

# THE THIN BLUE LINE BETWEEN OPERATION AND POLICY: EXAMINING THE ACCOUNTABILITY DEFICIT IN NEW ZEALAND POLICING

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*The Armed Response trial was a controversial Police initiative that armed teams of full-time police officers. Despite heavy public criticism, the government could not control whether the Police permanently implemented these teams. This article investigates the trial and exposes an accountability deficit for police operational policy decisions. Police decisions are usually categorised as "operational" or "policy". This categorisation determines the nature and depth of the decision's accountability. The Police is accountable to the government for policy decisions. However, for operational decisions, the Police is independent and therefore not democratically accountable. This article investigates accountability for decisions falling in the middle of the operational–policy spectrum. These decisions are usually classified as operational. The Armed Response trial is used as a case study to explore the relevant accountability relationships and demonstrate their shortcomings. This article argues the current classification of decisions has resulted in an accountability deficit.*

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## **I INTRODUCTION**

In October 2019, the Police Commissioner announced a trial of armed teams of police officers who would roam communities and address high-risk situations. Despite public backlash to the trial, the government claimed its hands were tied: the decision was solely for the Police Commissioner, who is not democratically accountable. The Police Commissioner ultimately decided against permanently implementing the Armed Response teams, but he could have decided differently.<sup>1</sup> I argue this demonstrates an accountability deficit.

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1 Police Media Centre "Armed Response Teams will not continue" (9 June 2020) New Zealand Police <[www.police.govt.nz](http://www.police.govt.nz)>.

The Police has far-reaching powers. The Crimes Act 1961 allows police officers to use necessary force, which in some cases is fatal.<sup>2</sup> It is therefore crucial for the Police's use of legitimate force to be controlled.<sup>3</sup> However, this accountability must be finely tuned.<sup>4</sup> Too much democratic accountability could lead to political pressure, risking the Police's independent and unbiased approach.<sup>5</sup> Police independence can be a necessary safeguard against political parties competing to be the "toughest on crime".<sup>6</sup>

A balance has been struck, allowing the government and the Police to each partially control policing. Decisions are classified as either "operational" or "policy", and this label dictates the nature and depth of accountability.<sup>7</sup> *Policy* encompasses decisions on policing methods, resource allocation and police priorities.<sup>8</sup> The Police Commissioner is accountable to the Minister of Police for policy decisions.<sup>9</sup> Policies help design systems and approaches at a higher level, where ultimately it is applied in an *operational* context, on the ground.<sup>10</sup> Operational decisions include investigations, prosecutions and law enforcement.<sup>11</sup> The Police Commissioner is ultimately accountable for these decisions and is not responsible to the Minister of Police.<sup>12</sup> This independence allows the Police

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2 Crimes Act 1961, ss 39, 40, 44 and 48. But see s 62. See also New Zealand Police *Tactical Options: 2019 Annual Report* (2019) at 57 and following.

3 Dermot PJ Walsh and Vicky Conway "Police governance and accountability: overview of current issues" (2011) 55 *Crime Law Soc Change* 61 at 61 and 71.

4 Robert Reiner "Police Accountability: Principles, Patterns and Practices" in Robert Reiner and Sarah Spencer (eds) *Accountable Policing: Effectiveness, Empowerment and Equity* (Institute for Public Policy Research, London, 1993) 1 at 1.

5 Policing Act 2008, s 8(1)(a) and (e).

6 Geoffrey Palmer "The Legislative Process and the Police" in Neil Cameron and Warren Young (eds) *Policing at the Crossroads* (Allen & Unwin New Zealand, Wellington, 1986) 86 at 87; and Benjamin Bowling, Robert Reiner and James Sheptycki *The Politics of the Police* (5th ed, Oxford University Press, Oxford, 2019) at 15. See also Bryn Caless and Jane Owens *Police and Crime Commissioners: The transformation of police accountability* (Bristol University Press, Bristol, 2016) at 25.

7 Reiner, above n 4, at 6.

8 Terence Arnold "Legal Accountability and the Police: The Role of the Courts" in Neil Cameron and Warren Young (eds) *Policing at the Crossroads* (Allen & Unwin New Zealand, Wellington, 1986) 67 at 71.

9 Policing Act, s 16(1).

10 Keith Manch "Exploring issues about regulation: policy and operations (also known as chalk and cheese)" (August 2019) Government Regulatory Practice Initiative <regulatoryfrontlines.blog>.

11 Policing Act, s 16(2).

12 Section 16(2).

Commissioner to decide on these matters using their expertise, without politics interfering. The divide between operation and policy is recognised by s 16 of the Policing Act 2008.

This article focuses on areas of overlap between operation and policy, which are usually higher-level decisions made by senior police leadership. These decisions are often labelled "operational", meaning they are not subject to democratic scrutiny. This lack of accountability is especially problematic given the importance of these decisions: "operational policies" influence policing on a broad scale. Such fundamental changes to policing can impact trust, and therefore public perceptions of police as an avenue to resolve issues.<sup>13</sup> Mistrust in police leads to citizens feeling unsafe and can erode the Police's legitimacy.<sup>14</sup>

The Armed Response team trial from 2019 to 2020 is an example of an operational policy. The trial deployed a vehicle of armed police officers in three locations: South Auckland, Waikato and Canterbury.<sup>15</sup> Arming officers was significant as New Zealand police are characterised by their generally unarmed status.<sup>16</sup> Police officers routinely carry tasers<sup>17</sup> and have both handguns and rifles locked in their cars to access if they deem it necessary.<sup>18</sup> The only police officers constantly armed are the Armed Offenders Squad members, who are part-time and on-call, contrasting with the full-time Armed Response teams.<sup>19</sup>

The Police and government categorised the Armed Response trial as an "operational" matter.<sup>20</sup> This limited the available accountability mechanisms the trial faced—especially democratic accountability. I argue the decisions to implement and discontinue the trial could be seen as either operation or policy. I agree the decision was at least partly operational as it related to policing methods. However, this was not a decision pertaining to individuals, but was instead higher-level. The

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13 Justice Tankebe "Self-Help, Policing, and Procedural Justice: Ghanaian Vigilantism and the Rule of Law" (2009) 43 L & Soc'y Rev 245 at 259–261.

14 Andrew Goldsmith "Police reform and the problem of trust" (2005) 9 Theo Crim 443.

15 Jordan Bond "Police Armed Response Team arrest in suburban area raises concerns" (11 November 2019) RNZ <www.rnz.co.nz>.

16 Kelly Buchanan "New Zealand" in Global Legal Research Centre (ed) *Police Weapons in Selected Jurisdictions* (The Law Library of Congress, 2014) 65 at 65; and "Arming the police - is it a step NZ wants to take?" (11 August 2021) RNZ <www.rnz.co.nz>.

17 "All frontline police to be armed with Tasers" *The New Zealand Herald* (online ed, Auckland, 31 July 2015).

18 Buchanan, above n 16, at 66; and "Arming the police - is it a step NZ wants to take?", above n 16.

19 Donna-Marie Lever "Unmasking the armed offenders squad" *North and South* (New Zealand, January 2019); Buchanan, above n 16, at 65; New Zealand Police "Armed Offenders Squads" <www.police.govt.nz>; and Baz Macdonald "For six months, cops in NZ had guns - campaigners say it can't continue" (5 June 2020) Re: <www.renews.co.nz>.

20 Bond, above n 15; and New Zealand Police, above n 1.

trial, if successful, would have been implemented throughout New Zealand.<sup>21</sup> These teams would have also fundamentally impacted how the New Zealand public viewed the Police. While this issue is partly operational, it is also political.

The Armed Response trial was subject to significant public criticism, and the Police Commissioner ultimately decided against permanently implementing the teams.<sup>22</sup> This decision was made before a full evaluation was completed, demonstrating the weight given to public opinion.<sup>23</sup> However, this public engagement was not required of him as the Police Commissioner is not democratically accountable. This demonstrates the issues that can arise from the ambiguous wording in the legislative framework.

In Part II, I introduce the problem raised by operational policy and further outline what constitutes policy and operational decisions. I then explore the overlap between these two categories. In Part III, I explain the Minister and Commissioner's relationship, comparing it to other relationships and explaining its uniqueness.

In Part IV, I introduce a relational definition of accountability and three frameworks to evaluate accountability relationships. I use these to explore the Police Commissioner's accountability for operational and policy decisions, demonstrating how this applied to the Armed Response trial. The trial provides a perspective through which to examine the web of police accountability relationships more generally. I then find that although the Policing Act allowed the trial to be labelled operational, there are normative arguments that this conclusion was unsuitable. Finally, in Part V, I conclude and raise some possible areas for further research, focusing on increasing the Minister of Police's accountability for operational policy decisions.

## ***II OPERATIONAL POLICY***

The "operational" or "policy" label on a decision determines who is ultimately accountable, as well as the nature and depth of that accountability. Despite the importance of this distinction, it is unclear what falls into either category, meaning many decisions have aspects of both operation and policy.

The Dawn Raids in the 1970s and 1980s demonstrate the danger of this blurred line. The government had a policy to arrest and deport people overstaying visas, which disproportionately

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21 Evidence Based Policing Centre *Armed Response Team Trial: Evaluation Report* (New Zealand Police, November 2020) at 24–25.

22 New Zealand Police, above n 1.

23 New Zealand Police, above n 1; and New Zealand Police "Armed Response Team publications" (November 2020) <[www.police.govt.nz](http://www.police.govt.nz)>.

targeted Pasifika people.<sup>24</sup> The Minister of Police likely then instructed the Police Commissioner to pursue this policy objective.<sup>25</sup> The Police acted accordingly. District Commanders, for example, were told to question people of non-Pākehā ethnicity on the street and generally target Pasifika people.<sup>26</sup> Following an adverse public reaction the Minister distanced himself, saying he was "not responsible for the day-to-day operations ... That's for the commissioner".<sup>27</sup> Despite these statements, individual police officers stated they did not feel they could disobey the policy.<sup>28</sup> The Minister of Police adopted the operational label to reduce the government's accountability for controversial operational policy. The Armed Response trial is another example of the government separating itself from a controversial initiative by describing it as operational.

The primary policing legislation in New Zealand is the Policing Act. This Act sets out the actors with ultimate accountability for police decisions. Government departments usually follow ministerial instructions, and in return the Minister takes ultimate responsibility for decisions.<sup>29</sup> The Police is different: although the Police is part of the executive, it behaves independently from the government on operational matters.<sup>30</sup> This concept is known as constabulary independence.<sup>31</sup> This article will simply call it "police independence".

Police independence allows police to be impartial, without political motivation to treat groups or individuals differently.<sup>32</sup> This prevents the politicisation of "safety, security and justice", and therefore is seen to justify reduced democratic governance and accountability.<sup>33</sup> Police independence

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24 Jacinda Ardern, Prime Minister of New Zealand "Speech to Dawn Raids Apology" (Auckland Town Hall, Auckland, 1 August 2021); and Ann Beaglehole "Immigration regulation – Controlling Pacific Island immigration" Te Ara – The Encyclopedia of New Zealand <teara.govt.nz>.

25 (2 November 1976) 407 NZPD 3538; and Gordon Orr "Police Accountability to the Executive and Parliament" in Neil Cameron and Warren Young (eds) *Policing at the Crossroads* (Allen & Unwin New Zealand, Wellington, 1986) 46 at 57.

26 Orr, above n 25, at 56.

27 At 57. See also (2 November 1976) 407 NZPD 3537.

28 Orr, above n 25, at 57.

29 Cabinet Office *Cabinet Manual 2017* at [3.27].

30 Policing Act, s 16(2).

31 Jack Elder *Review of Police Administration and Management Structures* (New Zealand Police, Preliminary Draft Report, 9 June 1998) at Appendix 1; and Cabinet Policy Committee Paper "Police Act Review – Paper 2: Governance and Accountability" (September 2007) at Appendix 1 at [5]. The Cabinet Policy Committee Paper can be found at the following link: <web.archive.org/web/20100525051204/www.policeact.govt.nz/cabinet-paper-20070905-2-governance.html>.

32 Walsh and Conway, above n 3, at 61 and 71; and Elder, above n 31, at Appendix 1.

33 Walsh and Conway, above n 3, at 61 and 71.

also benefits the Minister of Police and the wider government by sheltering them from the political controversy that often results from policing policy.<sup>34</sup>

This article focuses on the Police Commissioner's accountability, as they are often ultimately responsible for Police decisions. Frontline police swear an oath of impartiality and therefore have independent authority as public office holders of the Crown.<sup>35</sup> They are also prohibited from acting under a Minister's direction by s 30(4) of the Policing Act. While this appears to suggest frontline police are only "answerable to the law", officers' independence is restricted by the Police's strong hierarchical structure. The Police has a unique organisational culture, where officers must obey their superiors.<sup>36</sup> Discipline is critical, and there is a "strictly enforced chain of command".<sup>37</sup> As a result, the Police relies on a robust internal accountability structure, and the top of the hierarchy (the Police Commissioner) is responsible externally if needed.<sup>38</sup> The accountability the Police Commissioner faces is therefore extremely important.

Section 16 provides "basic parameters" for the Police Commissioner and Minister of Police's relationship and codifies police independence.<sup>39</sup> Section 16(1) outlines the functions of the Police Commissioner for which they are responsible to the Minister. I describe decisions made under these functions as "policy" decisions. The Police Commissioner's independent functions are codified in s 16(2) of the Policing Act. This section confirms the Police Commissioner's authority is not delegated from the Minister of Police,<sup>40</sup> and states the Police Commissioner is not responsible to ministers for certain matters. These matters are maintaining order and enforcing the law at an individual or group level, investigating and prosecuting offences, and making decisions about individual employees.<sup>41</sup> In this article, these are referred to as "operational" matters.

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34 Elder, above n 31, at Appendix 1.

35 Warren Young and Neville Trendle *Laws of New Zealand Police* (online ed) at [1]; and Policing Act, s 22.

36 Steve Uglow "police" in Peter Cane and Joanne Conaghan (eds) *The New Oxford Companion to Law* (Oxford University Press, Oxford, 2008).

37 Orr, above n 25, at 46.

38 United Nations Office on Drugs and Crime *Handbook on police accountability, oversight and integrity* (United Nations Office, July 2011) at 12.

39 Cabinet Policy Committee Paper, above n 31, at [17].

40 Letter from JJ McGrath (Solicitor-General) to John Banks (Minister of Police), Don Hunn (State Services Commissioner) and William Birch (Minister of State Services) regarding the constitutional relationship between the Police Commissioner and the Minister of Police (8 March 1993) at [2(a)]. See also Elder, above n 31, at [91(i)].

41 Policing Act, s 16(2).

## A *Operational Decisions under s 16(2)*

The Policing Act codified police independence of frontline police and amalgamated the preceding Police Act 1958, common law, convention and practice.<sup>42</sup> The history of independence dates back to 1829, when the founder of the initial police force in the United Kingdom proposed officers should be impartial, rather than catering exclusively to public opinion.<sup>43</sup> This allowed police to avoid unnecessary politics, and focus on their core functions.<sup>44</sup> Independence has since become a defining feature of the police.<sup>45</sup> In the first reading debate on the Policing Bill, the Minister of Police commented that the Bill "confirm[s] the relative areas of responsibility" of the Police Commissioner and Minister of Police.<sup>46</sup> The legislation did not substantively change police independence, other than making it more explicit and transparent by writing it down.<sup>47</sup>

Section 16(2) of the Policing Act upholds police independence by specifying functions the Police Commissioner must do independently. The section provides four categories of operational police functions. However, the wording of s 16 is broad, meaning it is not entirely clear what the section covers. There is also no publicly available Police guidance to explain what an operational function is compared to a policy. I therefore draw on the statutory wording and scholarly sources to explain what is covered by s 16(2).

First, under s 16(2)(a) and (b), maintaining order and enforcing the law are operational matters. This section echoes *Regina v Commissioner of Police of the Metropolis, Ex parte Blackburn* (*Blackburn*), an influential 1968 decision of the England and Wales Court of Appeal.<sup>48</sup> In this case, Lord Denning MR held the Police Commissioner had specific compulsory and independent duties for

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42 Cabinet Policy Committee Paper, above n 31, at [5] and Appendix 1.

43 Home Office "Definition of policing by consent" (10 December 2012) United Kingdom Government <[www.gov.uk](http://www.gov.uk)>.

44 Walsh and Conway, above n 3, at 61 and 71.

45 Neil Cameron "Developments and Issues in Policing New Zealand" in Neil Cameron and Warren Young (eds) *Policing at the Crossroads* (Allen & Unwin New Zealand, Wellington, 1986) 7 at 7; Cabinet Policy Committee Paper, above n 31; and Elder, above n 31, at [38].

46 Policing Bill 2007 (195-1) as referred to in (19 February 2008) 645 NZPD 14357.

47 Elder, above n 31, at Appendix 1; and New Zealand Police "Policing Act 2008 commences tomorrow" (press release, 30 September 2008).

48 *Regina v Commissioner of Police of the Metropolis, Ex parte Blackburn* [1968] 2 QB 118 (CA) [*Blackburn*].

which "[h]e is answerable to the law and to the law alone".<sup>49</sup> These duties included enforcing the law and keeping the peace.<sup>50</sup>

Secondly, the investigation and prosecution of offences is an operational matter under s 16(2)(c). As said in *Blackburn*, "the responsibility for law enforcement lies on [the Police Commissioner]".<sup>51</sup> This section would cover frontline decisions made during criminal investigations, such as which suspects to focus on or how evidence should be gathered. Section 16(2)(c) includes deciding who to prosecute, whether the matter is in the public interest, what charges to bring and other procedural issues.<sup>52</sup> Crown Law provides the Police with legal guidance in making these decisions,<sup>53</sup> such as guidelines on relevant factors police should consider when deciding on prosecution.<sup>54</sup> However, this does not compromise the Police's independence from ministers or the government, as Crown Law simply provides independent legal advice. Finally, as with s 16(2)(a) and (b), policies or reviews of s 16(2)(c) decisions would also likely be deemed operational. For example, it would not be appropriate for the Minister of Police to suggest police oppose bail on all burglaries, as this is an operational matter for the Police Commissioner.<sup>55</sup>

Finally, s 16(2)(d) covers decisions about individual Police employees. This includes deployment of Police staff, and likely also decisions around individuals' employment.<sup>56</sup> That said, a decision to deploy Police staff offshore, for example, would need to consider government foreign policy objectives.<sup>57</sup> It seems the deployment of resources (including staff) must be checked to ensure it is "consistent with government priorities and objectives".<sup>58</sup>

For frontline police, operational matters cover much of their general duties policing and interacting with the public. Their approach to diverse operations, from crowd control to arrests, both generally and relating to individuals, is operational. Frontline decisions are reviewed internally by

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49 At 135–136. But see Orr, above n 25, at 49.

50 *Blackburn*, above n 48, at 136.

51 At 136.

52 Elder, above n 31, at Appendix 1.

53 See Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013); and New Zealand Police *Police Prosecution Service: Statement of policy and practice* (13 July 2022) at 7.

54 Crown Law, above n 53, at 5–5.11.

55 Cabinet Policy Committee Paper, above n 31, at Appendix 2.

56 At Appendix 2.

57 At Appendix 2.

58 At Appendix 2.



supervisors when needed.<sup>59</sup> For leadership roles such as the Police Commissioner, the resourcing, strategies and policies relating to maintaining order and enforcing laws would likely also be deemed operational. However, per the legislation, this would only include decisions about individuals or specific groups, rather than broad policies.<sup>60</sup> The Police Commissioner is ultimately responsible for law enforcement resources used in particular cases, such as specific lower-level funding decisions. They are also responsible for law enforcement strategy and "reasonable policy directions" for classes of cases.<sup>61</sup> This enables them to direct police discretion regarding different kinds of offending or to tailor policing to particular locations.<sup>62</sup> For example, operational guidelines exist to help police determine if they should pursue a fleeing vehicle.<sup>63</sup> "Operation" therefore covers a broad spectrum of decisions made by all members of police, from frontline officers to the Police Commissioner.

### ***B Policy Decisions under s 16(1)***

Section 16(1) of the Policing Act covers functions for which the Police Commissioner is responsible to the Minister of Police. These are policy decisions. "Policy" in a general sense covers courses of action or general principles to be followed.<sup>64</sup> These decisions are typically higher-level and decided by leadership, such as the Police Commissioner, rather than frontline police. However, the Police Commissioner is ultimately accountable to the Minister of Police for their delivery.

Section 16(1)(a) and (b) are phrased extremely broadly, providing little insight into what is classified as a "policy" decision. Section 16(1)(a) covers the carrying out of the "functions and duties of the Police". There are eight police functions detailed in the Policing Act, including maintaining public safety, law enforcement and crime prevention.<sup>65</sup> The fact that the Police Commissioner is responsible to the Minister for the function of law enforcement appears to be at odds with s 16(2)(b), which clearly states law enforcement of individuals and groups is an operational matter. This overlap demonstrates the broad wording of s 16. One way of reconciling this issue is to read the Minister of Police's ambit as limited to wider policy, rather than anything regarding "any individual or group of

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59 Reiner, above n 4, at 7–11.

60 Policing Act, s 16(2)(a)–(b).

61 McGrath, above n 40, at [2(b)]–[2(d)].

62 Cabinet Policy Committee Paper, above n 31, at Appendix 1 at [7].

63 Sam Sherwood and Sophie Cornish "Speeding drivers now more likely to get police pursuit reprieve" (19 December 2020) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

64 Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (eBook ed, Oxford University Press, 2005) at "policy".

65 Policing Act, s 9. The other stated functions are keeping the peace, community support and reassurance, national security, participation in policing activities outside New Zealand and emergency management.

individuals".<sup>66</sup> Section 16(1)(b) states the "general conduct" of the Police is a policy matter. This wording is highly ambiguous, and makes it impossible to clearly define what matters the Police Commissioner is responsible to the Minister for.

A few categories of decision fall within s 16(1)(a) and (b). First, the Minister may be involved in law enforcement programmes—particularly those of high public interest, such as the crackdown on 1981 Springbok tour protesters and the inquiry into the sinking of *Rainbow Warrior*.<sup>67</sup> The Minister justified his involvement by describing his role as deciding the resource allocation for these two initiatives.<sup>68</sup> In the same vein, the Police Commissioner may be accountable to the Minister for policies about political demonstrations, when to intervene in industrial disputes, and how to deal with passive resistance.<sup>69</sup> Section 16(2) may also cover advising on general law enforcement or policing style, as well as perhaps general policy objectives.<sup>70</sup>

Section 16(1)(c) covers the effective, efficient and economical management of the Police. The Police Commissioner is ultimately responsible to the Minister for overall resourcing and administration, which is comparable to the responsibilities of public service chief executives.<sup>71</sup> For example, the Labour Party-led government in 2017 stated its intention to hire 1,800 new police officers, which required a commitment to resourcing.<sup>72</sup> Finally, s 16(1)(d) refers to tendering advice to the Minister of Police and other ministers of the Crown, and s 16(1)(e) covers giving effect to any lawful ministerial directions.

### ***C Where Operation and Policy Meet***

The distinction between operation and policy is not clear from the statutory wording. This ambiguity can result in situations like the Dawn Raids or the Armed Response trial. In these cases, it benefitted the government to label controversial policies "operational" to reduce democratic accountability. There are two main reasons for the blurred line between operation and policy.

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<sup>66</sup> Section 16(2)(b).

<sup>67</sup> McGrath, above n 40, at [2(f)].

<sup>68</sup> Cabinet Policy Committee Paper, above n 31, at Appendix 1 at [8].

<sup>69</sup> Orr, above n 25, at 54; and Reiner, above n 4, at 6–7.

<sup>70</sup> Reiner, above n 4, at 6–7 and 9–10.

<sup>71</sup> Cabinet Policy Committee Paper, above n 31, at [13]; Elder, above n 31, at [91(i)]; John Hughes and others *Mazengarb's Employment Law* (online ed, LexisNexis) at [PCA16.4]; and Cabinet Office, above n 29, at [3.11]–[3.13].

<sup>72</sup> Ben Strang "Police welcome 1800th officer, government yet to meet second target" (22 November 2019) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>.

First, there is legislative ambiguity as to which functions fit into each category.<sup>73</sup> The wording of s 16 of the Policing Act is unclear, and many functions appear to be both operation and policy. Non-specific and overlapping functions include "carrying out the functions and duties of the Police", "general conduct of the Police", "maintenance of order" and "the enforcement of the law".<sup>74</sup> The resulting confusion is understandable and is caused by an attempt to condense a spectrum of functions with both operational and policy aspects into two discreet boxes. There is no case law clarifying the wording of, or distinction between, s 16(1) and (2). Arguably, case law could further muddy the waters, as precisely defining the line between operation and policy may be impossible.<sup>75</sup>

Secondly, decisions are not made in a vacuum: policy decisions can have operational impacts and vice versa.<sup>76</sup> Senior leadership's administrative or policy decisions may impact operations, due to the connection between administration, resources and frontline work.<sup>77</sup> For example, if the Minister does not allocate resourcing to address white-collar crime, frontline police cannot adequately police it.<sup>78</sup> Even a policy decision to reduce funding for computers could impact an investigative team's effectiveness and decrease prosecutions.<sup>79</sup> The Minister of Police may decide that police should spend more time pursuing unexpired firearms licences, or perhaps set up a drug squad.<sup>80</sup> These "policy" decisions would significantly impact police operational capacity.

The boundaries are therefore unclear. The ambiguity also can lead to reduced political accountability between the Minister of Police and Parliament, further compounding the accountability deficit. Members of Parliament may worry about misunderstanding the distinction, and consequently shy away from questioning the Minister of Police on operational policy matters.<sup>81</sup> Members of Parliament do not debate issues around police accountability in detail, which means the distinction remains unclear.<sup>82</sup>

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73 Orr, above n 25, at 54; and Reiner, above n 4, at 7.

74 Policing Act, s 16.

75 See Laurence Lustgarten *The Governance of Police* (Sweet & Maxwell, London, 1986) at 20–22.

76 Reiner, above n 4, at 11; and Elder, above n 31, at Appendix 1.

77 Elder, above n 31, at Appendix 1.

78 Arnold, above n 8, at 72.

79 Elder, above n 31, at Appendix 1.

80 At Appendix 1; and Lustgarten, above n 75, at 21.

81 Cameron, above n 45, at 19.

82 At 19.

Finally, this ambiguity may harm police independence itself. The broad definition of "policy" could allow the Minister of Police to involve themselves in more of the Police Commissioner's functions if they see fit.

### **III THE RELATIONSHIP BETWEEN THE TWO KEY ACTORS**

The Minister of Police and Police Commissioner are the two key figures in charge of policing in New Zealand. Their relationship is complex and human, and practically impacts how the Police functions.

The Minister of Police is a government minister. They oversee police functions, duties and general conduct, as well as the "effective, efficient, and economical management of the Police".<sup>83</sup> The Police Commissioner is the Police's operational leader.<sup>84</sup> They provide direction, maintain relationships and develop the organisational culture.<sup>85</sup> They formally lead through communicating general instructions to guide Police staff and prescribing a code of conduct which includes behavioural standards.<sup>86</sup> The Police Commissioner is also the official Police spokesperson.<sup>87</sup>

The Police Commissioner's appointment is impartial and managed by the Public Service Commissioner.<sup>88</sup> However, the Minister of Police and Prime Minister make the final decision and instruct the Governor-General accordingly.<sup>89</sup> By contrast, the Minister comes to their position through democratic election and appointment.<sup>90</sup> First they must be elected as a Member of Parliament by the public. Then, once they are in government, they are given the Police portfolio through party mechanisms.

The Minister is, by definition, politically motivated. The Police Commissioner's role is said to be independent of both the executive government and, supposedly, politics. As a public servant, the

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83 Department of the Prime Minister and Cabinet "Ministerial portfolio: Police" (20 March 2023) <[www.dPMC.govt.nz](http://www.dPMC.govt.nz)>.

84 See Letter from Una Jagose (Solicitor-General) to Jacinda Ardern (Prime Minister) about an IPCA report on complaints about Deputy Commissioner of Police (20 December 2018) at [13].

85 Letter from Jacinda Ardern (Prime Minister) and Stuart Nash (Minister of Police) to Chair of Cabinet regarding the appointment of Andrew Coster as Commissioner of Police (2020) [Ardern].

86 Policing Act, ss 20 and 28–29.

87 Cameron, above n 45, at 18.

88 Cabinet Policy Committee Paper, above n 31, at [20].

89 Policing Act, ss 12(1) and 14; and Ardern, above n 85, at [18].

90 Department of Prime Minister and Cabinet "Ministerial List" (22 December 2020) <[www.dPMC.govt.nz](http://www.dPMC.govt.nz)>.

Police Commissioner is politically neutral.<sup>91</sup> For example, it is common practice for the government to advise the leader of the opposition before they announce the Police Commissioner's appointment.<sup>92</sup> Instances of political criticism of the Police Commissioner have been condemned.<sup>93</sup> Despite this, the Police Commissioner holds office "at the pleasure of the Governor-General".<sup>94</sup> If the government loses confidence in the Police Commissioner's ability to perform their role, the Prime Minister may recommend the Governor-General remove them.<sup>95</sup>

The Police has a unique constitutional position due to its independence, which is reflected in the relationship between the Minister of Police and the Police Commissioner. On the one hand, the Police is a department of the executive branch of government and has a responsible minister.<sup>96</sup> For example, the Police is still subject to reporting requirements under the Public Finance Act 1989.<sup>97</sup> However, the Police is not classified as a "public service" department,<sup>98</sup> but rather as an "instrument of the Crown".<sup>99</sup> This distinction suggests the Police can be treated like other departments for financial management and performance purposes, but not regarding governance or its relationship with its Minister.<sup>100</sup>

In most government departments, the Minister and the department have a "close and hierarchical relationship".<sup>101</sup> The Police Commissioner and the Minister of Police are no exception and have a very close relationship—they likely consult with one another often.<sup>102</sup> Official channels appear to be

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91 Public Service Commission "Standards of Integrity and Conduct" (30 November 2007) <[www.publicservice.govt.nz](http://www.publicservice.govt.nz)>; and Public Service Act 2020, s 12(1)(a).

92 Ardern, above n 85, at [19].

93 See Justin Giovannetti "Andrew Coster on claims of racism, Police Ten 7 and the future of the force" (6 April 2021) *The Spinoff* <[www.thespinoff.co.nz](http://www.thespinoff.co.nz)>; and Zane Small "Jacinda Ardern responds after Simon Bridges labels Police Commissioner Andrew Coster 'wokester'" (23 February 2021) *Newshub* <[www.newshub.co.nz](http://www.newshub.co.nz)>.

94 Policing Act, s 12(2).

95 Cabinet Policy Committee Paper, above n 31, at [25]; and Jagose, above n 84, at [3] and [15].

96 Department of the Prime Minister and Cabinet "The public service, the state services, and the state sector" (24 June 2017) <[www.dpnc.govt.nz](http://www.dpnc.govt.nz)> at [3.4].

97 Public Finance Act 1989, s 2 definition of "department".

98 Public Service Act, sch 2.

99 Policing Act, s 7.

100 Cabinet Policy Committee Paper, above n 31, at Appendix 1 at [1].

101 State Services Commission *Reviewing the Machinery of Government* (February 2007) at [54].

102 Elder, above n 31, at Appendix 1.

eschewed in favour of a close relationship of trust.<sup>103</sup> It is "essential" the Police Commissioner cooperates with the Minister due to the close connection of their roles.<sup>104</sup> The relationship is "human" and "ill suited to hard-and-fast definition".<sup>105</sup> The quality and nature of the relationship will vary greatly depending on the personal relationship between the two individuals. In 1986, it was said that "there is no bureaucracy between [the Police Commissioner] and his Minister".<sup>106</sup> There is no evidence this position has changed, despite the introduction of the Policing Act in 2008.

There is limited information about the Police Commissioner and Minister's relationship as their meetings are out of the public gaze. In 2007, a Cabinet Paper stated that the Police Commissioner and Minister had a memorandum of understanding with performance expectations.<sup>107</sup> It is unclear whether there is still such a memorandum or if they currently use other mechanisms. Whether or not there are formal measures in place, the Minister and Commissioner are unlikely to differ meaningfully on significant matters.<sup>108</sup> Because both usually publicly agree, an incident has not arisen to provoke a comprehensive definition of each sphere of authority. However, it still is possible the two would differ on important matters. In that situation, the absence of formal infrastructure regulating the relationship may result in problems.

Despite this close relationship, there is some evidence the Police Commissioner does not always keep the Minister of Police fully informed. A recent example is the Police's decision to stop the use of helicopters and planes to spot cannabis operations.<sup>109</sup> The media reported that "top brass at Police National Headquarters" decided to stop the program.<sup>110</sup> However, when approached by the media, the Minister of Police, the Hon Poto Williams MP, stated she was unaware of this change. She commented: "While this is an operational matter, I have asked for a full briefing as to the rationale behind this decision."<sup>111</sup>

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103 Cabinet Policy Committee Paper, above n 31, at [15].

104 Roma Mitchell *Report of the Royal Commission on the Dismissal of Harold Hubert Salisbury* (Office of Commissioner of Police, 1978) at 43 as cited in Orr, above n 25, at 61.

105 Cabinet Policy Committee Paper, above n 31, at [15].

106 Cameron, above n 45, at 18.

107 Cabinet Policy Committee Paper, above n 31, at [24].

108 Cameron, above n 45, at 19.

109 Sam Sherwood "Police slash annual cannabis operation, blind siding frontline staff and officials" (20 January 2021) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

110 Sherwood, above n 109.

111 Sherwood, above n 109.

The Police is not unique in its distinction between operational and policy matters. The *Cabinet Manual* states that ministers decide the direction and priorities of their departments, but that they are not usually involved in day-to-day operations.<sup>112</sup> Ministers generally determine, promote and defend policies, while officials should support ministers, serve their aims and implement government decisions.<sup>113</sup>

Other departments, Crown agents and Crown entities distinguish between functions with ministerial influence and functions independent of government.<sup>114</sup> The difference between operation and policy is used to determine what is for ministers and what is for department chief executives (who are functionally equivalent to the Police Commissioner).<sup>115</sup> For example, Statistics New Zealand has close ties with its Minister, but its decisions on statistical methods and publication are independent of government.<sup>116</sup>

While there are similarities between the Police and other departments, the Police Commissioner is also unique. Comparing the governing legislation illustrates these differences. Most government departments are covered by the Public Service Act 2020.<sup>117</sup> However, this list of departments does not include the Police, meaning the Police is not subject to most of the Act.<sup>118</sup> The Public Service Act gives the "general responsibilities of chief executives" of other government departments.<sup>119</sup> Section 52 states these chief executives are responsible to their minister for eight matters, including their agency's operation, advising ministers and delivering goods and services provided by the agency.<sup>120</sup> This list is more expansive than the Police Commissioner's responsibilities to their Minister.

The Public Service Act does not include functions chief executives should perform independently from their ministers. The only nod to this is in s 54, which states chief executives should decide on individual employment matters independently.<sup>121</sup> However, this is still subject to s 70, which states

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112 Cabinet Office, above n 29, at [3.7].

113 At [3.7] and [3.9].

114 State Services Commission, above n 101, at [68]–[69].

115 At [68].

116 At [68].

117 Public Service Act, sch 2.

118 Schedule 2. But see ss 26(3) and 33(3).

119 Section 52.

120 Section 52(1).

121 Section 54(1).

chief executives must regard their minister's wishes when deciding on issues relating to staff.<sup>122</sup> The Policing Act provides a different scheme, where the Police Commissioner is much more independent than chief executives.

As most other departments are not analogous with the Police, I make a final comparison with the relationships within the New Zealand Defence Force. The Defence Force is similarly not subject to most of the Public Service Act.<sup>123</sup> The functions of the two departments are also comparable: both departments are hierarchical, secretive, and have employees who are uniformed and wield force.

However, comparing the Defence Act 1990 with the Policing Act again demonstrates significant differences. The Minister of Defence controls the Defence Force through the Chief of Defence Force.<sup>124</sup> The Chief of Defence Force acts as the principal military adviser to the Minister of Defence, and is the closest comparison to the Police Commissioner.<sup>125</sup> Key similarities between the Chief of Defence Force and the Police Commissioner include the fact that both roles are appointed by the Governor-General and have similar responsibilities to their ministers.<sup>126</sup> Indeed, the functions the Chief of Defence Force is responsible for in s 25(1)(b) of the Defence Act are almost precisely mirrored in the s 16(1) responsibilities of the Police Commissioner to their Minister in the Policing Act. Both sections state responsibilities for "carrying out the functions and duties" of their departments, the department's "general conduct" and its efficient, effective, and economical management.<sup>127</sup>

Despite these similarities, the Chief of Defence Force is not independent of their Minister. The Defence Act does not have the equivalent of s 16(2) of the Policing Act, detailing independent functions of the Chief of Defence Force. The Minister provides the Chief of Defence Force with written terms of reference, including how the government expects their duties and obligations to be performed.<sup>128</sup> Therefore, what initially appears like a similar relationship is, in reality, very different.

The Police Commissioner and Minister of Police each play fundamental roles in crafting police approaches. Their unique relationship therefore profoundly impacts policing in New Zealand. The Police Commissioner and Minister have different motivators, objectives and skills. Their respective

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<sup>122</sup> Section 54(2).

<sup>123</sup> Public Service Act, sch 2.

<sup>124</sup> Defence Act, s 7.

<sup>125</sup> Section 25(1).

<sup>126</sup> Section 8; and Policing Act, s 12(1).

<sup>127</sup> Defence Act, s 25(1)(b); and Policing Act, s 16(1).

<sup>128</sup> Defence Act, s 25(2).



areas of control are governed by s 16 of the Policing Act and the underlying convention of police independence. Despite these differences, the two work closely.

#### ***IV ACCOUNTABILITY ANALYSIS***

This section compares the accountability relationships for operational and policy decisions. To undertake this comparison, a framework is needed to pull apart the elements of accountability and assess its efficacy. Accountability is inherently subjective and political.<sup>129</sup> It is often confused with values such as transparency or responsiveness.<sup>130</sup> It is important to tightly define accountability as the more stretched the wording, the "fuzzier" the standards of accountable behaviour.<sup>131</sup>

In this article, I draw from the relational view of accountability provided by Bovens:<sup>132</sup>

Accountability is a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.

Four key questions arise from this definition: What is the forum? Who is the actor? Is the actor obliged to render to account? And finally, what does the accountability process require?

First, the accountability *forum* refers to the entity passing judgment and can be a person, agency or group. Four types of forums are relevant to the Armed Response trial: political, legal, administrative and social.<sup>133</sup> Each forum type results in a different type of accountability. Political forums result in political accountability, where the voting public ultimately passes judgement.<sup>134</sup> Legal forums, resulting in legal accountability, are entities such as courts where scrutiny occurs according to

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129 Mark D Jarvis and Paul G Thomas "The Limits of Accountability: What Can and Cannot Be Accomplished in the Dialectics of Accountability?" in Herman Bakvis and Mark D Jarvis (eds) *From New Public Management to New Political Governance: Essays in Honour of Peter C Aucoin* (McGill-Queen's University Press, Montreal, 2012) 271 at 275 and 304.

130 Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13 *ELJ* 447 at 449–450.

131 Jarvis and Thomas, above n 129, at 280.

132 Bovens, above n 130, at 450 (emphasis removed).

133 At 455–457.

134 At 455.

prescribed legal standards.<sup>135</sup> Administrative forums, with administrative accountability, are quasi-legal forums.<sup>136</sup> Finally, social forums refer to the public, interest groups or other stakeholders.<sup>137</sup>

Second, the *actor* in the accountability relationship is the person or organisation that is obliged to render to account.<sup>138</sup> Accountability is inherently associated with control, so identifying the actor usually requires finding who ultimately made the decision.<sup>139</sup>

The third question is whether the actor is *obliged* to render to account.<sup>140</sup> This question asks whether rendering to account is required or voluntary. The final question is *what the accountability process involves*. For example, the actor may have to provide information, debate or justify their conduct, or otherwise face judgment and consequences.<sup>141</sup>

The best accountability mechanisms provide democratic monitoring of government, prevent power concentration and allow for systems to improve.<sup>142</sup> To evaluate accountability relationships, Bovens provides three evaluative frameworks: the democratic, constitutional and learning perspectives.<sup>143</sup>

The democratic perspective asks how effectively the accountability mechanism provides a democratic means to monitor and control governmental conduct.<sup>144</sup> Accountability to the public is an essential condition for this democratic perspective.<sup>145</sup> The constitutional perspective asks whether the mechanism offers sufficient incentives to prevent actors from abusing their executive authority.<sup>146</sup>

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135 At 456.

136 At 456.

137 At 457.

138 At 450.

139 At 457–459.

140 At 460.

141 At 451–452; and Mark Bovens, Thomas Schillemans and Paul Hart "Does Public Accountability Work? An Assessment Tool" (2008) 86 *Public Administration* 225 at 230–234.

142 Bovens, above n 130, at 465–466. See also Rayner Thwaites and Dean Knight "Administrative Law Through a Regulatory Lens: Situating Judicial Adjudication Within a Wider Accountability Framework" in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (LexisNexis, Wellington, 2013) 529.

143 Bovens, above n 130, at 462.

144 At 463.

145 At 463; and Thwaites and Knight, above n 142, at [14.2.1].

146 Bovens, above n 130, at 465.

Accountability forums should be "visible, tangible and powerful", able to reveal corruption or mismanagement, and include strong sanctions.<sup>147</sup> The final evaluative framework is the "learning perspective".<sup>148</sup> From this perspective, accountability is a tool to provide actors with feedback to increase their effectiveness and efficiency.<sup>149</sup> This perspective is often overlooked.<sup>150</sup> However it is valuable as its ultimate objective is allowing governments to learn and improve.<sup>151</sup>

### ***A Unpacking the Accountability Relationships***

Using the definition and evaluative perspectives discussed, I analyse the accountability mechanisms available for the Armed Response trial. First, I address the Police Commissioner's accountability for operational, independent work under s 16(2). The Armed Response trial was labelled "operational", so this analysis discusses the available mechanisms in this situation, finding them weak and ineffective. Secondly, I discuss the Police Commissioner's accountability to the Minister of Police for policy matters under s 16(1). The Armed Response trial was not labelled a policy matter, so this analysis asks how the accountability for the trial would have changed if it was instead seen as policy. Throughout, I define the relevant accountability relationships and assess the strength of these mechanisms using the democratic, constitutional and learning perspectives.

The accountable actors in this analysis are the Police Commissioner and Minister. While there are "complicated and dynamic" accountability relationships within both the Police and government,<sup>152</sup> both organisations approach accountability in a hierarchical way. The Minister and Commissioner assume responsibility to the outside world, while internal accountability processes are also followed inside their organisations.<sup>153</sup> Both are also involved in the final sign-offs of operational policy.

#### ***1 Police Commissioner's operational decisions under s 16(2)***

The Police Commissioner is accountable to several forums for their functions under s 16(2) of the Policing Act. These operational functions are maintaining order, enforcing the law, investigating and prosecuting offences, and making decisions about individual police employees.<sup>154</sup> The Armed

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147 At 465.

148 At 463–464.

149 At 466.

150 Thwaites and Knight, above n 142, at [14.1].

151 Jarvis and Thomas, above n 129, at 273.

152 At 271–272.

153 Bovens, above n 130, at 458.

154 Policing Act, s 16(2).

Response trial was labelled "operational" by those involved, including the government.<sup>155</sup> The Police's Executive Leadership Board decided to run the Armed Response trial.<sup>156</sup> The Board comprises nine members, including the Police Commissioner, Deputy Commissioners and Deputy Chief Executives.<sup>157</sup> The same Executive Leadership Board would have decided to discontinue Armed Response teams after the trial. The Armed Response trial therefore was subject to the s 16(2) accountability mechanisms.

Using the Armed Response trial as an example, I explain the possible accountability relationships the Police Commissioner is subject to for operational decisions. There are five key forums with whom the Police Commissioner has accountability relationships: the government, Parliament, the public, the Independent Police Conduct Authority and the courts. These forums cover political, social, administrative, and legal accountability.

(a) Political accountability to the government

The government, or more specifically the Minister of Police, is the first accountability forum for the Police Commissioner. This accountability relationship is a form of political accountability. Political accountability describes forums where "voters delegate their sovereignty to popular representatives", who then form a government and authorise public servants to act.<sup>158</sup> The voting public ultimately passes judgement, albeit accountability to the public is only possible periodically through elections.<sup>159</sup>

There is very limited scope for the Police Commissioner to be accountable to the government for their functions under s 16(2). For these functions, the Policing Act states "[t]he Commissioner is not responsible to, and must act independently of, any Minister of the Crown".<sup>160</sup> This corresponds with the government's lack of public involvement in the Armed Response trial. A spokesperson for the Minister of Police said the decision to launch the Armed Response teams was made solely by the Police, as it was an operational matter.<sup>161</sup> The government was therefore also not publicly involved in the final decision to discontinue the teams.

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155 Bond, above n 15.

156 Evidence Based Policing Centre, above n 21, at 14.

157 New Zealand Police "Commissioner and Executive" <[www.police.govt.nz](http://www.police.govt.nz)>.

158 Bovens, above n 130, at 455.

159 Andrew Le Sueur "Accountability" in Peter Cane and Joanne Conaghan (eds) *The New Oxford Companion to Law* (online ed, Oxford University Press, Oxford, 2009); and Bovens, above n 130, at 455.

160 Policing Act, s 16(2).

161 Bond, above n 15.

Formally, one of the only powers the government has in relation to the Police Commissioner is a power of dismissal.<sup>162</sup> The Police Commissioner holds office "at the pleasure of the Governor-General", meaning technically the government may instruct the Governor-General to dismiss the Police Commissioner without notice or reasons.<sup>163</sup> This is because the Police Commissioner and the government must work closely: if the elected government loses confidence in the Police Commissioner, "the person's position becomes untenable".<sup>164</sup>

That said, natural justice concerns still apply to the dismissal of the Police Commissioner.<sup>165</sup> Crown Law has suggested there must be a "clear and proper basis" to remove the Police Commissioner in these situations, which relates to their fitness to hold office.<sup>166</sup> This is to ensure police independence. The wording of s 16(2) suggests the Police Commissioner could not be dismissed for their work on operational matters, as for this the Police Commissioner "is not responsible to ... any Minister".<sup>167</sup> It therefore appears the threshold for dismissing the Police Commissioner is high and would only be available if there were concerns about their competence, rather than a difference of opinion. The Armed Response trial is not a situation where the Police Commissioner's competence would be questioned in such a way, and therefore his employment would not have been at risk.<sup>168</sup>

While the power to dismiss the Police Commissioner is the only form of consequence-based accountability available to the government, other, less overt forms of accountability are available. The Police Commissioner is still accountable through their obligations to provide the government with information. The Police must provide an annual report covering its performance and operations to the Minister.<sup>169</sup> At any point, the Minister of Police may require the Police to provide information on strategic intentions.<sup>170</sup> In addition, the Police must publish its strategic intentions every three years.<sup>171</sup> The Police Commissioner is also obliged to give the Minister access to information on specific police investigations on the Minister's request, although the Police Commissioner can decide the contents of

162 Policing Act, s 12(2); and Young and Trendle, above n 35, at [5].

163 Policing Act, s 12(2); and Young and Trendle, above n 35, at [23].

164 Cabinet Policy Committee Paper, above n 31, at [25].

165 New Zealand Bill of Rights Act 1990, s 27(1). See also Jagose, above n 84, at [12].

166 Jagose, above n 84, at [3] and [15].

167 Policing Act, s 16(2).

168 Cabinet Policy Committee Paper, above n 31, at [25].

169 Policing Act, s 101(a); and Public Finance Act, s 43.

170 Public Finance Act, s 38A.

171 Public Finance Act, s 38(1)(a) and 38(4)(a). See New Zealand Police *Four Year Plan: 2017/2018–2020/2021* (May 2017).

this report.<sup>172</sup> These are general obligations, and while this form of accountability can be useful, it is unlikely these reporting obligations impacted the Armed Response trial.

Informally, the Minister may also ask the Police Commissioner to report to them on significant or controversial operations. As mentioned, the relationship between the two individuals is close. I suggest the Minister of Police likely discussed the Armed Response trial with the Police Commissioner, albeit informally. This is supported by a Twitter conversation released to media in 2019, where the Prime Minister allegedly said: "We can't tell the police what to do operationally, but a few of us did meet with the Police Commissioner recently and share our views on [the Armed Response Trial]".<sup>173</sup> The close relationship between the Police and government would have been damaged if the Police Commissioner did not at least discuss the trial with the Minister. The Armed Response trial also would have required funding, which the Minister oversees.

Perhaps if the Police Commissioner were firmly in favour of the policy, and the Minister of Police were firmly against (or vice versa), an issue would arise. It is unclear what would happen if the government and Police Commissioner disagreed on a significant operational matter. Technically the Police Commissioner is able to implement impactful operational policy decisions against the government's wishes, due to the independence s 16(2) provides. However, this seems practically unlikely, and given the close relationship it is likely the two would instead come to a compromise.

Finally, the Police Commissioner can be held to account through a government inquiry, public inquiry, or royal commission of inquiry.<sup>174</sup> However, these inquiries tend to focus on significant and systemic failings, rather than controversial policies. For example, a royal commission of inquiry into the Police was initiated in 2004 to address allegations of systemic mistreatment of sexual assault cases.<sup>175</sup> This accountability mechanism does not seem appropriate to evaluate general operational policy and is retrospective in nature, meaning it was not available for the Armed Response trial.

The limited effectiveness of the accountability relationship with the Minister is demonstrated by the fact the democratic, learning and constitutional evaluative perspectives are not fully satisfied. First, while there are some obligations for the Police Commissioner to provide information to the government, the government cannot interfere with operational decisions due to s 16(2) of the Policing Act. From a democratic perspective, this relationship falls short as the public cannot hold the Police Commissioner to account through the government, apart from in very serious cases where the Police

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172 Cabinet Policy Committee Paper, above n 31, at Appendix 2.

173 "Avantdale Bowling Club's Tom Scott leaks direct messages with Jacinda Ardern" *The New Zealand Herald* (online ed, New Zealand, 29 November 2019).

174 *A to Z of New Zealand Law* (online looseleaf ed, Thomson Reuters) at [17.20.9.2].

175 Margaret Bazley *Report of the Commission of Inquiry into Police Conduct* (Commission of Inquiry into Police Conduct, vol 1, March 2007) at 25.

Commissioner should be dismissed. The constitutional perspective is also not satisfied, as the mechanisms do not appear sufficient to prevent abuse of power. The governmental and public inquiry function is retrospective, meaning issues can only be addressed once they have become a significant problem. However, these inquiries may inspire behaviour changes, arguably meaning the learning perspective is partially satisfied. The conversations between the Police Commissioner and the Minister may also result in feedback on operational decisions. That said, these learning opportunities are not sufficient to find a strong accountability relationship.

(b) Political accountability to Parliament

Parliament is the second possible accountability forum for the Police Commissioner. This accountability relationship is political, as Parliament is directly responsible to voters through elections.<sup>176</sup> The Police Commissioner is not accountable to Parliament for the Police's operational decisions. As a public servant, the Police Commissioner is intended to be apolitical, and therefore not the subject of political criticism.<sup>177</sup> Recently, a situation arose demonstrating this: the Hon Simon Bridges MP called the Police Commissioner a "wokester".<sup>178</sup> When questioned, he did not see his comments as inappropriate, while the Prime Minister, the Rt Hon Jacinda Ardern MP, pointed to the convention for all political parties to "acknowledge the operational independence of the police", stating this "personal attack on the Commissioner ... is a bit of a departure from convention".<sup>179</sup> However, the Prime Minister did acknowledge the Police Commissioner was not above criticism.<sup>180</sup>

Parliamentary scrutiny of police operations is possible through the formal inquiry function of select committees. Committees are authorised by the Standing Orders of the House of Representatives to undertake detailed investigations into specific issues and report to the House.<sup>181</sup> However, while the Police Commissioner may be subject to explanatory accountability to Parliament or select committees, this does not restrain the Police Commissioner's authority and independence over operational matters.<sup>182</sup> Therefore, while it may be possible for the Police Commissioner to be obliged to provide information or answer questions to Parliament in some circumstances, the Police Commissioner retains autonomy over operational decisions. The Armed Response trial was not

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176 Bovens, above n 130, at 455.

177 Public Service Commission, above n 91.

178 Small, above n 93.

179 Small, above n 93.

180 Small, above n 93.

181 Standing Orders of the House of Representatives 2020, SOs 189, 190(b) and 192. See also New Zealand Parliament "Parliament Brief: Select committees" (17 February 2021) <[www.parliament.nz](http://www.parliament.nz)>.

182 Cameron, above n 45, at 18–21.

subject to such a formal inquiry, and the trial was not materially addressed in parliamentary debate, despite its important and controversial nature.<sup>183</sup>

Finally, Parliament does have some form of ultimate control over the Police Commissioner through legislation. While it might be practically difficult for Parliament to legislate to directly interfere in operations, Parliament may legislate to change the scope of the Police Commissioner's role and the laws which guide police operations. Changing the empowering legislation for the Police would be a significant decision, which the Police and public would undoubtedly meet with criticism due to the convention of police independence. Therefore, the chance that Parliament would legislate to control police operations is remote.

The Police Commissioner is not directly accountable to Parliament for operational activities, meaning that the relationship does not provide strong accountability from the democratic, constitutional and learning perspectives. The Police Commissioner is not democratically accountable for operational decisions, and Parliament does not provide a way to curb the Police's power or provide feedback to allow the Police to learn. At most, the Police Commissioner could be subject to explanatory accountability through a formal inquiry, but this seems more suitable for serious incidents, rather than to provide accountability for regular operational policy.

(c) Social accountability to the public

The general public is the third accountability forum for the Police Commissioner. On first glance, it appears this forum has strong influence over the Police Commissioner's decisions. The Police discontinued the Armed Response teams due to significant public criticism and protest. Police Commissioner Andrew Coster explained in a June 2020 press release that the "response teams do not align with the style of policing that New Zealanders expect".<sup>184</sup> However, two key details weaken this accountability relationship: the lack of enforceability and the Police Commissioner's ability to define public opinion.

The Police strives to make decisions according to public opinion: a principle called "policing by consent".<sup>185</sup> This principle dates back to the creation of the British police force and is seen to legitimise police and their use of force.<sup>186</sup> The public allows police to operate, meaning the

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183 But see one brief mention in (7 May 2020) 745 NZPD 17570–17571.

184 New Zealand Police, above n 1.

185 Home Office, above n 43.

186 Home Office, above n 43. See Audrey Young "Police Commissioner Andrew Coster asks for clarity over intelligence gathering" *The New Zealand Herald* (online ed, Auckland, 11 March 2021).



relationship is theoretically cooperative rather than based on fear of force.<sup>187</sup> As Police Commissioner Andrew Coster stated, "without [the public's] support and without that sense of legitimacy, [the Police] can't actually operate".<sup>188</sup> Policing by consent is also reflected in s 8 of the Policing Act, which states policing services should rely "on a wide measure of public support and confidence".<sup>189</sup>

Although the Police strives for public consent, the organisation is not democratically accountable to the public. The Police Commissioner is appointed rather than elected.<sup>190</sup> It is difficult to imagine tangible consequences for not policing by consent, other than in extreme cases where other forums such as the government would become involved. Police independence necessarily insulates the Police Commissioner from the public to prevent the politicisation of "safety, security and justice".<sup>191</sup> Therefore, although policing by consent is a guiding principle, the absence of sanctions means it lacks teeth.

Accountability to the public is also weakened by the fact public support can be measured in a variety of ways. The Armed Response trial demonstrates this: public opinion was not as conclusive as the Police Commissioner suggested in his statement. In fact, a nationally representative Police survey found 72 per cent of participants supported the initiative following the trial.<sup>192</sup> While the Police aims to make major decisions with broad support, public opinion is often divided.<sup>193</sup> Instead of following the majority's views, the Police may be guided by those most impacted by the decision. The Police Commissioner ultimately decides how to determine public opinion, meaning the individual Commissioner is crucial. When there are reasonable options available, the Police Commissioner's personal view may be decisive.

When deciding on the Armed Response trial, Police Commissioner Andrew Coster was strongly influenced by high-profile protests. The group Arms Down Aotearoa was central to this campaign.<sup>194</sup> The group protested by encouraging and coordinating public submissions, reaching a large audience:

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187 See Robert Reiner and Sarah Spencer "Conclusions and Recommendations" in Robert Reiner and Sarah Spencer (eds) *Accountable Policing: Effectiveness, Empowerment and Equity* (Institute for Public Policy Research, London, 1993) 172 at 176; and Khylee Quince "Policing by consent is not 'woke' – it's the only way it can work" (6 March 2021) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

188 Young, above n 186. See also Giovannetti, above n 93; and New Zealand Police *Annual Report 2019/20* (2020) at 3 and 6.

189 Policing Act, s 8(b).

190 Section 12.

191 Walsh and Conway, above n 3, at 61 and 71.

192 Evidence Based Policing Centre, above n 21, at 102–103.

193 Home Office, above n 43.

194 "Arms Down: End racist police violence" Arms Down NZ <[www.armsdown.nz](http://www.armsdown.nz)>.

the hashtag "#ArmsDownNewZealand" became the top trending hashtag on Twitter in New Zealand.<sup>195</sup> Many submissions focused on the teams' general use of firearms, with activists such as Julia Whaipooti and Emilie Rāketē warning that the teams would inevitably lead to citizen deaths.<sup>196</sup> The Armed Response teams were also accused of "mission creep". While the stated purpose of the teams was to address high-risk situations, Armed Response officers often responded to non-violent, low-risk offending.<sup>197</sup> This included bail checks, traffic stops, and responding to suspicious activity. Statistics published after the trial showed only 2.6 per cent of the incidents attended by the teams were firearms offences.<sup>198</sup>

Protesters argued these harms would disproportionately affect marginalised groups.<sup>199</sup> Māori and Pasifika people are highly policed, especially young men and people in low socio-economic areas.<sup>200</sup> A 2019 Police report showed Māori men between 17 and 40 years old were subject to 35 per cent of all force used by police, despite only making up 3 per cent of the population.<sup>201</sup> Protesters highlighted that many young men in South Auckland have felt unfairly targeted in their interactions with police.<sup>202</sup> Further arming officers in this area was therefore met with trepidation and Māori were significantly less supportive of the trial.<sup>203</sup> Also relevant was the lack of police consultation with relevant groups before the trial.<sup>204</sup> For example, the executive director of the New Zealand Māori Council stated he was not informed of the trial prior to the public announcement, and that he did not know of any Māori groups consulted about it.<sup>205</sup> The trial went ahead despite researchers' advice to the Police that this limited consultation could damage the Police's relationships with Māori and Pasifika communities.<sup>206</sup>

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195 Gregory Warner "New Zealand Leaders Reconsider Arming Police In The Wake Of George Floyd's Killing" (10 June 2020) NPR <[www.npr.org](http://www.npr.org)>.

196 Warner, above n 195; and Macdonald, above n 19.

197 Bond, above n 15.

198 Evidence Based Policing Centre, above n 21, at 20.

199 Tim McKinnel "Police are trialling new heavily armed units. This ex-cop thinks that's a very dangerous idea" (20 October 2019) The Spinoff <[www.thespinoff.co.nz](http://www.thespinoff.co.nz)>.

200 Quince, above n 187.

201 New Zealand Police, above n 2, at 42.

202 "Arming the police - is it a step NZ wants to take?", above n 16.

203 See Evidence Based Policing Centre, above n 21, at 93–95 and 106.

204 At 91–92.

205 Michael Neilson "Armed Response Teams trial: Police warned not consulting Māori could have 'severe' consequence" (29 May 2020) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

206 Neilson, above n 205.

The Police Commissioner decided on the trial in June 2020, during worldwide Black Lives Matter protests.<sup>207</sup> These protests followed the murder of George Floyd, a Black man, by police in the United States.<sup>208</sup> Protesters campaigned for justice for the murder while also raising awareness of the intersection of violence and systemic racism in the police.<sup>209</sup> The protests drew New Zealanders' attention to the Armed Response trial, which likely increased submissions against the trial. Additionally, Police leadership paid close attention to the Black Lives Matter movement.<sup>210</sup> A week after the decision on the Armed Response trial, Police Commissioner Andrew Coster spoke at a vigil for George Floyd, where he said the protests prompted reflection in New Zealand.<sup>211</sup> Some people might have deemed these comments hypocritical had the Police not discontinued the Armed Response teams.

The backlash to the trial meant the Police decided not to continue Armed Response teams in June 2020, despite the full evaluation of the trial not having been completed.<sup>212</sup> In making this decision, Police Commissioner Andrew Coster appears to have listened to the voices of those most likely to be harmed by the teams. However, while this was his interpretation of policing by consent, another person in his position may have seen it differently. Another Commissioner could have waited for the full evaluation of the trial and acted according to the survey results showing public support for the teams. This would have been an understandable course of action, and still justifiable as "policing by consent". This shows the Police's accountability to the public is variable. The public does not wield any formal power over the Police Commissioner and although the Police is expected to act in line with public expectations, this can be interpreted in a range of ways.

The Police Commissioner's accountability relationship with the public does not satisfy the democratic, constitutional and learning perspectives. First, the democratic perspective applied to this accountability relationship asks how effectively the public provides a democratic means to monitor and control the Police Commissioner's conduct. While the Armed Response trial is an example of a Police Commissioner acting with public opinion in mind, ultimately accountability to the public

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207 See "Thousands of NZers march for Black Lives Matter" (14 June 2020) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>; and New Zealand Police, above n 1.

208 Billy Perrigo "Crowds Protest in New Zealand Against George Floyd's Death and Police Brutality Against Indigenous Communities" *Time* (online ed, Auckland, 1 June 2020).

209 Perrigo, above n 208.

210 Amber-Leigh Woolf "Police commissioner on Black Lives Matter: 'It's a difficult time to be in policing'" (17 June 2020) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

211 Amber-Leigh Woolf "Police commissioner speaks at vigil for George Floyd, says New Zealand should be 'the safest country'" (17 June 2020) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

212 New Zealand Police, above n 1.

depends on the individual Police Commissioner, their opinion of policing by consent, and whose consent they prioritise. Therefore, the Police Commissioner is not democratically accountable to the public.

Second, the constitutional perspective applied to this accountability relationship asks whether the public provides incentives to prevent the Police Commissioner from abusing their executive authority. The constitutional perspective requires accountability forums to be "visible, tangible and powerful", able to reveal corruption or mismanagement, and include strong sanctions.<sup>213</sup> The public is able to shine a spotlight on the Police Commissioner's decisions through pressure groups and the media. The group Arms Down Aotearoa is an example of a successful grassroots organisation used to educate the public, coordinate submissions and influence the Police.

In some cases, strong public pressure on officials can result in the tangible consequence of their resignation. A recent example is the resignation of the chief executive of Oranga Tamariki, Grainne Moss,<sup>214</sup> who had faced criticism from the public and media for several months following the poor performance of her department.<sup>215</sup> However, this was an exceptional case. The public's influence on the Police Commissioner is generally weak as there are usually no real sanctions associated. While public pressure may disincentivise the Police Commissioner from abusing their authority, there is no concrete method of enforcement. Therefore, the Police Commissioner's accountability relationship with the public does not satisfy the constitutional perspective.

Finally, the learning perspective asks whether the accountability mechanism allows the Police Commissioner to increase their effectiveness and efficiency.<sup>216</sup> Public criticism may provide the opportunity for the Police Commissioner to learn and adapt their strategies, but again this depends on their interpretation of policing by consent. Therefore, the learning perspective is also not satisfied, when looking to the Police Commissioner's accountability relationship with the public.

(d) Administrative accountability to the Independent Police Conduct Authority

The Independent Police Conduct Authority (IPCA) is the fourth accountability forum for the Police Commissioner. The IPCA is the independent oversight body for the New Zealand Police.<sup>217</sup> It receives complaints and performs independent reviews on police practices, policies and

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213 Bovens, above n 130, at 465.

214 "Timeline: Oranga Tamariki chief executive Grainne Moss' road to resignation" (23 January 2021) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>.

215 "Timeline: Oranga Tamariki chief executive Grainne Moss' road to resignation", above n 214. But see Martin Van Beynen "Oranga Tamariki boss Grainne Moss under fire - but for what exactly?" (19 December 2020) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

216 Bovens, above n 130, at 466.

217 Independent Police Conduct Authority "About us" <[www.ipca.govt.nz](http://www.ipca.govt.nz)>.

procedures.<sup>218</sup> The IPCA usually must receive a complaint to initiate an investigation.<sup>219</sup> The IPCA is conferred the same powers as a commission of inquiry, such as summoning witnesses and gathering evidence, which it may use in investigating a complaint.<sup>220</sup> The IPCA communicates its findings and recommendations to the Police Commissioner.<sup>221</sup>

The Police Commissioner's accountability to the IPCA is "diagonal". Bovens describes diagonal accountability relationships as those operating "in the shadow of hierarchy". This refers to an indirect relationship with an administrative accountability forum which gains its authority through reporting to a minister or Parliament.<sup>222</sup> The IPCA has no direct power over the Police Commissioner. However, if the IPCA is unsatisfied with the changes made, it can refer the matter to the Attorney-General and the Minister of Police,<sup>223</sup> or have its recommendations tabled in Parliament.<sup>224</sup>

The IPCA was not the correct forum for the Police Commissioner to be held accountable for the Armed Response trial. Although complaints may be made about policies,<sup>225</sup> the IPCA usually investigates and reports on isolated incidents.<sup>226</sup> The threshold used to ascertain whether to investigate a matter also appears to be high: many reports are written on allegations of corruption, misconduct and other serious errors.<sup>227</sup> Additionally, the IPCA requires complaints to act, and it is possible none were made about the Armed Response trial.<sup>228</sup> If anyone made a complaint, the subsequent investigation has not been publicly released.

The Police Commissioner's diagonal accountability to the IPCA means they are not directly democratically accountable under this relationship. However, this relationship does disincentivise the Police Commissioner from abusing their authority. The IPCA can investigate and report to other entities, although it is debatable whether the IPCA is visible and powerful enough to sanction the

218 Young and Trendle, above n 35, at [40].

219 Independent Police Conduct Authority Act 1988, s 12(1).

220 Sections 23–26; and Young and Trendle, above n 35, at [40].

221 Independent Police Conduct Authority "What we do" <[www.ipca.govt.nz](http://www.ipca.govt.nz)>.

222 Bovens, above n 130, at 460.

223 Independent Police Conduct Authority Act, s 29(2)(a).

224 Section 29(2)(b).

225 Independent Police Conduct Authority "What you can complain about" <[www.ipca.govt.nz](http://www.ipca.govt.nz)>.

226 See Independent Police Conduct Authority "Reports on independent investigations 2021" <[www.ipca.govt.nz](http://www.ipca.govt.nz)>; and Independent Police Conduct Authority "Reports on independent investigations 2020" <[www.ipca.govt.nz](http://www.ipca.govt.nz)>.

227 Independent Police Conduct Authority *Statement of Performance Expectations - 2017/18* (2018).

228 Independent Police Conduct Authority, above n 225.

Police meaningfully.<sup>229</sup> Ultimately, the IPCA best satisfies the learning perspective. The IPCA offers recommendations to the Police to improve its processes and actions in the future. However, these learning opportunities are only present in the case of an IPCA investigation and report, which are only made in some instances.

(e) Legal accountability to courts

The courts are the final accountability forum for the Police Commissioner. In *Blackburn*, Lord Denning MR stated the Police Commissioner is "answerable to the law and the law alone".<sup>230</sup> While clearly police are no longer considered accountable *only* to the law, police should always be legally accountable for their independent actions. Legal accountability of police occurs primarily through judicial review. Police officers are mainly held to account if they breach the legal framework within which they operate.<sup>231</sup>

Despite this, police officers' actions are rarely challenged in the courts. The Police as an organisation is even less likely to be judicially reviewed on higher-level operational policy. Some scholars argue that this kind of policy would only be found illegal where police have decided not to enforce a law at all.<sup>232</sup> The Hon Terence Arnold, writing extrajudicially, cynically argued legal accountability barely exists, but that it instead functions to claim there is no need for other forms of responsibility (for example, to the public).<sup>233</sup> As the courts are rarely used as the forum to test the legality of police policy, it practically does not provide accountability under any of Bovens' mechanisms. The Armed Response trial's legality was not tested in court, which is understandable as it does not seem there were sufficient legal grounds for questioning it.

The Armed Response trial demonstrated the Police Commissioner is subject to limited accountability for the Police's operational functions under s 16(2). Accountability mechanisms must balance the fine line between too much and not enough oversight. An accountability deficit allows errors or bad decisions to go unnoticed, but too much accountability may also cause problems by slowing decision-making.<sup>234</sup> For operational decisions, there is simultaneously too much and not enough accountability. While there are many different mechanisms available, most of them only apply in exceptional circumstances. For example, the government may dismiss the Police Commissioner, but only where their competence is seriously questioned. Similarly, Parliament could change the

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229 Bovens, above n 130, at 465.

230 *Blackburn*, above n 48, at 136.

231 Arnold, above n 8, at 68.

232 Cameron, above n 45, at 23; and Arnold, above n 8, at 72.

233 Arnold, above n 8, at 67.

234 Thwaites and Knight, above n 142, at [14.1].

Police's empowering legislation to impact their operational functions, but this is very unlikely. Select committee, government or public inquiries are only established if serious errors are found, and these inquiries are also limited by their retrospective nature.

Some accountability methods simply require the Police Commissioner to provide information to a forum, such as their reporting requirements to government. This form of accountability is the weakest as it does not offer the opportunity for debate or tangible consequences. Finally, judicial review and IPCA investigations do not seem appropriate to assess operational policy, and instead are best used for specific instances of police officers acting beyond their powers.

For operational matters, the Police Commissioner is mainly held to account using weak and informal mechanisms. While these mechanisms allow the Police Commissioner to learn and improve policy, they are ultimately voluntary. One example of this is the Police Commissioner's ability to discuss operational policy with the Minister informally. While the nature of their conversations is unknown due to their confidential relationship, it is likely the Minister provides the Police Commissioner with feedback and did so in the case of the Armed Response trial.<sup>235</sup>

The most meaningful accountability relationship for the Armed Response trial was that with the public. The Police's commitment to policing by consent means public opinion is relevant to operational decisions. Police Commissioner Andrew Coster's strong focus on policing by consent meant public criticism from affected groups was instrumental in ensuring the Armed Response teams were not permanently implemented. However, as discussed, this form of accountability is not enforceable and heavily depends on how senior leadership interprets policing by consent.

## *2 Police Commissioner's policy decisions under s 16(1)*

If the Armed Response trial were labelled policy rather than operation, the Police Commissioner would have been subject to accountability to the Minister under s 16(1) of the Policing Act. Policy decisions are not influenced by police independence, and therefore are not independent of government. However, s 16(1) does not state what this accountability relationship should look like or any possible consequences for the Police Commissioner if they do not abide by the Minister's wishes.

For policy decisions, the Police Commissioner is still subject to the accountability mechanisms already mentioned in relation to operational decisions. Additionally, however, for policy decisions the Police Commissioner is also accountable to the Minister of Police. The Minister is then accountable to their political party, government, Parliament and the public. The additional accountability for policy decisions demonstrates the importance of the labels "policy" or "operation".

The first additional accountability relationship is between the Minister of Police and Parliament. Parliament can directly hold the Minister of Police accountable for the Police Commissioner's actions.

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235 "Avantdale Bowling Club's Tom Scott leaks direct messages with Jacinda Ardern", above n 173.

There is explanatory accountability through the tabling of the Police's annual report in Parliament by the Minister.<sup>236</sup> The convention of individual ministerial responsibility also means ministers are accountable to Parliament for ensuring their departments carry out their functions "properly and efficiently".<sup>237</sup> The *Cabinet Manual* states that ministers may be responsible for their departments' actions even if they were unaware or uninvolved in the decision-making.<sup>238</sup>

The Minister of Police can therefore be held accountable for policy decisions made by the Police Commissioner, even if the Minister was uninvolved in the matter. Accountability to Parliament is said to be first explanatory and then amendatory.<sup>239</sup> The Minister of Police would first front to Parliament and parliamentary committees about the actions in question, and then seek to remedy the mistake.<sup>240</sup> The Minister may be questioned by Members of Parliament on the matter. The final form of the Minister's accountability to Parliament is culpability. This may involve the Minister facing consequences, such as being asked to resign if the Prime Minister loses confidence in them.<sup>241</sup> That said, in recent times ministers have shied away from accepting the culpable aspect of individual ministerial responsibility.<sup>242</sup> In the case of the Armed Response trial, it does not appear the Police Commissioner or Minister made an error requiring consequences, such as ministerial resignation, flowing from the Minister's individual ministerial responsibility to Parliament.

The government's accountability to the public is the most significant additional accountability relationship for policy decisions. The voting public is the end of the "chain" of accountability.<sup>243</sup> The government's democratic accountability motivates key players such as the Minister of Police to listen to the public's views. There was vocal public criticism of the Armed Response trial. However, as mentioned, a Police survey did find general public support for the trial.<sup>244</sup> If the Minister of Police

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236 Policing Act, s 101(a); and Public Finance Act, s 44.

237 Cabinet Office, above n 29, at [3.27].

238 At [3.27].

239 Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004) at 89.

240 Cameron, above n 45, at 20.

241 Palmer and Palmer, above n 239, at 91–94.

242 See Chris Eichbaum "Some Background Information on Individual Ministerial Responsibility" (July 2020) IPANZ <[www.ipanz.org.nz](http://www.ipanz.org.nz)>; and Peter Dunne "Still here, Minister?" (26 June 2020) Newsroom <[www.newsroom.co.nz](http://www.newsroom.co.nz)>.

243 Bovens, above n 130, at 455.

244 Evidence Based Policing Centre, above n 21, at 102–103.



were ultimately accountable to the public for the decision on the trial, public opinion would be influential—although it would be a political matter as to which opinion would take precedence.

The distinction between policy and operational decisions therefore fundamentally changes the nature and depth of accountability. The label given to the decision is consequential. There is effectively no democratic accountability for operational decisions. The Police Commissioner may take into account public opinion for operational decisions, but this is voluntary. However, when making policy decisions, the government is strongly influenced by public views as they wish to keep the country's support and stay in power. As the decision's label transforms the accountability mechanisms, it is worth examining whether the Armed Response trial's operational label was accurate.

### ***B Armed Response Team Trial: Operation or Policy?***

The Armed Response trial's operational status dictated the nature and depth of accountability to which the decision was subject. There is a strong argument the Armed Response trial should have instead been understood as a policy matter. The Minister of Police would have then been responsible for the decision, and therefore accountable to Parliament and the voting public. However, the wording of s 16 of the Policing Act is ambiguous, meaning the Armed Response trial could be interpreted as falling under either s 16(1) or (2).<sup>245</sup> The trial could be seen as either "general conduct of the Police" in s 16(1)(b), or as "the enforcement of the law in relation to any individual or group of individuals" in s 16(2)(b).

The Armed Response trial fits the plain meaning of "policy". The proposal for these teams was a suggested course of action from senior leadership.<sup>246</sup> It proposed a change in practice, impacting those teams and broader society. These teams of police officers would be armed at all times, which would change the way the public saw police generally. That said, although the plain meaning of "policy" appears to be satisfied here, s 16(1) has more specific requirements.

Section 16(1)(b) states general police conduct is a policy matter for which the Police Commissioner is responsible to the Minister. The introduction of Armed Response teams was a shift in policing direction, as the police officers on the teams were constantly armed. The impact on public trust in police is an argument for seeing this as a matter relating to the Police's "general conduct". However, "general conduct" in s 16(1)(b) is a vague term that has not been defined in case law. One reading of "general conduct" would require the decision to apply to police officers generally, rather than a decision impacting a small group of officers, such as the Armed Response teams.

Professor Robin Palmer notes the Armed Response trial could instead be interpreted as an operational decision under s 16(2)(b), which states the Police Commissioner must make decisions

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245 Macdonald, above n 19.

246 Deverson and Kennedy, above n 64, at "policy".

independently regarding law enforcement in relation to any individual or group of individuals.<sup>247</sup> The Armed Response teams could be characterised as a law enforcement strategy to better respond to groups of dangerous offenders. In this light, the decisions regarding the trial can be seen as operational.

Even though the trial was characterised as an operational decision, on a practical level the Minister of Police was likely closely involved in the discussions. This is supported by Jacinda Ardern's alleged statement that she met with the Police Commissioner to share her views on the Armed Response trial.<sup>248</sup> The Minister and Commissioner have a close relationship. It is likely that while the Police Commissioner was the one to make the final decision, the Minister provided advice.

The criticism of the operational labelling of the Armed Response trial seemingly arose from a public "sniff test". Intuitively, when faced with a strategic direction that many disagreed with, the public seemed frustrated there was no way to impact the decision-making. The trial could have been understood as policy under s 16(1), and it appears to have been labelled "operational" to avoid difficult questions from the public.

During the public discussion about the trial, the New Zealand Council for Civil Liberties published a statement arguing that while individualised decisions are operational, the general arming of police teams is political.<sup>249</sup> The Council stated decision-makers should have been democratically accountable for the decision, rather than it being something for the Police Commissioner's independent judgement. Arms Down Aotearoa also disputed the operational nature of the trial for similar reasons.<sup>250</sup>

These criticisms dispute the operational label due to the resulting lack of democratic accountability. However, this does not necessarily suggest an incorrect application of s 16. The statutory wording of s 16 is broad enough for the trial decision to have been classified either "operation" or "policy". While, legally, an operational label may have been open to the Police due to legislative ambiguity, the appropriateness of this labelling can be challenged normatively. The lack of democratic accountability may demonstrate s 16 does not strike the correct balance between operation and policy.

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247 Macdonald, above n 19.

248 "Avantdale Bowling Club's Tom Scott leaks direct messages with Jacinda Ardern", above n 173.

249 New Zealand Council for Civil Liberties "No to police patrolling in armed squads" (23 June 2021) <[www.nzcccl.org.nz](http://www.nzcccl.org.nz)>.

250 Macdonald, above n 19.

## V CONCLUSION

Both independence and accountability are required for an effective police force, but the balance must be struck correctly. Two thousand years ago, the question was posed: "... who will guard the guardians?".<sup>251</sup> Today, our guardians are police, and they are guarded through the accountability mechanisms discussed in this article. However, the nature and depth of this accountability depend on an operational or policy label.

Policy and operational decisions sit on either end of the spectrum of police decision-making. Operational policy decisions fill the grey area in the middle. Despite the importance of these decisions, the current balance struck allows many hybrid decisions to be categorised as operational. The ambiguous wording of s 16 facilitates this. The government can therefore avoid accountability for controversial and important police policy through the "operational" label. This is what occurred during the Armed Response trial. Police leadership ultimately listened to vocal public criticism of the trial and decided to discontinue the teams.<sup>252</sup> However, another Police Commissioner may not have made the same decision.

The Police has therefore somewhat "escaped" from democratic and political oversight.<sup>253</sup> Whether or not the Police seeks public consent for its independent decisions depends on who is in charge. Further, involving the Minister of Police in these decisions would allow the existing democratic infrastructure of Parliament to provide the public's consent on policing, rather than ad hoc consultation managed by the Police.

Accountability is a careful balance of opposing interests, rather than something to be solved once and for all.<sup>254</sup> Any adjustment to this balance must be done carefully to prevent unintended side-effects. This article unpacked the accountability deficit in policing, rather than suggesting ways forward. However, the issues highlighted in this article suggest a renegotiation of the current framework may be due. I therefore conclude by discussing two possible ways the Minister of Police could be further involved in, and accountable for, operational policy decisions. These proposed approaches flow naturally from the preceding analysis and would benefit from further research.

First, a decision could be made to ensure hybrid decisions in the middle of the policy–operation spectrum must be interpreted as policy rather than operation. Section 16(1) would therefore include more operational policies in its ambit. This would allow the Police Commissioner to be ultimately accountable to the Minister with matters such as the Armed Response trial. This would subject the decisions to democratic accountability, meaning the public's views would be more influential. This

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251 Juvenal *Satire VI* (Rome, approximately 100AD) at 346–348.

252 Quince, above n 187.

253 Cameron, above n 45, at 21 and 36.

254 Jarvis and Thomas, above n 129, at 304.

change is unlikely to occur through statutory interpretation of s 16 in the common law. Operational policy matters are rarely challenged through the courts. Even if an opportunity to address the issue arose, the courts would likely shy away from reducing the ambit of police independence. This change would therefore realistically only occur through legislative amendment.

Second, the hybrid category of operational policy could be recognised as its own distinct category of responsibility under the Act. The Minister of Police and the Police Commissioner could have overlapping accountability and be jointly responsible for operational policies such as the Armed Response trial. This would reflect the hybrid policy and operational nature of these decisions: they significantly impact operations, but also are higher-level and strategic.

This hybrid category would reflect the fact the Police Commissioner and Minister likely consult and discuss important issues with one another.<sup>255</sup> Modern decisions have multiple decision-makers, and the Minister and Commissioner have a close relationship.<sup>256</sup> In the Armed Response trial, it appears the Prime Minister met with the Police Commissioner to share the government's views.<sup>257</sup> The hybrid category would recognise the role the government already plays in these decisions and formally attribute accountability to both decision-makers. Ideally, this would be accompanied by more public information about the nature of the relationship between the Minister of Police and the Police Commissioner.<sup>258</sup>

However, interpreting more decisions as "policy" and creating a third hybrid category of decision are both forms of democratisation. Both suggestions therefore have similar drawbacks. Democratisation can mean the government can more easily use police to solidify political power or implement populist policies disadvantaging marginalised groups.

The Armed Response trial demonstrates this risk. There was an overwhelmingly negative public response to the trial in mainstream media, social media and advocacy platforms. Advocacy groups for criminal justice reform and Māori issues were particularly critical of the trial.<sup>259</sup> However, the final Police report on the Armed Response trial showed 72 per cent of survey participants supported the initiative.<sup>260</sup> While the Police only surveyed 574 people, the survey's methodology created a nationally representative sample.<sup>261</sup> This survey suggests the Armed Response teams might have

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255 Elder, above n 31, at Appendix 1.

256 Bovens, above n 130, at 457.

257 "Avantdale Bowling Club's Tom Scott leaks direct messages with Jacinda Ardern", above n 173.

258 Cameron, above n 45, at 37.

259 See JustSpeak "Open Letter to the Police Commissioner" (1 April 2020) <[www.justspeak.org.nz](http://www.justspeak.org.nz)>.

260 Evidence Based Policing Centre, above n 21, at 102.

261 At 102–103.

become permanent if the general population had decided the trial's fate. This demonstrates the limits of democratic accountability: it allows majoritarian policies to flourish, even if those most knowledgeable or impacted by them do not support them. The general population is also often uninformed on policing and criminal matters and tends to be more punitive than rational.<sup>262</sup> Bearing this in mind, the Police Commissioner's approach of focusing on the consent of more-policed groups appears fairer.

Any change to the allocation of accountability could also threaten the delicate balance captured by s 16 of the Policing Act. Independence relating to operational matters has been central to policing since its inception.<sup>263</sup> Although the two proposed approaches discussed are relatively minor tweaks, shifting the balance could lead to uncertainty. Changing accountability relationships could also lead to friction between the Police and government, and would require a very strong relationship between the Police Commissioner and Minister of Police.

Both of these approaches would allow for oversight, feedback and greater policing by consent. However, both would adjust how police independence operates in New Zealand. It is difficult to predict the full consequences of altering such a fundamental principle. However, a serious concern is that increased public control over policing could lead to populist policies disadvantaging marginalised groups such as Māori communities. Shifting matters into the Minister of Police's ambit may therefore increase accountability, but at the expense of creating other problems.

While the best way forward is still uncertain, it is clear there is a problematic accountability deficit within the Police. The Police Commissioner has limited accountability to the government and Parliament for operational matters. Similarly, accountability forums such as the public, the IPCA and the courts cannot strongly influence these decisions. The Police Commissioner is mainly accountable to these forums in an explanatory sense, or otherwise only in exceptional circumstances.

The Armed Response trial is an example of operational policy labelled solely as "operational", not "policy", which impacted the accountability the Police faced for the trial. However, there are many more examples of other important hybrid decisions labelled "operational".<sup>264</sup> Even generally arming police officers likely would not require democratic sign-off: while Ms Ardern previously suggested the government has "a say" on this issue,<sup>265</sup> she later stated this decision is for the Police, agreeing

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262 John Pratt and Marie Clark "Penal populism in New Zealand" (2005) 7 *Punishment & Society* 303 at 304–307.

263 Home Office, above n 43.

264 Julia Gabel "Race Relations Commissioner calls for police body cameras to address bias" *The New Zealand Herald* (online ed, New Zealand, 2 June 2021); and Sherwood, above n 109.

265 "Avantdale Bowling Club's Tom Scott leaks direct messages with Jacinda Ardern", above n 173.

with the Police Association and Commissioner.<sup>266</sup> The Armed Response trial is not unique, but instead demonstrates a much larger issue. This article has taken an initial step in highlighting the accountability deficit, and I anticipate larger conversations are in New Zealand's future about the careful balance of police accountability.

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<sup>266</sup> "General arming of police not the answer, say Ardern, Minister Williams, Commissioner Coster" (5 August 2021) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>; Police Association "We Need General Arming" (1 August 2021) <[www.policeassn.org.nz](http://www.policeassn.org.nz)>; and Ben Strang "Support among police for carrying arms at highest level in decade, survey shows" (5 August 2021) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>.