

ON THE RECORD...

Interview with Peter Tinsley, Executive Director of the Institute for Justice Sector Development, Canada

As reported by Andrew Faull in the previous edition of SA Crime Quarterly (36), the Independent Police Investigative Directorate (IPID) Bill is expected to be promulgated into South African law towards the end of the year. Once adopted, the new law will significantly change the functions of the Independent Complaints Directorate (ICD), which is currently South Africa's primary independent agency responsible for investigating complaints against the police.

Chris Botha met up with Peter Tinsley, recognised as an expert on the rule of law and the oversight of security forces, at a recent United Nations Development Programme (UNDP) conference on policing reform in Dhaka, Bangladesh, and discussed Canadian developments on issues of police oversight.

Chris Botha (CB): Tell us about yourself and your involvement in police oversight in the world.

Peter Tinsley (PT): I served in the Canadian military for 28 years, first as a military police officer and then as a military lawyer. In 1999 I was appointed as Director of the Special Investigations Unit of Ontario, an agency tasked with the investigation of police incidents involving death or injury. This appointment allowed me to assist in reforming and rebuilding community trust in the police. During the years 2003-2005 I served as a war crimes prosecutor in Kosovo as well as in Bosnia and Herzegovina after which I was appointed as Chairperson of the Military Police Complaints Division. I have participated in oversight and rule-of-law issues in Afghanistan, Somalia, Nicaragua, Guatemala, El Salvador, Cuba, Romania, Northern Ireland, Portugal, Iraq and Brazil. I am a past member and president of the Canadian Association for Civilian Oversight for Law Enforcement and presently I am the executive director of the Institute for Justice Sector Development, a non-government organisation

created to assist nations whose justice systems are in transition.

CB: Why oversight at all?

PT: The answer to your question is perhaps best tied up in the Latin maxim, often associated with Plato, of *quis custodiet ipsos custodias* – who guards the guardian or, more particularly, who will watch the watchman? The police typically have the legal authority to carry out their duties, holding extraordinary powers over other citizens, including the use of lethal force. In a constitutional democracy one should recognise that those with special powers – especially those with powers impinging directly on individual liberty, like the police – will require special accountability for the use of those powers. Therefore one cannot have the police policing themselves only. One should have alternative models of oversight additional to any internal models that the police may have, such as professional standards units or units tasked with internal affairs. To this end, it must be clear that I refer to independent, civilian oversight

external to the police when I speak about oversight in policing.

CB: Are the police not capable of policing themselves?

PT: One should not necessarily assume that the police are *not* capable of policing themselves, or that the police are not to be trusted. Human nature, however, necessitates oversight over the police. The police are typically tightly-knit, highly insular organisations often accused of ‘covering up’ abuses of power by their colleagues – a phenomenon in many places referred to as ‘the blue wall’. This aspect of human behaviour obviously needs to be checked constantly. However, I suggest to you that the major reason for independent oversight is a function of perception and the need of communities to be assured that there is accountability, that the rule of law is being applied. Further, there is a need on the part of the police to maintain the confidence of the community.

CB: Allow me to pick up on something you have just said: how important is the power of perception?

PT: A perception is formed quickly. The more the community notes issues of police abuse or bad behaviour, which can be through vicarious means, the more the police run the risk of being perceived abusive or behaviourally unacceptable. This cannot be fixed with some spin-doctoring. Instead, the police will have to address the perception in a transparent way. If not, the perception turns into a stereotype, labelling the police as bad. This stereotype is very difficult to turn around. This is where oversight structures come in: I have a firm view that the overarching purpose of independent oversight is the promotion and maintenance of community confidence in policing, police services and individual officers.

CB: Community confidence in the police through oversight?

PT: Indeed. You see, we often look at the complaint only; the allegation by an individual

citizen that the police have offended his or her rights or that he or she was abused by the actions of the police. Of course, that is part of the oversight role and should be addressed effectively. However, we must look at the underlying issues as well. What caused the police to act in the way that they did? Often, we will find deficiencies in supervision, training and equipment as underlying factors. During a recent inquiry into the conduct of Canadian law enforcement officials a judge in my country made us aware of this. Judge O’Connor was of the opinion that the full value of oversight can only be achieved if we look to more than the actions of an individual police official; oversight must of necessity also be a review mechanism for systemic causative factors. In a case brought before the Military Police Complaints Commission, the Commission found that the officers involved acted entirely in accordance with their protocols and their training. However, the Commission found that the training and protocols were substantially flawed and in fact provided for the abuse of the rights of people so handled. Therefore, the Military Police changed the practices of the police in instances such as the one brought before the Commission. So, whereas it is certainly important for the offended citizen to see his or her complaint dealt with, oversight has even greater value when the community as a whole sees a just system at work. Oversight actions may thus maintain, or in other cases restore, community confidence in the police.

CB: In South Africa, given our history, we developed and introduced a multiple accountability model of oversight on many levels, from parliamentary structures through (the then) National and Provincial Secretariats for Safety and Security (now Police), Community Police Forums and the ICD, to name but some of them. We were interested in civilian oversight because we needed to prevent unjust and abusive behaviour as it presented itself in our past. How did civilian oversight become part of the Canadian landscape?

PT: It is by no means a new concept. 1829 may be a long time ago, but I believe that the principles of policing offered by Sir Robert Peel in the United Kingdom then, still have relevance today. One of

those principles states clearly that the ability of the police to perform their duties is dependent upon public approval and that the police are required to secure and maintain the respect of the public. The concept of oversight originated in Australia in the early '70s and it spread, also to Canada. Most nations have done what you have done – they have advanced the concept of oversight in response to the demands of their people, probably since we have no binding international obligations regarding oversight. However, by implication and interpretation, we do have international instruments in existence that are relevant to the exercise of police powers. The 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights are examples of these instruments. Beyond these, international human rights law is generally satisfied by the legal (and preferably constitutional) recognition of certain rights of persons suspected or accused of crimes, particularly upon arrest or detention, along with access to judicial remedies for breaching these rights. There are others, such as the 1989 United Nations Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials and the 1993 'Paris Principles', which specified minimum standards for national human rights oversight bodies. All of these played a role in the determination of the Canadian models for oversight.

CB: Before exploring the Canadian model, would you care to explain the policing landscape in which this model is executed?

PT: Canada is a federation comprised of ten provinces and three territories. We have about 70 000 police officers employed at federal, provincial and municipal levels. Historically, control of the police was exercised by police commissions or boards. However, these structures came to be viewed as corporate boards of directors administering police services and really as part of the police. They were not positioned to fulfil the objective oversight role that communities were demanding. Today we have at least one fully developed civilian oversight agency in each of the ten provincial jurisdictions and at

the federal level. Every officer holding law enforcement powers is subject to some form of independent oversight. In the last four years alone three new more robust agencies have been established, while two other existing agencies have been scheduled for revitalisation and greater empowerment by their respective governments.

CB: Was this change in role and number, from the commissions/boards to a more widely spread and robust structure of civilian oversight, the result of community demands?

PT: The change was actually affected by both community demands as well as progress in the discourse of oversight, where a relatively theoretical concept was actually structured in our society. An example of the former may be found in the establishment of Ontario's Special Investigation Unit in 1990. The event that triggered this establishment was the shootings of two young men from a minority community within a two-week period. The event caused government to react with the purpose of assuring the community that the deaths would be properly investigated. The changes were not only limited to the number of oversight agencies, but also took place because of a developing trend to expand the role performed by, and the processes available to, oversight agencies. One now finds that the traditional Canadian model of oversight, which focused on review, appeal or audit following internal police reaction to a complaint, is shifting towards a 'first instance' jurisdiction where conduct complaints are made to the oversight bodies directly. In fact, in two provinces the jurisdiction for criminal investigations involving police officers and the performance of their duties has passed to independent civilian bodies. This same change in regime in the criminal context will soon be implemented in a third province and is being called for elsewhere.

CB: What is the attitude of the police towards civilian oversight?

PT: Historically, the attitude of the police towards civilian oversight was one of resentment and even active resistance by both police leaders and

frontline officers. In my experience, the reaction of the police was mostly one of ‘people outside the police do not understand what a police officer faces on a daily basis nor are they qualified to conduct investigations’. Of course, this view has been proven to be categorically incorrect in Canada and elsewhere. With some police leaders and officers a resistance mode continues to be the case, but overall it is fair to say that oversight is now generally accepted with a far higher degree of cooperation. It is recognised as a necessary part of police professionalism and the maintenance of community confidence.

CB: Why the change in attitude?

PT: The police, both leaders and frontline officers, have come to understand and accept that credible independent oversight bodies can serve to validate their performance in a way that they cannot do themselves. But, to achieve this attitude in the police it is critical that the oversight agencies are highly professional in every sense of the word and that they are seen as credible, not just by the community but by the police themselves. It takes a constant demonstration of standards and professionalism by the oversight body to achieve and maintain credibility.

CB: Canada, in my understanding, enjoys a high standard of policing. The police services are generally well funded, efficient and effective. In fact, many of us in South Africa have always seen your federal police service, the Royal Canadian Mounted Police, or ‘Mounties’, as some sort of icon in policing, a police service to be respected for how they do the job. Why then the increase in the number of oversight agencies and the discourse on the role of oversight in society?

PT: Indeed, we have excellent police services and polls suggest that the majority of Canadians generally hold the police in high regard. The ‘Mounties’ that you refer to are in fact a much revered historic national symbol of Canada. However, flawed or deficient police services are clearly not the motivation for the changes. It is the very importance that Canadians attribute to the police and their role in society, our quality of life,

and our unwillingness to allow inevitable instances of poor performance or misconduct of any degree to go unchallenged, that has been the primary impetus of change. This, I would suggest, is informed by the significance attributed to the rule of law and the belief that all must be equal, and seen to be equal, under the law. Also, we are experiencing a general lessening of tolerance for breaches of individual rights by the government or any agent thereof.

CB: Eventually, I’m getting to the Canadian model of oversight. Please tell me about it.

PT: Yes, there’s so much to talk about... In Canada, we do not claim to have identified the best or perfect oversight model. In fact, experience has taught us that no one specific model of oversight agency fits the needs of all communities, which may vary widely in terms of size, demographic make-up and other environmental factors and customs. One is able to identify four general groupings of models in Canada, as identified by their various processes or powers. Some agencies may initiate a complaint, may direct who will investigate the complaint, may refer the complaint to an independent adjudicator and may have binding disposition power. Others may adjudicate the complaint itself, or may investigate, while still others may only recommend disposition. Be that as it may, we have certain immutable, fundamental characteristics in our system spanning, as it were, all four general groupings. These are:

- Independence (both real and perceived). Oversight agencies must be free of government direction in terms of the performance of their mandate
- Appropriate empowerment by law, not by some lesser instrument of policy or governmental directive
- Sufficient resources to properly and professionally perform their mandate
- Transparency of process and fairness to all, including the police
- Sufficient and credible expertise and experience of all involved in the oversight process

- Communication with both the broader community and the police, since rights do not exist if they are not known.

CB: How many complaints are received by Canadian oversight agencies?

PT: Some years ago, the Canadian Association of Civilian Oversight of Law Enforcement adopted a statistical analysis system. We found that a police service should reasonably expect to receive complaints amounting to between five and ten per cent of the number of police officers employed. So, for every 100 police officials employed, we could expect between five and ten complaints. Of course, these are complaints received, not necessarily upheld.

CB: In your case then, with 70 000 police officials over all jurisdictions, you should expect between 3 500 and 7 000 complaints to investigate. What does this cost, what are the budgetary implications for the state, and how many people do you need to deal with the complaints effectively?

PT: I don't have available national figures but I could provide an example based on Ontario – Canada's second largest province at approximately 900 000 square kilometres (a significant factor in terms of the cost of service delivery), a population of approximately 12 million and approximately 27 000 police officers, both municipal and provincial. Ontario is one of the provinces with two oversight agencies, one dealing with complaints in an administrative/disciplinary context and the other with criminal investigations of police involved in incidents resulting in death or serious injury, including sexual assault. The former employs approximately 40 personnel and the latter 87, 39 of whom are regionally based 'as needed' investigators. The combined budgets of these two agencies are approximately 16,5 million dollars.

CB: Can you elaborate on the training provided to investigative members of oversight agencies in Canada? Are investigators sourced from the general public, or from policing agencies?

PT: The sourcing of staff, particularly investigators, has long been a contentious issue, with the police and broader community having very contrary views. While the notion of police secondments has been pretty much rejected, it is quite common to find mixed investigative staff members from both police and non-police backgrounds. With appropriate safeguards in place to avoid the perception of a conflict of interest for retired police officers, and a heavier training quotient for those without prior police experience, this compromise works effectively. Appropriate training for all staff is critical. In most oversight agencies it is a significant budget item with training obtained from academic institutions, specialised providers and even police colleges.

CB: Lastly, what advice would you give to South Africa on civilian oversight?

PT: I would not presume to advise the government of South Africa without having a much better grasp of the state of police community relations. However, when asked that question, I cannot help but think of the significant message in the title of the Commonwealth Human Rights Initiative's 2005 Report – 'Police Accountability: Too Important to Neglect, Too Urgent to Delay'. Independent civilian oversight is a concept that has spread exponentially over the last several decades. It has certain core requirements, as stated earlier, that when adapted to the circumstances of a community in a suitable model has proven to not just be of benefit to the community, but also as a multiplier of police service effectiveness. So, I would say that it is a worthy consideration everywhere.