



Notes for

Mr. Thomas G. Flanagan, S.C.

Military Police Complaints Commission

to the

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Canadian Association for Civilian
Oversight of Law Enforcement

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CHECK AGAINST DELIVERY

Introduction

Thank you Gary, (*Moderator Gary Mumford, Nova Scotia Police Commission*) and good morning. It is an honour to represent the Military Police Complaints Commission here today, and to be invited to speak on this very important topic to this very important group.

Assuring the integrity and credibility of investigations of police misconduct has to be considered one of the pillars of responsible policing, and of assuring public trust and confidence in law enforcement agencies.

It is also an essential element of effective civilian oversight of law enforcement. We have a responsibility to the public and to the agencies we oversee to promote practices that ensure investigations of police misconduct are not only thorough and impartial, but are seen to be thorough and impartial by all sides.

As Paul Monty of CACOLE has said, “oversight is not a static entity...the civilian oversight community must continue to be open to new concepts and learn from other jurisdictions in order to remain effective.”

In that spirit, what I would like to do today is talk about some of the considerations involved in determining whether police misconduct should be investigated as an internal matter, by an outside agency, or as some combination of the two. I will not pretend to have all the answers, but I hope to at least provide some food for thought and discussion.

Before I go too deeply into those questions, I would like to take a few minutes to talk about the Military Police Complaints Commission itself, for a couple of reasons:

First, because we are only a little more than two years old, and some of you may not know much about us, and second, because the Commission’s particular mandate has an impact on the way we look at investigating police misconduct.

The Military Police Complaints Commission

The Commission came into existence in December of 1999, as part of a major overhaul of Canada’s National Defence Act. In fact, it was the most sweeping revision of the Act in more than 50 years, and dealt almost exclusively with the military justice system.

I am sure most of you here are familiar with at least some of the incidents leading up to the re-writing of the National Defence Act, the most notorious of course, being the murder of a Somali teenager by Canadian troops deployed to east Africa on a mission of mercy.

The Government of Canada ordered a full-scale public inquiry into the Somalia mission, and in addition, the late Chief Justice of the Supreme Court, the Right Honourable Brian Dickson, was called to chair two separate Special Advisory Groups on the military justice system.

Although the public inquiry was ended before all of its work was finished, its report, and the reports issued by the Special Advisory Groups were exceptionally clear on the urgent need for major reforms to the military justice system. The former Chief Justice was especially forthright in citing the need for a mechanism for independent review to ensure confidence in and respect for the military justice system.

This is the role the Military Police Complaints Commission was created to fill.

The Military Police Complaints Commission has much in common with other civilian oversight body, but we are unique in a number of ways. The Commission operates independently of the Department of National Defence, and reports directly to Canadians through Parliament. The Chairperson and members are civilians. The Commission is both an investigative body and an administrative tribunal.

The Commission is unique in reach: We have jurisdiction in Canada, and anywhere in the world where Canadian Forces Military Police may be deployed.

We are also unique in that the Commission not only reviews complaints about the conduct of military police, but also has exclusive jurisdiction to investigate and report on complaints of interference. Any member of the Canadian Forces Military Police who believes another member of the Forces, of any rank, or any senior official within the Department of National Defence has attempted to obstruct or otherwise interfere with his or her investigation can complain to the Commission.

Now, while investigating complaints about the conduct of Military Police is the responsibility of the Canadian Forces Provost Marshal, the Chairperson of the Complaints Commission monitors these investigations, reviews the findings and, at her discretion, can decide to assume responsibility for the investigation of a conduct complaint at any stage of the process, should it be deemed to be in the public interest. Similarly, although this has not happened in practice, the Chairperson can decide to ask the Provost Marshal to handle the investigation of an interference complaint.

The Chairperson also has the power to initiate an investigation of any situation, whether it is related to Military Police conduct or a question of interference, whether a formal complaint has been filed or not, and even if a complaint has been filed and withdrawn.

Unlike many civilian oversight bodies, the Commission cannot impose disciplinary measures but, as the head of a quasi-judicial body, the Chairperson does have considerable powers of investigation, including the right to call public hearings and issue subpoenas.

The Chairperson can make recommendations based on the findings of the Commission's investigations, and if any of the recommendations are not implemented, those responsible must provide an explanation to both the Minister of National Defence and the Chairperson. The Chairperson has the authority to release her reports to any member of the public, subject to the Privacy Act requirements.

That, in the proverbial nutshell, is what the Military Police Complaints Commission is all about.

Investigating Police Misconduct

When it comes to investigating police misconduct, we have the three choices I mentioned earlier:

- an internal investigation
- investigation by an outside agency, or
- an investigation in which internal and external investigators work together.

The most logical choice, in terms of ensuring both actual and perceived thoroughness and impartiality, would seem to be choosing an investigation by an outside agency – but I think we may be limiting ourselves if we answer quite that categorically. Are there situations, for example, where a purely internal investigation is appropriate or even desirable?

Internal investigation

From the point-of-view of public perception, the internal investigation, also known by the somewhat more pejorative “police investigating themselves,” is sometimes considered to be biased.

At the same time, used judiciously – and by that I mean for the investigation of relatively minor offences that do not involve senior officers or other circumstances that might give the case a special sensitivity – one could argue that an internal investigation may well be the best course to follow.

From the point-of-view of civilian overseers, I think it's important to the long-term relationship with the police services we oversee not to make mountains out of molehills. Effective oversight demands trust and mutual respect between those that oversee and the overseen.

The oversight body has to be seen and respected as an impartial advocate for improving the professionalism of the law enforcement agency. If cooperation does not exist between the oversight body and the police service, the result can be a lessening of morale, which can lead to the lessening of efficiency, which can have an effect on the community served.

There are other considerations. Internal investigations can be initiated quickly, using existing resources, and if I can go against the conventional wisdom, may be even more thorough than an investigation conducted by an outside agency.

I say that based on my own experience as a police officer. There is no denying that there is a kind of bond among police officers everywhere, in the sense that, "if you attack one of us, you attack all of us." It is important to understand however, that this feeling goes both ways, as in, "if you do something to dishonour your uniform, you dishonour us all."

In my experience, officers carrying out internal investigations will go out of their way – sometimes too far out of their way – to ensure allegations of misconduct are investigated very thoroughly.

Indeed, this is one of the difficulties with initiating an investigation by an outside agency. Officers attached to the police service being investigated are quite likely to react with resentment that they are not trusted to be unbiased. In some instances, circumstances may dictate that an internal investigation is the only practical alternative.

It could be that some specific expertise or specialized local knowledge is needed to carry out a proper investigation, or there may be questions of time, distance and cost involved.

This is certainly true for the Military Police Complaints Commission, which may be called upon to deal with complaints anywhere members of the Canadian Forces Military Police are deployed, including theatres of war, such as Afghanistan.

The latter, of course, can mean special problems. In a battle zone, the operational concerns of the mission and the safety and security of personnel involved in the mission must have precedence over the desirability of having investigators from an outside agency brought in to gather evidence and conduct interviews.

There may also be questions of jurisdiction to address: On some deployments, Canadian Forces regulations may be superseded by those of the United Nations, for example.

External investigation

Having said all of those things, the internal investigation of police misconduct does have inherent disadvantages with which all of us are familiar – and, increasingly, so are the police agencies we are charged with overseeing.

As police service managers become more and more conscious of how police are perceived by the public, they are quite happy, relieved even, to have allegations of misconduct, especially those involving senior officers or other sensitive matters, investigations by an external agency. More than ever – and I think civilian oversight has played an important role in reaching this point – police understand the need to be seen as above reproach. As well, in certain circumstances, it is required to call in an outside agency, such as the Special Investigation Unit in Ontario.

As an example, while I was Chief of Police in Ottawa, the local crown attorney was suspected of assault after an incident in the driveway of his home. The crown was alleged to have applied the toe of his boot to the behind of a teenage boy he felt had been harassing an elderly neighbour. Although it did not, strictly speaking, involve police misconduct, I was very conscious of how the public perceived the relationship between police and the crown, and I did not hesitate to call an outside police service to conduct the investigation.

Still, I would again raise the caution I mentioned earlier about demanding an external investigation in each and every case.

Beyond the potential damage to the relationship between the law enforcement agency and its civilian overseers, putting every investigation of alleged misconduct into the hands of an outside agency has, in the words of Professor Stenning of the University of Toronto,

“...the undesirable result of allowing senior police officers to effectively avoid any responsibility for responding to complaints and to the situations that give rise to them.”

I can tell you from experience, this is a temptation. It is a comfort to be able to answer questions from the media with a simple, all-purpose, "I am afraid I cannot comment; you will have to talk to the officers from wherever. It is their investigation." However, having said this, it is always necessary to not be frivolous, or a nuisance, and carefully consider your options.

Joint investigation

A third option is the joint investigation, in which investigators from some outside enforcement agency are brought in to work in cooperation with internal investigators.

This certainly has its advantages as well. Among others, the investigation of misconduct can start immediately as an internal investigation, and when the representative of the outside agency arrives, he or she can review what has been done so far, and carry on from there in cooperation with the internal people. I would suggest that only the preliminary gathering of facts and documents be done by the primary agency. The actual investigation should be done jointly.

A joint investigation is also helpful in situations where a specific local expertise or knowledge is needed. You can probably see where this could be helpful in cases involving alleged misconduct by a member of the Canadian Forces Military Police. An investigator from an outside agency might waste a lot of time just figuring out the acronyms, let alone understanding the particulars of military culture and the chain of command structure.

From the standpoint of public perception, the joint investigation allows an enforcement agency to demonstrate its willingness to open itself to outside scrutiny, without at the same time absolving itself of responsibility for the conduct of its own members.

Care should be taken when choosing the external investigator in such a case, to ensure they can truly be seen to be independent. For example, a police officer seconded to the primary agency, and under that command, would not be considered as an external investigator.

Conclusion

In summary, when the question is, “How should police misconduct be investigated effectively?” I would have to say, “it depends.”

There will be situations where an internal investigation is the most appropriate or the only practical course available, just as there will be situations where it will be quite obvious that only an external investigation will satisfy the need for an investigation that is in fact and in perception thorough and impartial. At other times, a joint investigation will meet this requirement.

I think the key here is flexibility, and for civilian overseers, a need to work with law enforcement agencies to determine a set of guidelines that will help both sides decide what type of investigation should apply in different situations. It is imperative, in my view, that a dialogue exists between the overseen and the overseer permitting this mutual understanding and agreement.

In the Canadian Forces, these guidelines are based on a number of factors, primarily the seriousness of the alleged offence, and the sensitivity of the alleged offence. “Sensitivity” is usually defined as an offence that involves a senior officer or Defence Department official, or an offence that involves sensitive material or that could potentially bring discredit to the Department.

You notice I use the word “guidelines” and not “rules” or “regulations.”

Every case is different, and the factors that determine whether a case can be considered sensitive or serious can vary. For example, an officer may be accused of a minor indiscretion, but if it is the twentieth instance of this kind of indiscretion within the agency over the past couple of years, the perception may be that this is no longer a minor incident, and perhaps an external investigation is required.

As a final consideration, I would say that if there is to be an error in determining the most effective way to investigate police misconduct, let that error be on the side of caution.

Thank you, and I look forward to taking your questions after the break.
