PRIVATE POLICY AND POLICING—DOES PRIVATE ENTERPRISE HAVE A ROLE IN DELIVERING THE OUTPUT OF PUBLIC SAFETY AND SECURITY?

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WHO IS RESPONSIBLE FOR PUBLIC SAFETY AND SECURITY? THAT IS THE fundamental question that will be addressed in this paper. It goes to the very heart of policing and also to the heart of the private security industry which has a very real stake in the continuing development of a now contestable environment and the resultant growth of private policing.

This paper will firstly focus on some of those changes and how they have affected jurisdictions in other parts of the world. It will also identify a number of valid reasons for why the inevitable problems linking private justice delivery with public policy imperatives.

The paper will then examine how the New Zealand Police Association perceives the growth of private security activity in the policing arena and identify additional impediments that impact on any private enterprise involvement in the delivery of the primary policing output.

Finally, solutions will be suggested that may serve to satisfy the demands of both the consumer and funding provider, whilst maintaining the integrity of public policing as an essential public good.

International Practices

Within the United States there are now almost twice as many people employed in private security as there are public police (Trojanowicz & Bucqueroux 1990, p. 131). In addition to private prisons run for profit that
house adults, there has been a tremendous surge in the number of private initiatives that handle juvenile offenders.

In 1990, US companies spent an estimated $250 million each year on private undercover drug investigations of their employees.

Litigants in civil suits can now choose to hire a private "rent a judge and jury" to settle claims, virtually bypassing the public courts.

The Federal Trademark and Counterfeiting Act of 1984 gave businesses expanded powers to protect their property and profits, including the right to conduct independent investigations, obtain search warrants, seize evidence, arrest suspects and pursue private criminal justice prosecutions.

In a keynote paper to the 18th Criminological Research Conference held at Strasbourg in late 1988, M. M.F. Ocqueteau, of the French Centre for Sociological Research into Penology, said that the growing demand for a larger private sector stake in crime control had arisen from the inability of police in all countries to meet public expectations. He said at that time that police strengths were virtually stagnant, but the volume of crime and public unease about violence and property crime was rising. More and more, people were looking to insurance rather than to justice as the answer to the losses they sustained from crime. He believed there was no point in calling all the time for stronger penalties against offenders because the police no longer had the capability to arrest enough of them. One unwanted and serious consequence as he saw it, was that communities were turning away from the police and formal law and order towards "self-help" initiatives, which in France meant vigilante groups sponsored by the semi-fascist National Front. It was generally the poorer people who were attracted to this "solution" because they could not afford private security or prohibitively expensive insurance.

M. Ocqueteau went on to say that the private security sector in Europe was skilful in presenting itself as the "junior partner" of the police in the war against crime and the maintenance of law and order with one of the fastest growing parts of the private sector being the provision of bodyguards and sophisticated protection to the wealthy.

He said it was clear that private security firms were also able to offer clients access, albeit clandestine, to confidential data, usually through the "old boys" network. There were plenty of examples of illegal activities, electronic surveillance and industrial espionage among them and the same firms that hired private security to protect their secrets were none too scrupulous about gaining access to the competitor's secrets.

Possibly his most telling observation was that:

it is unrealistic to expect the private sector to have the same objectives as the public police. Profitability is their objective, not the prosecution and conviction of the offender" said M. Ocqueteau . . . There would always be a problem in reconciling private and public interest in crime control (Judge 1988, p. 13).

A leading British Criminologist, Professor McLintock of Edinburgh University, told the same conference that in Britain there was a whole range of private security involvement with crime investigation that was not
susceptible to public policy considerations or scrutiny. He instanced computer fraud and said the serious crimes committed by some employees of firms were rarely prosecuted by banks and large commercial firms because of the adverse effect of publicity (Judge 1988, p. 13).

The private organisations, however, were adept at utilising the public criminal justice system to reduce their own costs, as in the case of prosecuting shoplifters, and the more that commercial opportunities were developed he said, the bigger would become the attraction of working in the private sector for senior police officers, thus robbing public policing of its most valuable resource.

A Swedish contributor informed delegates that concern in his country was not about private involvement in crime prevention, but more towards viewing private investigation as a threat to civil rights (Judge 1988). After all, it was motivated by client demand and they that paid the piper called the tune—a melody that may not be to everyone's liking.

An American, Abe Rosentiel of the Civil Liberties Union spoke of the growth of vigilantism in poorer areas, a response to an ever-declining level of effective policing. He illustrated his point by referring to a Detroit incident where two men who burned down a house notorious as a "crack distribution centre", had been acquitted amid public acclaim after a judge allowed their plea that burning down such a threat to their neighbourhood amounted to self-defence (Judge 1988).

As elsewhere, private investigation in Holland was linked to "private justice". Employees caught stealing were sacked, not charged. Insurance claims were rejected where criminal behaviour was revealed, but this was not reported to the police.

It emerged quite clearly from the conference that the concept of private policing cannot be separated from private justice.

In the United Kingdom, the most graphic illustration of the inroads private enterprise has made into the traditional police environment has been the sale of whole police forces to private enterprise (Judge 1991, p. 34). This has occurred in respect of at least three port constabularies at Harwich, Felixstowe and Tilbury in central London. These three forces had traditionally been part of mainstream policing in Britain but have now been sold in entirety to the port companies, including all the jurisdictional powers previously exercised, but without the oversight of the Home Office, Police Complaints Authority, or other traditional monitoring agencies.

In describing the new way of operating, Inspector Tom Lund-Lack, the former Deputy Chief Officer of the Felixstowe Port Police, rapidly came to the conclusion that the new way had serious limitations. He cited the selection criteria and lack of training as the most serious implications and concluded that "the proper functioning of the police is essentially incompatible with the profit motive, which will always override considerations of impartiality or accountability" (Lund-Lack 1990, p. 798).

Also worth considering, according to American commentators, is the impact that parallel private operations have in the police environment. Consider the potential conflicts that can arise when a company hires a private firm to investigate possible drug trafficking or drug abuse among its
employees. If the public police are not informed, such initiatives not only risk compromising ongoing police investigations, but may deny the police important information they need to do their job well.

On the other hand, if the public police do become involved, are they lending their credibility and potential liability to enterprises over which they have little, if any, real control? (Trojanowicz & Bucqueroux 1990, p. 133).

Private Justice v. Public Policy

An overriding concern of this debate is whether the expansion in the number of private police initiatives threatens the very future of public policing. A recent article in New York magazine on the city's crack problems inadvertently underscored the potential threat.

The article took note of two success stories—one in which the Police Department's acclaimed Community Policing Outreach Program (CPOP) succeeded in helping a woman rid her Harlem apartment complex of drugs, and another that talked about how residents in a more affluent neighbourhood had hired a private firm to patrol their streets to drive out the crack dealers (Trojanowicz & Bucqueroux 1990, p. 134).

Viewed independently of each other, any one of the examples might seem merely interesting. But viewed as part of the ongoing process of privatisation, they raise the issue of whether we are on the brink of redefining what is meant by the concept of justice in this society. Is justice an ideal that we strive to achieve through public debate and tax funded initiatives? Or is it yet another commodity that can be offered for sale in a free market economy?

Are private initiatives serving a new niche in the market, or filling a vacuum that the public police should be providing? Does this herald a future where those who have the option choose to ignore the public police in favour of hiring private firms to provide them with as much help as they want and can afford? Will taxpayers therefore become increasingly reluctant to support public services that they perceive as primarily serving the poor?

As a consequence, will this intensify pressure to privatisate the public police? In this budget cutting era, New Zealand has seen many government agencies become private for profit enterprises. Many believe that the private sector is more efficient, more effective and less costly, and to a degree, they are probably right. Will we soon see communities subcontracting for all, or part, of their police service from private sources?

While this notion may appeal to some, it is in reality, severely flawed. The law provides private corporations protection from public scrutiny, whereas the major feature of public initiatives is their openness, transparency and accountability for the public good.

Private corporations are in business to make a profit, which means their primary responsibility is to their shareholders. Public institutions are ultimately held accountable to the people they serve. If private enterprises continue to encroach on public functions, will corporations see their traditional freedoms eroded, to ensure they act in the public interest? Or, instead, will this mean that the increasing privatisation of public justice poses a serious threat to our cherished liberties and civil rights?
As the examples mentioned earlier demonstrate, the question is no longer whether the trend toward privatising public justice should continue, we are already too far down that road to turn back completely. Therefore, the crucial question is whether these changes will occur piecemeal and poorly, or thoughtfully and well. What lines will be drawn, and who will draw them? The police, the frontline troops of the entire criminal justice system, face crucial questions that they must begin to address now loudly and clearly and with one voice if their input is to become part of the dialogue. The New Zealand Police Association believes that the public should clearly be policed by public police officers.

From the examples already discussed, the substitution of private police for publicly provided law enforcement has very real public policy implications, primarily because the "bottom line" must be the final arbiter for private enterprise involvement, taking precedence over any public policy considerations.

In addition, the Association believes that the "output" of safety and security belongs to public police officers because they are disciplined, experienced in it for the whole of society's good, and most importantly, accountable to the public. Police are accountable in both statutory and common law to every citizen in the western democratic model.

They have to satisfy rigorous selection criteria and complete an extensive period of training. They are also subject to a rigid code of discipline affecting both their public and private lives and policing itself is overseen by a system of legal checks and balances to protect us all against abuses by the police.

Private security guards need not adhere to the same procedural restraints as the public police. Where does a company's right to know about off the job behaviour that could impair an employee's performance end, and the employee's right to privacy begin?

Since private security operatives can testify in court, as private citizens, about what their investigations uncover, do they therefore actually have greater freedom to make cases against drug dealers than the public police? Or does this grant them undue licence to trample on an individual's civil rights?

What legal and ethical responsibility does a private security firm have in sharing information about illegal activity? Many private firms are hired only to investigate drug problems among line workers, not management. But if a private investigation reveals that a valued and virtually irreplaceable employee is dealing in drugs, whose rights will prevail if the company chief executive orders the private security firm to hide this information? As states pass new laws to hold drug users more accountable, will companies have the right to divert employees into treatment without reporting them to the police?

Protection of assets, both animate and inanimate, is critical to society in purely pragmatic terms but it is also a subject of more general concern. Protection, even in democratic societies, impacts on civil liberties, personal freedoms and privacy, to say nothing of personal safety. In addition, poorly implemented protective functions can place that which we hold dear in severe peril. Thus checks placed on protection oriented organisations, individuals and practices are extremely important issues (Swanton 1992, p. 6).
Most jurisdictions have legislation designed to control the private security sector industry in some degree. But apart from imposing controls on licensing and registration of personnel and businesses, along with certain aspects of company administration and harassment of citizens, such legislation does little in effect to safeguard the rights of the public.

Few private security operatives are sworn as special constables, the great majority possess powers no greater than those possessed by citizens generally. None of the industry statutes confer special powers. With very few exceptions, such as the statute which underpinned the 1982 Commonwealth Games, do private security operatives exercise any public authority. Even private sector conducted passenger screening personnel at airports possess no legislated authority (Swanton 1992, p. 7).

A number of bodies exist to represent private protection, such as the New Zealand Security Industry Association (NZSIA) and Australian Security Industry Association Limited (ASIAL). Both are employer organisations.

Unfortunately, some of these organisations possess standards and/or codes of ethics which are rarely, if ever, implemented by the wider industry. This situation is in part due to the fact that the overwhelming majority of practitioners are not members of industry representative bodies.

But, it is also due to the fact that none have clear protocols for the reception and resolution of client or public complaints in respect of members. Larger companies have their own employee behaviour codes which are enforced with varying degrees of commitment, while smaller companies operate in accordance with market forces applicable at the time. If they do not satisfy their clients in sufficient numbers, they do not remain in business.

Although client satisfaction is a powerful influence on private sector performance, it is a two-edged sword. It keeps companies lean and highly focused on the one hand but, alternatively, competition keeps margins distressingly low. Slim margins mean relatively poor wages and the quality of many private sector operatives reflects that bind. In addition, despite the beneficial effects of competition, some low calibre businesses do manage to remain afloat, fleecing the unwary.

On the other hand, police agencies in Australasia are universally regulated by statute, in addition to which, the various powers to enter premises, arrest, search, question, detain and seize evidence and so on, are also contained in a variety of laws.

In terms of behaviour control and public complaints, most police agencies are now subjected to formal external controls. Those controls are variously exercised by Ombudsmen or Police Complaint Authorities. In addition, police agencies are all equipped with internal affairs sections responsible for investigating complaints. Police Ministers are sensitive to complaints lodged within their portfolio and they, along with senior administrators, also play a controlling role relative to employee misconduct. Thus, one group is primarily controlled by market forces and the other by internal scrutiny and external overseeing bodies, a situation that acutely reflects their different orientations (Swanton 1992, p. 8).

The other significant area of difference is in relation to the level of training provided to public police compared with their private counterparts.
Within Australasia, all recruits, cadets or trainees, undergo periods of basic training and probation ranging upwards of two years. During this time, they are supervised very closely and have their performance continually monitored.

The same luxury would not be available to private operatives and the custom and practice of private security, certainly in New Zealand, is to provide a modicum of instruction because of the cost factor and to unleash the new employee as soon as possible. Certainly, the roles undertaken at present in New Zealand are limited, but nevertheless, they involve significant "client contact". The New Zealand Police invests in excess of $60,000 in training alone for each recruit who graduates from the Royal New Zealand Police College, a figure likely to dissuade the most optimistic alternative provider.

Private security has an important role to play, as long as it is in the "private" domain. Privately contracted security people and the provision of surveillance and security equipment both have a legitimate place supplementing traditional police service. If companies and some individuals want to pay for something extra because there must be a point where public policing, universally available, ceases to be provided, then that is all right. But they should not have to hire private security firms to obtain what should be a basic public responsibility in the first place. It is not the job, nor should it be the job, of private security firms to carry out criminal investigations and apprehensions, or normal day to day policing in the community.

The arguments provided outlining the philosophical incompatibility of a profit driven orientation, the difficulties with recruiting, training and controlling private police and the major public policy issue of private policing equalling private justice are sufficient in themselves to justify the pre-eminence of public police. But the argument is also ably supported by economic theory which clearly defines the policing output as a public good along with other primary state responsibilities such as health care and education.

Public goods are those goods which if supplied to one person can be made available to others at no extra cost. Once produced, the producer is unable to prevent anyone from using them. Because of their inability to be made exclusive, public goods are unlikely to be produced by private producers, since the good could be obtained without payment to the producer. As such, public goods are provided by governments and paid for through compulsory taxation. Police services are public goods in that they are available to the community as a whole.

Private goods, on the other hand, may be defined as those where exclusion may be practised by both producer and consumer. The producer can restrict use of the product to those consumers who are willing to pay for it. Any limitation on access is therefore incompatible with the delivery of public goods, yet another flaw in the private policing protagonists' argument (Berwick 1988, p. 11). Most people in the security industry are worthy of respect, but the security industry is not accountable like the police, and it is not subject to the same checks and balances to protect people against abuses of the system.
There always will be a blurred line between the role of the police and the role of the security industry in some instances. It is impossible to say where that line should be drawn, but ultimately, the primary provider of public policy must be public police.

The delivery of public safety and security is quite clearly a "public good", funded by the taxpayer who has a clear expectation of receiving a service corresponding to the input provided. The consumers are as diverse as the society from which they are sourced, but they are entitled to absolute fairness and impartiality irrespective of any socioeconomic delineations.

The service must be provided without fear or favour, with the objective of being meeting the expectations of all the consumers. This cannot be guaranteed by anyone other than public police. The requirement of any potential private provider to deliver an equal service to all, irrespective of the cost, would be in conflict with the overriding desire for that private provider to maximise their own utility to satisfy the need for profit.

When all these factors are taken into account, any suggestion that private enterprise can ever achieve a pre-eminent role in the delivery of the policing output is a nonsense. However, while the concept of major private enterprise involvement in traditional policing is dispelled as a myth, those of us with a stake in the public policing industry cannot just sit back and ignore the contemporary drive for greater effectiveness and efficiency in resource utilisation and output provision. Some suggestions as to how this may be achieved are follows.

**The User Pays Principle**

While the majority of policing functions must be provided free of charge, there are nevertheless a number of areas that could sustain an argument based on a concept of user pays, particularly if some of the product of the interaction has an element of "private goods" about it.

The capacity of police authorities to charge for specific services has a number of legal ramifications and has received attention in the courts over the years. A case frequently referred to is *Glasbrook Brothers Limited v. Glamorgan County Council* (1925) AC 271 (1925) 41 Tlr 215, in which the Lord Chancellor stated:

> No doubt there is an absolute and unconditional obligation binding on police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, for protecting life and property from criminal injury; and the public who pays for this protection through the rates and taxes cannot lawfully be called upon to make a further payment for that which is their right . . . I think that any attempt by a police authority to extract payment for services which fall within the plain obligations of the police force should be firmly discontertenanced by the Courts.

Legal advice indicates that police would only be legally justified in charging a fee for services in two situations:
• Where the legislation specifically allows a fee to be charged; or

• Where the police are carrying out some service beyond their ordinary duties (Berwick 1988, p. 2).

Accordingly, it is necessary to examine the role and functions of a public police force before one can determine the appropriateness of applying charges to particular services.

Whilst all forces are established under unique legislation, the functions common to all encompass the protection of life and property, the preservation of order, the prevention and detection of crime and the apprehension and bringing to justice of offenders.

Police forces are funded and structured so as to achieve the goals referred to. Manpower is deployed and capital resources applied according to demographic and other considerations to ensure that a satisfactory service is provided across the community.

Equally, however, police forces over the years have attracted a number of functions which do not fit within the prescribed charter. Such functions include:

• the issue of non-police warrants

• the provision of wide load escorts

• driver's licence tests

• photographs for insurance and other purposes

• transportation of prisoners

• issue of gaming and betting permits

• ex officio duties for other government departments

• security escort duties

• processing enquiries from insurance companies

• vetting of liquor and firearms licences

• acting as clerk of court

• provision of security to government premises; and

• the provision of patrols and security services to sporting and entertainment events.

This incomplete list of extraneous duties performed by police, particularly on behalf of other government agencies, illustrates the breadth of activities currently associated with the police, but not part of the policing mandate. Historical reasons for the attachment of such functions may be
many and varied but are certainly influenced by the police being the only government or social organisation readily available twenty-four hours a day.

It is recognised that certain classes of police activity and/or services have traditionally attracted the payment of fees. Such services include the provision of accident investigation reports for insurance purposes, special traffic escorts when transporting large loads, and the provision of photographs, licences, and so on.

As such charging practices are already in place, it is apparent that the public does accept that certain services provided by the police are of an obviously extraordinary nature and should therefore attract charges to the applicant.

Associated with this is the current trend of cross-charging through program budgeting, as currently employed in government. It is recognised that charging other departments can produce true economic benefits (as opposed to a mere paper shuffle) due to the "client" department being forced to recognise, and justify, the full cost of a particular procedure or investigation, and thereby, through cost-benefit analysis, determine the optimum level of police service for which they are prepared to pay (Berwick 1988, p. 4).

So it is possible that greater attention can be paid to determining what can be recovered from other governmental agencies, or the private sector, without compromising the underpinning philosophy of public policing. Present use of police cells to hold Justice Department sentenced and remand prisoners is an example in New Zealand.

The other area worthy of consideration is how much public police, on a collective or individual basis, can become involved in private sector activities. This is focusing on the use of serving police who are utilised on their days off, or rostered to respond to a specific request for service in return for a fee.

The police have valid concerns about what these changes mean. One important issue of immediate concern is the proper role of public police in private ventures. Some departments discourage their officers from moonlighting in private security, arguing that this can impair performance on the job by contributing to fatigue and burnout.

Others encourage this practice, and some even allow the officers to use police equipment, including patrol cars, on their off-duty security jobs, in the belief that extending the visibility and presence of the police in the community is a bonus to community oriented policing.

While the concept of extraordinary activity is worthy of consideration there are a number of questions that need to be answered before this course of action could be properly pursued (Trojanowicz & Bucqueroux 1990, p. 131).

Does the use of moonlighting police officers in private security substantially contribute to overall public safety?

Are police departments risking the possibility that this practice may unwittingly extend their liability to private ventures?
Should private firms be required to compensate departments for marketing and training and experience that the officers acquired at public expense?

Who should develop the models that communities can use to draft regulations for private security firms, to ensure that citizens have redress if they are harmed?

Should departments execute contracts detailing particulars concerning these issues whenever they allow their officers to moonlight for private firms?

To whom do moonlighting police officers owe their allegiance—the Police Department, the security firm or the company that hires these firms?

Should officers who moonlight receive guidance or written directives concerning proper conduct in their off-duty jobs?

How do officers handle situations when they may be asked to act improperly? There may be occasions, for example, when moonlighting officers will be asked to ignore drunk patrons staggering to their cars, or instructed to shoo away intending patrons on the basis of race or sexual preference.

Are departments putting their credibility on the line when officers work in part-time private security jobs?

Do they have a legal right to sanction employees who violate department rules in off-duty employment?

Does the general public understand the differences between public and private police?

Do citizens think that providing information about crime to a security guard ensures that it will be shared with the public police? (Trojanowicz & Bucqueroux 1990, pp. 131 & 133).

It would also be necessary to categorise events that should or should not attract a fee for police service with the principles of "public" and "private" goods being employed. A delineation of events into those of a community nature and those of a commercial or profit motivated nature would seem an obvious starting point (Berwick 1988, p. 13). There are a number of obvious "fish hooks" in this process but it does work very well in places, particularly the United States, and the United Kingdom where football matches have been policed for years by police staff working on their "days off".

The benefits to contractors and consumers alike are obvious and a greater involvement by public police in private enterprise may be worth very serious consideration. In addition, the control department's keen interest in effective resource utilisation may be satisfied if a return in fiscal terms can be provided.

The public policing industry should view the pressure being applied by the private sector as more of an opportunity than a threat as the strengths of
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delivery by paid, professional, public police, far exceed the private alternative whose weaknesses are apparent for all to see. Those of us who are involved in public policing must strive to "pick up our act" and ensure that the taxpayer receives value for money and the scrutiny of the control departments as a means of improving our efficiency and effectiveness is welcomed.

From an industrial perspective, this may require flexibility and a willingness to be innovative and confront change positively, attitudes the New Zealand Police Association recognises as vital if we are going to face the threats posed by private enterprise or by sections of the bureaucracy smitten with notions of policing being a contestable environment.

Are we headed toward a future like the one portrayed in the movie "Robocop", where profitability was the sole measure of police performance, and cops for hire brutalised any unfortunates who happened to cross their path? Or are we on the brink of a new era in which police departments will strive to become more user-friendly as a way of competing with private initiatives?

Many people still see their police department as a forbidding institution or as a maddening bureaucracy. Private enterprises, in contrast, work hard at making people want to call them first for any job. Community policing may prove to be the vehicle that allows police departments to market themselves better to the consumers on whose tax dollars they depend.

The police can choose to see the increasing privatisation of public justice as either a threat or an opportunity. Competition from private sources may spell the end of public policing as we know it, but it may also be the goad that prods departments toward delivering the kind of police service that people want.

The importance of the challenge facing the police cannot be overstated. The decisions about how best to contend with the increasing privatisation of public justice will shape the world that our children will inhabit. As we traverse the final decade of the 20th century, we must lay the proper groundwork for the kind of world we want to see tomorrow.

References


