

The Ambiguity of Accountability: Deaths in Custody, and the Regulation of Police Power

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1. Introduction

Policing is power. Police authority relies on transactions or relationships of power and influence.¹ The nature of that authority depends on, and takes its form from specific environments of opportunity. Opportunity is, in turn, designated by the aspirations for such relationships, and structures and processes at work towards their regulation.

Police authority can be confirmed either legitimately or illegitimately, depending on its context. Essential to the operation of police authority are the “boundaries of permission” which designate the dominion of police power. A principal regulator of police authority, and therefore an important mechanism whereby boundaries of permission² are determined, is accountability. Requirements for accountability may determine whether police authority is perceived as legitimate or otherwise. For instance, if the democratisation of policing is nominated by a community as a pre-condition for the legitimisation of its authority, then participatory processes of accountability may be required in confirmation of police authority.³

Mechanisms of accountability usually possess some potential to regulate policing practice. As is the case with most mechanisms of control in criminal justice, police accountability may not only support legality, it may also influence the nature and occurrence of malpractice. Concerning the example of police corruption and its regulation through accountability,⁴ the crime/control nexus is significant both for the eradication, as well as the perpetuation of malpractice. The selective exposure of malpractice through requirements for accountability which are discriminatory, for instance, may lead on to opportunities for malpractice in situations and relationships beyond the boundaries.

Accountability is rarely a feature of the illicit policing relationship, likewise it may not be essential to control mechanisms directed against it. Police corruption thrives on anonymity, while control agencies regularly rely on powers which grow out of autonomous authority. The appreciation of police malpractice or police deviance as a social threat or community problem, however,⁵ is often constructed in a very public/political arena, and

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1 See Findlay, M and Zvekic, U, *Alternative Policing Styles* (1993).

2 See section 5 of this article, “Accountability and Structures of Permission”.

3 See Brogden, M, Jefferson, T and Walklate, S, *Introducing Policework* (1988).

4 Findlay, M, “Breaking the Crime/Control Nexus — Market Models of Corruption and Opportunity” (1994) in Chappell, D and Wilson, P (eds), *Australian Criminal Justice Systems* Vol 3.

the expectations for its control have community-centred dimensions.⁶ The genesis of police complaints authorities,⁷ and police/community liaison committees,⁸ as products of political rhetoric and community unease about the excessive or aberrant use of police powers, confirm the essential public dimension of accountability discourse, and the community indebtedness of the institutions charged with its control.⁹ Therefore, while both police deviance and its control may exist beyond public view, the deviance/control nexus relies on accountability in a variety of interesting circumstances. These go well beyond the obvious calls for the open and responsible exercise of criminal justice.

This paper examines the ambiguous position of accountability within policing, particularly as it is directed to the abuse of police power and authority. Accountability is as essential to the language of "good" policing within democratic governments, as it is to the prevention of police malpractice and the abuse of authority.¹⁰ The nature and powers of the mechanisms for accountability which are charged with the control of police malpractice, and the sanctions which they impose, are also uniquely subject to the significance of accountability.¹¹ Yet the varied institutional and procedural requirements for accountability can produce contradictory results. For example, where the determination that certain stages of corruption investigations should be held in public is said to guarantee the community interest, the individual rights of persons under investigation may be jeopardised through public exposure.¹²

Some of the difficulty here lies with confusions concerning what accountability represents or requires. Such confusion is compounded by the expectations for accountability as a feature of control, and the diverse applications of accountability obligations to dimensions of the deviance/control relationship.

The paper explores the significance of accountability for police power and authority, as well as for the regulation of police. This dual focus reveals the position of accountability within the opportunity structures which promote the authority, malpractice, and control. For some policing styles potential accountability is important in claiming authority.¹³ A reason for this is the opportunity to regulate police power through public account. Yet the nature of accountability requirements may shift the opportunity for police deviance further underground, or into situations of opportunity where accountability is governed or negotiated.

- 5 Note the generation of public awareness and concern about recent deaths in police custody in New South Wales.
- 6 Note the recently encouraged practice in certain jurisdictions such as New South Wales for approved civilians to act as visitors to police cells in order to monitor the conditions of their occupants.
- 7 Freckelton, I and Selby, H, "Police Accountability" (1988) in Findlay, M and Hogg, R (eds), *Understanding Crime and Criminal Justice*.
- 8 Above n2.
- 9 Bersten, M and Hogg, R, "The NSW Anti-Corruption Commission: Has it been worth the wait?" (1988) 13(4) *Leg Serv Bull* at 146-148.
- 10 As Braithwaite observes; "Police services are both the most important institutional guarantors of dominion and the greatest institutional threat to dominion", Braithwaite, J, "Good and Bad Police Services and How to Pick Them" (1992) in Eijkman, H and Moir, P (eds), *Policing Australia: Old Issues, New Perspectives* at 13.
- 11 See Independent Commission Against Corruption (ICAC), *Annual Report* (1990) ch8; *Annual Report* (1991) ch 8.
- 12 ICAC Parliamentary Committee, *Inquiry into Commission Procedures and the Rights of Witnesses: First Report* (1990).
- 13 Above n1.

2. *Accountability*

In the crime/control equation, accountability can be viewed as the balance to discretion. However, there exists considerable uncertainty of perception and definition surrounding the understanding and representation of accountability. Much of this uncertainty, particularly amongst police, emanates from the association between accountability and penalty. The jealous protection of their discretion by police has tender to generate suspicion about any process which requires its regulation. And if accountability is viewed as the other side of police discretion, penalising its inappropriate exercise, then this punitive dimension will be considered a threat to individual police practice. Such an interpretation ignores the positive consequences which flow from fair demands for accountability, and assumes that accountability mechanisms must be confrontational in a police setting.¹⁴

Freckelton and Selby refer to accountability as the “obligation to answer for a responsibility which has been conferred”.¹⁵ In this definition they emphasise:

- i) the requirement to explain;
- ii) the stewardship of a duty; and
- iii) the relationship between the duty and its source.

Brogden places accountability in a wider political agenda by describing it as “institutional arrangements made to ensure that (individuals) do the job required of them”. In addition he suggests that accountability is “the degree of control political institutions have over [other institutions and operatives]”.¹⁶

Each of these impressions of accountability reveals the complexity of the process; a complexity which goes well beyond punitive intentions and consequences.

In its broadest sense accountability involves:

- *Identification of responsibility*: In this respect accountability is an expectation which results from a structure of responsibility. With the requirement that accountability should be sheeted home to an individual, and individualised responsibility, then this process of “naming” goes beyond the apportionment of guilt, and more towards the ramifications of shared relationships of responsibility.
- *Openness*: Particularly with respect to crime control debates, requirements for openness in the exercise of investigatory and punitive powers have featured recently. Community interests are now more vocal in their expectations for liaison and consultation with crime control agencies. These institutions for their part are now expecting that communities should be openly implicated in the crime control process.
- *popular participation*: Not so much as a characteristic of accountability, but as a check on its dimensions, participation in criminal justice by a wide range of interests is advanced. If

14 The utility of accountability is identified by Reiner, R, *The Politics of the Police* (1985), when he observes that its institutionalised forms will only be truly efficacious when they work within and win over the more general mechanisms for discipline and control within an organisation.

15 Above n6 at 225.

16 Above n2 at 151.

such participation is both popular and representative, then claims for accountability appear more convincing.

- *Audit*: Accountability relies on identifiable structures of responsibility, and codes of conduct against which the behaviour of individuals and organisations might be critically reflected. The audit function of processes of accountability should not only expose individual shortcomings through this comparison, but also inadequacies in these responsibility structures, and conduct expectations.
- *Compliance*: The proactive dimension of accountability arises out of the potential to combine responsibility, openness, participation and audit into a motivation towards compliance. Effective accountability measures and mechanisms gain functional credibility as much from their pressure to alter behaviours and relationships as they do from simply exposing “blocks” to good government.
- *Complaints and discipline*: A common and unduly pejorative conceptualisation of accountability is as a euphemism for discipline and penalty. The mechanisms for ensuring accountability, as so envisioned, are usually activated by individual complaints and therefore produce adversary consequences. At least some of the participants in such accountability contests will only view accountability as something to be avoided.
- *The background for stigmatisation, and re-integration*: Where accountability does retain a co-operative image, it still relies on processes of labelling and stigmatisation for its social impact. Whether such labels are eventually reintegrative or exclusionary will depend on a variety of environmental determinants which precede the behaviours and relationships under review.¹⁷

Above all else, accountable police practice requires civic engagement:

Citizens cannot enjoy dominion if they feel powerless in the face of the coercive power of the police. Dominion does not require that citizens actually do participate in influencing the policies and practices of the police. It requires only that they have a subjective assurance of the opportunity to do so if they wish.¹⁸

Whether effective engagement is to go beyond opportunity, and assurances of participation need actionable guarantees, are part of the politics of police accountability. What is generally essential is that engagement progress from the possible to the actual, if community policing is to attain mutual interest.

3. *Relationships of Accountability*

The significance of accountability relationships relies on the positions of power and authority retained by the participants. All too often the power structures which underlie such relationships are not sufficiently appreciated when expectations for accountability are formulated.¹⁹ This is particularly significant when hopes for “good” policing rest in the oversight of community engagement.

17 Findlay, M, “Police Authority, Respect and Shaming” (1993) 5(1) *Curr Iss Crim Just* 29–41.

18 Braithwaite, J, “Good and Bad Police Services and How to Pick Them” (1992) in Eijkman, H and Moir, P (eds), *Policing Australia: Old Issues, New Perspectives* at 27.

19 For example, it is impossible to understand the difficulties which plague mechanisms of police account-

Accountability as a consequence of power differentials within any relationship will also be profoundly influenced by community perceptions. The social situations in which accountability is expected are largely reliant on perception. These perceptions extend to the problematic aspects of the relationship necessary for review, as well as to the powers exerted towards requiring accountability.

Accountability as a process incorporated within control or prevention strategies can be both proactive and reactive. The investigation of breakdown in structures of responsibility, the criminogenic potential of secrecy, partiality in participation, and the consequences of audit, are primarily reactive. However community awareness campaigns, the development of codes of conduct, and the creation of an appropriate occupational or organisational consciousness are preventative and therefore pro-active in motivation.²⁰

When examining relationships of accountability for positions of power and authority, it is essential to discuss mechanisms as well as product. The interpretations of accountability considered above cover institutional manifestations as well their expected achievements. Accountability therefore arises within material structures, institutional relationships, and the processes and consequences which they produce.

Relationships of accountability are usefully applied to relationships of police corruption, malpractice, or the abuse of power, because to some extent they are interdependent with situations of opportunity. Whereas corruption as a market choice, for example, depends on the necessary conditions of opportunity which favour corruption, accountability as a mechanism of control depends on similar conditions for choice, and opportunities for achievement.

The control motivation for accountability, however, poses some significant contradictions when directed towards the largely discretionary exercise of power in policing. The influence of these contradictions for the control over policing, and the development of appropriate police functions through accountability, will depend on the environments within which they operate, and the situations of opportunity for their success.

4. Control Dilemmas

“Good” policing is traditionally only as strong as the mechanisms in place for controlling the exercise of police power. When considering the nexus between police deviance (such as police malpractice) and control, and the impact which accountability might have on this, the dilemmas which face control initiatives should not be overlooked. These dilemmas form boundaries around the control as a market condition, and therefore fundamentally influence the nexus between deviance and control.

- *Independence v accountability*: How far can institutions of control such as the police, or accountability mechanisms over the police, be required to account for the exercise of their powers, without compromising the legitimacy of their claimed independence?

ability unless one appreciates the features of power which prevail in the exercise of police discretion. See Selby, H, “Internal Investigation: Too little too late” (1988) in Freckelton, I and Selby, H (eds), *Police in Our Society*; Travis, G, “Police Discretion in Law Enforcement: A study of section 5 of the NSW *Offences in Public Places Act*” (1983) in Findlay, M, Egger, S and Sutton, G (eds), *Issues Criminal Justice Administration*.
 20 See Egger, S and Findlay, M, “The Politics of Police Discretion” (1983) in Findlay, M and Hogg, R (eds), *Understanding Crime and Criminal Justice*.

- *Responsibility v indemnity*: How can processes of accountability designed to control police power advance their legitimacy through the responsible exercise of accountable power, while advertising individual indemnity as an investigatory tool?
- *Publicity v secrecy*: How is the balance to be struck between a general community interest in seeing police power (and its abuses) controlled, and the need to maximise efficient exercise of specialist policing powers such as those which are investigative, requiring anonymity and individualised situations of discretion?
- *Anonymity v exposure*: To what extent should the punitive consequences of controlling police power through the stages of accountability and exposure (whether involving public investigation), and where should the rights and reputation of the individual gain from the ancillary affects of publicity?
- *Selectivity v total enforcement*: If the ideology of controlling police deviance is total prohibition, then how can it sit with processes of specific accountability and selective enforcement?
- *Policing the police*: How are the abuses of police power sometimes present in the exercise of police investigatory power to be avoided in accountability mechanisms directed against police deviance?

5. *Accountability and Structures of Permission*

So far we have considered relationships of power and control, conditions for opportunity, and situations of accountability in a rather separate fashion. It is within structures of permission where they merge.

To some extent both police power and processes of accountability may be viewed in terms of "market models". Particularly where power and accountability merge in situations of deviance and control, the market analogy presents possibilities for understanding the motivations for deviance, and resistance to control. Further, it allows for an appreciation of the impact of accountability over new opportunities for deviance and the abuse of power.

In market analysis, the market is a general boundary of permission. What is implied by this concept is some space within which behaviours, connections and consequences are expressly and implicitly allowed. It is a dynamic state where any condition might vary within the perimeters of tolerance.

Accountability connects with structures of permission in two principal ways. First, it forms an important part of the perimeters of tolerance. Requirements for accountability limit the nature and progress of market relationships, and require the establishment and operation of structures of responsibility. Secondly, accountability can become a positive link between opportunity, market relationships, and mechanisms for their regulation. For instance, where a monopolised market creates the opportunity for a particular enterprise, and the enterprise is traditionally covert, corrupt relationships may arise to service the enterprise. If the methods employed to regulate the enterprise rely on stages of accountability then these have the potential to alter the conditions of the enterprise and its reliance on corrupt or deviant power relations.²¹

Through focussing on relationships of deviance and control in order to understand police deviance, while ignoring the structures of permission within which they connect, an accurate appreciation of their impact on other market relationships becomes difficult, and

a chance to deconstruct police power is squandered. Accountability has the potential to expose the reality of police deviance and control at the same time as it identifies the nexus between them both and its ramifications for police power.

6. *Accountability as the New Sanctions*

In many respects the position of accountability within the regulation of police power in NSW has now developed a new punitive dimension. Public hearings, and findings of corrupt conduct by police²² often become punishment without industrial or criminal penalty. As for the accountability of control institutions charged with identifying police deviance and regulating police power, court decisions²³ and reports of parliamentary committees²⁴ have constrained their operations.

The punitive features of accountability sanctions against police deviance delimit structures of permission both for corrupt relationships, and control initiatives. However such limits do not effectively address the opportunities for corruption, and control, which exist within structures of permission.

Also by constructing the regulatory or control dimension of accountability in punitive terms, the impact of accountability as a market regulator may strengthen its nexus with the deviant power relationships which remain.

7. *Position of Accountability between Power and Control*

Accountability has the potential to limit deviant police relationships, and to activate the control of police power. This will occur when it influences deviant police power and control as they exist within structures of permission.

In order that accountability is instrumental in severing the nexus between police deviance and the control of police power it needs to influence opportunities for police deviance, for control, and any resultant nexus. This influence must arise not only from a punitive dimension but also from the features of accountability which stimulate responsibility, openness, participation and compliance.

A dramatic situation of police power is the detention of citizens in police custody. Recent concern over deaths and injuries in police custody have prompted inquiries into the

21 Take, for example, the New South Wales Independent Commission Against Corruption's (ICAC's) inquiry into the unauthorised use of government information. One important aspect of this trade in information was the trade in police criminal history data, from serving police officers, through retired police officers, to clients in the private sector. By exposing the nature of certain corrupt relationships, and the details of particular players in the trade, the form of market participation has altered. Yet, as the ICAC acknowledged, without a fundamental rethink about how government information should be appropriately available, and disseminated, the trade in such information will not cease. Following the ICAC's intervention it now seems that the market conditions which require such corrupt relationships for information transaction have simply relocated and become even more profitable, as a result of the inquiry. See; Independent Commission Against Corruption, *Report on Unauthorised Release of Government Information* (1992).

22 *Independent Commission Against Corruption Act* 1988 (NSW), sections 8 & 9.

23 See *Balog & Stait v ICAC* [1990] ALJR 400; *Greiner & Moore v ICAC* NSW Court of Appeal (CA 40346-7/92) 21/8/92.

24 Parliament of NSW Committee on the ICAC, *Review of the ICAC Act* (1993).

use (or abuse) of this power and any deviant activity by police in the discharge of their duties towards suspects and prisoners. It is a revealing commentary on police power that when deaths in custody occur, police malpractice is suspected. In addition, police resistance to accountability for their exercise of custodial power has confused any understanding of responsibility in death and injury situations. As an example of the potential possessed by mechanisms of accountability not only to influence police power, but to regulate the relationship between police deviance and efforts at its control, it is interesting to review a recent research study on deaths and injury in police custody.²⁵ The study also indicates the importance for accountability of police perceptions about its motives and consequences, and of the community's expectations for its impact.

8. *Police Custody Safety Study*

In association with the State Intelligence Group of the NSW Police Service, the author conducted a three month (February to April 1993) pilot study of all death and self injury incidents which occurred in police custody,²⁶ in New South Wales. Thirty five reported incidents were available for analysis. It appeared that this formed complete "sweep" of police custodial incidents (death/self injury/attempts) for that period.²⁷

Thirty-one prisoners were male, three female, and one designated male/female. Where known, seven prisoners were Aboriginal. The age range of prisoners involved in custodial incidents was between 17 and 54, with around half being under 25 years of age. Three were 17 years of age.

It would appear from the Criminal Name Index file numbers referred to (or not stated) that half of the prisoners involved in incidents had previously been known to the police.

Around two-thirds of the sample were incidents where alcohol or drugs were involved. The prisoners were usually moderately affected, but in nine cases they were well intoxicated. On nine occasions drugs were nominated as involved in the intoxication and the drug types included cannabis, valium, mogadon and heroin. Some respondents answered the drug involvement question as "unknown".

Regarding the patrols in which these incidents occurred, one patrol (Albury) reported four incidents. Two of these related to injuries where the victim "banged his head against the wall of the dock". Mt Druitt patrol reported three incidents, two of which were attempted hangings. Enfield, Parramatta, Liverpool, and Dee Why each reported two incidents.

25 See Findlay, M, *Police Custody Strategy Review Report* (1993), Report commissioned by the State Intelligence Group, NSW Police Service.

26 For the purposes of the study the adopted definition of police custody, which formed the national Standard for the Royal Commission into Aboriginal Deaths in Custody, included: where persons are in police custody or detention; where police are attempting to detain persons; where persons are escaping or attempting to escape from police custody; persons in or at police stations, vehicles, residential premises during search warrants, or at any other place where being interviewed by police. Also included is police pursuits, and siege situations.

27 It might be surprising to realise that even with such a small number of research instruments available the study was furnished with over two thousand pieces of discreet information concerning police custodial incidents. Because of the standardised format of this information a potential for useful cross frequency comparison exists.

A "Custody Incident Report Form" was developed for the purposes of the study. Prior to this research there existed no detailed or centralised database of information on police custodial populations in New South Wales. The form required police officers attending the incident to supply information regarding the incident, custodial circumstances, and the situation within which the incident occurred.

A. *The Incident*

Respondents were asked to classify the incident into one of the following categories: homicide; accident; unknown; suicide; attempt suicide; deliberate self-injury; pursuit; siege; other.²⁸ Fortunately there was only one incident of a death in custody during this survey period.

The category of "accident" was registered on two occasions, one where the respondents also circled the heading "pursuit". On this occasion the prisoner's vehicle collided at high speed with the curb, and lacerations and abrasions were suffered by the driver (prisoner) as a result. The other "accident" situation related to "struck head against bar".

At least on one other occasion where a motorcyclist fell from his vehicle during a police pursuit and broke a leg, the category "accident" might also have been invoked. Should the form be modified in the future then the "accident" category might be rethought, due to its somewhat subjective interpretation.

The category "unknown" was not utilised. The category "suicide" was used on one occasion.

The category "attempt suicide" was invoked on six occasions, four of which also nominated "deliberate self-injury" as an incident category. On one occasion the qualifier "threatened" was attached to the category "attempt suicide". The category "attempt" deliberate self-injury was also created by three respondents.

"Deliberate self-injury" was the most commonly invoked classification.²⁹ Under "deliberate self-injury" a substantial number of these incidents involved self inflicted injury

28 Two explanatory comments are necessary here prior to considering the classifications of incident. First are the occasions where there is some conflict over the accounts of the incident. Several of the forms returned give a police account of the incident which is contested by the prisoner. Where facts are in contest the status of the incident therefore is to some extent ambiguous. We have noted those instances where complaints have been made by the prisoner and facts have been contested and chosen to include the police account in the overall analysis of incidents until that time when it is confirmed or contradicted. These trends in complaint, and their similarities with other incidents not complained of, act as advance warning for general problem areas and explanations. Secondly, some confusion in the classification of incidents has arisen wherein respondents have added further classification types, qualified those presented to them, or duplicated their entries. Where this confusion has been evident, it is noted. For example, there seems to be some clear overlap between the classifications "attempt suicide" and "deliberate self-injury". On several occasions the new classification "attempt deliberate self-injury" was created by respondents.

29 As for "methods employed" these included: open vein by incision; ingest diazepam; physical force (head butting); tying a noose — not injured; hit head against wall and bars of dock; cut wrist; throwing himself against dock area; offender shot by police; deliberately hitting head on interior of caged truck; torn blanket loop — ripped foam mattress, stuffed into mouth, flushed head in toilet bowl; hitting head against door; hanging; asphyxiation; struck head against bar; head butting cage door of police van; banging head against wall and dock; attempt to tie blanket to cell bar; possible attempt hanging; shoe laces around throat; both wrists and inner left elbow cut with razor; lacerations; shooting. Associated with this was the question regarding implement used. The responses included: scalpel blade; diazepam; "sloppy-joe" tied in noose attached to cord from either tracksuit pants or "sloppy-joe"; physical force; plastic knife; coffee mug; rifle; cell blanket, cell mattress, toilet bowl; door; belt; knife; sock and cell blanket; shoelace; rope;

to the head and body when coming in contact with cell and truck perimeters. Over half of the incidents recorded were cases where the prisoner was alleged to have struck his/her head or body against the cell or dock bars or the truck caging or floor. The police account of at least three of these incidents has been challenged either by complaints to the State Ombudsman or matters referred to the Internal Affairs Branch of the NSW Police Service. In one situation the prisoner alleged that rather than inflict self-injury, he had been attacked and injured by police. In another the prisoner alleged that injuries were sustained as a result of the careless driving of police officers responsible for transferring him to the police station. On at least one occasion the incident described a situation where the offender and police fell to the ground on a number of occasions during the arrest process, and injuries resulted.

Over a third of the incidents would classify as "attempt suicide" or "deliberate self-injury" with the intention of hanging the victim. These events ranged from the prisoner simply being apprehended making a noose from clothing, to the discovery of prisoners in states of semi-consciousness due to asphyxiation. In almost all the incidents the prisoners were apprehended in the process of making hanging implements, or in demonstrations which gave the appearance of attempted hanging. On at least two occasions the apprehending officers expressed doubts as to the sincerity of the attempted injury (for example, "thought not to be genuine effort"). Also on several occasions the respondents recorded their prisoner's warning regarding likely suicide attempts.

Under the classification "other" were included the incident of the alleged overdose, the shooting by police of the prisoner as a result of a firearms exchange during a domestic violence situation, and the incident where the prisoner tore bedsheets, stuffed mattress filling into his mouth, and flushed his head in the toilet.

Most of the injuries sustained by prisoners were related to lacerations or abrasions to the head or body (20 incidents). Of those prisoners injured, ten required medical treatment and an additional six required hospitalisation. In twelve incidents the respondents nominated that no injuries were sustained.

Where the information was available, the time lapse between the occurrence of the incident and its discovery by police was no more than 10 minutes. For twenty-four incidents, the injury was instantaneously discovered, as in most cases the prisoner was under observation at the time.

The question seeking the identity of the officer discovering the incident was responded to at various levels of specificity. For example, on the general level this included "Rose Bay police", "station staff", "police on arrival". In twelve forms the question was not answered.

Questions regarding the "time of last inspection" did not produce significant responses for the following reasons:

- a large number of incidents occurred whilst the prisoner was under "constant observation";
- many of the incidents occurred soon after the individuals came into police custody (ie in police transport vehicles, in charge docks);
- in pursuit situations the police came upon the incident at the conclusion of the chase;

bath towel/half knot around neck; jeans; track suit pants cord; t-shirt and underpants; head and hard surface; cell blanket; shirt; razor blade; broken bottle; single barrel shotgun.

- the incident was in progress when the police carried out an investigation.

The place in which the incident occurred was designated as follows:

- in the street (whilst avoiding arrest), in pursuit, prior to transport to police station (9 incidents);
- charge dock, (6 incidents);
- cell and exercise yard (11 incidents);
- police vehicle (5 incidents);
- station or station muster room (2 incidents);
- siege situation (1 incident);
- prison cell (1 incident).

With such a diversity of locations, the later questions on the nature of detention become a little more difficult to standardise.

As for information on action taken immediately upon discovery of the incident, this obviously depended on the nature of the incident itself. There appears to be little consistency in the action taken even where injuries were apparent. In some cases medical assistance was rendered and ambulances were called (11 incidents). Where injuries were slight, and the offender was abusive, restraint and observation were the usual courses of action. In two situations the prisoner was strip-searched.

B. Custodial Circumstances

The categories under the heading “Reasons for Detainment” included “transit prisoner, intoxicated person (IP), habeas corpus, warrants, charged, other”.³⁰ In most responses the “charge” category was indicated (23). Warrants were nominated in five instances, intoxicated persons in two, and the “other” category was used on four occasions.

To the question “Did the prisoner display violent behaviour?” the response was marginally in the affirmative (16 replies “yes”, 15 replies “no”).

The question as to whether the person was in the company of others when detained was generally answered in the negative. Therefore the following questions regarding the treatment of additional individuals involved were of little consequence.

Responses to whether bail was refused or deferred were answered generally in the affirmative. In the nineteen instances bail was refused.³¹

30 From the manner in which this part of the form was completed it is obvious that some confusion was caused by it. In five forms the section was not completed. In two others new categories were proffered (for example, “incident occurred during arrest of offender”, “to be charged”). This would seem to indicate that the categories are insufficient and may require mention of the pre-charge stage.

31 The charges preferred against the prisoner’s included: driving in a manner dangerous; “misconduct caused bodily harm”; breach of bail conditions; steal motor vehicle; self administration heroin; assault occasioning actual bodily harm; failure to appear in court; breach of bail; break, enter and steal; assault police; attempt murder; steal motor vehicle, high range PCA; mid range PCA; resist arrest; warrants outstanding; break, enter and steal; malicious damage; assault (indictable); dv — assault; detained intoxicated persons. The following reasons for bail refusal were given: re-offending whilst on bail; nature of charges; charges, breach of bail; refuse to be fingerprinted, photographed, sign bail; seriousness of offence; escape lawful police custody; and true ID of offender not known; seriousness of offence; domestic

Where applicable, the prisoner was usually informed of the possible duration of detainment. On twenty-two occasions this was the case, and in most of the remaining situations the question was not answered.

Self-injury was threatened by the prisoner at the time of detention in around one quarter of the incidents reported (8). In a separate incident the respondent indicated that threats were made of further self harm after the incident was discovered.

The question regarding the time when a prisoner was placed in cells/vehicle allows for a measure of the duration of the custody period, between detention and the incident itself. For the sixteen incidents where this period was calculable, the range was considerable (between 2 minutes to 21 hours, with the average being around 45 minutes). The response to this question, however, indicated some confusion in the mind of the respondents about what detention actually meant. In addition two respondents indicated the time between when an incident outside the cells occurred, and when a prisoner was later put into the cells.

On only seven occasions was the accused lodged in a cell/vehicle with other persons. At the time of lodgement, not surprisingly, the large majority of respondents indicated that dangerous articles were removed from the prisoner. In one case however, where an affirmative response was given to this question, the prisoner slashed his wrists with a razor blade. In another the cord from track suit pants was used in an attempt to hang the prisoner. In two incidents where a negative response was given to the question about dangerous articles, a belt, and shoelaces were used in hanging attempts. Force was required to place the prisoner in the cell/vehicle in eight situations. In the majority of these situations, the injuries sustained corresponded with abrasions to the head or body alleged to have been caused by the prisoner striking objects in the cell or the vehicle.

C. *"The Situation"*

The question which commences this section, requiring a brief description of cell design or cell plan, may need some revision. In at least seventeen incidents the situation did not occur in the police station and therefore the question was generally not applicable. In six other situations the incident occurred in the dock (in the police charge room) or in the muster room. Even so, the respondents used their initiative and described the physical conditions in such cases.³² In the twelve situations where the incident occurred in a cell, six were accompanied with a floor plan drawing of the cell design.

The question concerning the number of people present in the cell/vehicle/dock at the time of the incident indicated that usually the offender was the only occupant (12 incidents of single occupancy compared with 6 incidents of dual occupancy). On whether the usual occupancy was shared, the question did not elicit a complete response. Of those responses given however, most cells and docks would be shared.

assault and continuing threat to harm himself/safety of offender and victim; presently serving time in Victoria on work release; warrant for revocation of bail — bail not applicable; continuous breaching (by magistrate); outstanding first instance warrant; likely to commit further offences; due to POI already on bail — old offender; previous failed to appear.

32 The following is an example: "Dock in charge room which is fully enclosed with steel bars on one side, then 2 gates constructed of steel bars and steel walls on the other 2 sides. With wooden seat. Approximately 2 metre wide x 1 metre deep x 3 metres high".

On whether the incident location was secured, the majority of responses were in the affirmative. However some confusion was indicated through these responses when one realises that a number of incident locations within this category appeared difficult if not impossible to secure. Where an implement was involved, responses almost uniformly indicated that this was secured as well.

Again in almost all situations, contemporaneous notes about the incident were made.

The response to the question concerning whether suicide warnings were known by the police to be in existence at the time of the confinement was more comprehensive. In five cases such warnings existed, and in two of the incidents in question the prisoner attempted suicide.

The next of kin were generally contacted, and where not, explanations were provided, and no response was given.

On seven occasions there was a "designated cell officer rostered" at the time of the incident. The majority of respondents remaining indicated the question was not applicable. Six respondents indicated no such rostering arrangements were made.

Perhaps the most informative contribution to the questions asked in this section was the invitation to provide a "brief narrative of the incident". Each respondent complied with this request, with the majority finding the space provided on the form being insufficient for the task. Four respondents included an attached report or extract from an occurrence pad providing more details of the incident.

The discursive "brief narrative of the incident" is also useful as a cross check against earlier classifications chosen by each respondent. For example, in one situation the incident was categorised as a deliberate self-injury and the brief narrative described the offender "placing a shoelace around her neck when detained in the rear of the police caged truck. The POI tightened the shoelace causing her to lapse into unconsciousness". One might question why this was not classified as an attempt suicide. On another occasion the brief narrative of the incident refers to the offender "entering the office after slashing his wrists on the ramp of the station.... he then started stabbing himself with a piece of broken glass in the throat". This was also classified as a deliberate self-injury rather than attempt suicide.

The final question in this section asked whether the Modus Operandi Unit of the NSW Police Service had been contacted to place warnings on the CNI system. In fourteen instances this precaution was taken. Surprisingly, on three occasions where the incident related to attempted hangings, no warning was conveyed to Modus Operandi. In one of these cases the incident was as follows: "... stepped off a seat with the cord of tracksuit pants around neck — too tall to have effect, bent knees to gain maximum effect — cut down by police... attention seeking only".

D. Information on Pursuits/Sieges Only

In eight cases this section was filled out.³³ This might indicate the need to explain this section of the form more fully. The information provided under this section was either minor in nature, or minimum in detail. Following on from the narrative description of the incident,

33 It appears that two of these were not in fact for pursuit or siege situations at all and therefore the completion was by mistake.

the implication might be that respondents felt that the provision of further information in this section was repetitive.

In all but two responses, the person injured was the prisoner alone.

The pursuit situations fell into one of two categories:

- offender drivers being pursued by police vehicles;
- prisoners attempting to resist arrest and escape from police custody.

There were two siege situations. One referred to the occasion where the prisoner was wounded in the stomach as a result of his firing on police officers during a situation of domestic violence and the police returning fire. The other was where the deceased and two co-offenders gained entry into an unoccupied farmhouse, and the deceased committed suicide after the other offenders surrendered to the police.

The Custody Incident Report Form concludes with identification details of the respondent.

9. Accountability Issues Presented by the Study

The initial response to the Custody Incident Report Form, from police officers at station level, was cautious. The following observation by a State Intelligence Group officer early in the pilot period is revealing: "City police are very, very wary even to the point of veiled hostility. It really is a job to convince them that the form is for study purposes only, however in time this may get better".

A reason for the suspicion and resistance may centre on the previous association between information gathering on custodial incidents and Police Internal Affairs (Professional Responsibility) investigations. Up until the study period, information on custodial incidents was referred to State Command either as part of the Internal Affairs investigation responsibilities, or as part of a coronial inquiry. Therefore the incident would form the focus of a disciplinary investigation, or information relating to the incident would form part of a court process. Both the tone and coverage of the Custody Incident Report Form were different to the sorts of inquiries which might emanate from Internal Affairs, or produce information unsuitable for production as evidence. Therefore it was necessary to educate recipients as to the objective purpose and impartial nature of the information.

Some resistance to completing the form might also be understood by general bureaucratic pressures which exist within the Police Service. Once the value of the study and the intentions for its results were properly communicated, then it appeared that police were anxious to transfer accurate information on custodial incidents. Police in general appreciated the seriousness of the problem and were concerned that it should be appropriately understood at a centralised level. Another observation from the Internal Security Unit³⁴ confirms this view:

On speaking to police in western NSW there appeared to be a degree of suspicion, however after explaining that the study was under the auspices of the Risk Minimisation Task Force, and the objectives of the study were given, they were more than helpful and co-operative. On this initial contact it seems that police in outlying areas are very aware of

³⁴ One section of the NSW Police service responsible for investigating police malpractice, and ensuring professional conduct.

the seriousness of custody incidents: perhaps this is because of Rigg,³⁵ and high Aboriginal populations.

The political climate of criticism about the police custody safety record which prevailed at the time of the study might also explain the resentment amongst police to opening up policing practice to community scrutiny. Particularly when an Ombudsman's inquiry³⁶ had been critical of police custody procedures,³⁷ and had named responsible officers, the general attitude amongst police to attempts to elicit more details about custodial information was not surprisingly one of suspicion.

10. Information Practices and Accountability

An essential support for effective accountability strategies is the availability of situational data which identifies the incident situations in question, and provides some insight into the police use of power therein. Such information in a centralised, holistic, impartial and accurate form was not available to be studied. One reason for this may have been the absence of accountability for the exercise of custodial power within the NSW Police Service.

The motivations for police record maintenance in the area of custodial safety reflect the general record keeping purposes of policing. First, there is that information that is accumulated and kept to facilitate criminal investigation. Second, information is gathered to answer internally issues of police accountability. Third, data is produced to service the policy requirements of policing management.

In certain respects these purposes may overlap, and there are situations in which the same or similar information will serve more than one purpose. What becomes apparent however in the police custody arena is the problem whereby one information management purpose will retard the achievement of another. The following situations are examples in point.

- i) An injury is inflicted upon a prisoner whilst in police custody. The Custody Incident Report Form is sent out for completion. At the same time the form is received at the local police station the officers are notified that a complaint has been lodged by the prisoner to the Ombudsman, and the Internal Affairs inquiry will ensue. The purposes of the Ombudsman's investigation and the Internal Affairs inquiry relate to issues of accountability. However this purpose may have a direct bearing on

35 New South Wales Ombudsman, *Inquiry into the Circumstances Surrounding the Injuries Suffered by Angus Rigg in Police Custody and into the Subsequent Police Investigations* (1993).

36 Ibid.

37 The report was particularly critical of information retained by police about the admission of prisoners into custody: "The Prisoner Admission Form is a method of concentrating police attention on 'the process whereby police officers detaining and arresting a person should observe him/her and assess his/her condition'. The form on its own is only one technique for screening the prisoner and it cannot be effective in isolation from a commitment of police to be careful with prisoner's coming into their custody. The form requires the Custody Officer to make visual observations of the prisoner and answer a number of specific question. It then contains a series of questions to ask the prisoner going to matters such as drug addiction, illness and suicide. The effectiveness of the procedure is completely dependent on its use. A number of cases of suicide and attempts in custody suggest that the form is not being properly used". In his general observations on the screening of prisoners the Ombudsman makes this comment on the form: "Although a comprehensive study could not be mounted, there is evidence that the form is used as part of the generally degrading routine of arrest, and not as it was intended. Some cases showing that the form was not used at all and was not used with much attention, are outlined".

the manner in which the Custody Incident Report Form is completed and returned. If it is assumed that information provided through the Custody Incident Report Form may adversely affect the determination of accountability then the candour of the respondents may be compromised.

- ii) A police officer arrests an offender towards the end of her shift. Once back at the station she fills out the local paper work and then completes the Prisoner Admission Form as quickly as possible, failing to fill out all the relevant details. The prisoner later attempts suicide and a Custody Incident Report Form is sent to the local police station. In assisting in the completion of that form the police officer concerned is not clear on certain details required, and these details are not referred to in the Admission Form or in cell book. Therefore rather than appear to be unco-operative at this stage the police officer submits details which are approximations, and some which she simply concocts.
- iii) In a certain region, the Regional Commander has instituted an inquiry into police pursuits. The results of that inquiry indicate a clear correlation between police driving habits and the police services capital repair bill. As a consequence the regional commander orders those in his command to terminate police pursuits after a designated time period. Each police station is required to keep records on pursuits and the times over which they occurred.

As a result of a particular pursuit the driver of the civilian car was injured. The pursuit had continued over the period designated by the regional commander. When the Custody Incident Report Form, details of the period of custody, and the nature of the pursuit, are given so as to accord with the regional commander's direction on pursuits.

Due to the public interest associated with the collection on information on police custodial incidents, it is important that the fullest account possible be guaranteed. Obviously those officers responsible for the production of this information at this stage will be susceptible to the influences of any purpose for which the information would be otherwise directed. Our experience with the Custody Incident Report Form indicates that accurate and complete information is forthcoming from police involved in custodial incidents if the officers concerned are confident that the information is to be used for a general educative purpose, and is to be retained in a form and location which separates it from accountability or specific policy concerns.

It is also important for the construction of management strategies that the information which is centrally maintained on custodial incidents is as "value-free" as possible. In this respect the methods for collecting, storing and disseminating such information must themselves appear as value-free as possible.

11. Accountability Strategies for Deaths/Injuries in Custody

The following are a range of strategies³⁸ proposed for reducing the risk factors involved in police custody, and indirectly either increasing levels of accountability for custodial practice, or minimising situations in which accountability is required.

38 The performance indicators identified as essential to these strategies include: to monitor the number of

- i) Alternatives to criminal charge and police detention — ensure that a primary objective of the Police Service to promote “safety in custody” is to avoid incarceration of persons in police cells.
- ii) Prisoner screening — improve prisoner screening to identify persons at risk by providing relevant detail in the prisoner admission records, and ensuring their conscientious completion.
- iii) Inspection and supervision of prisoners’ cells — ensure that priorities given to inspecting all prisoners, especially in the first two hours, followed by regular checks thereafter. Evaluate the benefits of video surveillance.
- iv) Bailing of prisoners — ensure prompt bail determination of prisoners so that those entitled to bail are quickly released and those unable to obtain bail are expeditiously transferred to Custody Stations or gaols.
- v) Prompt transfer to gaols — ensure that all prisoners who appear before court and are not released, are promptly transferred to gaols within the Corrective Services Department.
- vi) Police education and training — educate police in the concepts of their obligations to people in custody ... educate police in the alternatives to arrest ... train police to ensure an acceptable standard of, and appreciation of, their responsibilities in methods of risk awareness, recognition of the risk, and the concept of “police custody” as defined in the report of the Royal Commission into Aboriginal Deaths in Custody.
- vii) Lay visitors schemes — where there is no security risk involved, encourage visits by relatives and friends. Encourage the local community to participate in the lay visitors scheme.
- viii) Cell design and construction — ensure as soon possible all Custody Stations have cells that meet the requirements of the Royal Commission into Aboriginal Deaths in Custody and after that, all police cells in a priority listing to minimise the risk of self-injury.
- ix) Working with others — work with other agencies and community groups to encourage a multi-disciplinary problem solving approach to prisoner safety.

persons dealt with by alternatives to charging; to monitor the number of people in police custody refused, or unable to obtain bail; monitor the number of reported incidents of prisoner injuries per month. Irrespective of the actual impact of these performance indicators, and whether their measurement could confirm or deny the success of the suggested management strategies, they each depend on a significant improvement in police information practice. For example, any comparative analysis of police bailing practice would need to be put against accurate figures on the police custodial population. Such figures presently do not exist in New South Wales.

12. Conclusion

From a police perspective accountability is not considered as enhancing policing “opportunity”, but rather as curtailing the exercise of discretion which is seen as essential to opportunities for policing. Mechanisms for requiring or ensuring accountability are suspected of punitive motivations, and not considered as complementing the exercise of “real” police power or the maintenance of their authority. Thus, in the situation where death or self-injury occurs in police custody, efforts to secure even accountability over knowledge of the incident are resisted.

The ambiguity of police attitudes to accountability, and its position within police culture, becomes apparent when police authority is claimed through its connection with the community. As with the ideology of community policing, accountable police practice is said to confirm the responsible exercise of police power. Abuses of power, and malpractice, once identified at the community level, will stand opposed to police authority, and be rejected by it.

The contradiction grows when this vision for police power is placed against the police view of their power and its appropriate exercise. Police occupational culture tolerates the abuse of power, or occasions of malpractice, so long as they conform with the precepts of that culture. For example, “keeping the lid” on an incident where a prisoner suicides in a situation of neglect and abuse, is required by the ethic of unquestioned occupational solidarity.

Where accountability takes police power outside the occupational framework, to expose policing to “community” ideology may place the mechanisms of accountability squarely outside the “boundaries of permission” which prevail in “cop culture”. Resistance to these mechanisms from police is a consequence of any such process of exposure.

But what this simple oppositional view of policing and accountability ignores is the dynamics of the accountability process. The custody safety study revealed that accountability is as much concerned with the confirmation of appropriate policing practice as it is designed to reveal malpractice or the abuse of power. In addition accountability mechanisms may operate in ways which are supportive of both good and bad policing practice. An example is where information on deaths in custody is only sought for the purposes of internal police disciplinary inquiries. In such situations the accumulation of information about custodial incidents is reluctantly and selectively facilitated by the police under investigation and closest to the incident, and as much malpractice may be concealed as is revealed.

Accountability mechanisms may also adopt or employ practices similar to those which they would otherwise expose to criticisms. Investigations may be clandestine, coercive and unresponsive to independent inquiry. And the consequences of such practices may prove to be as unjust or abusive as those of the powers under review.

As policing is power, so too the relationship between police authority and accountability involves transactions of power. These transactions can minimise or propagate abuse and malpractice depending on the “boundaries of permission” which they create, regulate, and within which they operate.