

PARLIAMENT OF NEW SOUTH WALES



Committee on the Office of the Ombudsman and the Police Integrity Commission

REPORT ON THE INQUIRY INTO SCRUTINY OF NEW SOUTH WALES POLICE COUNTER-TERRORISM AND OTHER POWERS

Together with Committee Minutes

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Terms of Reference

That, in accordance with its statutory functions under s.95 of the *Police Integrity Commission Act 1996* and part 4A of the *Ombudsman Act 1974* the Committee on the Office of the Ombudsman and the Police Integrity Commission has resolved to conduct an inquiry into:

- (a) the functions of the PIC and the Ombudsman under the counter-terror law of NSW and in relation to oversight of the police use of covert and coercive powers;
- (b) oversight of the conduct of NSW police officers involved in the Counter Terrorism Coordination Command;
- (c) trends in anti-terror laws and oversight of these extraordinary powers;
- (d) impact of the growth of police powers on the nature of external police oversight; and
- (e) any other matter that the Committee considers relevant to the Inquiry;

and report to both Houses of Parliament on the inquiry.

Chairman's Foreword

This report is the final report of the Committee's inquiry into scrutiny of New South Wales Police counter-terrorism and other powers. Since the Committee's *Interim Report on an Inquiry into the Police Integrity Commission's Jurisdiction to Oversight the Protective Security Group* was tabled in March 2005 there have been significant and substantial increases in police powers and resources. While the *Interim Report* was interested in tracing the evolution from Special Branch to the Counter Terrorism Coordination Command, this report has focused closely on the types of risks inherent in such police work and appropriate levels of oversight for managing such risks.

The report draws on foundation work done by the Police Integrity Commission in conducting a risk assessment of the Counter Terrorism Coordination Command. It also draws on the experiences of internationally comparable policing agencies. In particular, it examines the experience of the London Metropolitan Police following the July 2005 bombings in London. I note that since the death of Mr Jean Charles de Menezes in July 2005, the Anti-Terrorism Branch officers shot, but did not kill, Mr Muhammad Abdulkahar during an unsuccessful counter-terrorism operation in June 2006. Additionally, two officers involved in the death of Mr de Menezes were involved in another fatal police shooting in November 2006.

If we are to trade some of our liberties for uncertain security, we must be as sure as we can that these powers are not abused. To this end the Committee has made a number of recommendations. Chief amongst these are that NSW Police should implement the recommendations contained within the Police Integrity Commission report *Management of Misconduct Risks by the NSW Police Counter Terrorist Coordination Command: An Assessment*.

NSW Police gave evidence that the reporting requirements in the *Terrorism (Police Powers) Act 2002* were sufficient for the purposes of public accountability. In particular, the Attorney General's annual report of the operation of the *Terrorism (Police Powers) Act* was seen to provide public transparency for these extraordinary powers. However, not one report has been tabled by the Attorney General regarding the operation of this Act. This is critical, as these powers have been used in New South Wales in Operation Pendennis. The end of the third reporting period is rapidly approaching. The Committee has recommended that the Attorney General table all the annual reviews of the *Terrorism (Police Powers) Act 2002* as soon as possible.

The Committee considers that the recommendations made in this report contribute to the public safety of all people in New South Wales, as well as making clear public expectations about the exercise of these powers by NSW Police.

Paul Lynch MP
Chairman

List of Recommendations

RECOMMENDATION 1: The Committee will seek regular progress reports from the Police Integrity Commission regarding NSW Police implementation of the recommendations contained within the PIC report Management of Misconduct Risks by the NSW Police Counter Terrorist Coordination Command: An Assessment.

Should the PIC's recommendations contained in its report Management of Misconduct Risks by the NSW Police Counter Terrorist Coordination Command: An Assessment not be implemented, or should they prove not to be effective, the Committee will consider recommending legislation to reintroduce a statutory audit..... 71

RECOMMENDATION 2: The Committee recommends that the Attorney General table all the outstanding annual reviews of the *Terrorism (Police Powers) Act 2002*..... 72

RECOMMENDATION 3: The Police Integrity Commission and the Office of the Ombudsman ensure that appropriate members of its staff have Commonwealth security clearance. 73

RECOMMENDATION 4: That the Attorney General raise the matter of uniform information sharing arrangements between oversight agencies with the Commonwealth Attorney General, in order to remedy existing statutory anomalies that limit the capacity for information sharing between such agencies. 74

RECOMMENDATION 5: It is recommended that the *Police Integrity Commission Act 1996* be amended to provide the Inspector with jurisdiction to investigate alleged improprieties and misconduct by non-PIC officers, in circumstances where:

- the conduct of a PIC officer also is involved; or
- there is a connection between the alleged misconduct and the activities of the PIC; or
- the legality or propriety of the PIC's activities is called into question;

and the conduct is conduct of a type that would normally fall within the Inspector's jurisdiction.

It is further recommended that permanent Parliamentary oversight for the Crime Commission be established in the manner of existing oversight for the Police Integrity Commission and the Ombudsman. 76

RECOMMENDATION 6: The Committee recommends that the Attorney General refer the codification of legislation providing for police powers, including counter-terrorism-related powers, to the Law Reform Commission for consideration, with particular reference to issues of consistency regarding approval, authorisation and accountability regimes. However codification should only be considered if the rigour of the current approval and oversight systems are maintained. 78

RECOMMENDATION 7: The Committee recommends that the Attorney General make a referral to the Law Reform Commission to consider a Public Interest Monitor for New South Wales. 79

Chapter One - Introduction

- 1.1 This report follows on from the Committee's *Interim Report on an Inquiry into the Police Integrity Commission's Jurisdiction to Oversight the Protective Security Group* which was tabled in Parliament in March 2005. The Interim Report examined previous oversight arrangements for police units that conducted substantially similar work to the former Special Branch. With the incorporation of the Protective Security Group into the Counter Terrorism Coordination Command (CTCC), the Committee was concerned that police work that had previously been identified as high risk and requiring special oversight, was now being conducted with more resourcing, more police powers and no oversight.
- 1.2 Since the Committee's Interim Report was tabled there has been a substantial increase in police powers relating to terrorism. New police powers in NSW specifically include oversight and review functions by both the PIC and the Ombudsman. This created the scope for much broader terms of reference than those of the Interim Report. The increase of extraordinary police powers to combat terrorism is part of a global trend in policing. This aligns with the Committee's function to examine trends and changes in police misconduct and corruption, and practices and methods relating to police misconduct.
- 1.3 As such, the Committee adopted new terms of reference for their final report which includes the PIC's risks assessment of the CTCC. These terms of reference are:
- 1.4 That, in accordance with its statutory functions under s.95 of the *Police Integrity Commission Act 1996* and part 4A of the *Ombudsman Act 1974* the Committee on the Office of the Ombudsman and the Police Integrity Commission has resolved to conduct an inquiry into:
- (a) the functions of the PIC and the Ombudsman under the counter-terror law of NSW and in relation to oversight of the police use of covert and coercive powers;
 - (b) oversight of the conduct of NSW police officers involved in the Counter Terrorism Coordination Command;
 - (c) trends in anti-terror laws and oversight of these extraordinary powers;
 - (d) impact of the growth of police powers on the nature of external police oversight; and
 - (e) any other matter that the Committee considers relevant to the Inquiry;

and report to both Houses of Parliament on the inquiry.

- 1.5 This report is divided into two main sections. The first half of the report focuses in the legislative, structural and financial changes to the CTCC since the publication of the Interim Report. Chapter 2 will examine the increased profile of the CTCC including resourcing, its increasing operational role (particularly in respect of joint operations) and its structure. Chapter 3 will detail the counter-terror legislation introduced since the *Terrorism (Police Powers) Act 2002* including substantial amendments to that Act. Oversight arrangements, including the specific roles of the Ombudsman and the

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PIC, will be discussed and their adequacy will be assessed. Chapter 4 will discuss how oversight for this type of policing is managed in comparable interstate and overseas jurisdictions, including the role of the Public Interest Monitor in Queensland.

1.6 The second section of the report will focus on the outcomes of the PIC's risk assessment of the CTCC. The PIC's submission to the Interim Report included a proposal to undertake a risk assessment of the CTCC to provide a reliable basis for recommendations regarding:

- the relative priority of treating risks associated with the CTCC, among other commands within NSW Police;
- the degree of priority to be attached to treating each of the identifiable risks;
- whether an audit, or other risk management action, would appropriately treat these;
- what the specific features of any such risk management action should be;
- whether an arrangement for the monitoring of such a risk management action would be appropriate and what its features should be;
- what the appropriate implementation model of any risk management/monitoring arrangement should be (regularity, consultation, reporting etc); and
- what system would be appropriate for reviewing any such risk management/monitoring arrangement, in light of the identified potential for risks to change over time or circumstance.

1.7 The PIC advised that the outcomes of this project included:

- improved understanding of the special features of the risks of police misconduct associated with this type of unit;
- options for auditing/monitoring arrangements substantiated with reference to the identified risks;
- the maximisation of the transparency, efficiency and effectiveness of any future audit or other risk management action; and
- a reference point for future determinations regarding audit/oversight arrangements to apply to NSW Police units with these functions.

1.8 Chapter 5 will examine the specific outcomes of the PIC's risk assessment and any recommendations that they make to NSW Police about managing the potential risk of misconduct and corruption amongst officers working in the CTCC. Chapter 6 will discuss specific oversight issues arising from joint operations and possible arrangements for management of misconduct investigations. Chapter 7 details the Committee's conclusions and recommendations arising from this Inquiry. These recommendations are made to a range of bodies, including NSW Police, the Attorney General, the Ombudsman and the Police Integrity Commission. The Committee will actively pursue these recommendations in coming General Meetings with both the Ombudsman and the Police Integrity Commission, as well as with the appropriate Ministers.

1.9 **Conduct of the Inquiry**

1.9.1 This inquiry forms the final report following the *Interim Report on an Inquiry into the Police Integrity Commission's Jurisdiction to Oversight the Protective Security Group* tabled in Parliament in March 2005. The Committee resolved on the terms of reference on 29 March 2006.

1.9.2 Advertisements were placed in the *Sydney Morning Herald*, *The Daily Telegraph* and *The Australian* 15 April 2006.

1.9.3 The following agencies were invited to make submissions:

- NSW Ombudsman
- Police Integrity Commission
- Inspector, Police Integrity Commission
- NSW Crime Commission
- Police Association of New South Wales
- NSW Police
- Law Society of New South Wales
- NSW Bar Association
- NSW Council for Civil Liberties
- Director of Public Prosecutions

1.9.4 Submissions were received from the following:

- The Hon James Wood AO QC, Inspector of the Police Integrity Commission
- Reverend Harry Herbert, Executive Director, Uniting Care
- Mr Denis Doherty, Communist Party of Australia
- Mr Martin Bibby, NSW Council for Civil Liberties
- The Hon Peter Breen, MLC
- Mr Bruce Barbour, NSW Ombudsman
- Mr Ali Roude, Deputy Chairman, Islamic Council of NSW
- Commissioner Ken Moroney, NSW Police
- Commissioner Terry Griffin, Police Integrity Commission
- A number of confidential submissions were also received

1.9.5 The Committee took evidence from the following people:

- Ms Pauline Wright, NSW Law Society, 14 June 2006
- Mr Robert Toner SC, NSW Bar Association, 14 June 2006
- Dr Martin Bibby, NSW Council for Civil Liberties, 14 June 2006
- Commissioner Ken Moroney, NSW Police, 24 August 2006
- Deputy Commissioner Terry Collins, NSW Police, 24 August 2006

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- Assistant Commissioner Nick Kaldas, Counter Terrorism Coordination Command, 24 August 2006
- The Hon James Wood, Inspector of the Police Integrity Commission, 24 August 2006
- Mr Colin Forrest, Public Interest Monitor (Qld), 24 August 2006
- Commissioner Terry Griffin, Police Integrity Commission, 24 August 2006
- Mr Andrew Nattress, Police Integrity Commission, 24 August 2006
- Mr Allan Kearney, Police Integrity Commission, 24 August 2006
- Mr Simon Cohen, Assistant Ombudsman – Police, 24 August 2006
- Mr Greg Andrews, Assistant Ombudsman – General, 24 August 2006
- Commissioner Phillip Bradley, NSW Crime Commission, 20 September 2006

1.10 **Procedural issue arising**

1.10.1 A significant procedural issue arose during the course of the inquiry in relation to the application of the NSW Legislative Assembly's media policy to the proceedings of the Committee.

1.10.2 Relevant legislation - As a Parliamentary Committee administered by the NSW Legislative Assembly, recording of the proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission is conducted in accordance with the NSW Legislative Assembly's Media Policy (dated 18 November 1997), which states:

1c. It is for the Committee itself to decide in each case whether and for how long photography and audio-visual coverage will be permitted when the Committee is meeting in any room other than the Jubilee Room.

...

2a. A witness who is to appear should be advised of the Committee's intention to permit still photography and audio-visual recording of proceedings for reproduction by print and broadcast media.

2b. A witness should be given reasonable opportunity to object before appearing.

2c. *The Committee should consider any objection, balancing the need for proper protection of witnesses and public interest in the proceedings.* (emphasis added)

2d. The witness must be advised of the Committee's decision before being sworn in.

1.10.3 The Committee's proceedings must also be conducted in accordance with the relevant statutory requirements contained in the *Ombudsman Act 1974*, s.31G(2) of which provides that, subject to the confidentiality provisions found at s.31H, the Committee must take all evidence in public. The issue in question during this inquiry was the extent of media coverage to be permitted at the public hearing. As a matter of convention, and consistent with the legislation relating to the Committee's operation, the Committee usually limits media coverage of its proceedings only in exceptional circumstances, for example, in the case of a witness who is giving evidence on a confidential matter in camera.

- 1.10.4 The Committee on the Office of the Ombudsman and the Police Integrity Commission has, on occasion, taken evidence in camera about sensitive information that could possibly reveal operational details with the potential to impede or jeopardise an agency's operations. The evidence taken in such a closed session may not be published without the agreement of the Committee. In considering applications to take evidence in camera, *House of Representative Practice* offers some guidance and advises that a Committee should decide the issue "on the balance of the public interest and any disadvantage the witness, or a third party, may suffer through the publication of the evidence".¹ House of Commons committees have occasionally taken evidence from witnesses whose names are not divulged where it is thought that "private injury or vengeance might result from publication".²
- 1.10.5 **The witness's first appearance** - The head of the NSW Crime Commission, Mr Phil Bradley had appeared before the Committee in November 2005 to give evidence in relation to another of the Committee's inquiries. At the time Mr Bradley requested that no photographs or other reproductions of his image be made, consistent with arrangements apparently made when he appeared before other parliamentary committees.³
- 1.10.6 In the lead-up to this first appearance in 2005, the Committee sought clarification from Mr Bradley as to the basis for his request, which he provided in a letter dated 21 October 2005 marked confidential. Mr Bradley's request for confidentiality placed limitations on the Committee's ability to fully account for its decision-making. The Committee subsequently resolved on 27 October 2005 that, on the balance of the public interest in the hearing and his own interests, on that occasion photography and filming would be restricted during the course of Mr Bradley's evidence.⁴
- 1.10.7 On the morning of Mr Bradley's appearance, the Chairman of the Committee received a letter from the President of the Press Gallery, Mr Alex Mitchell, dated 1 November 2005, in which the media objected to the Committee's decision and requested that in future appearances Mr Bradley should be treated in the same way as any other public servant appearing before the Committee (or any other parliamentary committee). The Chair read Mr Mitchell's letter onto the public record at the commencement of the hearing on 2 November 2005.

¹ *House of Representatives Practice*, 5th edition, p.677.

² *ibid.*, p.678

³ This appeared to be a reference to Mr Bradley's appearance on a number of occasions before Committees of the Legislative Council. Transcripts and reports are not available on the NSW Legislative Council website for all of the years in which Estimates Committees have been held (the relevant Committee being General Purpose Standing Committee No. 3). References to the non-publication practice is made in the transcripts of the Legislative Council's Estimates Committee for 25 June 2001, the 21 September and 7 December 2005, and the minutes attached to Report 16 of General Purpose Standing Committee No. 3 (dated March 2006). There is no reference to the restriction on the media in the transcript of Estimate Committees for 2000.

⁴ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Phase Two of an Inquiry into Section 10(5) of the Police Integrity Commission Act 1996*, transcript of evidence from Mr Phillip Bradley, NSW Crime Commission, 2 November 2005 (report forthcoming).

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- 1.10.8 On 1 April 2006, the *Sydney Morning Herald* published a clear colour photograph of Mr Bradley in relation to a report concerning a court case.
- 1.10.9 **The witness's second appearance in 2006** - When Mr Bradley was called to give evidence before the Committee for the current inquiry, he repeated his request that there be no photography or reproduction of his image during his appearance. In accordance with the New South Wales Legislative Assembly's Media Policy, the Committee again considered Mr Bradley's objection to photography by balancing the need for his proper protection as a witness and the public interest in the proceedings.
- 1.10.10 The Committee took a number of factors into consideration when making its decision as to how to proceed. Mr Bradley is the head of the NSW Crime Commission and as such is the spokesperson for that organisation. The Committee does not usually prevent the media from publishing the image of other law enforcement agency heads, such as the Commissioner of Police and the Commissioner of the Police Integrity Commission, when they give evidence in public. The Committee also considered that the publication of Mr Bradley's photo on 1 April 2006 by the *Sydney Morning Herald* significantly undermined his request not to have any photography or other reproduction of his image.
- 1.10.11 In considering Mr Bradley's request, the Committee sought informal advice about the practice of parliamentary committees in other jurisdictions. This advice indicated that a wide variety of procedures are utilised by Committees at Commonwealth level to deal with situations where witnesses have requested confidentiality or non-disclosure of their identity. For instance, measures can be taken to ensure the identity of an individual is not made known, including taking evidence *in camera* and not publishing the names of witnesses. Evidence may be taken *in camera* on matters that are *sub judice* or in relation to matters raising personal safety or human rights issues.
- 1.10.12 It is of relevance to Mr Bradley's situation to note that significant statutory restrictions operate in the case of the Federal Parliament's Joint Intelligence and Security Committee under which there are limitations on those officials from whom the Committee may obtain evidence. It is not possible for the Joint Intelligence and Security Committee to hear from personnel **other than** the head of an intelligence agency (s.30 *Intelligence Services Act 2001* Cth); the Committee cannot publish the names of agents; the Committee cannot conduct a review in public without the approval of the relevant Minister for the intelligence agency concerned (sch. 1, part 3, cl.20). In the case of one Commonwealth agency, which has given evidence to the Joint Intelligence and Security Committee, an arrangement is observed whereby the Director General is named and photographed but the accompanying legal officer is not, nor is the legal officer's name disclosed.
- 1.10.13 The Committee on the Office of the Ombudsman and the Police Integrity Commission expects to be able to take evidence from the head of an agency in public session without limiting media coverage unless there are exceptional reasons to do so. The Committee is not aware of any ongoing, blanket orders for non-publication of photographs having been made in respect of the heads of other

law enforcement agencies, including the head of national agencies such as the Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS), when they appear before parliamentary committees at public hearings. Heads of agencies with similar law enforcement or intelligence roles to the head of the NSW Crime Commission do not appear to have sought to prevent the media from publishing their image when they appear before Committees. It is the Committee's view that it should not restrict media coverage of public proceedings unless absolutely necessary and, where it does so, as far as possible a public account of the Committee's decision-making should be provided to Parliament.

- 1.10.14 Part of the ongoing difficulty for the Committee stems from Mr Bradley's request for confidentiality for the reasons for his request, which the Committee has resolved not to disclose. While the Committee concluded that it does not support, or find justified, the making of an order to limit publication of any image taken of Mr Bradley during his appearance at the public hearing, it still felt that it had to make such an order. The Committee did not consider that it was in a position to determine the weight that should be afforded Mr Bradley's reasons for requesting the restriction on the reproduction of his image.
- 1.10.15 The Chairman of the Committee made an announcement outlining the background to the media restriction and the position taken by the Committee at the commencement of the public hearing on 20 September 2006. He clearly stated that the Committee had made its decision because, on balance, it considered there is a public interest in taking Mr Bradley's evidence at a public hearing without a photograph rather than not having Mr Bradley's evidence in the public arena. However, the Chairman also made clear that the Committee's decision was not in the nature of an ongoing ban and that the issue was likely to recur in respect of Mr Bradley's future appearances before parliamentary committees.
- 1.10.16 The Committee's order preventing the reproduction of Mr Bradley's image did not obstruct or impede the Committee in its efforts to obtain information and report upon its inquiry (such a situation would need to be reported to both Houses for consideration as a potential contempt). Nor is it suggested that Mr Bradley had any intention of trying to obstruct or impede the Committee when making his request. Nevertheless, the situation raised unusual and difficult procedural questions for the Committee that warranted drawing to the attention of the Parliament. The Committee had not taken the decision to impose such a non-publication order lightly and it will continue to consider any similar requests by Mr Bradley in future only on a case-by-case basis.

Chapter Two - Changes to the CTCC since March 2005

2.1 Since the Committee tabled its *Interim Report on an Inquiry into the Police Integrity Commission's Jurisdiction to Oversight the Protect Security Group* in March 2005, there has been a substantial increase in the resources available to the Counter Terrorism Coordination Command and an increased operational role in regard to the Public Order and Riot Squad being relocated within the CTCC. Furthermore, the CTCC has now used the powers available to it in a high profile joint operation. This chapter will examine the changes to the CTCC and the environment in which it is operating. Specific legislative changes during this period will be addressed in Chapter 3.

2.2 Resources

2.2.1 At the conclusion of the Committee's Interim Report the CTCC was resourced as follows:

- approximately 70 staff;⁵
- \$5 million for bomb disposal and forensic services detection, inspection and containment equipment and the employment of chemists;
- \$4.8 million for an eight seat Eurocopter BK 117 helicopter to transport bomb specialists, forensic analysts or State Protection Group teams to critical incidents;
- \$1.9 million for officer protection, communication and transport for the State Protection Group;
- \$2.5 million for equipment and protective gear to combat biological, chemical and radiological threats; and
- \$1.8 million for enhanced electronic surveillance.⁶

2.2.2 In July 2003, three new Assistant Commissioners were appointed in NSW Police, one of whom was an Assistant Commissioner for the CTCC. Commander Norm Hazzard was appointed to this position.⁷

2.3 Structure

2.3.1 On Assistant Commissioner Hazzard's retirement in March 2006, Assistant Commissioner Nick Kaldas was appointed as the head of Counter Terrorism and Public Order Management.⁸ A significant structural change had taken place in the Command earlier in the year when on 1 January 2006, the Public Order and Riot Squad (PORS) began operating as a full time division within the CTCC. The PORS consists of 45 specialists whose duties include conducting searches for explosive devices, being the first officers to attend major chemical, biological and radiological incidents and performing disaster victim identification duties. Other duties include attending major public demonstrations and protests, assisting with searches for

⁵ Press Release, Premier of NSW, *Counter Terrorism Coordination Command*, 30 October 2002

⁶ *ibid.*

⁷ 'New police posts for 'vital areas'', *The Daily Telegraph*, 9 July 2003.

⁸ Press Release, Minister for Police, *New Head for Anti-Terror & Public Order in NSW*, 29 March 2006.

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evidence, people, property and drugs, as well as canvassing witnesses during large scale operations. Officers will also be required to conduct various security duties during industrial disputes in prisons. Positions in the PORS have a two year tenure and applicants are required to undergo psychological and physical testing to determine their suitability to perform the required duties. Qualifications for the positions include accreditation as Operations Support Group operatives⁹. Former Manly and Kings Cross commander, Chief Superintendent Steve Cullen took command of the PORS at 1 January 2006.¹⁰

2.3.2 Publicly available information regarding the structure of the CTCC is scarce. No current information about the structure of the Command is readily accessible beyond that on the NSW Police website and that provided in the PIC's *Management of Misconduct Risks by the NSW Police Counter Terrorist Coordination Command: An Assessment*. The organisational diagram on the NSW Police website shows the CTCC located within the Specialist Operations division. The CTCC is represented as consisting of Counter Terrorism Coordination, the State Protection Group and the Public Order and Riot Squad.¹¹ The mission and role of the CTCC are outlined on the website, and remain unchanged since its establishment. However as at September 2006, the website still lists Assistant Commissioner Hazzard as being the Commander of the CTCC, casting doubt on the complete accuracy of the information provided below.

2.3.3 The mission of the CTCC is "to provide a comprehensive and coordinated response to acts of terrorism or politically motivated violence through intelligence collection, analysis, investigation services and protection operations for dignitaries, national icons, business interests and critical infrastructure."¹²

2.3.4 The principle roles of Counter Terrorism and Public Order Management Command are to:

- provide close personal protection for internationally protected persons, dignitaries and other persons as determined appropriate by the Commander, CTCC;
- provide tactical intelligence gathering, analysis and investigation in relation to: politically motivated violence, terrorist activity, public order, dignitary protection, critical infrastructure, consequence management and national icons;
- coordinate the NSW Police response to politically motivated violence and terrorism in accordance with the National Counter-Terrorism Plan and the NSW Police Counter Terrorist Plan;
- liaise with, and provide advice to, clients with regard to the protection of critical infrastructure and consequence management; and

⁹ A large number of these operatives were involved in raiding the homes of Sydney terror suspects in November 2005.

¹⁰ John Kidman 'Frontline anti-terror role for riot squad' *The Sun Herald* 13 November 2005; Press Release, Minister for Police, *Major Restructure for NSW Police*, 1 September 2005.

¹¹ http://www.police.nsw.gov.au/about_us/structure

¹² *ibid.*

- provide strategic analysis, advice and direction to clients in relation to the security environment of NSW.¹³

2.3.5 The structure of the CTCC as outlined in the Committee's Interim Report has changed. At April 2003, the CTCC consisted of eight units and coordinators. These were:

- Dignitary Protection and Public Order Management Unit;
- Critical Infrastructure Protection Coordinator;
- Consequence Management Coordinator;
- NSW Police Counter Terrorism Response Coordinator;
- Analyst Unit;
- Investigations Unit;
- Protocol Unit; and
- Tactical Intelligence Unit.¹⁴

2.3.6 In September 2006 the PIC reported that the CTCC is composed of three different work units:

- **The Dignitary Protection Unit** is responsible for providing close personal protection to "at risk" dignitaries (both foreign and domestic). Among other functions, it coordinates and plans security escorts, and provides specialist advice to Regions and Local Area Commands in the planning and co-ordination of a policing response to dignitary protection, major event and public order management issues involving terrorism or politically motivated violence. It liaises with national and international agencies involved in the protection of "at risk" dignitaries, and it conducts physical security reviews and assessments.
- **The Intelligence Unit** provides NSW Police with a specialised strategic, operational and tactical intelligence service in relation to politically motivated violence including extremist activity and acts of terrorism. This includes the preparation of risk and threat assessments, National Security Hotline disseminations, National Security Threat Assessments, dignitary protection intelligence support, investigations intelligence support, field intelligence support, aviation and maritime liaison and counter intelligence. This unit provides professional oversight of the intelligence support for the SPG and for the PORS. It also manages the CTCC information management systems and COPS intelligence components for the CTCC, as well as internal and external agency liaison.
- **The Investigations Unit** is responsible for investigating offences relating to the threat of politically motivated violence including threats of terrorism, or threats against high office holders. In the case of a major terrorist incident, this unit may conduct a joint investigation with other NSW Police groups (such as the State Crime Command, Forensic Service Group, Special Services Group and relevant Local Area Commands) or relevant external agencies (particularly the AFP and ASIO). It is also responsible for investigating credible threats of terrorism (for

¹³ *ibid.*

¹⁴ Police Weekly Supplement, *Support Command* 7 April 2003, pp.13-14.

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example, alleged terrorist training camps, suspect financial activity or in response to information provided by other agencies). Critical to this role are the following activities:

- o conducting proactive investigations regarding suspected targets
- o liaison with other agencies and sharing information on investigations, and
- o use of covert evidence gathering techniques.¹⁵

2.3.7 The unit leaders of each of these units report to the Commander of the CTCC.

2.3.8 The PIC noted that since its establishment the CTCC had been subject to continuing change.¹⁶ This seems likely to continue, as the Assistant Commissioner, Counter Terrorism noted in the NSW Police submission to the inquiry that negotiations with the Australian Federal Police have resulted in an agreement to restructure the counter-terror investigations framework in NSW. The new structure will mean that NSW Police investigators will be co-located (probably in AFP's NSW headquarters) as part of a Joint Counter-Terrorism Team (JCTT). It is likely the JCTT will use AFP data systems and be subject to all the in-built checks and balances the AFP have in place.¹⁷

2.4 Staff secondments

2.4.1 Staffing of the CTCC has become more internationalised. In September 2005 the Premier and the Minister for Police announced three officers from the New York Police Department (NYPD) would review NSW Police counter-terrorism capabilities, including current intelligence gathering and management, in the following month. Exchanges between NSW Police and the NYPD were also announced, with a reciprocal secondment for a period of up to 12 months commencing in early 2006. A secondment of a similar length and nature between the Los Angeles Police Department (LAPD) Counter-terrorism Command was also announced, beginning in early 2006.¹⁸ In January 2006, a six month secondment arrangement with the UK's Anti-Terrorism Branch was announced.¹⁹

2.4.2 The Premier also announced that the Federal Bureau of Investigations (FBI) would be placing an officer in a legal attaché role in Sydney. This position had already been advertised at the time of the announcement and it was expected that the position would be filled by the beginning of 2006.²⁰ The attaché would operate from within the US consulate and improve the exchange of information between Australian and US law enforcement bodies and provide legal support to NSW agencies. The Sydney

¹⁵ Police Integrity Commission, *Management of Misconduct Risks by the NSW Police counter Terrorist Coordination Command: An Assessment*, September 2006, pp.59-60.

¹⁶ Ibid., p.62

¹⁷ NSW Police submission to the Inquiry, p.5.

¹⁸ Press Release, Premier, *NSW Police boost counter terrorism co-operation with key US law enforcement agencies* 22 September 2005.

¹⁹ Press Release, Minister for Police *CCTV mapping to aid war on terror*, 27 January 2006.

²⁰ Press Release, Premier, *NSW Police boost counter terrorism co-operation with key US law enforcement agencies* 22 September 2005.

position is the FBI's first permanent base outside of Canberra, and its second in the region.²¹

2.5 The CTCC as at September 2006

2.5.1 In late September 2005 a series of laws passed through state and federal parliaments that substantially increased police powers to detain people suspected of terrorism offences and to conduct searches on premises where people suspected of terrorist-related offences lived. On 3 November 2005 a Sydney newspaper ran a story that security agencies were poised to swoop on terrorist cells once a minor amendment to these laws was passed.²² At 2:30am on 8 November 2005 more than 400 state and federal police conducted raids across south western Sydney and seven men were arrested²³ (Operation Pendennis is discussed in detail in Chapter 6). On 13 November the Minister for Police announced that the Commissioner for Police would review the resources that supported the CTCC and advise him what extra support the Command required. The press release further noted:

- the CTCC drew on almost 500 staff to fight the battle against terrorism;
- in 2005/2006 \$19.8m would be spent by NSW Police on measures directly related to counter-terrorism activities;
- a new Forensic Science Centre (\$4.7m) with a specialist counter-terrorism capability and with a staff of 140;
- two bomb disposal robots and a larger bomb disposal robot vehicle;
- blast guards for bombs or chemical biological weapons;
- a "Bearcat" armoured rescue vehicle; and
- 27 new vessels for the NSW Police Marine Area Command.²⁴

2.5.2 Since March 2005, the CTCC has received significantly enhanced levels of resources. Of particular note are the following three developments. The CTCC staffing levels have increased from 70 in October 2002²⁵ to almost 500 in November 2005.²⁶ Presumably this number includes specialists from various Commands who could engage in counter-terrorism activities as part of their normal duties – for example forensic officers at the Forensic Science Centre, the Public Order and Riot Squad and the Dog Squad. However this represents a seven-fold increase in staff over a three year period.

2.5.3 Simultaneously, funding has also increased for the CTCC. The Minister announced in November 2005 that \$19.8 million of the NSW Police budget in 2005/2006 would be spent on counter-terrorism measures.²⁷ In May 2005 the Premier announced more than \$187 million would be spent on counter-terrorism measures in 2005-2006, up

²¹ Gibbs, S. 'FBI to establish base in Sydney as terrorism fight goes global', *Sydney Morning Herald* 22 September 2005.

²² Allard, T., Wilkinson, M. & Kerr, J. 'Police on standby for terror cell raids'. *Sydney Morning Herald*, 3 November 2005.

²³ McIlveen, L. and Hunt, E. 'A war at our door: police raids expose the terrorist threat'. *The Daily Telegraph* 9 November 2005.

²⁴ Press Release, Minister for Police *NSW Counter Terror Unit to be expanded* 13 November 2005.

²⁵ Press Release, Premier of NSW, *Counter Terrorism Coordination Command*, 30 October 2002.

²⁶ Press Release, Minister for Police, *NSW Counter Terror Unit to be Expanded* 12 November 2005.

²⁷ *ibid.*

Changes to the CTCC since March 2005

from \$147 million in 2004-2005²⁸. While some of this budget has been spent on multi-use items, such as 27 vessels for the NSW Police Marine Area Command,²⁹ this is still a large budgetary increase. The outcome of the Commissioner's review of the resources needed by the CTCC as announced by the Minister for Police in November 2005 has not been made public, so it is possible that more money could be allocated in the forthcoming financial year.

2.5.4 Finally the announcement of reciprocal secondment arrangements between NSW Police, NYPD, LAPD and the Anti-Terrorism Branch of the London Metropolitan Police, and the presence of a permanent FBI attaché marks an increasing internationalisation of policing in NSW. While the knowledge gained from these arrangements could prove invaluable, this international presence considerably complicates accountability and oversight arrangement, especially in terms of who has jurisdiction to investigate complaints. These issues will be further explored in the chapter examining joint operations.

²⁸ Press Release, Premier of NSW, *Premier Announces Record Spending on Counter Terrorism*, 20 May 2005.

²⁹ Press Release, Minister for Police, *NSW Counter Terror Unit to be Expanded* 12 November 2005.

Chapter Three - Legislation operating in NSW in relation to counter-terrorism

3.1 Introduction and Overview

- 3.1.1 Prior to the attacks in the USA on 11 September 2001, there were no specific terrorist offences under Commonwealth law or State law. After those attacks, the Commonwealth Parliament amended the Criminal Code to include certain terrorist offences for the first time.³⁰ These offences are set out in Part 5.3, Division 101, and include engaging in, and inciting the commission of, a “terrorist act”,³¹ providing or receiving training connected with a terrorist act, directing organisations concerned with terrorist acts, and possessing things connected with terrorist acts. Subsequent legislation has further amended Part 5.3 of the Commonwealth Criminal Code Act in respect of terrorist offences.³²
- 3.1.2 The Commonwealth Parliament was able to enact this legislation after all the States agreed to refer their powers to the Commonwealth for this purpose in accordance with section 51(xxxvii) of the Commonwealth Constitution. This agreement was made at the Leaders' Summit on Transnational Crime and Terrorism on 5 April 2002.³³ New South Wales referred its powers to the Commonwealth in the *Terrorism (Commonwealth Powers) Act 2002*. As a result of this referral, criminal offences relating to terrorism are governed by Federal law in tandem with NSW law conferring counter-terror related powers to law enforcement agencies.³⁴ References in NSW law to, for example, “terrorist act” or “terrorist organisation” has the meaning given in the Commonwealth Criminal Code (Part 5.3).
- 3.1.3 The *Terrorism (Police Powers) Act 2002*³⁵ confers a number of extraordinary powers on law enforcement agencies for counter-terror purposes. Many of these powers are already available to law enforcement agencies for use in general police work under NSW legislation and the common law, albeit with greater restrictions on their use (eg, under a warrant only) and subject to less stringent authorisation requirements. This chapter does not address those powers.³⁶

³⁰ The *Security Legislation Amendment (Terrorism) Act 2003* (Act no 40, 2003) amended the *Criminal Code Act 1995* to include terrorist offences.

³¹ “Terrorist act” is defined in section 100.1 of the *Commonwealth Criminal Code Act 1995*.

³² See *Anti-Terrorism Bill 2005* (Act no. 127, 2005) which amended the existing offences in the Criminal Code Act to clarify that it is not necessary to identify a particular terrorist act upon proving the offence.

³³ The text of the Agreement can be found on the Internet at <http://parlinfoweb.aph.gov.au/piweb/Repository1/Media/pressrel/5N9667.pdf>.

³⁴ Note that Part 6B of the *NSW Crimes Act 1900* provides for the offence of knowingly being a member of a terrorist organisation (s. 310J). “Terrorist organisation” has the meaning given in the Commonwealth Criminal Code Act. Part 6B will be repealed on 13 September 2007.

³⁵ Part 6B of the *Crimes Act 1900* creates the offence of membership of a terrorist organisation (s.310J), which is defined by reference to the definitions given in the Commonwealth Criminal Code. This Part was inserted into the *Crimes Act* by the *Terrorism Legislation Amendment (Warrants) Act 2005*.

³⁶ See especially the *Law Enforcement (Powers and Responsibilities) Act 2002*. Also, *Law Enforcement (Controlled Operations) Act 1997*, *Crimes Act 1900*, *Crimes (Forensic Procedures) Act 2000*, *Bail Act 1978* and *Listening Devices Act 1984*.

3.1.4 This Act has been amended a number of times to provide for further extraordinary powers. In 2004, the *Crimes Legislation Amendment (Terrorism) Act 2004* was enacted to broaden the powers of police in relation to an authorisation for the exercise of the special powers conferred under Part 2 of the *Terrorism (Police Powers) Act*. These powers include search of persons, vehicles and premises without a warrant. The most recent amendments were made in 2005 by the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* and the *Terrorism Legislation Amendment (Warrants) Act 2005*.

3.1.5 The powers given to police under this legislation, especially under the *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005* and the *Terrorism Legislation Amendment (Warrants) Act* are highly controversial. The powers to detain a person without charge for an extended period of time, as provided for under a preventative detention order (PDO), and to conduct covert searches of premises have not previously existed under Australian law. They go against a number of fundamental principles central to the Australian criminal justice system (eg, right to be presumed innocent). Their extraordinary nature and potential to trespass on such significant personal rights was addressed by the Government when introducing this legislation. In the second reading speeches for these bills, the Ministers were at pains to justify the measures and to assure Parliament that there were sufficient safeguards in place to protect fundamental rights. For example, in introducing the Warrants Bill, the Attorney General, Mr Bob Debus MP, said:

These powers are extraordinary and will be permitted only with the strictest of safeguards... Those safeguards are an attempt to balance the legitimate needs of law enforcement and the right of privacy that all citizens enjoy... These are extraordinary powers that the Government is enacting in response to the extreme threat that a terrorist attack poses to the peace and stability of our society. They are enacted only with the strictest safeguards and strong and effective oversight. When introducing the *Terrorism (Police Powers) Act 2002*, the Premier said he looked forward to the day when the threat of terrorism has been eliminated from our State and when laws and powers like this can be removed from our statute books. I echo those sentiments.³⁷

3.1.6 Similarly, the second reading speech on the Preventative Detention Bill, stated:

There is no doubt that these powers are extraordinary, but they are designed to be used only in extraordinary circumstances and are accompanied by strong safeguards and accountability measures... I also want to assure the public that the Government will always attend to the liberties and freedoms that are the mark of our democracy. I repeat the commitment of the then Premier Carr in introducing the *Terrorism (Police Powers) Act* in 2002, that we look forward to a time when these powers are no longer needed and can be removed from the statute books of New South Wales.³⁸

3.1.7 These powers and the principal “safeguards and accountability measures” are discussed below.

³⁷ The Hon Bob Debus MP, Attorney General, Second Reading Speech, *Terrorism Legislation Amendment (Warrants) Act 2005*, Legislative Assembly Hansard, 9 June 2005, at p.16940.

³⁸ Mr Milton Orkopolous MP, Minister for Aboriginal Affairs, and Minister Assisting the Premier on Citizenship, Second Reading Speech, *Terrorism (Police Powers) Amendment (Preventative Detention) Act 2005*, Legislative Assembly Hansard, 17 November 2005, at p.20008.

3.2 Counter-terrorism Police Powers

3.2.1 The *Terrorism (Police Powers) Act 2002* (the “2002 Act”) gives law enforcement agencies a series of special powers that may only be used for counter-terrorism. Part 2 sets out a series of “special powers”, such as search and seizure. Part 2A provides for powers related to preventative detention and Part 3 establishes covert search warrants. Each of these three categories of powers has different authorisation and oversight requirements, which are detailed below.

3.2.2 *Special Powers (Part 2)*

3.2.2.1 Part 2 powers may only be exercised by authorised police officers in connection with terrorism offences. Part 2 gives an authorised police officer³⁹ the power:

- to obtain disclosure of a person’s identity (s.15);
- without a warrant, to stop and search a person (including a frisk or strip search as specified in the authorisation), and anything in their possession or control (s.16);
- without a warrant, to stop and search a vehicle and anything in the vehicle (s.17);
- without a warrant, to enter and search any premises (s.18);
- to place a cordon around a target area or any part of it for the purposes of stopping and searching persons, vehicles or premises in the target area;
- to seize and detain things (s.19);
- to use such force as is reasonably necessary to exercise any of these special powers (s.20);
- to detain a person under a preventative detention order; and
- to execute covert search warrants.

3.2.3 *Preventative Detention Orders (Part 2A) & Covert Search Warrants (Part 3)*

3.2.3.1 The amendments in the *Preventative Detention Act* arose out of an agreement of all States, Territories and the Commonwealth.⁴⁰ The powers conferred by that Act,

³⁹ Any police officer with authorisation may exercise Part 2 powers, not just members of the CTCC.

⁴⁰ This “COAG” agreement was reached on 27 September 2005. The COAG Communiqué announcing the new amendments stated in part:

COAG considered the evolving security environment in the context of the terrorist attacks in London in July 2005 and agreed that there is a clear case for Australia's counter-terrorism laws to be strengthened. Leaders agreed that any strengthened counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence-led and proportionate. Leaders also agreed that COAG would review the new laws after five years and that they would sunset after 10 years.

COAG agreed to the Commonwealth Criminal Code being amended to enable Australia better to deter and prevent potential acts of terrorism and prosecute where these occur. This includes amendments to provide for control orders and preventative detention for up to 48 hours to restrict the movement of those who pose a terrorist risk to the community...

State and Territory leaders agreed to enact legislation to give effect to measures which, because of constitutional constraints, the Commonwealth could not enact, including preventative detention for up to 14 days and stop, question and search powers in areas such as transport hubs and places of mass gatherings. COAG noted that most States and Territories already had or had announced stop, question and search powers.

now contained in Part 2A of the 2002 Act, allow the police to apply to the Supreme Court for orders:

- to detain a person 16 years of age or more who has not been charged with any offence, in circumstances relating to preventing an imminent terrorist act or to preserving evidence of terrorist acts that have occurred;
- to detain that person under a preventative detention order for successive periods of up to 14 days, or under an interim preventative detention order for successive periods of up to 48 hours (in relation to which there has been no hearing or other opportunity for the person concerned to challenge the making of the order);
- to detain that person solely on the basis of a “reasonable suspicion” that they will engage, or have engaged, in a terrorist act or that they possess a thing connected to a terrorist act; and
- to prohibit a person who is the subject of an interim or final PDO from contacting a person specified in the order, including their chosen lawyer and family members (a “prohibited contact order”).⁴¹

3.2.3.2 The powers conferred by the Warrants Act allow an “eligible police officer” or “eligible staff member of the Crime Commission”⁴² to apply to the Supreme Court for orders authorising the issuing and execution of covert search warrants. A covert search warrant can, among other things, authorise an eligible person:

- to enter premises without any occupier’s knowledge;
- to impersonate another person;
- to use force to enter the premises;
- to enter adjoining premises, with force if necessary;
- to search the premises for any kind of thing described in the warrant;
- to seize and detain a thing, including a thing that is connected with a serious indictable offence⁴³ that the person finds in the course of executing the warrant; and
- to substitute a thing seized.

3.3 Authorisation regimes

3.3.1 *Special Powers (Part 2)*

3.3.1.1 The powers under Part 2 may be exercised under a written or oral authorisation, given by the Commissioner, or a Deputy Commissioner, of Police (s. 8). An authorisation may be given if the Commissioner or Deputy Commissioner, as the case may be, giving the authorisation is “satisfied that there are reasonable grounds for believing that there is a threat of a terrorist act occurring in the near

Full text on the internet at <http://www.coag.gov.au/meetings/270905/index.htm#Strengthening>

⁴¹ For a discussion of these powers, see NSW Legislation Review Committee *Digest No. 47* of 29 November 2005 at <http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/V3Home> .

⁴² Eligible police officers and eligible staff members of the Crime Commission are police officers or employees of the Crime Commission, as the case may be, who are employed within an investigation group designated by the Police Commissioner or Crime Commissioner respectively [section 27A].

⁴³ This “serious indictable offence” does not have to be terrorism-related or related to the purpose for which the covert search warrant was given.

future” and that the exercise of those powers will substantially assist in preventing the terrorist act (s. 5). It may also be given if satisfied that there are reasonable grounds for believing that a terrorist act has been committed and that the exercise of those powers will substantially assist in apprehending the persons responsible (s. 6).

- 3.3.1.2 A further check on the use of these extraordinary powers requires the Commissioner or Deputy Commissioner to seek the concurrence of the Police Minister before giving an authorisation (s. 9). The 2002 Act provides for one exception to this rule, namely if the Minister cannot be contacted at the time the authorisation is given. In this situation, authorisation may be given, but the Police Minister must be notified as soon as he or she is available to be notified. If the Police Minister does not confirm the authorisation within 48 hours of its having been given, the authorisation lapses.
- 3.3.1.3 Importantly, an authorisation to exercise the powers under the 2002 Act cannot be “challenged, reviewed, quashed or called into question on any grounds whatsoever before any court, tribunal, body or person in any legal proceedings, or restrained, removed or otherwise affected by proceedings in the nature of prohibition or mandamus” (s. 13).
- 3.3.1.4 The *Crimes Legislation Amendment (Terrorism) Act 2004* expanded the situations in which authorisation could be given. Before its enactment, authorisation could be given if the Commissioner, or a Deputy Commissioner, of Police was satisfied in the first instance that there were reasonable grounds to believe “that there was an imminent threat of a terrorist act”. The 2004 Act changed the requirement of a reasonable belief of an “imminent terrorist act” to a requirement of a reasonable belief of a terrorist act “occurring in the near future”.
- 3.3.1.5 Consistent with their extraordinary nature, powers relating to preventative detention orders and covert search warrants have a different and more stringent authorisation regime as discussed below.
- 3.3.2 *Preventative Detention Orders (Part 2A)*
- 3.3.2.1 The preventative detention regime under Part 2A requires a police officer to have approval from the Commissioner of Police, a Deputy Commissioner of Police or an Assistant Commissioner of Police responsible for counter-terrorism operations before applying to the Supreme Court for a PDO (s. 26F). Only the Supreme Court can make a PDO and related orders (eg, prohibited contact order).
- 3.3.2.2 In addition, once the Supreme Court has made a PDO, “any police officer” may take the person concerned into custody and detain him or her. However, the Commissioner or a Deputy Commission of Police, or an Assistant Commission of Police responsible for counter-terrorism operations, must nominate a police officer of or above the rank of superintendent to oversee the exercise of functions under the PDO. This nominated senior police officer must be someone who was not involved in the making of the application for the PDO.

- 3.3.2.3 The functions of the nominated senior police officer are set out in section 26 of the 2002 Act and include:
- overseeing the exercise of the functions under the PDO;
 - ensuring compliance with the Act in relation to the PDO; and
 - considering any representations made by the person being detained, their lawyer or other person with whom they are in contact, in relation to the exercise of functions under the PDO or to the treatment of the detained person.

3.3.3 *Covert Search Warrants (Part 3)*

3.3.3.1 Covert search warrants are provided for in Part 3 of the 2002 Act. This Part authorises the Commissioner of Police and the Crime Commissioner to authorise an eligible police officer or an eligible staff member of the Crime Commission, as the case may be, to apply to an “eligible Judge” for a covert search warrant. An “eligible Judge” is a judge of the Supreme Court, who has consented to be, and has been, nominated by the Attorney General as an “eligible Judge” under the Act.

3.3.3.2 The eligible police officer or staff member of the Crime Commission may make an application for a covert search warrant, if they suspect or believe on reasonable grounds:

- (a) that a terrorist act has been, is being, or is likely to be committed;
- (b) that the entry to and search of the premises will substantially assist in responding to or preventing the terrorist act; and
- (c) that it is necessary for the entry and search of those premises to be conducted without the knowledge of any occupier of the premises.

3.3.3.1 The applicant must make their application for a covert search warrant in writing and in person, except in the case of a telephone warrant, which may be issued in urgent cases.

3.4 **Oversight of exercise of powers**

3.4.1 *Review of the 2002 Act*

3.4.1.1 The legislation does provide for various restrictions on the use of the powers set out in the 2002 Act, including special authorisation requirements and internal reporting. In terms of external oversight, many of the powers remain subject to oversight by the Ombudsman and the Police Integrity Commission under their constitutive legislation.

3.4.1.2 In addition, the Act requires the Attorney General, as the Minister responsible for the Act, to review its operation annually and report to Parliament on the outcome of that review (s. 36).⁴⁴ The Attorney General must conduct the first annual review “as soon as possible after the period of 12 months from the date of assent to this Act”, namely 5 December 2002. The report to Parliament on the review must be given within 12 months. At the time of writing, the Attorney General had not

⁴⁴ Specifically, the Attorney General is to review the Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

reported, notwithstanding the fact that the first review and reporting period ended on 5 December 2004.

3.4.2 *Oversight of the Special Powers under the 2002 Act*

3.4.2.1 The Commissioner of Police must report in writing to the Attorney General and the Minister of Police on any authorisation given for use of Part 2 powers once that authorisation has lapsed. The Commissioner must report on:

- the terms of the authorisation;
- the period during which the authorisation had effect;
- the matters relied on in giving the authorisation;
- the powers exercised under the authorisation; and
- the results of the exercise of those powers (s. 14B).

3.4.2.2 There is no requirement under the Act for this report to be tabled in Parliament or otherwise made public.

3.4.2.3 While the Act does not provide for any special oversight mechanisms for these special powers, they fall within the general mandates of the Ombudsman and Police Integrity Commission.

3.4.3 *Preventative Detention Orders and Covert Search Warrants*

3.4.3.1 The Act provides for minimal external oversight for the exercise of powers related to PDOs and covert search warrants. However, it does require the Commissioner of Police and the Crime Commissioner to report annually to the Attorney General and the Minister of Police. It also enables the Ombudsman to monitor the exercise of these powers.

3.4.3.2 Annual reports by Police and Crime Commissioners

3.4.3.2.1 The Commissioner of Police must report annually to the Attorney General and Minister for Police on the exercise of PDO-related powers by police officers. The Commissioner of Police and the Crime Commissioner must also report annually in relation to covert search warrants. These reports must be provided within 4 months of every 30 June. They can be combined into one report.

3.4.3.2.2 The Attorney General must table these reports in Parliament as soon as practicable after he or she receives them. To date, the Attorney General has not tabled any such report.⁴⁵

3.4.3.2.3 The Act lists the information that each report must contain. In relation to the report on PDO related powers, it must include information about:

- the number of applications made in the period;
- the duration of any PDOs made;

⁴⁵ Note that the amendments in the *Warrants Act*, now found in Part 2A of the 2002 Act, commenced on 13 September 2005 and the amendments in the *Preventative Detention Act*, now found in Part 3 of the Act, commenced on 16 December 2005.

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- whether a person was detained under a PDO and if so, where they were detained (eg, in a correctional facility);
- whether the PDO was made to prevent a terrorist act or preserve evidence; and
- the particulars of any complaints made to the Ombudsman or the PIC by a person detained under a PDO.⁴⁶

3.4.3.2.4 Reports on covert search warrants must contain similar information, including:

- the number of applications for covert search warrants made, granted and executed;
- whether any things were seized, substituted, returned or retrieved or copied or photographed under the warrant;
- the number of arrests made, and charges laid (if any), in connection with a terrorist act for which a covert search warrant was executed;
- the number of complaints made and investigated, about conduct relating to the execution of a covert search warrant; and
- any other matters requested by the Police Minister or the Attorney General.⁴⁷

3.4.3.3 Ombudsman monitoring and reporting

3.4.3.3.1 The Act provides for monitoring by the Ombudsman of the PDO regime under Part 2A during the first five years of its operation (s. 26ZO). Similarly, the Ombudsman is to monitor Part 3 of the Act, but only for the first two years of its operation (s. 27ZC). In both cases, the Ombudsman is to keep under scrutiny the exercise of powers conferred by these Parts.

3.4.3.3.2 For the purpose of monitoring the PDO regime, the Act requires the Commissioner of Police or any public authority to provide information about the exercise of those powers to the Ombudsman. In particular, the Commissioner of Police must ensure that the Ombudsman is notified:

- (a) of the making of a PDO or prohibited contact order, and given a copy of any such order;
- (b) if a person is taken into custody under a PDO; and
- (c) if a PDO or other order made under the Part is revoked.

3.4.3.3.3 There is no similar requirement in relation to the Ombudsman's responsibility to monitor the covert search warrant regime under Part 3. However, the Ombudsman does have the power to require the Commissioner of Police, the Crime Commissioner or the Director General of the Attorney General's Department to provide information about the exercise of the powers relating to covert search warrants.

⁴⁶ Subsection 26ZN(2) sets out the full list of information that must be included in annual reports on the exercise of PDO related powers.

⁴⁷ Subsection 27ZB(3) sets out the full list of information that must be included in annual reports on the exercise of powers related to covert search warrants.

- 3.4.3.3.4 The Ombudsman must report to the Attorney General and the Minister for Police on the exercise of the powers relating to PDOs and covert search warrants. The Ombudsman is to report on the exercise of powers under Part 2A two years after the commencement of that Part and then again five years after its commencement. The Ombudsman must also report on the exercise of the covert search warrant powers at the end of the two-year monitoring period established by section 27ZC.
- 3.4.3.3.5 The Attorney General must table these reports in each House of Parliament “as soon as practicable after they are received”. The PDO and covert search warrant powers are too new for the Ombudsman to have conducted such a review, so no reports have been made as yet.
- 3.4.3.3.6 The 2002 Act provides another possible avenue for oversight of the preventative detention regime by providing that a person being detained under a PDO is entitled to contact the Ombudsman and the Police Integrity Commission. However, the Act is silent on whether or not the police must inform the detained person of this entitlement. Importantly, the Act expressly states that the functions and powers of the Ombudsman and the Police Integrity Commission to oversee the activities of law-enforcement agencies under other Acts continue to operate. If a complaint were made in relation to detention under a PDO, the Ombudsman or the Police Integrity Commission would deal with it in the prescribed manner under such Acts.

Chapter Four - Comparable Jurisdictions

4.1 This chapter will examine oversight arrangement for counter-terrorist policing in comparable jurisdictions. This will include New York Police Department, Los Angeles Police Department and the Anti-Terrorist Branch of the London Metropolitan Police as reciprocal secondment arrangements exist between these policing agencies and NSW Police. This chapter will also look at oversight for Australian Federal Police engaged in counter-terrorist activities, as well as arrangements in Queensland for oversight of some counter-terrorism activities.

4.2 **Australian Federal Police**

4.2.1 In 2003 the Australian Federal Police established a Counter-Terrorism Division to undertake intelligence-led investigations to prevent and disrupt terrorist acts. Joint Counter-Terrorism Teams, comprising APF members and state and territory police were established concurrently. This follows from the Australian Protective Services (APS) becoming a division of the AFP in July 2002, ensuring the closest possible cooperation between two of Australia's key counter-terrorist agencies. The APS is mainly responsible for consular and diplomatic guarding, the air security officer program and the Counter-Terrorist First Response function at airports⁴⁸. The AFP's most recent Ministerial Direction signed on August 31 2004 gives preventing, countering and investigating terrorism under Commonwealth legislation as the AFP's number one policy emphasis.⁴⁹

4.2.2 The AFP's counter-terrorism role is multi-faceted and incorporates a range of domestic and international measures to mitigate the threat of terrorism in Australia, as well as the region. The AFP views the threat to Australia from terrorism as predominantly offshore, and as such the AFP's overseas counter-terrorism cooperation role and contribution is prominent in its work. The Joint Counter-Terrorism Teams established in all States and Territories by the AFP provide flexible and adaptive investigative resources to the investigation of terrorism in Australia, as well as providing support to AFP investigations undertaken offshore.⁵⁰

4.2.3 There are 11 JCTTs throughout Australia. These teams work closely with other domestic agencies, the intelligence community and international partners to identify and investigate any activities in Australia which may be linked to terrorism. Resourcing for the JCTTs increased during the 2004-2005 reporting period with an increase of 13 full-time staff. During 2005, a member of the Federal Bureau of Investigation was seconded to the AFP Counter-Terrorism for three months. Arrangements to continue this secondment program have been put in place.⁵¹

4.2.4 The AFP, through the JCTTs, has to date arrested 23 people for suspected links to terrorism. The most recent of these arrests involved the execution of 22 search warrants across Sydney and Melbourne on November 8 2005 which resulted in the

⁴⁸ Dr Peter Shergold, 19 November 2003, *New Challenges for the Australian Federal Police*, www.pmc.gov.au/speeches/shergold/afp_challenges_2003-11-19.cfm

⁴⁹ Australian Federal Police *Annual Report 2004-2005*, p.7.

⁵⁰ *ibid.*, p.19.

⁵¹ *ibid.*, p.23

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arrest of 17 men. The arrests followed a lengthy joint operation between law enforcement and intelligence agencies.⁵²

4.2.5 Funding in 2004-2005 from the Commonwealth *Fighting Terrorism at its Source* initiative enabled Counter-Terrorism Intelligence to increase its staffing, and restructure its teams to allow for a more proactive domestic counter-terrorism intelligence capability. Alongside two internationally focused teams, the South-East Asia-Indonesia Team and the South-East Asia-Philippines Team, there are the Convergence Team and the Target Development Team. The Convergence Team provides a strategic overview of all AFP counter-terrorism investigations to identify the links and overlaps between the investigations. The Target Development Team aims to identify criminality in those individuals and groups who present a terrorist threat to Australians, or Australian interests. This team includes a financial analyst to look at terrorist financing.⁵³

4.2.6 The AFP also has officers seconded to the following counter-terror bodies:

- the National Threat Assessment Centre, under the auspices of the Australian Security Intelligence Organisation, which monitors and assesses the likelihood and probability of terrorism and other acts of politically-motivated violence against Australia, Australian citizens and Australian interests abroad.
- the Joint Counter-Terrorism Intelligence Coordination Unit, hosted by ASIO, which comprises Australian intelligence agency representatives to advise on investigative and operational opportunities that counter further counter-terrorism investigations. This Unit has assisted APR counter-terrorism investigations with referrals from Joint Counter-Terrorism Teams in Canberra, Brisbane, Darwin, Melbourne, Perth and Sydney.⁵⁴

4.2.7 Oversight for the AFP is currently conducted by the Commonwealth Ombudsman and the soon to be established Australian Commission for Law Enforcement Integrity (ACLEI). The ACLEI will be responsible for detecting and investigating allegations of corruption against the AFP and the Australian Crime Commission and will have the powers of a royal commission.⁵⁵ There is no special monitoring for the exercise of counter-terrorist powers, it is presumed that any misconduct or corruption involving these powers will be captured by the existing oversight regime.

4.3 Queensland

4.3.1 Counter-terrorist responsibilities lie with two divisions within the Queensland Police Service (QPS). The Counter Terrorism Coordination Unit was established in February 2003, in response to the September 11 2001 bombings in New York and the bombings of two Bali night clubs in October 2002⁵⁶. In conjunction with the Security

⁵² Media Release by APF, Victoria Police, NSW Police and ASIO, *Terrorism Related Charges*, 8 November 2005.

⁵³ Australian Federal Police *Annual Report 2004-2005*, p.17.

⁵⁴ *Ibid.*, pp.17-18

⁵⁵ The Senate Legal and Constitutional Legislation Committee, *Report on the Provisions of the Law Enforcement Integrity Commissioner Bill 2006, Law Enforcement Integrity Commission (Consequential Amendments) Bill 2006 and Law Enforcement (APF Professional Standards and Related Measures) Bill 2006*, May 2006, paragraph 1.2

⁵⁶ Queensland Police Service *Annual Report 2002-2003* p.37.

Planning Coordination Unit from the Department of the Premier and Cabinet, the CTCU liaises with other State and Commonwealth agencies on issues relevant to their preparedness to prevent, respond to and recover from a terrorist act or threat. Counter Terrorism liaison officers are designated in each region and command in QPS, and are responsible for developing counter-terrorism risk management plans and business continuity plans to ensure a coordinated Service response to a threat or act of terrorism.⁵⁷ In 2003-2004, the Queensland Government funded the CTCU to the amount of \$0.6 million.⁵⁸ The CTCU was established permanently in 2004-2005.⁵⁹

- 4.3.2 The responsibility for policing counter-terrorism lies with the Special Emergency Response Team (SERT). The SERT is within the Specialist Services Branch in the Operations Support Command.⁶⁰ The SERT provides a highly-trained, specialist capability to resolve incidents which involve violence, or are potentially violent and exceed normal response capabilities. They respond to terrorist incidents within the arrangements agreed to under the Commonwealth National Counter-Terrorism Plan⁶¹.
- 4.3.3 Queensland has a raft of counter-terrorism legislation providing Queensland Police with counter-terrorist powers broadly similar to those existing in New South Wales⁶². No oversight regime specific to police counter-terrorism powers and operations exists. An unspoken assumption seems to be that general police oversight agencies will detect abuse of these powers. The agency with responsibility for overseeing police in Queensland is the Crime and Misconduct Commission.
- 4.3.4 The Crime and Misconduct Commission (CMC) is a unique agency that combines the jurisdiction of a crime commission with a complaints handling body (such as the NSW Ombudsman) and a public sector anti-corruption agency (such as the NSW Independent Commission Against Corruption). It also has an education and research function and runs a witness protection service. The CMC, through its crime commission functions, has a counter-terrorism reference which relates to a wide range of organised criminal activity undertaken to advance a political, religious or ideological cause with the intention of intimidating the government or the public. This reference would be exercised in partnership with other law enforcement agencies, such as Queensland Police and federal agencies. The CMC has two current counter-terrorism referrals, one from December 2002 and the other from September 2004⁶³.
- 4.3.5 The CMC oversees the complaints process within the QPS. Similar to the NSW Ombudsman, it receives complaints, and has the power to review, or compel QPS to review complaints. Like the Police Integrity Commission, the CMC also has the power to investigate serious police corruption, and exercise Royal Commission powers such as hold public hearings into such matters. While the QPS is encouraged to take responsibility for complaints handling by consultation with the CMC, as well as liaison

⁵⁷ Queensland Police Service *Annual Report 2004-2005* p.27.

⁵⁸ Queensland Police Service *Annual Report 2003-2004*, p.38.

⁵⁹ Queensland Police Service *Annual Report 2004-2005*, p.3.

⁶⁰ *ibid.*, p.13.

⁶¹ *ibid.*, p.27.

⁶² The principal pieces of legislation include *Terrorism (Commonwealth Powers) Act 2002*, *Terrorism (Preventative Detention) Act 2005*, *Terrorism (Community Safety) Amendment Act 2004*, *Crime and Misconduct Act 2001*, *Police Powers and Responsibilities Act 2000*.

⁶³ Crime and Misconduct Commission *Annual Report 2004-2005*, p.14.

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and support for complaints handling processes, the CMC retains authority over all matters involving suspected official misconduct. It may choose to take a range of actions including investigating complaints itself, investigating the complaint jointly with the QPS or referring the matter to the QPS to investigate and report back to the CMC throughout the investigation or at the conclusion of the investigation.⁶⁴

4.3.6 One official exists in Queensland who does directly oversight aspects of counter-terrorism laws. The Public Interest Monitor (PIM) promotes the public interest during applications for surveillance and covert search warrants under the *Crime and Misconduct Act 2001* and the *Police Powers Responsibilities Act 2000* by the QPS and the CMC. The current PIM, Mr Colin Forrest, gave evidence before the Committee about the way in which his office works. He told the Committee that he liaises with QPS and CMC legal officers who are preparing the applications for warrants and gives his views as PIM on the warrant. This may mean more information is added to the application, or in some cases the application for the warrant does not proceed. When the application goes before the judge or the magistrate, the PIM or the deputy PIMs will also make submissions. If the warrant is granted, the PIM has an ongoing monitoring role and may audit the conduct of the warrant by the QSP or the CMC. At the conclusion of the warrant, these agencies have to report to the PIM in terms of whether the warrant has been effective.⁶⁵

4.3.7 The PIM must also be present at applications for covert search warrants and preventative detention orders. In particular the PIM must be notified at the beginning of this process, when an interim preventative detention order is being made. The PIM has the right to make submissions and be heard at the hearing of an application for a preventative detention order. The PIM also has the right to ask questions of anyone present at the hearing. The PIM would be present at any application made in Queensland, regardless of whether the application was made by a state or federal agency. Mr Forrest stated that there had to date been no applications for preventative detention orders made in Queensland.⁶⁶

4.3.8 Most applications for warrants deal with serious crimes, the majority of which are to do with drug trafficking. The others are in relation to murders and rapes and occasionally serious child abuse. The overwhelming majority of these warrants are granted—the PIM indicated about 90% to 95%. Mr Forrest stated that about 5% end up being denied and another 20% granted but with different conditions attached to them. The reason for this very high rate of approval, according to Mr Forrest, is due to the excellent working relations between his office, the QPS and the CMC. He reported that the QPS, in particular the Chief Superintendent in charge of Crime Operations, says it is an excellent system and helps QPS decide which warrants should be sought. He noted that he had not perceived any resistance from QPS since he had been PIM. Mr Forrest noted that the cost of his office was about \$200 000 per year.⁶⁷

⁶⁴ Crime and Misconduct Commission *Handling complaints against Queensland police: part, present, future*. No.2 August 2004, pp.9-10.

⁶⁵ Evidence taken from Mr Colin Forrest, Public Interest Monitor, at public hearings 24 August 2006.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

4.4 **Federal Bureau of Investigation**

4.4.1 The FBI is responsible for protecting the United States against terrorist and foreign intelligence threats, upholding and enforcing the criminal laws of the United States, and providing leadership and criminal justice services to federal, state, municipal, and international agencies and partners.⁶⁸ Through Joint Terrorism Task Forces (JTTF) the FBI in partnership with state and municipal law enforcement agencies investigates terrorism cases. JTTFs play a central role in nearly every terrorism investigation, prevention or interdiction within the United States.⁶⁹ JTTFs have been instrumental in breaking up cells like the "Portland Seven," the "Lackawanna Six," and the Northern Virginia jihad. They have also traced sources of terrorist funding and responded to anthrax threats.⁷⁰

4.4.2 In October 2001, the United States introduced the USA PATRIOT (the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act as a response to the September 11 2001 attacks. The Act is a lengthy and complex piece of legislation which includes a range of terrorism-specific offences, as well as increased powers for law enforcement agencies to investigate terrorism. These powers have been echoed in the responses of other jurisdictions to the September 11 attacks and other terrorist acts, for example enhanced surveillance procedures including delaying notice of the execution of a search warrant, the ability to seize electronic records and the ability to compel a service provider to hand over customer details in emergency situations.

4.4.3 Section 1001 of the USA PATRIOT Act 2001 requires the Inspector General of the Department of Justice to designate one official who shall:

- (1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice;
- (2) make public through the Internet, radio, television, and newspaper advertisements information on the responsibilities and functions of, and how to contact, the official; and
- (3) submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report on the implementation of this subsection and detailing any abuses described in paragraph (1), including a description of the use of funds appropriations used to carry out this subsection.⁷¹

4.4.4 The Office of the Inspector General (OIG) reports bi-annually to both Houses of the American Parliament on complaints received regarding the conduct of employees of the Department of Justice, which includes the FBI, the Drug Enforcement Agency

⁶⁸ <http://www.fbi.gov/quickfacts.htm>

⁶⁹ Federal Bureau of Investigation, 14 April 2004, Report to the National Commission on Terrorist Attacks upon the United States, *The FBI's Counterterrorism Program Since September 2001*, p.38.

⁷⁰ <http://www.fbi.gov/page2/dec04/jttf120114.htm>

⁷¹ Section 1001 of the USA PATRIOT Act 2001.

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(DEA), the Federal Bureau of Prisons (BOP), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and the US Attorney's Officers amongst others.⁷²

4.4.5 The OIG has six divisions:

- the Audit Division, responsible for independent audits of Department programs, computer systems, and financial statements.
- the Evaluation and Inspections Division, which provides an alternative mechanism to traditional audits and investigations to review Department programs and activities.
- the Investigations Division, responsible for investigating allegations of bribery, fraud, abuse, civil rights violations, and violations of other criminal laws and administrative procedures that govern Department employees, contractors and grantees.
- the Oversight and Review Division, a multidisciplinary unit of attorneys, investigators, and program analysts who investigate or review high profile or sensitive matters involving Department programs or employees.
- the Management and Planning Division, which provides services in the areas of planning, budget, finance, personnel, training, procurement, automated data processing, computer network communications and general support.
- the Office of General Counsel, which provides legal advice to OIG management and staff, drafts memoranda on issues of law, prepares administrative subpoenas, represents the OIG in personnel, contractual and legal matters and responds to Freedom of Information requests.⁷³

4.4.6 The OIG has approximately 400 employees, about half of whom are based in Washington DC, while the rest work from 16 Investigations Division field and area offices and seven Audit Division regional offices located throughout the country.⁷⁴

4.4.7 During the reporting period from 1 January 2006 to 30 June 2006, the OIG processed 803 complaints. Of these complaints:

- 647 fell outside OIG's jurisdiction or did not warrant further investigation;
- 336 involved agencies outside the jurisdiction of the OIG and were referred on to the appropriate bodies;
- 311 did not warrant further investigation;
- 143 raised management issues that were referred to the appropriate Department of Justice agencies;
- five did not provide enough information to determine if an abuse had occurred. Further information was sought from the complainants, but they did not respond;

⁷² US Department of Justice, Office of the Inspector General *Report to Congress on Implementation of Section 1001 of the USA PATRIO Act* August 15 2006, p.1.

⁷³ *Ibid.*, p.2

⁷⁴ *ibid.*

- eight matters warranted an investigation to determine if a Section 1001 abuse had occurred. Six involved Bureau of Prison employees and two involved FBI employees.⁷⁵

4.4.8 The OIG conducts other reviews that go beyond the explicit requirements of Section 1001 in order to more broadly fulfil its civil rights and civil liberties oversight responsibilities. To this end the OIG has initiated several special reviews that relate to its duties under Section 1001. These include:

- Review of the FBI's use of National Security Letters and Ex Parte Order for Business Records;
- Following up the Recommendations in the report *The September 11 Detainees: A Review of the Treatment of Aliens Held Under Immigration Charges in Connection with the Investigation of the September 11 Attacks*
- The FBI's Interview of Potential Protesters in Advance of the 2004 National Political Conventions
- Review of the FBI's Investigation of Certain Domestic Advocacy Groups;
- Review of FBI Conduct relating to Detainees in Military Facilities in Guantanamo Bay and Iraq
- FBI's Reporting of Possible Intelligence Violations to the President's Intelligence Oversight Board
- Material Witness Warrants.

4.5 **CASE STUDY: The Arrest and Detention of Mr Brandon Mayfield**

4.5.1 One of the more high profile cases reviewed by the OIG was the FBI's handling of the Brandon Mayfield matter. On 11 March 2004 a series of bombs were detonated on commuter trains in Madrid, Spain, killing 200 people and injuring more than 1 400 others. The Spanish National Police recovered fingerprints on a bag of detonators connected with the attacks and through INTERPOL requested that the FBI provide assistance in identifying the prints. On 19 March 2004 the FBI identified one of the prints as belonging to Mr Brandon Mayfield, a United States citizen. This identification was verified by a second examination of the print. As a result the FBI began immediate, intensive surveillance of Mr Mayfield. They found that amongst other things, Mr Mayfield:

- was an attorney;
- was a Muslim;
- had married an Egyptian immigrant;
- had represented a convicted terrorist in a child custody dispute; and
- had contact with suspected terrorists.

4.5.2 However there was no information connecting Mr Mayfield specifically with the Madrid train bombings.⁷⁶

⁷⁵ *ibid.* pp.4-5

⁷⁶ US Department of Justice, Office of the Inspector General, *A Review of the FBI's Handling of the Brandon Mayfield Case*, January 2006, pp.1-2.

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- 4.5.3 On 13 April 2004 the FBI found out that the Spanish National Police (SNP) examination of Mr Mayfield's fingerprints had yielded a negative result. The FBI dispatched an officer to meet with the SNP to explain how they had identified the fingerprints. On the basis of that meeting, the SNP said they would re-examine Mr Mayfield's fingerprints.⁷⁷
- 4.5.4 In early May 2004, the FBI began to receive media inquiries about an American suspect in the Madrid bombings and became concerned that Mr Mayfield might flee or destroy evidence. Hence, on 6 May 2004 Mr Mayfield was detained as a material witness and his home and office were searched and evidence seized. When Mr Mayfield was brought before the court, he denied the fingerprints were his and that he owned the detonator bag.⁷⁸
- 4.5.5 On 19 May 2004 a Court-appointed independent expert reviewed the fingerprint evidence and agreed with the FBI's identification of the fingerprint as belonging to Mr Mayfield.⁷⁹ However on the same day the SNP informed the FBI that they had positively identified the fingerprints as coming from an Algerian national. Mr Mayfield was released to home detention on 20 May 2004, and after reviewing the Algerian's prints the FBI withdrew its identification of Mr Mayfield on 24 May 2005 and the material witness proceeding was dismissed.⁸⁰
- 4.5.6 The FBI initially provided a number of explanations for the misidentification, including the poor quality of the digital image of the print, lack of access to the original print and the similarity of the print to Mr Mayfield's prints. After the FBI withdrew its identification it convened a two day session with an international panel of experts to determine how it failed in its identification of the print and to make recommendations for change in FBI fingerprint proceedings. The panellists identified errors in the identification process, over-confidence in a particular method for identifying prints and the pressure of working on a high profile case.⁸¹
- 4.5.7 On 16 July 2004 the FBI issued a formal report identifying the Algerian national as the source of the print. In October 2004 attorneys for Mr Mayfield filed a civil action against the FBI, Department of Justice and several individuals. The complaint included, amongst other things, violation of Mr Mayfield's civil rights and violations of the US constitution.⁸²
- 4.5.8 The OIG examined the conduct of the FBI in this case specifically in relation to:
- determining the causes of the fingerprint misidentification;
 - assessing the FBI's response to the error and if appropriate make additional recommendations for procedural changes to prevent future errors of this type;

⁷⁷ Ibid., p.2

⁷⁸ Ibid., p.3

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid., p.4

- determining if the FBI unfairly targeted Mr Mayfield in the fingerprint identification or in the ensuing investigation because of his religion;
- assessing the FBI's conduct in the investigation and arrest of Mr Mayfield;
- assessing the FBI's conduct in making certain representations to the United States District Court in support of the request for a material witness warrant and search warrants; and
- assessing the conditions under which Mr Mayfield was confined prior to his release.⁸³

4.5.9 The OIG found in relation to the FBI misidentification of the fingerprint that the unusual similarity between Mr Mayfield's print and the Algerian's fingerprint was a major fact. However the examiners committed errors in the examination procedure and misidentification could have been prevented by a more rigorous application of several principles of latent fingerprint identification.⁸⁴ The OIG concluded that Mr Mayfield's religion was not the sole or primary cause of the FBI's failure to question the original misidentification and catch its error. However as the facts about Mr Mayfield were revealed during the investigation, these most likely contributed to the examiners' failure to sufficiently reconsider the identification after questions about it were raised.⁸⁵

4.5.10 The OIG made a series of recommendations to the FBI to address the problems found in their investigation of the Mayfield case. The OIG did not find any intentional misconduct by FBI employees, but it did find a series of performance issues. Most significantly it found a series of systemic issues, particularly in the FBI Laboratory that helped cause the errors in the Mayfield case. While the FBI had taken significant steps to address these issues, the OIG made a series of additional recommendations to the FBI to address the FBI Laboratory issues raised by the misidentification.⁸⁶ A copy of the unclassified executive summary of the OIG's *Review of the FBI's Handling of the Brandon Mayfield Case* may be found at Appendix 3.

4.6 **New York Police Department**

4.6.1 The New York Police Department has been investigating terrorism through Operation Atlas. Run by the Deputy Commissioner of Counter Terrorism, Richard A Falkenrath, Operation Atlas has launched a coordinated defence of the city using regular patrol as well as police officers with heavy weapons safeguarding landmarks, places of worship, bridges, tunnels, subways and the transport system. Operation Atlas began in March 2003, corresponding with the beginning of the war in Iraq. The core elements of Operation Atlas are increased personnel deployment, transit system security, increased coverage patrol operations and intelligence. This includes close coordination with other agencies and authorities such as the Transport Bureau and the Port Authority.⁸⁷ NYPD is also running Operation Nexus, which encourages

⁸³ *ibid.*

⁸⁴ *ibid.*, p.6

⁸⁵ *ibid.*, p.12

⁸⁶ *ibid.* p.20

⁸⁷ <http://www.nyc.gov/html/nypd/html/dcct/dcct-home.html>

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business owners, operators and their employees to report any suspicious purchases or customers.⁸⁸

4.6.2 NYPD has no specific oversight for its counter-terrorism programs. All NYP oversight is provided by Internal Affairs, which is responsible for investigating complaints of misconduct and corruption against NYPD officers. The New York City Civilian Complaint Review Board (NYCCCRB) provides external oversight for misconduct issues. Of the 10 000 complaints finalised in 2005:

- 7% were substantiated.
- 21% were unfounded. That is, there was sufficient credible evidence to believe that the officer did not commit the alleged act of misconduct.
- In 37% of complaints, the officer was exonerated. That is, that the officer was found to have committed the act, but the act was lawful and proper.
- 24% of complaints were unsubstantiated. That is, from the available, credible evidence it was not possible to prove the allegation.
- In 9% of the complaints it was not possible to identify the officer.
- 3% of complaints were classified as miscellaneous.⁸⁹

4.6.3 The NYCCCRB has the power to subpoena documents⁹⁰ and under New York State Civil Service Law, officers who are the subjects of substantiated CCRB complaints must be disciplined or served with disciplinary charges within 18 months of the date of incident. The only exception to the statute of limitations occurs when the alleged misconduct committed by the officer constitutes a crime.⁹¹

4.6.4 The CCRB refers complaints of corruption and neglect of duty back to the NYPD to investigate.⁹² The Mollen Commission investigated serious acts of police corruption by NYPD officers during the first half of the 1990s. The Commission's final report recommended the establishment of "a permanent independent oversight body so that the vigilance and determination to fight the police corruption we see in our City today does not again evaporate when public attention and political concerns turn elsewhere."⁹³ This has not occurred.

4.7 Los Angeles Police Department (LAPD)

4.7.1 Counter-terrorism operations by the LAPD are conducted by the Major Crimes Division. It is connected to several other sections to ensure the supply of intelligence, specifically those who respond first to an incident such as Patrol groups, the Bomb Squad and the Fire Department and big picture bodies such as the Los Angeles County Terrorist Early Warning System and the California Anti-Terrorism Information Centre.⁹⁴ The LAPD is a charter member agency in the Los

⁸⁸ <http://www.nyc.gov/html/nypd/html/nexus.html>

⁸⁹ <http://www.nyc.gov/html/ccrb/html/how.html>

⁹⁰ <http://www.nyc.gov/html/ccrb/html/how.html>

⁹¹ <http://www.nyc.gov/html/ccrb/html/ccrbsub.html>

⁹² <http://www.nyc.gov/html/ccrb/html/faq.html>

⁹³ The City of New York, July 1994, *Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department Commission Report*, p 7.

⁹⁴ *Terrorism and the Municipal Police Department*

Angeles Task Force on Terrorism which was establishing during planning for the 1984 Olympics. A number of Major Crime Division personnel are permanently assigned to the Los Angeles FBI office to work with the FBI. All Major Crime Division personnel are considered to be part of the Task Force on Terrorism, regardless of where they are located.⁹⁵

- 4.7.2 All LA police officers are accountable to the five member Board of Police Commissioners, who are community members appointed by the Mayor to oversee LAPD operations and establish policy. The Major Crimes Division is subject to annual audit by the Police Commission's auditor and is also subject to unannounced audits by the Commission. The LAPD website states that "This oversight by an objective civilian entity is welcomed and essential in maintaining the confidence of the City Council and citizenry that abuses of power are not taking place."⁹⁶ The website goes on to note that it is important that the auditors of the intelligence unit "are closely scrutinized and subject to comprehensive background investigations."⁹⁷
- 4.7.3 External oversight for the LAPD was recommended by the Christopher Commission, an inquiry headed by Warren Christopher into the beating of Rodney King by some LAPD officers in 1991. However a mayoral election meant that this recommendation was not acted on until 1995. The duties of the Office of the Inspector General at that time were to audit, investigate, and oversee the Police Department's handling of complaints of misconduct by police officers and civilian employees, and perform other duties as assigned by the Police Commission.⁹⁸ However the Rampart corruption scandal in 1999 led to changes in the OIG charter in 2000. The OIG now has:
- the authority to initiate any audit or investigation pertaining to the Police Department, without the prior approval of the Police Commission, subject to the Commission's authority to direct that investigation be discontinued;
 - guaranteed access to all information and documents of the Police Department, to the same extent as the Police Commission itself;
 - the power to subpoena witnesses; and
 - authority to hire, discipline, and transfer the employees of the OIG.⁹⁹
- 4.7.4 The OIG has oversight over the LAPD's internal disciplinary process. OIG staff receive copies of every personnel complaint filed, and track selected cases along with any resultant litigation. In addition, the OIG audits selected investigations and conducts systemic reviews of the disciplinary system to ensure fairness and equity. Although the Commission, by Charter, does not have the authority to impose discipline, it receives regular reports and can investigate particular cases. In addition to overseeing the Department's disciplinary process, the Inspector General may undertake special projects as directed by the Board.¹⁰⁰

http://www.lapdonline.org/search_results/content_basic_view/27421

⁹⁵ http://www.lapdonline.org/search_results/content_basic_view/27421

⁹⁶ http://www.lapdonline.org/search_results/content_basic_view/27421

⁹⁷ http://www.lapdonline.org/search_results/content_basic_view/27421

⁹⁸ <http://www.lacity.org/oig/isgig2c.htm>

⁹⁹ <http://www.lacity.org/oig/isgig2c.htm>

¹⁰⁰ http://www.lapdonline.org/search_results/content_basic_view/1076

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4.8 Anti-Terrorism Branch, London Metropolitan Police

- 4.8.1 The UK has had anti-terrorism laws in place since the 1970s, mainly as a result of ongoing social and political unrest in Northern Ireland. The *Terrorism Act 2000* provides the current legislative basis for these laws. This Act is subject to extensive annual review by an independent judicial officer. Since 2001 this has been Lord Carlile of Berriew QC.
- 4.8.2 Following the September 11 attacks in 2001, the *Anti-Terrorism, Crime and Security Act 2001* was passed, which provides for extended periods of detention for foreign nationals suspected of terrorism, cutting off terrorist funding and ensuring the safety of aviation and nuclear industries. During a 2004 review of the *Anti-Terrorism, Crime and Security Act 2001*, the Government stated that the terrorist threat to the UK still came predominantly from foreign nationals.¹⁰¹
- 4.8.3 However following the 11 July 2005 bombings of the London underground, the *Prevention of Terrorism Act 2005* was introduced which allowed for control orders to be placed on British citizens. This Act was followed by the *Prevention of Terrorism Act 2006*, which created a number of new offences including acts preparatory to terrorism, encouragement to terrorism, disseminating terrorist publications and training terrorists.
- 4.8.4 Both the *Terrorism Act 2000* and the *Prevention of Terrorism Act 2005* are reviewed annually by Lord Carlile of Berriew QC. The *Anti-Terrorism, Crime and Security Act 2001* is reviewed by an independent committee of Privy Councillors headed by Lord Newton of Braintree.
- 4.8.5 The purpose of the independent review of the *Terrorism Act 2000* is to assist the Secretary of State and Parliament in relation to the workings of the Act. In determining this, the reviewer is required to make detailed enquiries of the people who use the Act or are affected by it. Each annual report lists those people and organisations consulted, as well as places visited. For 2005 this included the Islamic Forum Europe, Hizb at-Tahrir Britain, Human Rights Watch, European Committee for the Prevention of Torture, Northern Ireland Public Prosecution Service and the Bishop of Oxford¹⁰² amongst others. These reviews are comprehensive, and while not questioning whether the legislation is required, have stated on occasion if a section of the Act is otiose, redundant, unnecessary or counter-productive. Some repeals have occurred as a result¹⁰³.
- 4.8.6 The Annual Report on Section 14(3) of the *Prevention of Terrorism Act 2005*, examines the use of control orders. This includes a review of the use of control orders during the reporting period, detention and rendition of non-citizens the subject of control orders, modification of control orders, offences in contravention of a control

¹⁰¹ Secretary of State, *Counter Terrorism Powers: Reconciling Security and Liberty in an Open Society – A Discussion Paper* February 2004, p.2.

¹⁰² Lord Carlile of Berriew QC, *Report on the Operation in 2005 of the Terrorism Act 2000*, p. 46-39

¹⁰³ *ibid*, p.5.

order and appeals and other proceedings.¹⁰⁴ Most of these aspects of control orders are as yet untested in the Courts.

4.8.7 In terms of specific oversight of police using these laws, general misconduct and corruption oversight applies. The Independent Police Complaints Commission (IPCC) is responsible for investigating misconduct and corruption by police in England and Wales. The IPCC has been in operation since 1 April 2004. It can:

- manage or supervise a police investigation into a case and investigate independently the most serious cases using its own investigators;
- use police powers and must by law be given access to police premises, documents and other evidence on request;
- investigate all complaints against police officers, up to and including Chief Constables, and all police staff;
- issue complaint handling standards to the police service;
- use directed and intrusive surveillance and covert human intelligence sources;
- make recommendations on policy and operational lessons arising from its work;
- analyse information and carry out research into complaint trends and patterns; and
- gather feedback and information from communities about the police complaints system.¹⁰⁵

4.8.8 In January 2005 the IPCC asked all police forces within England and Wales to forward to it any complaints or misconduct issues arising from arrests under anti-terrorist legislation. The Chair of the IPCC, Mr Nick Hardwick stated:

The police must give the highest priority to protecting the public from the threat of terrorism. I hope that by calling in these complaints we can provide independent reassurance to Muslim communities that the special powers the police have are being used in an accountable and proper way. However, there is no doubt that the use of these exceptional powers has undermined confidence in the police amongst some Muslim communities.

Whilst we will be specifically calling in complaints or conduct matters that arise from arrests under the Terrorism Act, concerns have also been raised about the use of stop and search and its connection to countering terrorism. We will continue to monitor the issue closely.¹⁰⁶

4.8.9 The IPCC was responsible for investigating the death of Jean Charles de Menezes. This investigation tests the appropriateness of general accountability agencies investigating complaints arising from counter-terrorist operations.

¹⁰⁴ Lord Carlile of Berriew QC, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*.

¹⁰⁵ Independent Police Complaints Authority, *Annual Report and Accounts 2004/2005*, pp.4-5.

¹⁰⁶ http://www.ipcc.gov.uk/news/pr250105_antiterror.htm

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4.9 **CASE STUDY: The death of Mr Jean Charles de Menezes**

- 4.9.1 Jean Charles de Menezes was shot in the head at close range seven times by police engaged in a counter-terrorist operation at Stockwell Tube Station on Friday 22 July 2005. The counter-terrorist operation was in response to a series of bombings on London underground that occurred on 7 July 2005, as well as attempted bombings on 21 July 2005. Police had a block of flats in Tulse Hill, South London, under surveillance after finding a gym membership card linking a suspect to the attempted bombings. The card belonged to a resident of the flats who lived on the floor below Mr de Menezes. At about 9:30 am on Friday 22 July, Mr de Menezes left the flats and the army surveillance officer watching the building to identify suspects from photographs said he thought it would be worth someone else looking at Mr de Menezes to confirm his identity. However, as he was going to the toilet at the time, the officer was unable to video Mr de Menezes.¹⁰⁷
- 4.9.2 Officers then followed Mr de Menezes as he caught a bus, while members of the security services tried to confirm that he was the man they were looking for in relation to the attempted bombings. Mr de Menezes got off the bus near Stockwell Tube Station, picked up a free newspaper and used his Underground pass to get through the ticket barriers. At least one witness said that he saw a man vaulting the ticket barriers, but later acknowledged that it could have been the police pursuing Mr de Menezes. He went down the escalators, and at some point began running towards the train. Initial reports by witnesses say Mr de Menezes began running because he was being pursued by police. These reports were not dismissed by police, but leaked documents from the IPCC investigation suggest that Mr de Menezes was running to catch the train.¹⁰⁸
- 4.9.3 Mr de Menezes got on the train and sat down. Officers who had followed him sat nearby. One officer got up and held the train door open to let in armed police. In a leaked statement, the officer said that there was some shouting, including the word “police”, and that Mr de Menezes got up from his seat and started walking towards the armed officers. An officer then tackled Mr de Menezes and held him down in his seat. Mr de Menezes was then shot seven times in his head with hollow point bullets¹⁰⁹, and once in his shoulder. An additional three bullets missed him.¹¹⁰ Initial reports suggested that Mr de Menezes was wearing a thick padded jacket, despite the warm weather, which added to police suspicions that he was carrying a bomb. The Commissioner of the London Metropolitan Police, Sir Ian Blair, said soon after the shooting that the dead man’s clothing and behaviour had added to their suspicions.¹¹¹ Photographs of the scene show Mr de Menezes wearing a blue denim jacket or shirt.¹¹²
- 4.9.4 Within hours of the shooting, the head of London Metropolitan Police, Sir Ian Blair, wrote to the Home Office urging a delay in bringing in the IPCC to investigate the

¹⁰⁷ http://news.bbc.co.uk/1/shared/spl/hi/uk/05/london_blasts/tube_shooting/html/stakeout.stm

¹⁰⁸ http://news.bbc.co.uk/1/shared/spl/hi/uk/05/london_blasts/tube_shooting/html/station.stm

¹⁰⁹ <http://www.guardian.co.uk/menezes/story/0,,1691528,00.html>. These bullets are banned from use in warfare.

¹¹⁰ http://news.bbc.co.uk/1/shared/spl/hi/uk/05/london_blasts/tube_shooting/html/shooting.stm

¹¹¹ http://www.timesonline.co.uk/article/0,,22989-1739222_2,00.html

¹¹² http://news.bbc.co.uk/1/shared/spl/hi/uk/05/london_blasts/tube_shooting/html/pursuit.stm

shooting for fear of jeopardising the counter-terrorist investigation. At 4pm Blair told a press conference that “As I understand the situation, the man was challenged and refused to obey police instructions.”¹¹³ Metropolitan Police (the Met) later issued a press release stating, amongst other details, that while the identity of the man shot by police was not yet clear, he was under observation because he had come out of a house that was under police observation and that “his clothing and his behaviour at the station added to their suspicions”.¹¹⁴

- 4.9.5 On 23 July 2005, Scotland Yard announced that Mr de Menezes was not connected to the counter-terror operation, that the Met’s Directorate of Professional Standards would investigate the death, and that it would be referred to the IPCC¹¹⁵ as is required by law. Although the IPCC was notified on 22 July 2005, the investigation was not formally handed over until 27 July 2005, some five days later.¹¹⁶
- 4.9.6 In October 2005 details of the correspondence written by Sir Ian Blair to the Home Office on the day of the shooting appeared in *The Guardian*. The letter outlined Sir Ian’s concern about revealing operational tactics and sources of information to another agency.¹¹⁷ As such, Sir Ian wrote that he should be able to suspend the law requiring police to give the IPCC any information it requested while investigating a death arising from an anti-terrorist operation. He further wrote that he was worried about the IPCC’s duty to provide as much information as possible to the victim’s family, stating that this could put further lives at risk. He then stated “I have therefore given instructions that the shooting that has just occurred at Stockwell is not to be referred to the IPCC and that they will be given no access to the scene at the present time.”¹¹⁸ Sir Ian asked for Home Office support for the measure, “which may form the basis for amending the legislation in the future”.¹¹⁹
- 4.9.7 The Home Office response stated that the law mandating the IPCC to investigate fatal shootings cannot be suspended. A meeting under the auspices of the Home Office was arranged between the Met and IPCC, at which agreement was reached allowing the IPCC to take control of the inquiry into the shooting.¹²⁰
- 4.9.8 In January 2006, the IPCC delivered its report into the death of de Menezes to the Crown Prosecution Service. According to newspaper reports, up to ten officers potentially could have faced criminal charges. These officers were questioned by the IPCC under criminal caution, as were the soldiers who were responsible for conducting surveillance on the block of flats.¹²¹ Officers included in the referral to the CPS included Commander Cressida Dick, the senior officer in charge of deciding whether the threat posed by Mr de Menezes was so great that shoot-to-kill tactics were necessary, along with the two officers who shot Mr de Menezes.¹²² Under the

¹¹³ http://www.timesonline.co.uk/article/0,,22989-1739222_2,00.html

¹¹⁴ http://www.timesonline.co.uk/article/0,,22989-1739222_2,00.html

¹¹⁵ http://www.timesonline.co.uk/article/0,,22989-1739222_2,00.html

¹¹⁶ http://news.bbc.co.uk/1/shared/spl/hi/uk/05/london_blasts/tube_shooting/html/shooting.stm

¹¹⁷ <http://www.guardian.co.uk/menezes/story/0,,1691529,00.html>

¹¹⁸ <http://www.guardian.co.uk/menezes/story/0,,1691529,00.html>

¹¹⁹ <http://www.guardian.co.uk/menezes/story/0,,1691529,00.html>

¹²⁰ <http://www.guardian.co.uk/menezes/story/0,,1691529,00.html>

¹²¹ <http://www.guardian.co.uk/menezes/story/0,,1702743,00.html>

¹²² <http://www.guardian.co.uk/menezes/story/0,,1691521,00.html>

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Police Reform Act 2002, the IPCC sends its findings to the CPS when their report indicates that a criminal offence may have been committed by the person whose conduct was the subject of the investigation.¹²³

4.9.9 In July 2006 the Crown Prosecution Service announced that no police would face murder or manslaughter charges relating to the death of Mr de Menezes, but the Metropolitan Police Service would be charged with failing to provide for the health, safety and welfare of Mr de Menezes under the *Health and Safety at Work Act 1974*.¹²⁴ In August 2006, the Metropolitan Police Authority requested that the Attorney General, Lord Goldsmith, stop the Met being prosecuted under health and safety laws.¹²⁵ In September 2006 the Met pleaded not guilty to breaching health and safety laws in respect of Mr de Menezes. The case has been adjourned until 16 January 2007. The inquest into Mr de Menezes' death will not be held until the criminal proceedings have concluded.¹²⁶

4.9.10 The IPCC has reportedly made two reports on this matter. The first, known as the Stockwell Report – because of the location of the shooting of Mr de Menezes – will not be made public until any legal action arising from the death of Mr de Menezes is concluded. The Stockwell Report is expected to focus on a series of communication problems between CO19 (Central Operations Specialist Firearms Command, which provides armed support to police operations) and the surveillance teams.¹²⁷ It also raised the possibility of manslaughter charges against the two firearms officers who repeatedly shot Mr de Menezes, as well as Commander Cressida Dick who was in charge of the firearms operations on the day of the shooting. The IPCC specifically investigated whether she had given a clear-cut order for officers to shoot-to-kill.¹²⁸ According to a letter received by the de Menezes family from the Crown Prosecution Service, the IPCC report found that:

- officers running the operation ordered that Mr de Menezes be stopped from boarding the train and arrested;
- a firearms team was out of position and thus unable to detain him as ordered;
- a misunderstanding between commanding officers and firearms officers meant the order to arrest him as not “made explicit” to the team rushing to the train to stop Mr de Menezes;
- when firearms officers arrived they mistakenly thought they had to shoot him because he was going to attack the train;
- the two officers who shot Mr de Menezes told investigators that he was wearing a bulky jacket, which he was not; and
- the two officers who shot Mr de Menezes told investigators that they had shouted “Armed police” before firing. This was not corroborated by independent witnesses.¹²⁹

¹²³ Schedule 3 Part 3 Section 23 *Police Reform Act 2002*

¹²⁴ <http://www.guardian.co.uk/menezes/story/0,,1822711,00.html>

¹²⁵ <http://www.guardian.co.uk/menezes/story/0,,1837780,00.html>

¹²⁶ <http://www.guardian.co.uk/menezes/story/0,,1876071,00.html>

¹²⁷ <http://www.guardian.co.uk/menezes/story/0,,1702743,00.html>

¹²⁸ <http://www.guardian.co.uk/menezes/story/0,,1821152,00.html>

¹²⁹ <http://www.guardian.co.uk/menezes/story/0,,1826529,00.html>

- 4.9.11 The second Stockwell Report, also known as Stockwell 2, focuses on the nature of the statements made by Sir Ian Blair following the death of Mr de Menezes. Sir Ian repeatedly said that he was unaware Mr de Menezes was not a suicide bomber until 24 hours after his death. However several witnesses at the IPCC inquiry have reportedly said that within hours of the shooting, and well before Sir Ian's press conference, they knew the wrong man had been killed.¹³⁰ It will also address some of the statements Sir Ian made, including statements about the clothing Mr de Menezes was wearing, and whether he obeyed police directions¹³¹.
- 4.9.12 The two firearms officers who shot Mr de Menezes recommenced operational duties in July 2006. Depending on the contents of the IPCC report, they may face internal disciplinary action, but it was reported that senior officers felt they could return to duties because it is likely that criticism will be made of officers in charge of the operation. Apparently other officers associated with the operation remain on restricted duties.¹³² The officer in charge of the operation, Commander Cressida Dick was promoted to Deputy Assistant Commissioner of the Metropolitan Police in September 2006. She too could potentially face disciplinary action.¹³³
- 4.10 **Specialist oversight versus generalist oversight**
- 4.10.1 The cases of Brandon Mayfield and Jean Charles de Menezes highlight some important differences between specialist oversight such as that offered by the Bureau of Justice's Office of the Inspector General and the generalist oversight offered by the Independent Police Complaints Commission. Moreover the reactions of the two law enforcement agencies involved also show the benefits of specialist oversight.
- 4.10.2 In the Brandon Mayfield matter, the FBI took immediate steps to rectify the process errors made by its laboratory by convening a two day seminar with fingerprint identification experts to determine how their examination procedures failed and make recommendations for changes in procedure. When the OIG investigated, they had access to all staff involved in the case, as well as all the documentation relating to the matter. An unclassified executive summary of the OIG's investigation into this matter was published on the web in January 2006.
- 4.10.3 Under the *Police Reform Act 2002* police forces in England and Wales have a statutory duty to refer to the IPCC any incident involving a death which has arisen from police contact.¹³⁴ This allows the IPCC to determine and oversee investigations with the appropriate level of external supervision. At the time of the death of Mr Menezes, the Commissioner of the London Met denied IPCC investigators access to the site of the shooting despite legislative requirements. At the time Sir Ian stated that this was because of concerns that this would compromise and jeopardise intelligence sources on which the counter-terrorist operation was based. However,

¹³⁰ <http://www.guardian.co.uk/menezes/story/0,,1726675,00.html>

¹³¹ http://www.guardian.co.uk/uk_news/story/0,,1835640,00.html

¹³² <http://www.guardian.co.uk/menezes/story/0,,1832855,00.html>

¹³³ <http://www.guardian.co.uk/menezes/story/0,,1870915,00.html>

¹³⁴ Independent Police Complaints Authority, *Annual Report and Accounts 2004/2005*, p.56.

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some senior officers have since given evidence that it was known by the afternoon of Friday 22 July 2005 that an innocent man had been killed.

- 4.10.4 More than a year later, the IPCC is yet to publicly report on the Menezes matter. Lack of a timely public report has meant that information relating to the events leading to Mr Menezes death has been spread in disjointed snatches, largely through leaks of IPCC reports and Freedom of Information requests by newspapers, notably *The Guardian*. The Menezes family has also released the contents of some official correspondence to the media. Lack of public reporting has damaged public opinion regarding the London Met as well as Met officers' morale. At the time that Sir Ian decided to block IPCC access to the site of Mr Menezes' death, he was warned by his own officers that his actions left the force open to accusations of a cover-up.¹³⁵
- 4.10.5 Public perceptions of special treatment of the officers involved in Mr Menezes' death have been magnified by the decision of the Crown Prosecutor Service to charge the London Metropolitan Police under occupational health and safety laws without disclosing publicly and in detail the reasons why this decision was made. Similarly, the promotion of the officer in charge of the operation to the position of Assistant Commissioner before any public reporting of the circumstances of the operation, the resolution of any legal cases or any decision regarding disciplinary action has caused a public outcry.¹³⁶
- 4.10.6 Lack of public reporting has also caused ongoing grief for the Menezes family as they have not been informed of what occurred on the day of Mr Menezes death. The IPCC report will not be released until after any criminal legal action has concluded, and the inquest into Mr Menezes' death will not occur until the conclusion of any criminal action. This means that the Menezes family will only find out the details of events at the same time the rest of the public does. It also means that they will not be able to have legal representatives question any witnesses about their evidence until the inquest occurs.¹³⁷ Recently the Menezes family has challenged the decision by the Crown Prosecutor Service not to charge police with manslaughter, and a separate legal challenge of the IPCC's decision not to release their report to the Menezes family.¹³⁸
- 4.10.7 The experience of the Menezes investigation is in sharp contrast to the IPCC investigation into the shooting of Muhammad Abdulkahar. Mr Abdulkahar was shot and wounded by members of the Anti-Terrorist Branch raiding his home during the early hours of Friday 2 June 2006. The IPCC had reported publicly on these events by 3 August 2006. The IPCC report forms Appendix 4 of this Report.

¹³⁵ <http://www.guardian.co.uk/menezes/story/0,,1822211,00.html>

¹³⁶ <http://www.guardian.co.uk/menezes/story/0,,1840288,00.html>;
<http://www.guardian.co.uk/menezes/story/0,,1870915,00.html>; and
<http://www.guardian.co.uk/menezes/story/0,,1872959,00.html>

¹³⁷ <http://www.guardian.co.uk/menezes/story/0,,1824549,00.html>

¹³⁸ <http://www.guardian.co.uk/menezes/story/0,,1884990,00.html>

Chapter Five - PIC Risk Assessment of the Counter Terrorism Coordination Command

- 5.1 This chapter examines the specific outcomes of the PIC's risk assessment of the Counter Terrorism Coordination Command. For details regarding the methodology used by the PIC to conduct the risk assessment, the misconduct risk assessment and a discussion of risk management in law enforcement, please refer to the PIC's submission which can be found on the Committee website.
- 5.2 In undertaking the risk assessment the PIC consulted with senior levels of NSW Police and senior levels of the CTCC. The PIC formally and separately sought NSW police corporate level views and CTCC command-level views on areas of interest in addition to interviewing key staff of the CTCC. The PIC also contacted a number of law enforcement agencies in regard to the management of the risk of misconduct in those areas tasked with similar responsibilities and with similar powers to the CTCC. They also made enquiries with the NSW Audit Office and with Treasury concerning risk management methodologies, as well as with Australian and international researchers to identify available research on the relationship between misconduct risks and different police functions and powers, as well as research on risk management in policing.¹³⁹
- 5.3 By conducting this risk assessment, the PIC sought to identify the misconduct risks associated with the functions of the CTCC and how well NSW Police is identifying, assessing and managing misconduct risks faced by those working within the CTCC. The PIC acknowledged the limitations of the risk assessment, in particular that the information collected for the project relied primarily on material provided by NSW Police. The PIC made no attempt to view CTCC holdings or observe CTCC officers using their operational powers. As such, their assessment is largely based on an examination of the CTCC's stated practices without examining how these practices are applied in the field.¹⁴⁰
- 5.4 **Risk management by NSW Police and the CTCC**
- 5.4.1 The PIC wrote to the Deputy Commissioner of Specialist Operations to obtain corporate level information about risk management practices, as well as to the Assistant Commissioner Counter Terrorism to obtain command level information about risk management practices.
- 5.4.2 At a corporate level, the PIC asked if:
- NSW Police has a Service-wide policy or process it uses for identifying, documenting and managing risks, and if it does, whether this policy or process includes identifying and documenting organisational and/or command-level misconduct risks and misconduct prevention strategies;

¹³⁹ Police Integrity Commission 2006 *Management of Misconduct Risks by the NSW Police Counter Terrorism Coordination Command: an assessment*, p 30.

¹⁴⁰ *ibid.*, 32

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- there are any specific areas within NSW Police that have been assigned responsibility for overseeing misconduct risk management across the organisation as a whole or within the individual commands;
- NSW Police has issued any statements or directions concerning command responsibilities for misconduct risk management;
- NSW Police has provided any resources to assist commands in the process of identifying, assessing and managing misconduct risks; and
- NSW Police monitors the effectiveness of the treatment strategies used to reduce or manage individual misconduct risks.¹⁴¹

5.4.3 NSW Police advised that at a corporate level it uses the Command Management Framework (CMF) to identify, document and manage risks. NSW Police advised that corruption resistance is a major component of one module of this tool. Local commands are encouraged to adapt the CMF to their own needs, and this is seen by NSW Police as a move away from compliance-based auditing to a risk-based self-assessment audit process. This encourages individual commands to take responsibility for internal control processes. The NSW Police position is that self-assessment provides a balance between reporting needs and unnecessary external scrutiny.¹⁴²

5.4.4 The CMF is divided into three modules: People, Crime and Systems. Corruption resistance (or strategies to minimise misconduct) forms one part of the People Management Module. According to the NSW Police intranet “this module provides an effective tool to continually improve the management of corruption resistance activities and complaints handling procedures.”¹⁴³

5.4.5 Additionally NSW Police provides a range of resources to commands. These include structures such as the Professional Standards Command and services such as the Police Employee Corruption Hotline. Other broad groups include:

- resources that document guidance on acceptable behaviour and NSW Police values (the Code of Conduct and Ethics, the Statement of Values, the Oath of Office and the Code of Conduct for Students);
- legislation: the *Police Act 1990* (section 181D and 173) and integrity testing as provided for by Part 10 A, the *Police Regulation 2000*, the *Independent Commission Against Corruption Act 1988*, the *Public Sector Employment and Management Act 2002* and the *Protected Disclosures Act 1994*
- components of the NSW Police complaints management system and management action processes (c@ts.i, Commissioner’s Advisory Panel, Internal Review Panel, Complaint Management Teams, Local Management Issues).¹⁴⁴

5.4.6 NSW Police also provided the PIC with two analytical products for commands offered by the Professional Standards Command. These are Officer Complaints Analysis and Environmental Scans. The Officer Complaints Analysis is designed to assist

¹⁴¹ *ibid.*, p.44

¹⁴² *ibid.*, p.45

¹⁴³ *ibid.*, p.46

¹⁴⁴ *ibid.* pp.47-48

commanders when developing intervention strategies to minimise the risk of an officer receiving further complaints. The intention of the Officer Complaints Analysis is to identify complaints trends where early intervention can be of assistance. An Officer Complaints Analysis can be requested by a Commander or Professional Standards Manager for an officer who is considered at risk of attracting complaints.¹⁴⁵

5.4.7 The Environmental Scan aims to provide an understanding of the nature of complaints received at a command and the demographics of officers at risk. The analysis informs commanders in developing timely intervention strategies with a view to minimising the risk of officers receiving further complaints.¹⁴⁶

5.4.8 When the PIC requested additional information about the Officer Complaints Analysis and Environment Scans, it learnt that the first Officer Complaints Analysis was completed in November 2002 and that no request had been made for an Officer Complaints Analysis for an officer attached the Protective Security Group, the CTCC or the Public Order and Riot Squad. The first Environmental Scan was completed in March 2003, and no Environmental Scan has been prepared for the CTCC or PORS.¹⁴⁷

5.4.9 At a command level, the PIC asked the CTCC:

- whether there is an individual, group or committee responsible for identifying, reducing and/or managing misconduct risks faced by officers working in the CTCC;
- how misconduct risks are identified and assessed within the CTCC, and more specifically:
 - what processes and sources of information are used for identifying misconduct risks;
 - whether some assessment is made of the relative seriousness of the different misconduct risks, and if so, how that assessment is made;
 - how the CTCC determines the best way of responding to each of the identified misconduct risks;
 - to whom the identified misconduct risks and management strategies are reported;
 - what resources are available to implement the risk management strategies;
 - whether the risk management processes used by the CTCC are different from the processes used to identify, assess and manage misconduct risks within the Command;
 - whether it is intended that the misconduct risks faced by officers working in the CTCC or the risk reduction or management strategies be reviewed from time to time, and if so, what would trigger such a review; and
 - whether the CTCC monitors the effectiveness of the treatment strategies used to reduce or manage individual misconduct risks.¹⁴⁸

5.4.10 The CTCC told the PIC that the processes it uses to identify, assess and manage misconduct risks are not different from the processes used within NSW Police generally. When asked whether there is any individual, group or committee

¹⁴⁵ *ibid.* p.48

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*, pp.44-45

responsible for identifying, reducing and/or managing misconduct risk faced by officers working the CTCC, the CTCC responded:

- Individuals within the Command are aware of their obligation in relation to the NSW Police Code of Conduct and Statement of Values, and the Commissioner's Statement of Professional Conduct.
- Management meetings are conducted monthly providing a forum for issues to be raised and addressed. These issues include risk issues and may include misconduct issues.
- The Complaints Management Team assesses and manages using the NSW Police Complaints risk management model.
- The HR Committee provides recommendations to the Commander about the recruitment and management of staff.
- The Operation Review Committee (made up of the Commander, Unit leaders and other staff who meet three times a week) monitors, discusses and reviews information and intelligence taskings.
- The NSW Police Command Management Framework operates within the CTCC, with each unit monitoring the results. It is oversighted by the Commander of the CTCC. The CMF is based on risk assessment and the level of monitoring is commensurate with the identified level of risk. Regular reporting of these issues provides the opportunity of reviewing the level of risk and adjusting monitoring to cater for increased or decreased levels of risk.¹⁴⁹

5.4.11 In its response to the Commission, the CTCC listed the following processes and sources of information as ones that it uses to identify misconduct risks:

- Command Management Framework
- Complaint Management Team
- Ensure compliance with Secondary Employment Policy
- Gift register
- Assets management
- COPS audits
- Monitor access control
- Monitor systems in use (ie internet)
- Safe storage and handling of documents/information (per Australian Government Protective Security Manual and corporate policies and procedures)
- Integrity checking when coming to Command
- Commander liaison with stakeholders
- Telephone usage audits
- Operational Review Committee processes

¹⁴⁹ *ibid.*, p.49

- Performance Management Scheme (PMS).

5.4.12 The PIC asked the CTCC to identify a number of factors that could trigger the Command to review the misconduct risks faced by its officers. The CTCC said that these factors include: the “time period since the last review”, “issues that are identified”, “changes to existing work environment or exposure to a new environment”, “set time periods”, “CMF results”, “audit results”, “trends identified in the complaints”, and/or the “introduction of new legislation, policies or procedures”.¹⁵⁰

5.4.13 The CTCC told the Commission that it makes an assessment of the relative seriousness of different misconduct risks proactively through the Command Management Framework and reactively through the Complaints Management Team (CMT). In its response, the CTCC explained that the CMF “rates risks of differing systems and processes throughout the Command”. It further stated that “this framework allows checking against compliance and reassessment of risk if misconduct or procedural shortcomings are identified”. The CTCC’s response also referred to a “post-event review and analysis of complaints by the CMT [which] allows for causal factors to be identified and treatment options applied” such as amending the CMF to cater for the newly identified risks. The CTCC further said that as part of its review of complaints “the CMT is in a position to rate the seriousness which is usually conducted using corporately determined criteria”.¹⁵¹

5.4.14 When describing its process for assessing the seriousness of misconduct risks, the CTCC did not explicitly refer to considering the likelihood or the consequences of the risks. The CTCC said that it determines the best way of responding to each of the misconduct risks through:

- discussions at the Command Management meetings and Complaint Management Team meetings;
- consultation with specialists such as Professional Standards Command (PSC);
- development of policies (SOPs) and establishment of guidelines;
- preparation and presentation of induction packages;
- participation in the Performance Management Scheme and other Employment Management policies;
- amendment of the Command Management Framework.¹⁵²

5.4.15 The CTCC Induction Program documentation describes corruption resistance (or strategies to minimise misconduct) as a major component of one module of the CMF. However, when the PIC sought to obtain a copy of that section of the CTCC’s CMF that deals with corruption resistance, the Commission was informed that there is no discrete section. Instead, the Commission was told that corruption resistance was built in overall within the CTCC’s CMF.¹⁵³

¹⁵⁰ *ibid.*, pp.49-50

¹⁵¹ *ibid.*, p.50

¹⁵² *ibid.*, pp.50-51

¹⁵³ *ibid.*, p.52

5.4.16 In addition to the CMF, the CTCC also identified the Complaints Management Team as playing an important role in its misconduct risk management process. The CTCC referred to the CMT as one of the committees responsible for identifying risks faced by CTCC officers as well as being responsible for assessing and monitoring these risks. The Commission requested copies of the minutes of the CTCC's CMT meetings to better understand the role of this CMT in relation to misconduct risk management. The CTCC supplied the minutes for twelve meetings held between October 2004 and April 2006.¹⁵⁴

5.4.17 The Commission found these minutes to be clearly presented. These minutes documented:

- the status of investigations of complaints made against officers;
- any new complaints received;
- the progress of individual officers who were operating under a conduct management plan;
- discussions of the results of COPS and RTA audits;
- consideration of failed prosecutions; and
- general issues raised such as correspondence received from Professional Standards Command.¹⁵⁵

5.4.18 Information on the NSW Police intranet in relation to the "management of actions & outcomes" states that in order to enable CMTs to identify systems issues, recurring themes, emerging patterns in officer complaint histories and complaint turnaround times, they should maintain "complaint trends" as a standing agenda item. In the minutes of the CTCC's CMT meetings there was no mention of "complaint trends" as such and hence no indication that it was a standing agenda item. However, within the CTCC's CMT meeting minutes there were clear examples of where the CMT had looked at the wider implications of individual complaints and where it had taken steps to tackle the issues underlying some of these complaints:

- In some cases the complaints led to all officers being sent reminders of specific policies. In one case an email was sent to all officers reminding them of their responsibilities in relation to the NSW Police Email Policy; in another case a direction was given to remind all officers to obtain approval from their supervisor prior to changing their shifts.
- In relation to one set of COPS and RTA audits that were conducted, the CMT had noted a failure by some officers to supply their note book or duty book references to support their accesses to information. It was further noted that the supervisors of those officers had failed to identify this deficiency. This led to the Commander deciding to speak with Unit Leaders to reinforce the correct auditing procedures.

¹⁵⁴ *ibid.*, pp.52-53

¹⁵⁵ *ibid.*, p.53

- Following one complaint an officer was asked to prepare an information package for distribution within the command concerning legislation with which he had previously said he had not been familiar.
- Following another specific complaint, the CMT determined to conduct a comprehensive audit of a particular area of operation, review the current Standard Operating Procedures for that area and implement a new recording system.¹⁵⁶

5.4.19 Generally, the PIC's risk assessment of the CTCC's approach to risk management found that the CTCC's approach to misconduct risk management does not differ from the corporate approach. That is to say, it uses the CMF. The CTCC has followed NSW Police requirements to tailor its CMF to its own requirements (for example by including a template on Consulate Liaison) and has taken responsibility for administering this tailored CMF. However, the nature of the material in the CTCC's CMF templates is diverse and it is unclear how these templates relate to the misconduct or other risks that may be facing the CTCC.¹⁵⁷

5.4.20 The PIC found that the CTCC, in its command-level response, has advised that it has a number of committees that are responsible for identifying, reducing and/or managing misconduct risks. It has listed fourteen different processes that it uses to identify misconduct risks as well as a number of factors which could trigger the command to review the misconduct risks faced by its officers.¹⁵⁸

5.4.21 However the PIC found that the absence of documentation of the CTCC's risk management strategies means that it is difficult to assess how cohesive or comprehensive its current processes are. It is also not possible to determine how well the CTCC has tailored its CMF to meet its needs. Overall, the picture the CTCC provides of its risk management strategies is one incorporating a number of discrete elements where any interrelationships between the elements are not specified.

5.4.22 It is perhaps surprising that while lauding the value of a corruption resistance module in the CMF, the Commission was informed that there is no discrete section in the CTCC's CMF that relates to corruption resistance. Instead, the Commission was told that corruption resistance was built in overall within the CTCC's CMF.¹⁵⁹

5.5 Features of the CTCC's work

5.5.1 The PIC considered that a number of features of the CTCC's work are of note. Specifically:

1. It is broader than counter-terrorism policing.
2. It is specialised.
3. Much of the work is covert, hence it is not open to public scrutiny.
4. The work can become high-profile (see the earlier case study regarding the death of Mr Menezes in Chapter 4 of this report).

¹⁵⁶ *ibid.*, pp.53-54

¹⁵⁷ *ibid.*, p.55

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*

5. The work of the CTCC encompasses many of the same functions that were undertaken by its predecessors, the Special Branch and the PSG – it involves the protection of dignitaries as well as analysis, information gathering and liaison in relation to politically-motivated violence including terrorist activity – hence it would be incorrect to argue that the risks and oversight arrangements required for the CTCC are different from those of the former Special Branch or the former PSG on the premise that the functions of the CTCC are different from those of its predecessors.
6. It has the same combination of functions that caused the Privacy Committee to recommend that the former Special Branch “should have a more limited entitlement to collect intelligence than would normally be given to a Police force”.¹⁶⁰ When describing the functions of the former Special Branch, the Privacy Committee wrote:

...the Committee considers that the Branch should be mindful of its different functions, wherever possible. The wider powers particularly those of enforcement, held by the Special Branch, as an arm of the NSW Police Force, carry with them responsibilities which may not apply as clearly to purely executive intelligence organisation [*sic*].¹⁶¹

More recently, when discussing covert search warrants, the Australian Muslim Civil Rights Advocacy Network (AMCRAN) wrote:

At the core of the problem is that NSW Police in executing such warrants are behaving in an intelligence-gathering capacity rather than a law enforcement capacity. These two capacities are important to separate – and that is why the functions and duties of ASIO and the Australian Federal Police are distinguished.¹⁶²

7. The work has a preventative focus with the consequence that much of the information collected by the CTCC is gathered in an attempt to prevent future threats of terrorism or other forms of politically-motivated violence or attacks on dignitaries which have yet to occur. This preventative focus distinguishes its information collection from that in many other areas of policing.
8. The nature of the work may cause some people to fear the creation of “dirt files”, even if this fear is misplaced. Hocking cited Justice Lionel Murphy’s minority judgment in the Church of Scientology case in 1982 in which Justice Murphy described the consequences of intelligence collection including the generation of a climate of apprehension. Hocking stated that Justice Murphy:

...reflected on the need for adequate legislative control and oversight of security organisations, recognising in particular that the practice of political surveillance in the civic arena and the public awareness of this practice, generates what he termed: “...a climate of apprehension and an inhibition of lawful political activity even at the high levels of government... Experience thus shows [Murphy continued] that for a free society to exist intelligence organisations must be subject to administrative supervision and amenable to legal process” .¹⁶³

¹⁶⁰ Privacy Committee, 1978. *The Special Branch Criminal Records in NSW*, p.26.

¹⁶¹ *Ibid.*, p.22

¹⁶² AMCRAN, 2005, <http://www.amcran.org/>

¹⁶³ J. Hocking, 2003, *Terror Laws: ASIO, counter terrorism and the threat to democracy*, UNSW Press, p.7.

9. Some of the information collected is likely to be irrelevant and some assessments are likely to be subjective. When discussing the nature of the information collected by the former Special Branch, the Privacy Committee wrote:

... we believe the Police will invariably accumulate a certain amount of possibly irrelevant and subjective data about the subjects of their files. The high degree of risk involved in this collection practice which we believe can be justified in the interest of Branch efficiency must be countered by strict security measures.¹⁶⁴

10. In most cases the information collected will be incomplete.

11. The work requires strong cooperative, coordinated and consultative relationships with officers from a range of federal and state agencies, including work as part of Joint Counter-Terrorism Teams, and frequent liaison with the Australian Federal Police, Australian Security Intelligence Organisation, Protective Security Coordination Centre, Department of Foreign Affairs and Trade and the NSW Consular Corps.¹⁶⁵

5.5.2 In addition, it is also noteworthy that the structure of the CTCC has been subject to continuing change. During the period that the Commission was collecting information for this assessment (late 2005 to mid-2006) a number of changes occurred or were foreshadowed to occur, including:

- the creation of the Public Order and Riot Squad and its location within the renamed Counter-Terrorism and Public Order Management Group;
- the relocation of the Vikings Unit¹⁶⁶ within the Counter-Terrorism and Public Order Management Group;
- a new Assistant Commissioner Counter Terrorism and Public Order Management commenced duties on 3 April 2006;
- at the end of June 2006, an in-principle agreement to co-locate the investigation team, together with their intelligence support with the NSW Crime Commission and AFP investigators, and to establish a joint management arrangement governed by a new Tri-Partite MOU were foreshadowed. At that stage it was known that further consultation would be required regarding data management arrangements, among other things.¹⁶⁷

5.5.3 The CTCC's response to the PIC noted that there is no consolidated documentation of the misconduct risks identified as being faced by officers working within the CTCC. When asked "what misconduct risks have been identified as potentially being faced by officers working in the CTCC as a result of the types of work carried out by the CTCC", the command identified the following list of potential misconduct risks:

- unauthorised release or misuse of information—either deliberately or accidentally—especially information provided from third parties;

¹⁶⁴ Privacy Committee, op cit, p.26

¹⁶⁵ Police Integrity Commission 2006 *Management of Misconduct Risks by the NSW Police Counter Terrorism Coordination Command: an assessment*, pp.59-62.

¹⁶⁶ Viking Unit undertake high visibility policing operations targeting anti-social behaviour, street level offences and alcohol related crime.

¹⁶⁷ Ibid., p.62

- inappropriate storage of information;
- inappropriate collection of information;
- recruitment of officers for information by external agencies (national security issue);
- improper associations;
- misuse of motor vehicles;
- misuse of mobile phones;
- false overtime claims;
- misuse of covert licenses.¹⁶⁸

5.5.4 The first four of these were considered to be “moderate” risks by the CTCC, while the last five were considered to be “minor” misconduct risks. The CTCC did not elaborate further on these potential misconduct risks.¹⁶⁹

5.5.5 In the structured interviews that Commission officers conducted with key CTCC and PORS officers, officers were asked what they considered to be the major misconduct risks faced by officers working in the CTCC. As can be seen from Table 1, in their responses, these officers mentioned each of the risks listed above other than the last two: “false overtime claims” and “misuse of covert licences”. In addition, the officers interviewed also identified the following misconduct risks:

- compromise of, or impropriety in, investigation;
- informant management;
- officers acting outside their charter;
- covert search warrants;
- security of exhibits/exhibit handling;
- drug and alcohol abuse.¹⁷⁰

5.5.6 In relation to staff working in PORS, the risk of “inappropriate use of force” received a special mention.¹⁷¹

5.5.7 Some of those interviewed were not sure whether the misconduct risks were documented or not. One said that he thought that the generic risks would be in the Code of Conduct and Ethics. Another said that he thought that the CMF documents a range of risks including misconduct risks. Another officer said that some of the misconduct risks would be documented in the CTCC’s Standard Operating Procedures (SOPs) and in its CMF, though he added that he had not seen a consolidated list.¹⁷²

¹⁶⁸ *ibid.*, p.63

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*, p.64

¹⁷¹ *ibid.*

¹⁷² *ibid.*

- 5.5.8 A summary of the potential misconduct risk areas identified by the PIC from a range of different sources can be found at the end of this chapter.¹⁷³
- 5.5.9 The PIC also examined complaints made about officers working in the CTCC that were registered on c@ts.i¹⁷⁴ between March 2003 and May 2006. The objective of this exercise was twofold: firstly, to identify misconduct allegation types to see whether these allegation types are similar to or different from allegations made about officers undertaking other types of police work and secondly, to determine whether any of allegations made about CTCC officers were consistent with types of misconduct previously identified by the Royal Commission in relation to the former Special Branch. The PIC found that there was nothing to distinguish the types of allegations made about officers assigned to the CTCC from those working in other commands. The PIC did not find any examples of complaints that reflected the types of misconduct previously identified by the Royal Commission in relation to the former Special Branch.¹⁷⁵
- 5.5.10 The Commission used comments made in the judgment on three pre-trial motions concerning the admissibility of evidence in *Regina v Zaky Mallah* as an additional source to identify potential misconduct risks. The judgment revealed that correct procedures had not been followed in this instance when NSW Police did not obtain a Controlled Operations Certificate at the beginning of an undercover part of the operation (though a Controlled Operations Certificate was subsequently obtained).
- 5.5.11 In this case the failure appeared to be the result of a lack of knowledge about proper procedures regarding the use of police powers. Evidence on which this judgment was based portrayed some officers as not being aware of the legislation and procedures required when conducting the investigation and not taking steps to find out more or to obtain legal advice. It is of concern that senior officers involved in the Mallah investigation were not aware of the required procedures in relation to Controlled Operations. Moreover, these officers said they did not take steps to remedy this situation by either reading the legislation or seeking legal advice. Instead they said they acted on their “assumptions” and “beliefs”.¹⁷⁶ This is of particular concern given that the amount of legislation that officers are required to be familiar with has increased as a result of the additional police powers provided to counter-terrorism in NSW (see Chapter 3 of this report for discussion of the legislation).
- 5.5.12 The PIC noted that this example both highlights operational risks for the CTCC where officers may not be aware of the appropriate procedures and identifies the possibility of officers who are aware of the appropriate processes failing to follow them.¹⁷⁷

¹⁷³ *ibid.*, p.69-70

¹⁷⁴ The NSW Police complaints management system.

¹⁷⁵ *Ibid.*, p.68

¹⁷⁶ Judgment in *R. v Zaky Mallah*, pp.27&39

¹⁷⁷ Police Integrity Commission 2006 *Management of Misconduct Risks by the NSW Police Counter Terrorism Coordination Command: an assessment*, p.71.

- 5.5.13 The PIC's risk assessment found that the CTCC has advised that it uses a range of strategies to manage the potential misconduct risks its officers may face. These strategies include: physical security measures, use of corporate systems for information management and informant management, a panel rather than individuals to decide which information should be collected, supervision and record keeping in relation to investigations, rotation of officers, and audits to deter and detect individual instances of misconduct. The CTCC has also advised that because its officers work closely with officers from other agencies such as the AFP and ASIO, the work of CTCC officers is subject to being observed by officers from the other agencies with whom they work.¹⁷⁸
- 5.5.14 While the adoption of such measures is likely to assist in minimising future misconduct, from the information provided to the Commission it is not possible to assess the effectiveness of the CTCC's misconduct risk treatment strategies. For example, in its written response the CTCC has not linked its treatment strategies to specific misconduct risks. Hence it has not clarified whether it has strategies in place for each of the misconduct risks it has nominated or whether it has decided that some of the misconduct risks do not require a specific response.¹⁷⁹
- 5.5.15 Although the Commission has been informed that the CTCC's CMF is tailored for the requirements of this particular command, the criteria used to tailor the CMF are not clear. If the CMF is to be a command risk management tool, it is perhaps surprising that there was no clear link between the CMF and any of the misconduct risks that the CTCC rated as "moderate". On the other hand, the CMF does include risk treatment strategies for misuse of motor vehicles and misuse of mobile phones (two of the five misconduct risks that the CTCC rated as "minor").¹⁸⁰
- 5.5.16 While the CTCC described the strategies it uses to treat its misconduct risks, it did not provide any information about the range of options that had been considered, the processes used to weigh possible different treatment options and/or why it chose its current treatment strategies. For example, the material provided to the Commission does not indicate whether or not the CTCC has considered using strategies such as those itemised in the former PSG's Corruption Prevention Plan, such as:
- identifying the number of sensitive targets authorised by the ORC;
 - conducting random audits on information holdings, both hard copy and COPS, to ensure compliance with the charter;
 - auditing ASNET disseminations;
 - conducting random checks of the security of documents to ensure appropriate security of confidential information.¹⁸¹
- 5.5.17 Currently little is done to prepare CTCC officers for the specific misconduct risks they may face which are associated with the work of the CTCC. While the CTCC

¹⁷⁸ *ibid.*, p.89

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*, p.90

has advised that it is considering including identified misconduct risks in induction documentation, at the time of drafting this report CTCC officers were not told of the specific misconduct risks they might face in their work nor were they told of the problems identified in the way the former Special Branch conducted functions not dissimilar to those performed by the CTCC. No explicit reference is made to the CTCC's charter in its induction program, nor is any explicit reference made to that part of the charter that specifies limits to the range of intelligence activities and investigations that the CTCC should undertake.¹⁸²

5.5.18 It would seem reasonable to expect that in circumstances where a high-level governance document is in place for a business unit—such as a charter—that those aspects that establish standards for the conduct of staff should be cascaded down to systems and procedures that govern the day-to-day activities of staff, such as an induction program. However, based on the information obtained by the Commission during the course of this project, it would seem that the CTCC charter—which establishes a command-level standard requiring staff to ensure they do not investigate persons solely on the basis of political views—is not replicated in any of the misconduct risk management strategies identified by the command. This raises questions about the extent to which the charter can be regarded as effective in establishing standards at a high level for the CTCC and further illustrates the disconnected nature of the CTCC's approach to the management of misconduct risk.¹⁸³

5.5.19 *Findings of the PIC's risk assessment*

5.5.19.1 Unlike the former PSG, which was subject to a legislated oversight regime requiring an annual audit conducted by the NSW Police Audit Group and monitoring of that audit by the Commission, much of the oversight of the CTCC is currently based on supervision and self-assessment. While the Commission values the importance of self-assessment, it considers that oversight also plays a useful role in deterring future misconduct.¹⁸⁴

5.5.19.2 Key CTCC officers perceived that the benefits of an annual audit and oversight by an external agency were that such measures provide an assurance to Government and the Parliament and can enhance the reputation of the command. However, some also commented that the audit conducted on the PSG was a waste of resources as it duplicated internal checking processes, was time-consuming and focused too broadly, including areas that were not at risk. Some officers also considered that these audits had an adverse effect on morale through a perceived lack of trust.¹⁸⁵

5.5.19.3 The Commission is of the view that for any oversight planned, care should be taken to design the oversight to carefully target what is being monitored and minimise the resources required and the potential disruption caused. It is arguable that the audit methodology applied to the PSG canvassed the potential for

¹⁸² *ibid.*

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*, p.98

¹⁸⁵ *ibid.*

misconduct too widely rather than specifically focussing on the misconduct risks faced by the PSG that were different from the misconduct risks faced by other NSW Police commands, which had originally been a concern in the Special Branch. In terms of morale, it is important to present clear messages that any oversight is a result of the nature of specific functions carried out, not the result of any specific concerns about the officers who are employed in the area.¹⁸⁶

5.5.19.4 When asked for their suggestions concerning the types of monitoring arrangements necessary to adequately manage the misconduct risks that may be faced by officers working in the CTCC, the majority of officers interviewed said that they thought that:

...the oversight for the CTCC should be the same as the oversight arrangements for other NSW Police commands. They tended to argue this on an equity basis, that is, that the CTCC should be treated in the same way as other commands. The Commission does not accept the argument that oversight should be based on equity considerations. Instead the Commission is of the view that the need for oversight should be determined by the nature of the risk. This was the case for the oversight of the PSG which was recognised as being under much greater scrutiny than any other NSW Police command. In particular the Commission considers the need for any oversight or special monitoring of the CTCC should be based on considerations such as whether the misconduct risks faced by the CTCC differ from those faced by other commands and the nature of the mechanisms that are in place to address any CTCC misconduct risks that are different from those faced by other commands.¹⁸⁷

5.5.19.5 The Commission supports the view expressed by some officers that any oversight should be targeted to those areas which are associated with a special risk. It is of interest to note that one officer suggested that it might be appropriate to confine the oversight to information gathering, recording and intelligence management in the area of public order management because of the difficulty in delineating between people involved in legitimate protest versus those involved in politically-motivated violence.¹⁸⁸

5.6 **PIC's consideration of oversight required for the CTCC**

5.6.1 The Commission considers that, like officers from any command, the officers who work in the CTCC face a range of misconduct risks. While most of these misconduct risks are pertinent to officers working in other commands, some misconduct risks arising in the CTCC environment would be uncommon in other commands. It is to these misconduct risks, which are not common to NSW Police as a whole and which would be faced by any unit undertaking the same functions as the CTCC, that this assessment had been addressed.

5.6.2 A more targeted form of monitoring than that previously required for the Protective Security Group (PSG)

5.6.2.1 The Commission is of the view that, because of the nature of these uncommon risks, some aspects of the work of the CTCC warrant careful monitoring, but that such monitoring can be more tailored and should be more focused than in the

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid.*, p.99

¹⁸⁸ *ibid.*

past. The Commission considers that fewer aspects of the work of the CTCC require some form of special attention than was the case for the PSG because, unlike the former Special Branch which used stand-alone systems, the CTCC uses corporate systems for its storage of information, management and payment of informants, and recruitment.

- 5.6.2.2 Previously, Part 3 of the *Police Act 1990* required that the audit of the PSG specifically focussed on whether proper procedures existed and were being adhered to by the PSG in connection with the use and payment of informants. While the Commission recognises that informant management is a corruption risk for law enforcement agencies internationally, and hence presents a corruption risk for all investigative areas of NSW Police that use informants, the Commission is of the view that informant (or source) management does not pose a greater risk to the CTCC than it does to other areas of NSW Police. As such the Commission considers that informant management and the payment of informants by the CTCC should be subject to the same form of monitoring as that used for informant management undertaken by other commands.
- 5.6.2.3 The Commission is of the view that investigations to prevent acts of terrorism, while having different operational risks from other investigations, largely present the same misconduct risks as those faced by other areas of policing that conduct criminal investigations.
- 5.6.2.4 While the execution of covert search warrants is an area of CTCC operations that may require special monitoring in the future, the Commission is of the view that consideration of the need for any additional oversight in this area should be deferred until the findings of the NSW Ombudsman's report monitoring the first two years operation of this aspect of the legislation become available.
- 5.6.3 Focus on appropriate targeting and appropriate retention (and disposal) of information
- 5.6.3.1 The Commission sees that the misconduct risks which are different and require special management are restricted to quite specific areas of the work undertaken by the CTCC. In particular, the Commission considers that the misconduct risks that initially require some form of special management are those that pertain to the possibility of:
- inappropriate targeting, and
 - maintaining files on those who are unlikely to pose a threat of politically-motivated violence.
- 5.6.3.2 The nature of the information collected by the CTCC, like the information collected by the former Special Branch and the former PSG, may cause some people to fear the creation and maintenance of "dirt files" on individuals, even if this fear is misplaced. While the Commission considers that such misconduct is unlikely, because its consequences would be large if it were to occur the Commission believes that these areas warrant careful monitoring. The purpose of such monitoring is to focus attention on these areas as a means of deterring potential

misconduct and to provide an effective reminder of the lessons from the investigations into the operations of the former Special Branch.

5.6.4 The way forward

5.6.4.1 The Commission considers that the way forward should include an improved CTCC misconduct risk management process to enable the CTCC to improve its capacity to identify and respond to current and future misconduct risks, as well as specific monitoring of the practices and procedures used by the CTCC to manage targeting and information retention (and disposal). Specifically, the Commission is of the view that the following needs to occur:

1. The CTCC (at the command level) and NSW Police (at the corporate level) should document their recognition of the inherent misconduct risks for any unit that undertakes the work of the former Special Branch and document the lessons, for those currently undertaking this work, to be learnt from the investigations undertaken into the work of the former Special Branch.
2. The CTCC should more generally strengthen its capacity to resist misconduct, as discussed in Section 9.2, by:
 - preparing and implementing a documented misconduct risk management plan;
 - equipping its officers for the misconduct risks they may face through their work in the CTCC by informing them of the specific misconduct risks they might encounter in their work and how they should respond if they find themselves in such circumstances; and
3. NSW Police should impose some form of monitoring that directly focuses on minimising the potential for inappropriate targeting and retention of inappropriate information which may be perceived as “dirt files”.

5.6.4.2 The Commission concludes its risk assessment by stating that it does not wish to prescribe the form of monitoring to be used by NSW Police. The Commission considers this as a management issue for NSW Police, but believes that clearly defined, transparent procedures need to be developed and promulgated. The Commission does not see that further oversight by an external agency needs to be mandated at this stage. The current absence of a legislative provision for auditing and monitoring does not in any way preclude the Commission from exercising its functions and powers in connection with the CTCC. The Commission is able to intervene either in direct response to a complaint or when it has a reason to believe that it would be in the public interest to do so. Also the management of any complaints about CTCC officers remains subject to the oversight of the NSW Ombudsman’s Office.

5.6.4.3 However, the Commission will retain an interest in this area until it is satisfied with the systems put in place by the CTCC and by NSW Police to manage these potential misconduct risks.

Summary of potential misconduct risk areas
identified through different sources of information

Potential misconduct risk area	Identified in CTCC command-level written response ¹	Identified in interviews with key CTCC officers ²	Identified in investigations of former Special Branch	Identified by other law enforcement agencies	Identified from the literature
Unauthorised release or misuse of information*	√	√	X	√	√
Inappropriate storage of information*	√	√	√ ³	√	X
Inappropriate collection of information*	√	√ ⁴	√ ⁵	√	X
Recruitment of officers for information by external agencies (national security issue)*	√	√	X	X	X
Improper associations*	√	√	X	X	X
Misuse of motor vehicles*	√	√	X	X	X
Misuse of mobile phones*	√	√	X	X	X
False overtime claims*	√	X	X	X	X
Misuse of covert licences*	√	X	X	X	X
Compromise in, or impropriety of, investigation	X	√	X	X	√ ⁶
Informant management	X	√	√	√	√
Officers act outside their charter	X	√	√	X	X
Covert search warrants	X	√	X	X	X
Security of exhibits/exhibit handling	X	√	X	X	X
Drug and alcohol abuse	X	√ ⁷	√ ⁸	X	X

- 1 These misconduct risks were provided in the command-level response in a letter from NSW Police Deputy Commissioner Specialist Operations to Commissioner Police Integrity Commission dated 20 April 2006, received 20 April 2006.
- 2 These misconduct risks were identified by key CTCC and PORS officers interviewed in March-April 2006.
- 3 The Royal Commission referred to "lax and inconsistent record keeping practices" and "the ineffective and outdated intelligence system [Special Branch] maintained" (Wood 1997, p. 251).
- 4 Those interviewed worded this as "improper targeting of suspects".
- 5 The Royal Commission referred to "the opening of dossiers and the keeping of records in respect of various persons, for example, barristers practising in the criminal law who on no reasonable basis could have been of interest to Special Branch within its charter" and "the belief that it had long been associated with political interests, and seen as an agency which could be used for political advantage against person on whom 'dirt files' had been kept" (Wood 1997, p. 251).
- 6 Discussed in the literature as occurring as a result of pressure to produce results (HMIC 1999, p. 3; Punch 2000, pp. 309-310; Prenzler 2002, p. 14).
- 7 The officers who nominated this misconduct risk did not consider it to be specific to the CTCC, but considered it as a potential misconduct risk facing officers in many commands.
- 8 The Royal Commission did not specifically refer to drug and alcohol abuse. It referred to "long lunches by supervisors and the consumption of alcohol on duty, particularly within the Special Branch office where it seems a bar was regularly opened in the afternoons" (Wood 1997, p. 251)

* Wording of these potential misconduct risks is taken directly from CTCC command-level written response.

Chapter Six - Joint Operations and the Counter Terrorism Coordination Command

- 6.1 The Counter Terrorism Coordination Command, like other Commands within NSW Police, has the ability to conduct joint operations with other law enforcement agencies. The National Counter-Terrorism Plan specifies that “police will, where appropriate, adopt a multi-jurisdictional approach (that may take the form of joint task forces) to the criminal investigation of terrorism”.¹⁸⁹
- 6.2 The Commander of the Professional Standards Command, Assistant Commissioner John Carroll, during the Committee’s *Phase Two Inquiry into Section 10(5) of the Police Integrity Commission Act 1996*, gave evidence on the general operation of NSW Police taskforces. He stated that taskforce arrangements with external agencies are positive arrangements, with a lot to offer NSW Police. However, the terms of reference establishing taskforces must be clearly articulated otherwise there can be issues for officers as to what is their chain of command. If officers are left on taskforces too long, this can reduce their chances for promotion opportunities. Occupational health and safety issues can also arise, as well as welfare issues. There are also legislative requirements in relation to gathering evidence and presenting evidence that can impact on officers within taskforces.¹⁹⁰
- 6.3 Assistant Commissioner Carroll stated that taskforces are established and operate according to terms of reference drawn up at the beginning of a joint investigation. The terms of reference set out the arrangements between the parties to the investigation. These terms of reference exist in the context of broader Memorandums of Understanding that exist between agencies that conduct joint investigations. These documents define clear lines of responsibility for a number of things, including for example, who manages the source of the information. For NSW Police officers, this must be done as specified by informant management policies. Assistant Commissioner Carroll acknowledged that for officers working at another location, sometimes “if someone is working at a location, it is irresistible that as the time goes on you start to adopt the principles and the relationships that are in that environment.”¹⁹¹
- 6.4 In relation specifically to the Counter Terrorism Coordination Command, Assistant Commissioner Nick Kaldas, Counter Terrorism and Public Order Management, gave evidence before the Committee on 24 August 2006. He stated:
- The current terrorism environment involved NSW Police working hand in glove with the Australian Federal Police, ASIO and other Commonwealth intelligence agencies. I cannot envisage that NSW Police would ever conduct a major terrorism investigation without the involvement and partnership of those Commonwealth agencies.¹⁹²

¹⁸⁹ *National Counter-Terrorism Plan*, September 2005, paragraph 16, p.3:2.

¹⁹⁰ Evidence from Assistant Commissioner John Carroll, 2 November 2005, Committee on the Office of the Ombudsman and the Police Integrity Commission Report *Phase Two Inquiry into Section 10(5) of the Police Integrity Commission Act 1996*

¹⁹¹ *ibid.*

¹⁹² Evidence from Assistant Commissioner Nick Kaldas, 24 August 2006.

- 6.5 Deputy Commissioner Specialists Operations, Terry Collins, also gave evidence to the Committee on the procedures used by the CTCC for joint operations. He emphasised that inquiries following the September 11 2001 events in America clearly identified that there was a critical need for all agencies to work together, share intelligence and work in a collegiate way such as in joint investigation teams. As such the management systems and process that are in place now in counter-terrorism commands are significantly different to the old systems. For example, target selection is considered in a rigorous manner by investigation teams rather than being selected by a single person. Reviewing the decisions of the investigation team is a joint senior management team. Above that is an executive committee whose members are at an Assistant and Deputy Commissioner level. This system oversees operations such as Operation Pendennis (discussed later in this chapter).
- 6.6 In terms of the conduct of joint investigations, Assistant Commissioner Kaldas discussed how operations are conducted with very clear terms of reference which are issued to senior team members so that they know who they have working for them. An investigation agreement is struck, particularly when local area commands are involved, so that everyone is clear who is in charge, what the parameters of the operation are and what is expected of them. Once the operation is in progress there is a systematic and regular reporting regime, followed by a post-operational assessment at the end.¹⁹³
- 6.7 Additionally, Deputy Commissioner Collins, reminded the Committee of the safeguards built into the counter-terrorism legislation and the “extraordinary oversight in regard to each and every time we use those powers”.¹⁹⁴
- 6.8 A particular issue regarding oversight for joint taskforces was raised by Assistant Commissioner Kaldas concerning access to intelligence holdings by those outside of NSW Police and its investigative partners. He made that the point that if there is a perception by the Commonwealth or other agencies that the material they hold is to be examined by those outside the counter-terror environment, those agencies:
- ...will definitely think twice about what material they can share with us. The added complication is that they are also recipients of information from other agencies and other countries about which they have agreements and that also may be breached if that is allowed to happen.¹⁹⁵
- 6.9 From the evidence given by Assistant Commissioner Kaldas that NSW works in a “hand in glove”¹⁹⁶ way with other agencies for counter-terrorism operations, another issue for oversight of counter-terrorism operations is that of officers coming from a range of jurisdictions with differing levels of oversight. With international secondment arrangements and multi-jurisdiction taskforces, it is entirely possible that a NSW Crime Commission officer (subject to no external oversight agency) would be working with NSW and AFP police officers (subject to the NSW and Commonwealth Ombudsman and the PIC and ACLEI respectively), a London

¹⁹³ *ibid.*

¹⁹⁴ Evidence from Deputy Commissioner Terry Collins, 24 August 2006.

¹⁹⁵ Evidence from Assistant Commissioner Nick Kaldas, 24 August 2006

¹⁹⁶ *ibid.*, 24 August 2006

Metropolitan police officer (scrutinised by the Independent Police Complaints Ombudsman), a NYPD police officer (oversighted by the New York City Civilian Complaint Review Board), a LAPD police officer (oversighted by the Office of the Inspector General) advised by the FBI attaché from the US consulate (oversighted by the FBI's Office of the Inspector General). It is unclear how oversight would be managed in such a situation, especially given the extremely varied nature of the oversight agencies.

6.10 Tensions between agencies could also be a potential problem for joint operations. For example, relations between the NSW Crime Commission and the AFP are such that the AFP allegedly requested that the Crime Commission not be part of any joint counter-terror operation, with ASIO allegedly sharing the AFP's reservations about such an arrangement.¹⁹⁷

6.11 **Operation Pendennis**

6.11.1 In the early hours of 8 November 2005, seventeen people were arrested in Sydney and Melbourne as a result of an ongoing counter-terrorism operation, known as Operation Pendennis, involving the AFP, NSW Police, NSW Crime Commission, Victoria Police and ASIO. The arrests followed the execution of search warrants where officers seized a range of material including unidentified substances, firearms, travel documents, computers and backpacks. Eight people were arrested in Sydney after warrants were executed on homes in Lakemba, Belmore, Wiley Park, Greenacre, Illawong, Punchbowl, Hoxton Park, Condell Park, Ingleburn, Belfield, Bankstown and Kemps Creek.¹⁹⁸

6.11.2 NSW Police Commissioner Ken Moroney stated that he was "satisfied that we have disrupted what I would regard as the final stages of a large scale terrorist attack here in Australia."¹⁹⁹ It was alleged that the Sydney arm of an Islamic terrorist group had stockpiled enough chemicals to make at least 15 large bombs to be used against selected targets. Police stated that the Sydney suspects were so advanced in their plans that they could have produced bombs within days.²⁰⁰

6.11.3 The media later described it as the biggest anti-terrorist operation in Australian history. Operation Pendennis had been underway for sixteen months prior to the November 2005 arrests. At the beginning of November 2005, senior police from the operation briefed the NSW Minister for Police, saying that the investigation was coming to a head. The then Commander of the CTCC, Assistant Commissioner Norm Hazzard publicly stated "We reached a stage where we could no longer search for evidence [that a terrorist attack would take place] as opposed to looking at the safety of the community."²⁰¹

¹⁹⁷ Neil Mercer, 6 November 2005, 'Police check on would-be terrorists' *The Sunday Telegraph*, p 15.

¹⁹⁸ Media Release, APF, Victoria Police, NSW Police and ASIO. November 8 2005. *Terrorism Related Charges*.

¹⁹⁹ McIlveen, L & Hunt, E. 9 November 2005. 'A war at our door: police raids expose terrorist threat.' *The Daily Telegraph*.

²⁰⁰ Silvester, J., Munro, I. & Gibbs, S. 10 November 2005. 'Enough to build 15 bombs'. *Sydney Morning Herald*.

²⁰¹ Wilkinson, M & Moore, M. 12 November 2005. 'Patient hunters wait to spring the trap.' www.smh.com.au

- 6.11.4 On the basis of the evidence brought forward by NSW Police, a briefing was given to the Prime Minister. Media reports claim that Pendennis was being driven from Sydney, but the AFP were critical of the evidence provided as the most likely immediate charges against the suspects had to be laid under the federal criminal code.²⁰² Following the briefing, the Prime Minister decided to recall the Senate to pass a small amendment to the federal laws which would mean that police would no longer need to specify the location or timing of a terrorist attack when charging a suspect.²⁰³
- 6.11.5 A series of stories in state and national dailies quickly followed. One mentioned “Operation Pandanus” and stated that at least six people suspected of planning a terror attack were under surveillance in Sydney and that they had been stockpiling explosives. Possible attacks sites, including the Sydney Harbour Bridge and the Melbourne Stock Exchange were listed.²⁰⁴
- 6.11.6 Another article in a national newspaper discussed a rift between the ASIO and the AFP following the Prime Minister’s decision to recall the Senate, thus publicly revealing the counter-terror operation. The article stated that the APF and NSW Police were unhappy with the decision to reveal the terror threat that prompted specific changes to the law. A police source was quoted as being concerned that all the monitoring and surveillance could have been jeopardised by what had been revealed when the Senate was recalled. Victoria Police counter-terrorism sources were quoted as being furious. The article alleged that at the heart of police concerns was a fear that advance publicity may have damaged surveillance of suspected terrorist cells. The article asserted that ASIO had advised the Prime Minister that public reference to the existence of fresh intelligence could be made and that they had cleared the public announcement made by him.²⁰⁵
- 6.11.7 Further allegations of disquiet amongst the joint investigative partners about the actions of the Prime Minister were made in another article which alleged that intelligence and law enforcement sources were amazed by the Prime Minister’s actions in drawing public attention to Operation Pendennis as some suspects knew they were persons of interest because their homes had been raided by ASIO in June 2005, but others would not be aware they were under surveillance. The article claimed that while the suspects had talked about a potential attack, much of it in a general way, until recently there had been no target selected. One source is quoted as saying “...with each article [suspects] are more likely to say: ‘It’s us’.”²⁰⁶ The article goes on to say that 30 officers from the NSW CTCC were working out of the NSW Crime Commission and that according to an AFP source, the AFP did not want members of a joint state and federal team working with the Crime Commission. The article also stated that ASIO shared these reservations.²⁰⁷

²⁰² *ibid.*

²⁰³ *ibid.*

²⁰⁴ Butterly, N., Lawrence, K. & McIlveen, L. 5 November 2005. ‘Spies eye six terror suspects’. *The Daily Telegraph*.

²⁰⁵ Shanahan, D. & Walters, P. 5 November 2005. ‘Police rift over PM’s terror alert’. *The Australian*.

²⁰⁶ Mercer, N. 6 November 2005. ‘Police check on would-be terrorists’. *The Sunday Telegraph*.

²⁰⁷ *ibid.*

- 6.11.8 On 8 November the joint task force running Operation Pendennis conducted a series of raids. It appears that the men arrested had long been known to intelligence services and the police. In Sydney more than 360 NSW Police and 70 federal officers were deployed, including forensic experts, plainclothes officers, the dog squad, and at least two police video crews as well as air support. They were coordinated from Police Headquarters by a group of officers working a bank of computers.²⁰⁸
- 6.11.9 When police raided the Bankstown house of the suspected leader of the Sydney group, Mohamed Elomar tried to escape. The police helicopter tracked him with thermal imaging equipment as he ran from tree to tree, trying to hide. By following directions from the helicopter, armed police with dogs surrounded him.²⁰⁹ The footage of his arrest was later released to the media by police. Elomar had come to the attention of police and ASIO since the Sydney Olympics. At that time he and his brothers owned a property near Canberra, from which the police had received reports of gun fire. Following the September 11 2001 attacks the police increased scrutiny of the family. It was alleged that member of an Islamic youth group were using the property as a terrorist training camp.²¹⁰
- 6.11.10 In Lakemba, police arrested Abdul Rhakib Hasan, a Bangladeshi-born butcher who had been under intense scrutiny by ASIO for the previous two years. He had first been questioned by ASIO in November 2003 as part of the investigation into the French terrorist suspect Willie Brigitte.²¹¹ Hasan had previously been charged by ASIO for lying about his links to Brigitte.²¹² In Wiley Park another man arrested, Kaheld Sharrouf, had also been part of the ASIO investigation of Brigitte. Sharrouf's sister-in-law had introduced Brigitte to his Australian born-wife.²¹³
- 6.11.11 At the other end of the same street, police arrested Khaled Cheikho and his nephew Moustafa Cheikho. Both Cheikhos are alleged to have trained with the proscribed terrorist organisation, Lashkar-e-Taiba, in Pakistan. However Khaled Cheikho allegedly trained with them before the organisation was banned, and when it was heavily supported by the Pakistani intelligence services. Both Cheikhos had been under surveillance by ASIO and police for at least 18 months before their arrest in November 2005.²¹⁴
- 6.11.12 Other suspects had not previously been known to law enforcement agencies, for instance Omar Baladjam, who had appeared in small parts on *Home and Away* and *Wildside*. Witnesses have stated that when approached by police, he shot at them with a handgun. He was shot in the neck by police. Officers found a second handgun in his backpack.²¹⁵ He was charged in a bedside hearing at Liverpool

²⁰⁸ Wilkinson, M & Moore, M. 12 November 2005. 'Patient hunters wait to spring the trap.' *www.smh.com.au*
²⁰⁹ *ibid.*

²¹⁰ Wilkinson, M & Allard, T. 10 November 2005. 'Shadowy links start to emerge'. *Sydney Morning Herald*.

²¹¹ Wilkinson, M & Moore, M. 12 November 2005. 'Patient hunters wait to spring the trap.' *www.smh.com.au*

²¹² Wilkinson, M; Moore, M & Clark, A. 9 November 2005. 'We'll charge more suspects'. *Sydney Morning Herald*.

²¹³ Wilkinson, M & Moore, M. 12 November 2005. 'Patient hunters wait to spring the trap.' *www.smh.com.au*

²¹⁴ Wilkinson, M & Allard, T. 10 November 2005. 'Shadowy links start to emerge'. *Sydney Morning Herald*.

²¹⁵ Kennedy, L. & Clark, A. 9 November 2005. 'Shot man appeared on Home and Away'. *Sydney Morning Herald*.

Hospital on 9 November 2005 with attempting to murder police, malicious wounding, and terrorism and firearms offences.²¹⁶

6.11.13 The origins of Operation Pendennis go back to June 2004, when police were following the French terrorist suspect Willie Brigitte, who had arrived in Australia in 2003 after allegedly training in a terrorist camp in Pakistan. Anyone linked to Brigitte or Laskar-e-Toiba has been under scrutiny as part of Pendennis. The Brigitte investigation led the AFP to arrest one of Brigitte's associates, Faheem Lodhi, who was accused of planning to blow up the Sydney electricity grid and several defence sites.²¹⁷

6.11.14 A raid in Sydney in July 2005 found instructions for making explosives in a rubbish skip at one of the suspect's houses.²¹⁸ At the time no-one was charged with terror offences, but investigators monitored the increasing chatter amongst group members, and some of those raided in July 2005 were arrested in November 2005,²¹⁹ including Mohamed Elomar.²²⁰

6.11.15 The eight men arrested in Sydney on 8 November 2005 were charged with conspiring to manufacture explosives in preparation for a terrorist act. The men are Mohamed Elomar, Khaled Sharrouf, Moustafa Cheiko, Khaled Cheiko, Mazen Touma, Abdul Rhakib Hasan, Mirsad Mulahalilovic and Omar Baladjam.²²¹

6.11.16 Police executed new search warrants as part of Operation Pendennis on 9 March 2006. Federal Police, NSW Police and ASIO raided homes at Hoxton Park and Bankstown, as well as a number of suspects' cells at Goulburn prison. The lawyer for one of the accused has claimed that police breached legal privilege by taking documents prepared for the purpose of seeking legal advice from his client's cell.²²²

6.11.17 On 31 May 2006, AFP officers and Victorian police arrested three more men in Melbourne as part of Operation Pendennis.²²³

6.11.18 Legal action against those charged with terrorist activities as part of Operation Pendennis is ongoing.

²¹⁶ Silvester, J., Munro, I. & Gibbs, S. 10 November 2005. 'Enough to build 15 bombs'. *Sydney Morning Herald*.

²¹⁷ Kennedy, L. & Clark, A. 9 November 2005. 'Shot man appeared on Home and Away'. *Sydney Morning Herald*.

²¹⁸ *ibid.*

²¹⁹ Lawrence, K. & Benson, S. 9 November 2005. 'Vital intelligence that averted a catastrophe'. *The Daily Telegraph*.

²²⁰ Wilkinson, M. & Allard, T. 10 November 2005. 'Shadowy links start to emerge.' *Sydney Morning Herald*.

²²¹ McIlveen, L & Hunt, E. 9 November 2005. 'A war at our door: police raids expose terrorist threat.' *The Daily Telegraph*.

²²² 'Police reveal counter-terrorism raids' www.abc.gov.au/news/items/200603/1596619.htm?sydney

²²³ Nguyen, K. 1 April 2006. 'Terror swoop, three charged'. *The Age*.

Chapter Seven - Oversight for the Counter Terrorism Coordination Command

7.1 This inquiry has considered a range of issues pertinent to a more specific form of oversight for the Counter Terrorism Coordination Command. Chief amongst these has been the argument strongly mounted by NSW Police, that the CTCC is unlike the old Special Branch. It is connected to the mainstream of NSW Police through its recruitment practices and use of corporate data management systems. According to NSW Police its work in partnership with a range of Commonwealth and State agencies means that practices that were acceptable in Special Branch could simply not occur. Above all, NSW Police maintain that their culture has changed substantially, and the practices of Special Branch would not be tolerated. On this basis the Assistant Commissioner of the CTCC argued that:

...subjecting the counter-terrorism area of operation to further, onerous, dedicated audits will place this operational sphere in a unique situation that not other area of the Services, with no supporting rationale.²²⁴

7.2 As was considered in the Committee's previous report, *Interim Report on an Inquiry into the Police Integrity Commission's Jurisdiction to Oversight the Protective Security Group*, the predecessor of the CTCC, the Protective Security Group, was the successor of Special Branch. It was subject to a regime of annual internal auditing to ensure it was conforming to its charter. The PIC monitored the outcomes of the audit.

7.3 The claim that the CTCC is completely different to the Special Branch was specifically addressed in the PIC's risk assessment of the CTCC, which formed their submission to this inquiry. They found that:

- The work of the CTCC encompasses many of the same functions that were undertaken by the Special Branch and the PSG. Hence it would be incorrect to argue that the risks and oversight arrangements required for the CTCC should be different from those of the former PSG based on any differences in their functions.²²⁵
- The work of the CTCC is broader than counter-terrorism policing. Much of its work is covert, though it can become high-profile. The CTCC's work has a preventative focus. The nature of the work may cause some people to fear the creation of "dirt files", even if this fear is misplaced. The work requires cooperative, coordinated and consultative relationships with officers from a range of federal and state agencies. The structure has been subject to continuing change.²²⁶
- The CTCC command-level response to the PIC's request to identify misconduct risks did not include "informant management" or "officers acting outside their charter" as corruption risks both of which had been documented to be problems experienced by the former Special Branch.²²⁷

²²⁴ NSW Police submission

²²⁵ Police Integrity Commission 2006 *Management of Misconduct Risks by the NSW Police Counter Terrorism Coordination Command: an assessment*, p.72

²²⁶ *ibid.*

²²⁷ *ibid.*

- Unlike the former Special Branch, the CTCC is not relying on stand-alone systems. Its systems are as accountable and transparent as the systems used by other NSW Police commands because it is using the same corporate systems.²²⁸
- CTCC officers are not told of the specific misconduct risks they might face in their work. Nor are they told of the documented problems associated with the way the former Special Branch discharged functions not dissimilar to those performed by the CTCC.²²⁹

7.4 In evidence before the Committee, and in the CTCC submission to the Committee, Assistant Commissioner Nick Kaldas stated that:

- New powers available to the CTCC, rather than increasing the risk of misconduct, have brought with them checks and balances in the legislation which has increased oversight of the CTCC.²³⁰
- Use of NSW Police corporate information management systems provides accountability to the actions of the CTCC that Special Branch did not have.²³¹
- The environment within which counter-terrorism investigations take place is not conducive to corruption or misconduct because there is no profit motive.²³²
- Oversight by an organisation outside the counter-terror environment may lead to difficulties with intelligence holdings and create difficulties with intelligence sharing with national and international partners.²³³
- A new agreement with the AFP means that NSW Police investigators will be collocated, probably in the AFP Headquarters and will be part of a Joint Counter-Terrorism Team. It is likely the JCTT will use the AFP data system and be subject to the checks and balances that the AFP has in place. This would further complicate access to data by oversight agencies, “and perhaps lessen the need for oversight even further”.²³⁴
- The culture that contributed to the excesses of Special Branch no longer exists.²³⁵
- The current external operating environment post September 11 2001 has fundamentally and irreversibly changed, which would no longer allow the activities of Special Branch to occur. For example all CTCC investigations are undertaken as joint operations.²³⁶

7.5 Nevertheless the PIC’s risk assessment of the CTCC concluded that, like officers in any other command, the officers who work in the CTCC face a range of misconduct risks. While most of these risks are the same across commands, some misconduct risks arising in the CTCC environment would be uncommon in other commands. The PIC considers that fewer aspects of the work of the CTCC require some form of

²²⁸ *ibid.*, p.91

²²⁹ *ibid.*

²³⁰ NSW Police submission, p.3

²³¹ *ibid.*, p.4

²³² *ibid.*, p.5

²³³ *ibid.*

²³⁴ *ibid.*

²³⁵ *ibid.*

²³⁶ Evidence from Assistant Commissioner Nick Kaldas, 24 August 2006.

monitoring than the Protective Security Group because unlike the former Special Branch, the CTCC uses corporate systems for its storage of information, management and payment of informants, and recruitment.²³⁷

- 7.6 Previously, Part 3 of the *Police Act 1990* required that the audit of the PSG specifically focussed on whether proper procedures existed and were being adhered to by the PSG in connection with the use and payment of informants. While the PIC recognises that informant management is a corruption risk for law enforcement agencies internationally, and hence presents a corruption risk for all investigative areas of NSW Police that use informants, the PIC is of the view that informant (or source) management does not pose a greater risk to the CTCC than it does to other areas of NSW Police. As such, the PIC considers that informant management and the payment of informants by the CTCC should be subject to the same form of monitoring as that used for informant management undertaken by other commands.²³⁸
- 7.7 The PIC acknowledged that the execution of covert search warrants is an area of CTCC operations that may require special monitoring in the future. However it is of the view that consideration for any additional oversight in this area should be deferred until the findings of the NSW Ombudsman's report monitoring the first two years of operation of this piece of legislation becomes available.²³⁹
- 7.8 Specifically, the PIC identified two misconduct risks that initially at least require special management. These are:
- the possibility of inappropriate targeting; and
 - the risk of maintaining files on those who are unlikely to pose a threat of politically-motivated violence.
- 7.9 The PIC notes that the nature of the information collected by the former Special Branch and the former PSG may cause some people to fear the creation and maintenance of "dirt files" on individuals, even if such a fear is misplaced. While the PIC considers that such misconduct is unlikely because its consequences would be large if it were to happen, the PIC also believes that these areas warrant careful monitoring. The purpose of such monitoring is to focus attention on these areas as a means of deterring potential misconduct and providing an effective reminder of the lessons from the investigations into the operations of the former Special Branch.²⁴⁰
- 7.10 The PIC's risk assessment concludes that the way forward should include an improved CTCC misconduct risk management process to enable the CTCC to improve its capacity to identify and respond to current and future misconduct risks, as well as specific monitoring of the practices and procedures used by the CTCC to manage targeting and information retention and disposal.²⁴¹

²³⁷ Police Integrity Commission 2006 *Management of Misconduct Risks by the NSW Police Counter Terrorism Coordination Command: an assessment*, p.112

²³⁸ *ibid.*

²³⁹ *ibid.*

²⁴⁰ *ibid.*, p.113

²⁴¹ *ibid.*

7.11 The PIC is of the opinion that the following needs to occur:

1. The CTCC (at the command level) and NSW Police (at the corporate level) should document their recognition of the inherent misconduct risks for any unit that undertakes the work of the former Special Branch and document the lessons to be learned from the investigations into Special Branch for those currently working in the CTCC.
2. The CTCC should more generally strengthen its capacity to resist misconduct by:
 - preparing and implementing a documented misconduct risk management plan;
 - equipping its officers for the misconduct risks they may face through their work in the CTCC by informing them of the specific misconduct risks they might encounter in their work and how they should respond if they find themselves in such circumstances; and
3. NSW Police should impose some form of monitoring that directly focuses on minimising the potential for inappropriate targeting and retention of inappropriate information which may be perceived as “dirt files”.²⁴²

7.12 The PIC states that it does not wish to prescribe the form of monitoring to be used by NSW Police, as this is a management issue for them, but the PIC does believe that it needs to be clearly defined and transparent procedures need to be developed and promulgated.²⁴³

7.13 The PIC further stated that it does not see that further oversight by an external agency needs to be mandated at this stage. It notes that the absence of a legislative provision for auditing and oversight does not preclude the PIC from exercising its functions and powers in connections with the CTCC.²⁴⁴

7.14 The Committee supports the PIC recommendation that the CTCC draw on the lessons from Special Branch for those working within the CTCC. The Committee strongly endorses the PIC recommendation that the CTCC should prepare and implement a risk misconduct plan and prepare its officers for the kinds of risks they may face during their work. The Committee will actively follow the progress of the implementation of these recommendations by NSW Police.

7.15 In regard to the PIC’s third recommendation, that NSW Police have some form of monitoring that minimises the potential for inappropriate targeting and the retention of inappropriate information, the Committee notes the evidence of Assistant Commissioner Kaldas who stated that:

If there was a regime in place where it could be audited and the results made available to others who need to examine what has been audited and what has happened without looking at the material itself, I can see that as a way forward.²⁴⁵

²⁴² *ibid.*

²⁴³ *ibid.*

²⁴⁴ *ibid.*, pp.113-114

²⁴⁵ Evidence from Assistant Commissioner Kaldas, 24 August 2006.

7.16 The Committee fully supports the PIC's third recommendation, and given the tacit support for an internal monitoring regime by Assistant Commissioner Kaldas, the Committee looks forward to regular progress reports on the implementation of this recommendation.

7.17 In relation to the Committee's concern that noble cause corruption had not been identified as a potential misconduct risk for CTCC, the Commissioner of the PIC gave evidence that:

noble cause corruption is usually developed around systems that are not working perfectly and police who are inclined to do the right thing take shortcuts because the system does not work. I do not think there is any indication that the powers and processes that are available to the CTCC will not work.²⁴⁶

7.18 The Committee is satisfied that this aspect of misconduct has been considered by the PIC.

RECOMMENDATION 1: The Committee will seek regular progress reports from the Police Integrity Commission regarding NSW Police implementation of the recommendations contained within the PIC report Management of Misconduct Risks by the NSW Police Counter Terrorist Coordination Command: An Assessment.

Should the PIC's recommendations contained in its report Management of Misconduct Risks by the NSW Police Counter Terrorist Coordination Command: An Assessment not be implemented, or should they prove not to be effective, the Committee will consider recommending legislation to reintroduce a statutory audit.

7.19 **Legislative checks and balances**

7.19.1 Much was made of the inbuilt checks and balances contained within NSW counter-terrorism legislation. The NSW Police submission drew the Committee's attention to checks and balances contained within the various pieces of legislation, in particular the Attorney General's annual review of the operation of the *Terrorism (Police Powers) Act 2002* and the requirement for the Attorney General to table in Parliament annual reports from the Commissioner of Police and the Commissioner of the Crime Commission in relation to the use of preventative detention orders.²⁴⁷

7.19.2 Section 36 of the *Terrorism (Police Powers) Act 2002* specifically requires the Attorney General to review the operation of the Act annually and report to Parliament on the outcome of that review. The Attorney General was required to conduct the first review as soon as possible after the period of 12 months from the date of assent to this Act. Assent was given on 5 December 2002. The review was to be tabled within 12 months. As such the first review should have been tabled by 5 December 2004, and the second review by 5 December 2005. The second review of the Act is particularly important, as it contains the utilisation of powers under the Act by Operation Pendennis. The end of the third reporting period is rapidly approaching. To date none of these annual reviews have been tabled.

²⁴⁶ Evidence from Commissioner Terry Griffin, 24 August 2006.

²⁴⁷ NSW Police submission, Annexure A.

RECOMMENDATION 2: The Committee recommends that the Attorney General table all the outstanding annual reviews of the *Terrorism (Police Powers) Act 2002*.

7.20 Intelligence and oversight

- 7.20.1 One of the biggest issues to emerge from the research conducted for this inquiry and the evidence taken from witnesses is the perceived difficulty in performing effective oversight while maintaining the confidentiality and security of the agency's intelligence holdings and sources. As counter-terrorism agencies are only able to perform their duties on the basis of sound intelligence, and the nature of the joint investigations they conduct means that they have to share their intelligence, an environment of trust between the agencies must be maintained.
- 7.20.2 The balance between preserving the public safety, ensuring the integrity of an investigation and operating in a transparent and accountable way is at its most tenuous in counter-terrorism policing. This can manifest in a number of ways. An example at the worst extreme is the blocking of the UK Independent Police Complaints Commission investigation as required by law, when contact between London Metropolitan police officers and a civilian resulted in the civilian's death (see the discussion of the de Menezes case in Chapter 4 for details). Sir Ian Blair, the Commissioner of the Metropolitan Police felt this was necessary so as not to reveal the operational tactics of the Anti Terrorism Branch or their sources. He was also concerned about the IPCC's duty to provide as much information as possible to the victim's family as he felt that this could put further lives at risk.²⁴⁸
- 7.20.3 Echoes of these concerns can be found in evidence given to the Committee by Assistant Commissioner Kaldas in relation to the difficulty of increased levels of oversight in joint operations. Assistant Commissioner Kaldas noted:
- ...nobody who is not cleared and has gone through all the normal processes is entitled to see that information [jointly held by CTCC and Commonwealth agencies]. The thing that concerns us and I think we have to watch out for is that if there is a perception by the Commonwealth or other agencies that the material we hold is to be examined by those outside the environment, if you like, they will definitely think twice about what material they can share with us. The added complication is that they are also recipients of information from other agencies and other countries about which they have agreements and that also may be breached if that is allowed to happen.²⁴⁹
- 7.20.4 Concerns about safeguarding operational tactics and intelligence sources, as well as people's lives, are real. These are important issues that cut to the heart of successful counter-terrorism operations and the Committee acknowledges them.
- 7.20.5 However, it must be noted that people who are "cleared" as the Assistant Commissioner Counter Terrorism describes it, that is those who have security clearances, can access this material. The Commissioner of the PIC gave evidence that there are members of the PIC who are cleared to the highest Commonwealth security level. The Commissioner noted that handling classified information is not a

²⁴⁸ <http://www.guardian.co.uk/menezes/story/0,,1691529,00.html>

²⁴⁹ Evidence from Assistant Commissioner Kaldas, Counter Terrorism Coordination Command, 24 August 2006.

problem that the PIC has encountered but warned that it could be used as “a stalking horse for a problem that will be used to limit, if you like, the powers of places such as the PIC.”²⁵⁰

7.20.6 The Commissioner of the PIC further stated:

In the final analysis, I would say that we have the power to kick in the doors, and if we upset a MOU that the police have with the FBI, if there is such a thing, we would not do it lightly but we would say we could do it. So the first thing would be, “Let’s talk about what it is that is being claimed.” That would need a pretty good look I think before anyone would be satisfied that it was a real issue. The next step would be, particularly in relation to the Commonwealth, to go to the Commonwealth and say, “These are our functions. We must be able to work out some way to do them.” I think that could be done. If all that failed and we thought we have a matter of such significance that it would put at risk some other relationship, we would say we are in New South Wales and we have the bolt cutters...²⁵¹

7.20.7 The Committee agrees that should the situation ever arise, it is important that the PIC have staff with the appropriate level of security clearance to access CTCC intelligence holdings should it prove necessary during a misconduct or corruption investigation. As such the Committee recommends to the PIC that it ensure that appropriate members of its staff have Commonwealth security clearance.

7.20.8 It is of equal importance that appropriate members of the Office of the Ombudsman also maintain Commonwealth security clearances. Evidence from the Assistant Ombudsman – General, Mr Greg Andrews, indicates that a number of people at the Ombudsman’s Office do have security clearances. Mr Andrews agreed that it would not be a substantial argument that increased oversight of the CTCC would jeopardise the flow of information from federal agencies.²⁵²

RECOMMENDATION 3: The Police Integrity Commission and the Office of the Ombudsman ensure that appropriate members of its staff have Commonwealth security clearance.

7.21 **Multiple investigative partners**

7.21.1 Counter-terrorism investigations in NSW now involve multiple investigative partners from national and international jurisdictions. NSW Police seconds officers from the London Metropolitan Police, the New York Police Department and the Los Angeles Police Department. Depending on what duties these officers are involved in, there is the possibility of complaints arising from the actions of these officers while they are in NSW. Of course, given the small numbers of these officers, this may be an unlikely possibility. However as Assistant Commissioner Kaldas noted, NSW Police is very unlikely ever to run a counter-terrorism operation on its own, so it is important that the PIC have an excellent working relationship with the newly established Australian Commission for Law Enforcement Integrity.

²⁵⁰ Evidence from Commissioner Terry Griffin, Police Integrity Commission, 24 August 2006

²⁵¹ *ibid.*

²⁵² Evidence from the Assistant Ombudsman – General, Mr Greg Andrews, Office of the NSW Ombudsman, 24 August 2006.

7.21.2 Evidence from the Assistant Ombudsman – Police, Mr Simon Cohen raised some further issues regarding multiple agency operations. Mr Cohen stated:

I think there are problems in a number of areas. One is that while we are permitted to oversight narrowly the exercise of functions by New South Wales agencies, there is not a facility for us to communicate with the oversight bodies for other agencies in relation to particular matters that we might be looking at, and there has been no facility provided for free flow of information in that respect.²⁵³

7.21.3 Mr Cohen confirmed that contacting other oversight bodies for the purpose of sharing information would require legislative change.²⁵⁴ Mr Andrews pointed out that anomalies already exist, for example the Commonwealth Ombudsman has the power in some Acts to provide the State Ombudsman with information, but there is no reciprocal power for the NSW Ombudsman to receive it or give it.²⁵⁵

7.21.4 For oversight of multi-jurisdiction, multi-agency operations to be effective, there needs to be formal information sharing arrangements between oversight agencies. While this needs a national solution to ensure consistency, the Committee notes information sharing as a particular problem and recommends that the Attorney General raise this issue with the Commonwealth Attorney General. Obviously, because of the cross-jurisdictional context this may be a matter for consideration by the Standing Committee of Attorneys General.

RECOMMENDATION 4: That the Attorney General raise the matter of uniform information sharing arrangements between oversight agencies with the Commonwealth Attorney General, in order to remedy existing statutory anomalies that limit the capacity for information sharing between such agencies.

7.22 **NSW Crime Commission**

7.22.1 The NSW Crime Commission has been an investigative partner of the PIC, and was part of the joint counter-terrorism operation known as Operation Pendennis. The Committee has on previous occasions recommended that the Inspector of the PIC's jurisdiction be extended to include the PIC's investigative partners. Commissioner Bradley, of the NSW Crime Commission, gave evidence before the Committee that he saw no problem with extending the PIC Inspector's jurisdiction.²⁵⁶ In a submission to the Committee's Ten Year Review of the Police Complaints System the Police Integrity Commission Inspector, the Hon James Wood, stated that the PIC's role should be extended to include the Crime Commission.²⁵⁷

7.22.2 In his submission to this inquiry, the NSW Ombudsman noted that while Crime Commission staff may be subject to specific accountability regimes, such as when using telephone intercepts of listening devices, there is no general oversight regime

²⁵³ Evidence from Assistant Ombudsman – Police, Mr Simon Cohen, Office of the NSW Ombudsman, 24 August 2006.

²⁵⁴ *ibid.*

²⁵⁵ Evidence from Assistant Ombudsman – General, Mr Greg Andrews, Office of the NSW Ombudsman, 24 August 2006.

²⁵⁶ Evidence from the Commissioner of the NSW Crime Commission, Mr Phillip Bradley, 24 August 2006.

²⁵⁷ Justice James Wood, Inspector of the Police Integrity Commission, submission to the *Ten Year Review of the Police Oversight System* (report forthcoming).

for them. The Ombudsman points out that members of the Crime Commission and its Management Committee are specifically excluded from the Ombudsman's jurisdiction, and the fact that the Crime Commission only investigates matters where ordinary police investigations are unlikely to be effective suggests there is an even greater imperative for appropriate external oversight. In the Ombudsman's view

...there is a strong case for consideration of additional and external scrutiny of the Crime Commission. This is consistent with the principle that oversight mechanisms, to be effective, should cover the field where different agencies perform similar functions; and that the strength of oversight mechanisms should be proportionate to the intrusiveness of powers being conferred on law enforcement agencies.²⁵⁸

7.22.3 There has recently been some development in terms of oversight for the NSW Crime Commission. The NSW Legislative Council recently considered a motion to suspend standing and sessional orders so that the house could debate the motion of Ms Lee Rhiannon MLC that a select committee be established to inquire into and report on the conduct of the NSW Crime Commission. The select committee would, amongst other issues, examine the resolution of complaints, allegations and grievances by individuals, and the accountability of the NSW Crime Commission.²⁵⁹ However the vote to suspend standing and sessional orders was defeated.²⁶⁰

7.22.4 A number of media reports in May 2006 stated that Cabinet was expected to approve a proposal to allow oversight of the NSW Crime Commission.²⁶¹

7.22.5 Given that the NSW Crime Commission is an investigative partner in joint counter-terrorism operations, as well as an investigative partner to both NSW Police and the Police Integrity Commission, the Committee considers it appropriate that the Crime Commission be subject to oversight. The Committee stands by its earlier recommendation that the jurisdiction of the Inspector of the Police Integrity Commission be extended to cover limited oversight of the NSW Crime Commission.

RECOMMENDATION 5: It is recommended that the *Police Integrity Commission Act 1996* be amended to provide the Inspector with jurisdiction to investigate alleged improprieties and misconduct by non-PIC officers, in circumstances where:

- the conduct of a PIC officer also is involved; or
- there is a connection between the alleged misconduct and the activities of the PIC; or
- the legality or propriety of the PIC's activities is called into question;

and the conduct is conduct of a type that would normally fall within the Inspector's jurisdiction.²⁶²

²⁵⁸ NSW Ombudsman, submission to inquiry into the Scrutiny of NSW Police Counter-Terrorism and Other Powers.

²⁵⁹ Legislative Council Notice Paper No. 149 – Tuesday 9 May 2006, No.197.

²⁶⁰ Legislative Council Minutes No. 150 – Tuesday 9 May 2006, no.13. Following prorogation on 19 May 2006, the motion has not been placed on the Notice Paper again.

²⁶¹ Mitchell, A. 7 May 2006. 'Watchdog for crime body boss' *The Sun Herald*; Mercer, N. 28 May 2006. 'Workings of a secret force'. *The Sunday Telegraph*.

²⁶² Committee on the Ombudsman and the Police Integrity Commission, *Report on the Seventh General Meeting with the Inspector of the Police Integrity Commission*, October 2005, pp.1-8.

It is further recommended that permanent Parliamentary oversight for the Crime Commission be established in the manner of existing oversight for the Police Integrity Commission and the Ombudsman.

7.23 Proliferation of powers

7.23.1 The Inspector of the Police Integrity Commission, the Hon James Wood, raised the issue of the police now using a large body of legislation containing coercive powers (This issue has been discussed in Chapter 3). Justice Wood noted that there is little in the way of consistency in relation to the exercise of these powers.

For example those arising in emergencies or situations of public disorder, (under the Law Enforcement (Powers and Responsibilities) Act) can be exercised without the need for a warrant or judicial order, whereas others require the authority of a Judge (eg the issue of a covert search warrant or the making of a preventative detention order or a prohibited contact order under the Terrorism legislation). In some instances crime scene powers can be exercised without a warrant, and in other circumstances one is required. In some instances, the coercive powers, (including several of the special powers arising under the Terrorism legislation) can be exercised upon the authority of the Commissioner or Assistant Commissioner of Police or in their absence by an officer above the rank of Superintendent, in each case, subject to a report to the Attorney General and Police Minister.

In some instances power can be exercised in relation to adults with their consent or only by Judicial Order in relation to children (eg search for internally concealed drugs).

In addition to the general powers just mentioned, the Police have extensive powers in relation to covert operations and electronic surveillance arising under the:

- Listening Devices Act 1984
- Telecommunications (interception) Act (Cth) 1979
- Law Enforcement (Controlled Operations) Act 1997
- Law Enforcement and National Security (Assumed Identities) Act 1998

While in some instance, the Ombudsman or the Attorney General need to be informed of the exercise of these powers (eg under the Listening Devices legislation), or the Ombudsman has a statutory oversight role (eg under the Controlled Operations legislation), or the relevant agency has an audit responsibility (eg under the Assumed Identities Legislation), there is no uniformity in this regard.²⁶³

7.23.2 Justice Wood further stated his concerns about the amount of counter-terrorism legislation and inconsistency of various provisions. He drew the Committee's attention to the codification of all police powers and relevant matters into a single piece of legislation in the United Kingdom, and he noted that this has stripped away many regulations and unclear, inconsistent provisions. The Inspector said

I am strongly of the view that something should happen along those lines in this State, otherwise the police sometimes have problems in knowing precisely what their powers are and what controls, permissions or authorities are needed to exercise them.²⁶⁴

²⁶³ Justice Wood, Inspector of the Police Integrity Commission, submission to the inquiry into Scrutiny of NSW Police Counter Terrorism and Other Powers

²⁶⁴ Evidence from Justice Wood, Inspector of the Police Integrity Commission, 24 August 2006.

- 7.23.3 The PIC's risk assessment of the CTCC noted comments made in the judgement on three pre-trial motions concerning the admissibility of evidence in *Regina v Zaky Mallah* where the judgment revealed that correct procedures had not been followed in this instance as NSW Police did not obtain a Controlled Operations Certificate from the outset of an undercover aspect of this operation, though a Controlled Operations Certificate was subsequently obtained.²⁶⁵
- 7.23.4 The PIC observed that in this case the failure appeared to be the result of a lack of knowledge about proper procedures regarding the use of police powers. Evidence on which this judgement was based portrayed some officers not being aware of the legislation and procedures required when conducting the investigation and not taking steps to find out more or to obtain legal advice. The PIC stated that it is of concern that senior officers involved in the Mallah investigation were not aware of the required procedures in relation to controlled operations. Moreover, these officers said they did not take steps to remedy this situation by either reading the legislation or seeking legal advice. Instead they acted on their "assumptions" and "beliefs".²⁶⁶ The PIC noted that this is of particular concern given the amount of legislation that officers are required to be familiar with has increased as a result of the additional police powers provided for counter-terrorism in NSW.²⁶⁷
- 7.23.5 Legal proceedings recently commenced in the NSW Supreme Court in which the defence for an alleged drug smuggler is arguing that the evidence on which the prosecution's case is based is inadmissible as the controlled operation from which the evidence derived involved unlawful activities. It has been reported that six out of seven kilograms of cocaine sold onto the street as part of the controlled operation, apparently approved by NSW Crime Commission, was not recovered by law enforcement agencies.²⁶⁸
- 7.23.6 In another recent case, District Court Judge Michael Finnane found that police from Taskforce Gain, established to investigate Middle Eastern crime, had gathered evidence against their target in an "improper and unlawful way".²⁶⁹ Judge Finnane stated that in his opinion "there would not have been any difficulty in obtaining the evidence without impropriety or contravention of an Australian law, since if the controlled operation had been authorised, the evidence could have been obtained legally."²⁷⁰ As a result, the case against the target of perverting the course of justice could not go ahead.

²⁶⁵ Police Integrity Commission 2006 *Management of Misconduct Risks by the NSW Police Counter Terrorism Coordination Command: an assessment*, p.71

²⁶⁶ R-v-Makkah [2005] NSWSC 358 (11 February 2005).

²⁶⁷ Police Integrity Commission 2006 *Management of Misconduct Risks by the NSW Police Counter Terrorism Coordination Command: an assessment*, p.71

²⁶⁸ Mercer, N. 19 March 2006. 'Police make \$1m by selling cocaine' *The Sunday Telegraph*, p.7.

²⁶⁹ Mercer, N. 2 April 2006. 'Police at fault: judge'. *The Sunday Telegraph*, p 4; para 3, *Regina v John Ibrahim* [2006] NSWDC 6.

²⁷⁰ *ibid.*, para 38

RECOMMENDATION 6: The Committee recommends that the Attorney General refer the codification of legislation providing for police powers, including counter-terrorism-related powers, to the Law Reform Commission for consideration, with particular reference to issues of consistency regarding approval, authorisation and accountability regimes. However codification should only be considered if the rigour of the current approval and oversight systems are maintained.

7.24 Public Interest Monitor

7.24.1 The Committee took evidence from the Queensland Public Interest Monitor during the course of this inquiry (see discussion in Chapter 4) about his duty to represent the public interest during Queensland Police Service and Crime and Misconduct Commission applications for warrants. When an application is heard, the PIM or the deputy PIMs will also make submissions. If a warrant is granted, the PIM has an ongoing monitoring role and may audit the conduct of the warrant by the QSP or the CMC. At the conclusion of a warrant, these agencies have to report to the PIM in terms of whether the warrant has been effective. The PIM also has a particular role to play in applications for preventative detention orders and covert search warrants.²⁷¹

7.24.2 Regarding relations between his office and the QPS, he reported that the QPS, in particular the Chief Superintendent in charge of Crime Operations, says the PIM is an excellent system and helps QPS decide which warrants should be sought. He noted that he had not perceived any resistance from QPS since he had been PIM.²⁷²

7.24.3 Two controversial warrants that may have benefited from monitoring by a Public Interest Monitor have arisen from joint Crime Commission operations. One, the so-called “114 name warrant” arose from a joint PIC- Crime Commission operation. The Crime Commission sought a warrant naming 114 people and this eventually resulted in the then Minister for Police directing the Inspector of the Police Integrity Commission to investigate the warrant. It is relevant to note that the PIC was not involved in compiling the affidavits in support of issuing the warrant or in its execution.²⁷³ The other warrant, also sought by the Crime Commission, involved bugging a public telephone in Bream Street, Coogee.²⁷⁴

7.24.4 The Committee sees a number of advantages in this system, including a level of judicial oversight that is discrete, appropriate and not intrusive or onerous in terms of creating extra layers of procedures for law enforcement agencies to have to satisfy. It is also a cost effective form of oversight—the PIM gave evidence to the effect that his office cost about \$200 000 per annum.²⁷⁵

²⁷¹ Evidence taken from Mr Colin Forrest, Public Interest Monitor, at public hearings 24 August 2006.

²⁷² *ibid.*

²⁷³ Committee on the Ombudsman and the Police Integrity Commission, *Report on the Seventh General Meeting with the Inspector of the Police Integrity Commission*, October 2005, pp 3-4.

²⁷⁴ Mercer, N. 22 May 2005. ‘Secretive crime body bugs our phone booths’ *The Sunday Telegraph*, p 2.

²⁷⁵ *ibid.*

RECOMMENDATION 7: The Committee recommends that the Attorney General make a referral to the Law Reform Commission to consider a Public Interest Monitor for New South Wales.

Appendix One - Glossary

ACLEI	Australian Commission for Law Enforcement Integrity
AFP	Australian Federal Police
AMCRAN	Australian Muslim Civil Rights Advocacy Network
APS	Australian Protective Services
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
ATF	Bureau of Alcohol, Tobacco, Firearms and Explosives
BOP	Federal Bureau of Prisons
CMF	Command Management Framework
CMC	Crime and Misconduct Commission
CMT	Complaints Management Team
CO19	Central Operations Specialist Firearms Command
CTCC	Counter Terrorism Coordination Command
DEA	Drug Enforcement Agency
IPCC	Independent Police Complaints Commission
JCTT	Joint Counter-Terrorism Team
JTTF	Joint Terrorism Task Forces
LAPD	Los Angeles Police Department
MOU	Memorandum of Understanding
NYC	New York City
NYPD	New York Police Department
OIG	Office of the Inspector General
PDO	Preventative detention order
PIM	Public Interest Monitor
PMS	Performance Management Scheme
PORS	Public Order and Riot Squad
PSC	Professional Standards Command
PSG	Protective Security Group
QPS	Queensland Police Service
SERT	Special Emergency Response Team
SNP	Spanish National Police
SOP	Standard Operating Procedure

Appendix Two - Committee Minutes



PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Wednesday 29 March 2006 at 6.30pm
Room 1153, Parliament House

Members Present

Mr Lynch (Chair), Ms Burnswoods (Vice-Chair), Mr Breen, Mr Chaytor, Mr Clarke, and Mr Corrigan

Apologies

Mr Kerr

In attendance: Helen Minnican, Pru Sheaves, Jennifer North.

The Chairman commenced proceedings at 6.30pm.

...

4. Inquiry Program: Reports and new inquiries

...

(e) New inquiries:

i. Terrorism laws and policing

The Committee discussed the briefing note.

Resolved on the motion of Mr Chaytor, seconded Mr Corrigan, that in accordance with its statutory functions under s.95 of the *Police Integrity Commission Act 1996* and part 4A of the *Ombudsman Act 1974* the Committee on the Office of the Ombudsman and the Police Integrity Commission has resolved to conduct an inquiry into:

- (a) the functions of the PIC and the Ombudsman under the counter-terror laws of NSW and in relation to oversight of the police use of covert and coercive powers;
- (b) oversight of the conduct of NSW police officers involved in the Counter Terrorism Coordination Command (CTCC);
- (c) trends in anti-terror laws and oversight of these extraordinary powers;
- (d) impact of the growth of police powers on the nature of external police oversight;
- (e) any other matter that the Committee considers relevant to the inquiry;

and to report to both Houses of Parliament on the inquiry.

The Committee further resolved on the motion of Mr Chaytor, seconded Mr Corrigan, that: the first section of the final report will detail legislative, structural and financial changes to the CTCC since the publication of the Interim Report; oversight arrangements arising from these pieces of legislation would be examined, focusing in particular on the roles of the Ombudsman and the PIC, including a comparative analysis or oversight mechanisms for similar legislation in other jurisdictions; the impact of model legislation on accountability organisations in NSW would also be examined; this analysis will be used to generate a number of possible oversight arrangements and assess their strengths and weaknesses; and arising from this analysis, the Final Report will put forward an optimum oversight model for anti-terrorism and public order laws in NSW.

The Committee agreed to determine a short-title for the inquiry at a later date, prior to publication of the terms of reference.

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PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Wednesday 5 April 2006 at 6.30pm
Room 1043, Parliament House

Members Present

Mr Lynch (Chair), Mr Breen, Mr Chaytor, Mr Clarke, and Mr Corrigan

Apologies

Ms Burnswoods, Mr Kerr

In attendance: Helen Minnican, Pru Sheaves, Jennifer North.

The Chairman commenced proceedings at 6.30pm.

...

3. Inquiry Program: Reports and new inquiries

(d) **New inquiries:**

The Committee resolved on the motion of Mr Clark, seconded Mr Breen, that the advertisement calling for submissions for the Inquiry into the ten year review of police oversight in NSW and the inquiry into scrutiny of NSW Police counter-terrorism and other powers, as previously circulated, be published.

...



Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Wednesday 14 June 2006 at 2.00pm
Room 814/815, Parliament House

Members Present

Mr Lynch (Chairman), Ms Burnswoods, Mr Chaytor, Mr Clarke, and Mr Corrigan

Apologies

Mr Kerr, Ms Rhiannon

In attendance: Helen Minnican, Hilary Parker

. . .

PUBLIC HEARING: INQUIRY INTO THE SCRUTINY OF NSW POLICE COUNTER-TERRORISM AND OTHER POWERS

The Chairman commenced proceedings at 2.05pm.

Ms Pauline Jennifer Wright, Solicitor and Chair of the New South Wales Law Society Criminal Law Committee, affirmed and made an opening statement based on questions on notice provided to her by the Committee. The Chairman then commenced questioning Ms Wright, followed by other Members of the Committee. Ms Wright tabled the written answers to the questions on notice.

Questioning concluded, the Chairman thanked the witness and the witness withdrew.

Mr Robert Stephen Toner, Senior Counsel, and Treasurer, New South Wales Bar Association, affirmed and made an opening statement. The Chairman, followed by other Members of the Committee, questioned Mr Toner.

Questioning concluded, the Chairman thanked the witness and the witness withdrew.

. . .

Dr Richard Martin Bibby, Assistant Secretary, New South Wales Council for Civil Liberties, affirmed and made an opening statement. The Chairman, followed by other Members of the Committee, questioned Dr Bibby.

Questioning concluded, the Chairman thanked the witness and the witness withdrew.

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PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Wednesday 28 June 2006 at 1 .00pm
Room 814/815, Parliament House

Members Present

Mr Lynch (Chairman), Ms Burnswoods, Mr Clarke, Mr Corrigan and Mr Kerr

Apologies

Mr Chaytor, Ms Rhiannon

In attendance: Helen Minnican, Hilary Parker, Pru Sheaves

...

DELIBERATIVE MEETING

...

2. Business arising

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Queensland Public Interest Monitor: The Committee noted that Mr Colin Forrest, the Queensland Public Interest Monitor, had been sent copies of the submissions tabled thus far in relation to the inquiry into scrutiny of police counter-terrorism powers, and he has indicated that he may be able to attend the Committee's public hearing on 24 August to give evidence.

...

4. Inquiry Program: Scrutiny of NSW Police Counter-terrorism and Other Powers and Ten-year Review of the Police Oversight System in New South Wales

The Committee noted the draft timetable for the hearing on Thursday 24 August 2006.

5. General Business

Evidence from Mr Phil Bradley, Commissioner, NSW Crime Commission

The Chair addressed the Committee on the reasons for the recent deferral of Mr Bradley's appearance as a witness for the hearing on 28 June. A briefing paper to the Chairman was distributed to Committee Members. The Chairman spoke to the paper and advised of recent correspondence from Mr Bradley dated 26 June 2006. Discussion ensued.

The Committee agreed to the following in relation to Mr Bradley's evidence for the current inquiries:

That the Committee:

- a) advise Mr Bradley formally of its concerns regarding his request, namely that:
 - the Committee does not support the making of an order to limit publication of any image taken of him during his evidence and does not find that the request to limit media coverage is justified;
 - the Committee expects to be able to take evidence from the head of agencies in public session without limiting media coverage, unless there are exceptional reasons to do so;
 - it has noted that his photograph has been published recently in a major newspaper and this substantially undermines the reasoning he has used to support his request;
 - it is not aware that any similar arrangement has been made for the heads of other law enforcement agencies appearing before Parliamentary Committees in public hearings, including the head of national agencies such as ASIO and ASIS;
 - if he refuses to give evidence in public, other than where the Committee has made such a non-publication order, the Committee will take his evidence at the public hearing as it considers that, on balance, the public interest in taking his evidence far outweighs the public interest in further broadcasting his image. However, the Committee will report its views on his request to both Houses of Parliament and the circumstances in which it limited media coverage during his evidence, which concerned matters that the Committee considers warranted examination on the public record.
- b) keep Mr Bradley's reasoning for his request . . . confidential as he has requested, but the fact that Mr Bradley sought confidentiality when giving his reasons to the Committee will be included in the Committee's report and statements of the Committee.
- c) proceed to take evidence from Mr Bradley on the subject matter of the inquiry and, in accordance with previous practice, the Chair is to make a statement at the commencement of proceedings outlining the media arrangements for the public hearing and the Committee's position as notified to Mr Bradley following its latest deliberations.

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PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Thursday 3 August 2006 at 10.00am
Room 1043, Parliament House

Members Present

Mr Lynch (Chairman), Ms Burnswoods, Mr Chaytor, Mr Clarke, Mr Corrigan and Ms Rhiannon

Apologies

Mr Kerr

In attendance: Helen Minnican, Jennifer North and Hilary Parker

...

2. Inquiry Program

Counter Terror Inquiry and Ten Year Review of Police Oversight System

The Chairman briefed the Committee on the status of and background to recent correspondence with Mr Bradley, NSW Crime Commissioner, concerning his appearance at the Committee's Counter Terror Inquiry.

The Chairman informed the Committee that the Ombudsman was unable to appear at the public hearing on 24 August 2006. Discussion ensued and the Committee agreed to hear evidence from Mr Steve Kinmond, Deputy Ombudsman (Community Services Division), and Mr Simon Cohen, Assistant Ombudsman (Police) and to hear from Mr Barbour at a later date, should that be considered necessary.

Submissions from the witnesses appearing in relation to both the Counter Terror Inquiry and the Ten Year Review on 24 August were distributed to Committee Members in preparation for the public hearing. Also distributed were answers provided by Dr Martin Bibby, NSW Council for Civil Liberties, to questions taken on notice at the hearing on 14 June 2006.

...



Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Thursday 24 August 2006 at 10.00am
Room 814/815, Parliament House

Members Present

Mr Lynch (Chairman), Ms Burnswoods, Mr Chaytor, Mr Clarke, Mr Corrigan, Mr Kerr and Ms Rhiannon

In attendance: Mel Keenan, Helen Minnican, Jennifer North, Hilary Parker, Indira Rosenthal, Pru Sheaves

Witnesses present:

Commissioner Moroney, Deputy Commissioner Collins, Assistant Commissioners Carroll and Kaldas, the Hon James Wood QC, Mr Colin Forrest, Commissioner Terry Griffin, Mr Andy Nattress, Mr Allan Kearney, Mr Simon Cohen, Mr Greg Andrews . . .

PUBLIC HEARING: TEN YEAR REVIEW OF THE NSW POLICE OVERSIGHT SYSTEM; SCRUTINY OF NSW POLICE COUNTER-TERRORISM AND OTHER POWERS

Mr Kenneth Edward Moroney, Commissioner, NSW Police, Mr Terrence Walter Collins, Deputy Commissioner of Police, Specialist Operations, Mr John Thomas Carroll, Assistant Commissioner, Professional Standards, NSW Police, and Mr Naguib Kaldas, Assistant Commissioner, NSW Police, took the oath. NSW Police's submissions to both inquiries were tabled and included in the evidence. Commissioner Moroney made an opening statement, followed by Assistant Commissioners Carroll and Kaldas, then Deputy Commissioner Collins.

The Chairman questioned the witnesses, followed by other Members of the Committee. Commissioner Moroney provided the Committee with his Statement of Professional Conduct (a public document).

Questioning concluded, the Chairman thanked the witnesses and the witnesses withdrew.

The Hon James Roland Thompson Wood AO QC, Inspector of the Police Integrity Commission, took the oath. The Inspector's submission, dealing with both inquiries, was tabled and included in the evidence. The Inspector then made a brief opening statement. The Chairman questioned the witness, followed by other Members of the Committee.

Questioning concluded, the Chairman thanked the witness and the witness withdrew.

A luncheon adjournment commenced at 12.10pm. The public hearing resumed at 12.50pm.

Mr Colin James Forrest, Queensland Public Interest Monitor, took the oath and made an opening statement in relation to the Committee's inquiry into the scrutiny of NSW Police counter-terrorism and other powers. The Chairman questioned the witness, followed by other Members of the Committee.

Questioning concluded, the Chairman thanked the witness and the witness withdrew.

Mr Terrence Peter Griffin, Commissioner, Police Integrity Commission, took the oath. Mr Andrew Stewart Nattress, Director, Operations, Police Integrity Commission, and Mr Allan Geoffrey Kearney, Director, Intelligence and Executive Services, Police Integrity Commission, affirmed. The Commission's submission to the Ten Year Review was tabled and included in the evidence. The Chairman noted the Commission had provided background material about its current project concerning the Counter Terrorist Co-ordination Command for the information of Committee Members and that this material was to be treated confidentially until the consultation process with NSW Police was settled.

The Chairman questioned the witnesses, followed by other Members of the Committee.

Questioning concluded, the Chairman thanked the witnesses and the witnesses withdrew.

There was a short adjournment at 2.30pm. The public hearing resumed at 2.45pm.

Mr Simon Justin Cohen, Assistant Ombudsman (Police), and Mr Gregory Robert Andrews, Assistant Ombudsman (General), NSW Ombudsman's Office, affirmed. The Ombudsman's submissions to both inquiries were tabled and included in the evidence. Mr Cohen made an opening statement on behalf of the NSW Ombudsman, who was unable to attend.

The Chairman questioned the witnesses, followed by other Members of the Committee. Mr Cohen provided for the information of Committee Members only a complete list of correspondence between the Office and NSW Police concerning c@tsi and a discussion paper: *NSW Ombudsman's observations of complaint management team meetings*.

Questioning concluded, the Chairman thanked the witnesses and the witnesses withdrew.

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Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Wednesday 6 September 2006 at 6.30pm
Waratah Room, Parliament House

Members Present

Mr Lynch (Chairman), Ms Burnswoods, Mr Chaytor, Mr Clarke, Mr Corrigan, Mr Kerr and Ms Rhiannon

In attendance: Helen Minnican, Hilary Parker, Pru Sheaves

. . .

4. Inquiry Program

The Committee considered confidential submissions and those not tabled during public hearings. The Chair spoke to each submission.

. . .

CTCC Inquiry

Resolved on the motion of Mr Corrigan, seconded by Mr Clarke, that, in relation to:

Submission 2: the submission be published on the website;

Submission 3: the submission be published on the website;

Submission 5: the submission is outside jurisdiction and should not be published;

Submission 6: the Secretariat confirm the source of the transcript material referred to in the submission to determine whether it is a matter on the public record and that the item be held over for further discussion at the next Committee meeting (the issue of the extent to which the submission contains confidential material was raised by Ms Rhiannon and discussed by the Committee);

Submission 8: the Secretariat confirm that the submission is not confidential;

Submission 9: the Secretariat confirm that the submission is not confidential;

Submission 12: the submission is confidential and will not be published on the website.

. . .



PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Wednesday 20 September 2006 at 6.30pm
Waratah Room, Parliament House

Members Present

Mr Lynch (Chairman), Ms Burnswoods, Mr Chaytor, Mr Clarke, Mr Corrigan, Mr Kerr and Ms Rhiannon

In attendance: Helen Minnican, Jennifer North, Hilary Parker, Indira Rosenthal, Pru Sheaves

Witness present:

Mr Phillip Bradley

PUBLIC HEARING: TEN YEAR REVIEW OF THE NSW POLICE OVERSIGHT SYSTEM; SCRUTINY OF NSW POLICE COUNTER-TERRORISM AND OTHER POWERS

The Chairman commenced the hearing at 6.35pm, announced the witness and made a brief statement concerning the Committee's views on Mr Bradley's request that his image not be published by the media.

Mr Phillip Alexander Bradley, Commissioner, NSW Crime Commission, affirmed.

The Chairman questioned the witness, followed by other members of the Committee.

Questioning concluded, the Chairman thanked the witness for his attendance and the witness withdrew.

The public hearing concluded at 7.15pm.

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DELIBERATIVE MEETING

1. Inquiry Program

- i) Supplementary submission from the Inspector of the Police Integrity Commission and answers to questions taken on notice by the NSW Law Society on 14 June 2006.

Resolved on the motion of Mr Kerr, seconded by Mr Corrigan, that the Inspector's supplementary submission and the Law Society's answers be tabled and published on the Committee's website.

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iii) Supplementary submission, dated 11 September 2006, from the Hon Peter Breen MLC.

The Committee agreed to defer consideration of the submission.

...



PARLIAMENT OF NEW SOUTH WALES
COMMITTEE ON THE OFFICE OF THE OMBUDSMAN AND THE POLICE INTEGRITY COMMISSION

Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Wednesday 18 October 2006 at 6.30pm
Room 1153, Parliament House

Members Present

Mr Lynch (Chairman), Ms Burnswoods, Mr Chaytor, Mr Clarke, Mr Corrigan, Mr Kerr and Ms Rhiannon

In attendance: Jennifer North, Hilary Parker, Pru Sheaves

The Chairman commenced proceedings at 6.35pm.

...

3. Inquiry Program

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- ii. The draft report on the inquiry into scrutiny of NSW Police counter terrorism and other powers was distributed, together with the Police Integrity Commission's submission to the inquiry, *Management of Misconduct Risks by the NSW Police Counter Terrorism Co-ordination Command: an assessment*. Members were advised that draft reports on s10(5) of the PIC Act Phase 2 and on the ten year review of police oversight would be distributed shortly and that it was intended that all three draft reports would be considered at the Committee's next deliberative meeting on 15 November 2006.

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- iv. Resolved on the motion of Mr Clarke, seconded by Mr Chaytor that a revised submission from Mr Peter Breen to the Counter Terror Inquiry be published on the Committee's website, once Mr Breen had made the revisions.

...



Minutes of Proceedings of the Committee on the Office of the Ombudsman and the Police Integrity Commission

Wednesday 15 November 2006 at 6.30pm
Room 1043, Parliament House

Members Present

Mr Lynch (Chairman), Ms Burnswoods, Mr Chaytor, Mr Clarke, Mr Corrigan, Mr Kerr and Ms Rhiannon

In attendance: Ms Helen Minnican, Jennifer North, Pru Sheaves

The Chairman commenced proceedings at 6.35pm . . .

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3. Inquiry Program – Draft Reports

- i. The Committee considered the following draft reports and schedule of amendments as previously circulated:

The draft report on the Scrutiny of NSW Police counter-terrorism and other powers and proposed amendments

Chapter 1 paragraph 1.10.6 as amended read and agreed to.

Chapter 4 as amended read and agreed to.

Appendices – Appendix 4 read and agreed to.

Report adopted.

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Resolved on the motion of Mr Chaytor, seconded by Ms Rhiannon, that the draft reports, as amended, be the Reports of the Committee, that they be signed by the Chairman and presented to the House, together with the minutes of evidence and that the Chairman, Committee Manager and Senior Committee Officer be permitted to correct minor stylistic, typographical and grammatical errors.

....

The Committee adjourned at 7:00 pm *sine die*.

Chairman

Committee Manager

Appendix Three - A Review of the FBI's Handling of the Brandon Mayfield Case

U. S. Department of Justice
Office of the Inspector General

A Review of the FBI's Handling of the Brandon Mayfield Case



UNCLASSIFIED EXECUTIVE SUMMARY

Office of the Inspector General
Oversight and Review Division
January 2006

EXECUTIVE SUMMARY*

In May 2004, the Federal Bureau of Investigation (FBI) arrested Brandon Mayfield, an Oregon attorney, as a material witness in an investigation of the terrorist attacks on commuter trains in Madrid, Spain, in March 2004. Mayfield had been identified by the FBI Laboratory as the source of a fingerprint found on a bag of detonators in Madrid that was connected to the attacks. Approximately two weeks after Mayfield was arrested, the Spanish National Police (SNP) informed the FBI that it had identified an Algerian national as the source of the fingerprint on the bag. After the FBI Laboratory examined the fingerprints of the Algerian, it withdrew its identification of Mayfield and he was released from custody.

As a result of these events, the Office of the Inspector General (OIG) initiated an investigation into the misidentification, investigation, and detention of Mayfield. We sought to determine the causes of the misidentification and to assess the FBI Laboratory's responses to the error. We also examined whether the FBI used the USA PATRIOT Act (Patriot Act) in connection with the investigation of Mayfield, whether the FBI targeted Mayfield because of his Muslim religion, and whether the FBI's representations to the United States District Court in support of the requests for a material witness warrant and search warrants were accurate. In addition, we examined Mayfield's conditions of confinement and whether they were consistent with the material witness statute.

I. Background

On March 11, 2004, terrorists detonated bombs on several commuter trains in Madrid, Spain, killing approximately 200 people and injuring more than 1,400 others. The SNP recovered fingerprints on a bag of detonators connected with the attacks and transmitted them to INTERPOL with a request that the FBI Laboratory provide assistance in identifying the fingerprints. On March 19, the FBI Laboratory's Latent Print Units (LPU) identified a United States citizen, Brandon Mayfield, as the source of one of the fingerprints on the bag, referred to as Latent Fingerprint Number 17 (LFP 17). Mayfield's fingerprints had been initially retrieved, along with others, as a potential match to LFP 17 based on a computerized search of millions of fingerprints in FBI databases. This automated search by the FBI's Integrated Automated Fingerprint Identification System (IAFIS) generated a list of 20 candidate prints from the FBI's Criminal Master File. An FBI examiner then began side-by-side comparisons of LFP 17 and the potential matches, one of which was Mayfield's fingerprint. Following a detailed comparison of LFP 17 and Mayfield's known fingerprint, the examiner concluded that Mayfield was the source of LFP 17.

* This Executive Summary includes a limited amount of information that the Federal Bureau of Investigation (FBI) considered to be classified or law enforcement sensitive and therefore could not be publicly released. To create this public version of the Executive Summary, the Office of the Inspector General (OIG) redacted (deleted) the portions of the Executive Summary that were considered classified or sensitive by the FBI and we indicated where those redactions were made.

This conclusion was verified by a second LPU examiner and reviewed by a Unit Chief in the LPU, who concurred with the identification.

As a result of this identification, the FBI immediately opened an intensive investigation of Mayfield, including 24-hour surveillance. The FBI determined that Mayfield was an attorney in Portland, Oregon. The FBI also learned, among other things, that Mayfield was a Muslim who had married an Egyptian immigrant, had represented a convicted terrorist in a child custody dispute in Portland, and had contacts with suspected terrorists. However, the FBI's investigation did not turn up any information specifically linking Mayfield to the Madrid train attacks.

As part of the investigation, the FBI obtained authority to conduct covert electronic surveillance and physical searches of Mayfield pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA).¹ The FBI's electronic surveillance of Mayfield began on [REDACTED]. The FBI also conducted [REDACTED] searches of Mayfield's law office on [REDACTED], and of the Mayfield residence on [REDACTED].

On April 13, the FBI learned that the SNP Laboratory's examination of Mayfield's fingerprints had yielded a "negativo" (negative) result. The FBI therefore dispatched an examiner to meet with the SNP in Madrid on April 21 to explain the basis of the FBI's identification of LFP 17 as belonging to Mayfield. At the end of that meeting, the SNP Laboratory representatives said they would reexamine Mayfield's fingerprints and LFP 17 in light of the FBI's presentation.

In early May, the FBI began receiving media inquiries about a possible American suspect in the Madrid bombings case. The FBI became concerned that its investigation of Mayfield would become publicly known and that Mayfield might flee or destroy evidence. As a result, on May 6 the FBI and Department of Justice (DOJ) attorneys applied to the United States District Court in Oregon for a warrant to detain Mayfield as a "material witness"

¹ FISA provides for the use of, among other things, covert electronic surveillance and physical searches to gather foreign intelligence information. To obtain FISA authorization to conduct covert surveillance and searches, the government must submit a written application to a special court, the Foreign Intelligence Surveillance Court (FISA Court), which has the authority to grant or deny the application. The written application must establish, among other things, probable cause for the FISA Court to find that the target of the surveillance and searches is either a foreign power or an agent of a foreign power, and that a significant purpose of the surveillance and searches is to obtain foreign intelligence information. A foreign power is defined broadly to include any group engaged in international terrorism.

pursuant to 18 U.S.C. § 3144.² The FBI and DOJ also applied to the Court for criminal search warrants for Mayfield's home and office. The FBI submitted affidavits to the Court in support of these requests. On the basis of the representations in these affidavits, the Court issued the material witness warrant and the criminal search warrants.

The FBI arrested Mayfield on May 6 and executed the search warrants that same day, seizing evidence from his home and office. When Mayfield was brought before the Court on May 6, he denied that the fingerprint on the detonator bag was his and said he had no idea how it got there. The Court denied Mayfield's request to be released to home detention and he was incarcerated at the Multnomah County Detention Center (MCDC) in Portland, Oregon.

On May 17, the Court appointed an independent expert to review the FBI's fingerprint identification. On May 19, the independent expert concurred with the FBI's identification of LFP 17 as being Mayfield's fingerprint.

However, on the same day, May 19, the SNP informed the FBI that it had positively identified LFP 17 as the fingerprint of a different person, an Algerian national named Ouhmane Daoud. At the request of the Portland prosecutors, the Court released Mayfield to home detention on May 20. After reviewing Daoud's prints, the FBI Laboratory withdrew its identification of Mayfield on May 24, and the government dismissed the material witness proceeding.

The FBI initially provided a variety of explanations for the fingerprint misidentification, including the poor quality of the digital image of LFP 17, lack of access to the original fingerprint on the bag of detonators, and the similarity of LFP 17 to Mayfield's fingerprint.

After the FBI withdrew its identification, it convened a 2-day session with an International Panel of fingerprint experts to determine how the examination of LFP 17 failed and to make recommendations for changes in FBI fingerprint procedures. The Panel met at the FBI Laboratory in June 2004, and was provided information about the Mayfield case. Several panelists concluded that the initial examiner failed to conduct a complete analysis of LFP 17 before conducting the IAFIS search, which in turn caused him to disregard important differences in appearance between LFP 17 and Mayfield's known prints. Several panelists cited overconfidence in the power of IAFIS and the pressure of working on a high-profile case as contributing to the error. Some panelists

² Pursuant to 18 U.S.C. § 3144, a court may order the arrest of a person if it appears that the testimony of the person is material to a criminal proceeding, and it is shown that it may become "impracticable to secure the presence of the person by subpoena."

stated that the verification was “tainted” by knowledge of the initial examiner’s conclusion. The panelists made recommendations for changes in the FBI Laboratory, including expanded documentation requirements and modified verification procedures.

On July 16, the FBI Laboratory issued a formal report identifying Daoud as the source of LFP 17.

In October 2004, attorneys for Mayfield filed a civil action against the FBI, DOJ, and several individuals. The complaint includes claims for violations of Mayfield’s civil rights, violations of the Privacy Act, and violations of the United States Constitution in connection with the FBI’s investigation and arrest of Mayfield.

II. The Methodology of the OIG Investigation

The OIG’s investigation examined the conduct of the FBI in the Mayfield case. The specific objectives of the OIG’s investigation were: (1) to determine the causes of the fingerprint misidentification; (2) to assess the Laboratory’s responses to the error and, if appropriate, to make additional recommendations for changes in Laboratory procedures to prevent future errors of this type; (3) to determine whether the FBI unfairly targeted Mayfield in the fingerprint identification or in the ensuing investigation because of his religion; (4) to assess the FBI’s conduct in the investigation and arrest of Mayfield; (5) to assess the FBI’s conduct in making certain representations to the United States District Court in support of the requests for a material witness warrant and search warrants; and (6) to assess the conditions under which Mayfield was confined prior to his release.

The OIG’s investigation was conducted by a team of attorneys and a program analyst. The OIG interviewed approximately 70 individuals, including personnel from the DOJ Counterterrorism Section (CTS), the DOJ Office of Intelligence Policy and Review (OIPR), the FBI Laboratory, and the FBI Counterterrorism Division (CTD). In Portland, Oregon, the OIG interviewed personnel from the Portland Division of the FBI, the United States Attorney’s Office (U.S. Attorney’s Office), the United States Marshals Service (USMS), the Multnomah County Sheriff’s Office (MCSO), and the Multnomah County Detention Center (MCDC). The OIG also interviewed four officials of the SNP by telephone. In addition, the OIG interviewed two members of the International Panel of fingerprint experts convened by the FBI Laboratory, as well as the Executive Director of American Society of Crime Laboratory Directors/ Laboratory Accreditation Board (ASCLD/LAB), the organization responsible for accrediting the FBI Laboratory. Mayfield’s attorneys declined the OIG’s request to interview Mayfield.

In addition, the OIG reviewed thousands of pages of documents generated by the FBI, DOJ, the U.S. Attorney's Office, the USMS, and the MCDC pertaining to the fingerprint identification and the investigation, arrest, and detention of Mayfield. This documentation included e-mails, internal memoranda and reports, notes, briefing materials, policy and procedural manuals, timelines, and investigative records, as well as pleadings, transcripts, and orders from court proceedings.

In evaluating the causes of the fingerprint misidentification, the OIG consulted with three distinguished latent fingerprint examiners outside the FBI Laboratory: John D. "Dusty" Clark, formerly of the California Department of Justice and currently with the Western Identification Network; Michael R. Grimm, a Forensic Supervisor with the Virginia State Police; and John R. Vanderkolk, Regional Laboratory Manager for the Indiana State Police. These expert consultants were selected for their achievements and reputations within the latent fingerprint community and for the diversity of viewpoints that they have expressed within the latent fingerprint discipline.

In addition to the OIG's review, the DOJ Office of Professional Responsibility (OPR) also conducted an investigation into aspects of the Mayfield case that involved the conduct of Department attorneys. Initially, the OIG intended to investigate the entire Mayfield matter, including the conduct of DOJ attorneys working with the FBI. We believed that one DOJ oversight entity should investigate the matter, and we also concluded that the OIG had jurisdiction under Section 1001 of the Patriot Act to investigate allegations of civil rights or civil liberties abuse made against all DOJ employees, including DOJ attorneys. However, OPR disagreed, stating that it has the authority generally to investigate allegations involving the professional conduct of DOJ attorneys. Eventually, the Deputy Attorney General decided that OPR would investigate the conduct of DOJ attorneys in the Mayfield case and the OIG would investigate the actions of the FBI.

As a result, OPR (rather than the OIG) evaluated DOJ attorneys' conduct in the Mayfield case, such as the decision to obtain a material witness warrant and the accuracy and sufficiency of the evidence presented by attorneys in support of the warrant. In addition, OPR examined representations made by DOJ attorneys in connection with their request that Mayfield be held in custody and the decision by DOJ attorneys to include certain information about Mayfield in court pleadings.

III. Organization of the OIG Report

The OIG's Report is divided into seven chapters. Chapter One provides an introduction to the report, including the methodology of the OIG's

investigation. Chapter Two sets forth a detailed chronology of events regarding Mayfield's fingerprint identification, investigation, arrest, detention, and subsequent release. Chapter Three provides background information regarding fingerprint identification issues, including a description of the operations of the FBI's LPU and an overview of the latent fingerprint examination process utilized by the Laboratory.

Chapter Four contains the OIG's substantive review of the causes of the erroneous fingerprint identification. Chapter Five presents a review of the Laboratory's responses to the error, including various reforms underway in the LPU, and additional OIG recommendations for the FBI Laboratory.

Chapter Six evaluates the conduct of the FBI with respect to its investigation and arrest of Mayfield. It addresses the issue of whether Mayfield was improperly targeted because of his religion, examines the FBI's use of FISA and the Patriot Act in the investigation, and assesses representations made by the FBI in affidavits submitted in support of the requests for a material witness warrant and criminal search warrants. Chapter Six also examines Mayfield's conditions of confinement. Chapter Seven summarizes the OIG's conclusions.

IV. OIG Assessment of the Causes of the Misidentification

In this section of the Executive Summary, we discuss the OIG's assessment of the causes of the FBI Laboratory's misidentification of LFP 17.

A. The Primary Causes of the Error

The OIG found several factors that caused the FBI's misidentification of the fingerprint. The unusual similarity between LFP 17 and Mayfield's known fingerprint was a major factor in the misidentification that confused three experienced FBI examiners and a court-appointed expert. However, we concluded that the examiners committed errors in the examination procedure, and that the misidentification could have been prevented through a more rigorous application of several principles of latent fingerprint identification.

1. The unusual similarity of the prints

In identifying Mayfield as the source of LFP 17, the FBI examiners relied in significant part on the relationship of "minutiae" or "points" within the prints. These points are places where individual ridges in the fingerprint end ("ending ridges") or split ("bifurcations"). Ten of the points in LFP 17 that were used to identify Mayfield were also later used by different FBI examiners to

identify Daoud as the source of the print. These 10 features in LFP 17 formed a constellation of points that was generally consistent with the constellation of points in the known fingerprints of both Mayfield and Daoud. The unusual similarity is reflected in the relative location of the points, the orientation of the ridges coming into the points, and the number of intervening ridges between the points. Although the OIG found no systematic study of the rarity of such an event, anecdotal reports suggest that this degree of similarity between prints from two different people is an extremely unusual circumstance.

Despite the unusual similarity in the relationship between points on the Mayfield and Daoud prints, however, Mayfield and Daoud did not have identical fingerprints. In several instances, a bifurcation in one print corresponded to an ending ridge in the other. There were also other subtle but important differences between the prints in the positioning of the features. But the unusual similarity in position and ridge counts was a critical factor that misled four examiners and contributed to their overlooking other important differences between LFP 17 and Mayfield's fingerprint.

In addition, the Mayfield case illustrates a particular hazard of the IAFIS computer program. IAFIS is designed to find candidate fingerprints having the most minutiae arrangements similar to the encoded minutiae from the latent print. These candidates should include the correct match of the print (if it is in the FBI database), but will also include the closest possible non-matches. In this case, the true source of the print was not in the IAFIS database, but the computer found an unusually close non-match. The enormous size of the IAFIS database and the power of the IAFIS program can find a confusingly similar candidate print. The Mayfield case demonstrates the need for particular care in conducting latent fingerprint examinations involving IAFIS candidates because of the elevated danger of encountering a close non-match.

2. Bias from the known prints of Mayfield

The unusual similarity of the Mayfield and Daoud fingerprints was not the sole cause of the misidentification. The OIG found that a significant cause of the misidentification was that the LPU examiners' interpretation of some features in LFP 17 was adjusted or influenced by reasoning "backward" from features that were visible in the known prints of Mayfield. This bias is sometimes referred to as "circular reasoning," and is an important pitfall to be avoided. Having found as many as 10 points of unusual similarity, the FBI examiners began to "find" additional features in LFP 17 that were not really there, but rather were suggested to the examiners by features in the Mayfield prints. As a result of this process, murky or ambiguous details in LFP 17 were erroneously identified as points of similarity with Mayfield's prints.

3. Faulty reliance on extremely tiny (Level 3) details

The OIG also found that the FBI examiners gave significant weight to the purported agreement between extremely tiny details in LFP 17 and Mayfield's fingerprint. These details, including shapes interpreted as individual pores, incipient dots between ridges, and ridge edges, are known as "Level 3" details. Because Level 3 details are so small, the appearance of such details in fingerprints is highly variable, even between different fingerprints made by the same finger. As a result, the reliability of Level 3 details is the subject of some controversy within the latent fingerprint community.

The OIG found that none of the purported Level 3 features in LFP 17 used to identify Mayfield corresponded to features in the known prints of the true donor (Daoud). Thus, unlike the case with larger details, the examiners were not confused by any unusual similarity in Level 3 details on the fingers of Mayfield and Daoud. Rather, they apparently misinterpreted distortions in LFP 17 as real features corresponding to Level 3 details seen in Mayfield's known fingerprints.

There were several indications available to FBI examiners at the time of the identification that the purported Level 3 similarities did not provide reliable support for the identification. Although several different examples of Mayfield's known fingerprints were available to the FBI, some of the details that the FBI examiners considered to be important were only visible on one version of those fingerprints, suggesting the possibility that these details were not reliable characteristics for identification. In addition, the examiners involved in the identification appear to have relied on selected Level 3 similarities, while dismissing or discounting other apparent Level 3 details, such as pores, ridge edge shapes, and small between-ridge details in LFP 17, that were not in agreement with the known Mayfield fingerprints. Several other examiners interviewed by the OIG questioned whether the clarity of LFP 17 was sufficient to support any reliance on Level 3 details. The OIG concluded that the examiners' reliance on Level 3 details in this case was misplaced and contributed to the erroneous identification.

4. Inadequate explanations for differences in appearance

FBI fingerprint examiners are governed by the "one discrepancy rule" in which a single difference in appearance between a latent print and a known fingerprint must preclude an identification unless the examiner has a valid explanation for the difference. Latent fingerprint identifications are subject to a standard of 100 percent certainty. Implicit in this standard is the requirement that the examiner have equivalent certainty in the validity of each explanation for each difference in appearance between prints.

The OIG found that the available information did not support this degree of certainty for the explanations that the examiners adopted for several differences in appearance between LFP 17 and Mayfield's fingerprint. For example, the FBI recognized that the entire upper left portion of LFP 17 did not correspond with Mayfield's fingerprint. The examiners explained this difference as being the result of a separate touch, possibly by a different finger or a different person. This explanation required the examiners to accept an extraordinary set of coincidences. The OIG found that the support for this explanation was, at best, contradictory. Although there was a gap in the fingerprint separating the upper left portion from the rest of the print, the ridge flow was consistent across the gap, suggesting a single touch. Most of the "red flags" that would typically indicate a second touch were not present in LFP 17. Deposition pressure was consistent in both parts of the print, indicating that both areas were part of a single print. In light of this conflicting information, the FBI examiners should not have found sufficient certainty in the "double touch" explanation to support an identification.

There were several other differences between LFP 17 and Mayfield's known fingerprint. Although the explanations that the examiners gave for each difference were individually plausible, they cumulatively required too many rationalizations to support an identification with the requisite certainty. The OIG concluded that the FBI examiners did not apply a sufficiently stringent standard for their explanations and thereby failed to appropriately apply the "one discrepancy rule."

5. Failure to assess the poor quality of similarities

The OIG also found that the FBI examiners failed to give adequate consideration to the incomplete nature of the agreement in points between LFP 17 and Mayfield's fingerprint. As previously described, there was a constellation of as many as 10 points in LFP 17 that bore an unusual similarity to points in the Mayfield fingerprint. However, the limited clarity of LFP 17 prevented the examiners from making an accurate determination of the type of many of these points (that is, whether they were ending ridges or bifurcations). The OIG found that many of the points utilized by the FBI to support the identification suffered from this shortcoming (ambiguity as to feature type), and that accordingly the "quality" of the agreement was inadequate to support the conclusion of identification.

6. Failure to reexamine LFP 17 following the April 13 Negative Report

The FBI Laboratory missed an opportunity to catch its error when the SNP informed the FBI on April 13 that it had reached a "negative" (negative) conclusion with respect to matching LFP 17 to Mayfield's fingerprints. At that

time, the FBI Laboratory did not adequately explore the possibility that it had erred in identifying Mayfield. Moreover, the FBI examiners did not attempt to determine the basis of the SNP's doubts before reiterating that they were "absolutely confident" in the identification on April 15, a full week before the FBI Laboratory met with the SNP. We believe that the FBI Laboratory's overconfidence in the skill and superiority of its examiners prevented it from taking the "April 13 Negativo Report" as seriously as it should have. A better response to a conflicting determination by another forensic laboratory would have been first to determine the complete basis for the other laboratory's disagreement before committing anew to the validity of the original determination, and also to arrange for a fresh examination of the relevant prints by a new examiner who had not previously committed himself to a particular conclusion. The FBI Laboratory took neither of these steps.

B. OIG Assessment of Other Potential Sources of Error

The OIG evaluated three additional factors that potentially caused the FBI's erroneous identification. While we can not definitively state that these factors were sources of the Mayfield error, they create sufficient potential for other erroneous identifications to merit discussion in this report and recommendations for changes in the FBI Laboratory.

First, the OIG examined whether the standard used by the FBI Laboratory for declaring an identification contributed to the error. The FBI Laboratory employs the "Ridgeology Standard" for identification, which does not require the agreement of a predetermined minimum number of characteristics (sometimes referred to as a "Numerical Standard"), but rather emphasizes the expert examiner's assessment of the quality of agreement as well as the quantity. The OIG concluded that the error would not necessarily have been avoided by the application of a Numerical Standard. The examiners believed that they had found at least 15 "points" in LFP 17 in agreement with Mayfield's fingerprint, which would have satisfied the 12-point threshold advocated by many proponents of a Numerical Standard, and the threshold used in several other countries (including Spain). The methodological errors committed by the examiners – such as applying circular reasoning and failing to apply the "one discrepancy rule" with adequate rigor – could lead to an erroneous identification under either the Ridgeology Standard or a Numerical Standard. However, we agree with the Laboratory's decision following discovery of the error to research and develop more objective standards for fingerprint identification.

Second, the OIG examined whether the FBI's verification procedures contributed to the error. FBI procedures require that every identification be verified by a second examiner. However, under procedures in place at the time of the Mayfield identification, the verifier was aware that an identification had

already been made by a prior FBI examiner at the time he was requested to conduct the verification. Critics of this procedure assert that it may contribute to the expectation that the second examiner will concur with his colleague. It was difficult for the OIG to assess whether the FBI's verification procedures contributed to the Mayfield error, primarily because the retired examiner who verified the Mayfield identification declined to be interviewed for this investigation, and because he was not required to document the features or mental processes that led to his conclusion. Yet, the OIG found it significant that the court-appointed expert reached the same conclusion regarding the identification. The pressures that might cause an FBI examiner to hesitate to dispute a colleague's identification should not have impacted the independent expert's impartiality. Thus, the OIG did not find compelling evidence that the FBI's verification procedures introduced a bias that prevented or discouraged the official verifier from challenging the identification in this case. The OIG believes, however, that the existing Laboratory procedures could be improved to assure that verifications involve complete and independent examinations and provide a more stringent safeguard against erroneous identifications.

Third, the OIG considered whether the pressure of working on a high-profile terrorism case was a significant contributing cause of the error in this case. We found no evidence to support this conclusion. FBI examiners work on many high-profile cases without committing such errors. In addition, the examiners were unable to identify most of the latent fingerprints submitted by the SNP as part of its investigation of the Madrid bombings, and the pressure to identify LFP 17 was no greater than the pressure to identify the other prints. The OIG did find, however, that the FBI Laboratory's stated criteria for reporting an "inconclusive" result from a latent fingerprint examination could result in implicit pressure on the examiner to make an identification in a difficult comparison in a case involving a particularly heinous crime, and the OIG recommends that the FBI take several specific steps to reduce any such pressure in the future.

C. The Role of Mayfield's Religion in the Identification

The OIG also investigated whether the FBI fingerprint examiners were aware of and improperly influenced by knowledge of Mayfield's religion when they made the identification of LFP 17. We determined that the FBI examiners were not aware of Mayfield's religion at the time they concluded Mayfield was the source of LFP 17. The records available to the examiners did not reveal his religion, his marriage to an Egyptian immigrant, or his representation of other Muslims as an attorney. The OIG found no evidence that the FBI Laboratory had knowledge of Mayfield's religion until the FBI Portland Division learned this fact in the early stages of the field investigation, after the identification had been made and verified by the FBI Laboratory.

However, whether Mayfield's religion was a factor in the Laboratory's failure to revisit its identification and discover the error in the weeks following the initial identification is a more difficult question. By the time the SNP issued the April 13 Negativo Report, the Laboratory examiners had become aware of information about Mayfield obtained in the course of the Portland Division's investigation, including the fact that Mayfield had acted as an attorney for a convicted terrorist, had contacts with suspected terrorists, and was a Muslim. One of the examiners candidly admitted that if the person identified had been someone without these characteristics, like the "Maytag Repairman," the Laboratory might have revisited the identification with more skepticism and caught the error.

The OIG concluded that Mayfield's religion was not the sole or primary cause of the FBI's failure to question the original misidentification and catch its error. The primary factors were the similarity of the prints and the Laboratory's overconfidence in the superiority of its examiners. However, we believe that Mayfield's representation of a convicted terrorist and other facts developed during the field investigation, including his Muslim religion, also likely contributed to the examiners' failure to sufficiently reconsider the identification after legitimate questions about it were raised.

D. Explanations Found by the OIG Not To Have Contributed to the Error

The OIG found that several explanations for the error proposed by various sources, including FBI Laboratory spokespersons, were not persuasive.

First, the OIG reviewed the FBI's initial claim that the FBI's lack of access to the original evidence on which LFP 17 was deposited was a cause of the error. The FBI examiners made the identification of Mayfield based on a digital photograph provided by the SNP, and the examiners did not have access to the original bag with the fingerprint. Some FBI examiners suggested that this lack of access prevented the FBI from determining, from the positioning of several fingerprints on the evidence, that LFP 17 was made by a right middle finger, not by a left index finger (the Mayfield digit to which it was erroneously matched). Although the positioning of the prints on the evidence certainly suggested the possibility that LFP 17 was made by a right middle finger, that finger was not the only plausible digit. The OIG reviewed the evidence and concluded that, contrary to the FBI's claims, having access to the bag would not necessarily have prevented the LPU from misidentifying Mayfield.

FBI spokespersons also offered another explanation immediately after the error was discovered: that the FBI was working with a degraded or distorted third-generation digital image of LFP 17 provided by the SNP. The OIG found

that although there was a modest improvement in clarity in the photographic image of LFP 17 that the SNP eventually made available to the FBI, the quality of the digital image initially supplied to the FBI did not cause the error.

We also examined the suggestion made by Laboratory spokespersons that the initial examiner should have determined that LFP 17 was not “of value” for identification because there were many lines of separation or demarcation in the fingerprint creating interruptions to ridge flow. The OIG found that this explanation was inconsistent with the Laboratory’s subsequent determination that the fingerprint was in fact suitable for comparison and could be identified as being made by Daoud. The OIG concluded that the purported interruptions to ridge flow within LFP 17 were not a cause of the erroneous identification.

We also considered the suggestion by some members of the International Panel that the FBI examiners were misled by an excessive faith in the IAFIS technology. The OIG did not find this explanation to be persuasive. The FBI examiners were aware that many IAFIS searches do not result in identifications, and the initial examiner conducted IAFIS searches of at least seven other latent fingerprints submitted by the SNP without declaring an identification. IAFIS did not suggest a single candidate to the FBI examiners; it generated a list of candidate fingerprints from which the initial examiner found Mayfield.

V. OIG Assessment of the FBI Laboratory’s Responses to the Error

Following discovery of the misidentification, the FBI Laboratory initiated several actions, including: (1) an internal review of LPU policies and procedures, (2) a review of prior IAFIS identifications from digital prints, (3) a monthly review of prisoners scheduled for capital punishment who may have been convicted or sentenced based on an FBI fingerprint identification, and (4) corrective action with respect to the examiners involved in the Mayfield misidentification.

The OIG concluded that these are significant steps, and we concur with many of the reforms that the Laboratory has adopted, particularly with respect to the development of more objective criteria for declaring an identification, revision of the Standard Operating Procedures (SOPs) to provide greater detail and more specific procedures, and establishment of meaningful minimum documentation requirements for identifications. These reforms will result in significant modifications of practices in the LPU of the FBI Laboratory that we believe will help prevent future errors.

However, we found that the actions proposed by the Laboratory were not fully responsive to the issues raised by the Mayfield misidentification and that additional or more specific modifications to Laboratory practices should be adopted. Accordingly, the OIG made additional recommendations. These include recommendations that the Laboratory develop criteria for the use of Level 3 details to support identifications, clarify the “one discrepancy rule” to assure that it is applied in a manner consistent with the level of certainty claimed for latent fingerprint identifications, require documentation of features observed in the latent fingerprint before the comparison phase to help prevent circular reasoning, adopt alternate procedures for blind verifications, review prior cases in which the identification of a criminal suspect was made on the basis of only one latent fingerprint searched through IAFIS, and require more meaningful and independent documentation of the causes of errors as part of the Laboratory's corrective action procedures.

VI. Analysis of the Investigation, Arrest, and Confinement of Mayfield

The OIG also reviewed the FBI's conduct in the investigation and arrest of Mayfield that followed the FBI Laboratory's identification of him as the source of LFP 17. This portion of our review included an examination of whether the FBI used the Patriot Act in connection with the investigation and an assessment of the role of Mayfield's religion in the FBI's field investigation. We also examined the accuracy and completeness of the FBI's representations in affidavits filed in support of the material witness and criminal search warrants. Finally, we examined the effect of media leaks on Mayfield's arrest and issues related to his conditions of confinement.

A. Effect of the Patriot Act on the Mayfield Investigation

In the following sections, we summarize the OIG analysis of the Patriot Act provisions that may have had an impact on the Mayfield investigation. We concluded that the Patriot Act amendments to FISA did not affect either the government's decision to seek FISA search and surveillance authority in the Mayfield case or the scope of information the government collected about Mayfield pursuant to FISA. We found that the FBI likely would have sought and been able to obtain FISA authorization for the searches and surveillance even without the Patriot Act amendments to FISA. We also found that, contrary to public speculation after Mayfield's arrest, the FBI did not use certain provisions of the Patriot Act in the Mayfield case. However, the Patriot Act did affect the sharing of information about Mayfield with law enforcement agents and intelligence agents and the amount of information that the government collected [REDACTED].

1. Sections 218 and 504 of the Patriot Act

As mentioned previously, the FBI obtained authority to conduct covert surveillance and searches of Mayfield pursuant to FISA. To obtain FISA authority, the government must submit an application to the FISA Court certifying that a significant purpose of the requested surveillance and searches is to gather foreign intelligence information. The application must also establish probable cause for the FISA Court to find that the target of the requested surveillance and searches is either a foreign power or an agent of a foreign power. A foreign power is defined broadly to include any group engaged in international terrorism.

Prior to the Patriot Act amendments, FISA required the government to certify that “the purpose” of the requested surveillance was to gather foreign intelligence information. In assessing such requests, the Department of Justice and courts applied the “primary purpose” test. This allowed the use of FISA-derived information in a criminal case only if the primary purpose of the FISA surveillance or search was to gather foreign intelligence information rather than to conduct a criminal investigation.

Beginning in the 1980s, the Department of Justice developed procedures that limited the circumstances under which information from intelligence investigations could be shared with criminal prosecutors and criminal law enforcement personnel. As a result, a “wall” developed between Department intelligence personnel and criminal personnel that limited information sharing. In addition, while pre-Patriot Act FISA-derived information could be shared freely with intelligence agencies such as the Central Intelligence Agency (CIA) and the National Security Agency, that same information could not be shared with criminal law enforcement officials without consultation and approval from senior officials in the Department of Justice.

Section 218 of the Patriot Act amended FISA to replace the phrase “the purpose” with the phrase “a significant purpose.” Accordingly, the government can now obtain a FISA warrant by showing that the collection of foreign intelligence information is a “significant purpose” of the investigation, rather than the primary purpose as under the previous standard. In addition, Section 504 of the Patriot Act amended FISA to specify that intelligence investigators conducting FISA surveillance or searches may consult with criminal investigators to coordinate efforts to investigate or protect against international terrorism.

To determine if the Patriot Act affected the course of the Mayfield investigation, the OIG examined whether the government, prior to the Patriot Act, would have sought FISA authority to conduct covert searches and

surveillance of Mayfield, and whether FISA authority could have been obtained under the more rigorous pre-Patriot Act primary purpose standard.

Based on our interviews and review of the evidence known to the FBI when it made the decision to seek emergency FISA authority, we concluded that the government likely would have proceeded with a FISA application even before the Patriot Act. Witnesses from the FBI and DOJ who worked on the Mayfield matter and had both pre-Patriot Act and post-Patriot Act experience stated that even before the Patriot Act, the government would have treated the Mayfield matter at the outset primarily as an intelligence case rather than a criminal case. All of the witnesses stated that the primary purpose at the outset of the Mayfield investigation was to collect foreign intelligence information and that the prospect of criminal prosecution of Mayfield was incidental. In addition, some of the witnesses expressed doubts that the government could have obtained the electronic surveillance information it sought had it attempted to use traditional criminal investigative methods.

We concluded that the Patriot Act did not affect the government's decision to pursue FISA search and surveillance authority in this matter. Further, we believe that the government could have met the more stringent primary purpose standard that existed prior to enactment of the Patriot Act.

However, we found that the Patriot Act did affect the government's dissemination of intelligence information about Mayfield. By dismantling the "wall" between criminal and intelligence investigators, the Patriot Act allowed the government to freely share intelligence information about Mayfield gathered in the FISA surveillance and searches with prosecutors and other criminal law enforcement officials. In addition, Section 203 of the Patriot Act allowed the government to share grand jury information with the intelligence community, some of which could not have been obtained and shared through intelligence methods prior to the Patriot Act.

2. National Security Letters

[REDACTED]

[REDACTED]. Section 505 of the Patriot Act relaxed the certification requirements for issuing NSLs to allow issuance upon a showing that the information sought is "relevant" to an authorized investigation to protect against international terrorism, rather than requiring specific and articulable facts that the information sought pertained to an agent of a foreign power. [REDACTED]

[REDACTED]

3. Other Patriot Act provisions

The OIG found that, contrary to some public speculation about the Mayfield case, certain other Patriot Act provisions either were not used in or had no significant effect on the Mayfield investigation. For example, Section 213 of the Patriot Act authorizes delayed notification of the execution of criminal search warrants, which are sometimes referred to as “sneak and peek” searches. We found that there were no such searches conducted in the Mayfield investigation. The covert searches that were conducted of Mayfield’s home and office before his arrest were not conducted pursuant to criminal search warrants. After his arrest, the searches were based on overt criminal search warrants and the Patriot Act was not implicated in those searches.

Another provision of the Patriot Act, Section 206, amended FISA to allow the government to seek multi-point or “roving” wiretaps. [REDACTED]

[REDACTED]

4. Conclusion regarding the impact of Patriot Act amendments on the Mayfield investigation

In sum, the OIG concluded that the Patriot Act amendments to FISA did not affect the government’s decision to seek FISA authority in the Mayfield case and did not affect the scope of information the government collected about Mayfield pursuant to the FISA surveillance and searches. We also found that the FBI did not use certain provisions of the Patriot Act in the Mayfield case, such as those relating to delayed notification searches. Moreover, the evidence indicated that, even prior to the Patriot Act, the FBI would likely have sought and been able to obtain identical FISA authorization for the searches and surveillance of Mayfield that it conducted.

However, the Patriot Act did permit a significant amount of information about Mayfield to be shared with a wide variety of law enforcement agents and intelligence agents that could not have been shared prior to the Patriot Act. By dismantling the wall between intelligence and criminal investigations, the Patriot Act allowed the government to freely share intelligence information about Mayfield gathered in the FISA surveillance and searches with prosecutors and other criminal law enforcement officials. The Patriot Act also allowed the government to share grand jury information with the intelligence

community that could not previously have been shared. In addition, the Patriot Act affected the amount of information the government collected

[REDACTED]

We did not find any evidence that the FBI misused any of the provisions of the Patriot Act in conducting its investigation of Mayfield. However, the increased information sharing allowed by the Patriot Act amplified the consequences of the FBI's fingerprint misidentification in the Mayfield case.

B. The Role of Mayfield's Religion in the Investigation

The OIG evaluated whether Mayfield's religion improperly influenced the FBI's actions in the field investigation and arrest of Mayfield. As discussed previously, the OIG concluded that the FBI did not initiate its investigation of Mayfield because of his religion. The FBI Laboratory examiners did not know Mayfield's religion when they made the initial fingerprint identification. Similarly, when the Laboratory's fingerprint identification was communicated to the FBI CTD and the Portland Division, neither entity knew about Mayfield's religion. The FBI first learned of Mayfield's religion only after it had opened a full field investigation of Mayfield to gather all intelligence available on him. Thus, we concluded that Mayfield's religion played no role in the FBI's decision to initiate a full field investigation of Mayfield.

In addition, we concluded that the field investigation of Mayfield was not improperly influenced by the FBI's knowledge of Mayfield's religion. Some government witnesses acknowledged, however, that Mayfield's religion was a factor in the investigation. The FBI learned that the SNP believed the Madrid bombings had been carried out by radical Muslims. Thus, several DOJ and FBI witnesses stated that they expected to discover in investigating the case that the suspects would be Muslim. For example, a Portland Assistant United States Attorney (AUSA) called Mayfield's religious beliefs a "mildly corroborating factor." Other FBI witnesses said Mayfield's religion was not a factor in the investigation, but that his contacts with other suspected terrorists were.

We concluded that the FBI's field investigation of Mayfield was initiated because of and largely driven by the identification of his fingerprint on evidence associated with the train bombings, not by his religious beliefs. We believe the FBI would have sought covert search and surveillance authority irrespective of Mayfield's religion. Moreover, we did not find evidence suggesting that the investigation was prolonged because Mayfield is a Muslim.

In our view, the FBI's field investigation appropriately sought information about a subject who had been positively identified by the FBI Laboratory as having left a fingerprint on a bag of detonators found in Madrid. When the FBI

Laboratory continued to declare that the fingerprint was Mayfield's, we do not believe it was unreasonable for FBI agents to aggressively pursue this investigation.

C. The FBI's Participation in the Preparation of the Material Witness and Criminal Search Warrants

Several FBI agents, a Laboratory Supervisory Fingerprint Specialist, and the FBI's Legal Attaché in Madrid participated in the preparation or review of the affidavits submitted to the United States District Court in support of the material witness and criminal search warrants. We examined the accuracy and supportability of representations made in these affidavits.¹

We found that the affidavits contained several inaccuracies that reflected a regrettable lack of attention to detail. In addition, we found the wording of the affidavits to be troubling in several respects. In particular, the affidavits provided an ambiguous description of the April 21 meeting between the FBI and the SNP, which apparently led the judge to believe that the SNP had agreed with the FBI's fingerprint identification. In fact, the SNP had only agreed to conduct a reexamination of LFP 17. Finally, we believe the material witness warrant affidavit contained an unfounded inference concerning the likelihood of the existence of false travel documents regarding Mayfield.

D. The Role of Media Leaks in the Arrest of Mayfield

The FBI discovered in early May 2004 that several media outlets had inquired about an American suspect in the Madrid bombings. This information caused the FBI, in conjunction with the DOJ CTS and the Portland U.S. Attorney's Office, to obtain a material witness and criminal search warrants on May 6. The media leak disrupted the FBI's investigative plan, which had called for the FBI to finish its intelligence gathering and analytical work concerning Mayfield near the end of May. The FBI then intended to approach Mayfield in early June and attempt to interview him voluntarily, but not necessarily arrest him.

We found insufficient evidence to conclude that anyone in either the FBI or the DOJ caused or contributed to the leak of information about Mayfield in

¹ The Portland U.S. Attorney's Office participated in the drafting, editing, and approval of the final versions of the affidavits. The DOJ CTS reviewed the affidavits (for legal sufficiency) and made a recommendation to the Deputy Assistant Attorney General and Assistant Attorney General of the Criminal Division regarding the final versions of the affidavits. The Deputy Assistant Attorney General and the Assistant Attorney General were involved in the review and approval of the final versions of the affidavits. As noted previously, DOJ OPR evaluated the conduct of DOJ attorneys in this case.

order to facilitate his arrest. Further, we did not find sufficient evidence to determine who leaked this information about Mayfield to the media.

E. The Conditions of Mayfield's Confinement

After Mayfield was arrested on the material witness warrant and the Court denied his request to be released to home detention, the USMS assigned Mayfield to be confined at the MCDC. From May 6 until May 12, he was housed in the administrative segregation unit where he was kept in his cell for up to 22 hours per day. On May 12, the MCDC moved Mayfield to the less restrictive protective custody unit, where he was still housed in a solitary cell but was permitted more recreation time outside his cell.

We found that Mayfield's conditions of confinement did not violate the material witness statute. We also did not find evidence that Mayfield was mistreated during his confinement. We found that he was housed under conditions that were consistent with the normal practices of the USMS and the MCDC for criminal defendants and material witnesses.

However, the OIG found that the MCDC failed to communicate important information about Mayfield to appropriate prison personnel, including the instruction to keep him separated from other prisoners for his own safety and the fact that he had been booked under an alias to protect grand jury secrecy. These failures resulted in an inadvertent disclosure of the alias to the media and an unnecessary confrontation between Mayfield and a correctional officer who did not know who he was and confronted Mayfield about his true identity.

F. Recommendations

As a result of our investigation, we provided a series of recommendations to the FBI to address the problems we found in the Mayfield case. While we did not find any intentional misconduct by FBI employees, either in the Laboratory or by those conducting the FBI field investigation, we did find performance issues by various FBI employees. Most significantly, we found a series of systemic issues, particularly in the FBI Laboratory, that helped cause the errors in the Mayfield case. While the FBI Laboratory has taken significant steps to address these issues, we made a series of additional recommendations to the FBI to address the Laboratory issues raised by the Mayfield misidentification. We believe our recommendations, if fully adopted, can help prevent similar errors in the future.

Appendix Four - Metropolitan Police - Forest Gate report



IPCC Independent Investigation into the Shooting of Muhammad Abdulkahar in 46 Lansdown Road, Forest Gate on Friday 2 June 2006

In the early hours of 2 June 2006 the Metropolitan Police mounted a counter-terrorist operation in 46 and 48 Lansdown Road, Forest Gate in east London. During that operation, one of the residents of 46 Lansdown Road, Muhammad Abdulkahar, was wounded by a police firearm.

The shooting was immediately referred to the Independent Police Complaints Commission, which deployed its own investigators to carry out an assessment. Later that morning the IPCC determined that the shooting would be independently investigated, led by Senior Investigator Simon Cousins. This investigation is referred to as Forest Gate 1. The terms of reference for this investigation are:

- *to investigate the circumstances of the discharge of a police firearm during a police counter-terrorist operation at 46 Lansdown Road, Forest Gate on 2 June 2006, to include:*
 - *whether or not the police officer from whose weapon the shot was discharged has committed any criminal or disciplinary offence; and*
 - *the justification for authorisation of firearms for the police operation.*
- *Except as necessary to meet (2) above, the wider circumstances of the police counter-terrorist operation do not form part of the IPCC investigation.*

Subsequently, complaints were made by the residents of both properties subject to the police raid, about the way they were treated during and after the police operation. These complaints now form two further independent investigations by the IPCC, referred to as Forest Gate 2 and Forest Gate 3.

This report sets out the findings and conclusions in respect of Forest Gate 1. Forest Gate 2 and 3 remain under investigation and further reports will be issued in respect of those.

The investigation

Forensic work required by the IPCC from inside the house at 46 Lansdown Road was carried out late in the evening of 2/3 June 2006 after the completion of a safety

search carried out as part of the MPS counter-terrorist operation. This work, together with the clothing worn by the injured man, allowed the forensic scientist to determine the position and angle of the weapon when the shot was discharged. The weapon from which the shot was discharged was also subject to forensic examination by the independent Forensic Science Service. We have also seen the specialist clothing worn by the armed officers when they entered the house.

Accounts were obtained from the police officers who entered 46 Lansdown Road, including a detailed account from the officer from whose weapon the shot was discharged. Detailed statements were also taken from the occupants of 46 Lansdown Road in co-operation with their solicitor. These contain a number of complaints that are subject to further investigation.

The investigation also examined the justification for the authorisation of firearms for the police operation. This included an examination of confidential documents in respect of the operation but does not, however, include an examination of the underlying intelligence, which is outside the terms of reference of this investigation.

Findings of the investigation

As a result of information received, the Anti Terrorist Branch (SO13) of the Metropolitan Police decided to mount an operation in respect of the residents of 46 and 48 Lansdown Road, Forest Gate. A sworn statement was laid before a magistrate at Bow Street Magistrates Court and warrants were issued to enter and search both premises.

The information was that a bomb with additional hazardous material (a 'dirty bomb') was located in 46 or 48, Lansdown Road. The police operation was designed to ensure rapid entry into the properties to secure the residents within, and then to search the premises for the device and any other related items.

Because of the nature of the information, authority was sought to carry out an armed entry into the premises of 46 and 48, Lansdown Road. A Tactical Assessment was prepared and a firearms authority was granted.

A large number of police officers (approx. 250) were on stand-by, ready to move in and assist in evacuation of premises and street closures should a device be found.

Contrary to much of the speculative press reporting, 250 officers did not enter Lansdown Road. Statements were obtained from the fifteen officers who did enter 46 Lansdown Road.

A number of specialist firearms teams from CO19 were tasked to carry out the entry into both premises. Because of the information all the officers wore full Chemical, Biological, Nuclear and Radiological (CBNR) suits and respirators. The suits are made up of 3 layers of clothing, two pairs of gloves (inner of cloth and outer of rubber), cloth boots and rubber overboots. The officers also wore bullet resistant vests, equipment vests, ear defenders, helmets and radios. In addition the officers

carried their personal issue Glock 17 pistols and a variety of other weapons including the Heckler and Koch MP5 carbine. Photos of the equipment used are attached. The officers had been briefed in respect of the serious risk that might be present in the house.

The first officer to enter 46 Lansdown Road was B6. He was followed into the house by another fourteen officers. Each of the officers deployed to various parts of the house to secure the residents and ensure that it was safe for the premises to be searched.

It would appear that as the officers had entered the house, Abdulkahar and his brother Abul Koyair heard the noise and started to move downstairs.

In his statement to the IPCC Muhammad Abdulkahar describes that some time before 4.17am (the time his alarm was set for) he heard a strange scream from his brother, whose room was in the attic above him. Abdulkahar left his room and went to the first floor landing. He saw his brother on the stairs above him, and the reflection of torch lights on the landing below. As he moved down the stairs to the half landing he describes seeing a number of men dressed all in black, at least one with something covering his face. He did not hear them speaking or realise they were police officers, and says that he believed it was a robbery. He believes that when he was less than 3 feet from the men there was a bang and an orange flash. He says he felt a pressure but did not realise he had been shot. He then dropped to the ground in a crouching position.

He makes a number of complaints about his subsequent treatment, which will be dealt with in a further report.

In his statement his brother Abul Koyair states that he heard glass breaking. He believed that robbers were entering the house, and screamed out to raise the alarm. He came down from his attic room and saw his brother ahead of him on the stairs. He heard a bang and saw a flash; he did not actually see his brother being shot.

His parents and sisters were also in the house, but did not see Abdulkahar being shot.

B6 was the first officer to climb the steep, narrow and dark stairs to the first floor. He states that as he climbed the stairs he was shouting "armed police". As he was wearing a respirator any words spoken would have been muffled. As it was dark, B6 was using the torch fitted to his MP5 Carbine. B6 says he was carrying the weapon "raised to an off aim position in front of me".

As this was a dynamic house entry and B6 was the first officer to enter the premises B6 had placed the safety catch of his MP5 in the fire position. This is a normal procedure for specialist firearms officers in such circumstances. The 'off aim' position is used when officers are in a high state of alert. The weapon is raised but is below the eye/sighting line. This position means that the weapon only has to be raised a

short distance if a threat appears but still allows the officer to have a general view of his environment.

As B6 was on the half-landing (which is approximately 4'6" by 2' 9") he states he was aware of two figures approaching from his right at speed. B6 states that he and the two figures came into contact and this caused him to lose his balance and come into contact with the wall. B6 says he was aware of person(s) pulling at his right arm. He states that he feared that the person(s) were trying to take his weapon, and that he feared for his life. During the confrontation the torch on B6's weapon had been turned off.

B6 states that he heard a 'pop', but did not register that it was a shot (he was wearing ear defenders, a helmet and a hooded suit). He was aware that the confrontation, and the pull at his arm and weapon, had lessened. He says he became aware that one of the men was sitting on the floor. He had turned his torch back on and saw a red stain on the man's shirt. It was at this stage that B6 says he realised that the 'pop' was a shot and that the man had been wounded. He says he was not certain, as he had not deliberately shot anybody.

He shouted to his colleagues that there was a "man down". B6, along with other officers, moved on up the stairs to secure rooms on the first and second floor, and other officers took control of the two men and removed them from the house, where the injured man was given first aid by police and ambulance crew.

Although there were a number of other officers behind B6, due to the narrow confines of the stairs and half-landing, as well as the poor light, they are unable to provide a clear account of the incident.

A forensic scientist commissioned by the IPCC was asked to establish the range and trajectory of the bullet that struck Abdulkahar, as well as to carry out a full examination of the weapon. The scientist confirms that the weapon was in correct working order and that the 'trigger pull' for the weapon was normal. He states that the only way for the weapon to fire was for the trigger to be pulled.

No identifiable fingerprints could be found on the weapon except those attributed to the officer who would have handled the weapon. No fingerprints were found on the trigger.

The scientist visited the scene and examined the bullet impact damage. He then examined the position and type of the holes in the clothing worn and the xray of the wound. He used a dummy to demonstrate the relationship of the wounds and the holes in the clothing to the damage to the wall and ceiling where the bullet made contact.

The scientist concludes that the weapon was within 2 inches of Abdulkahar when fired. As the weapon was fastened to the officer by a sling this would mean that the two men were very close together. He also describes the steep angle at which the weapon was being pointed. Taking into account the fact that the gun was within two

inches of the clothing, and the trajectory of the shot, it can be seen that the gun was not in a normal firing position. Taking into account the bullet impact damage to the wall and ceiling, he concludes that both Abdulkahar and the police officer would have been on the half-landing when Abdulkahar was shot.

Conclusion

It is not the purpose of this report to comment on the MPS counter-terrorist operation. To the extent that this is part of the investigation into the complaints by the occupants of Lansdown Road, this will be the subject of a further report.

It was however within the terms of reference of this investigation to look at the justification for the use of armed officers. The criteria for the issue of a firearms authority is set out in the ACPO Manual of Guidance on Police Use of Firearms. This allows the issue of firearms where the authorising officer has reason to suppose that officers may have to protect themselves or others from a person who has access to a firearm, or is otherwise so dangerous that the officer's use of a firearm may be necessary. The nature of the information which they were acting upon justified the deployment of firearms officers.

There are two accounts of this incident, one by a police officer and the other by Abdulkahar. In some respects they agree. However, in the detail of the confrontation and the firing of the shot there are differences.

It is for this reason that the role of the independent scientist is vital. This work shows that the gun was fired from much less than the 3 feet (or less) described by Abdulkahar, and that the gun was positioned in a close to upright position. This is consistent with the officer's account that both parties were very close together.

We also note that the half landing was a confined and dark space, and that the incident took place within seconds of Abdulkahar waking up. From the equipment and respirators worn by the officers it is not surprising that he did not recognise them in the dark to be police officers. This must have been a very frightening situation, which would also have been very shocking. The incident also happened very quickly, and these factors are likely to have a bearing on his recollection of events.

There is no evidence to support the speculative reporting that the weapon was fired by one of the brothers, or that it was a deliberate act by the police officer.

It is our conclusion that during contact between the officer and Abdulkahar in a very narrow space on the half landing a shot was accidentally discharged from B6's weapon. We note that the safety catch was off, in accordance with police training for what was regarded as a high-risk entry, and the officer was wearing two pairs of gloves as part of his protective clothing.

In the circumstances I conclude that the officer has committed no criminal or disciplinary offence.

I have considered whether we are required to refer the investigation to the Crown Prosecution Service for their consideration of whether a criminal offence may have been committed. I have received legal advice on this.

The threshold for referral to the CPS is very low. I am advised that the injury to Abdulkahar is serious enough to fall under the definition of grievous bodily harm. However, based on the report of the forensic scientist, there is no evidence of intent or recklessness.

I have also been advised as to the possibility of an offence under health and safety legislation. In issue is whether the discharge of the firearm was an accident about to happen. There is little doubt that the bulky clothing and gloves had an effect on the officer's mobility and dexterity, and that the respirator muffled sound. The equipment was however the most up to date currently available for use by the MPS in such circumstances. Officers were trained in its use. The equipment carried health and safety risks, but reasonable steps were taken to minimise them. We do not think a criminal offence is made out on these grounds. We have therefore not referred this investigation to the CPS.

Recommendations will be made following the conclusion of the further investigations into the events in Forest Gate.



Deborah Glass
Commissioner

3 August 2006



Chemical, Biological, Nuclear and Radiological (CBNR) suit and respirator as worn by officers during the operation at 46 Lansdown Road.



Heckler and Koch MP5 carbine – the firearm discharged during the operation at 46 Lansdown Road.