



**Governance and accountability of policing in Scotland:  
a discussion paper by HM Inspectorate of Constabulary**

# **Abridged Report**

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## **INTRODUCTION**

This abridged report has been drawn from a comprehensive document, by the same authors, which provides a fuller chronology and observational analysis of views on the emergent system of governance and accountability of policing in Scotland. Given the complexity of the subject and its evolution over the past 50 years, or so, this abridged report aims to cut to the core of the issues as they may apply to the current debate on policing reform. In a similar fashion, the chronology, contained in the appendix to the abridged report, has been shortened.

Both the abridged and full reports have been compiled with the intention of highlighting weaknesses in police governance and accountability which have perpetuated since the 1962 Royal Commission<sup>1</sup> and which, it is contended, must be redressed in supporting any future model of policing for Scotland.

By its nature, the abridged report contains truncated arguments and readers are advised to refer to the full version to explore the extended rationale and logic, where they deem that appropriate.

Neither report is deemed to be conclusive; however, the intent is to open debate on the key issues, rather than to resolve them.

**That said, and for ease, some conclusions and issues to be addressed going forward, are set out at pages 14-18 of this document.**

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<sup>1</sup> *Royal Commission on the Police* (1962), Final Report, Cmnd. 1728.

## **Governance and Accountability of Policing in Scotland**

In recognising inherent weaknesses in the system of governance and accountability of policing, the 1962 Commission set out to secure a more effective system of control. The 1967 Act, which remains the primary source of legislation in Scotland, brought forward provisions for an enhanced role for central government as recommended by the Commission. It is argued, however, that a lack of definition around chief constables' authority coupled with a ministerial interpretation of the Act that centred on 'rules and resources'<sup>2</sup>, exacerbated, rather than resolved, the criticisms raised by the 1962 Commission which are detailed more fully in Appendix A.

Over the following 20 years the primary arrangements for governance and accountability of policing remained largely the same, albeit the advent of the Accounts Commission indirectly introduced a further level of accountability for forces.

The consequence of emergent legislation over the last decade of the 20<sup>th</sup> century was arguably minimal.

And so it was largely within the context of the 1967 Act, and its inherent failings, that Scotland and policing in Scotland entered devolution. Since then, a further programme of primary legislation affecting wider public services, together with a number of other reviews, has been instrumental in shaping the current system of governance and accountability either indirectly or by design. Most significantly, the implications of Best Value shifted responsibility for efficiency of policing in Scotland back from central to local government.

The period 2000 to 2010 has, nonetheless, been an active one. The continuing development of Best Value, community planning partnerships, single outcome agreements, the Scottish Police Services Agency, Performance Frameworks, a Justice Committee report, an Independent Review of Policing and the arrival of the Scottish Policing Board, have all been influential in redefining the mechanisms by which policing is made answerable, governed and brought to account.

The question that persists is whether these events have satisfied the need for a balanced system of governance and accountability: one in which local and national demand are

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<sup>2</sup> N. Walker (2000) *Policing in Changing Constitutional Order*. London: Sweet & Maxwell.

properly considered and prioritised; one in which there is a clearer understanding of the extent to which a chief constable's 'independence' should reasonably be exercised; one in which there is clarity around the seats of responsibility and accountability; and one in which the governing bodies have sufficient capacity, capability and competence to exercise their full responsibility for holding policing to account.

Arguably, the answer is NO. The findings of the 2008 Justice Committee, the 2009 Independent Review and recent Best Value audits and inspections of police authorities and forces (discussed and referenced in the following sections of this report) have all been consistent in identifying precisely these continuing weaknesses.

Instead we see an increasingly complex landscape of bodies with some level of direct or inferred responsibility for the governance of 'policing'. Multiple conduits of local accountability, including police authorities, joint police boards, community planning partnerships and local authorities, now exist. New and existing fora, such as the 'non-directive' Scottish Policing Board and ACPOS (a non-accountable body) focus on the national themes that the tripartite structure seems unable to satisfy; and the answer to the question of where a chief constable's independence ends and where an authority's responsibility starts remains far too vague.

The need for a systemic revision of the model of governance and accountability to support wider developments in policing in Scotland is both essential and timely.

The following pages aim to consider the impact of the above described evolution on key stakeholders and other bodies party to the current overall system of governance and then to highlight perpetual anomalies which may hinder the process of reform.

### **Local government**

In terms of the Local Government etc. (Scotland) Act 2003, each of the 32 unitary authorities continues to be the sole 'police authority' for their area. Their role, as set out in the Act (primarily around pay, resource and administration) is a product of the Royal Commission's view that police authorities had neither the technical competence nor an adequate system of inspection to be responsible for ensuring the efficiency of forces. Some 40 years later the 2003 Act returned responsibility for force's efficiency and effectiveness to police authorities.

### **Joint police boards and unitary police authorities**

Joint police boards are made up of locally elected members. At this time, six force areas are governed by Joint Police Boards, made up of between three and twelve unitary authorities. In two cases, the councils are co-terminous with their respective police force and are referred to as 'unitary police authorities'. Reflecting the principle of the Royal Commission, responsibility of those police authorities is delegated to a committee of the council. Committee decisions, however, including any financial estimates, must be ratified by the council. This runs counter to the situation for joint police boards, which have the right to requisition for police expenditure upon their constituent councils.

### **Governance competencies**

Joint police boards are required to appoint a clerk<sup>3</sup> and a treasurer<sup>4</sup> to provide administrative, financial and legal expertise. Routinely drawn from constituent local councils, they are neither 'members' of the board, nor do they have 'voting rights.

For unitary authorities, the guidance is much less clear. Whilst the principle of providing support and advice remains sound, it is inferred that such capacity can be provided directly by the constituent local authority. Dumfries and Galloway Council has retained the role of 'treasurer' and 'clerk whilst Fife council has allocated the roles to the chief executive and executive director finance, respectively.

In the main, the functions of clerk and treasurer offer the only level of 'technical competence' provided routinely to boards and it is evident that little has been done to improve this situation since the 1962 Commission, albeit responsibility for the efficiency of forces was returned to boards in 2003. It should be noted, however, that some boards have introduced dedicated support resources in recent years.

In the face of continuing discourse around the breadth of competencies available to boards, there remains no definitive list of competencies required to ensure adequate governance and accountability over policing. However, given the complexities of policing, at both the professional and organisational level, it is suggested that the range should extend, at least, to: technical and professional knowledge; legal and policy expertise; business acumen (not

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<sup>3</sup> Local Government Housing Act 1989

<sup>4</sup> Local Government Finance Act 1988

purely or solely financial); and, be supported by appropriate 'directorship' experience or skill<sup>5</sup>. Vitally, all should be in support of balanced democratic representation and influence.

### **Capacity**

Members' capacity to perform their duties is a further concern. Nearly half of board members estimate that they spent fewer than two hours a week on police board business. The same proportion report having other occupations and many also sit on other police or local authority sub-committees.

Similarly, the role of 'treasurer' and 'clerk' are generally secondary posts. The opportunity for them to contribute much beyond the facilitation of board meetings is often extremely limited. Given that, it is hard to envisage how they could realistically provide the fuller range of competencies advocated.

### **Conflicts of interests**

It is expected that the 'clerk' and 'treasurer' will "represent solely the interests and wishes" of the joint police board. That presents potential conflict to their role as a local government officer. Conflict of focus also faces elected members charged with responsibility for their ward but asked to consider policing over a much wider geography.

Supporting that assertion, Audit Scotland observed there was a lack of understanding around the roles of elected members in their different capacities as authority members and as council committee members in their audit of [Fife Council](#) in 2009<sup>6</sup>.

### **Strathclyde's joint police board**

Strathclyde's Joint Police Board (SPA) is unique in Scotland in that it employs eleven dedicated staff to provide specialist support and administration to the SPA. Whilst SPA should no longer be as dependent upon either its police force or its constituent police authorities, a recent review identified a number of areas for improvement. It found inconsistent links to the 12 constituent councils, limited training of its members, varying levels of understanding of their roles and responsibilities and a generally passive, rather than influencing, approach to information from the force.

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<sup>5</sup> For example, as set out in the *Institute of Directors: Role of the company director and the board*. Director Development: London.

<sup>6</sup> Audit Scotland (2009) *Audit of Best Value and Community Planning: Fife Council*.

Further, early findings of the Best Value audit and inspection of the force and its police authority suggest that despite the dedicated support function, SPA suffers from many of the criticisms that beleaguer boards in general.

### **Joint Best Value audits and inspections**

Other joint audit and inspections of police authorities and police forces conducted over the last two years by HMICS and Audit Scotland confirm this general picture.

### **Reflections from England and Wales**

In England and Wales, in 1996, independent members were introduced to bring in people with the professional experience and expertise not routinely present in local government. Research suggests that the move was a largely positive development that led to more effective decision-making.

Drawing this together, it is contended that the core shortcoming centres on the lack of development around wider 'governance competencies', rather than simply the need for democratic control. In all of those terms, and given the primacy of police authorities for ensuring the 'effectiveness and efficiency' of police forces, the supervision of chief constables and the disbursement of the mainstay of public money into policing, it is perhaps in this arena that the most compelling case for change can be found.

## **CENTRAL GOVERNMENT**

Central government's involvement remains limited in contrast to the Commission's intention; it is for police boards to set and agree local strategic direction and plans with individual chief constables.

### **National direction**

The absence of statutory arrangements that would allow a national strategic direction for policing to be set persists. Consequently, while chief constables and their joint boards and authorities remain bound to give local matters precedence, Ministers' statutory responsibilities leave them ill-equipped to direct or incentivise to augment national capability and capacity. The current system is, therefore, ineffectual where national interest is required to supersede the local.

### **Holding to account**

Despite the absence of direction over national policing, through its National Performance Framework Scottish Government has been able to set a number of high-level national indicators through which elements of policing performance can be tested by police boards or authorities.

Responsibility for single outcome agreements (SOAs), however, sits at council level. The result is dual accountability that is, most often, not wholly joined up. Running parallel are the policing priorities determined by forces and ACPOS through individual force strategic assessments and the Scottish Policing Assessment respectively.

National and local accountability for achieving all these is now assisted by the Scottish Policing Performance Framework (SPPF). However, while the SPPF reflects something of all of these it captures none in its entirety. What sanctions are available, should *national* targets not be achieved, is not readily apparent and suggests a further weakness in current accountability arrangements.

In relation to chief constables, for failures of efficiency, there is of course the ultimate sanction of dismissal. Over the years there have been a number of high profile cases, where ministers have sought to exercise power of this kind<sup>7</sup>. In each instance their actions were considered controversial.

In essence then, there is a continuing disjoint or gap between the role of central government in determining and promoting effort towards the national good and their ability to exercise or influence that in any directive or manifest way. Indeed, one of the key governance challenges centres on the need to achieve appropriate balance between local and national demand and, within that, to establish a system which provides sufficient flexibility to adjust that balance to fit the need at any particular time.

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<sup>7</sup> Dr Ian Oliver, chief constable of Grampian Police; Paul Whitehouse chief constable of Sussex Police; David Westwood of Humberside Police and Sir Ian Blair Commissioner of the Metropolitan Police Service.



## **CHIEF CONSTABLES**

The statutory powers of chief constables in Scotland have changed marginally since the Royal Commission. So too, the conceptualisations of their remit to control, direct and instruct police resources in the enforcement of the law.

Issue is not taken with the notion of their operational discretion per se. Concern centres on the absence of consensus around what exactly it means, how far it extends, and what effect such lack of clarity has on others' abilities to hold them democratically (or otherwise) to account.

### **Operational Independence at the local level**

The primary responsibility of policing is to preserve order and protect the public through independent application of the law. It is that notion that sets policing apart from other public services.

Legislation remains frustratingly opaque on the matter of independence. The evidence that is available suggests that police boards and authorities are still uncertain in the exercise of their powers to hold chief constables to account. That confusion continues in England and Wales, where statutory definitions have been more forthcoming, is apparent from HMIC's attempt, in October 2010, to clarify the remit of chief constables for the benefit of police authorities there<sup>8</sup>. Yet there are compelling reasons why such ambiguity must be minimised, most prevalently, to support robust accountability.

Perhaps the core principle of operational independence lies in the simplicity of the ruling by Lord Denning that the chief constable was 'not the servant of anyone, save the law itself'.

### **Operational independence at the national level**

There are also critical questions around how independence should play out on a national platform.

Through the ACPOS structure, there is clear acknowledgment of the need to respond to national requirements. At present, however, there is a singular legislative prerogative for

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<sup>8</sup> Her Majesty's Inspectorate of Constabulary: *Police Governance in Austerity: HMIC thematic report into the effectiveness of police governance*, October 2010.

chief constables to put local considerations first. Compounding that factor, there is no formal mechanism for holding ACPOS to account. The situation, is arguably, not tenable.

Given the dynamics of policing and the multitude of relationships, legislative provision and guidance that exists, it would be naïve to consider the possibility of establishing parameters that are definitive in terms of the matter of independence. Neither is it suggested that the chief constables' independence in law should be diminished. What must be sought is a better balance than that which exists and greater clarity about where those boundaries lie, particularly for those who are expected to hold them to account.

### **Her Majesty's Inspectorate of Constabulary for Scotland (HMICS)**

The statutory purpose of HMICS has changed only marginally over time. Its role in Scotland is to provide independent, professional advice to Ministers on any matter concerning the operation of a police force or police forces generally, which may include the state and efficiency of the policing.

HMICS is not empowered to compel forces or the constituent bodies of the SPSA to act on any of its recommendations or to direct recommendations at ACPOS. While it has an advisory role in chief officer appointments for individual forces it has no remit in national appointments. It is recognised as the source of independent advice on policing matters and, in any system of governance, it is that independence that sets it apart from other bodies within the direct governance system.

That said, the focus and role of HMICS has shifted on a number of occasions in recent years and there is question over the role HMICS has played, and should play in the future, in supporting the governance and accountability mechanism. Under current arrangements, that is perhaps most significantly the case around its engagement with, and support to, police authorities in terms of its professional advisory capacity. That question will be of particular importance in considering the breadth of competences it is argued that are needed within a robust system of governance and accountability.

### **Other Arrangements**

Given the frailties of legislative provision, the complexity of the matter and the perennial criticisms that have been levelled, it is perhaps not surprising that a number of existing

bodies - and others created especially for this purpose - have found themselves taking on roles that in some way endeavour to bridge the governance shortcomings. Their very existence might be seen as calling into question the resilience of current arrangements.

### **Audit Scotland (Accounts Commission)**

With the introduction of Best Value, Audit Scotland's involvement in policing has grown considerably. It is a statutory, independent organisation, which aims to ensure that local government bodies are using their resources economically, efficiently and effectively.

The Accounts Commission has powers to report and make recommendations to the audited bodies and to Scottish Ministers.

### **Auditor General for Scotland**

The national remit of the independent and Crown-appointed Auditor-General for Scotland is to ensure the propriety and value for money in the spending of public funds. This is achieved by audits of central government and other organisations such as government agencies, NDPBs and NHS bodies. The Auditor-General reports to the Parliament, consideration of reports being led by the Public Audit Committee. The post-holder is not, however, subject to the direction or control of the Scottish Government or of the Parliament in the exercise of his statutory functions.

Through their national studies, both the Accounts Commission and the Auditor-General can make recommendations to police authorities and audited bodies respectively but have no powers to enforce them.

### **The Association of Chief Police Officer in Scotland (ACPOS)**

Constituted as a company limited by guarantee its most recent annual report describes ACPOS as: *“leading and co-ordinating the direction and development of the police service in Scotland in equal and active partnership with the Scottish Government, police authorities and partner organisations.”*

ACPOS plays a significant role in developing and delivering national policing policy. However, anxieties regarding its lack of accountability exist. There is also a potential conflict of interests for its members over who they are ultimately accountable to – their own organisations (or boards) or the national good. The reality is that they are not

constitutionally bound by any collective decisions, as ACPOS has no statutory basis in that regard. Neither the Inspectorate nor the Accounts Commission has a locus in scrutinising ACPOS' activities and yet ACPOS is responsible for major policing decisions, initiatives and disbursement of monies that inevitably affect policing at all levels.

### **The Scottish Policing Board**

Established as an outcome of the Independent Review of Policing, the Scottish Policing Board brings with it some of the anxieties described of ACPOS. While it is recognised that the Board was intended as a discursive forum for national policing matters, it might be considered anomalous in the current context of governance that it has a non-directive remit.

### **The Police Advisory Board for Scotland (PABS)**

Created in 2000 under provisions contained within the 1996 Police Act and chaired by the Cabinet Secretary for Justice, its membership consists of representatives of CoSLA, ACPOS, the Association of Scottish Police Superintendents (ASPS) and the Scottish Police Federation (SPF). Its functions are to advise Scottish Ministers on general questions affecting the police in Scotland and to consider draft regulations on pay and allowances, hours of duty, leave and the issue, use and return of clothing, equipment and other accoutrements.

To some observers PABS offered a pragmatic solution to the Independent Review of Policing recommendation for a national strategic body oversight body. In practice, however, its focus on regulations was felt to detract from the more risk-oriented and strategic perspective that was required.

### **The Serious Organised Crime Taskforce**

Established in 2007 to "help deliver the Scottish Government's commitment to tackling serious organised crime", the group is essentially a strategic forum with a remit to foster ways of supporting Scotland's policing response to what are supra-force concerns. It enjoys ministerial leadership in the form of both the Cabinet Secretary for Justice and the Lord Advocate.

In terms of governance and accountability, it is again unclear who it compels or directs, who is accountable to it and, indeed, to whom it is accountable.

### **The Scottish Police Authorities Conveners' Forum**

The Scottish Police Authorities Conveners' Forum is a non-statutory voluntary forum whose membership is drawn from each of the constituent police authorities in Scotland. Its functions are to support members in fulfilling their statutory obligations.

Again this is a valuable forum but one which sits alongside, rather than within, the system of governance per se.

### **The Civil Service**

The civil service is a clear conduit for Ministerial work and is appropriately positioned to inform Ministerial thinking on policing. As an integral and key part of the Scottish Government, the Civil Service supports development and implementation of its policies, including those that affect policing. Given the momentum that has gathered around the emerging thinking on Police Service Reform, the Civil Service provides a valuable and significant level of support to Ministers.

Whilst accepting that the Civil Service is an integral part of the Scottish Government it is bound by its own code of conduct to act objectively and impartially in serving governments of different political persuasions. It is accountable to Ministers and, in turn, to Scottish Parliament. In those terms, although a significant contributor to the arrangements for policing in Scotland, it may be important to define whether it sits within or adjacent to the tri-partite arrangement.

### **Local Government Officers**

Local government officers, arguably fulfil a similar function for locally elected members as do civil servants for national government and ministers. They are again considerably influential in the position of support they offer elected members, police authorities and boards.

The question of their role in providing technical expertise to boards, and the intended level of that support, remain unclear. Additionally, their role in supporting local authorities in discharging their community planning responsibilities provides scope for significant conflicts of interest.

## **CONCLUSIONS**

In considering the chronology of changes, the opening of this abridged report concludes with the contention that a systemic revision of those arrangements is necessary to support the inevitable changes facing policing in Scotland in the near future.

Part II explores the same matters but from the perspective of stakeholders and affiliated bodies. Not surprisingly, the conclusions converge. That said, the contributing factors differ.

Taken from the context of impact on stakeholders and emergent bodies, it is further contended that the fundamental problems raised by the 1962 Royal Commission have never been addressed. That is, that the complex competencies required to govern policing fully and enable accountability have never been made available. Combined with difficulties of capacity, conflicts of interest and a continuing recognition of the systemic weaknesses the system of governance and accountability remains flawed.

That is not to detract from the significant contribution and commitment of locally elected members. Rather it is to suggest that democratic influence can only be a part of an effective overall system of governance and accountability.

Indeed, it could be construed that the plethora of affiliated bodies that have emerged, have done so out of a need to augment the otherwise flawed arrangements. Whilst all important in their own right, three concerns arise: first, the complex landscape that has evolved; second, the lack of cohesive accountability that has emerged; and third, the lack of accountability that exists particularly within that wider national system.

When combined with the continuing lack of understanding of the roles of each of the tripartite partners; a recognition of the lack of legislated authority for central government and persistent obfuscation around chief constables' 'independence', then the case for a systemic revision of the model of governance and accountability' is magnified.

In drawing together the complexity of evidence we have found, it is possible to identify seven key areas of anomaly which, it is suggested, must be addressed if any future model of policing in Scotland is to stand the test of time.

## **1. Defining the Policing Function**

Policing has evolved significantly since the founding concepts of 'guard, watch and patrol' stated in the 1967 Act. An evolved understanding of the need for policing to be an integral part of a wider system of public services centred on creating common benefit to communities has emerged as a commonly understood and widely accepted theme – but all within an equal acceptance over the primacy, and primary responsibility, of policing to preserve order and protect the public through independent application of the law. It is that notion that sets policing aside from other public services.

And yet, whilst common understanding over the role of policing has arguably developed, there is no single point of reference to define the policing 'function' in the 21<sup>st</sup> Century in Scotland. In the context of reform, that is anomalous and, whilst it is suggested that restating the accepted position should not be complicated, it will be a key step in disentangling the range of other anomalies which undermine the current system of governance and accountability.

Within that exercise, it would be of considerable benefit to review and restate the relationship between central government, local government, police authorities and chief constables.

## **2. Balancing Democracy and Governance**

A key principle in the governance of policing is that it is exercised through the process of democracy (as supported by Local Government Officers and Civil Servants). Essentially, chief constables can only be called to account by their police board or authority and those bodies comprise only elected members.

The strength within that system is clearly predicated towards the influence of local democratic representation. However, the complexity of policing as a business as a largely 'closed' professional environment and one which aims to exercise independence, draws question over the capability of the existing system to properly exercise the necessary levels of control and accountability. In those terms, any future systems should develop a fuller system of governance incorporating the wider skills, knowledge, competences, capabilities and capacity necessary to draw policing more fully to account. Whilst that may continue to be a single 'seat of governance', it may alternatively be a system of governance which

converges ultimately at a single point. Irrespective of this, the challenge will be in developing a suitable balance between professional capability and preservation of the democratic voice, at an appropriately influential level.

### **3. Balancing Operational Independence and Governance**

A second key principle in the governance of policing is that it aims to preserve the independence both of policing and the operational autonomy of chief constables.

That principle has been sustained and restated through a number of legal challenges. Yet interpretations within the current system of governance vary and manifest themselves in conflict, stalemate and further legal challenge or, conversely, a lack of proper accountability or control being exercised.

In those terms, it is important to establish what operational independence means; what policing should be independent from; and where the boundaries of responsibilities meet between chief constables, those charged with the provision of resourcing for policing and democratic will. Importantly, in any emerging system, it will be vital to build in appropriate measures to fully insure the 'level of independence' that it is determined necessary to protect both policing and chief constables.

### **4. Balancing Interests, Responsibilities and Capability**

Many individuals within the system of governance fulfil a number of often competing roles – whether they be elected members, chief constables or local government officers. Whilst it is almost inevitable that conflicts of interests will arise, there is a need for clearer and more distinct definition around codes of conduct and expectations whilst fulfilling the responsibilities to be carried by these various roles

In considering the range of competences and looking to the requirements for defined codes of conduct, consideration should also be given to the recruitment, selection, appointment and performance management of those chosen to exercise responsibility for governance.

### **5. Balancing the National and Local**

The current system - where the tri-partite arrangement allows for the provision of funding from central and local government, but where only the latter has any legitimate authority to



directly influence policing and, at that, a singular fiduciary responsibility to local communities - is anomalous. A more balanced and legitimised approach, allowing a proportionate decision making process, which would include the necessary balance (and recognising that requirements will dynamically shift from time to time) between national and local need must be established. Within that, consideration should be given to the need for a simplified, clear, linear model which, at any given time provides adequate levels of protection for local empowerment, but which also places primacy with the highest 'ranking' authority'.

Alongside those efforts, it will be important to consider where responsibility for strategic, policy, operational and tactical responsibility and decision making lies.

## **6. Simplifying the Governance Landscape**

Whilst the tri-partite arrangement serves as an important foundation, evolution of policing purpose, coupled with inherent weaknesses within the system of governance have seen the emergence of a complex and somewhat disjointed system of governance. The combined consequences, all but, preclude the necessary wherewithal to hold policing to account.

Within that, the emergence, and pre-existence, of a range of influential bodies that sit out with the legislated tri-partite structure and which are either not directly accountable, non-accountable or in some other way separated from the system of governance presents conflict, confusion and anomaly. Included within that mix are ACPOS, the Scottish Policing Board, the Serious Organised Crime Taskforce, local authorities and community planning partnerships and the collective extended remit for single outcome agreements. All cater for valuable functions, but within the overall architecture of a new system, the disjoints must be redressed and simplification should be sought.

Turning specifically to the role of ACPOS, whilst a legislated body and one which is significantly influential in policing, it is neither compelling, in terms of its members, nor is it an accountable body. There is, however, a clear need for a professional policy making body and for commonality across a range of policing doctrines. In looking to the future, there would be value in considering establishment of a formalised body, whether that be ACPOS or not, charged with legislated responsibility and with some level of authority or accountability for ensuring compliance within that, or a wider, framework of control.

## **7. Effective Governance and Scrutiny**

In a similar vein, there would be a benefit in reviewing the drive towards efficiency, effectiveness and best value and restating within clearly defined parameters where responsibility and accountability for each should sit within a revised system of governance.

Equally, in determining where accountability and responsibility lie, it will be as important to consider setting out what sanctions, if any, should exist; whom they should apply to; and where responsibility for exercising them should rest. It will be equally important to consider the developing thinking on the independence of policing, in that regard.

Turning then to some of the 'counter' checks and balances, within the emergent system of governance and reflecting on the issues raised earlier, the position of primacy over scrutiny and accountability for both Forces and Police Authorities and Boards adds a further layer of complexity to the governance arrangements. There are clear overlaps in the functions of HMICS and Audit Scotland in their scrutiny of Police Authorities and, whilst they are worked through on the basis of common understanding, it will be important to consider the role that such bodies would play in an overall, simplified, system of governance in the future. Of key importance would be the principle of subsidiarity and where such bodies would report to.

In considering those functions, it will be necessary to support those charged with responsibility for governance with adequate information upon which to base their considerations. To that end, it will be vital to construct an appropriate set of performance metrics that are consistent with any emerging structure of policing, its defined functions and the system of governance adopted.

### **Closing remarks**

As stated in the introduction to this document, HMICS hopes that this paper will facilitate further discussion on this issue which is fundamental to ensuring any reform of policing is effective.

## ANNEX A

### 1962 – The Royal Commission on the Police

The Commission's main recommendations were to secure a more effective system of control and accountability over the police. Existing arrangements were seen as ill-defined and gave rise to two anxieties: "*the problem of controlling chief constables*" and the lack of "*technical competence and inadequate system of inspection*" within police authorities.

In relation to the latter, the Commission deemed the matter of efficiency to be beyond the capability of police authorities and it recommended a fundamental shift in that responsibility to central government. Ministers would also be responsible for mutual aid; force amalgamations; and providing ancillary services. They were to be assisted by an enhanced Inspectorate. Police authorities would be responsible for providing and equipping an "adequate" force.

The Commission also aimed to preserve the position of chief constables as impartial agents of the Crown, emphasising that: "*the Secretaries of State should have no powers of direction*" and should not be held responsible for the act of individual officers or the day-to-day enforcement of the law; and, that a police authority "*would not be entitled to give orders on matters connected with policing ... those decisions would be the responsibility of the chief constable alone*". It further recommended formalising that principle, stating that "*the concern of a police authority with problems of law and order [should] be unequivocally recognised*".

### 1967 - The Police (Scotland) Act

The legislative outcome of the Royal Commission's findings were the 1964 and 1967 Police Acts of England and Wales and of Scotland respectively. The former states that a police force in England and Wales "*shall be under the direction and control of the chief constable appointed ...*". The Scotland Act was silent on this, indeed, it did little to regulate constabulary independence, making it clear only that chief constables have a duty to comply with instructions from the Lord Advocate.

The 1967 Act retained the constitution of police authorities in Scotland in spite of a recommendation to that effect by the Commission. They continued to be made up of councils and to consist wholly of varying numbers of elected members and leaving them to

concentrate on maintaining police forces, including the provision of pay, equipment, land and buildings, and the appointment of senior officers. Additionally, The Act intended that Ministers be charged with responsibility for efficiency.

The effect in practice, however, did not mirror this intent. Ministers stepped back, limiting their exercise of control to police “rules and resources”<sup>9</sup> and with the police authorities’ powers diminished, chief constables were able to more fully exercise their autonomy against the principles of the Commission’s recommendations.

That said, the judicial ruling by Lord Denning in 1968 in the case of *R v Metropolitan Police Commissioner ex parte Blackburn*<sup>10</sup> supported the chief constable’s position. In deliberating on the local policy of the chief of the Metropolitan Police not to prosecute shoplifters, Lord Denning determined that:

*“[A chief constable] must make steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. But in all things he is not the servant of anyone, save of the law itself.”*

It is argued, then, that these early legislative reforms were less than fulsome in resolving the fundamental weaknesses which were core to the Commission’s purpose.

### **1973 to 1993 - The Local Government Acts in Scotland**

Legislative change over this 20-year period focused largely on local authority reorganisation. In its final report the Royal Commission had recommended that in Scotland “the police authority for an individual or a joint police area be a committee and not the whole council or constituent council”. Its justifications were twofold: firstly and pragmatically, police forces were increasingly likely to straddle more than one local council; secondly and with more regard to principle, it did not consider the entire council “a suitable body to discuss and decide the important matters which arise in connection with the police”.

The recommendation was not, however, adopted in legislation and so under the 1967 Act each local council remained the police authority for its council area.

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<sup>9</sup> Walker 2000) op cit.

<sup>10</sup> *R v Metropolitan Police Commissioner, ex parte Blackburn* [1968] 2 Q.B.118 at 136.

Under the Local Government (Scotland) Act of 1973, arrangements for the formation of joint police boards were introduced and the remit for 'clerks' and 'treasurers' was later set out in the Local Government Housing Act 1989 and the Local Government Finance Act 1988, respectively.

Another significant addition to central oversight arrangements in the period prior to devolution was the creation of the Accounts Commission through the 1973 Act. This, and the subsequent expansion of its powers through the 1988 Local Government Act, had led to the creation of a new centralised scrutiny body for Scotland with powers to ensure the "economy, efficiency and effectiveness" of local authority resources including the police authorities and joint boards.

The Local Government Act 1992 gave the Accounts Commission yet further powers, this time to direct local councils to publish further information. These criteria were extended to include Best Value with the subsequent 2003 Act (see following section). Combined, these changes introduced a set of annual statutory performance indicators and, consequently, the foundations of an accountability framework for police performance emerged by proxy.

Whilst there was no direct attempt to change the fundamental arrangements for governance and accountability of policing during this period, collectively they brought new influences and interests. That said, they did not have any real impact on the key questions raised in the Commission and which, we argue, were not answered in the 1967 Act.

### **1994 to 2002 - the Police and Magistrates' Courts Act 1994, Police Act 1996 and the Crime and Disorder Act 1998**

In spite of the controversy generated by Lord Denning's 1968 judicial ruling it would take roughly thirty years before any major legislative changes to tripartite roles and responsibilities were proposed and legislated for. Even then, few were directed at Scotland. The provisions of the Police and Magistrates' Courts Act 1994 and the Police Act 1996 were the product of two government reviews published in 1993: the Sheehy Report, which aimed to "enhance the ability of the police service to manage itself and its staff effectively"; and a Home Office white paper that focused on governance and the lines of accountability for policing. It was the latter that acknowledged the shortcomings of the 1964 and 1967 Acts

using the terms “confusion”, “entanglement” and “uncertainty” to describe the functions of the tripartite members.

The solutions it proffered, at least for England and Wales, were enhanced strategic roles for central and local government and clearer management responsibilities for chief constables. Central government was to set national policing strategy and have greater fiscal authority. Police authorities retained responsibility to provide and maintain staffing levels, buildings and equipment but in addition were now to develop local policing and report on progress to the centre. Provision was also extended to include independent local people on boards. Chief constables were to have responsibility for the ‘day to day’ management of policing resources.

Scotland’s provisions remained largely unchanged. Under minor changes to the wording of the 1967 provisions ‘discipline’ was to be termed ‘*conduct and efficiency*’, while common services established by the Secretary of State would be for the purpose of “*promoting the efficiency of the police*” which they could now “*require*” forces to use. The Secretary of State could also “*prescribe*” what matters should be reported on in chief constables’ annual written reports, inferring the opportunity to set out national policing priorities. Whilst different from the legislative approach in England and Wales, this similarly strengthened the role of central government in the Scottish tripartite arrangements.

The 1996 Act did make provision for the subsequent establishment of the Police Advisory Board for Scotland in 2000. It did not, however, introduce a duty for central government to “take responsibility for the effectiveness of the police service across Scotland” (albeit Scottish Government guidance<sup>11</sup> implies that it did).

Thus, in effecting these amendments, the legislation widened the gap between England and Wales and Scotland.

Returning then to the question of a chief constable’s operational independence - as these Acts were coming into effect another judicial review was taking place<sup>12</sup>. In this instance, the case under domestic law against a chief constable was that he had denied the International

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<sup>11</sup> *Guidance for members of police authorities and joint police boards*. Scottish Government 2007.

<sup>12</sup> *R v the chief constable of Sussex ex parte International Traders’ Ferry Ltd (ITF)*, 1998.

Traders' Ferry (ITF) Ltd the protection of the law in the knowledge that without it, ITF's lawful trade would be disrupted by unlawful acts of obstruction and possibly violence from people protesting at the transportation of animals to slaughter.

In the ruling, another of Lord Denning's judgments on the independence of chief constables was cited: "*... it is for the ... chief constable ... to decide ... on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter.*"

### **1999 to 2002 – Devolution in Scotland and the Police Reform Act 2002**

And so it was within this context that, with the advent of Scottish devolution and the enactment of the 1998 Scotland Act in 1999, the majority of policing functions<sup>13</sup> were transferred to Scotland. Simultaneously the former powers and responsibilities of the Secretary of State were transferred to Scottish Ministers, but the tripartite arrangements for governance and administration of the police persisted.

In England and Wales, the Police Reform Act 2002 introduced new powers and responsibilities concerning the supervision, administration, functions and conduct of police. It extended the Home Secretary's ability to draw up codes of practice and exercise greater authority over performance matters, including new powers to require a chief constable to resign in the interests of efficiency or effectiveness, or to be suspended the interests of "[maintaining] *public confidence in the force*".

No equivalent legislation was enacted in Scotland.

### **2003 - Best Value: the Local Government in Scotland Act**

Introducing a duty to secure Best Value and accountability the 2003 Local Government in Scotland Act provided a new performance management, improvement and accountability, regime for local authorities including joint police boards and authorities. Scrutiny of these obligations would be dispensed by the Accounts Commission and HM Inspectorate of Constabulary for Scotland, while their enforcement would be the function of Ministers.

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<sup>13</sup> Those that remained reserved included, among others, firearms, immigration and national security.

The guidance placed an expectation on joint police boards and authorities to work with chief constables to produce and fulfil Best Value action plans and to agree a shared strategic direction for the force. It was through this joint responsibility that boards and authorities would be able to “*secure the maintenance of an efficient and effective police force in their area*”. Fundamentally, that returned responsibility for efficiency of policing from central to local government.

Whilst the 2003 Act brought about provisions for policing plans, objectives and performance of police authorities, that initial focus was quickly subsumed by a set of performance metrics that focused on operational policing delivery rather than on the confused governance arrangements that persisted. Within a short period of time, the Accounts Commission itself raised question over the confused governance arrangements and has persisted in doing so to date, as articulated most recently through the current round of joint Best Value audits and inspections of police authorities and forces in Scotland <sup>14</sup>.

Through its challenge, the Accounts Commission sought “*the delineation of responsibilities and the definitions of appropriate roles and procedures that [would] ensure that joint working between partners could be achieved to a consistent standard*”. Notwithstanding this, in the Scottish Parliament’s Justice Committee Report of 2008 on the effective use of police resources<sup>15</sup>, the “*somewhat cloudy*”<sup>16</sup> question of who has what responsibility was still unresolved.

Another aspect of the Act that was the introduction of community planning partnerships aimed at improving service outcomes for local areas. Paradoxically, and setting aside the significant and accepted benefit of the principle, the advent of community planning brought in yet another tier of accountability, compounding rather than clarifying the arrangements for governance and accountability of policing.

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<sup>14</sup> <http://www.scotland.gov.uk/Topics/Justice/public-safety/Police/local/15403/hmics-work/BVreports> or Audit Scotland’s, at: [http://www.audit-scotland.gov.uk/work/bestvalue\\_police.php](http://www.audit-scotland.gov.uk/work/bestvalue_police.php)

<sup>15</sup> Inquiry into the effective use of police resources, Justice Committee Report, January 2008.

<sup>16</sup> Citing the Accounts Commission in the 2008 Justice Committee Report, op cit.



## **2006 - The Police, Public Order and Criminal Justice (Scotland) Act 2006**

In a departure from the historic norm for governance of policing in Scotland, it is under this Act that the Scottish Police Services Authority (SPSA)<sup>17</sup> was established as a non-departmental public body, to provide a range of national support services to policing in Scotland. It is governed by a board appointed by Scottish Ministers that consists of police board convenors, chief constables and independent lay members. The chair of the board is a lay member appointed through a public appointments process. In addition, it employs its own staff and manages its own budgets.

Although the legislation does not set out their role, the explanatory notes state that it is the duty of board members to ensure that the SPSA is “run efficiently and effectively”. While HMICS can inspect the SPSA’s constituent support services, it has no statutory remit to examine the SPSA itself. That role can be performed by an agency working at the request of Scottish Ministers, or the Auditor-General for Scotland can himself decide to conduct an audit.

The Scottish Crime and Drug Enforcement Agency (SCDEA) reports to the same board. Given its operational locus it is perhaps unsurprising that some of the Act’s provisions for the SCDEA mirror those already enacted for police forces elsewhere. The Agency is statutorily “under the direction and control” of its Director General and it is emphasised that *Scottish Ministers must not do anything which would, or might, affect the decisions of the Agency about which particular operations are to be carried out by it in compliance with those priorities and how they are to be so carried out*”.

This is the closest that any Scottish legislation has come to providing a statutory definition of a senior police officer’s operational independence.

## **2007 - Performance Frameworks**

Whilst not directly focused on governance and accountability, the national performance framework, community planning partnerships, single outcome agreements and the Scottish Policing Performance Framework all set an expectation of what policing is to deliver and, consequently, much of the detail of what chief constables’ are to be held to account for.

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<sup>17</sup> Provides national training, IT and data systems and forensic support to the Scottish forces and maintains the Scottish Crime & Drug Enforcement Agency (SCDEA).

### **National Performance Framework**

The National Performance Framework, launched in 2007, is arguably a non-statutory measure which in part defines the direction of policing in Scotland. It includes measures to assess the effectiveness of policing and, more generally, the efficiency of and quality of public services. It does not determine targeted performance levels. Chief constables, then, have relative freedom to decide where to target activities and resources in order to deliver improvements.

The Framework is now underpinned by single outcome agreements (SOAs), negotiated at the local level by community planning partnerships.

### **Community planning partnerships**

While the police forces and their joint police boards and authorities are statutorily obliged to participate in community planning through their duties under the Local Government in Scotland Act 2003, they have their own separate governance arrangements. Community planning partnerships, in contrast, have no separate legal standing. In its guidance to community planning partnerships<sup>18</sup> the multi-agency Concordat Oversight Group (COG) now stresses that as all statutory public sector partners to the partnerships are ultimately accountable for public spending and policy performance they are also accountable politically and publicly for the content of the SOAs. Therefore a key step for partnerships is to create a secondary “effective mechanisms for joint accountability for SOA commitment” that will run alongside, rather than be incorporated into, the individual lines of accountabilities for their own resources and services.

### **Single outcome agreements**

The signing of the Concordat between the Scottish Government and the Convention of Scottish Local Authorities (CoSLA) in November 2007 saw the introduction of SOAs between individual councils and central government. The agreements set out objectives identified by local authorities and their partner agencies intended to help them achieve both local strategic priorities and in turn, Scottish Government’s national outcomes. In their second year of operation the responsibility for drawing up SOAs was transferred from the local

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<sup>18</sup> *SOA guidance for community planning partnerships*. Concordat Oversight Group 2008. Broxburn: Improvement Service

authorities themselves to their community planning partnerships and the secondary accountability mechanism that was created there.

### **Scottish Policing Performance Framework**

This Framework, also launched in April 2007, was the product of collaboration between ACPOS, the Scottish Government, Audit Scotland, the Scottish Police Authorities Convenors' Forum and HMICS. Its purpose, as a "coherent national model for the measurement and reporting of performance information", was to "improve local and national accountability" as well as helping police managers to provide more effective policing.

The Framework has continued to evolve and contains over 40 performance indicators intended to cover the breadth of policing activity. In addition, the Accounts Commission's separate statutory indicators have now been subsumed by it. It is also used by HMICS and Scottish Government as a basis for assessing police performance and informs other frameworks and monitoring regimes such as the SOAs.

It is perhaps worrying that there are some significant, but as yet unresolved, limitations: despite good intentions and intense background work, some of the statistical data remain inconsistent; the value or ability of some indicators to reflect policing activity fairly or accurately have been questioned; and there is still some unease that its indicators do not fit well with policing priorities falling out of the more rigorous process of the Scottish strategic assessment (or national business assessment). More specifically in terms of accountability, what 'poor' performance might look like and what should happen in the event of it has never been made explicit.

In concluding here, there is clear evidence of a move towards partnerships focused on strategic outcomes and it must be recognised that this is both a complex process and in the early stages of maturation. It is, however, neither complete nor conclusive. Where principle would dictate a need for shared and common goals, accountability in practice is hugely fractured with chief constables reporting separately to the parallel, and often disjointed, accountability mechanisms. At best, it is a confused landscape; at worst, it is one in which competing aims dilute, rather than concentrate focus.

## **2008 –Justice Committee Inquiry: the effective use of police resources**

What is abundantly clear at this juncture is that the matters raised by the 1962 Commission as requiring fundamental revision remained unresolved.

In compiling contemporary views on the status and viability of the tripartite regime, the Justice Committee report reflects much of the 1962 Commission's findings: too little direct input or challenge from elected members; the "misinterpretation" of the operational autonomy of chief constables; a different degree of structure and national consistency in Scotland from that imposed by statute elsewhere in the UK; a reduced role for police authorities in Scotland compared with those in England and Wales who could set strategic direction and produce policing plans to which chiefs are held to account; the possible conflict of interest for police authorities as service providers but with a monitoring and scrutiny remit; the under-resourcing of police authorities detracting from their ability to hold forces to account; the fact that joint police boards and even the two single-council authorities are not necessarily "cohesive bodies"; the lack of independent members in police authorities; and, the absence of independent full-time support to police authorities.

Not surprisingly, the Committee made recommendations intended to strengthen current arrangements "*in order to clarify the role and responsibilities of each of the partners and to enhance the capacity of police authorities to independently scrutinise chief constables and police forces.*" Scottish Government was tasked with re-stating and clarifying the roles and responsibilities of the tripartite members and with reviewing the feasibility of appointing independent members to police authorities in a professional advisory capacity. Police authorities were urged to seek sufficient, independent professional support and analytical capacity to enhance their ability to scrutinise the performance of their force and to take various measures to raise their engagement with local communities.

A further recommendation to Scottish Government was to "*introduce appropriate mechanisms to strengthen ACPOS' accountability in order to secure its legitimate status as the leadership of the police service in Scotland.*"<sup>19</sup> In its oral evidence to the Committee, HMICS further suggested that a similar tripartite arrangement to that for individual forces be "replicated at the national level", but with a formal mechanism to ensure accountability.

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<sup>19</sup> Paragraph 356 - *Inquiry into the effective use of police resources*, Justice Committee Report, January 2008

In its final report the Justice Committee went on to recommend that Scottish Parliament “initiate an independent review of the role and responsibilities of the police in Scotland” informed by its findings. HMICS was duly invited by the Cabinet Secretary for Justice to carry out the review.

### **2009 - The Independent Review of Policing, 2009<sup>20</sup>**

Following on from the Justice Committee’s recommendation, HMICS was asked to make recommendations for the “organisation, governance and accountability” of the police service that would best support policing at all levels, from the individual, local and everyday to the collaborative, national and specialist.

Its findings highlighted “serious challenges”<sup>21</sup>. Essentially, these were gaps in governance arrangements at the very local level; shortcomings in existing arrangements and their practical application at force level; and, the absence of a national forum for deciding how police resources should be used to manage risk effectively and achieve Best Value across Scotland. More specifically, concern was raised over the adequacy of current governance arrangements and the growth in influence of interests which lay out with the tri-partite arrangement.

The Review uncovered little evidence of joint police boards and authorities contributing to relevant SOAs and only a few examples of them even seeing them. Nor did it find much in the way of regular discussion with police authorities on how to balance forces’ resources for SOAs with those for non-SOA policing activities, nor any clear arrangements for performance information-sharing between the police authorities and councils. Under-developed performance monitoring was also a shortcoming of the governance arrangements as was the over-reliance of elected members on the views of the chief constable. Despite provisions under Best Value, members’ involvement in setting a strategic direction for the force or in its Best Value reviews tended to be limited.

Further difficulties - both in terms of public accountability and the conflicting demands of serving both a local authority and a joint police board or unitary police authority - arose

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<sup>20</sup> *Independent Review of Policing: a report for the Cabinet Secretary for Justice*, HM Inspectorate of Constabulary for Scotland, January 2009.

<sup>21</sup> Covering letter to the above from Cabinet Secretary for Justice, Mr Kenny MacAskill.

from the fact that joint police board and authority members are not directly elected or appointed to this roll.

The overarching recommendations focused on central government actions to bolster national arrangements. It proposed that legislation be drafted to impose a statutory duty on chief constables and police authorities to consider, when making decisions, “Scotland’s national policing capacity and capability, its national resilience to catastrophic events or strategic threats from criminality and the opportunity to reduce costs arising from any unnecessary duplication of services.” A more appropriate extended question may well be where (or in governance terms, how) to set the balance appropriately between local and national need.

As can be seen, both the Justice Committee Report and the Independent Review of Policing continued to focus largely on the absence of appropriate governance and accountability in policing. Although they tend more towards the balance between national and local priorities, they also highlight the need to clarify and strengthen the role of each of the tripartite partners and ACPOS. In its conclusion the Independent Review called for a national policing board that would bring together these agencies “to oversee and provide tripartite governance for those limited policing matters that need to be discussed and agreed at national level”. While this might be seen as simply building on, rather than redressing, weaknesses, the resultant creation of the Scottish Policing Board is nevertheless the most significant development so far to fall out of the Review’s recommendations.

### **Scottish Policing Board, 2009**

The Scottish Policing Board (SPB) was established in November 2009. Chaired by the Cabinet Secretary for Justice, the SPB’s core membership comprises senior Scottish Government officials, convenors of police authorities and boards, chief constables and, in recognition of the increasing role of local authorities in policing, representatives of CoSLA. HM Inspector of Constabulary also attends, but as an independent professional advisor. The group’s remit is to: provide a forum for identifying, and considering responses to, key national strategic priorities; review responses to national strategic priorities across Scotland; add impetus to activities of collective importance and provide a focus for output from this work; identify key matters on which to develop a collective position and communicate it to other parts of

government, the public sector and the public; and, maintain oversight of collaboration with other partners both within and outside Scotland.

The intention was that the SPB would build on the current system of local policing and accountability, complementing the role of PABS which had evolved largely to deal with matters of 'pay and rations'. However, its membership is neither wholly balanced nor fully representative of the membership of its constituent bodies. Whilst all eight police boards and authorities are represented, only three chief constables are regular core members. Setting aside this immediate anomaly, in considering the non-accountable and non-compelling status of ACPOS it is questionable whether, even then, they can be wholly representative.

Since its inception some of the main areas of its focus have been national strategic priorities, collaborations and, increasingly, efficiencies and police reform. Importantly however, despite its impressive list of functions it is essentially a non-directive body and has limited power to hold policing to account for its contribution towards national themes.

In those terms alone, it cannot be seen to have bridged the difficult gap in balancing the national and local need.