; unless continuity and tradition are accepted as ends in themselves.

(c) The Problem Posed by the Police Function

(i) The Police as Judicial Decision-Makers

The argument about the special nature of the police function has also been severely tested by critical examination from advocates of greater democratic control.[5] However, it has proved more substantial. This argument derives from a perception of the police as judicial or quasi-judicial functionaries. Their role in law enforcement is equated with that of a judge. While the task of the judge is the impartial interpretation and application of the law to the facts of each case brought before him, so also must the garda make an impartial determination of what the law requires and act accordingly in any situation that he comes across. Because the criminal law sets basic minimum standards of behaviour expected of each individual in society it is a fundamental principle of natural justice that those who interpret and

enforce it must act, and be seen to act, with complete impartiality. In the case of the judiciary that is achieved by placing them above politics in the sense that they are constitutionally independent from executive direction in the exercise of their judicial functions. Similarly, it is argued, that the police must also enjoy this independence from democratic control in the exercise of their law enforcement function.

(ii) The Police as Political Decision-Makers

One fallacy in the argument is its failure to cope with the concept of discretion. The judiciary, of course, do not exercise discretion in their interpretation of the law and, only in exceptional circumstances, do they have discretion in their application of the law to individual cases; even then their discretion is normally constrained by formal legal rules. The same cannot be said for the police function. To suppose that the enforcement of the law on the streets is amenable to a similar mechanical process is to ignore reality. Writing in 1960 Goldstein drew attention to the fundamental importance of discretion in police work.[6] He explained how the police are virtually unique among bureaucratic organisations in that the degree of discretion vested in them is greatest at the lowest level of the hierarchy; in the case of the Garda Siochana that would be the bottom ranking garda. Closely associated with this point is the fact that the discretion is often exercised in circumstances of "low visibility"

where the chances of review are remote. Subsequent commentators have developed this thesis to the extent that police discretion in law enforcement has become a central concept in police literature.[7] Lustgarten, for example, gives an excellent account of the contextual factors that a police officer must consider when deciding whether or how to enforce the law in individual situations.[8] The decision to effect an arrest or to take names and addresses with a view to prosecution is only one option open to him. He could choose to proceed by securing the consent of the person or persons involved to cease their unlawful activity or he could decide that the unlawful activity will only be temporary and that, taking all the circumstances into account, the benefits of tolerating it outweigh the harmful consequences that would flow from a strict and rigorous application of the law. Insensitive and inflexible enforcement of the law in individual cases could aggravate a sense of injustice already felt by one section of the community to the extent that it would erupt into communal violence and/or a breakdown in relations between the police and that section of the community. It is the police officer who must take this into account when deciding whether or not to enforce the law in any individual case. In most situations he will be acting within his lawful discretion whether he decides to insist on a strict application of the law or not. His action in doing so, however, can only be described as judicial in the very broadest sense of that word.

The importance of discretion in the role of the individual police officer is replicated at the level of the force as a whole. The chief officer must also be aware of the need to balance the demand for rigorous law enforcement with the need to avoid a breakdown in public order or in police-community relations.[9] Accordingly, he will find the need, on occasions, to issue instructions to the effect that police intervention should be used as a last resort or that certain practices should be followed in the exercise of coercive powers. When to issue such instructions, and what their content should be, are political choices within the discretion of the chief officer. The courts can intervene only in very exceptional situations. A similar exercise in political decision-making arises with respect to the allocation of resources in law enforcement. Given the scope and number of criminal offences, coupled with the limited resources that can be made available to the police, absolute enforcement of the law is a practical impossibility. This in turn means that the chief officer will have to decide from time to time which crimes, neighbourhoods, persons and property deserve proportionately more attention. Variables which will influence his decisions are perceived trends in criminal activity; social, economic and cultural change; the vested interests of the police organisation; his own personal law enforcement priorities; perceived swings in public opinion; changes in the law etc. At the end of the day, however, it is for the chief officer to weigh up all the competing

factors and make a decision to favour one interest over another. That can only be described as a political act.

The proponents of greater democratic control over the police enlist this political dimension of law enforcement as a primary ingredient in their case. They accept that operational decisions concerning an individual arrest, investigation or prosecution should be beyond the scope of political direction. However, they also argue, with disarming simplicity, that in the general policy making aspects of law enforcement the chief officer should be amenable to directions from a democratically elected body.[10] While various views have been offered on the degree and form of this input there is general agreement among them that the inherently political nature of decision making on operational police policy matters requires democratic control.

(iii) <u>The Distinctiveness of the Police Remit</u>

While there is clearly much substance to the arguments of the proponents of greater democratic control, it is submitted that they fail to give sufficient weight to the distinctive nature of the police function and organisation or to address the full implications of direct democratic control over operational police decision-making. To equate a chief police officer's direction and control over his force with the political direction exercised over other public bodies and services, as Lustgarten does, is hardly

to equate like with like. The differences are evident at several levels. First, there is the contrast between the nature of the police function itself and the functions discharged by other government departments or bodies. The latter comprise mainly of units with relatively narrow remits prescribed either in the Ministers and Secretaries legislation or in their own subject-specific establishing legislation. When a government Minister exercises a directive power over any of these departments or bodies the effect will be felt only within the relatively narrow subject boundaries which have been imposed by parliament. The police remit as described earlier, however, is characterised by its broad scope and relatively indeterminate nature. Law enforcement, crime prevention, the maintenance of public order, securing the stability of the State, the enforcement of economic, social and general public regulations and coping with accidents and emergencies are not necessarily a finite definition of the Garda function, and yet they already embrace a remit many times wider than that of any other government department or body. Consequently if a government Minister was vested with the power to issue operational policy instructions on police matters, that power would be as broad and as ill-defined as the police remit itself. Clearly such a power would be in a wholly different category from the directive powers normally associated with government Ministers.

Another aspect of the police function which emphasises

its singularity is the preoccupation with law enforcement. Some other government department and bodies do include law enforcement within their remits but the subject matter affected is even more narrowly defined than the already narrowly defined remits of the bodies themselves. The police, by contrast, are not confined by any such restraints. They are expected to enforce the law generally irrespective of subject matter. The significance of this is enhanced by the special authority enjoyed by the law in a democratic society.[11] One of the pillars upon which this authority has been built is the notion that everyone is equal before the law. In matters of law enforcement this translates into the expectation that the law will be enforced impartially and without fear or favour to any vested interest or individual.[12] Any deviation in practice from this cardinal rule will not be viewed simply as part of the normal give and take expected in the functioning of democratic government. It will be seen instead as an attack on the authority of the law and, by implication, on one of the basic tenets of civilised society. The law enforcement function of the police, therefore, can be identified as something quite different in kind from the other executive functions carried on by government.

(iv) <u>The Distinctiveness of Police Resources</u>

A second difference between police and other government functions concerns the resources used to

discharge the functions in question. As described earlier, the police have at their disposal a vast array of legal powers to interfere coercively and summarily with the person, property, liberty, privacy and even the life and death of each individual. To facilitate the exercise of such powers they are provided with the necessary training, organisation, manpower and equipment. Most other government departments or bodies, by contrast, can encroach only, if at all, on the property rights of individuals. Even then they must normally follow lengthy bureaucratic procedures in the course of which the individual concerned will usually have easy access to the protection of judicial authority. Superficially this contrast may be blurred by the powers available to bodies such as: the prison service, the immigration service, customs and excise and the psychiatric service. The coercive powers vested in these bodies, however, may be exercised only in very narrowly defined situations. The powers and resources vested in the police, by contrast, are so numerous and broadly defined that they enable the Garda to function more or less as a general State watchdog with the capacity to bite any individual who fails to live up to the basic standards of behaviour prescribed by the State. Quite clearly if this immense power was used lawfully to target any particular class or minority the consequences would be much more severe than anything that might result for that class or minority if it was targeted lawfully by any other government body.

(d) Risks inherent in Political Control

When these special characteristics are taken into account it would seem that operational policing matters are simply too critical for the well-being of the individual and the community to be left to the cut and thrust of democratic politics. It is one thing to allow a democratically elected government to decide whether, for example, a school should be built in one area as opposed to another. It is quite a different matter, however, to give it the power to dictate the operational priorities or strategies of the police from time to time in any locality and throughout the country. In the case of the former the worst that can happen is that certain individuals or areas may gain a disproportionately large share of the national cake at the expense of others; an imbalance which may be redressed by a future change of government. In the case of the latter, however, there is a danger that peoples lives, persons and property would be put at risk and the basic concept of equality before the law undermined as a result of police resources being deployed to suit politically partisan objectives. In this event the prospect of the balance being restored may be irrelevant as the damage done will often be irreversible. Furthermore, in a country like Ireland with a national police force it is likely that any sustained sense of grievance about operational policing will be confined to isolated minority pockets scattered throughout the country. The chances of any future government taking up these grievances are remote.

Democratic control over operational policing, therefore, even if it is confined to policy directions carries with it the danger that the police will be used as a tool to promote the narrow political prejudices of those in power to the detriment of vulnerable minorities. Given the immense power, authority and resources encapsulated in the police it should be obvious that the consequences for such minorities would be much more severe than would be the case if any other function of government was discharged in a similarly partisan manner.

Practical examples of the consequences of subordinating the police too closely to the directive control of political authority can be found in the history of policing in the USA and Northern Ireland. The USA, in particular, has a sordid history of the police being used for narrow party-political gain.[13] Many of the police forces which were established in major U.S. cities and towns in the nineteenth century were little more than the private militias of the political bosses. Almost inevitably the police were drawn into situations where their law enforcement efforts had to take account of the political connections of those who were breaking the law. Illegal drinking and gambling clubs, for example, would have to be ignored if they were owned or frequented by senior members of the dominant party machine. Attempts by rival operators to get in on the act would have to be stamped on ruthlessly if they were from outside the party

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machine. In these circumstances the police were more likely to constitute an impediment to effective and equitable law enforcement. In many cases they even became an active and integral part of the corruption.

Northern Ireland provides a different illustration. From 1922-72 the Stormount administration was under the exclusive control of the Unionist Party. Although the Minister for Home Affairs did not enjoy a formal power of direction in operational police matters the institutional relationship between his office and the force was such that he could exercise a tight control over its policies and practices. The combination of these two factors meant that the police were de facto under party political control.[14] While it may be untrue to say that the general law enforcement activities of the RUC were as strongly tainted with political corruption as their nineteenth century American counterparts, there is compelling evidence to suggest that party political considerations have influenced their policing of conflict between the nationalist minority on the one hand and the unionist majority and the State on the other.[15] Their brutal handling of civil rights marches and demonstrations in the late sixties and early seventies contrasted sharply with their exceptionally tolerant attitude to violent attacks by unionist supporters on the civil rights marchers. These events confirmed for the nationalist minority what they had always suspected; namely that the RUC was more the armed wing of the Unionist

Party than an impartial police service. The consequences are being felt to this day in many nationalist areas of Northern Ireland. Attempts by the RUC to provide a genuine police service in these areas are viewed with deep suspicion and mistrust.

The lessons of the USA and Northern Ireland can be used to suggest that the police should be distanced from democratic control. The argument runs that if everyone is to benefit from impartial and professional law enforcement, and individuals and minorities are to be protected against the risk of unfair and oppressive police practices, it is essential that the police should be given the autonomy to get on with the job. So long as they are equipped with the necessary powers, resources and professional skills to provide a competent police service within the law there should be no room for any external executive authority to direct them on how they should deliver that service. Direct democratic control over the police, therefore, is not a credible option for securing effective police accountability. The catch, of course, is that the further the police are removed from democratic control the more difficult it will be to call them to account for the manner in which they deliver the police service. As the accountability mechanisms inherent in direct democratic control are loosened an accountability vacuum will develop. Unless this vacuum is filled by alternative mechanisms the police will emerge as a very powerful institution in its

own right with it own political agenda. The dangers implicit in this are at least as threatening to impartial law enforcement and fairplay to minorities as direct democratic control could ever be.[16] The challenge, therefore, is to devise accountability mechanisms which will render the police responsive to the fluid demands of the communities they serve without at the same time exposing the police to the danger of being used as a policy instrument to serve the partisan desires of whichever party happens to be in power.

2. A Police Authority

(a) The Public Debate

In recent years such debate as there has been about democratic control and accountability over the police in Ireland has revolved around the question of whether or not a police authority should be established.[17] The proponents of a police authority are motivated primarily by a desire to distance the control of the Garda Siochana from the Department of Justice. They are persuaded that the political sensitivities of the government of the day, and bureaucratic inertia within the department, undermine the Commissioner's capacity to deliver a modern, efficient and independent police service. Increasingly they feel that operational failures or shortcomings are the fault not of the Garda personnel involved but of deficiencies in the whole management and administration of the force coupled with excessive political encroachment on the Commissioner's

operational freedom. From this perspective, therefore, the Commissioner's capacity to deliver a modern, professional police service is dependant on his enjoying greater managerial, financial and operational autonomy over the force. The proponents of this argument link the Commissioner's autonomy with the establishment of a police authority. In broad outline they envisage a police authority as a body which is independent of the government in much the same way as the Revenue Commissioners. To this new authority the government and the Department of Justice would cede most of the administrative, management and financial responsibilities that they currently discharge with respect to the force. In practice that could mean that the government's input into some appointments to the force would be diluted; the department's control over finance and internal managerial matters such as recruitment, training, administrative and organisation structures would be diminished; and the Commissioner would be less likely to look for the approval of the Minister or the department before taking operational decisions which have significant implications for policing either generally or in individual cases. The decline in government and departmental input in all these matters would be offset by a corresponding rise in that of the police authority and the Commissioner.

The proponents of a police authority have not addressed themselves publicly in detail to the composition

of such a body or to the related issue of how it would impact on police accountability. The significance of this omission is enhanced by the fact that there is no clear concept of the composition or functions of a police authority. Even within the United Kingdom from where, presumably, the proponents have borrowed the idea, the composition and functions of police authorities have changed from place to place and from time to time. Since the legal and constitutional concept of police in Ireland bears major similarities to that in the United Kingdom, it would be useful to consider briefly the composition and role of police authorities there. By focusing on their contribution to accountability it should be possible to draw some lessons for the accountability implications of a police authority in Ireland.

(b) The English Concept

(i) Democratic Control Over Police

Today in England and Wales a police authority is readily recognisable as a body, composed as to two-thirds local councillors and one-third magistrates, which is vested with the statutory responsibility to maintain an adequate and efficient police force for its area. In the past, however, these bodies have been designated as watch committees in boroughs and standing joint committees in the counties. Their origin as a distinct concept in British policing can probably be traced back to the time when magistrates, or justices of the peace, meeting in quarter

sessions were the mainspring of local government. However, they were first put on a statutory footing and vested with specific statutory responsibilities by the Municipal Corporations Act, 1835. That Act was designed to bring local self-government to the towns and cities of England and Wales. Broadly speaking it made provision for directly elected town or city councils to which were delegated broad powers of local government. In the matter of police the Act compelled each council to appoint a sufficient number of members who, together with the mayor, would constitute a watch committee.[18] It was on the watch committee, as opposed to the whole council, that the Act vested the police responsibility. The committee was obliged to establish a police force of constables[19] and to frame regulations for their management.[20] In 1856 the constables were further subordinated to the watch committee in that they were obliged to perform, in addition to their ordinary duties, all such police duties as directed or requested by the watch committee from time to time.[21]

There is little significance in the fact that the police functions of the new councils were vested directly by law in a committee of the council as opposed to the council itself. It was certainly not an attempt to dilute democratic control over the new municipal police forces. Indeed, a primary motivation behind the new arrangement was to ensure local, democratic control over the police. This is summed up in the following extract from the speech of

Lord Justice Russell in recommending the Bill to Parliament on behalf of the Government:

> .... the only notion I can form of a municipal government is that the keeping of the peace, or to use the words of olden times, 'the quieting of the town', should be immediately under the control of the persons who are deemed proper to have the government of the town: therefore any power inconsistent with the power of the general council, as far as the watching of the town is concerned, will be abolished ....[22].

However, no specific explanation was offered as to why the police function was vested in a committee of the council as opposed to the council as a whole. Perhaps it can be explained on the purely pragmatic ground that in some boroughs the councils would simply be too large and unwieldy to function effectively as the governing body of the local police force. Support for this view is forthcoming from the fact that in 1882 it was found necessary to impose a statutory restriction on the size of watch committees to one-third of the council members.[23]

Local democratic control over county police forces did not materialise until 1888. The Local Government Act of that year did for the counties what the Municipal Corporations Act, 1835 had done for the towns and cities. In the counties, however, the government shied away from full democratic control and opted instead for a half-way house of joint control by members of the county council and quarter sessions.[24] This was achieved by vesting all the powers, duties and liabilities of quarters sessions and

justices out of session over the county police jointly in the county council and quarter sessions.[25] This joint power and responsibility was to be exercised and discharged through a standing joint committee composed of an equal number of justices appointed by quarter sessions and members of the county council appointed by the council.[26] Once again the police authority was to take the form of a committee, although this time the necessity for it was dictated by the government's decision to stop short of full democratic control over the police.

In the course of the debates on the 1888 Bill government speakers were hard pressed to justify the departure from the precedent of full local democratic control over the police which had been set in 1835 and, apparently, had worked quite satisfactorily. The dilemma faced by the government was that local control of the county police forces had always rested exclusively in the hands of quarter sessions and neither the government nor its supporters in the counties were keen to see this control being ceded to elected authorities. The fact that the government was very lukewarm to the precedent of the municipal corporations is reflected in the Secretary of State for the Home Department's description of "putting the whole force responsible for law and order into the hands of a purely elected body" as "extraordinary".[27] The government's proffered reasons for opting for joint control can be boiled down to two. First, the constable's duties

as a servant of the law were at least partly judicial and, as such, their execution had always been subject to the supervision of judicial authority. To divorce the constable wholly from judicial authority, therefore, "would not be wise or expedient".[28] Second was the notion that elected bodies are always prone to be:

> Swayed not merely by a general sympathy with the people, which is a good thing, but by sympathy with temporal gusts of popular feeling, which is not always a good thing, and may lead to uncertainty in respect for the administration of the law.[29]

By contrast:

> .... greater impartiality and calmness and more judicial temper in the administration of the law [will be had] from the magistrates, or a body in which the magisterial element has its influence.[30]

Viewed from this perspective the allocation of half the seats on the standing committees to elected councillors represents a purchase of democratic participation at the expense of excellence in police management and control.

Although there was no significant change in the statutory framework of police authorities from 1888 up to 1964, it does not follow that the powers and scope of a police authority's functions were interpreted uniformly throughout that period. There was general acceptance of the obvious fact that police authorities enjoyed control over the finance and general management of their police forces subject to the powers and responsibilities of the full councils and the Secretary of State in these matters.

Where conflict did eventually emerge was on the very difficult question of to what extent, if any, a police authority could direct its chief constable on operational aspects of policing.[31] A major problem compounding this issue was the inherently vague concept of operational policing matters. An instruction to take certain action or refrain from certain action in the enforcement of the law in an individual case is clearly an operational matter. But what about a direction to follow a certain course of action every time a specified law enforcement situation arose? An example would be an instruction not to arrest anyone for being drunk in a public place unless they were posing a risk to themselves or others. What about a more general direction such as a direction to put more personnel on the beat in a certain area in order to combat an unacceptable level of street crime in that area? Or more general still, a direction on how to treat suspects in police custody? All of these directions clearly have the capacity to impinge on how members of the force carry out their police duties. Which, if any, of them were within the legal competence of a police authority to issue to its chief constable prior to the enactment of the Police Act, 1964?

The bare words of the relevant legislation would appear to grant the police authorities quite extensive powers of operational direction. The County and Borough Police Act, 1856 obliges borough constables to perform all

such police duties as directed by their watch committee.[32] Standing joint committees are given the same power over county police forces by virtue of the Local Government Act, 1888 which also gave them the same powers, duties and liabilities over the county police as are vested in quarter sessions and justices out of session.[33] At the very least these provisions should enable watch committees and standing joint committees to issue general policy directions on the operational deployment of their respective police forces. So, for example, they could instruct their chief constables to put more men on the beat in certain areas or to get tough on certain crimes. It is even possible that a standing joint committee had the power to go further and issue instructions on how police powers should be exercised in certain law enforcement situations and on their exercise in individual cases. This arose from the fact that constables have functioned traditionally as ministerial officers of quarter sessions and justices out of session in certain law enforcement situations. Unfortunately, the exact parameters of a police authority's power of operational direction over its police force were not fully addressed in the debates on the Bills preceding the enactment of the relevant legislation. As late as 1888 few speakers seemed aware that there could be a significant difference between administrative control and operational control of a police force. Those who did, distinguished between the judicial and administrative functions of the constable.[34] They took the view that watch committees

and standing joint committees were competent to issue directives to their forces in administrative matters; indeed that was their responsibility. In judicial matters, however, the constable was beyond the reach of these police authorities; being subject only to the direction of the justices. Unfortunately, the advocates of separation between the administrative and judicial functions of the constable never clarified the exact point of separation. It would seem, however, that in the judicial function they were referring to those situations in which the justices traditionally relied on constables in order to execute their own judicial responsibilities in matters of law enforcement. In other words it would be confined to law enforcement in certain individual cases such as: to execute a warrant for arrest, to identify and bring to justice those persons responsible for an outbreak of lawlessness, and to enforce, or assist in the enforcement, of a court order. The administrative function, therefore, would be much broader than it is defined today. It would encompass the issuing of directives on general law enforcement matters and may even extend so far as instructions on how specified powers should be exercised generally in defined situations.

There can be no doubt that police authorities in the nineteenth century did issue, and were accepted as having the power to, issue operational instructions to their police forces on matters such as the enforcement of

licensing laws or vice.[35] As the twentieth century progressed, however, the opinion grew that operational matters were the preserve of the chief constables and that police authorities' functions were confined to matters affecting the finance, management, administration, manpower and resources of the force.[36] Doubts about the legal soundness of this opinion were rendered largely academic by the enactment of the Police Act, 1964 which put it on a statutory footing. The developments of the twentieth century, however, cannot erase the fact that at least during the nineteenth century police authorities in England and Wales appeared to have both the de iure and de facto authority to issue operational instructions to their police forces.

(ii) Managerial and Administrative Control Over Police

Police authorities in England and Wales today find their legal basis in the Police Act, 1964. This Act abolished the old watch committees and standing joint committees and replaced them with new bodies known simply as police authorities.[37] Their composition, powers and functions are standard irrespective of whether they serve a borough or a county. Their membership is made up of two-thirds councillors, appointed by the relevant council, and one third magistrates, appointed by quarter sessions.[38] That means that the unelected portion of the authorities in the counties is reduced from one-half to one-third while the authorities in the boroughs have to accept unelected

members for the first time. The government's attempt to justify this retreat from full democracy in the police authorities bordered on the pathetic.[39] It based its case almost exclusively on the proposition that the Royal Commission on the Police had carried out a full investigation into the merits of having magistrates on police authorities and had concluded that their membership was desirable.The Commission's report does not offer any further enlightenment on the basis for its recommendation. The only other justification offered by the government for the inclusion of magistrates was their knowledge of police and criminal matters gained from experience on the bench.

Of even greater significance than the composition of the new police authorities is the role mapped out for them by the government. The 1964 Act obliges each authority to maintain an "adequate and efficient" force[40] and to keep themselves informed of the manner in which complaints are being handled.[41] This must be read against the context that the responsibility for the "direction and control" of the force is vested in the chief constable.[42] There is no similar provision subordinating the chief constable to general directions from his police authority. The clear implication is that the authority has no power to direct the operational policies or practices of its force. The parliamentary debates on the Police Bill confirm that it was certainly not the government's intention that a police authority should have such power.[43] It does not follow,

however, that the chief constables are not accountable to their police authorities. The government envisaged that a police authority would take an interest in the policies and practices of its force to the extent that it would question its chief constable about them and discuss with him what changes it would like to see. While the power to determine what policies and practices should be adopted would remain with the chief constable, he would be under some pressure to reach an accommodation with his police authority as much as possible.[44] Admittedly, the 1964 Act does not make precise provision even for this limited measure of control over the chief constable. However, it can be deduced from several provisions. The police authority's obligation to maintain an "efficient" police force, for example, implies a general responsibility to check that the policies and practices of the force are consistent with the maintenance of an efficient force. A specific application of this is the obligation to keep itself informed of how complaints are handled. The authority's power to call for reports from the chief constable[45] provides it with both an essential tool to engage in this supervisory role and confirmation that this is a legitimate role for it to play. If a chief constable refuses to cooperate in these matters he could be seen as an obstacle to efficiency and ripe for removal. The police authority's accountability role, therefore, can be summed up as advisory and supervisory but falling short of full direction and control.

The police authority also has the power of appointment, discipline and retirement, in the interests of efficiency, over the ranks of deputy and assistant chief constable[46] while the chief constable enjoys a similar power over the other ranks.[47] The chief constable is under an obligation to submit an annual report to the police authority[48] and, when specifically required by the authority from time to time, reports on any matters relevant to the discharge of the authority's functions.[49] These provisions clearly retain the police authority's traditional functions concerning the finance, management, administration, manpower and resources of its force. The discharge of these functions, however, are heavily influenced by the input of central government. The authority's exercise of the power of appointment and dismissal over the most senior officers, for example, is subject to the approval of the Home Secretary.[50] Ever since 1919 the Home Secretary has had the power to issue regulations setting uniform standards in matter such as discipline, uniform, pay, promotions, retirement, etc.[51] Furthermore, central government continues to enjoy the power to shape the policy-making of police authorities in a wide range of management, resource and administrative matters through the work of its inspectorate of constabulary and the related police grant. The scheme envisaged by the 1964 Act, therefore, is that a police authority would constitute only one limb of a tri-partite arrangement for the control of a police force.

It is difficult to judge how effective this arrangement has been in practice for police accountability purposes. Insofar as it did not give rise to any public controversy or debate up until the early eighties it must be assumed that it worked quite satisfactorily. The typical practice[52] seemed to be that the chief constable attended a monthly meeting of his police authority at which he might be asked about police action or inaction in specific incidents or situations, police policies and practices with respect to the enforcement of certain laws and the deployment of personnel in certain areas and on certain duties. The chief constable would normally explain his input into these matters and why he felt his decisions and policies were the most appropriate in the circumstances. He would also listen to and discuss alternative policies or practices favoured by the authority. At the end of the day, however, it would be the responsibility of the chief constable to decide what, if any, changes he would make in the operational policies and practices of the force in order to take into account the views of his police authority. Of course, the monthly meetings were also the forum in which the chief constable would press the case for more manpower, more equipment, the acquisition of new technology, new riot control weapons, better protective clothing, better facilities for the force, new administrative arrangements, etc. On these matters the last word would normally rest with the police authority. Discussion, on them, therefore, was often

related to discussion on operational police matters. Many of the operational policies and practices that the chief constable would wish to pursue might be dependant on the availability of certain equipment or resources. In order to get the necessary manpower or resources the chief constable might have to accept certain changes in these, or other, policies or practices desired by the police authority. An active and committed police authority, therefore, could manage to influence the operational policies and practices of its police force without having the power to dictate, and without having to resort to the ultimate and double-edged weapon of seeking the chief constable's removal.

The riots and street clashes with the police in the inner city areas of some of the larger English cities in the early eighties focused the spotlight very firmly on police community relations and, in particular, the arrangements for police accountability. Only then did it become apparent that the normal interaction between a police authority and its chief constable, described above, was not the practice in every police area in England and Wales.[53] In a few areas, from time to time, the police authority felt that its statutory duty to maintain an adequate and efficient police force carried with it the power to give operational policy directions to its chief constables. Unlike their counterparts in the nineteenth-century the chief constables felt sufficiently confident to

rebuff such encroachment on their independence. Their confidence was bolstered by the orthodox view, supported by the courts, the Home Secretary and ACPO, that a chief constable could not be subject to direction in such matters. Even where this stand threatened to result in open conflict between a chief constable and his police authority the former could normally rely on the Home Secretary as an ally against any attempt by the police authority to secure his removal.[54] More frequent, perhaps, were the police areas in which the chief constable adopted the attitude that the police authority had no power or business to concern itself with the substance of his operational policies or practice. While this carried the potential to result in open conflict the more typical outcome was passive acceptance on the part of the police authority. Indeed, one of the most frequent criticisms of police authorities in the wake of the riots was that they displayed a tendency to sit back and give their chief constables a free hand to get on with the job of policing.[55]

These shortcomings in the accountability functions of police authorities can be explained by personalities and politics. In those police areas where the structures have not fulfilled their potential the blame can be put at the doorstep of one or more of the following: an autocratic chief constable, a police authority dominated by members driven by strong ideological views on policing or by

members disinterested in the subject. It must be said, however, that there are some structural features of police authorities which restrict their capacity to render their police forces accountable, in the narrow sense of that term, to the communities they serve. For a police authority to be in a position to discharge this function fully it must at least be representative of its community. Even if it is accepted that local councils in England and Wales are sufficiently representative for police purposes, it would seem that police authorities are hardly a model for the democratic accountability of the police. Since only two-thirds of the membership of police authorities in England and Wales can claim a democratic mandate the authorities cannot claim to be fully representative of their communities. This problem is exacerbated by the fact that the elected representatives on the police authority constitute a minority of the members of the council which appointed them. This leaves the majority of elected councillors with no opportunity to participate directly in calling their chief constable to account. The most they can do is put questions to the chairperson of the police authority at council meetings and make their views known during council debates. Their input may be reduced further where their area is served by a combined police force and police authority.[56] In this situation the chairperson of the authority may not even be a member of their council. Finally, the failure of the legislation to impose precise powers and obligations on the accountability relationship

must be at least partly responsible for some of the accountability vacuum that has developed. If the legislation imposed a specific duty on a chief constable to explain and justify the policies and practices of his force to the police authority , and to take into account the authority's views on such matters, there would be less room for fudging on the respective roles of the chief constable and the police authority in the accountability process.

(c) Other Variations

(i) The Police Authority for Northern Ireland

Even today there are variations in the composition, structure, powers and functions of police authorities in the United Kingdom. Although the 1964 Act provided uniformity in these matters for most of England and Wales the relevant provisions did not extend to the London metropolitan area which is policed by the largest police force in the United Kingdom. Instead, the 1964 Act stipulated that the Home Secretary shall constitute the police authority for the LMP.[57] Another variation of great relevance to Ireland is found in the police authority for Northern Ireland. From 1922-1970 policing structures in Northern Ireland retained closer similarities to their Irish predecessors of the nineteenth century than their contemporary counterparts in Great Britain. This is most evident in the fact that Northern Ireland has been policed by a single force rather than a number of forces based on local authority areas. Equally, there is no such thing as

local police authorities composed of elected councillors and magistrates. The force has been financed and administered by, and subject to the close supervision of, the government of Northern Ireland. In other words it bears all the hallmarks of a national police force and, as such, has much in common with the Garda Siochana. It was only in 1970 that efforts were made to bring the policing structures of Northern Ireland more into line with those prevailing in England and Wales. A major feature of these reforms was the establishment of a police authority for Northern Ireland.[58] Since this represented an attempt to wed the concept of an English police authority with the reality of a national police force it has special significance for the Irish situation.

The most distinguishing feature of the police authority for Northern Ireland is its composition. The Police Act (Northern Ireland) 1970 stipulates that its members are to be appointed by the Governor of Northern Ireland.[59] Since the advent of direct rule in 1972 this function is performed by the Secretary of State for Northern Ireland. The only restraint imposed by the Act is that the membership, as far as practicable, is to consist of people representative of the community in Northern Ireland.[60] Accordingly, the Secretary of State is obliged to seek nominees by consulting with organisations representative of specific interests.[61] The fact that the authority need not be composed, at least in part, of

elected representatives marks it out from its counterparts in England and Wales. The explanation for this difference, however, has little or nothing to do with the fact that police in Northern Ireland is organised on a national, as opposed to a local, basis. Democratic representation could have been secured by the reservation of seats on the authority for elected members of the Northern Ireland parliament. The reason why this course was not adopted is, ironically, the reason why a police authority was established in the first place. The author of the 1970 reforms, Lord Hunt, concluded from his enquiry into policing structures in Northern Ireland that the RUC was very vulnerable to the control of the Minister for Home Affairs.[62] Since Northern Ireland was politically a very rigidly divided society there was a danger, perhaps realised in practice, that the Minister for Home Affairs would use the police as a weapon in that political conflict. The need to protect the police against such divisive political interference in the discharge of their functions required that they should be put beyond the reach of the Minister. Hunt calculated that this could only be achieved by establishing a police authority to which would be transferred the financial, administrative and management functions for the RUC then enjoyed by the Minister.[63] The chief constable's direction and control of the force would be enshrined in law in the same terms as that for a British chief constable, and the Minister would be given the sort of regulatory powers over the force and

supervisory powers over the police authority that are enjoyed by the Home Secretary in British policing. Given this scenario it would not have made sense to structure the police authority in a manner which reflected the democratic choice of the electorate.[64] The prospects of a police authority which was as politically divided as the electorate of Northern Ireland would almost certainly have been worse than no police authority at all. The compromise, therefore, was to facilitate the appointment of a police authority composed of responsible persons who had a record of public work on behalf of various interest groups in Northern Ireland, but who could equally be relied upon to rise above the political divide.

The Northern Ireland police authority's lack of democratic mandate from the community renders it more susceptible to central government control than its counterparts in England and Wales. This is not just a matter of the power of appointment and removal to and from the body residing in the Secretary of State. Two-thirds of the members of police authorities in England and Wales are elected to their councils on the basis of a public manifesto. On occasions when their policies or decisions in the police authority conflict with the views of the Home Secretary their hand is strengthened through being able to claim a democratic mandate for their policies or actions. In the event of conflict between the police authority and the Secretary of State in Northern Ireland, however, the

members of the authority will have to rely solely on the power of persuasion to get their way. Also, police authorities in England and Wales can point to the fact that up to half the cost of their forces is financed locally. Accordingly, they can argue that the wishes of the local paymaster, as represented by the elected members on the police authorities, should be represented. This source of strength is denied the police authority for Northern Ireland as its police force is financed totally from central government in London. The net effect is that the police authority for Northern Ireland cannot be as independent from central government in its supervisory and accountability role as its counterparts in England and Wales. This must be borne in mind when reading the list of the authority's formal powers and duties.

Like its counterparts in England and Wales the police authority for Northern Ireland has the overall responsibility for securing the "maintenance of an adequate and efficient police force".[65] This includes the duty to provide and maintain buildings, vehicles and other material resources needed to provide a police service in Northern Ireland.[66] It determines the size of the force, the budgetary estimate for the force and it enjoys the power of appointment and removal over the senior officers.[67] The chief constable must submit an annual report to the authority[68] and, when requested, reports on specific subject matters.[69] The authority must also keep itself

informed as to the manner in which complaints from members of the public against members of the police force are dealt with by the chief constable.[70] Apart from this last function the exercise of all these powers and the performance of all these duties are subject to the approval of the Secretary of State. While a similar arrangement exists in England and Wales the impact is much more severe in Northern Ireland given that the Secretary of State is already in a dominant position over the authority. Not surprisingly, the special problems of policing in Northern Ireland are reflected in the police authority being equipped with at least one power not enjoyed by its counterparts in England and Wales.[71] It has the power to set up a tribunal to consider a complaint by a member of the public against a police officer where the complaint appears to affect the public interest.[72]

Although the police authority functioned very much like its counterparts in England and Wales its record in publicly calling the RUC to account throughout the seventies and eighties must be described as poor. While a similar description could be applied to police authorities in England and Wales the record in Northern Ireland is much more serious given that the demand for accountability there has been much more acute. There was hardly a time during these two decades when policing practices were not a matter of public concern to some sections of the community.[73] In the early years criticism focused on the handling of

street disturbances and public marches and demonstrations. From the mid-seventies to 1980 concern switched to interrogation methods. In the early eighties it focused on arrest practices and the cultivation of supergrasses. Since then allegations of a shoot-to-kill policy within the force have been stealing the limelight. For the most part, but by no means universally, these publicly expressed concerns about policing emanated from one section of the community. Like so much else in Northern Ireland they reflected the deep community divide and the contrast in the attitudes of the two sections of the community to the State of Northern Ireland and its apparatus. That, however, should not be interpreted as a reflection on the veracity or sincerity of the allegations. There have been sufficient enquiries, official and unofficial, and expressions of concern by independent and widely respected individuals and bodies to convince most observers that policing practices throughout the seventies and eighties frequently overstepped the boundaries of impartiality, professionalism and legality. Surprisingly, one voice that was never heard giving leadership or expression to this concern was that of the police authority. On the rare occasions when it did make its voice heard it was to support the RUC; sometimes in circumstances where the RUC's position had already been discredited.[74] Instead of portraying itself as a body through which public concern about policing could be channelled and addressed, it adopted a stance of complete loyalty to the force. Its

accountability and supervisory potential, such as it was, fell by the wayside.[75]

It is easy, of course, to point the finger at the police authority's failure to function as an energetic and effective engine for police accountability. As has already been pointed out, however, its lack of a democratic mandate and subordination to the Secretary of State meant that it could always be gagged by the Secretary of State if it adopted a public profile which wasn't to his liking. Unfortunately, the security situation in Northern Ireland over the past twenty years has been such that the Secretary of State has been most anxious to keep a tight rein on the authority. From 1975 onwards the British government's policy has been to rely primarily on the police and the courts to cope with the violence. This has meant deploying the RUC in a paramilitary role and placing a huge burden on it to secure results in the form of arrests, prosecutions, convictions and in the maintenance of public order. Inevitably this has meant the RUC having to take risks with both its members' lives and with the sensitivities of the law and of those sections of the community in which suspects and opposition to the State are to be found. The quid pro quo is that the government must ensure that the RUC is provided not just with the necessary manpower resources and authority, but also with the moral support of the State. Accordingly, when the RUC is vilified by those sections of the community which have suffered from its

operations, it is imperative from the perspective of the Secretary of State that the State should stand firmly behind the force. The implications for the police authority are obvious. It must not become a vehicle for criticism of the RUC, nor be seen to be anything but fully supportive of the force. Any attempt by it to adopt a more open, or independent approach to events as they unfold would not be welcomed by the Secretary of State.

There is also a human side to the authority's poor public record in police accountability matters over the past twenty years. It must be remembered that its members are part-timers who hold down other full-time jobs or positions. Most of them will have families. As members of the police authority, however, they are viewed as legitimate targets by the IRA. If they adopt a sharply critical stance in public on RUC practices they could find themselves being vilified or targeted by other sections of the community and the government. To date, three members have been killed; seemingly on account of their membership. Viewed from this perspective therefore, it is hardly surprising that members of the authority would not want to draw too much attention to themselves by adopting a publicly critical stance on controversial aspects of police practices. Indeed, the real surprise is that they would agree to serve at all. Accordingly, the poor record of the police authority for Northern Ireland in the area of police accountability matters should not be interpreted as

conclusive evidence that the concept is not suitable in the context of a national police force.

(d) A Police Authority for Ireland

(i) Advantages

The question that must be addressed now is whether it would be desirable to establish a British type police authority in Ireland. The advocates of such a move, as explained earlier, are motivated primarily by their expectation that it will lead to a more efficient and professional management and administration of the Garda Siochana. Their expectation would seem reasonable in this regard. Under the current arrangements the finance and administration of the force are handled by one department of central government. That department, however, has responsibilities in other areas besides police, and it is merely one of several department's which must function collectively as a team under the direction of their political heads. The inevitable result is that the officials in the Department of Justice will not always have as much time and resources to devote to police matters as would be the case with their counterparts in a police authority whose only concern would be police. Of greater practical import is the fact that, in matters of finance and decision-making, the department officials will have to follow bureaucratic standards and practices which have been set with the whole government civil service in mind. These will be supplemented from time to time by political

directions which, again, have been formulated with the whole government in mind. The end result can often be that departmental decisions concerning the Garda Siochana, which need to be taken quickly, get bogged down or delayed by formal bureaucratic procedures which, in substance, are unnecessary or irrelevant to the matter in question. This situation could become intolerable under a cautious Garda Commissioner who wants the security of departmental sanction for every significant decision he has to take. Clearly there would be a lot to be gained from establishing a body outside the departmental framework with statutory authority over finance, buildings, vehicles, uniforms, equipment, senior appointments, numbers in each rank and the general administration for the force. Since this body would be concerned only with police it would be insulated against the effects of its manpower and resources being diverted from time to time to cope with urgent matters which have arisen in other areas under the general umbrella of Justice. Equally, it would be free to adopt its own standards and procedures in finance and decision-making. These could be tailored to meet the specific requirements of efficient and professional policing; in particular, by facilitating quick decision-making unhindered by bureaucratic and political directions which have little or nothing to do with the exigencies of policing.

The advocates of a police authority can derive support for their case from the British experience. In Britain it

is accepted that the police function is such that the general management and administration of police forces should be vested statutorily in special police committees. This raises the question why it should be different here? The police function is very similar in both jurisdictions and it is very different from most other functions of local and central government in both jurisdictions. If the British approach to the general management and administration of police forces is conducive to the delivery of an efficient and professional police service, it is imperative to come up with a justification for the different Irish approach given the level of dissatisfaction that has surfaced in these matters over recent years.

(ii) <u>The Accountability Deficit</u>

Although the advocates of a police authority for Ireland rest their case on the expected benefits in the management and administration of the police service the issue cannot be decided on that basis alone. There is another, perhaps even more important, dimension to the concept of a police authority. This other dimension is accountability. A police authority plays, or is expected to play, a critical role in rendering its chief constable accountable to the electorate for the manner in which he exercises his direction and control over the force. Similarly, the authority itself is accountable to the electorate for the manner in which it delivers the general management and administration of the force. The medium for

this accountability is the presence on a police authority of the elected councillors from the area served by the police force. The British approach, therefore, combines responsibility for the general management and administration of a police force with the accountability of its chief constable in one body which has a democratic mandate from the people. This is similar to the current position in Ireland insofar as the general management and administration of the force and the accountability of the Garda Commissioner are vested in one body; namely the Minister for Justice. The differences are that the Garda Siochana is a national force, the Minister for Justice also enjoys the general regulatory powers which in Britain vest in the Secretary of State and the Minister's mandate from the people comes indirectly through the medium of the elected representatives in the Dail. It is against this background that a transfer of the general management and administration of the force from the Minister to a police authority outside the departmental framework must be viewed. Under such an arrangement the Minister would not be able to answer to the people, through the Dail, for the efficiency of the police service. Since senior appointments in the force, and the manner in which the budget for the force is spent, would be the primary responsibility of the police authority, the Minister could disclaim any responsibility in the Dail for the overall efficiency of the force. His current practice of answering questions in the Dail about specific incidents or aspects

of policing would be seen for what it really is; namely a conveying of information from the Garda Commissioner to the Dail. He could not normally be expected to carry responsibility for police action or policy in such matters as his capacity to influence them would have been severely curtailed. Democratic accountability of the police through the Minister, deficient as it may be in many respects at the moment, would suffer greatly. The question, therefore, is whether it is possible within the current Irish framework of police and government to design a police authority which can take responsibility for the general management and administration of the force without simultaneously undermining the current level of democratic accountability.

(iii) Obstacles to Accountability

In order for a police authority to fill the accountability shoes of the Minister it would have to be answerable to the people for the discharge of its own police responsibilities and act as a channel through which the Garda Commissioner could answer for his. There are only two ways in which this could be achieved: either the police authority would be directly elected or it would be answerable to the Dail. Either option will pose difficulties. Given that the Garda Siochana is a national force the police authority would have to be a national body. If it was directly elected by the people that would mean a national election. This would raise all sorts of

difficult issues such as: how to strike a balance between a body which is big enough to be representative of three and a half million people and small enough to discharge its functions smoothly and efficiently; how to justify the expense of a separate national election for one function of government; and, most important of all, how to avoid the police being turned into a political football in the process. Even to state the issues is to invite an urgent search for a less problematic alternative.

The alternative of making the police authority answerable to the Dail also poses some practical difficulty. Under our system of democratic government the accountability of any public body or service to the Dail is effected through government Ministers. A government Minister will either be directly responsible for the body or service in question or he will be prepared to answer to the Dail on its behalf. The practice of the Minister for Justice answering on behalf of the Garda Commissioner for the latter's direction and control of the force is an example of a government Minister answering on behalf of a body over which he has no direct control. Presumably, he would be prepared to provide the same service for a police authority. That, however, would amount to a reduction in the level of democratic police accountability. By the addition of this extra tier in the chain of accountability the Dail would become even more distant from the operational aspect of policing. Furthermore, instead of

the Minister having to accept full responsibility for matters concerning the general management and administration of the force he could confine himself to a role of merely conveying information on such matters from the police authority to the Dail. The whole process of police accountability would become more complex, convoluted and weak as a result. Before the Minister could agree to take direct responsibility for the actions of the police authority he would have to be in a position to control it. That, however, would contradict the objectives behind the adoption of a police authority in the first place.

There is another less conventional method through which a police authority might satisfy the needs of accountability to the people. It would involve establishing the authority as a Committee of the Dail in much the same way as police authorities in England and Wales are, at least partly, committees of their respective councils. The authority would be served by its own team of officials who would be outside the bureaucracy of government departments. As a Committee of the Dail its numbers could be kept at a level compatible with the smooth and efficient discharge of its functions. The elected status of the members would provide it with a democratic legitimacy. As members of the Dail they could be expected to be present when the Chamber debates the reports and accounts of the authority and on other occasions when police matters were being discussed. It should also be

possible to devise some arrangement whereby the chairman of the police authority would submit to Dail questions on the Garda Siochana and on the discharge of the authority's responsibilities. The Dail should find that the chairman would offer a greater opportunity for meaningful police accountability in that he, unlike the Minister for Justice, would have no other executive responsibilities apart from police to distract him. To these accountability benefits would be added the attraction of the general management and administration of the police being freed from the bureaucracy of the Department of Justice.

The attractions of such a proposal must be set against the obstacles that it would face. Not the least of these is the problem of clientelism in Irish politics.[76] By this is meant the tendency for Dail deputies to act as spokespersons on behalf of individual constituents seeking some benefit or concession from the administration. A danger in establishing a police authority composed of Dail deputies, therefore, is that at least some of them will attempt to use their position in order to gain favours for individual constituents in law enforcement matters. The end result would either be a legacy of strained relations between members of the authority and senior Garda management, or disrepute for the Garda Siochana and the law. Apart from this danger there is the strong likelihood that the government would be opposed to the establishment of a police authority with the powers and functions being

suggested here; and, especially, if that authority was composed of members of the Dail.

Since the Garda Siochana is a national police force it is inevitable that the government of the day will want to retain its capacity to influence police policies, priorities and practices. From the financial perspective alone the government can reap the political benefits that accrue from being able to exert a strong influence over how the annual budget of £400 million is spent. To lose this would be a very bitter pill to swallow given that the government would still have to carry the political burden of raising this money in taxes. Of greater long term significance, perhaps, is the link between political stability and government confidence in the force. As explained earlier, policing is not simply a matter of mechanical law enforcement. The demands of law enforcement far outweigh any resources that can be applied in response. The inevitable consequence is that the Garda Commissioner must exercise discretion in how he deploys the resources at his disposal to meet the demand. His discretion is enlarged by the fact that many demands are made on the police service which have little or nothing to do with law enforcement. In a State with a national force the government must be sure that this discretion will be exercised in a manner that protects the stability of the government and the State. So, for example, it needs to be satisfied not only that the force has the manpower,

resources and training to cope with threats such as: subversive activities, organised crime, an upsurge in crime and vandalism, major public disorders, natural disasters and economic disruption, but also that it is deployed effectively to combat such threats. Given this need for government confidence in the force it is almost unthinkable that any government would be willing to establish a police authority outside its control and cede to that authority the powers and functions it currently enjoys over the finance, management and administration of the Garda Siochana. Even if it was prepared to contemplate such a move it would find great difficulty in accepting that the authority should be composed of a Committee of the Dail. Since this Committee would be discharging a function that carries a high profile nationally its members would attract a high level of media interest. At the very least the government would view this as unnecessary competition for publicity both in and outside the Dail. At worst they would see it as an undesirable opportunity for members of opposition parties to reap political advantage from the media attention and power which accompany the responsibility for the general management and administration of a national police force with an annual budget of £400 million.

This prognosis for government opposition to the establishment of a police authority in Ireland is supported by developments in Britain. The LMP, for example, has

never been burdened with a police authority of the type familiar in the rest of England and Wales. Proposals for the extension of the police authority concept to the LMP in the interests of democratic police accountability have always been rebuffed by the argument that London is not merely a locality or region but the seat of national government and one of the major financial, commercial, cultural and political capitals in the world.[77] Accordingly, any weakness or breakdown in the police of London has major implications for the security and government of the whole country. The LMP, therefore, must be viewed not simply as a local police force but as a force which bears many of the characteristics of a national force. It is this national aspect that obliges central government to retain control over the finance, management, and administration of the police. To shed this responsibility to an independent body would weaken the government's capacity to provide peace, order and good government for the country as a whole. Since the Garda Siochana is a fully fledged national police force these considerations apply with at least equal force to the relationship between it and the government. The example of Northern Ireland cannot be used to mount an argument that a police authority, independent of central government, is compatible with the equivalent of a national police force. If anything, it supports the argument for incompatibility. As explained earlier the police authority for Northern Ireland differs substantially from its counterparts in

England and Wales in that it is much more subject to control from the Secretary of State. This can be ascribed primarily to the fact that the RUC is structured and organised like a national force and discharges functions associated with a national force. Indeed, it is also worth saying that central government is steadily seeking to exercise greater control over the police forces and authorities throughout England and Wales.[78] Again this is a reflection of the increasingly significant impact of local policing on the central administration's attempts to deliver good government for the whole country. It is difficult to imagine an Irish administration, long accustomed to the luxury of close central control over the police, being persuaded that it should proceed in the opposite direction.

3. A Dail Committee on Police

(a) Introduction

Just because the structures of police and government are not conducive to the establishment of a British type police authority it does not follow that democratic police accountability cannot be strengthened. It should be possible to introduce measures at both national and local level which will render the Garda Siochana more democratically accountable while, at the same time, substantially leaving in place the current arrangements for control over the general management, administration and operational aspects of policing. The national dimension

will be considered first.

At the national level the community, through its elected representatives in the Dail, will want to be assured that the Garda Siochana is adequately resourced in terms of finance, manpower, buildings, vehicles, equipment, technology, training, management, administration and powers to deliver a modern, efficient police service. They will also be concerned that the resources vested in the force are actually used to provide what they expect from a modern police service. What these expectations are may vary in certain aspects from time to time and from place to place. Nevertheless, it can be assumed that the broad range of expectations will find representation at some level in the Dail. As explained earlier, however, representation in the Dail may not always be sufficient to ensure that the Minister and/or the Commissioner answer fully for their policies and practices, and it may not always be sufficient to facilitate the translation of concern into action at the policy and street levels. Real democratic police accountability at national level will require an enhancement of the Dail's capacity to question and influence the Minister and the Commissioner in the discharge of their police functions. It is submitted that this could be achieved, or at least promoted, by the establishment of a Select Dail Committee with a remit to keep the police service under review and, for that purpose, to carry out such investigations and make such reports and

recommendations to the Dail as it considers necessary.

(b) Composition, Functions and Powers

The Select Committee envisaged here would have to be permanent in the manner of the Public Accounts Committee.[79] Its members would reflect the proportional strength of the respective parties and independents in the Dail and would be selected in the normal manner by the Committee on Procedure and Privileges. It would be provided with adequate secretarial resources and finance to engage the services of independent experts where necessary. Most important of all it would have the power to send for persons, papers and records; subject to suitable safeguards for the protection of legitimate concerns in the areas of confidentiality and State security. Given the Committee's remit it is likely that the Garda Commissioner, senior Garda officers and senior officials in the Department of Justice could be called to appear before it from time to time. Again, provision would have to be made to clarify the extent to which any of them could claim privilege; for example, it would be necessary to protect Garda personnel against any obligation to submit information which could jeopardise the success of current or planned operations. Departmental civil servants would have to be protected against questions on their preference for one course of action as opposed to another in any given situation. It should, however, be possible to meet any reasonable concerns that might arise in such matters without at the

same time defeating the Committee's capacity to make a major impact on the quality of police accountability.

Since the Committee would operate at a national level its interests would focus primarily on aspects of policing that were giving cause for concern throughout the whole, or in several parts of, the country. These issues might vary widely from time to time. Examples would be: a perceived increase in high profile criminal activities such as joyriding, drug abuse and burglary; the manner in which the law on activities such as under-age drinking, gaming and prostitution is enforced; the allocation of resources among the various branches of the police service; the manner in which gardai exercise certain powers; Garda policy and practice in the handling of certain types of public demonstrations; Garda procedures and practice in the surveillance, arrest and interrogation of suspects; the opening hours of rural Garda stations; and community policing to mention only some. In investigating such matters the Committee would be concerned to find out what the situation was on the ground, whether adequate resources were available to deal with the matter, whether those resources were being deployed in a manner which catered most efficiently for the public concerns that were being expressed and what, if any, more suitable alternatives were available. The Committee's link with the public would be maintained partly by its hearings being conducted in public, although provision would need to be made for it to

sit in camera in certain defined, exceptional situations. Perhaps even more important, however, would be the publication of reports and recommendations. In the first instance these would be laid before the Dail, but it is envisaged that they would also be made generally available and would be reported in the press and other media.

(c) Accountability Contribution

(i) Openess

The Committee's role should make a substantial contribution to the quality of police accountability at two levels. First, it would facilitate openess and accountability about the manner in which the police function is being discharged. These ingredients are a fundamental pre-requisite of accountability to the public. The Committee would be in a position to investigate fully most aspects of any policy, practice or procedure related to the Garda. It could also investigate specific Garda operations which had given rise to serious public concern. In this role there would be a need to define a working relationship between the Committee and the proposed complaints ombudsman. There would be no advantage in having the same incident investigated from the same perspective by the two bodies acting independently of each other. There may be occasions, however, where an incident or operation is not amenable to investigation by the ombudsman, or where his investigation throws up deeper policy or procedural issues which are outside his remit.

In these circumstances the Committee could fill the vacuum. The immediate objective of any Committee investigation would be to make as much relevant information as possible available on the issue in question to all members of the Oireachtas and the public. Simply being able to access detailed information on the discharge of the police function would represent a significant boost to the quality of police accountability. In particular, it would be an improvement on the current position where members of the Dail often have to be content with second hand reports on controversial aspects of policing which are often designed and used to conceal more than they reveal. Furthermore, as members acquire greater knowledge and expertise about policing through their work on the Committee they will become more adept at cross examining the Minister in the Dail and at using Dail procedures to expose more aspects of policing to public scrutiny. The Committee would also be in a position to stimulate more informed debate on what, if any, changes were desirable in any aspect of policing. This would link up with the second level at which the Committee could contribute to more meaningful police accountability.

(ii) <u>Advisory and Supervisory</u>

The second level concerns the process of reaching an accommodation between the views of the public, as represented by the Committee, and the existing policies and practices of the Minister or the Commissioner on any aspect

of policing. This end could be served by the Committee putting pressure on the Minister, the Commissioner or other relevant authorities to act on any recommendation contained in its reports. The Committee would have no power to direct the Minister etc. to adopt or desist from any specific policy, strategy, practice or procedure. However, the fact that the recommendations contained in a report emanate from nationally elected members of the legislature, coupled with the publicity that they would receive, should be sufficient to encourage the Minister and/or the Commissioner to give them serious consideration. In the event of recommendations being ignored in circumstances where the Committee deems action to be essential it could increase the pressure by issuing subsequent reports on the matter and by raising the matter regularly in the Dail. In a very extreme situation it could threaten to issue a public statement calling into question the Minister's, or the Commissioner's, fitness for office. In short it should be possible for this Committee, given its status and high profile, to have an impact by argument, persuasion and pressure. It would not be necessary for it to have the power to interfere directly with the Commissioner's professional autonomy. Admittedly it is inherent in this arrangement that there would be occasion when the Commissioner and/or the Minister would refuse to be moved by the Committee's arguments and machinations. For matters within the Minister's responsibility this is a normal incident of parliamentary government. He is always in a

position of having to make political choices between conflicting courses of action proposed by different bodies or interests. At the end of the day he, just like the members of the Committee, must answer for his stewardship to the people at election time. For operational matters within the Commissioner's domain this is merely a recognition of the reality that the Commissioner is established as the professional in these matters and accordingly, he must be given the freedom to take the final decision even if that decision conflicts on occasions with the wishes of the people as expressed through their elected representatives. One attraction of the Committee arrangement being proposed here is that it should help to keep the incidence of such conflict as low as possible.

4. Police-Community Liaison councils

(a) The Concept

Because policing in Ireland is organised on a national basis it is only to be expected that the Committee would confine its supervisory activities to matters which are of national concern. In any event, the limitations of time and the fact that the Committee is a Committee of the Dail would prevent it from dealing with incidents or matters which are of purely local concern. This leaves a major gap in the provisions for democratic police accountability. This gap becomes apparent when a local community, or a minority within a local community, feels that the police service they are receiving does not always cater adequately

for their needs, or is unsatisfactory in some other respect. Perhaps policies, practices or procedures set at national level do not take sufficient account of the economic, social, cultural or environmental realities of life in certain local areas. Perhaps the police service in some local areas suffers from an unusually high incidence of inefficient or undesirable personnel. Or perhaps a public event is planned for a certain locality and the local community, or a section of it, have a legitimate interest in seeking to influence how it will be policed. Whatever the reason, there will always be occasions where local communities are so affected by aspects of policing in their areas that they want the opportunity to express their concerns and have their concerns taken into account. The proposed Dail Committee is unlikely to provide an appropriate forum in such circumstances. In many of these situations the people affected would be from minorities or groups whose views would not find much sympathy in a Committee whose composition reflected the broad political establishment. In any event, the Committee could not possibly cope with all the local policing issues which will arise from time to time up and down the country. Something more is needed.

Ideally what is required is a network of police-community liaison councils. These councils would be broadly representative of the local communities in which they are based. Their function would be to meet regularly,

both formally and informally, with their local police commanders to discuss aspects of policing in their areas. The exact format of these meetings would differ from place to place and from time to time in response to differing local conditions. The basic idea, however, is that the local community could use these councils to bring perceived deficiencies in local policing to the attention of the police commanders, to get an explanation for the deficiencies, if any, and to put forward proposals on how they might be remedied. An added bonus is the likelihood that through the medium of these councils local communities would become much more aware of the nature of their policing needs and the mechanics of satisfying them. The local police commanders, in turn, could use the councils to ascertain views on policing policies, priorities and practices, both generally and in relation to any specific incident that might be raised, to inform the community of the constraints that the police must work under and, in the event of conflict, to try to hammer out some compromise. As with the Dail committees, however, a local council would not have the power to issue directions to its local commanders. Its effort to effect change in any aspect of local policing would have to be achieved through argument and persuasion. This could extend to making representations to the Dail Committee and/or the Garda Commissioner where local commanders prove consistently unsympathetic, autocratic or inefficient in matters of acute concern to the local community. For the most part it could be

expected that these councils would work smoothly and beneficially for both the community and the police.

It is one thing to describe broadly how these councils might operate to achieve greater co-operation and understanding between the Garda and local communities, it is quite another to devise universal structures to give effect to that co-operation. The concept, however, is not unknown elsewhere and so it would be useful to look briefly at how it is implemented in practice in two other jurisdictions.

(b) Precedents

(i) Britain

In Britain the first official recognition of the need for greater formal community involvement in local policing appeared in the Scarman Report[80]. Having examined the causes and the course of the riots in Brixton and to a lesser extent, in some other British cities Lord Scarman concluded that there was a very real need for the establishment of machinery to facilitate consultation and communication between the police and local communities. This machinery would have a vital role to play in situations where the police felt that the level or nature of crime in a certain area required harsh measures which may prove unpopular with the local community. The police could use the machinery to relate their concern to the community and to explain in broad terms what measures they

felt they had to take in order to fulfil their duty to enforce the law. The onus would then be on the community to voice its views on the proposed strategy and to suggest whatever changes would be necessary to satisfy its concerns. A similar consultation process could be used in advance for the policing of public marches or demonstrations which may occasion public disorder. The machinery would also have a role to play in on-going or past policing situations. For example the local community might be unhappy about some aspect of its police service or it might be incensed at how a particular incident was handled or at how an ongoing situation was being policed. In any of these events the local community could use the machinery to press for change. Apart from suggesting that statutory recognition should be given to the status and function of these liaison councils, Scarman did not prescribe in any detail how they should be structured. Indeed, he seemed to favour maximum flexibility in this matter. His proposals were taken up to some extent in the Police and Criminal Evidence Act 1984[81]. That Act obliged the police authority for each area, after consultation with its chief constable, to make arrangements for obtaining the views of the people in the area about matters concerning the policing of the area and for co-operation in preventing crime[82]. The Act does not state specifically that the chief constable is under a statutory duty to meet with representatives of the local community and to listen to, and discuss, their views on local

policing; but it seems to be implied. What is clear is that the arrangements need not be uniform from one area to the next. It is up to the police authority and its chief constable to devise the arrangement that is best suited to the needs of their area. If, however, the Home Secretary feels that the arrangements are not adequate in any area he can call for reports and can require a review of the arrangements in any area.

(ii) New York

In the U.S.A. many police forces have arrangements for seeking the views of the local community on policing in their area. These can range from the purely informal which characterise the very small localities which have their own police forces to the more formal arrangements which prevail in some cities such as Washington D.C. and San Francisco. Many, of course, have none at all; this is particularly true among State police forces. An interesting example is the New York City Police Community Relations Programme. Somewhat paradoxically it is organised by the New York Police Department itself. Within the force there is a separate department of community affairs which oversees the establishment and maintenance of councils at precinct level. In each precinct there is an adult council and a youth council. Membership is open to all who live within the precinct; in practice it is simply a matter of turning up at the regular meetings. On the whole the police find that attendance at these meetings is usually representative

of the local community. Representatives from local tenants, business, labour and other community groups are frequent attenders. Where apathy sets in, or where narrow but vocal interests assume prominence, the police make an effort to encourage people to get involved in order to maintain vibrant and balanced councils. Internal force regulations require the precinct commander, along with other officers from his command, to attend the regular meetings of their local councils. The police function at these meetings is to explain police problems, practices, policies and operations; particularly where any of these have caused friction. Equally they are there to listen to the views of the council and to work with it to identify the policing problems and requirements of the precinct, to work out mutually acceptable methods of coping with the problems and to defuse tensions that may have built up as a result of specific police operations or policies[83]. The functioning of these councils is facilitated by the election of boards at full council meetings. The boards are charged with the responsibility of drawing up the agenda, and framing rules and standing orders, for the conduct of full council meetings. The board maintains contact with the police on a regular basis in between meetings. Where specific policing issues have a multi-precinct dimension the community affairs bureau at headquarters will liaise with the groups involved. It also maintains on-going communication with various special interest groups which are spread and organised throughout

the city.

The New York arrangement is unusual in that its impetus comes from within the police department itself. This should not be interpreted as conclusive evidence that the rank and file within the force view the councils as an essential element of policing as opposed to an unnecessary constraint on their freedom to get on with their job. Equally so it does not mean that the councils are so closely identified with the police that they lose their independence. The fact is that the heads of the various departments within the police department are civilians and the department itself is viewed institutionally as just another department in the civil government of the city. Accordingly the liaison councils can be viewed very much as an instrument put in place by the city government with a view to bringing the policies, priorities and practices of that government more into line with the wishes and requirements of the city residents. Of course, the close police involvement in the establishment and maintenance of the councils always raises the suspicion that they will encourage the formation of councils which are acceptable to them rather than councils which reflect the social demography of each precinct. Against this it must be said that the police role can be credited with keeping councils alive in some precincts and with preventing some from being manipulated by narrow vocal minorities.

(c) Application to Ireland

It is not suggested here that either the Scarman or the New York blueprint should be transposed to Ireland. Not only are there weaknesses in both from an accountability perspective, but the broader policing context is quite different. In Britain most police forces are much smaller than the Garda Siochana and are established on a relatively local or regional basis. The New York City police, by contrast, is much larger than the Garda Siochana and operates in an urban environment which is quite different from most police environments in Ireland. The American and British examples, however, confirm that it is not necessary to adopt a uniform, rigid arrangement even within a single jurisdiction. So long as there is an obligation to establish and maintain bodies representative of local communities coupled with a concomitant obligation on the police to liaise and work with the bodies for the better policing of their areas, it should not matter that the arrangements are not uniform up and down the country or how the obligations are imposed. All that is necessary is that there is publicly identifiable machinery through which local communities and the police can explain, convey and discuss their respective feelings, concerns and objectives for local policing.

In Ireland the most immediate constraints on an arrangement for police accountability at local level are: the national as opposed to local police organisation, the

operational autonomy of the Garda Commissioner and the broad division of local government organisation into city, town and county. Because police is organised on a national basis it could be argued, along the lines of the New York model, that the establishment and maintenance of the liaison councils should be located centrally, perhaps in the force itself. That, however would be to incorporate unnecessarily one of the accountability weaknesses of the New York model. In Ireland there is no reason why this responsibility could not be given to city councils, county councils and urban district councils. This would require the imposition on the relevant local councils of a statutory obligation to establish and maintain police-community liaison councils which would be capable of representing the range of community views on local policing. This should be eminently feasible at least in provincial towns up and down the country. The local urban district council should be in a position to identify the various localities and groups within its town where distinctive views on policing might be expected. It would be the UDC's duty to appoint a liaison council, the composition of which would reflect these views as proportionately as possible. Presumably, such a liaison council would include representatives from: the business community, the employed, the unemployed, welfare and community groups, environmental groups, tenants organisations, home owners, senior citizens, young people, women's groups, ethnic and religious minorities etc.

Representatives from political parties, elected or otherwise, would be excluded partly to avoid even the appearance of the councils being dominated by party politics and partly because the political parties are already sufficiently organised and able to convey their views on policing to the Garda at both a national and local level. It would be useful if a statutory obligation was imposed on the Minister to maintain, through the issuing of regulations, an inclusive list of the sort of groups and interests that a council should consider when appointing a liaison council. Ministerial regulations could also be used to fix matters such as: maximum and minimum membership for councils, procedures for seeking nominees, the term of office for members, procedure for filling vacancies, the minimum number of public meetings, advance publication of the intention to hold public meetings etc. Apart from those basic regulations it would be up to each council to regulate its own procedure to suit the circumstances of its own area.

Once appointed it would be the statutory duty of a council to keep the policing of their area under review in respect of both general and particular matters, and to meet regularly with the local police commanders for the purpose of discussing how policing could be improved to the satisfaction of both the police and the local community. This would require a concomitant statutory obligation on local police commanders, designated by the Commissioner, to

meet regularly with the local councils, to explain any aspect of policing in the area, or with respect to any particular incident in a matter affecting the area, and to discuss how local police policies or practices could be improved to meet the concerns of the community, or specific sections of it, without at the same time frustrating the general obligation to enforce the law and maintain order. The usual proviso would have to be added protecting the police against any obligation to reveal information which could frustrate ongoing criminal investigations or which otherwise would not be in the public interest to reveal. A problem could also arise where a council wished to question the local police commander about a particular incident which had been the subject of a citizen complaint. In this event the commander would be permitted to withhold any comment until the complaint and/or court proceedings had concluded. That would not bar him from commenting. Indeed, he might be expected to be responsive to questions about general police policy or practice which lay behind the substance of the complaint, as opposed to questions about the actual behaviour of the individual gardai involved.

In the normal course of events it might be expected that a council would meet with the local police commanders at least once a month; sub-committees set up to liaise with the police on specific or ongoing matters would meet more frequently. Progress at these meetings would

undoubtedly be swifter if they were held in private. However, it would be a significant concession to openess and public accountability if at least some general meetings were open to the public. That way the various local sections of the community could see at firsthand how their interests were being represented. Ideally some time would be set aside at these public meetings for questions from the floor to be put to both members of the council and the local police commanders present. This should act as a safeguard against the danger of the council and the police commanders developing a cosy relationship in which their primary duty of service to the public is displaced in favour of a tendency to accommodate the selfish interests of each other. Ministerial regulations could fix a minimum and a maximum number of public meetings which each council must hold every year. Figures of two and six respectively would seem reasonable.

So far the discussion has focused on the establishment of police-community councils in the provincial towns. Further complications would arise, however, in their extension to the main cities and county areas outside UDC areas. The primary problem with the cities is that they embrace a very wide range of distinct social environments and interest groups spread out over a very large area. Any attempt to construct liaison councils which were as representative as those in the provincial towns would result in very large unwieldy bodies. Their sheer size

would make it impractical to function effectively in the role envisaged. There simply would not be enough time at the regular meetings to deal with all the local policing concerns that are likely to arise form within such a body. Keeping the numbers down to a workable level might solve the logistical problem but it would leave the councils much less representative of the localities within the cities and thereby defeat one of the primary purposes behind their establishment. A practical solution would be to impose a statutory obligation on each city council to establish a sufficient number of liaison councils throughout the city in order to secure reasonable representation for all localities and interests. Ministerial regulations could prescribe a flexible target figure of, for example, one council per 50,000 inhabitants. Each council would be established within a designated area the exact parameters of which would be worked out between the city council and the Garda authorities. It would then be up to each liaison council to work with the local police commanders for the benefit of the community and various sectional interests within its area. Everything else said about the liaison councils in the provincial towns would apply to the councils in the cities.

A slightly different problem would arise with liaison councils in the county areas outside the towns and cities. Unlike the cities the policing concerns of communities in these areas could be defined in fairly narrow terms. In

some counties, however, a logistical problem would arise in trying to put together a council which was fairly representative of all localities. In expansive counties such as Cork or Tipperary, for example, a truly representative council could prove large and unwieldy. It would involve members, and Garda personnel, from outlying districts having to travel intolerable distances to and from meetings. Again, the practical solution would be to permit county councils to establish more than one liaison council with a view to securing representation of all distinct localities and interests within the county. The only practical difference from the situation in the cities is that the size of the liaison councils in those counties which establish more than one is likely to be much smaller.

Finance is always an issue that arises in the context of any proposal which involves the proliferation of new bodies. The current proposal would entail the establishment of about 140 local bodies embracing a membership of about 1200 people[84]. These people would serve on a purely voluntary, unpaid basis. Nevertheless, many of them would be able to claim travelling expenses for attending meetings. To this would have to be added incidental expenses such as: heating and lighting of premises for meetings, secretarial services, stationary and advertising. These could be kept to a minimum through judicious use of county, city and urban council resources. When all these matters are taken into account it is highly

unlikely that the annual budget for servicing these liaison councils would exceed £2 million. This should be seen in the context of a current budget of £400 million for the Garda. £2 million, therefore, seems a very small price to pay for such a huge exercise in local government and more open and acceptable policing.

5. Conclusion

In a jurisdiction served by a single national police force the issue of democratic accountability will have to be addressed at a national and local level. The mechanisms which function at a national level will not be able to cope with the full diversity of policing issues that will be apparent at the local level, let alone the variations from one locality to the next. It follows that if the recipients of the police service are to be given an effective say on how their own policing needs should be met the central mechanism will have to be supplemented at the local level. Common to both, however, are the key issues of what form these mechanisms should take and how much control they should exercise over policing at national and local level. With respect to the former, the view being offered here is that the mechanisms should comprise bodies broadly reflecting the constituencies which they represent. In other words there would be a national body broadly reflecting the views of the country as a whole, and a large number of local bodies each reflecting the views of its' own locality. It does not follow that these bodies should

be directly elected. Indeed, it is suggested here that not only would direct elections run the risk of turning the police into a political football but it would also create unnecessary practical difficulties. It is submitted that a workable, and satisfactory compromise, is to establish a Dail Committee on police as the national forum and local liaison committees, appointed by the local councils, as the local fora.

The issue of what sort of control these bodies should have over policing issues has been considered here on the premise that the State will continue to be served by a national force whose senior officers are appointed by the government and whose resources are supplied by the government on the authority of the Dail. It was felt that the risks inherent in vesting a political authority with the power to issue operational instructions were too high relative to the accountability gain that might ensue. Instead, it is submitted that much of the accountability deficit apparent from chapter 10 could be remedied by strengthening the public's capacity: to access information about current policing policies, priorities, resources and practices; to query the suitability of those on offer, to weigh up the alternatives; and to have their own views taken into account by the Minister, the government and the Garda Siochana at national and local level. To some extent this represents a dilution of democratic control over the police when compared to other public services. At the same

time, however, it also represents a considerable strengthening of accountability. The fact that the police, unlike any other public service, would be subject to the permanent scrutiny of a Dail Committee and of a national organisation of local liaison committees would surely render it one of the most democratically accountable public services in the State. It is submitted that this would actually deliver much more in terms of democratic police accountability than conferring ultimate control over the police on the Minister for Justice or any other political authority. At the end of the day, the views of the Minister and the Garda Commissioner on policing issues will almost always find an accommodation with each other. The core problem is how to open up those views to public scrutiny and influence.

CONCLUSION

The primary task of this thesis was to analyse and assess the current structures of police accountability in Ireland with a view to forwarding proposals on how, if at all, the structures could be strengthened in order to render the Garda Siochana more receptive and responsive to the policing needs and wishes of the public. The distinctive nature of the service offered by the police has presented a complicating factor from the outset. Unlike most other public services it offers a vital protection while simultaneously posing a fearsome threat to the well-being of the individual in his daily life. Accordingly, the individual will be concerned, or potentially concerned, not only with how he has been treated personally at the hands of the police but also with how he, as a member of a distinct class or interest group or of the public as a whole, is served by the public resources and powers delegated to the police. Traditionally, these concerns have been catered for in Ireland through the rule of law and the democratic process respectively. Accordingly, this thesis has had to address itself to both, and in particular, to how they cope with the distinctive legal, constitutional and administrative status of the police coupled with the distinctive nature of the police role.

Superficially this should have been a straightforward project which would fall naturally into three parts. The

first part would place the police within the framework of the general public services provided by the State. This would entail an explanatory description of the Garda role (including relevant powers, duties and resources), the internal structure of the service and its' structural relationship with the Minister for Justice, the government and the Dail. It might be expected that these matters, apart from the substance of the Garda role itself, would follow along the lines of any other public service provided by the government. The second part would consist of an explanatory account of the various mechanisms for ensuring that each individual member of the force, and the service as a whole, are accountable for the discharge of their police functions. Again it might be expected that these would not differ significantly from those applicable to any of the other public services. They would embrace: mechanisms internal to the service itself; the traditional legal remedies, with particular emphasis on their application to public bodies as opposed to private individuals; and the normal processes of democratic accountability. Finally, the third part would involve a consideration of how effective the structures described in part 2 were in rendering the service described in part 1 fully accountable to the public. In the event of any weaknesses or loopholes emerging it would be necessary to consider whether these could be remedied without impeding the capacity of the Garda to deliver an effective police service.

Unfortunately, the project has not proved so straightforward. From the outset the distinctive nature of the police function in Ireland, coupled with the legal and constitutional status of the Garda Siochana, have emerged as hugely complicating factors. Surprising as it may seem, for a public service so familiar and vital as police, there is no clear legal definition of the limits of the police function or its' primary concerns. It was necessary, therefore, to build up a composite picture from a mixture of common law, diverse statutory provisions and the standing orders of the Garda Commissioner. Even then this picture could be offered only as a general guide to the Garda function as there is no statutory provision compelling the force to provide all of the services described in chapter 2 or, indeed, to confine itself to them. This is quite different from most other public services where the norm is for remits to be defined narrowly and precisely.

The impact of the difference is felt in the context of accountability. The performance of other public services, for example, can be measured against the tasks allotted to them. In the case of the Garda Siochana, however, there are no hard and fast boundaries defining for what it is being held accountable. Furthermore, the nature of what the Garda actually does in practice can also have a distinctive effect on its' accountability. Because it shoulders a very broad responsibility for enforcing the law at grass roots

level in society it is much more likely to encroach forcefully upon the liberty, person and property of individuals than is the case with most other public services. Since each individual member of the force is responsible in law for his own actions in law enforcement it follows that he is much more prone to be called to account through the traditional actions in law than would be the case for most other public servants. The traditional legal remedies, therefore, must form a major focus of police accountability.

The legal and constitutional status of the Garda Siochana proved even more troublesome. Despite the fact that the Garda was put on a statutory footing in 1923 as a new police force for a new State no attempt was made then, or since, to define its' legal and constitutional status, or that of its' members, in terms that could be equated easily with other public bodies and servants. The Garda's description as a "force" of "officers and men" under the general direction and control of a chief officer and subject to regulations issued by the Minister could find no parallel in any other public service of the State. Accordingly, it was necessary to turn to the history of British policing from where this particular model had originated. For the most part this complicated the picture even further as it transpired that each member of the force actually occupied an office which was rooted in the common law and which carried with it a number of significant

characteristics. These common law characteristics formed the basis on which the British courts developed a very imprecise doctrine of police independence which holds that each individual member of the force is independent in the exercise of the functions of his office and that the force as a whole is independent from higher executive authority in operational matters. The first limb of this doctrine seems strangely at odds with the concept of an organised and disciplined police force, while the second limb sits uneasily in the context of a national police force. Nevertheless, a complete analysis of the legal and constitutional status of the Garda Siochana is a pre-requisite for any informed consideration of police accountability in Ireland. Accordingly, it was necessary to unravel all the legal and constitutional threads even if, at times, they seemed somewhat detached from reality.

Although the legal and constitutional status of the Garda Siochana is fundamentally different from that pertaining to other public services both the legal and democratic processes continue to treat it as if it was no different. The impact on police accountability has been profound. Where the individual has suffered loss or injury at the hands of the police his remedy, in the first instance, will lie only against those members of the force directly responsible. Even if he can identify them he will be faced with a range of obstacles which he would not expect to find in a similar action concerning another

public service. For example, his action may be defeated because the impugned conduct is covered by the very broad discretion vested in each member of the force; if his grievance alleges a criminal offence it will be investigated by other members of the force; and, in the event of a civil action, he should find that there is uncertainty over whether the State can be vicariously liable. Effective police accountability also assumes the capacity to challenge police policies that have given rise to hardship or unfairness in individual cases. The doctrine of police independence, however, has ensured that the courts will be much less inclined to interfere in the exercise of police discretion than they would be in the case of most other public bodies.

The impact on the parliamentary process is the most peculiar of all. It offers the spectacle of the Minister for Justice conveying information from the Garda Authorities to the Dail in matters over which he professes to have no control. He makes it clear that he is acting only as a conduit for information and that he cannot accept responsibility for the operational aspects of the matters raised, nor can he undertake to issue instructions in such matters to the force. The reality is, however, that the Minister (and the government) is in a very powerful position to ensure that his views on all aspects of policing are satisfied. In other words, there is a measure of power without accountability.

The conclusion from all this must be that none of the standard causes of action in law, nor the traditional doctrine of ministerial responsibility fulfil satisfactorily the police accountability role mapped out for them. That is not to suggest that the Garda Siochana, and its' individual members, are somehow a law onto themselves, or are immune to the needs or the wishes of the community. On the contrary, for the most part, the rule of law and the democratic process operate quite effectively to curb extreme excess on the part of the force, or individual members, and to maintain a high level of common identity between it and the people they serve. What is suggested, however, is that the role of the Garda Siochana, coupled with its' peculiar status within the legal and constitutional structures of central government, leave the force with a considerable degree of autonomy. So long as oppressive police action in individual cases is not extreme the traditional legal remedies will prove elusive for the victims. Similarly, where the victims of unsatisfactory police service are minorities the accountability value of the democratic process will often be derisory.

Attempts to strengthen the police accountability effectiveness of the traditional mechanisms are always haunted by the danger of proving to be counterproductive. Inevitably, stricter accountability means encroaching on the freedom of the force to get on with the vital task of delivering a police service. It will not be much comfort to

the individual to know that he can call the police to account for everything they do if the structures which deliver that accountability prevent the force from delivering an effective police service. Similarly, if greater accountability meant greater democratic control there is always the risk that it will facilitate the powerful in using the police as an instrument to serve their own vested interests to the detriment of the weak.

Obviously, a balance has to be struck between, on the one hand, the need to ensure that the police are accountable and, on the other hand, to ensure that the accountability process does not either frustrate the delivery of an effective police service or render it a tool of the powerful. It is not the purpose of this thesis to present a single model of police governance which is guaranteed to secure this objective more effectively than any other. Indeed, there is probably no such thing. The primary contribution of this thesis lies in its' attempt to identify, analyse and correlate the diverse constitutional, legal and administrative structures and principles which form the basis from which any informed debate on police accountability in Ireland must proceed. The fact that proposals for enhanced accountability are included should be interpreted only as my reasoned views on the direction in which I feel that the accountability debate should proceed.

I take the view that progress on police accountability in Ireland can be made by building on the existing mechanisms. My proposals on reform of the citizens' complaints procedure and the democratic process do not represent any radical new departure from existing principles and structures. They are merely an attempt to maximise the potential inherent in these principles and structures to deliver on effective and balanced police accountability. If implemented to the full each should make its' own distinctive contribution to this end. On the complaints side, for example, the citizen should find that appropriate remedies for the abuse of police powers and status, ranging from the unlawful use of violence to mere discourtesy, are much more accessible, uncomplicated and effective than is the case at present. On the democratic side he should find that he, in conjunction with like-minded citizens, can actually have an influence on policing policies and practices in his locality. The fact the reforms are designed to function within the framework of the existing principles and structures should ensure that they do not impose a heavier demand on police resources or expose the police to a greater risk of party political manipulation. If anything, they should militate in the opposite direction.

Although the proposed reforms have been presented primarily within the context of their respective accountability structures that should not hide the fact

that they have a complementary role to play in providing more effective police accountability. This is evident from two dominant and inter-related themes which are common to both; namely openness and public participation. Openness is a vital commodity in balanced police accountability. The very fact that a police force does, and must, enjoy broad powers and resources for law enforcement, coupled with the fact that the policies governing their use are treated as confidential, creates a divide of suspicion and fear where often none is warranted. If these policies were in the public domain there would be no grounds for suspicion and, presumably, none for fear. Furthermore, many citizens who feel aggrieved at their treatment at the hands of individual police officers would be less inclined to believe that they had been victimised by arbitrary behaviour if their complaints could be resolved by an explanation of the contents of, and justification for, the policy or strategy being applied in their cases instead of simply being told that their complaints are unfounded. The fact that police power over individuals is often exercised away from the public view, either in police stations or late at night on the streets or on the highway, puts a premium on openness in the accountability mechanisms. Unless structures are devised which can ensure as much as possible that all the relevant facts are disclosed in a citizen's complaint of ill-treatment or abuse, suspicion will linger. It is vital, therefore, that not only should the police be under an obligation to cooperate with

complaints against themselves but also that the investigation and adjudication should be entrusted to a competent and independent body.

Greater openness about police policies and practices will facilitate greater public participation in policing. The concept of police prevalent in Ireland today is based very heavily on an affinity or common identity between police and public. Coercive powers are a measure of last resort only. In the discharge of their law enforcement and public order functions the Garda Siochana are expected to rely primarily on public cooperation and support. This cooperation and support can be fostered and encouraged by inviting individuals as members of local communities and interest groups to contribute meaningfully to the contents of the police policies and practices which affect them. The proposals for a select Dail committee and local liaison councils would provide the mechanisms through which views could be formulated and promoted. These mechanisms can only function effectively, however, if the police are open to them. Openness in this context would mean a willingness to explain and justify existing police policies and practices and a willingness to consider constructive criticism. Openness and public participation, therefore, strike at the very heart of the proposals advanced in this thesis. In a society governed by the rule of law and the democratic process it would seem reasonable to conclude that the quality of police accountability could be judged by the

extent to which the relevant structures and principles upon which it is based reflect openness and public participation.

Finally, a word of caution. It is not being suggested here that enhanced police accountability will inevitably produce a better police service. At the end of the day the quality of a police service will be dependent on factors such as the quality of: recruits, minimum standards of entry, training methods, promotion criteria, powers and resources. The structures and principles of police accountability can make only an indirect contribution to the quality of the police service through their capacity to shape the contents of the other determining factors. That, however, should not detract from the fact that effective police accountability is a desirable end in itself in a liberal democratic society; and, indeed, in any society.