

REVIEW ARTICLE*

Complaints Against Police in New South Wales by JULIE STUBBS (Sydney: NSW Bureau of Crime Statistics and Research, 1992) pp i-vii + 1-44. Softcover recommended retail price \$20.00 (ISBN 0 7310 0039 0).

Complaints Against Police: the Trend to External Review edited by ANDREW J GOLDSMITH (England: Clarendon Press, 1991) pp i-xi + 1-331. Hardcover recommended retail price \$110.00 (ISBN 0 19 825257 9).

These studies are good examples of the renewed academic attention to issues of policing. They show how what has been a narrow applied social science is attracting the attention of writers who are able to put the issues into broader theoretical and policy contexts.

In her study for the NSW Bureau of Crime Statistics and Research, Stubbs investigates the reasons why complaints against police in New South Wales rose 34.4 per cent between 1989-1990 and 1990-1991. In the course of her statistical analysis of various possible explanations, she provides a useful picture of who makes complaints and what they are about. The difficulties of doing research in a bureaucracy such as the NSW Police are illustrated by the problems which Stubbs encountered in data collection: despite official cooperation, it proved impossible to track down no less than 49 of the 420 complaint files selected for inclusion in the study sample. Useful as the report is in providing specific data, it is a shame that there was not time and space for a more extensive theoretical treatment of the empirical material. Stubbs is able only to provide some guideposts for such a study in her concluding comments on the broader context of complaints. These

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correspond to arguments in Goldsmith's important collection of essays on the 'trend to external review'.

The major contribution is Goldsmith's chapter, 'External review and self-regulation', which provides a discussion of fundamental issues and principles, some of which are addressed in subsequent chapters in specific contexts. Goldsmith surveys the literature on and experiences of complaints procedures which are internal to police organisations and concludes that an external element is required. Regarding completely independent investigations to be impossible, he argues for "the apparent inescapability of a balance between external and internal complaints mechanisms".¹ None of this is surprising. However, Goldsmith goes much further than the usual negative critique of complaints systems. He argues that "complaints need to be seen not simply as *threats* to existing policies and procedures or individual officers but, more importantly, as *opportunities* for re-examination of organisational policies and practices"². Characteristically, complaints procedures have been concerned, in traditional legal fashion, with *retrospective* consideration of *individual* adversary cases. Drawing on the theoretical literature which has transformed public law scholarship in recent years, Goldsmith argues ably that complaints should be seen as a resource for *prospective, organisational* change. He connects this to broader debates about change in policing and in police/public relations which are usually summarised as the shift towards 'community policing'.

This argument is developed through discussing the experience of independent and quasi-independent complaints mechanisms, including Citizen Review Boards in the United States and ombudsmen in Australia. The latter section includes a useful analysis of the New South Wales system. As Goldsmith suggests, the Ombudsman's mandate includes making recommendations on systemic issues of policy and organisation. However, no data are available concerning use of these powers and the implementation (or otherwise) of recommended changes to practices and procedures.³ As elsewhere, the potential of complaints systems for systematic and policy change is limited by lawyers' domination of ombudsmen institutions. As Goldsmith argues:⁴

While...legal investigative and forensic skills are appropriate in matters of assessing allegations of misconduct and the carriage of complaints prosecutions, it is not evident...that lawyerly skills are most appropriate to the performance of the systemic *ex ante* role.

1 Andrew J Goldsmith (ed) *Complaints Against Police: the Trend to External Review* (1991) p 14.

2 *Ibid* p 19.

3 *Ibid* p 45.

4 *Ibid* p 51.

Goldsmith suggests that it would be desirable to employ non-lawyers. While not disagreeing, I feel that this treats 'legal skills' as immutable: it may be equally desirable for ombudsmen to employ lawyers who have been trained in a way that allows them to see beyond individual cases.

New South Wales followed the Australian Law Reform Commission's recommendation that police complaints be added to the existing responsibilities of a generic ombudsman. Among the advantages of this approach is that it emphasises that police forces should, as far as possible, be accountable in the same way that other public servants are. Goldsmith contrasts this model with South Australia's specialist Ombudsman and the 'strongly external character' of the Official Misconduct Division of Queensland's Criminal Justice Commission, which was being set up at the time Goldsmith was writing.⁵

A much more detailed treatment of an example is given in the second chapter, in which Ian Freckelton documents the life and death of Victoria's experiment with an independent dedicated ombudsman, the Police Complaints Authority (PCA). Freckelton was a participant (as PCA Manager and Counsel Assisting) in the history which he relates, and the bitterness of the experience is clear. The emphasis here is on detail rather than analysis, but it is a fascinating, well-told story. Its central lesson is the aggressive political strength of Australian police forces and their hegemony over criminal justice politics. The circle is vicious: what makes control and accountability so necessary is exactly what makes achieving them so very difficult. As Goldsmith comments:⁶

The challenge posed for external review bodies is to persuade the police of the wider implications of complaints and of their own legitimate involvement in the process, and of the mutual benefits and commonality of interests at stake in the handling of complaints.

He is suitably circumspect about the prospects of meeting this challenge.

Goode's title, "Complaints against the police in Australia" might lead readers to expect a comprehensive discussion of Australian complaints systems which fills out Goldsmith's earlier sketch. If so, they will be disappointed. Instead, Goode devotes most of his essay to what he sees as the context of developments in police complaints procedures - law reform activity and, more generally, "wider currents of intellectual thought and social change evident not only in Australia but in other Western countries in the 1960s and 1970s".⁷ Unfortunately, ambition is not matched by quality of discussion, which meanders through discussions of legal change, its origins, police/public relations, the growth and influence of conflict

5 *Ibid* p 49.

6 *Ibid* p 56.

7 *Ibid* p 8.

theory [sic] and the overcriminalisation debate, judicial law-making, and the development of Law Reform Commissions.

Goode's style varies in irritating fashion. Sometimes, his word processor seems to have lost control:⁸

The disclosure of police misconduct, be it individual or organisational, the reaction of the public, the media, and the powerful, whether community tolerance, official tolerance, or the power balance in the given society is high or low for that kind of police deviance and the effects, if any, in and beyond the police organisation are random and hence, to a significant degree, the law reform which may or may not result is random.

Elsewhere, Goode emulates Denning-staccato:

There was another application for an order to review. It went to the Full Court of the Supreme Court of Western Australia. The Court found that the magistrate had erred. It remitted the case. This all went to the High Court.⁹

At times, it is merely pretentious: "There is an ebb and flow to creation".¹⁰ He mixes sweeping generalisations with local references which will puzzle international readers; what, for instance are they supposed to make of the bare instruction: "Consider the Eureka Stockade"?¹¹ And do they really need to be told of "the public campaign of denigration directed at the Law School of MacQuarie [sic] University" as an example of the controversial nature of "conflict theory"?¹² The chapter is peppered with questionable claims: for example, the "policing structure of Australia...derives from the...heritage of 'the Peelers'".¹³ This grossly oversimplifies a process which was at least as much influenced by the rather different tradition of Irish policing. Elsewhere, he claims that the "exclusionary rule...in relation to confessions and admissions...had a discernible effect in controlling police misconduct in that area".¹⁴ No evidence is provided.

After some 28 pages, Goode finally gets around to writing about Australian complaints procedures. The important and interesting story of how the Australian Law Reform Commission recommended a distinctive combination of internal and external regulation and this model's subsequent adoption in varying forms in various Australian jurisdictions is summarily presented in four concluding pages, which include brief comments on New South Wales and Queensland, a recapitulation of the Victorian story already provided in great detail in the preceding chapter, and nothing on the other Australian jurisdictions. The author's

8 *Ibid* p 119.

9 *Ibid* p 138, see also p 146.

10 *Ibid* p 124.

11 *Ibid* 127.

12 *Ibid* 124.

13 *Ibid* 125.

14 *Ibid* 137.

parochialism is again evident in his comment justifying the brevity of his treatment of Queensland: "The police accountability disaster in (Queensland) is well known".¹⁵ Perhaps, to Australian readers, but a Clarendon Press title is expected to be read by people who know nothing of Joh or his works. There is more of value in Goldsmith's sub-section on Australian complaints than in Goode's whole chapter. Read the former, skip the latter.

In the first half of the book, the focus is mainly (although not exclusively) on Australia. In the second, it shifts overseas, with a series of comparative studies of Canada, England and Wales, the United States and Northern Ireland. Clare Lewis discusses his responsibilities as Public Complaints Commissioner (PCC) in Toronto. These include monitoring the handling by police of complaints, investigating in special circumstances or when the complainant is dissatisfied by the police investigation, and making recommendations on issues of policy: the characteristic model of external review with limited proactive and policy elements. In addition, when the public interest requires, cases can be referred "to a civilian adjudicative tribunal with direct disciplinary power".¹⁶ Lewis argues that leaving initial investigations to internal police investigators is "a rational and acceptable compromise".¹⁷ In line with Goldsmith's approach, Lewis sees this not only as politically expedient, but also as encouraging police to take responsibility for dealing with complaints and the problems which underlie them. As elsewhere, an independent element in police complaints was politically controversial: a significant cost of acceptance imposed by police was the requirement that complaints made by members of the public must be proved beyond reasonable doubt. Not surprisingly, few findings of misconduct have been made.

Toronto police initially accepted this system in the belief that it "would never succeed in seriously disciplining an officer for misconduct...if the police themselves did not believe that serious discipline was appropriate".¹⁸ When the PCC stepped over this mark drawn by police, the reaction was legal challenge and a police 'strike', refusing to deal with traffic violations and thereby denying proceeds of fines to the Government.¹⁹ In contrast to what happened in Victoria, the PCC weathered the storm, and indeed its jurisdiction was expanded throughout Ontario and has led to similar developments elsewhere in Canada. Lewis concludes that "The Toronto experience should give confidence to those interested in complaints

15 *Ibid* 146.

16 *Ibid* p 157.

17 *Ibid* p 160.

18 *Ibid* p 164.

19 *Ibid* p 166.

reform.”²⁰ The distinction between Toronto and Victoria is that, in the former, political will and power existed to resist police demands.

Studies of complaints procedures in England and Wales are provided by two leading English criminologists, Mike Maguire and Robert Reiner. Unlike most other contributions, these chapters draw on empirical research, reflecting the substantial commitment of official resources to research on policing in the attempt to find solutions to the crisis of confidence which has overtaken policing in England and Wales since the late 1970s. Maguire’s chapter draws on extensive fieldwork both in the Police Complaints Authority and in three police forces, and also material provided from a national crime survey. Maguire makes clear that the changes in discipline and complaints procedures must be appreciated as part of more general strategies to control policing: the improvement of training and supervision and the specification of powers and rights in legislation and codes of practice. As elsewhere, introducing an independent element in complaints procedures has been a controversial business (leading, notably, to the resignation of Metropolitan Police Commissioner, Robert Mark). The resulting system is remarkably conservative: a Police Complaints Authority ‘supervises’ complaints involving death or serious injury and examines files of all completed investigations, with power to direct the holding of a disciplinary tribunal. The PCA treads lightly in an attempt not to antagonise the police: in consequence it, inevitably, has not changed public scepticism about the complaints system.

Maguire interviewed both complainants and officers against whom complaints had been made. These reports of direct experience add weight to scepticism: complaints were accepted as part of the job by most officers who, “although disliking the process of being investigated, know that there is little chance of a complaint of any but the most blatant misconduct leading to any action against them”.²¹ Meanwhile, 48 per cent of complainants were very dissatisfied with the outcome of their complaint. This dissatisfaction “was not closely correlated with outcomes; even those whose complaints had been substantiated were generally unimpressed”.²²

Most police research is focused on the activities of uniformed constables and sergeants. Police managers are usually happy for their subordinates to be interviewed and observed. They are less amenable to being the focus of research themselves. Reiner’s chapter is therefore remarkable in being a product of a project in which he interviewed at length nearly all (40/43) of the most senior police officers in England and Wales.²³ Reiner is a shrewd commentator: he

20 *Ibid* p 174.

21 *Ibid* p 204.

22 *Ibid* p 190.

23 For the full results see Reiner *Chief Constables: Bobbies, Bosses or Bureaucrats?* (1991).

discusses well the way in which critical criminologists and police officers reverse their usual positions when police deviance is discussed. The former speak the language of classical deterrence theory: "elimination of police deviance calls for enhanced certainty and severity of punishment".²⁴ Meanwhile, the latter insist on the complex causes of deviance and the inefficacy of deterrent strategies. For Reiner, "the debate is largely symbolic...the arrangements favoured by different viewpoints are espoused for what they represent rather than what they are realistically capable of achieving".²⁵ The best illustration is the suggestion that the unusual support of the English police union for a fully independent complaints system is cynically motivated by a belief that this would be less effective than investigations by police officers. Reiner's interviews illustrate the depth and variety of opinion amongst senior officers, whose words, quoted at length, show the inappropriateness of stereotypes. Thirty per cent favour a completely independent system, with another 18 per cent undecided. However, Reiner concludes that dissatisfaction about the rate at which complaints are substantiated will not be reduced by independent investigations. The real problem is not partiality in investigations, but the rules, adopted from criminal procedure, which govern them: notably the burden of proof and the right of silence.

Topping discusses how police complaints are handled in the extraordinary policing situation of Northern Ireland. His chapter also provides an introduction to the legal and constitutional position of the Royal Ulster Constabulary which usefully complements John Brewer and Kathleen Magee's remarkable observational study, *Inside the RUC* (1991). The complaints system is structurally similar to that in England and Wales: limited external supervision of investigations carried out by police officers. Not surprisingly, however, its operation in practice is very different, and Topping warns against transplanting legal mechanisms from one context to another. His argument is not fully developed: it would have been good to see more substantial discussion of what it is about complaints in Northern Ireland that distinguishes them from elsewhere.

'Professionalisation' has been a recurrent theme in recent debates on policing. Internal control of discipline and complaints procedure is often characteristic of 'professional' bodies. Petterson discusses the problems of providing civilian oversight of complaints procedures in the context of policing developments in the US, notably American police forces' aspirations towards professionalism. He provides a useful survey of the variety of external regulation in the US. Like Goldsmith, Petterson stresses the constructive potential of complaints: "civilian oversight" can provide a forum in which²⁶

24 Note 1 *supra* p 213.

25 *Id.*

26 *Ibid* p 273.

citizens and police debate the ends and means of policing in relation to specific circumstances raised by a complaint. As individual complaints are examined, the acceptable limits of police practices in enforcing laws and maintaining order can be better delineated.

Here, complaints procedures are presented as potentially carrying out a surrogate political function. Distrust of, or disenchantment with the local democratic institutions may encourage resort to such means. In the final chapter, Terrill provides an historical account of external regulation in the US, which stresses the links between the development of such regulation and concerns about civil rights and racism.

Three critical comments can be made about what is generally an excellent book. First, a comparative perspective, so often lacking in writings on police, is provided; but it is a shame that studies of less familiar, non-anglophone societies were not included. Second, there is not room in the book for detailed discussion of discipline codes and systems. This is problematic because, as Maguire comments in relation to England and Wales, "complaints are inextricably bound up with the internal police disciplinary system, being recorded and investigated as alleged breaches of a specified section of the disciplinary code".²⁷ The significance of this is that police sensitivity about complaints procedures is directly linked to their experience of working in what officers frequently insist is a 'disciplined service'. That discipline is often seen as unpredictable and arbitrary. Most commentators on policing overlook this constitutive element of police culture which inevitably affects police attitudes to complaints. Third, the editor could have been stricter with his contributors, binding them to his central theme and minimising repetition, particularly in the discussions of Australia.

As a commercial product, the book is what you expect from Clarendon Press - expensive, but immaculate. The jacket is, because it is a book about the police, blue and white (at least we are spared the usual police badge/helmet photograph), so it will match all the other police books on the shelf. But it would be a shame if this was treated as just a book for policing students: Goldsmith's vision of his subject makes it a valuable source for all interested in matters of public law and accountability.

27 *Ibid* p 180.