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POLICE DISCIPLINARY ACTION

- 5.1 This chapter considers the police disciplinary system as required by term of reference (2)(e), which requires the Commission to inquire into, and report upon
- (2) irrespective of the existence or adequacy of standards or procedures as a matter of Police policy, the practice of Police in the investigation of complaints alleging sexual assault by members of the Police or by associates of the Police or by both, in particular, but not limited to,—
...
 - (e) whether disciplinary action has been and is taken against members of the Police who engage in sexual activity that gives cause for concern or complaint or both, and, if not, why not:
- 5.2 The New Zealand Police disciplinary system is unique within the public sector context. It stems from the legislative base of the Police Act 1958 and the Police Regulations 1992, and operates as a very formal, and often time-consuming and complex process. Thus in addressing this term of reference I considered the following matters:
- the nature of the police disciplinary system, its legal foundation, and its relationship with performance management
 - issues arising in respect of the system
 - alternatives to the current system.

Background details of relevance to this chapter

Draft Code of Conduct for Sworn Members of the New Zealand Police. The draft code was issued by the Commissioner of Police in February 2002 with the agreement of the Police Association. This draft code was intended to replace the current disciplinary provisions in the Police Act 1958, Police Regulations 1992, and police general instructions.

Human Resources and Professional Standards sections at the Office of the Commissioner. During the period of interest to this Commission, the national headquarters of New Zealand Police (the Office of the Commissioner) had two separate sections involved with employment issues: Human Resources looking after performance management and appraisal, and Professional Standards dealing with complaints against staff members and any consequent disciplinary processes.

Police Amendment Bill (No 2). This bill was introduced to Parliament on 31 July 2001. It sought to do two things: first to strengthen police governance and accountability arrangements; second to improve police effectiveness in managing human resources. The bill sat low in the order paper for several years and was withdrawn in March 2006 when the Minister of Police announced that the Police Act 1958 was to be reviewed with the aim of having a draft Police Bill ready by November 2007, for introduction to Parliament in 2008.

Police Act 1958 and Police Regulations 1992. This legislation governs the present police disciplinary system. It is currently subject to a comprehensive review.

THE NEW ZEALAND POLICE DISCIPLINARY SYSTEM

- 5.3 With the exception of sexual harassment, inappropriate behaviour by sworn police officers is addressed by way of the police disciplinary system.⁵⁵⁹ (Sexual harassment is subject to separate policy directions. However, if dealt with formally, sexual harassment may also be addressed by way of the police disciplinary system.)
- 5.4 Separate disciplinary systems exist for sworn and non-sworn staff:
- The discipline of sworn staff is governed by the Police Act and the Police Regulations. Section 5(4) of the Act provides that the Commissioner of Police “may at any time remove any member of the Police from that member’s employment”, but that right is subject to the provisions of the Act, any general instructions issued, and any regulations made, as well as the conditions of employment set out in any contract of service.
 - The discipline of non-sworn staff is governed by a code of conduct, made under the Police Regulations. The code reflects standard procedure for public service employees under the State Sector Act 1988.

Disciplinary system for sworn staff

- 5.5 The disciplinary system for sworn staff is governed by the Police Act and the 1992 Regulations. Relevant, too, are the general instructions dealing with complaints (IA100–IA133). The system has two elements:

559 Mr Wayne Annan, New Zealand Police General Manager: Human Resources, Brief of evidence, 17 November 2005, p. 10.

- lower level disciplinary sanctions, which can be imposed by police management
- more serious sanctions, which might result in dismissal, which must be dealt with by bringing a charge before the police disciplinary tribunal.

Management-level disciplinary action

- 5.6 General instruction IA122 describes two types of disciplinary sanctions that can be imposed by police management on sworn staff, apart from laying formal criminal or disciplinary charges. These are an adverse report and a reprimand. General instruction IA131 adds the option of counselling (that is, advice intended to improve a police officer's conduct or performance) as part of the performance appraisal process.
- 5.7 Under general instruction IA122(4), an adverse report can be issued by a district commander when a staff member's conduct falls below the required standard through attitude, behaviour, lack of judgment, or some other reason. The type of behaviour that gives rise to an adverse report is generally of a relatively minor nature that does not warrant a formal charge or reprimand. An adverse report remains on the member's file for four years⁵⁶⁰ and the associated investigation file is also referred to the PCA for its review. In this and all other cases, if the PCA disagrees with the action taken by police, it can recommend other action be taken, including disciplinary or criminal proceedings. I was told by the Professional Standards national manager that there are apparently no cases in recent times where the PCA has disagreed with the actions proposed by the police in this regard.⁵⁶¹
- 5.8 The next level of disciplinary sanction is a formal reprimand. A reprimand is very similar to an adverse report; however, reprimands are reserved for cases where the breach or misconduct is serious but does not warrant laying a charge. Reprimands remain on the member's file for seven years. They have to be signed by the police commissioner, a deputy commissioner, or an authorised delegate.⁵⁶² If a member disputes the allegations that led to the recommendation of a reprimand (and that allegation is of misconduct or neglect of duty), then a reprimand is not issued, and the member will instead be charged in a disciplinary hearing.⁵⁶³
- 5.9 Counselling is another management tool used to guide a staff member towards improving his or her conduct or performance where it has fallen below the standard expected. Counselling is administered by a commissioned officer and forms part of the performance appraisal process.⁵⁶⁴ No record of the counselling is attached to the officer's personal file.⁵⁶⁵

560 Superintendent Stuart Wildon, New Zealand Police National Manager: Professional Standards, Brief of evidence, 21 November 2005, p. 9.

561 Superintendent Stuart Wildon, New Zealand Police National Manager: Professional Standards, Brief of evidence, 21 November 2005, p. 9.

562 Superintendent Stuart Wildon, New Zealand Police National Manager: Professional Standards, Brief of evidence, 21 November 2005, pp. 9 and 10.

563 New Zealand Police, General instruction IA122, "Disciplinary Action", last published July 2002.

564 The performance appraisal process involves an assessment of an employee's performance against both the functional requirements of their position and the police competency framework. The appraisal process is designed to consider not only the results produced by a particular employee, but also how those results have been achieved.

565 New Zealand Police, General instruction IA131, "Counselling", last published July 2002.

Police disciplinary tribunal

- 5.10 Misconduct too serious to be resolved by way of an adverse report or reprimand is dealt with by laying a formal charge before the police disciplinary tribunal. The tribunal consists of a retired judge or senior lawyer. If the charge is proven, the Commissioner of Police may impose the following penalties: reduction in rank, reduction in seniority, reduction in pay, a fine not exceeding \$500, or dismissal of the member.⁵⁶⁶
- 5.11 According to section 5A of the Police Act, the Commissioner of Police may institute the removal of a member of the police only “following an inquiry under section 12 of this Act into alleged misconduct”. Section 12(4) requires the person holding the inquiry to follow the procedure described in the regulations (although the rules of evidence can be relaxed to the extent that the inquiry may receive any relevant information whether or not this information would be admissible in a court of law). The regulations require the “investigation” to be carried out by the police disciplinary tribunal. The combined effect of the Act and regulations is therefore that the police commissioner cannot lawfully dismiss a member from his or her employment unless that member has first been found guilty of a disciplinary offence before the tribunal.⁵⁶⁷ The obligation to follow the procedure prescribed in the regulations means that what would otherwise be an independent but not necessarily formal disciplinary inquiry under section 12 of the Act becomes a highly regulated and formal process.
- 5.12 Indeed, as a result of the Police Regulations, the police disciplinary tribunal hearing process is very similar to the hearing of a criminal prosecution. Regulation 24 says that the procedure at the hearing “shall conform as far as practicable and with any necessary modifications to that followed in District Courts in their summary criminal jurisdiction”. A disciplinary matter is referred to as an “offence” rather than “misconduct”; the tribunal hears the “charge” as opposed to considers the “complaint”. Witnesses may be called to give evidence, and can be tested by cross-examination. If the charge is a serious one, the standard of proof required is high, in effect commensurate with the criminal standard of “beyond reasonable doubt”.
- 5.13 Regulation 9 sets out a full list of 42 offences of misconduct or neglect of duty on the part of sworn members of police. The offences listed include the following:
- being guilty of disgraceful conduct or conduct tending to bring discredit on the police (regulation 9(12))
 - using indecent, insulting, abusive, or threatening language in or upon police premises, or while on duty (regulation 9(11))
 - any act, conduct, disorder, or neglect to the prejudice of good order, morality, or discipline of the police, though not specified in the regulations (regulation 9(42)).
- 5.14 I was told that the charges most commonly laid are those of disgraceful conduct or conduct tending to bring discredit on the police, negligence, and excessive use of force.⁵⁶⁸

566 Police Act 1958 sections 5(7) and 5A.

567 New Zealand Police, Closing submissions, 16 December 2005, p. 31.

568 Superintendent Stuart Wildon, New Zealand Police National Manager: Professional Standards, Brief of evidence, 21 November 2005, pp. 10 and 11.

- 5.15 Numerous formal elements to the tribunal process are also specified in the regulations. They include the following conditions:
- A member of police cannot be charged with a disciplinary offence if the act or omission constituting the offence occurred 12 or more months previously, unless it can be shown that the charge could not reasonably have been proceeded with sooner (regulation 13).
 - The charge is to be in writing and contain such particulars as will fairly inform the member charged of the substance of the offence (regulation 14(1)).
 - The member is to be served with a copy of the charge and the summary of facts relating to the charge (regulation 14(2)).
 - Once charges are served on a police officer, that officer may seek an indication of the penalty in the event that he or she pleads guilty. The Commissioner of Police may give this indication if the proposed penalty would be no more than a fine.⁵⁶⁹ Such an indication is binding on the police commissioner if the member does so admit the charge (regulation 14(3) to 14(7)).
 - A member is to “plead” to the charge in writing (regulation 15).
 - If the member pleads not guilty then the matter goes to a hearing. At the beginning the charge is read (regulation 18(1)). The tribunal then hears the “prosecutor” and the prosecutor’s evidence, and then the member charged, and his or her evidence, followed by any rebuttal evidence (regulation 20(1)).
 - The parties may examine, cross-examine, and re-examine witnesses (regulation 20(2)).
 - The evidence is to be recorded (regulation 20(3)).
 - Where the charge is admitted or found to be established, oral or written submissions as to penalty are made by both the prosecutor and the member, either at or after the hearing (time frames apply) (regulation 21).
 - The tribunal is to forward to the police commissioner all submissions as to penalty and/or replies to those submissions and any comments based on the evidence or arising from the submissions or replies that the tribunal sees fit (regulation 26(2)).
 - Police officers can apply to have the charge dismissed by the tribunal where it appears a member has been unfairly prejudiced through not being informed as soon as practicable after the investigation that the member was to be reported (regulation 12(3)).
 - The Commissioner of Police may grant a rehearing of any charge if application is made within seven days of the member being notified that the charge has been proved (regulation 27).
- 5.16 The officer also has the right (under common law) to challenge the tribunal process by judicial review proceedings in the High Court.

Disciplinary system for non-sworn staff

- 5.17 As stated previously, the discipline of non-sworn staff is governed by a code of conduct, made under the Police Regulations. The code reflects standard procedure for public service employees under the State Sector Act 1988.

⁵⁶⁹ Regulations 9(12), 9(40), and 9(5) respectively; Superintendent Stuart Wildon, New Zealand Police National Manager: Professional Standards, Brief of evidence, 21 November 2005, p. 11.

- 5.18 As far as I could establish, the discipline of non-sworn staff is handled effectively within the police and is not the subject of any significant ongoing concern. Thus I have focused my attention in the report on issues related to the discipline of sworn members.

POLICE DISCIPLINARY ACTIONS TAKEN

- 5.19 I was told that between 1995 and 2005 a total of 262 officers appeared before the tribunal (covering all misconduct cases). Of these, 129 resulted in guilty pleas, 25 were withdrawn, 55 did not proceed because the officer accused left the police before the tribunal hearing, and eight were ongoing in November 2005. Only 45 cases actually came before the tribunal, of which 28 were proven and 11 not proven; the remaining six were abandoned.⁵⁷⁰
- 5.20 I reviewed 313 complaints of sexual misconduct made against 222 police officers. Ninety-six of these complaints, made by 85 complainants against 51 members of police, resulted in some form of internal disciplinary action being taken against the member of police involved, or they were dealt with via the complaint resolution process prescribed under the New Zealand Police Sexual Harassment Policy. Of these 96 complaints, 62 complaints (against 21 officers) were referred for hearing before a disciplinary tribunal. The remainder were dealt with by some lower level sanction ranging from counselling to a reprimand. The outcomes of the disciplinary processes were as follows:
- There were 28 complaints from 28 complainants involving 10 officers that were proven at a tribunal hearing.⁵⁷¹ Of these
 - Three charges were proven in relation to complaints of indecent assault against two officers (two complainants).⁵⁷²
 - Numerous charges of misconduct were laid against one officer. Of these charges, 17 were of a sexual nature, 13 of which were proven (five complainants).⁵⁷³
 - Charges against four officers, based on complaints of sexual harassment by nine complainants, were proven.⁵⁷⁴
 - Of 19 charges of misconduct of a sexual nature laid against one officer, 11 were proven (eight complainants).⁵⁷⁵
 - Five charges against two officers relating to complaints of misconduct of a sexual nature were proven (four complainants).⁵⁷⁶
 - Three complaints against three officers were not proven.⁵⁷⁷
 - Three officers resigned prior to disciplinary hearings relating to seven complaints (seven complainants).⁵⁷⁸ Of these
 - One officer faced complaints from five complainants, in particular, that he indecently assaulted two of the complainants, that he indecently exposed himself

570 Detective Superintendent Malcolm Burgess, Brief of evidence, 29 November 2005, Appendix 9.

571 Operation Loft files LT 80, LT 86, LT 94, LT 104, LT 131, LT 133, LT 142, LT 149, LT 163, and LT 187.

572 Operation Loft files LT 104 and LT 133.

573 Operation Loft file LT 86.

574 Operation Loft files LT 80, LT 94, LT 131, and LT 149.

575 Operation Loft file LT 187.

576 Operation Loft files LT 142 and LT 163.

577 Operation Loft files LT 149, LT 161, and LT 190. One of these officers also had a complaint against him proven (LT 149).

578 Operation Loft files LT 67, LT 96, and LT 138. (The officer who is the subject of LT 96 had also previously received an adverse report as a result of a sexual harassment complaint. He is also the subject of LT 116.)

- to two of the complainants, and that he used obscene language in requesting sexual acts from three of the complainants.⁵⁷⁹
- One officer resigned in 2001 after admitting three of six misconduct charges.⁵⁸⁰ This officer had previously received an adverse report in 1998 as a result of a complaint made by another complainant.⁵⁸¹
 - One officer resigned. He had been charged with a disciplinary offence after a complaint of rape was made against him.⁵⁸²
 - Six officers disengaged prior to disciplinary hearings relating to 24 complaints made by 24 complainants.⁵⁸³ Of these
 - One officer faced disciplinary charges based on 17 complaints of sexual harassment made by 17 complainants. A complainant had also alleged that this officer had raped her; however, this complaint was subsequently withdrawn.⁵⁸⁴
 - Three complainants made three complaints against three officers. Their allegations included sexual violation by rape, indecent assault, and sexual violation by coercion. Disciplinary charges were preferred against the officers after the completion of the investigations into these women's complaints.⁵⁸⁵
 - Three complainants made three complaints of sexual harassment against two officers.⁵⁸⁶
 - Four officers received an adverse report.⁵⁸⁷ Of these
 - One adverse report related to a police officer having sex in a public place. The complainant alleged that the officer had sexually violated her. The officer admitted having sex with the complainant but said that the sex was consensual.⁵⁸⁸
 - Two officers received an adverse report as a result of two sexual harassment complaints.⁵⁸⁹
 - One officer received an adverse report after the investigation into a complaint of indecent assault.⁵⁹⁰
 - Five officers received reprimands as a result of six complaints (made by six complainants).⁵⁹¹ One of the complaints involved an allegation of an officer having consensual sexual intercourse with an intellectually disabled woman.⁵⁹²

579 Operation Loft file LT 67.

580 Operation Loft file LT 96.

581 Operation Loft file LT 116. This officer is also the subject of LT 96.

582 Operation Loft file LT 138.

583 Operation Loft files LT 1, LT 91, LT 125, LT 126, LT 139, and LT 141. (The officer who was the subject of LT 91 had previously had a sexual harassment complaint made against him, which had been resolved.)

584 Operation Loft file LT 139.

585 Operation Loft files LT 1, LT 125, and LT 126.

586 Operation Loft files LT 91 and LT 141. (Another complainant had also made a complaint of sexual harassment against the officer who was the subject of LT 91. This complaint was resolved under the sexual harassment procedures.)

587 Operation Loft files LT 88, LT 116, LT 124, and LT 208. (The officer who was the subject of LT 116 is also the subject of LT 96, and is also included in the statistics relating to the number of officers that resigned before a disciplinary hearing.)

588 Operation Loft file LT 208.

589 Operation Loft files LT 88 and LT 116. (The officer who was the subject of LT 116 resigned prior to a disciplinary hearing into charges resulting from other complaints (LT 96).)

590 Operation Loft file LT 124.

591 Operation Loft files LT 30, LT 75, LT 120, LT 146, and LT 147. (The complainant in LT 30 also complained about the behaviours of another police member in LT 3 and as a result of this complaint the police member was counselled.)

592 Operation Loft file LT 75.

- Complaints of sexual harassment from two complainants resulted in a written warning for a non-sworn member of the police.⁵⁹³
- Twelve officers, four police recruits, and one non-sworn staff member were counselled as a result of 17 complaints made by nine complainants.⁵⁹⁴ Of these
 - Two officers, four recruits, and one non-sworn staff member were counselled as a result of complaints of sexual harassment by one police recruit.⁵⁹⁵ One was also transferred. Complaints against a further two officers are referred to in the next primary-level bullet point.
 - Two officers were counselled after a complaint was made that they were involved in a strip search of a minor (the complaint was upheld).⁵⁹⁶
 - One officer was counselled after removing a cigarette lighter from a woman prisoner's vagina.⁵⁹⁷
 - One complaint against an officer did not proceed to a formal charge because too much time had elapsed to lay disciplinary charges.⁵⁹⁸
 - Three officers were counselled as a result of three sexual harassment complaints made by two complainants.⁵⁹⁹
 - Two officers were counselled after the police investigated two complaints of indecent assault.⁶⁰⁰
 - One officer was counselled for having sexual intercourse at a police station.⁶⁰¹
- As mentioned in the bullet point above, a recruit at the Royal New Zealand Police College also complained about two officers at the college. These officers were cautioned as a result of the recruit's complaint.⁶⁰²
- Three complaints involving three officers were resolved under the Sexual Harassment Policy.⁶⁰³
- A further four police members subject to investigation as the result of five complaints (made by five complainants) disengaged or resigned during the course of the investigation.⁶⁰⁴

SUBMISSIONS RECEIVED ON ASPECTS OF THE DISCIPLINARY SYSTEM

5.21 I sought and received advice from counsel assisting the Commission, by way of submission, on the legal nature of the police disciplinary framework. This submission set out

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- 593 Operation Loft file LT 87.
594 Operation Loft files LT 3, LT 115, LT 136, LT 150, LT 167 (two officers were counselled as a result of one person's complaint), LT 169, LT 188 (six members of police were counselled as a result of one person's complaint), LT 212, and LT 216 (two officers were counselled as a result of one person's complaint).
595 Operation Loft file LT 188.
596 Operation Loft file LT 216.
597 Operation Loft file LT 212.
598 Operation Loft file LT 169.
599 Operation Loft files LT 136 and LT 167.
600 Operation Loft files LT 115 and LT 150.
601 Operation Loft file LT 3.
602 Operation Loft file LT 188.
603 Operation Loft files LT 39, LT 91, and LT 201. (The officer who was the subject of LT 91 was also the subject of other sexual harassment complaints. He disengaged prior to a disciplinary hearing in relation to these complaints.)
604 Operation Loft files LT 103, LT 123, LT 154, and LT 199. (These complaints are not included in the 96 complaints mentioned in the first sentence of the current paragraph because the members' resignation or disengagement was completed before any disciplinary action was taken.)

- the nature of the police disciplinary system for sworn officers
- the changes proposed by the Police Amendment Bill (No 2), which was withdrawn in March 2006
- the standard employment process where allegations of misconduct arise
- the appropriateness of the current police disciplinary system
- alternatives for consideration.

5.22 In summary, counsel assisting submitted to me that the current disciplinary regime for the police is “outdated and stands in the way of good employment practice”; and that, in relation to matters concerning this Commission, the regime neither facilitated fair dealing with complaints against the police nor promoted good performance management practices. Counsel assisting pointed out that a performance-based regime would have provided police management with the opportunity to shift poor performers more rapidly out of the police force if appropriate.⁶⁰⁵

5.23 Counsel for New Zealand Police submitted that, in general, the police supported the thrust of the submission from counsel assisting, and confirmed that it was largely in accordance with the position the police had advanced.⁶⁰⁶

5.24 The New Zealand Police Association, however, did not agree with the submission from counsel assisting. Counsel for the Police Association submitted that I should not accept the suggestion that the current regulations and policy framework are unworkable in relation to the management of poorly performing staff. In the association’s view, “the failings in the area of performance management are largely a result of a failure to implement the system that is currently in place.”⁶⁰⁷ Counsel for the Police Association explained that the tribunal was a more formal environment than that which would be encountered by most employees when dealing with issues of discipline, but that did not make the system bad.⁶⁰⁸

5.25 The Police Managers’ Guild agreed that sworn police staff should be subject to the provisions of employment law applicable to other employees in the public sector, based on a code of conduct. However, the guild submitted that the disciplinary tribunal should be retained for matters other than performance management (for example, matters of serious misconduct).⁶⁰⁹

5.26 What follows in this section of my report has been informed by the submissions I received from counsel assisting, taking into account also the submissions of the parties to the inquiry.

605 Ms Mary Scholtens QC, Counsel Assisting the Commission of Inquiry into Police Conduct, Submissions in relation to issues surrounding the police disciplinary framework, 8 December 2005, p. 13. (For comment on the provision of references to quotations, submissions, and other information provided by the parties, refer to “Notes for readers” in the Appendices.)

606 New Zealand Police, Transcript of hearing, 8 December 2005, p. 24.

607 New Zealand Police Association, Closing submissions, 16 December 2005, p. 6.

608 New Zealand Police Association, Closing submissions, 16 December 2005, p. 6.

609 Police Managers’ Guild, Submissions in response to draft report, 9 May 2006, p. 5.

THE WIDER EMPLOYMENT CONTEXT

- 5.27 The police disciplinary system needs to be placed in the wider context of employment relationships in New Zealand. These are governed by the Employment Relations Act 2000. That Act applies generally to the State sector. A large body of law developed over many years governs those relationships, including the way in which employers are to deal with disciplinary issues and termination of employment. The principles of natural justice, fair dealing, and good faith are at the heart of these.
- 5.28 These principles, applicable to all employment relationships, are applied by the police as employer where a member of the police takes a personal grievance claim under the Employment Relations Act (arguing, for example, unjustified dismissal). However, the disciplinary process within the police is subject to an additional formal investigation and quasi-judicial process under the Police Regulations; in contrast, in other workplaces, the body of law on employment relationships, including the requirements of natural justice, is regarded as sufficient.
- 5.29 Where misconduct or serious misconduct is alleged by an employer in a standard employment context the procedures to be followed by the employer must comply with the requirements of natural justice (as well as any agreed or published procedures). Natural justice depends very much on the particular circumstances; however, in the employment context it is tolerably clear what is required. The more serious the potential consequences for the individual, the more onerous are the requirements of natural justice.
- 5.30 As advised by counsel assisting,⁶¹⁰ in the normal employment context, case law confirms that natural justice will usually involve the following:
- The employee receives full and fair notice of the nature of the allegation(s) against him or her.
 - The employer or its agent must conduct a proper and sufficient inquiry.
 - A proper inquiry will necessarily include ensuring the employee sees all the information that is relevant to the allegation(s) held by the employer or obtained as a result of the investigation (unless there are proper grounds for withholding the information, which will be rare).
 - The employee must be given a proper opportunity to put his or her explanation or side of the story. Usually this will involve the opportunity to have counsel or an agent briefed. This will rarely, if ever, require formal cross-examination of witnesses, or even face-to-face questioning.
 - The employer must consider all the information fairly, with an open mind and without bias or predetermination, or regard to extraneous and irrelevant matters, weighing matters of credibility in the mix with all other information.
 - The employer must reach a decision that, on the information available, it is reasonably open to reach. The standard of proof is that the decision must be reasonably open to the employer, having regard to the gravity of the matter, and taking into account the information that the employer has.

⁶¹⁰ Ms Mary Scholtens QC, Counsel Assisting the Commission of Inquiry into Police Conduct, Submissions in relation to issues surrounding the police disciplinary framework, 8 December 2005.

- Any penalty must be proportionate to the proven offending.

5.31 These obligations and protections provide a sound platform for governing how issues of misconduct are addressed in New Zealand workplaces. In my view, it is important to have very good reasons for supplementing these obligations and protections.

ISSUES ARISING IN RESPECT OF THE POLICE DISCIPLINARY SYSTEM FOR SWORN STAFF

5.32 On the basis of the files I have read and the evidence I have heard, it appears that discipline and the management of poor performance by sworn staff are very difficult matters within the police. The existing disciplinary system appears to me to be part of the problem. Its high degree of procedural formality is out of step with the prevailing approach for dealing with employee misconduct used by other employers, which often uses a code of conduct as the basis for determining whether misconduct has taken place and for dealing with it.

5.33 Several features give rise to my concerns with the system:

- It is cumbersome, time-consuming, and costly, requiring considerable resources at both national and district levels.
- In many cases, particularly those involving complaints of sexual misconduct, disciplinary action can be initiated only when a complainant is prepared to be identified and, if necessary, give formal evidence at a disciplinary hearing. The formality of the process means that complainants may be reluctant to make this commitment (especially in cases of sexual harassment, where complainants may fear repercussions on their own career prospects).
- The formal and procedurally complex setting of the tribunal acts as an obstacle to New Zealand Police in meeting the standard of proof required for an employer to take appropriate disciplinary action in serious cases.
- Time limits on bringing disciplinary charges, and the need to await the outcome of criminal proceedings, mean that a high degree of care is needed in formulating disciplinary charges to ensure that disciplinary action can continue in instances where criminal charges are not proceeded with or an officer is acquitted of criminal offending.
- The balance of protection in the process is overly weighted in favour of the individual police officer, and hence is detrimental to the interests of the person making the complaint and to the need for New Zealand Police to manage poor behaviour. Complainant dissatisfaction about this can bring the police into disrepute.

5.34 There are two further systemic concerns, which reinforce the unsatisfactory state of the discipline and performance management systems:

- the inappropriate and arbitrary separation between disciplinary matters and performance management issues
- the incentive and opportunity, in the past, for police officers and managers to favour disengagement under the Police Employment Rehabilitation Fund (PERF) scheme as a means of avoiding disciplinary action, which left alleged victims of misconduct feeling aggrieved and created a perception that the police were “looking after their own”.

Cost and complexity of the system

- 5.35 Police Commissioner Robinson described the police disciplinary framework as “cumbersome”.⁶¹¹ Indeed, I was disturbed by the sheer volume of paperwork that the system generated and the amount of staff time involved in administering it. For example, I saw two investigations into officers that each comprised 19 files.⁶¹² Dealing with each of these officers spanned several years and would have involved extensive management time.
- 5.36 I accept that an effective system for investigating serious allegations will always be resource-intensive and will generate considerable paperwork. It is also clear to me that the police have struggled to find the best way of managing the disciplinary process. Because of its cost and complexity, taking disciplinary action against a sworn member often takes a long time to get under way and to be completed. The time frames are similar to those in the criminal courts. Those representing accused officers seek to have disclosure of statements and discovery processes completed. There is often a debate about availability of hearing dates, difficulty in appointing a tribunal, and for achieving agreement between the tribunal and the respective counsel as to an appropriate date for the hearing. All of this results in matters taking some time to be heard. Delays can be difficult for all those involved.
- 5.37 The need to use the formal disciplinary process for cases of sexual misconduct has clearly made it more difficult for the police to deal with such matters than is the case for other employers. This may lead to a reluctance to initiate formal disciplinary proceedings because of the significant cost (both monetary and in terms of the time and energies of senior police officers) of doing so.

Need for the complainant to be identified and to make formal complaint

- 5.38 In the normal employment context, employers can act upon complaints of misconduct even if the complainant is reluctant to be identified. Moreover, in cases involving the disclosure of serious wrongdoing under the Protected Disclosures Act 2000, an employer has an express duty to protect the confidentiality of the discloser as far as possible. However, the police told me that, because of the quasi-judicial nature of the police disciplinary process, they must have evidence to prove a charge before they can initiate disciplinary action.⁶¹³ In many cases, that evidence can be given only by the complainant, who must be willing to testify if necessary at a formal, defended hearing and face cross-examination.
- 5.39 Identifying the complainant is necessary in any employment situation where misconduct is alleged against an employee – for example, in a case of sexual misconduct of an identifiable individual. However, the additional requirement that the complainant be prepared to give evidence before a formally constituted tribunal may well be a factor in making victims (particularly fellow officers, but also those complainants who are aware of what the process involves) reluctant to come forward and/or to proceed with a complaint. If victims are reluctant to come forward there is greater risk that behaviour (such as offensive language or offensive behaviour) that may not in itself be considered serious enough to warrant the full

611 Police Commissioner Robert Robinson, Brief of evidence, 28 November 2005, paragraph 32.

612 Operation Loft files LT 3 and LT 86.

613 Superintendent Stuart Wildon, New Zealand Police National Manager: Professional Standards, Brief of evidence, 21 November 2005, pp. 7–8.

disciplinary process may not be picked up by the performance management process. Such behaviour may be a good predictor of a risk of more serious misconduct.

Formality of the process and the high standard of evidence and proof

- 5.40 In any disciplinary proceedings involving an employee, the employer must reach a decision that, on the information available, is reasonably open to the employer to reach. The nature and gravity of the issue necessarily determines the manner in which the employer reasonably satisfies itself of the truth of any allegations made against the employee.⁶¹⁴ This standard is commonly known as the “sliding scale” standard. Applying this approach, the police disciplinary tribunal determines the standard of proof required to prove a charge under the Police Regulations on the basis of the seriousness of the charge. Where a disciplinary charge is based on actions that are also (or have been) subject to a criminal charge then the appropriate standard of proof will usually equate to the criminal standard: proof beyond reasonable doubt.
- 5.41 This creates two risks for the disciplinary system. First, although a sliding scale standard of proof applies, the nature of the process means that more often than not those involved may assume that the criminal standard of proof applies to the tribunal. This type of assumption appears to be not uncommon among those involved in police disciplinary matters. That is to be contrasted with the more flexible approach taken in the usual employment situation where the employer is entitled to weigh conflicting information and come to a reasonable decision having regard to the nature and gravity of the matter. Secondly, there is a risk that acquittal of an officer on a criminal charge could inhibit management from bringing a disciplinary charge based on the same incident even if the conduct is deserving of action within a disciplinary framework. In my view this approach is too black and white. A jury in a criminal trial may be unlikely to convict for a range of reasons – for example, inconsistent evidence or witness credibility. But that should not preclude the police from forming a view as to the facts of the case for the purposes of disciplinary action, and acting accordingly. Sometimes an allegation may fall evidentially short of the criminal standard of proof for rape or other sexual offending but the conduct established is nonetheless entirely inappropriate and should be the subject of disciplinary action.
- 5.42 The risks arising from the formality of the process are greater where the complaint is one of sexual assault or harassment. The police disciplinary process, proceeding, as it does, like a criminal trial, has the same traumatic implications for the complainant. It is understandable that some complainants may not wish to put themselves through such a process, particularly after an acquittal in the criminal courts. This would not be necessary if the usual employment disciplinary processes could be followed.
- 5.43 The evidence before the Commission suggested that the criminal process mind-set of the police influences the investigation of complaints and the prosecution of disciplinary charges. This is not intended as any criticism. Police officers are required to undertake meticulous and rigorous evidential inquiries in order to successfully bring to justice those

⁶¹⁴ The leading legal authority for this proposition is *Khawaja v Secretary of State for the Home Department* [1983] 1 All ER 765, 784.

who have committed criminal offences. General instruction IA111(5) imposes the same high standards of evidence and proof in respect of the investigation of complaints against members under the Police Complaints Authority Act 1988. One can well understand that, being familiar with these processes, the police appear to see it as the only fair way to proceed in disciplinary matters as well.

- 5.44 However, this approach overlooks the fundamental difference between criminal prosecution, with its limited outcomes (guilty or not guilty), and a performance management system with its wider set of outcomes. An approach that draws upon the mind-set of criminal investigation is less likely to result in disciplinary action in response to information that is uncorroborated, such as a sexual assault complaint, than a less formal process would. I do not consider the fact that the police deal routinely with very difficult people, who are perhaps likely to make false complaints, as a reason justifying a more formal disciplinary process for the police than for other types of employee. The Commissioner of Police as employer should be well able to assess the reliability and credibility of the relevant evidence, after an independent (but not necessarily procedurally formal) inquiry where that is necessary or appropriate.
- 5.45 The current disciplinary system thus creates a confused amalgam of criminal prosecution and employment law. It implies that the disciplinary process imposes the same evidential obligations and standards as the criminal courts, and that disciplinary offences effectively mirror criminal offences. The tribunal applies the sliding scale standard of proof applicable in any employment situation but in a manner that effectively equates the standard in serious cases to the criminal standard of proof. The procedural formality of the tribunal process exacerbates this.
- 5.46 I believe this is conceptually wrong. It does not follow that an officer's ability to continue as a police officer should remain unquestioned, just because his or her behaviour does not meet the standard of proof of "beyond reasonable doubt" applied in the criminal courts or cannot be established by formal proof in an adversarial tribunal process. Under a modern performance management process, incorporating standard employment law obligations and protections, inappropriate conduct should be capable of investigation using a range of possible methods, and should be subject to the full range of possible sanctions, including dismissal.
- 5.47 The police submissions on a draft of my report said that cases are most commonly brought before the tribunal where the police wish to consider dismissal of the member. They did not agree that the police fail to distinguish appropriately between disciplinary and criminal matters, and rejected any suggestion of charges not being brought before the tribunal where it would have been appropriate to have done so. Rather, they stressed the need to be confident in a disciplinary situation about whether misconduct has been established to a level commensurate with the seriousness of an allegation (and the potential consequences, including dismissal), which is a common feature of the tribunal's processes and of employment law.⁶¹⁵

615 New Zealand Police, Submissions in response to draft report, 20 June 2006, p. 86.

- 5.48 There is no dispute about the need to establish whether the misconduct occurred to the necessary legal standard. My concern is that the high standards of formality and proof required by the tribunal process prevent disciplinary matters being pursued with the same degree of rigour and flexibility as happens in other employment situations.

Time limits on bringing charges

- 5.49 The 12-month limitation period on laying disciplinary charges, required by the Police Regulations (regulation 13), may give rise to practical difficulties, particularly where complaints have proceeded down a criminal path without disciplinary charges being laid in the meantime. The need to await the outcome of criminal proceedings means that a high degree of care is required in formulating the initial charges, as well as their timing, if there is to be any continuing disciplinary action after an acquittal of criminal offending.
- 5.50 The result is that if the officer is acquitted of the criminal charges, and if disciplinary charges have not been laid within the 12-month period, then police management has little option but to reinstate the officer despite the officer having behaved in a manner that may not meet acceptable standards of personal behaviour expected of a police officer. Again, this situation is an example of where, if the police had a disciplinary system based on a code of conduct, they would still be able to take disciplinary action based on a breach of professional behaviour, even if the criminal charges took time to proceed through the courts, and/or the police officer was acquitted.

Balance of protection

- 5.51 The balance of protection in the police disciplinary system is weighted in favour of the individual police officer and imposes on New Zealand Police obligations that extend well beyond the requirements of natural justice. The common explanation for this is that the police are in a similar position to other professions such as medical practitioners, lawyers, or chartered accountants. The disciplinary models of the police and these professions share a high degree of formality, but the police model has its own unique characteristics. Currently the police cannot dismiss a sworn police officer unless the matter goes to the police disciplinary tribunal.
- 5.52 In my view, there is no justification for the police to determine employment matters using a disciplinary process similar to professional disciplinary processes. The question at issue in professional disciplinary processes is whether a person is fit to hold a practising certificate and to be registered as a member of a particular profession. The loss of a practising certificate by an employed professional (for example, a doctor employed by a hospital) would almost certainly lead to termination of that individual's employment as well. But their employment could also be terminated for a range of other reasons related to performance problems rather than fitness to practise.
- 5.53 I am not aware of any other employment situation where such a requirement exists, that is where an employee cannot be dismissed unless charges are taken before a tribunal or disciplinary body. Although other employers wanting to dismiss an employee are required to ensure that their procedures comply with the rules of natural justice (thus the process

gives the employee the chance to be heard and to have representation), no other employer is required to follow a formal disciplinary process that is akin to a criminal trial.

- 5.54 In the policing context, it seems to me essential that a mechanism should exist for terminating the employment of those who fail to perform adequately, just as a hospital or law firm can terminate the employment of a doctor or lawyer who fails to meet standards of performance. Given that there is no parallel in policing to a professional practising certificate, it does not seem to me that a professional tribunal empowered to “deregister” police officers is necessary. The Police Association argued that, for a police officer, loss of his or her employment is tantamount to loss of his or her career. However, it is not an uncommon scenario in a small country for there to be only one employer of people with particular skill sets, and these situations do not elsewhere justify a separate professional disciplinary tribunal. Besides, there are many examples of former police officers (whether they have left the police voluntarily or been dismissed) using their police training and experience successfully in careers other than policing.
- 5.55 Were the separate police disciplinary system to be abolished, members of the police who believed they had been unfairly treated or unjustifiably dismissed would be amply protected by their ability to take a personal grievance to the Employment Relations Authority.⁶¹⁶

Separation of discipline from performance management

- 5.56 I was surprised to discover that between 1 January 1979 (the starting point for police investigations considered by this Commission) and 1 July 2006 the management of discipline was entirely separate from the human resource function within New Zealand Police. During this period, responsibility for the disciplinary process lay with the national manager of Professional Standards, who reported to the Deputy Commissioner of Police (Operations). Performance management and the annual performance appraisal system were the responsibility of the police general manager of human resources, who reported to the Deputy Commissioner of Police (Resource Management).
- 5.57 The separation of these functions is highly unusual. Mr Wayne Annan, New Zealand Police General Manager: Human Resources, who had previously worked in several private sector organisations, told me that he had never known an organisation where the disciplinary process was outside the human resource function.⁶¹⁷
- 5.58 This systemic disjunction between 1979 and 2006 has caused a range of difficulties associated with the police disciplinary process:
- divergent approaches to dealing with misconduct
 - division of responsibilities and the risk of inconsistency
 - information “silos” impeding effective performance management.

616 The Employment Relations Authority is an investigative body that operates in an informal way to resolve employment relationship problems. It looks into the facts and makes a decision based on the merits of the case, not on legal technicalities. Before conducting an investigation the authority will consider whether it is possible to resolve the problem by mediation. (Refer <http://www.ers.dol.govt.nz/problem/authority/>)

617 Mr Wayne Annan, New Zealand Police General Manager: Human Resources, Transcript of hearing, 18 November 2005, p. 33.

Divergent approaches to dealing with misconduct

- 5.59 The split between the functions of Professional Standards and Human Resources has encouraged two divergent philosophies and approaches around dealing with misconduct. The Professional Standards section, headed by a senior detective, approaches discipline from within a criminal investigative framework that focuses on whether the allegations are sufficiently supported by credible, admissible evidence to meet a standard of proof equivalent to that of “beyond reasonable doubt” so as to obtain a conviction.
- 5.60 By contrast, human resource specialists generally prefer to take a problem-solving approach of “let’s understand the problem and deal with the problem.”⁶¹⁸ Mr Annan told me that the human resources approach involves “having some dialogue, listening, understanding what the problem is, looking at the collective patterns that exist, and then without perfect information make some decisions and act on those.”⁶¹⁹

Need for consistency in dealing with misconduct

- 5.61 Also associated with the responsibility for disciplinary matters is the issue of national consistency. Under the disciplinary system, district commanders have authority to administer discipline for their own staff and operate their own Professional Standards units. Each district has a Professional Standards group, which carries out its function in various ways. I heard from one district commander who has taken control of the complaint process and manages it himself to ensure that it is done to his requirements.⁶²⁰
- 5.62 The Professional Standards section at the Office of the Commissioner seeks to ensure that there is a consistent approach to dealing with similar misconduct across the country. It reviews the district commanders’ recommendations to issue a reprimand or lay a disciplinary charge before these are submitted to the Commissioner of Police.
- 5.63 As noted in Chapter 2, in November 2005, in response to concerns raised by my inquiry, I was informed by the police of a proposal to enhance the Professional Standards section, increase its resources, and give it more control over the complaints process at a district level.⁶²¹ I was also informed of a direction given by Police Commissioner Robinson that in all future investigations of complaints against police (other than reasonably minor matters deemed appropriate for the District Complaint Resolution⁶²² process), district commanders were required to consult with the Professional Standards national manager regarding the appointment of an investigating officer. The purpose of this directive was to achieve consistency across districts and to ensure that the principles of independence were appropriately applied.⁶²³

618 Mr Wayne Annan, New Zealand Police General Manager: Human Resources, Transcript of hearing, 18 November 2005, p. 28.

619 Mr Wayne Annan, New Zealand Police General Manager: Human Resources, Transcript of hearing, 18 November 2005, p. 28.

620 Superintendent Mark Lammas, District Commander, Central, Brief of evidence, 15 November 2005, p. 5.

621 Police Commissioner Robert Robinson, Brief of evidence, 28 November 2005, p. 6.

622 The District Complaint Resolution system was developed by the Police Complaints Authority as an effective means of resolving a problem arising between a member of the public and the police. It is used where a complaint of a non-serious nature is made, for example a complaint of poor attitude as opposed to criminal behaviour. This is discussed in Chapter 4.

623 New Zealand Police, Memorandum from Police Commissioner Robinson to Office of the Commissioner executive and district commanders, 24 November 2005.

Dealing with persistent poor behaviour

- 5.64 I questioned Mr Annan regarding how the police might deal with an officer who consistently behaved in an unsatisfactory manner. He told me that the tribunal is a poor forum for dealing with persistent low-level misconduct, which is far more appropriately addressed by the performance management system. Although it would be possible to draft a charge of “disgraceful conduct”, he said, in reality that would be unlikely to occur because “the energy and efforts that go into these things are so significant that it’s unlikely to happen for those things that would be considered not serious.”⁶²⁴
- 5.65 There is also the issue of the obvious lack of fit between discipline and the performance management process. At present the police have no fair and proper means to dismiss a person who is unsuited for police work save by categorising their actions as misconduct and proceeding with the full force of the disciplinary tribunal process. I have already commented on the disincentives that exist to taking this approach. This appears to have resulted in reliance, instead, on informal processes, such as the Police Association persuading unsuitable officers to leave the organisation. I accept the police’s comment that the two organisations work cooperatively in this regard. But the extent of the police’s reliance on the Police Association to persuade unsuitable staff members to leave is extremely unusual in my experience. It is also undesirable, because it results in a perception that the police union has been ceded the power of the employer; that should belong to the Commissioner of Police.
- 5.66 These issues will need to be addressed as the integration of the discipline and human resources functions proceeds on from the establishment of a single management structure on 1 July 2006.

Development of an early warning system

- 5.67 The separation between the disciplinary and performance management systems may also have impeded the development of an effective early warning system (discussed in Chapter 6). I was told in November 2005 that the police were implementing a national early warning system whereby routine assessments are undertaken to determine whether an officer is at risk of doing something that could embarrass the organisation and harm other police members or members of the public.
- 5.68 Having an integrated approach to human resource management and staff discipline will assist the technological development and operation of the early warning system. At the moment the complaints database is not part of the human resources database so the human resources staff do not have access to it.⁶²⁵
- 5.69 The police did not accept that the separation of human resource management and discipline had impeded the development of early warning systems. However, they confirmed that the integration of the two sections will include amalgamating the relevant databases and developing appropriate strategies for early intervention.

624 Mr Wayne Annan, New Zealand Police General Manager: Human Resources, Transcript of hearing, 18 November 2005, p. 30.

625 Mr Wayne Annan, New Zealand Police General Manager: Human Resources, Transcript of hearing, 18 November 2005, p. 17.

Letters of appreciation sent to officers facing disciplinary charges who disengage

5.70 The Commission heard evidence of another matter caused by the separation of human resources and professional standards data into separate information “silos”. Human resources staff had sent out standardised letters of appreciation generated from the human resources database to police officers who had resigned or disengaged from the police while disciplinary charges were in train (disengagement is discussed further below).

5.71 In some cases I reviewed, officers who were referred for disciplinary charges after an investigation into alleged sexual misconduct but who disengaged before the hearing were subsequently sent standard letters from police management thanking them for their years of “dedicated” or “faithful” service; in reality, they were leaving under a cloud because of their alleged misconduct.⁶²⁶ For example, an officer who faced four disciplinary charges for alleged sexual misconduct under the provisions of the Police Regulations and who disengaged before the tribunal hearing received a letter from the police expressing appreciation:

On behalf of the Commissioner and Headquarters staff, I extend my sincere appreciation for the years of dedicated service you have given to the Police. I wish you and your family good health and every success.⁶²⁷

5.72 These letters caused me two points of concern. The first was that the message they gave to the departing officers was one of tolerance of their inappropriate conduct. Such letters could be used in a retiring officer’s curriculum vitae and give misleading information to other employers. My second concern was that, had the complainants seen these letters, they could have inferred from them a cultural or institutional lack of appreciation of the seriousness of the situation under which these officers were disengaging.

5.73 After having drawn attention to these letters during this inquiry, I was told in November 2005 that the police were now no longer sending standard letters of thanks to people who were disengaging or retiring with disciplinary or criminal matters pending.⁶²⁸ I was informed that the alert system for avoiding these standardised letters being sent out was still a manual one because the human resources staff did not have access to the complaint database held by Professional Standards.⁶²⁹ I would be very concerned if this practice were still continuing because of lack of administrative oversight and poor human resources systems.

Views on division of responsibilities and their integration

5.74 In its submission on my draft report, the Police Managers’ Guild accepted that there is inconsistency in the police about who is responsible for performance matters involving sworn staff. The guild commented that some districts see it as a Human Resources

⁶²⁶ For example, Operation Loft file LT 126.

⁶²⁷ Operation Loft file LT 1.

⁶²⁸ I note that in their June 2006 submissions in response to the draft report, New Zealand Police submitted the following: “It is far from uncommon for employees who are leaving a job, even under difficult circumstances, to receive kind words and thanks from their employer, especially where they have held their position for many years.” (New Zealand Police, Submissions in response to draft report, 20 June 2006, p. 96) I did not receive any evidence in support of this assertion, and my experience in the public sector suggests otherwise.

⁶²⁹ Mr Wayne Annan, New Zealand Police General Manager: Human Resources, Transcript of hearing, 18 November 2005, p. 17.

responsibility, others as a Professional Standards responsibility. The guild does not have a view either way, but asked whichever group was given responsibility for that group to develop and promulgate clear guidelines.⁶³⁰

- 5.75 The Police Association strenuously opposed any move to bring discipline of sworn members under the responsibility of the human resources general manager, on the basis that sworn members are not simply employees and, presumably, that they should not be disciplined by non-sworn staff. The association considered that disciplinary matters should remain the responsibility of the Professional Standards section, which should be given better resources, skills, and procedures for the task.
- 5.76 My view is that the separation of functions has done little to assist the police to deal effectively with poor performance or misconduct amongst officers. Although a formal, adversarial approach may be satisfactory for the criminal jurisdiction, it is not effective in an employment context when dealing with misconduct.
- 5.77 The police themselves accepted the need for the two functions to be integrated. The first stage in remedying the separation of function occurred on 1 July 2006, when the Professional Standards national manager began to report to the Human Resources general manager. The police noted that integration of the Human Resources and Professional Standards sections would have occurred earlier had the proposed code of conduct been introduced as a consequence of the Police Amendment Bill (No 2).
- 5.78 The police told me that the integration will lead, in time, to greater sharing of information between the human resources and disciplinary sections, and will ensure that Human Resources retains oversight of the steps taken after internal inquiries – whether performance-based or disciplinary.⁶³¹ Although I am pleased to note this development, I regard it as only a start. I remain concerned about the effectiveness of the police performance management and disciplinary system processes. The two functions will need to be fully integrated in all aspects of their operations and systems to ensure the integration is truly effective.
- 5.79 In my view the police would benefit from an independent review of the two functions to ensure that the integrated systems and processes are adequate, standardised, and managed to a standard that is consistent with best practice in the public sector. I believe that the State Services Commission, as the agency with overall responsibility for public sector management, should undertake this review.

Disengagement

- 5.80 “Disengagement” is the term used within New Zealand Police to refer to a member’s retirement from the police because of medical or psychological unfitness. This has been referred to colloquially as “PERFing” – (a reference to the Police Employment Rehabilitation Fund). Section 28 of the Police Act covers disengagements. That section enables a member of police who is certified by two medical practitioners nominated by the Commissioner of Police to be declared substantially unfit to perform the duties of a constable.

630 Police Managers’ Guild, Submissions in response to draft report, 9 May 2006, p. 5.

631 New Zealand Police, Submission re Integration of Professional Standards and Human Resources, August 2006.

- 5.81 The Government Superannuation Fund (GSF) scheme provides for contributions to be made by a member's employer as well as the member. Until 1992, the ability of a member to gain access to the commissioner's contribution upon leaving the police depended on the manner in which the member left. Members aged 49 years or younger, who disengaged under section 28, were entitled to receive their superannuation as a lump sum, including the commissioner's contribution. If these members resigned or were dismissed they were entitled only to their own contributions plus interest (at about 3 percent). Alternatively, they could elect to freeze their contributions and receive a pension (which would include the commissioner's contribution) from the age of 50. Accordingly there was an incentive for police officers who were under 50, who met the criteria for disengagement, and who wished to obtain immediate access to their superannuation funds, to disengage rather than resign or remain in the police force and risk dismissal. Police members aged 50 years or older received a pension regardless of whether they resigned, retired, or were dismissed.
- 5.82 The use of disengagement prior to a tribunal hearing has been an area of particular sensitivity in the past because disengagement tended to be dealt with as an employment issue, without any formal link to the disciplinary process. This created a perception among complainants that police officers could use the disengagement process as a means of leaving the police to avoid disciplinary action being taken against them, and that New Zealand Police as employer tacitly approved such action. I was told that changes to police processes, and also changes to the police superannuation schemes in 1992, now mean that this is no longer an issue.
- 5.83 The position is different for a member of the Police Superannuation Scheme (PSS), which replaced the GSF as the superannuation scheme for police members joining after 1992. Under the PSS a member who resigns is treated in the same way as one who retires. The fact that PSS members can leave the police with their full superannuation entitlement, whenever they wish, is seen by the police as almost certainly the reason why applications to disengage have decreased significantly in recent years.⁶³² Disengagements under section 28 fell from 244 in 1999 to 95 in 2005. At the same time resignations increased steadily over this period from 49 in 1999 to 205 in 2005.
- 5.84 For those members who are still members of the GSF, all applications for disengagement are now considered by the human resources general manager, who has the delegated authority to accept or decline applications to disengage. I was told by Mr Annan that when he considers an application for disengagement under section 28 from a member who is also under investigation for a disciplinary or criminal matter, he is advised of concurrent disciplinary action by Professional Standards, and takes into account whether the application was made before the applicant knew he or she was being investigated, and whether the application is in any way linked with the complaint that has been made about the member. Where it is apparent that either situation exists, Mr Annan said that the application would ordinarily be declined.⁶³³

632 Mr Wayne Annan, New Zealand Police General Manager: Human Resources, Brief of evidence, 18 November 2005, p. 13.

633 Mr Wayne Annan, New Zealand Police General Manager: Human Resources, Brief of evidence, 18 November 2005, p. 13.

- 5.85 I was also told that this has not always been the case,⁶³⁴ and that was apparent from a number of the files I studied. The files indicated that, provided medical certificates properly supported the application, the member was generally able to disengage and claim full pension entitlements and severance pay. I saw examples on the files where members disengaged prior to the tribunal hearing, particularly when they realised that they were likely to face a significant penalty such as dismissal.⁶³⁵
- 5.86 The Police Association pointed out that disengagement is a right that any officer who joined the police before 1992 can claim provided that there is proper supporting evidence (for example, medical certificates). I accept that. However, officers could disengage on medical or psychological grounds such as stress arising from or exacerbated by the officer's own misconduct and/or its reporting. For example, one officer who was the subject of a rape allegation, and was then served disciplinary charges, disengaged on the same day the disciplinary charges were served on him. Counsel for the police made a submission on this case:
- In short, the stress associated with the rape inquiry, followed by the disciplinary proceedings, brought him to a state where he was psychologically unfit to continue to serve as a Police officer.⁶³⁶
- 5.87 Complainants in such cases could be left with a sense of injustice when advised the disciplinary matter could not be taken further because the alleged offender had disengaged and was no longer a member of police (criminal proceedings not being in contemplation).
- 5.88 The police pointed out that, in the cases in question, disciplinary proceedings had been launched with a view to dismissing the offending members from the police. If those members chose to leave of their own accord, then the objective of the exercise was achieved. The police said that there was nothing inherently objectionable about resolving applications for disengagement on their merits, and permitting members who had demonstrated that they were unfit to continue in the police to leave before the disciplinary process had run its course. Every disengagement had to be supported by proper documentation, including certificates from independent medical practitioners. Nevertheless, the police said that in each of these cases the formal complaints made were still determined (and inevitably upheld) by both the police and the PCA, thereby vindicating the complainants.⁶³⁷
- 5.89 I accept that police members who appeared to have left with large sums through disengagement were in fact receiving payments that represented capitalisation of many years of contributions. The payments were not any form of bonus or golden handshake. Police members of the GSF, as with other public servants who leave before their retirement date, are entitled to receive back their contributions plus interest, and (depending on their length of service) are entitled to the employer's contribution as well.
- 5.90 My concern is that allowing the voluntary departure of the members (as opposed to their dismissal), and the consequent abandonment of disciplinary proceedings, gave complainants the message that their complaints were being swept under the carpet and

634 Mr Wayne Annan, New Zealand Police General Manager: Human Resources, Brief of evidence, 18 November 2005, p. 13.

635 For example, Operation Loft files LT 1, LT 91, LT 139, and LT 141.

636 For example, Operation Loft file LT 1; Submission from Ms Kristy McDonald QC, Counsel for New Zealand Police, 12 July 2005, p. 7.

637 New Zealand Police, Submissions in response to draft report, 20 June 2006, p. 94 and p. 96.

that the officers were incurring no penalty at all for their misconduct. In many instances, the timing of the disengagement and the fact that it was permitted on the grounds of stress arising from or exacerbated by the disciplinary charges themselves gave the appearance that the police management was relieved at the departure of a troublesome officer and avoidance of a time-consuming and costly tribunal process; meanwhile, the officer concerned was able to take with him superannuation contributions from the commissioner and other benefits. I do not wish to suggest that there was anything improper about this. However, it created a perception that the outcome was mutually beneficial for the police and the officer concerned, and in some cases, a perception of collusion – the police “looking after their own”. Two of the submitters who appeared before me were very concerned that the alleged offender in each of their cases had been able to disengage from the police without going through the disciplinary process.⁶³⁸ The message to complainants from all of this was a harsh and hurtful one.

- 5.91 I do not agree that it is an acceptable outcome for a member facing disciplinary proceedings to disengage rather than face the tribunal on the sole basis that he or she meets the test for disengagement. The fact that a complaint under the Police Complaints Authority Act 1988 (PCA Act) may later be upheld will be small comfort to a complainant in the absence of any disciplinary penalty. In my view, when an employee who has been accused of serious misconduct seeks to resign, the employer should have the option of declining to accept the resignation in order to see a disciplinary process through to formal dismissal – on the basis that the misconduct is too serious not to have some sanction. In my experience, that is common practice in the public sector and some professions.⁶³⁹

ADEQUACY OF THE CURRENT DISCIPLINARY SYSTEM

- 5.92 Witnesses appearing for the police laid much of the blame for the problems of managing poor performance on the police disciplinary system. In his evidence to me, Police Commissioner Robinson stated,

the Police have for many years regarded the current disciplinary framework as cumbersome and anachronistic. In order to take serious disciplinary action against a member of the Police, a Tribunal must be convened, and the member charged with a disciplinary offence.⁶⁴⁰

- 5.93 New Zealand Police said that the reasons for the present arrangement were unclear. It was likely that it had its origins in the nature of the office of constable, by which police officers are not “normal” employees but enjoy considerable independence. However, the police submissions during the hearings confirmed that the present arrangements are not necessary to preserve the independence of the office of constable.⁶⁴¹
- 5.94 More importantly the police said that the disciplinary system draws no distinction between misconduct that reflects bad behaviour and that which reflects poor performance. They told me that there are disciplinary options that do not require the tribunal’s involvement,

⁶³⁸ Submitters D and E, Operation Loft files LT 1 and LT 126.

⁶³⁹ For example, the Institute of Chartered Accountants of New Zealand has a rule to deal with such circumstances.

⁶⁴⁰ Police Commissioner Robert Robinson, Brief of evidence, 28 November 2005, p. 11.

⁶⁴¹ New Zealand Police, Closing submissions, 16 December 2005, p. 31. Constabulary independence is discussed in more detail in Chapter 3, paragraphs 3.263 to 3.266.

that performance issues can be addressed as part of routine supervision, and that the police have always been attuned to the possibility that conduct perhaps falling short of provable criminal conduct may nonetheless indicate entirely inappropriate behaviour and need to be dealt with accordingly. But they accepted that the tribunal is a poor forum for addressing persistent low-level misconduct because, no matter how badly a police officer performs and how many warnings he or she receives, under the present law he or she cannot be sacked for incompetent performance alone.⁶⁴²

5.95 The police submitted that there appeared to be little justification for the continuation of such an anomalous employment regime, and that very few other employment relationships provided such a significant additional safeguard to employees, or such a steep additional hurdle for an employer.⁶⁴³ Employment-based mechanisms for dealing with issues of performance are therefore an essential reform.⁶⁴⁴

5.96 Several witnesses from the Police Association and New Zealand Police who appeared before this Commission argued, on the other hand, that the current disciplinary system was justified. Their arguments for its retention can be summarised as follows:

- There is a significant right at stake – a person’s livelihood and reputation – and the likely difficulty of obtaining any similar employment.
- There is the nature of policing (including the persons the police must deal with on a day-to-day basis, who can be quick to complain, and situations where the use of force may be necessary, readily resulting in a complaint of assault).
- Where criminal proceedings are not pursued, but the complaint is a serious one (such as one of improper use of force), a police officer should have the benefit of a quasi-criminal testing of the complaint against him or her.
- Concerns about the veracity of witnesses require a forensic exercise including the full testing of the evidence and, essentially, meeting the criminal standard of proof before a charge should be found proved.

5.97 The Police Association submitted that the disciplinary tribunal system is appropriate for the police environment because police officers occupy a particularly difficult position in society in that their employer is also an investigator and prosecutor. For these reasons the association believes that it is imperative that those who know and understand the issues that confront police officers deal with matters of discipline. Mr Greg O’Connor, President of the New Zealand Police Association, maintained that it is a matter of natural justice for someone who faces a career-ending allegation to have that allegation properly investigated, particularly if the allegation is strenuously denied.⁶⁴⁵ The current disciplinary system is “a framework to ensure that Police follow a process that provides natural justice for the employee”.⁶⁴⁶

5.98 The association also made the point that the Commissioner of Police has a very low level of dismissal of non-sworn staff in the organisation, despite the fact that for non-sworn staff

642 New Zealand Police, Closing submissions, 16 December 2005, p. 32.

643 New Zealand Police, Closing submissions, 16 December 2005, p. 31.

644 New Zealand Police, Submissions in response to draft report, 20 June 2006, pp. 85–86 and 89.

645 Mr Greg O’Connor, President, New Zealand Police Association, Transcript of hearing, 5 December 2005, pp. 85–86.

646 New Zealand Police Association, Closing submissions, 16 December 2005, p. 6.

the police do not need to go through the tribunal process.⁶⁴⁷ Evidence presented by the association suggested that the problem lay as much with poor performance management practices by supervising officers as with any deficiency in the tribunal process. In its evidence the association also told me that there is an understandable and logical way in which trained detectives conduct investigations, and these officers find it difficult to distinguish between criminal investigations and employment investigations because sometimes they are the same thing in the sense that an employment investigation arises out of a criminal investigation.⁶⁴⁸

My views on the system

- 5.99 In my view, the current disciplinary system has no place in a modern police human resources strategy. It is not working and has not worked adequately during the period of interest to the Commission. The system for sworn members is not based on a code of conduct, which would allow the police to take prompt action when that code is breached by an employee behaving unprofessionally.
- 5.100 I agree with Police Commissioner Robinson that the need to charge the member with a disciplinary offence under the Police Regulations, and have the charge heard before the disciplinary tribunal, is both cumbersome and anachronistic. The formality of the tribunal process reinforces the difficulties caused by the standard of proof, and appears to lead some of those involved in the system to assume that the standard of proof applying for proving any breach of the regulations is the same as it is in the criminal law. The fact that cases of sexual assault and abuse are particularly difficult cases to prove in the criminal court does not mean that they should not be pursued for disciplinary purposes.
- 5.101 It may well be the case, as suggested by the Police Association, that those who manage the performance of front-line police are not particularly adept at following best practice. If so, I would suggest that the disciplinary process exacerbates this situation, because, whereas normal employment law requires an employer to follow a fair process when dealing with poor performance (for example, in giving clear instructions about the expected level of performance, giving timely warnings about poor performance, and providing opportunities for staff to respond with improved performance), the police system requires only that management prove a single “charge” in a formal setting, typically to a high standard of proof. In other words, the system is punitive and adversarial, and works against performance management that is based upon constructive and facilitative processes.

OPTIONS FOR REFORM

- 5.102 I firmly believe that the present disciplinary system should not remain in place. It should be replaced by a system based on standard employment law procedures using a code of conduct.
- 5.103 Police Commissioner Robinson suggested to me in evidence that even under a system governed by a code of conduct there would be scope to retain a formal disciplinary tribunal for some cases, for instance for serious allegations of misconduct where there

647 Mr Ross Crotty, Barrister, Brief of evidence, 5 December 2005, pp. 3–5.

648 Mr Ross Crotty, Barrister, Transcript of hearing, 5 December 2005, p. 28.

are significant factual disputes and/or credibility issues, or where there are allegations of criminal offending.⁶⁴⁹ The draft code of conduct for sworn members included provision for a national disciplinary panel that would make classification decisions when a matter first surfaced, for instance whether the officer's behaviour was a performance issue, a misconduct issue, or an issue that involves criminality. If the matter were classified as serious, with dismissal as a possible penalty, the officer concerned would have the ability to make representations to a decision-maker and independent person.⁶⁵⁰

5.104 The Police Association supported the introduction of a code of conduct. But it also favoured retaining the tribunal, with various procedural reforms, to provide an avenue for independent inquiry into allegations of conduct that is not plainly criminal but that might, if established, give rise to criminal charges – for example, complaints about the use of excessive force. The association proposed the following procedural reforms:

- a panel of prospective members, selected by agreement between employer and employee representatives
- strict timetabling, to ensure that matters can be dealt with promptly (within 60 days of complaint)
- changed evidential requirements
- tribunal decisions binding on the police commissioner, to avoid further delay and uncertainty
- appeals no longer involving a hearing *de novo* (that is, a complete reconsideration of the evidence).⁶⁵¹

5.105 Despite these proposals, it is my firm view that retaining the police disciplinary tribunal in any form would be a retrograde step. Retaining the tribunal only for the most serious matters would add nothing but further complication to the process for managing serious misconduct by sworn members. The well-established principles of employment law provide more than adequate protections for employees of the police, including in cases where misconduct is sufficiently serious to warrant the intervention of the criminal law. The question of criminality is for the courts; the employment-related consequences of the conduct are a matter for the Commissioner of Police as employer.

Safeguarding procedural integrity and fairness

5.106 In their submissions on a draft of this report, the police accepted that the requirements in the regulations that an adversarial hearing be convened, and that the proceedings resemble a criminal trial, are unnecessary in the employment context and should be abolished. They also agreed that the 12-month limitation for disciplinary proceedings could no longer be justified. Their only concern was to preserve the legal obligation to establish misconduct to a level commensurate with the seriousness of the allegation. To this end, they urged retention of independent involvement (albeit without any of the formal trappings of the existing system) in those cases where it would prove to be a help rather than a hindrance.⁶⁵²

649 Police Commissioner Robert Robinson, Brief of evidence, 28 November 2005, pp. 12 and 13.

650 New Zealand Police, Draft *Code of Conduct for Sworn Members of the New Zealand Police*, [February 2002].

651 New Zealand Police Association, Submission in response to draft report, 14 June 2006, p. 5.

652 New Zealand Police, Submissions in response to draft report, 20 June 2006, pp. 3–7, 11–12, 92–93.

5.107 In my view, a well-functioning human resources system operating within the normal employment law context would ensure both a due level of inquiry into allegations of misconduct, so that the public can have confidence in all members of the police force, and a procedure that is fair to the employee and meets the requirements of natural justice. Abolishing the tribunal would enable a more flexible approach to such inquiry, while still enabling the Commissioner of Police, as employer, to have the necessary independent factual assurance before taking serious action against a member (as is required by section 12 of the Police Act in a case involving dismissal).

Interface with the complaints system

5.108 The integration of the Human Resources and Professional Standards sections of the police will mean that disciplinary matters are dealt with by the same staff who are responsible for performance management. I see no reason why the functions of these two sections cannot be fully integrated in all aspects of their operations and systems. However, there are some implications for the management of complaints.

5.109 The existence of a complaint against a member under the PCA Act, or an allegation of criminal conduct, is a separate matter from a disciplinary investigation, which will need to be investigated under a parallel process involving police investigators and/or the PCA. But a complaint can have employment implications for the member at an early stage too – for example, where there is a need to consider suspension pending determination of a complaint or a criminal charge. There are standard procedures under employment law to address the timing issues that can arise in respect of those matters.

5.110 I also note, in respect of complaints, that the PCA has the power under sections 27(2) and 28(2)(b) of the PCA Act to recommend to the police commissioner that disciplinary proceedings be taken against a member after a complaint investigation.

The case for interim reform

5.111 The Police Amendment Bill (No 2) was intended to streamline and strengthen disciplinary processes for police staff who fall short of the required standards.⁶⁵³ The bill provided for the abolition of the tribunal, and the police told me that it would have given them a legal base for a code of conduct and the means of tackling poor performance using modern human resource practices.

5.112 In explaining the changes that would have arisen from the new system under the bill, Police Commissioner Robinson told me,

The new system will provide for a number of new measures that the organisation may take if these conventional performance management techniques fail, including, ... the dismissal of the member for ongoing poor performance.⁶⁵⁴

5.113 The Police Association told me that it had made representations to the Minister of Police in November 2005 on the bill. In its submission to the minister, the association stated that its view was unchanged since 2001, when the bill was first introduced; in particular,

653 Explanatory note, Police Amendment Bill (No 2) , p. 2.

654 Police Commissioner Robert Robinson, Brief of evidence, 28 November 2005, p. 12.

the association believed the bill was “an exaggerated response” to the four specific issues of concern that the bill addressed.⁶⁵⁵ The association told me in December 2005 that it believed that the bill should be abandoned and had made a submission to the Minister of Police to that effect.⁶⁵⁶

- 5.114 In March 2006 the bill, which had been before Parliament since 2001 was withdrawn, after the announcement by the Minister of Police that the Police Act 1958 and the Police Regulations 1992 were to be reviewed.⁶⁵⁷
- 5.115 I am very concerned that the review of the Police Act will take a long period of time and will delay the vitally urgent reform that is needed of the current disciplinary system. The review of the Act is comprehensive, and will not be finalised until at least 2008. I believe it is imperative that interim changes are made, pending the outcome of the review.
- 5.116 The interim changes I propose would involve Government revoking (by executive action) those provisions of the Police Regulations that establish the disciplinary tribunal system, and adopting in its place a system based upon a code of conduct. I believe that a suitable code of conduct should govern the discipline of sworn staff, as it does for non-sworn staff. (The issue of the need for a code of conduct for sworn staff is addressed in more detail in Chapter 6 and gave rise to recommendation R38.) Dealing with misconduct by non-sworn staff is more straightforward because they have a code of conduct in place.
- 5.117 Revoking the relevant regulations would allow discipline to be dealt with by the Commissioner of Police under his general powers as an employer, as envisaged by sections 5(4) and 5A of the Police Act. Pending completion of the review of the Act, those sections would remain subject to the obligations in the Act itself in relation to termination. Importantly, those obligations include section 12(2), which provides that dismissal of a member can occur only after an independent (but not necessarily procedurally formal) inquiry. In short, it would enable the police to adopt a best practice State sector disciplinary process.
- 5.118 It appears, then, that my proposal for interim reform largely accords with the police views, because an independent (but not formal) inquiry could continue to occur in serious cases as required by the Police Act. The process would be more straightforward, and would better integrate with performance management processes. I would expect, as a result, better performance management within New Zealand Police and the ability for the organisation to more appropriately discipline sworn members of the police who engage in sexual activity that gives cause for concern.

655 New Zealand Police Association, Memo from Greg O'Connor, President, to the Hon Annette King, Minister of Police, on the Police Amendment Bill (No 2) , 28 November 2005, p. 1.

656 New Zealand Police Association, Closing submissions, 16 December 2005, p. 7.

657 Hon Annette King, Minister of Police, news release, “Police Act to be reviewed”, 7 March 2006.

Recommendations

Police disciplinary system and procedures

- R33** Those provisions of the Police Regulations 1992 that establish the disciplinary tribunal system should be revoked as soon as possible to enable a more efficient system to come into force.
- R34** New Zealand Police should implement a best practice State sector disciplinary system based on a code of conduct in keeping with the principles of fairness and natural justice as part of the employment relationship.
- R35** The new disciplinary system should allow independent investigation of alleged misconduct where necessary or appropriate (in accordance with sections 5A and 12 of the Police Act 1958) but should not include the use of a formal disciplinary tribunal.
- R36** New Zealand Police should ensure that the human resource and professional standards functions are fully integrated in all aspects of their operations and systems.
- R37** The Commissioner of Police should invite the State Services Commissioner to review the police approach to performance management and discipline to ensure their systems and processes are adequate, standardised, and managed to a standard that is consistent with best practice in the public sector.

