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## **Adapting the Police Authority Concept to a Centralised National Police Service: Appearance over Substance in the Republic of Ireland?**

### **Key words**

Policing. Police democratic accountability. Police Authority. Irish law.

### **Abstract**

*The Republic of Ireland has been convulsed by a series of police corruption scandals over the past fifteen years and they show no sign of abating. In 2015, in an attempt to stem the drain in public confidence in the Garda and the administration of justice generally, the government established a Policing Authority which it presented as “the most important single change in the governance of the Garda Síochána in its history”. This article critically examines whether the new Irish Policing Authority can be interpreted as a successful adaptation of the traditional police authority concept to a parliamentary democracy policed by a single, national body. In particular, it considers whether it is equipped to shield the Garda and policing from the influence of partisan political and institutional interests, while at the same time deliver transparent democratic scrutiny of the Garda and policing on behalf of all sections of the community. It concludes that, contrary to the superficial impression generated by the government at the time, the Authority does not represent a fundamentally new departure in the democratic scrutiny of the policing in Ireland. While it opens up a useful channel for input from outside the central executive and parliament, it will do little to change the established democratic power relations in policing, or to deliver greater transparency in respect of policing policies, practices and accountability. Nor can it be interpreted as a successful adaptation of the police authority concept to a parliamentary democracy policed by a single national body under central government control.*

### **Introduction**

The Republic of Ireland has been convulsed by a series of police corruption scandals over the past fifteen years and they show no sign of abating. They have spawned no less than four Tribunals of Inquiry, nine Commissions of Investigation, several government sponsored reviews and investigations and, ultimately, a Commission on the Future of Policing in Ireland.<sup>1</sup> In 2005, major legislative reforms on Garda governance and accountability failed to restore public confidence, even though they were described by the Minister for Justice at the time as containing “the most important legislative proposals on policing ever to come before the Houses of [Parliament]”.<sup>2</sup> Only nine years later, the government felt compelled to announce yet further fundamental reform. This entailed the establishment of a ‘Policing Authority’, a concept expressly rejected by the Minister for Justice less than two months

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<sup>1</sup> The Commission’s website is <http://policereform.ie/>.

<sup>2</sup> *Dail Debates* Vol.597, No.4, 953 (10<sup>th</sup> February 2005).

earlier on the premise that experience in England and Wales showed that it did not deliver sufficient democratic accountability.<sup>3</sup> The immediate catalyst for the sudden *volte face* were conclusions in a report from senior counsel to the effect that the Minister for Justice at the time had failed to have allegations of serious Garda corruption and neglect properly investigated.<sup>4</sup> Of particular importance was a conclusion to the effect that the Minister had been content to accept assurances from the Garda Commissioner that the allegations had been investigated and found to be unwarranted (even though the Commissioner himself was the subject of some of the allegations). Although that conclusion has since been challenged by the Minister in question, it fuelled long-standing perceptions of a police-government relationship in which the immediate political and institutional interests of the latter prevail to the prejudice of a professional and publicly accountable police service.<sup>5</sup> The damage to public confidence in the Garda, the administration of justice and political stability generally was further compounded by the very rare event of both the Garda Commissioner and the Minister for Justice being forced out of office in the ensuing turmoil. The ongoing (and new) controversies have since resulted in the Commissioner's successor departing reluctantly less than two years after being appointed. Inevitably, all of this has kept the vexed issue of democratic governance and accountability of the police to the fore in Ireland.

Many liberal democracies have struggled to devise institutional structures capable of delivering effective democratic scrutiny of policing, while at the same time avoiding the associated risks of partisan political control in this sensitive area.<sup>6</sup> In England and Wales, the police authority concept featured as a prominent part of the institutional solution to this challenge for more than fifty years, and can be traced back for almost two centuries. From a distance, therefore, it might have seemed that it offered a solution to the Irish crisis. Indeed, the establishment of a police authority to dilute central government control over policing had been a regular demand from political parties in opposition and from other commentators in Ireland for decades. Nevertheless, it was not the only option available to the Irish government. Nor was it necessarily the most appropriate one.

Historically, police authorities were established and functioned in the context of the locally-based policing structures in England and Wales. Each police authority was responsible for the policing of its area on behalf of the local community. The consequent dispersal of

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<sup>3</sup> *Dail Debates* Vol.829, No.2, pp.6-7 (5<sup>th</sup> February 2014).

<sup>4</sup> *Review of the action taken by An Garda Síochána pertaining to certain allegations made by Sergeant Maurice McCabe* (6<sup>th</sup> May 2014) (The Guerin Report). The Report has since been removed from the government's website following the decision of the Court of Appeal in *Shatter v Guerin* [2016] IECA 318. That decision is currently on appeal to the Supreme Court.

<sup>5</sup> See, for example: *Report on Remuneration and Conditions of Service* (Dublin: Stationery Office, 1970) para.1267; C. Brady *Guardians of the Peace* (Dublin: Gill & Macmillan, 1974) pp.102-105, 119-122 and, generally chs.8-14; J. Brewer et al. *The Police, Public Order and the State* 2<sup>nd</sup> ed. (Basingstoke: Macmillan, 1996) pp.103-107; V. Conway *Policing Twentieth Century Ireland: A History of An Garda Síochána* (Abingdon: Routledge, 2014) ch.3, pp.178-179 and 209-210; DPJ Walsh "Tightening the Noose of Central Government Control over Policing in Ireland: Innovations in the Garda Síochána Act 2005" (2009) 60 *NILQ* 163; DPJ Walsh *The Irish Police: a Legal and Constitutional Perspective* (Dublin: Round Hall Sweet and Maxwell, 1998) pp.124-128 and 397-402.

<sup>6</sup> See, for example, M. Beare and T. Murray "Introduction" in M. Beare and T. Murray (editors) *Police and Government Relations: Who's Calling the Shots?* (Toronto: University of Toronto Press, 2007).

democratic police governance across 41 local police authorities outside London played a vital role in diluting central government control over policing. It cannot simply be assumed that this police authority concept is readily transferrable to a polity, such as the Republic of Ireland, where policing has always been treated as a central executive function delivered through the medium of a single national police organisation which, critically and unusually, also encompasses the State's security service.<sup>7</sup> As a departmental public service, it is subject to the conventional Diceyan model of ministerial control and associated accountability to parliament.<sup>8</sup> Adding a national police authority to this setting may have some potential to reinforce democratic accountability by providing further protection against the ills that can flow from the excessive concentration of extensive police power in the hands of a single government minister and a national police chief. Equally, however, it has the potential to do the opposite. The establishment of such a body outside of parliament may entail transferring some, or most, responsibility for the delivery of the vital policing service from the reach of the elected representatives of the people to a faceless body of executive appointees. Instead of delivering effective accountability, there is a real risk that it would serve as a convenient shield behind which central government, and/or other powerful, unelected, sectional interests, could exercise influence over policing without having to shoulder the concomitant responsibility and public accountability.<sup>9</sup> Securing the potential benefits of a national police authority, while avoiding that risk will require some careful engineering.

There is a further complication. As will be seen below, police authorities in England and Wales were criticised persistently for decades as being invisible and ineffective in delivering democratic scrutiny of their police forces. Their capacity to deliver was heavily circumscribed by, among other things, weaknesses in composition, remit, powers and relationships with other key players, most notably central government and their local police chiefs. The interplay between these variables frequently led to dysfunctional and ineffective police governance and accountability. Ultimately, the police authorities were replaced in 2012 by directly elected Police and Crime Commissioners. If the police authority concept is to be transplanted successfully to Ireland's national policing environment, it is essential that the weaknesses associated with the experience in England and Wales are avoided.

This article critically examines whether the new Irish Policing Authority can be interpreted as a successful adaptation of the police authority concept to a parliamentary democracy policed by a single, national body under central government control. It begins by setting the context for the analysis in the tensions inherent in rendering the police democratically accountable while at the same protecting professional policing against the risks of partisan political control. This is followed by a critique of the relative failure of the police authority

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<sup>7</sup> See DPJ Walsh fn.5, p.163. See M. Mulqueen *Re-evaluating Irish National Security Policy: Affordable Threats?* (Manchester: Manchester University Press) for a supporting State security role from within the Defence Forces.

<sup>8</sup> See DPJ Walsh fn.5, chs.4 and 5.

<sup>9</sup> For a critique of this phenomenon generally, see M. Moran *The British Regulatory State* (Oxford: OUP, 2003) ch.6. More specifically on policing, see N. Walker *Policing in a Constitutional Order* (London: Sweet and Maxwell, 2000) p.101.

concept, as applied in England and Wales and initially in Northern Ireland, to mediate those tensions successfully. The current Policing Board in Northern Ireland, by contrast, suggests that the concept has potential and can be adapted successfully to the equivalent of a single national police service. The article argues that the mixed lessons from England and Wales and Northern Ireland have not been learned in the design of the Irish Policing Authority. Despite claims to the contrary by the Irish government, it does not constitute a fundamentally new departure in the democratic governance and accountability of policing in Ireland. Nor can it be interpreted as a successful adaptation of the police authority concept to a parliamentary democracy policed by a single national body under central government control.

## **The Police Authority Concept**

### *Tensions in Democratic Control of Policing*

The importance of democratic control over policing is linked to a mixture of the extensive scope of the police function, and the degree of discretion entrusted to the personnel at the front-end of the police service.<sup>10</sup> Not only does the law confer a wide range of coercive powers (and duties) directly on each individual police officer, but it also affords the officer exceptionally broad discretion over how or whether to exercise that power in any law enforcement situation not involving serious risk to the person or property. Police chiefs, however, can shape the exercise of that discretion through their own broad power to set law enforcement policies, priorities and strategies for their police bodies,<sup>11</sup> and through their control over the internal management of police resources and performance audits.<sup>12</sup> As explained by Lustgarten, their decisions frequently entail choices which are essentially political (or institutionally influenced) rather than legal in nature.<sup>13</sup> These, in turn, feed through into how policing is experienced on the ground by individuals and communities and, ultimately which (or whose) values and interests are prioritised in law enforcement, public order, public safety and policing services generally.

The inherent presence of political choices at all levels of policing brings into focus the question of who or what, ultimately, should determine such choices.<sup>14</sup> The law plays a relatively weak role in this context. So long as police personnel operate within the scope of their discretion, act in good faith and avoid breaching fundamental human rights, the courts will generally decline to second-guess their decisions.<sup>15</sup> The real question is whether, or to

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<sup>10</sup> J. Goldstein "Police Discretion not to Invoke the Criminal Process" (1960) 69 *Yale L.J.* 543; K.C. Davis *Police Discretion* (St. Pauls Minnesota: West Pub. Co., 1975); H. Goldstein *Policing a Free Society* (Massachusetts, Ballinger, 1977) ch.5; L. Lustgarten *The Governance of Police* (London: Sweet & Maxwell, 1986) ch.1.

<sup>11</sup> See, for example, S. Spencer *Called to Account: the case for police accountability in England and Wales* (London: NCCL, 1985) pp.90-92.

<sup>12</sup> See, generally, N. Walker fn.9, pp.24-25; L. Lustgarten fn.10, pp.20-22.

<sup>13</sup> L. Lustgarten fn.10, ch.1.

<sup>14</sup> *Ibid.*, p.30; H. Goldstein fn.10, ch.6.

<sup>15</sup> See, for example, *R v Metropolitan Police Commissioner, ex parte Blackburn* [1968] 2 QB 118; *R v Metropolitan Police Commissioner, ex parte Blackburn* (No.3) [1973] 1 QB 241; *R v Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1988] 2 WLR 590; *R v Chief Constable of Sussex, ex*

what extent,<sup>16</sup> control should reside in the hands of the police themselves or in a democratically mandated external body. Ceding a broad measure of professional autonomy to the police in the lawful discharge of their functions invites the risk of power without effective accountability, and a consequent divide between the police and those communities adversely affected by the manner in which that power is exercised.<sup>17</sup> By the same token, however, rendering the police subject to the direction of a democratically elected authority can leave the door open to politicised policing which prioritises the interests and values of the dominant political, institutional, economic and/or security establishments, to the detriment of minority interests and values.<sup>18</sup> There is, of course, no single institutional solution to this conundrum. Much will depend on the broader constitutional context, and the incorporation of appropriate checks and balances aimed at maximising transparent democratic control while, at the same time, ensuring that control is not used in a discriminatory or oppressive manner.<sup>19</sup> Equally important are the principles and values that inform the contributions of the institutional players,<sup>20</sup> as well as the policing environment and its prevailing culture.<sup>21</sup>

In the locally-based structure of policing in England and Wales, institutional control over police ‘political’ choices has, until recently, been located in a tripartite sharing of responsibility among the constituencies of central government in the form of the Home Secretary, local government in the form of police authorities and the police chiefs reinforced by the doctrine of constabulary independence.<sup>22</sup> Since this article is addressing how the local police authority concept has been transplanted to the national policing environment in Ireland, that concept needs to be probed more deeply. However, it cannot be fully understood without some further observations on the doctrine of constabulary independence which, although based on a shaky legal and constitutional foundation,<sup>23</sup>

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*parte International Trader's Ferry Ltd* [1998] 3 WLR 1260. N. Walker fn.9, pp.26-27; and see pp.60-66 for a critical assessment of the strengths and limits of the law in protecting the police against partisan political direction and curbing excesses of operational police independence.

<sup>16</sup> Inevitably, it is a question of degree rather than an either/or situation; see D. Harkin “Simmel, the Police Form and the Limits of Democratic Policing” (2015) 55(4) *British Journal of Criminology* 730.

<sup>17</sup> See N. Walker fn.9, pp.54-56; H. Goldstein fn.10, pp.135-140; L. Lustgarten fn.10, ch.10; S. Spencer fn.11, ch.5.

<sup>18</sup> Geoffrey Marshall famously cited such risks in 1978 when advocating greater confidence in an independent chief constable over democratically elected politicians to protect civil liberties and impartial justice, even though in 1965 he had advocated a preference for more democratic control over police discretion; see G. Marshall “Police Accountability Revisited” in D. Butler and A. Halsey (eds) *Policy and Politics* (London: Macmillan, 1979) ch.5. See also the analysis of the implications of elected Police and Crime Commissioners in the context of road traffic enforcement; H. Wells “PCCs, Road Policing and the Dilemmas of Increased Democratic Accountability” (2016) 56(2) *British Journal of Criminology* 274.

<sup>19</sup> See, for example, L. Lustgarten fn.10, ch.10; S. Spencer fn.11, ch.5.

<sup>20</sup> T. Jones, T. Newburn and D.J. Smith *Democracy and Policing* (London: Policy Studies Institute, 1994) app.36-48 argue persuasively that the concept of democracy in this context is best understood as a set of values rather than political institutions. See also I. Loader and N. Walker *Civilising Security* (Cambridge: CUP, 2007) ch.6.

<sup>21</sup> See, generally, M. Beare and T Murray (editors) fn.6.

<sup>22</sup> For analysis of the evolution of the tripartite arrangement from the 19<sup>th</sup> century, see L. Lustgarten fn.10, ch.3; and, generally, T.A. Critchley *A History of Police in England and Wales* (London: Constable, 1967) pp.112-139 and chs.6-8.

<sup>23</sup> See, for example, the incisive criticisms of Lustgarten, fn.10, ch.4.

remains a fundamental principle at the heart of police governance in the United Kingdom and in the Republic of Ireland.<sup>24</sup> Essentially, that doctrine holds that chief police officers are not subject to direction from political or external executive authority in respect of their operational policies or decision-making in law enforcement or peace-keeping matters.<sup>25</sup> No workable distinction is drawn in this context between appropriate and inappropriate political direction; all is lumped together as dangerous and unacceptable interference with impartial policing under the law.<sup>26</sup> On the other hand, a police chief is not wholly insulated from external political influence. Under the old tripartite structure, he or she was dependant on the local police authorities and the Home Secretary for the resources needed in the policing of his or her area. He or she also worked with them in agreeing the policing objectives, strategies and plans and, critically, in answering to them for his or her performance and that of the force in the policing of the area.

### *Police Authorities in England and Wales*

A police authority, as a distinct body with the responsibility for providing the policing of its area, can be traced in England and Wales back at least to the establishment of organised police forces in the municipalities outside London from 1835.<sup>27</sup> Initially designated Watch Committees, they were composed of the elected mayor and “a sufficient number of [the] members” of the elected town council.<sup>28</sup> They were statutorily required to appoint “a sufficient number of fit men” as constables.<sup>29</sup> Although there was some ambiguity surrounding the strict legal position,<sup>30</sup> it seems generally accepted that many Watch Committees issued operational directions to their chief police officers well into the twentieth century.<sup>31</sup> Another variation appeared in the counties from 1888 under the designation of standing joint committees,<sup>32</sup> and it was not until the Police Act 1964 that a common model, under the designation ‘Police Authority’, was adopted.

The 1964 Act, reflecting the recommendations of the Final Report of the Royal Commission on the Police,<sup>33</sup> institutionalised the tripartite arrangement. Broadly, a Police Authority was charged with the maintenance of an adequate and efficient police force for its area. To this

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<sup>24</sup> N. Walker suggests that, for all its weaknesses, it remains central to attempts to understand (and to change) the world of police governance; fn.9, p.44. See also, DPJ Walsh fn.5, chs.4 and 5.

<sup>25</sup> See L. Lustgarten fn.10, ch.2; N. Walker fn.9, pp.52-53. See also the Patten Commission’s criticism in the context of the overriding need for accountability; *A New Beginning for Policing in Northern Ireland: The Report of the Independent Commission on Policing in Northern Ireland* (London: HMSO 1999) paras.6.19-6.23.

<sup>26</sup> See N. Walker fn.9, pp.54-60 for an incisive critique of the manner in which the doctrine is interpreted or has evolved to categorise as illegitimate political involvement in all police policy decisions that might impact on operational matters.

<sup>27</sup> See T.A. Critchley fn.22, pp.88-92 and ch.4.

<sup>28</sup> Municipal Corporations Act 1835, s.76. The “sufficient number of their members” was later restricted to one third of their number by Municipal Corporations Act 1882, s.190(1).

<sup>29</sup> Municipal Corporations Act 1835, s.76.

<sup>30</sup> See, for example, S. Spencer fn.11, ch.2.

<sup>31</sup> See, for example, L. Lustgarten fn.10, ch.3; G. Marshall fn.18, p.56; T.A. Critchley fn.22, pp.124-126 and 131-133

<sup>32</sup> See T.A. Critchley fn.22, pp.134-138; L. Lustgarten fn.10, pp.41-48.

<sup>33</sup> *Final Report of the Royal Commission on the Police* (London: HMSO, Cmnd 1728, 1962).

end it was given important powers such as: appointing (and removing) its chief constable and senior officers; determining the overall budget for its force; providing buildings, vehicles and equipment; and securing reports from its chief constable on aspects of policing in its area. All of these powers, however, were shared with the Home Secretary, while the Chief Constable was conferred with the power of direction and control over the force. Critically, a Police Authority was denied the power to issue directions to its Chief Constable, and could only hold him or her accountable (in the explanatory sense)<sup>34</sup> for his or her management of the force and the policing of the area. The Act also diluted the political/democratic membership of the police authorities.<sup>35</sup> The net effect was that the capacity of police authorities to deliver effective democratic scrutiny was severely weakened.<sup>36</sup> Writing in 1986, Lustgarten concluded that: “.. most police authorities are pliant bodies whose members view themselves as a sort of cheerleader corps for their force.”<sup>37</sup> Their weakness has also been attributed partly to a lack of clarity and coherence in the distribution of powers and functions among the tripartite components.<sup>38</sup> Police Authorities suffered most in this arrangement as they were increasingly squeezed between the centralising forces of the Home Secretary and the Chief Constables.<sup>39</sup> At the same time, central government was adept at exploiting the lack of clarity to avoid accepting full and transparent accountability for policing policies and performance.<sup>40</sup>

Subsequent reforms from 1994 were motivated by a desire to introduce business or market-type efficiencies into the delivery of policing as a service.<sup>41</sup> Superficially, they brought a democratic accountability dividend through an enhanced role for a Police Authority. It was given the responsibility of: setting local authority policing objectives and performance targets; agreeing the Chief Constable’s annual policing plans; and keeping itself informed of community needs and concerns over policing, crime and law enforcement. In reality, however, these were a vehicle for achieving efficiency targets imposed by central government. The local policing objectives and plans, for example, had to be consistent with the relevant national regulations and standards on organisation and management set by the Home Secretary, as well as the national policing objectives. Even the local democratic complement of a Police Authority was further diluted so that it was composed almost evenly of locally elected representatives and independent appointed members.

The reforms did not succeed in elevating local police authorities to a meaningful and effective role in the delivery of democratic police governance and accountability. If

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<sup>34</sup> See G. Marshall fn.18, pp.61-62.

<sup>35</sup> See N. Walker op.cit. at pp.140-142.

<sup>36</sup> See, for example, R. Reiner *The Politics of the Police 4<sup>th</sup> ed.* (Oxford: OUP, 2010) at pp.227-237; S. Spencer fn.11, chs.2 and 3.

<sup>37</sup> L. Lustgarten fn.10, p.87. For further criticisms, see L. Lustgarten fn.10, chs.6-8; M. Brogden “A Police Authority – The Denial of Conflict” (1977) 25 Soc. Rev. 325; M. Simey “Police Authorities and Accountability: the Merseyside Experience” in D. Cowell et al. editors (London: Junction Books, 1982); S. Spencer fn.11, ch.3.

<sup>38</sup> See, for example, R. Reiner fn.36, pp.227-228; N. Walker fn.9, pp.99-100. Spencer also highlighted a lack of political will in, and relatively weak powers attaching to, police authorities; fn.11, ch.3.

<sup>39</sup> See, for example, R. Reiner fn.36, pp.227-237; N. Walker fn.9, pp.99-100; S. Spencer fn.11, ch.3.

<sup>40</sup> N. Walkerfn.9, p.101; S. Spencer fn.11, pp.55-84.

<sup>41</sup> See, for example, E. McLaughlin “Forcing the Issue: New Labour, New Localism and the Democratic Renewal of Police Accountability” (2005) 44(5) *The Howard Journal* 473; R. Reiner op.cit. at pp.170-171.



anything, they facilitated a further concentration of central government influence,<sup>42</sup> as the local authorities became more invisible and remote from the communities they were supposed to represent.<sup>43</sup> Ultimately, each Police Authority was replaced in 2012 by a Police and Crime Commissioner (PCC) who is directly elected every four years by the electorate in his or her local police area. The declared motivation for the change was to strengthen the bond between the police and local communities and to roll back the weight of central government bureaucracy, targets and micromanagement in policing.<sup>44</sup> In particular, it was envisaged that the PCCs would render policing more democratically accountable, give the local communities more control over how their money was spent on policing and incentivise reform and innovation.

Whether the PCC model is delivering, or can deliver, on the anticipated efficiency and democratic legitimacy dividends is hotly contested in England and Wales.<sup>45</sup> More important, from an Irish perspective, is the fact that its introduction did not signal a fundamental failure of the police authority concept. The real problem with police authorities in England and Wales clearly lay in a combination of their composition, remit, powers and weak status relative to the other two prongs in the tripartite structure. Walker highlighted, in particular, the relative de-politicisation of their composition through the inclusion of appointees as a vital factor in expediting their demise. He argued that this hampered them from forging a political role, in the sense of a strong independent normative perspective on policing as distinct from a professional instrumental approach to performance.<sup>46</sup>

There are important lessons here for the Republic of Ireland in the construction of a national police authority that can protect policing from the partisan political influence of central government, while at the same time render the national police service subject to effective democratic governance and accountability. If the Authority is not infused with a strong democratic base, conferred with clearly defined powers to render the Garda Commissioner accountable, given sufficient status and resources to function independently of the Minister for Justice, and located within a clear, coherent and cohesive governance framework incorporating the other key players, there is a very real risk that it will find itself little more than a token player in Garda governance and accountability. It may even find itself used as a convenient shield behind which partisan political influence continues unabated and hidden

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<sup>42</sup> See R. Reiner fn.36, pp.232-237 and ch.7 generally; N. Walker fn.9, pp.139-145; T. Jones et al. fn.20.

<sup>43</sup> Home Office *Policing in the 21<sup>st</sup> Century: Reconnecting police and the people* (London: HMSO, Cm 7925, 2010) at paras. 1.11 and 2.4. *The Government Response to the Sixteenth Report from the Home Affairs Committee Select Committee Session 2013-14 HC 757: Police and Crime Commissioners, progress to date* (London: Cm 8981, 2014) at p.1.

<sup>44</sup> Home Office *Policing in the 21<sup>st</sup> Century* fn.47, paras.1.20 – 1.23 and ch.3.

<sup>45</sup> For critical analysis of the PCC model, see, for example: T. Newburn "Police and Crime Commissioners: the Americanization of Policing or a very British Reform" (2012) 40 *International Journal of Law, Crime and Justice* 31; S. Lister "The New Politics of the Police: Police and Crime Commissioners and the Operational Independence of the Police" (2013) 7(3) *Policing* 239; R. Reiner "Who Governs? Democracy, Plutocracy, Science and Prophecy in Shaping Policing" (2013) 13(2) *Criminology and Criminal Justice* 161; S. Lister and M. Rowe "Electing police and crime commissioners in England and Wales: prospecting for the democratisation of policing" (2015) 25(4) *Policing and Society* 358; J. McDaniel "Rethinking the role of law and politics within democratic police accountability" *The Police Journal* (forthcoming 2018).

<sup>46</sup> N. Walker fn.9, pp.140-142.

from public scrutiny. Even if these aspects are addressed appropriately, there remains the issue of whether the police authority concept can function effectively in the environment of a centralised national police service that has always been subject to direct government control. The history of the police authority concept in Northern Ireland offers further valuable lessons on these aspects.

### *The Police Authority Concept in Northern Ireland*

The police authority experience in Northern Ireland has particular resonance for the introduction of the concept into the Republic of Ireland. Although the image and history of policing in the two jurisdictions has been markedly different, they have also held some fundamental characteristics in common (including a common parent in the Royal Irish Constabulary).<sup>47</sup> Prior to the establishment of a Police Authority in Northern Ireland in 1970, it, too, was policed by a single force under the direct and close control of a central government Minister who was answerable to a democratically elected parliament. Consequent on the report of the Hunt Committee,<sup>48</sup> a Police Authority for Northern Ireland (PANI) was established essentially to impede the permanent unionist majority using the police in a politically partisan manner against the Irish nationalist minority.<sup>49</sup> For the most part, PANI was entrusted with the same powers and functions as its counterparts at the time in England and Wales. The net effect was to establish a tripartite arrangement composed of a government Minister (or Secretary of State),<sup>50</sup> PANI and the Chief Constable.

Over the thirty years of its existence, PANI never managed to convince that it offered an effective check against the subordination of the police to partisan political expediency and security interests over the rule of law and the principles of ethical policing. Its general performance, especially during the acute public controversies surrounding policing methods from the 1970s to the 1990s, was characterised by timidity, invisibility and subservience to central government and the Chief Constable.<sup>51</sup> While that can be attributed partly to the

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<sup>47</sup> See, for example, A. Mulcahy "Trajectories of Policing in Ireland: Similarities, Differences, Convergences" in D. Healy et al. (editors) *Handbook of Irish Criminology* (Abingdon: Routledge, 2016) 261; B. Griffin "A Force Divided Policing Ireland 1900-60" (1999) 49(10) *History Today* 25; P. Manning "Mirrors: the Garda and the PSNI" *Irish Journal of Sociology* (Forthcoming)

<sup>48</sup> *Report of the Advisory Committee on Police in Northern Ireland* (the Hunt Report) (Belfast: HMSO Cmd.535, 1969) paras.85-92.

<sup>49</sup> R. Weitzer *Policing under Fire: Ethnic Conflict and Police Community Relations* (Albany: SUNY, 1995); J. McGarry and B. O'Leary *Policing Northern Ireland: Proposals for a New Start* (Belfast, Blackstaff Press, 1999) pp.27-33.

<sup>50</sup> Since 1972, it has mostly been the Secretary of State for Northern Ireland.

<sup>51</sup> See, J. McGarry and B. O'Leary fn.49, pp.99-104; R. Weitzer fn.49; M. O'Rawe and L. Moore *Policing a Divided Society: Issues and Perceptions in Northern Ireland* (Coleraine: Centre for the Study of Conflict, 1995) pp.22-25; M. O'Rawe and L. Moore *Human Rights on Duty: Principles for Better Policing – International Lessons for Northern Ireland* (Belfast: CAJ, 1997) pp.143-144; A. Mulcahy *Policing Northern Ireland: Conflict, Legitimacy and Reform* (Cullompton: Willan, 2006) pp.39-41; M. Connolly et al. "Policing Structures and Public Accountability in Northern Ireland" (1996) 22 *Local Government Studies* 229; DPJ Walsh *The Police Authority for Northern Ireland – 10 Years After* (Unpublished, School of Law, Queen's University Belfast, 1980) pp.27-44. See also early criticisms from the opposition in parliament at, for example: N.I.H.C Debates Vol.77, col.995; Vol.78, col.1603; Vol.79, cols.311 and 319; Vol.80, col.1737; Vol.82, col.1348.

exceptionally difficult security environment in which PANI was operating, it can also be linked to three key factors, which have particular resonance for the new Irish Policing Authority, namely: composition, powers retained by central government, and the relative autonomy of the Chief Constable.

PANI's composition lacked a democratic mandate; a feature which the Patten Report identified as a significant factor in reducing its credibility.<sup>52</sup> Its establishing legislation stipulated that they should be selected to ensure that, insofar as practicable, they would be representative of the community in Northern Ireland.<sup>53</sup> While the Hunt Committee had envisaged such representativeness as instrumental in enhancing PANI's capacity to limit the Minister's control over the police,<sup>54</sup> the rather obvious Achilles Heel was that the members were selected by that same Minister.<sup>55</sup> Inevitably, this offered the temptation to weight the Authority in favour of members who would not be inclined to challenge ministerial and security interests rigorously. Arguably, this temptation was not resisted.<sup>56</sup>

Even if PANI had been minded to chart a more independent course from central government, it suffered from an even greater degree of regulatory and budgetary subordination to central government than its failed counterparts in England and Wales. Moreover, while PANI was supposed to have an important police accountability function,<sup>57</sup> the establishing legislation did not render the Chief Constable expressly subordinate to it in respect of his direction and control of the force. Of particular significance for the adaptation of the police authority concept to the Republic of Ireland, is the fact that there was only one police force, one PANI and one Minister. This enabled the Minister to play a much closer interventionist role than was the case in England and Wales where he or she had to engage with over forty police forces and police authorities. Given that situation, and the fact that State security played a central role in policing in Northern Ireland, it was almost inevitable that the relationship between the Minister and the Chief Constable would dominate to the detriment of the status and input of PANI.<sup>58</sup> McGarry and O'Leary observed bluntly that in the supposed tripod of police governance in Northern Ireland, there was one leg missing; and that missing leg was PANI.<sup>59</sup>

Several of PANI's weaknesses were addressed in the design of its successor, the Northern Ireland Policing Board (NIPB), which was established in 2001 consequent on the Good Friday Peace Agreement and the recommendations of the Patten Report. Critically, the NIPB has a strong democratic mandate, with ten "political" members from (and representative of) the elected Assembly, as against nine "independent" members appointed by the First and Deputy First Ministers of the executive (or the Secretary of State for Northern Ireland, as the

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<sup>52</sup> Patten Report op.cit. at para.1.15.

<sup>53</sup> Police Act (Northern Ireland) 1970, s.1(3) and Schedule 1, para.2(1)(a). PANI comprised a chairman, a vice-chairman and not less than 14 nor more than 20 members; para.1.

<sup>54</sup> Hunt Report fn.48, paras.86-88.

<sup>55</sup> Note, for example, Police Act (Northern Ireland) 1970, s.1(3) and Schedule 1, para.2(2).

<sup>56</sup> See J. McGarry and B. O'Leary fn.49, pp.100-104; DPJ Walsh fn.51, pp.35-36;

<sup>57</sup> Police Act (Northern Ireland) 1970, ss.12, 13 and 15.

<sup>58</sup> See Patten Report fn.25, paras.5.5-5.13.

<sup>59</sup> McGarry and O'Leary fn.49, p.102.

case may be). The Patten Report viewed the majority elected membership as vital to the Board's capacity to command respect and credibility and to deliver effective accountability.<sup>60</sup> Both the Chair and the Vice Chair of the NIPB are also elected by its members, rather than being appointed by government. The net effect of these provisions is that the NIPB has deeper democratic (as well as broad representative) roots in the community, and more substantial autonomy from the central executive relative to its PANI predecessor.

As well as discharging the standard police governance functions of PANI, the NIPB issues a code of ethics and monitors compliance with that code and human rights standards. It also has the power to require the Chief Constable to submit a report on any matter connected with the policing of Northern Ireland, and it can follow up by causing an inquiry to be held on any such matter.<sup>61</sup> These enhance the Board's capacity to shape the methods adopted by the police service and to question the Chief Constable and call him or her to account on policing operations after the event.

It seems that these measures have had a real effect. NIPB has proved substantially more successful than PANI in generating confidence in its capacity to protect the impartiality and professionalism of the police service against the demands of partisan politico-security interests and expediency. Undoubtedly its success can be linked partly to the more favourable political and security environments in which it has been operating. Equally, however, there can be little doubt that the changes have enhanced its status relative to the Chief Constable and central executive. From that position of comparative strength, it has been able to exercise its substantial governance and accountability powers with a confidence and autonomy that could not be matched by PANI.

Significantly, for the new Irish Policing Authority, the NIPB experience would suggest that the traditional police authority concept can be transplanted to a context resembling a national policing environment. However, the Authority's success in delivering effective accountability, and in protecting policing from the adverse effects of partisan political influence, will be heavily dependant on learning from the experiences in England and Wales and in Northern Ireland. At the very least, it seems that it must have a democratic mandate and be suitably representative of the whole community, have the powers and resources to manage the delivery of an efficient police service and to render the police body accountable for its performance in delivering that service, and have sufficient status and autonomy to function as an effective counterweight against executive government control over policing. It would also seem essential that there should be clarity of purpose and structure in the institutional relationship and in the division of powers and functions among the Authority, the national parliament, the central executive and the Garda Commissioner. A lack of clarity in these matters will provide the conditions in which the central executive and the Garda Commissioner can maintain their mutually self-serving control over policing at the expense of the Authority and parliament, in much the same manner as the Home Secretary and Chief Constables did with respect to police authorities in England and Wales. How the Irish

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<sup>60</sup> See Patten Report fn.25, paras.6.11-6.14.

<sup>61</sup> Ibid. paras.6.19-6.23.

Policing Authority measures up to these requirements will be considered below through a particular focus on: its composition and appointments; its functions and remit (including accountability); and its capacity to operate independently of central executive control. First, however, it is necessary to outline the distinctive Irish political and constitutional contexts into which it was introduced.

### **The Irish Constitutional Context**

Following the establishment of the Irish State in 1922, the “administration and business generally of public services in connection with .. police” was statutorily entrusted to the Minister for Justice.<sup>62</sup> Implicit in this arrangement is the notion that the Minister is in a position to determine the ‘political’ choices made by the Garda Commissioner in his or her direction and control of the police force and in the delivery of a policing service. Equally, it should follow that the Minister, in classic Diceyan theory, is responsible to Parliament for those choices. In other words, there should be a direct line of accountability stretching from the police officer on the front line up through the organisation to the Garda Commissioner, from there to the Department and Minister for Justice, and from the Minister to the democratically elected representatives of the people in the national Parliament.

Since at least the 1980s, successive Ministers have generally sought to evade this parliamentary responsibility. Typically, when called to account in respect of operational policing issues, which are loosely and not always consistently defined, the Minister responds that they are a matter for the Garda authorities.<sup>63</sup> At most, he or she will relay the response of the Garda authorities as a matter of information. Any attempt to secure detailed accountability or to leverage a change in operational policy or practice is thereby deflected. The reality, of course, is that the Minister is in a powerful position to shape and even determine such Garda policies and practices,<sup>64</sup> and meets regularly with the Garda Commissioner and senior officers to discuss aspects of them.<sup>65</sup> In effect, the Minister’s interpretation of the governance arrangements in respect of policing enables him or her to exercise power in these matters while shielded from the full force of parliamentary responsibility and accountability. The net result is not just a democratic deficit in policing. As noted in the introduction, it has the potential to facilitate a police-government relationship that serves and prioritises the self-serving interests of the political establishment and police

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<sup>62</sup> Ministers and Secretaries Act 1924, s.1(iii) and Schedule, Second Part. The word “police” is used but not defined in the 1924 Act. Given the context it seems safe to assume that it refers to the familiar crime and public order functions traditionally discharged by bodies statutorily established under the designation of a police force or constabulary in Ireland. For a broader historical understanding of the concept, see M. Dean *Governmentality: Power and Rule in Modern Society 2<sup>nd</sup> ed* (London: Sage, 2010) pp.107-111.

<sup>63</sup> See DPJ Walsh fn.5, ch.12.

<sup>64</sup> Unlike the statutory provisions that it replaced, the Garda Síochána Act 2005 empowers the Minister to encroach on the Commissioner’s operational autonomy through a number of mechanisms, including the setting of priorities and performance targets to which the Commissioner must have regard, and issuing binding directives to the Commissioner; see DPJ Walsh (2009) fn.5.

<sup>65</sup> DPJ Walsh (fn.5, ch.5.

leadership over weaker political and community interests, including the rank and file of the police service itself.

Against this background, the establishment of an external dimension in the form of a national police authority, and the transfer to that authority of significant executive powers and functions over police governance and accountability, would amount to radical and transformative change. It was not the only option available to deal with the crisis of confidence in the democratic accountability of the police. The government could have kept faith with the Diceyan model of parliamentary accountability and strengthened the capacity of the national Parliament to render the Minister and the police chiefs more accountable for their decisions and performance in the delivery of the State's policing service. Its sudden and dramatic endorsement of the police authority solution conveyed the impression that the government had accepted the radical option. Indeed, it was content to encourage that impression by declaring support in principle for the robust NIPB-type body proposed in a private members bill in 2014.<sup>66</sup> The government further fuelled this perception by claiming that its own intentions for a police authority would effect "the most important single change in the governance of the Garda Síochána in its history."<sup>67</sup> However, there were, and are, deep-rooted political and institutional reasons for scepticism over the government's true intentions.

The Garda's status as the sole national police service and State security service means that the government is acutely dependant on it to secure and maintain law and order and the political stability of the State. The government is also dependant on the public allegiance of the Garda Commissioner when the former is under political fire for failing to provide the Garda with sufficient powers and resources to cope effectively with an upsurge in crime.<sup>68</sup> These dependencies mean that the Garda Commissioner, in turn, can generally rely on the public support of the government in the face of public concern over allegations of Garda corruption and inefficiency.<sup>69</sup> Given such a mutually self-serving relationship, there was always going to be an entrenched reluctance to cede control over policing to an outside body. That reluctance was further fuelled by vested interests within the Department of Justice which would be keen to retain the authority they have traditionally enjoyed over policing and security matters in Ireland. It was hardly a surprise, therefore, that what the government actually delivered (as will be seen below), more than eighteen months later when the immediate political crisis had passed, was a much weaker version of the police authority concept that left the hegemony of the central executive largely intact, if not actually strengthened. Indeed, it is arguable that what has been introduced is such a pale version of the police authority concept that it is even misleading to describe it as a police authority.

Interestingly, the Minister did not seek to justify this back-tracking on the police authority concept by arguing that it was not readily transferable to a polity policed by a single,

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<sup>66</sup> See, for example, *Dail Debates* Vol.842, No.1, pp.46-47 (27<sup>th</sup> May 2014).

<sup>67</sup> *Dail Debates* Vol.841, No.3, p.24 (15<sup>th</sup> May 2014).

<sup>68</sup> DPJ Walsh fn.5, pp.124-128.

<sup>69</sup> DPJ Walsh fn.5, pp.399-402.

centralised, national service. Instead, she sought cover in a constitutional argument that was trotted out for the first time when the underpinning legislative bill was being piloted through parliament.<sup>70</sup> Relying on unpublished advice from the Attorney General, she asserted that policing was an integral part of the executive power which was entrusted constitutionally to the exclusive remit of the government.<sup>71</sup> Without amending the Constitution, she claimed, it was not possible to transfer that power (or a portion of it) in respect of policing wholly out of the hands of the government to an external body such as a police authority.

The merits of that argument may be undermined by, among other things, the fact that each individual member of the Garda, in whom is vested the full complement of police powers and duties, is an independent officeholder and servant of the State, as distinct from a government civil servant.<sup>72</sup> In other words, the substantive core of police powers is already located outside of the government. Moreover, as noted above, when called upon to accept responsibility and accountability for Garda policies, practices and decisions, the government has been content for decades to hide behind the mantra that these are matters within the exclusive responsibility of the Garda authorities and the Garda Commissioner in the exercise of his or her statutory power of direction and control over the force.<sup>73</sup> Since the Commissioner is not part of the government, this stance seems incompatible with the notion of policing being an exclusive government responsibility. The alleged constitutional constraint has also not impeded the establishment of the independent Garda Síochána Ombudsman Commission which is equipped with significant police powers over members of the Garda, including the Garda Commissioner.<sup>74</sup> In any event, the establishment of an independent police authority with autonomous powers of governance and accountability with respect to policing does not necessarily entail the complete transfer of executive responsibility for policing from the government to such an authority. There will still be room (and the need) for the government to exercise key powers and responsibilities in matters such as resourcing and, arguably, State security.

Even if these counter-arguments are dismissed, it remains the case that the government could easily have promoted a straightforward constitutional amendment permitting the legislative transfer of police governance and accountability powers and responsibilities to an independent police authority established by law. Significantly, it was quite happy to hold constitutional referenda on arguably less substantial matters such as the removal of the prohibition on a reduction in the salary of Irish judges (2011), and a reduction in the eligible age of candidacy for the Presidency (2015). The fact that the government has not done so with respect to the Policing Authority suggests that the belated constitutional argument is a

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<sup>70</sup> *Dail Debates* Vol.890, No.2, p.11 (24<sup>th</sup> September 2015).

<sup>71</sup> See, for example, *Dail Debates* Vol.890, No.2, p.11 (24<sup>th</sup> September 2015); Vol.896, No.2, p.33 (12<sup>th</sup> November 2015); and Houses of the Oireachtas *Select Committee on Justice, Defence and Equality Debates* 7<sup>th</sup> October 2015, p.2.

<sup>72</sup> DPJ Walsh fn.5, ch.3 and pp.322-323.

<sup>73</sup> *Ibid.* at ch.12.

<sup>74</sup> See Garda Síochána Act 2005, parts 3 and 4, as amended by Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015.

strained attempt to find cover for its retreat from its earlier public show of support for the establishment of a robust police authority in the image of the NIPB.<sup>75</sup>

The substantive issue that must now be considered is whether the Irish Policing Authority can be interpreted as a successful adaptation of the police authority concept to a centralised, national police service? To what extent, if any, does it incorporate a meaningful transfer of police governance and accountability from the national political executive to an independent body? Is it equipped to deliver transparent democratic scrutiny of the police and policing, and can it protect policing from the effects of partisan political and institutional interests and expediency?

## **The Irish Policing Authority**

### *Overview*

The establishing legislation, as enacted in December 2015, provides for an “independent” body with a role in: appointments to and removals from Commissioner and senior ranks; setting Commissioner strategy statements and policing plans; overseeing the performance by the Garda of its functions relating to policing services; overseeing Garda implementation of Inspectorate recommendations; keeping itself informed on complaints against members of the Garda and the application of the Disciplinary Regulations; advising the Minister annually on the resources likely to be needed by the Garda to perform its functions; promoting and supporting continuous improvement of policing in the State; and establishing a code of ethics for the Garda; among others.<sup>76</sup> Superficially, this looks impressive and consistent with the notion of deploying the familiar police authority concept as a buffer to distance police governance and accountability from central government control and to render it more transparent and community-oriented. Closer analysis of aspects of the legislation, however, suggests that what has been delivered is even weaker than the failed model in England and Wales and the failed PANI. Indeed, it may actually prove a further impediment to democratic police accountability and transparency in the Republic of Ireland.

### *Composition and Appointments*

The statutory provisions on the composition of the Policing Authority show that the advice of the Patten Commission has not been heeded, and that the lessons from England and Wales and Northern Ireland have not been learned. The members are appointed by the government from among those recommended as suitable for appointment by the independent Public Appointments Service (PAS) following a selection competition.<sup>77</sup> Each

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<sup>75</sup> See, for example, *Dail Debates* Vol.840, No.3, p.19 (8<sup>th</sup> May 2014); Vol.841, No.2, p.21 (14<sup>th</sup> May 2014); Vol.841, No.3, pp.23-24 (15<sup>th</sup> May 2014); Vol.842, No.1, pp.46-47 (27<sup>th</sup> May 2014).

<sup>76</sup> Garda Síochána Act 2005, s.62H, as inserted by Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015, s.44.

<sup>77</sup> *Ibid.* s.62C(8).



appointee must also be approved by a resolution passed by each of the Houses of Parliament.<sup>78</sup> The value of these 'independent' elements is diluted by the fact that PAS must agree the competition selection criteria and process with the Minister for Justice in advance,<sup>79</sup> while the government will always be able to rely on its majority in Parliament to secure approval of its own choice of appointees. Clearly the members will lack a democratic mandate in any meaningful sense, and there is no statutory requirement to ensure that they will be representative of a broad range of community sectors. Instead, it is stipulated that the list from which they are drawn should favour persons having knowledge of, or experience in, a disappointingly narrow range of policing, administrative, business, human rights and community crime prevention fields.<sup>80</sup> Moreover, representatives of the political parties in parliament are expressly excluded,<sup>81</sup> yet there is no exclusion for current or former government civil servants.

These arrangements seemed designed to ensure that the Minister and the government retain a firm grip over the membership. That grip is tightened even further by the relatively small size of the Authority, which is composed of eight members plus a chairperson.<sup>82</sup> This contrasts with the NIPB, which has nineteen members for a much smaller police force and jurisdiction. Critically, the Authority chairperson is recruited and appointed directly by the government, without any requirement for approval by both Houses of Parliament. This is particularly disappointing given the key role of the chairperson in shaping and guiding the role and work of the Authority. The first incumbent was appointed as a chair designate before the legislation was enacted and the members recruited. She was also fully involved in the selection of the first batch of members who would inevitably set the tone for the Authority and its development.<sup>83</sup>

Given these provisions on composition and appointments, it is difficult to see how the Policing Authority can be (and be seen to be) sufficiently independent to deliver on the promise of protecting the Garda against partisan political influence from the central executive. The absence of members of Parliament in its membership, and general lack of a democratic mandate, suggests that it will be seen as an agent of government rather than a representative of the people or communities. Indeed, the early indications are that the government sees the Authority as a vehicle for bringing external expertise to bear on policing, as distinct from democratic accountability.. There can be no doubt that each of the first appointees and chairperson bring an impressive depth of experience, qualifications and success to the role. Collectively, however, they reflect a relatively narrow spectrum of business, management and public service. They can hardly be described as broadly representative of the community. No less than seven of the nine, including the chairperson, have a background of distinguished service and experience on government appointed State

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<sup>78</sup> Ibid. s.62C(7). This does not extend, and was not applied, to the first batch of appointees.

<sup>79</sup> Ibid. s.62D(2).

<sup>80</sup> Garda Síochána Act 2005, s.62D, as inserted by Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015, s.44.

<sup>81</sup> Ibid. s.62F(1)(a) and (3)(a) & (b).

<sup>82</sup> Ibid. s.62C(1).

<sup>83</sup> *Dail Debates* Vol.864, No.3, p.15 (22<sup>nd</sup> January 2015).

boards or in government employment. While it may be important to have such experience on the Authority, its over-representation will do little to engender public confidence in the Authority's capacity to assert its own independent voice and to sever the mutually self-serving relationship between government and senior Garda management. As will be seen below under 'Ministerial Control', a pattern seems to be developing already whereby the Authority is seen to be acting in a subsidiary role to the Minister when responding to ongoing policing controversies.

### *Functions and remit*

A telling feature of the nature and status of the Policing Authority is the extent to which its functions and remit fall far short of those traditionally associated with police authorities in England and Wales and Northern Ireland. So, for example, it has no general statutory responsibility for the maintenance of an efficient and effective police service. That core governance responsibility remains firmly with the Minister and the government. Equally, it has no management role in respect of the Garda budget which remains with the Minister and the Garda Commissioner. Without budgetary powers, the Authority lacks real tools to shape Garda policy and practice. It cannot determine basics such as Garda numbers and equipment, Garda strategies and operations with budgetary implications, the establishment of specialist units, and so on. All of these remain the preserve of the Commissioner and the Minister, with the Authority being confined to persuasion or making representations. By way of contrast, expenditures above £50,000 in a police force in England and Wales must be pre-approved by the relevant PCC; a requirement that gives them extensive leverage over all aspects of policing. Further major concessions to the central executive and the Garda Commissioner, at the expense of the Authority's status, concern its accountability function and its role in securing human rights compliant policing. The former is dealt with separately below while the latter does not feature at all in the Authority's remit.

Another striking limitation in the Authority's remit is its explicit exclusion from State security aspects of policing. These remain the concern of the Commissioner and the Minister. The significance of this restriction is immense. The Garda Síochána, unlike most other comparable police services, encompasses the State's civil police service and the State security service.<sup>84</sup> As such, the Authority is precluded from an oversight role with respect to a major expanse of Garda activities. This limitation is accentuated by an open-ended statutory definition of State security which includes the investigation, prevention and detection of offences under the Offences against the State legislation,<sup>85</sup> which has been a source of serious and persistent criticisms of Garda methods for decades.<sup>86</sup> Equally worrying

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<sup>84</sup> Garda Síochána Act 2005, s.7(1). Ireland does not have a distinct State security service or services outside of the Garda Síochána or the Defence Forces.

<sup>85</sup> Ibid. s.3A(1). Resort to an open-ended definition of State security is a problematic feature of Irish police and criminal justice measures; see, for example, M. Mulqueen "Securing the State with soldier spies: evaluating the risks of using military personnel to gather surveillance evidence in Ireland" (2009) 20 *Irish Studies in International Affairs* 121, pp.135-136.

<sup>86</sup> See, for example, J. Joyce and P. Murtagh *Blind Justice* (Dublin: Poolbeg Press, 1984); DPJ Walsh *Human Rights and Policing in Ireland* (Dublin: Clarus Press, 2009) at chs.22-26.

is the fact that any dispute over whether a situation raises a State security issue is determined by the Minister.<sup>87</sup> The underlying strategy seems to be to confine the Authority to addressing mainstream community concerns about crime and disorder, to the exclusion of broader issues of political policing or even Garda methods in the prevention, investigation and detection of whole swathes of serious crime.

These major departures from the traditional police authority concept can be interpreted as evidence that the Irish government was never actually committed to the adoption of a robust police authority model; that it was merely engaged in an expedient political strategy of conveying the pretense of radical reform in order to dampen the immediate political and policing crises. So, for example, the government's initial proposals envisaged the Authority having the function of ensuring that the resources available to the Garda are used so as to achieve and maintain the highest levels of efficiency and effectiveness, as measured by the best standards of comparable police services.<sup>88</sup> In the legislation, however, that was quietly watered down to "[keeping] under review the adequacy of .. the arrangements for managing and deploying the resources available to the Garda Síochána so as to ensure the most beneficial, effective and efficient use of those resources."<sup>89</sup> The woolly language conceals a demotion from an important directive power of ensuring that certain standards are met to an ex post facto function of reviewing the arrangements put in place by the Garda Commissioner for achieving certain standards. Similarly, the government's initial proposals stipulated that the Authority shall "monitor and address human rights compliance by the Garda Síochána in relation to policing matters."<sup>90</sup> This, of course, should have been a vital aspect of the Authority's functions, and would have been in line with the NIPB, as recommended by the Patten Commission. Incredibly, it has disappeared completely in the legislation as enacted. Further examples of such unexplained fundamental departures from the initial proposals are highlighted under 'Accountability' and 'Ministerial Control' below.

A more benign interpretation of these retreats is that the government had not fully contemplated the implications of transplanting the police authority concept into an environment where both the civil policing and State security services were delivered by a single national police body under the control of the central executive which, in turn, was accountable to the national parliament. Perhaps, it was only when it began to address the detail that the full implications for the key stakeholders within the central executive and the Garda became clear. In that scenario the retreat could be interpreted as concessions to those vested interests who, of course, would have immense influence in determining the substance of the legislative proposals. Whatever the explanation, there can be little doubt that the functions and remit of the Authority are a pale shadow of the NIPB and even of its PANI predecessor and the old police authorities in England and Wales. When coupled with

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<sup>87</sup> Garda Síochána Act 2005, s.3A(3) and (4), as inserted by Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015, s.4.

<sup>88</sup> General Scheme for Garda Síochána (Amendment) Bill 2014, Head 5G(2)( a).

<sup>89</sup> Garda Síochána Act 2005, s.62H(2)(iv), as inserted by Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015, s.44.

<sup>90</sup> General Scheme for Garda Síochána (Amendment) Bill 2014, s.5G(2)(i).

the membership aspects, it is clear that the government has kept the Authority on a tight leash to the extent that it will be difficult for the latter to develop a status, profile and impact independent of the former. These aspects are brought into even sharper focus in the Authority's accountability role.

### *Accountability*

Rendering a chief police officer accountable for the operational policies, practices and performance of his or her force, and for the general policing of his or her area, has always been a central, perhaps even a defining, feature of the police authority concept. The Patten Commission viewed it as the "statutory primary function" of the NIPB.<sup>91</sup> Since Garda accountability and protection against self-serving political influence were at the core of the policing crisis at the time, it is no surprise that the government promoted its proposed 'Garda Authority' as a primary and core component of its response to the crisis and, specifically, as a vital instrument for enhancing transparent democratic governance and accountability in policing.<sup>92</sup>

Superficially it appears that the Authority is in a position to exercise a robust Garda accountability function. Commendably, it can secure reports and documents from the Garda Commissioner in respect of policing services.<sup>93</sup> The Commissioner is also under an obligation to submit annual and other reports on policing services to the Authority,<sup>94</sup> and generally to keep the Authority informed of matters relevant to its functions.<sup>95</sup> Appearance, however, can be deceiving. Closer analysis of the legislation reveals that the Authority's accountability status is relatively weak and that the real power/accountability relationship continues to be that between the Minister and the Garda. The first indicator of this is the fact that the Authority's accountability remit does not extend at all to State security policing which, of course, accounts for a substantial dimension of the Garda function and activity. Oversight of that remains firmly in the hands of the Minister. Even within its limited civil policing service remit, the Authority has a diminished accountability status relative to the Minister. So, for example, the legislation states expressly that the Garda Commissioner is obliged to *account fully* to the government and the Minister for Justice for any aspect of his or her functions,<sup>96</sup> while he or she is only required to *report* to the Authority in order to facilitate the Authority in the performance of its functions.

The difference in language between the Authority's and the Minister's accountability roles is deliberate, and it harbours further evidence of a substantial mismatch between what the government initially promised and what it actually delivered. The government's initial proposals stated clearly that the Authority shall "hold the Garda Commissioner to account

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<sup>91</sup> See Patten Report fn.25, para.6.3.

<sup>92</sup> See, for example, *Dail Debates* Vol.840, No.3, p.11 (8<sup>th</sup> May 2014).

<sup>93</sup> Garda Síochána Act 2005, ss.41A(2) s.40(2A), as inserted by and ss.34 and 32(c) of 2015.

<sup>94</sup> *Ibid.*, s.46, as amended by s.38 of 2015; and ss.20-24, as inserted by ss.18-22 of 2015.

<sup>95</sup> *Ibid.* s.41A(1) as inserted by s.34 of 2015.

<sup>96</sup> *Ibid.*, s.40(1).

for policing matters”.<sup>97</sup> They also expressly stated that the Commissioner would be accountable to the Authority for the performance of his or her functions and those of the Garda Síochána insofar as they related to policing matters.<sup>98</sup> By the time the proposals reached Parliament, however, the Authority’s accountability competence had been emaciated.<sup>99</sup> Nowhere in the Act is there any express reference to the Commissioner being accountable to the Authority. Indeed, the statutory definition of the Commissioner’s functions on this aspect merely states that he or she is to “assist and cooperate with the Authority in order to facilitate the performance by the Authority of its functions”.<sup>100</sup> This reflects the language of functionality, rather than accountability. It stands in contrast to that part of the Commissioner’s functions which states expressly that he or she “is accountable to the Minister for the performance of [his or her] functions and those of the Garda Síochána.”<sup>101</sup>

Arguably, the systemic weaknesses in these arrangements have emboldened the Commissioner to adopt a minimalist approach in reporting to the Authority, thereby diminishing the status and significance of the Authority even further. While the former Commissioner appeared before the Authority on a regular basis, she was not so fastidious in keeping the Authority informed of continued significant operational failings within the Garda. In 2017, for example, there were major public controversies (ongoing at the time of writing) in respect of thousands of wrongful road traffic convictions due to Garda procedural errors, gross inflation in the reported numbers of road-side breath tests carried out by the Garda and a financial scandal within the Garda Training College. Despite the fact that the Garda Commissioner knew about these matters for months, she failed to inform the Policing Authority which learned about some of them from media reports.

It seems abundantly clear there has been no significant shift in the vital Garda accountability function from the Minister to the Authority. This is further evidence of the extent to which the Authority falls significantly short of the traditional police authority concept. In some respects, that is not entirely surprising. Giving it a central police accountability role would raise difficult issues over the division of functions between it and Parliament. That, however, has never really featured as part of the police authority debate in the Republic of Ireland, and the government did not seek to address that aspect in its initial proposals. It is difficult to avoid the conclusion that, contrary to the impression the government sought to convey initially, it never really envisaged the Policing Authority effecting a substantial change in the traditional locus of democratic governance and accountability in policing.

### *Ministerial Control*

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<sup>97</sup> See Garda Policing Authority: General Scheme of Bill 2014 at Head 5 and s.5G(1)(a)(iii).

<sup>98</sup> *Ibid.* at Head 7 and s.27(3)(a).

<sup>99</sup> Interestingly, when presenting and defending the bill through the legislative process in parliament, the Minister studiously avoided any reference to the Authority having an accountability function. Instead she consistently referred to an “oversight” function.

<sup>100</sup> Garda Síochána Act 2005, s.26(1)(ca), as inserted by Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2005, s.24(a).

<sup>101</sup> *Ibid.*, s.26(3).

Despite the Irish government's pretense of the Authority representing a "sea change in the oversight of policing in the State,"<sup>102</sup> it is apparent that the executive remains dominant in the field. Most of the Authority's key governance powers and duties are qualified by the express requirement for ministerial approval or consent for their exercise or discharge. Even its power of appointment over the senior Commissioner ranks is subject to government veto,<sup>103</sup> while the power of dismissal over these ranks resides almost exclusively in the hands of the government.<sup>104</sup> Significantly, the Authority's power to have the Garda Commissioner investigated for an alleged offence or serious misconduct is also subject to the consent of the Minister.<sup>105</sup> Inevitably, this facilitates the sort of political protection for the Commissioner that was so instrumental in the demands for the establishment of an independent police authority in the first place.<sup>106</sup> It can be argued, of course, that these requirements for ministerial or government approval are broadly consistent with the traditional police authority model, and even with the current PCCs in England and Wales. They, however, were (or are) local bodies operating in an environment where the maintenance of national standards in certain governance matters is desirable. That need simply does not arise in the Irish context. There, it is essentially a question of whether the government is willing to transfer sufficient autonomy to a national Policing Authority to establish it as the independent locus of governance and accountability in respect of the Garda and policing.

The Authority's weakness relative to the central executive is explicitly confirmed by the statutory provisions on who can issue directives to whom. These also provide further evidence of the government's strategy of backtracking significantly on what it initially promised at the height of the policing crisis. Patently, the Authority is not given a power to issue directives to the Garda Commissioner on the delivery of policing services. That, of course, is consistent with the police authority concept as applied in England and Wales (and Northern Ireland) since at least the middle of the twentieth century. In the government's initial proposals, however, the Policing Authority was given a power to issue binding written directives to the Garda Commissioner following the approval of the government.<sup>107</sup> This replicated an almost identical power already enjoyed by the Minister. As such, it clearly signalled a substantive move to put the Authority on at least the same footing as the Minister. By the time the legislative proposals were tabled, however, the Authority's power had been watered down to nothing more than a power to recommend to the Minister that the Minister should issue a directive to the Commissioner on a specific matter relating to policing services.<sup>108</sup>

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<sup>102</sup> *Dail Debates* Vol.890, No.2, p.10 (24<sup>th</sup> September 2015).

<sup>103</sup> Garda Síochána Act 2005, s.9(7), as substituted by Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015, s.8(1).

<sup>104</sup> *Ibid.* s.11, as added by s.10(1) of 2015.

<sup>105</sup> *Ibid.*, s.102B(1A), as inserted by Garda Síochána (Amendment) Act 2015, s.7 and amended by Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015, s.49(a).

<sup>106</sup> See *Dail Debates* Vol.890, No.2, p.34 (Clare Daly TD) (24<sup>th</sup> September 2015).

<sup>107</sup> See General Scheme: Garda Síochána (Amendment) Bill 2014, Head 7 providing for a new s.26(1)(a).

<sup>108</sup> Garda Síochána Act 2005, s.25(1A), as inserted by Garda Síochána (Policing Authority and Miscellaneous Provisions) Act 2015, s.23(a).

These arrangements seem carefully calibrated to ensure that the real power relationship remains that between the executive and the Commissioner, with the Authority at best playing a secondary role. Indeed, the Authority's subordination to the Minister is most explicitly put beyond doubt by the fact that the Minister is given a statutory power to issue directives to the Authority itself on any matter relating to its functions in policing services.<sup>109</sup> The Authority must comply with any such directive and inform the Minister of the measures taken in compliance.<sup>110</sup>

The practice to date confirms that the government, and the Minister for Justice in particular, are still very much in control behind the scenes, with the Policing Authority playing a relatively peripheral role. The Minister is still seen taking the lead on high profile policing issues such as an: upsurge in gangland crime, the hugely controversial treatment of Garda whistleblowers, contingency plans for a threatened Garda strike and the Garda response to the findings of independent investigations or Inspectorate recommendations.<sup>111</sup> Similarly, there has been little substantive change in the manner in which the Minister answers in parliament for policing, and she made it clear during the passage of the Policing Authority legislation that she envisages continuing in that mode.<sup>112</sup> Nevertheless, there are emerging signs of the Minister (and government) taking advantage of the Authority to deflect awkward questions or issues with the response that they are being examined by the Authority.<sup>113</sup> So, for example, questions on the Garda response to the implementation of Inspectorate recommendations and findings from independent investigations are long-fingered by saying that they are being overseen by the Policing Authority.<sup>114</sup> Superficially, this might be interpreted as increasing the status of the Authority at the expense of the Minister. Typically, however, the Authority is instructed to report back to the Minister on these matters, sometime at regular intervals.<sup>115</sup> This suggests that the former is functioning in a subsidiary role to the latter, rather than as a constitutionally independent check on policing policy, practice, management and performance.

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<sup>109</sup> *Ibid.*, s.25(1B), as inserted by s.23(a) of 2015.

<sup>110</sup> *Ibid.* s.25(2), as substituted by s.23(b) of 2015; and s.25(6), as added by s.23(c) of 2015.

<sup>111</sup> See, for example, *Dail Debates* Vol.904, No.2, p.6 (27<sup>th</sup> January 2016); Vol.908, No.2, p.4 (5<sup>th</sup> May 2016); Vol.909, No.1, p.9 (17<sup>th</sup> May 2016); Vol.909, No.2, p.6 (18<sup>th</sup> May 2016); Vol.944, No.2, from p.34 (28<sup>th</sup> March 2017); Vol.945, No.1, Written Answer 22 (30<sup>th</sup> March 2017); Vol.953, No.2, Written Answers 50-52 (1<sup>st</sup> June 2017); Vol.958, No.1, p.29 (12<sup>th</sup> July 2017); Written Answers 537-572 (26<sup>th</sup> July 2017).

<sup>112</sup> See, for example, *Dail Debates* Vol.890, No.2, pp.35-36 (24<sup>th</sup> September 2015).

<sup>113</sup> See, for example, *Dail Debates* Vol.909, No.2, p.3 (18<sup>th</sup> May 2016); Vol.922, No.2, Written Answer 82 (28<sup>th</sup> September 2016)

<sup>114</sup> See, for example, *Dail Debates* Vol.922, No.2, Written Answer 57 (28<sup>th</sup> September 2016); Vol.944, No.2, from p.34 (28<sup>th</sup> March 2017); Vol.945, No.1, p.39 (30<sup>th</sup> March 2017); Vol.945, No.2, Written Answers 113-142 (4<sup>th</sup> April 2017); Vol.947, No.1, p.49 (12<sup>th</sup> April 2017); Vol.950, No.1, p.6 (10<sup>th</sup> May 2017); Vol.950, No.2, p.14 (11<sup>th</sup> May 2017); Vol.965, No.3, Written Answer 294 (4<sup>th</sup> July 2017)

<sup>115</sup> See, for example, *Dail Debates* Vol.926, No.1, Written Answer 134; Vol.938, No.2, p.24 (9<sup>th</sup> February 2017); Vol.939, No.2, p.33 (16<sup>th</sup> February 2017); Vol.946, No.1, Written Answers 81 and 83-85 (6<sup>th</sup> April 2017); Vol.951, No.3, Written Answer 76 (23<sup>rd</sup> May 2017)

## Conclusion

The introduction of the conventional police authority concept to the centralised national policing environment in Ireland would undoubtedly constitute a radical innovation, not just in Ireland but also in the police authority concept itself. Not surprisingly, successive Irish governments resisted that innovation, as they feared it would dilute their traditionally close control over the Garda which provides the State's powerful civil police and security service. Accordingly, the government's unexpected concession to opposition demands for a police authority in 2014 raised hopes that it was genuinely committed to the establishment of a body that could render the Garda more fully accountable and protected against partisan political influence. A more sceptical observer would have suspected that the government's public stance was little more than an expedient strategy to dissipate the acute political and policing crisis provoked by the ongoing revelations of police corruption and associated weaknesses in democratic police governance and accountability.

The contrasting experiences of the NIPB, and those of the failed PANI and police authorities in England and Wales, show that the capacity of a police authority to deliver effective police governance and accountability is heavily dependant on a combination of key factors, namely: the size and composition of the authority; the mode of appointment of its members; its remit, powers and functions; and its institutional relationship with central government and the police chief. This article has attempted to show that these factors have not been addressed in a manner that will enable the new Policing Authority to displace central government in the democratic governance and accountability of the police. Despite the superficial appearance, the substantive reality is little change in the familiar political and constitutional power structure that has prevailed in policing since the establishment of the Irish State. The Policing Authority is a pale shadow, at best, of the current model in Northern Ireland (NIPB) and even of the old PANI. It seems more accurate to describe it as an elaborate national advisory body rather than a national police authority. Despite the Irish government's initial endorsement of the latter, it is likely that it never intended anything other than the former. Disappointingly, therefore, the Policing Authority will not shed any light on whether democratic police governance and accountability can be delivered effectively through a robust, independent, national police authority located outside the central executive and national Parliament.