

**Commission of Inquiry
into the Actions of Canadian Officials in Relation to Maher Arar
Policy Review**

**International Models of Review of National Security Activities
A Supplementary Paper
to the Commission's
Background Paper on International Models**

May 2005

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A. Introduction

In December, 2004, the Commission published a paper entitled “International Models of Review and Oversight of Police Forces and Security Intelligence Agencies”. The paper provided an overview of the review and oversight mechanisms for law enforcement and security intelligence agencies in eight countries: Australia, Belgium, Germany, New Zealand, Norway, Sweden, the United Kingdom and the United States.

Since the publication of the “International Models” paper, the Commission has carried out further research on the mechanisms in place in these eight countries, in particular on those agencies with review jurisdiction over police forces engaged in national security activities. In some cases, this supplementary research also touched on agencies that review intelligence services, either because the agencies have jurisdiction over both intelligence and police forces, or because there are statutory features that merited further examination. The Commission’s research included information-gathering from representatives of certain agencies. A list of these agencies can be found at Appendix A.

This paper summarizes the information the Commission has learned about features of these models that are novel and/or potentially applicable to the Canadian context, including in some cases the agencies’ experiences with these features. In most cases, the paper does not reiterate information contained in the December “International Models” paper, but rather assumes knowledge of the information contained therein. This paper also clarifies and updates certain information set out in the December paper.

B. Review of national security activities: summary of further information-gathering on international models

I. SUMMARY OBSERVATIONS

In six of the eight countries examined, police forces that are involved in national security activities are subject to review by something more than a pure complaints-based body. Germany and New Zealand are the exception. In summary:

- National security policing in **Belgium** is conducted by divisions of the regular police, and is under the complaint-processing and inspection¹ jurisdiction of Committee P. Committee P also has jurisdiction over other public authorities with police powers, such as customs. Committee P has a statutory obligation to share information and collaborate with Committee I, a similarly-constituted body that reviews Belgium's intelligence agencies.
- National security policing in **Norway** is conducted by a division of the regular police with a separate statutory mandate (the Police Security Service), as well as by the ordinary police. The Police Security Service is under the complaint-processing and inspection jurisdiction of the EOS Committee, which also reviews Norway's other intelligence agencies. The Police Security Service is also under the jurisdiction of the complaint-processing body for the rest of the police. The jurisdiction of the EOS Committee is functionally-defined, and questions have arisen in Norway as to whether there are sections of the ordinary police, and of other authorities, such as immigration, which fall under this functional definition.
- National security policing in **Sweden** is conducted by a division of the police (*Såpo*, the Security Service) which operates under direction from government ordinances and which has separate offices and structures. National security policing is also carried out by the ordinary police. Both fall under the jurisdiction of the Parliamentary Ombudsmen's office, as do the military intelligence services. The Ombudsmen's office has complaint-processing and inspection functions, but its role as secondary supervisor and its small size preclude close and regular scrutiny of any of these agencies.
- National security policing in **Northern Ireland** is conducted by the regular police force, including its Special Branch, both of which fall under the complaints-processing jurisdiction of the Police Ombudsman for Northern Ireland, as well as

¹ The term "inspection" power will be used throughout this paper to mean the power to inspect a police or intelligence agency's activities, in the absence of a complaint, in a manner resembling audits of an agency's or company's books, and generally unrestricted in its scope. An inspection power differs from the power to conduct "own motion investigations" or from "self-initiated complaints", inasmuch as these latter generally relate to one identifiable matter or course of conduct. In the context of the United States, the term "audit" is also used, and generally connotes an evaluation of the financial aspects of a program.

the Investigatory Powers Tribunal (IPT). The IPT investigates complaints regarding certain defined investigative activities such as wiretapping or surveillance. These activities are also subject to monitoring and other supervision by the Interception of Communications Commissioner (ICC) and the Office of the Surveillance Commissioners (OSC), whose jurisdiction covers any public authority engaging in such defined activities, including the intelligence services and customs and transport authorities.

- National security policing in **England and Wales** is conducted by all 43 police forces in England and Wales, with the Metropolitan Police Service playing the lead role, and the Special Branches in each force playing the principal intelligence role. Various other specialized police forces and enforcement units within the new Customs and Revenue department and the Immigration Service also play a national security role. All fall within the complaints-processing and “call-in”² jurisdiction of the newly-constituted Independent Police Complaints Commission and the IPT, as well as within the function-based inspection jurisdiction of the ICC and the OSC. Police forces are also subject to substantial “effectiveness and efficiency” scrutiny by Her Majesty’s Inspectorate of Constabulary.
- National security policing in **Australia** is conducted by the Australian Federal Police, who are under the complaints-processing, inspection and “own motion” investigation jurisdiction of the Commonwealth Ombudsman, a body that also has jurisdiction over approximately 150 other public authorities, including most of Australia’s intelligence agencies, and the new, integrated Australian Crime Commission (ACC). Integration among domestic agencies, including across federal and state/territory jurisdiction is an emerging issue in Australia, and the Ombudsman is increasingly working in cooperation with other accountability bodies. Indeed there have been formal recommendations for cooperation among review bodies, and a statutory provision for “arrangements” between review bodies was created to avoid accountability gaps in the ACC.

² See discussion of the Independent Police Complaints Commission below.

- National security policing in the **United States** is conducted largely by the FBI, which is subject to the complaints-processing, audit, inspection and investigation jurisdiction of the Inspector General of the Department of Justice. The Department of Homeland Security, which also engages in law enforcement and intelligence related to national security, is subject to similar review by the Inspector General of the Department of Homeland Security.

II. BELGIUM

a. Committees P and I

i. Committee I's jurisdiction over two intelligence agencies only.

The “International Models” paper published in December stated that the Standing Committee for the Monitoring of Intelligence Services (“Committee I”) has jurisdiction over Belgium’s two security intelligence agencies, as well as any other public body with a mandate to collect and analyse information in the interest of security. In other words, Committee I’s jurisdiction was defined in part by this function. However, the Commission has learned that following a 1999 legislative amendment³, Committee I now only has jurisdiction over Belgium’s two security intelligence agencies: the *Surêté de l’État* (“SE”), the state intelligence service; and the *Service Général du Renseignement et de la Sécurité des Forces armées* (“SGR”), the military security intelligence service. This legislative change was motivated in part by disagreements as to the scope of Committee I’s jurisdiction.

Although Committee I no longer has jurisdiction over other bodies involved in intelligence, its monitoring of both the SE and the SGR, in its view, has had a number of advantages. It has allowed the Committee to compare the methods used and the information held by each service, and to observe the collaboration and coordination between the two agencies. It has also allowed the Committee to observe that information has flowed to another public authority, such as a police force, and to observe that actions may have been taken by such other bodies that may require scrutiny. Committee I can then note these observations in its reports to parliament, and parliament can choose to ask the appropriate authorities to look into the matter. In such cases,

³ *Loi du 1 avril 1999*, art. 4, amending art. 3 of the *Loi organique du contrôle des services de police et de renseignements*, dated July 18, 1991, file no. 1991-07-18/53 (« *Loi organique du contrôle* »).

Committee I can also caution or urge the intelligence agency in question to alter its actions accordingly.

ii. Committee P's jurisdiction over all persons with law enforcement functions.

According to its governing statute, the Standing Committee for Monitoring of Police Forces ("Committee P") has jurisdiction over all of Belgium's police services, which comprise approximately 40,000 personnel, as well as all persons "individually assigned to investigate and ascertain violations of the law".⁴ Committee P advises that there are a number of public authorities with personnel that are generally understood to fall within this category, but that disagreements abound as to whether they in fact do fall within Committee P's review jurisdiction. These include personnel working in customs, transport and environment authorities.

iii. Coordination between Committees I and P.

As the "International Models" paper noted, Committees P and I are required by their governing statute to exchange information regarding their activities, to submit their reports and conclusions to each other, to hold joint meetings where complementary information can be exchanged, and to jointly discharge their mandates in certain circumstances.⁵ These provisions have led Committees P and I to carry out several joint investigations, including one on police and intelligence coordination, and a current review of terrorism coordination among police and intelligence agencies.

Both Committees spoke favourably about the potential benefits of such cooperation, including the exchange of information on the integrated activities of police and intelligence services, particularly in an era of increasing overlap in the mandates of police and intelligence services, and increased information-sharing and cooperation. Indeed, as Committee P stated, institutional cooperation among review bodies is vital as long as there is institutional cooperation among the bodies being reviewed. Otherwise, there is too much risk of escape from scrutiny by one body or the other. However, they noted that there have been challenges in carrying out joint investigations, including:

⁴ *Loi organique du contrôle*, art. 3.

⁵ *Loi organique du contrôle des services de police et de renseignements*, arts. 52ff. English translation: Organic Law of 18 July 1991 on Monitoring Police Forces and Intelligence Services.

- the differences in operational culture, approaches, structures and objectives between the police and intelligence services;
- the difference in size of the respective forces and the corresponding workload of the Committees;
- the fact that both Committees are still relatively new and have had to focus much of their effort on the learning and development of best practices that are necessary to carry out their core mandate;
- the fact that not all members of Committee P have the requisite security clearance to allow information-sharing between the two Committees; and
- the difficulty of coming to joint conclusions and recommendations (though they noted that in many cases these were not necessary, and that much could still be gained from joint investigations, with separate conclusions and recommendations).

The Committees also noted that parliament and ministers can play a similar role, inasmuch as they receive reports from both Committees, and are empowered to request investigations⁶. This parliamentary monitoring role is essentially played by standing parliamentary commissions, who have access to both Committees' reports.

iv. Intelligence services reviewed by one body, and police reviewed by another.

Both Committees I and P stated their preference for a review system in which one agency is specialized in the review of intelligence services, and the other is specialized in the review of police services. They observed that when combined with a statutory mechanism for the exchange of information and for joint investigations (described above), it is a system that allows for specialization of each review body in the respective work of the intelligence or police services, and that responds to the differences in operational culture, mandates and activities of the two services. Both Committees noted, however, the increasing overlap between intelligence activities and law enforcement activities.

⁶ *Loi organique du contrôle*, arts. 8, 9, 11, 32, 33 and 35.

v. Dual complaint-processing and inspection function.

Committee I noted that it is an advantage to combine a complaint-processing and inspection function in one body, because the investigation of complaints helps develop knowledge and expertise of the activities under review, and because complaints often act as indicators of problems in certain areas.

Committee P, which also has a combined complaint-processing and inspection function, echoed this observation. Indeed, Committee P has shifted much of its focus from first-instance complaint-processing, to analysis of the information that complaints provide about potential systemic problems or other areas that require greater scrutiny. In so doing, it is increasingly leaving resolution of complaints to police forces, while monitoring outcomes, and retaining the right to proceed with an investigation if it is dissatisfied.

Committee P has made this shift for three main reasons: (i) its recognition that its complaint-processing burden was becoming untenable; (ii) its belief that police are best-equipped to deal with most complaints and are more likely to self-improve if they bear primary responsibility for complaints-handling (under the scrutiny of, and with the threat of secondary recourse to, an external monitor); and (iii) its view that analysis of complaint trends and potential systemic problems is a critical task.

vi. Committee P's mandate to review for propriety and efficiency; and Committee P's inspection power.

As noted in the "International Models" paper, Committee P reviews Belgium's police forces for both compliance with law, policies and guidelines, and for overall efficiency and effectiveness of its practices. Committee P conducts these reviews whether pursuant to complaints, pursuant to inspections, or pursuant to own-motion investigations. Investigations can be large "thematic" investigations, or more particularized ones.⁷

⁷ *Loi organique du contrôle*, arts. 8, 9, 10. See also Committee P's annual reports and various special reports, found on its website: <http://www.comitep.be>.

III. NORWAY

a. EOS Committee

i. *Functionally-defined jurisdiction.*

The Committee for Oversight of the Intelligence, Surveillance and Security Services (“EOS Committee”⁸) has jurisdiction over all “intelligence, surveillance and security services carried out by, under the control of or on the authority of the public administration”.⁹ The EOS Committee advises that this provision is interpreted as meaning that the purpose of the intelligence, surveillance and security activity must be to safeguard national security interests. Activities with different objectives, such as traffic surveillance or criminal intelligence are not included.

Thus far, the EOS Committee’s jurisdiction has therefore only extended to the Intelligence Service, the Police Security Service and the National Security Authority.¹⁰ However, the functional definition of the Committee’s jurisdiction is intended to capture any other public or private entity that might engage in such activities, including by statutory or organizational change, or by informal arrangement or contract.

Further, the Committee notes that in an era of increased integration among public authorities engaged in counter-terrorism, new questions are arising as to whether the Committee should be monitoring certain activities of other bodies. These include the ordinary police force, which often carries out counter-terrorism investigations with the assistance of the Police Security Service; and immigration authorities.¹¹ These issues have not been formally tested yet, although in its last annual report, the EOS Committee discussed the question of whether its review jurisdiction could or should extend to the

⁸ « EOS » is an acronym for the three Norwegian words for intelligence, surveillance and security (etterretnings, overvåknings, sikkerhetstjeneste). “EOS Committee” is the common English name for the Committee.

⁹ *Act relating to the Monitoring of Intelligence, Surveillance and Security Services*, no. 7 of 3 February 1995 (“*Intelligence Monitoring Act*”), s. 1.

¹⁰ This is a correction to the « International Models » paper, which stated that the EOS Committee’s jurisdiction presently extends to these three agencies, as well as any intelligence activities conducted by other governmental bodies.

¹¹ Fredrik Sejersted has noted that the issue is “growing”, as cooperation among domestic agencies increases. He notes that the EOS Committee is “keeping its eye on” the coordinated efforts of the Police Security Service and the economic crimes unit of the ordinary police, as well as the coordination between the Police Security Service and immigration authorities. See “Intelligence Oversight in Norway”, (Geneva Centre for the Democratic Control of Armed Forces: 2003), p. 13, fn 12.

economic crimes unit of Norway's ordinary police force, which is the principal investigator of terrorism-financing cases (rather than the Police Security Service).¹²

ii. Advantages of jurisdiction over three intelligence services.

The EOS Committee believes that there are several advantages in its multi-agency jurisdiction. These include:

- insight into and knowledge of the entire 'EOS' area, allowing for better assessment of complaints;
- the ability to verify one agency's statements about the role that another agency might have played;
- the ability to monitor communications and cooperation between the services; and
- the avoidance of disputes as to whether the Committee properly has jurisdiction.

However, the Committee also noted that Norway is a small country, that the Committee has jurisdiction over no more than 1000 personnel in total¹³, and that its size (7 Committee members and 4 staff) reflects this fact. It suggested that in a larger country an effective multi-agency model might prove more difficult to realize. The Committee also stated that the differences in culture, operational activities and objectives which it observes in the services under its purview, in particular between the Police Security Service and the other intelligence agencies, might be more problematic for a multi-agency model with sizeably more personnel under its jurisdiction.

iii. Jurisdiction over the Police Security Service¹⁴, but not the rest of the police force.

The EOS Committee has jurisdiction over the Police Security Service, which has its own statutory mandate, but in practice it does not have jurisdiction over the rest of Norway's police force, the *Norske Politiet*. However, as noted above, with the increasing

¹² In Norway, this issue is complicated by the fact that the economic crimes unit forms part of the superior prosecution body, which is exempt from oversight by the EOS Committee. The discussion is at section 2 of the Committee's 2003 Annual Report, but the Report is only available in Norwegian.

¹³ The Police Security Service has approximately 250 people, the Intelligence Service less than 500, and the National Security Authority approximately 120.

¹⁴ It should be clarified that while the Police Security Service is described in the "International Models" paper as a civilian agency, its members are generally uniformed police officers with normal police powers. Members of the Service are commonly described as 'civilian' in Norway only to distinguish them from *military* personnel.

involvement of the ordinary police in counter-terrorism investigations, and with the increasing integration of Norway's law enforcement and intelligence services, questions have begun to arise as to whether the EOS Committee should have jurisdiction over certain activities of the ordinary police.

In addition, there is an overlap of jurisdiction between the EOS Committee and the body responsible for complaints against the police force¹⁵, whether these complaints are made against ordinary police officers or the Police Security Service. Due to the overlap, the Director General of Public Prosecutions has issued Guidelines to the complaints-based body to advise the EOS Committee of any allegations against the Police Security Service, to keep it apprised of investigations and recommendations, and to inform the Committee of any matters that may be of interest to it. The Committee has a more limited reciprocal duty to inform of any findings that indicate activity that might fall within the complaints-based body's jurisdiction. Given the extent of overlap in jurisdiction, the EOS Committee maintains that such cooperation and communication are essential to the fulfillment of the two bodies' respective mandates.

The Committee added that if it received a complaint against the ordinary police that appeared to deal with 'EOS'-related questions, it would investigate the complaint, and it has already had occasion to ask the Police Security Service to provide information from the ordinary police. However, the Committee has also encountered problems in following the course of an investigation, including information-sharing activity, between the Security Service and sections of the ordinary police, such as the economic crimes unit, since it is commonly held that it does not have jurisdiction over the latter.¹⁶

The various points of access that the EOS Committee has to files and personnel of the ordinary police force have also allowed it to observe that there is little difference between their investigative methods, other than the fact that the Police Security Service works much more often in secret; and that case files shift back and forth between sections of the ordinary police force and the Security Service. This latter has a separate database

¹⁵ Until January 1, 2005, this body was SEFO (the Norwegian acronym for the Special Investigating Body for Police Matters). As of January 1, 2005, complaints against the police are handled by a new agency called the Spesilaenheten for politisaker – the Special Unit for Police Matters. In contrast to SEFO, this new body is external to the police.

¹⁶ See discussion above.

for its files, and will shortly be moving to a separate building from the ordinary police force. It can access the files and databases of the ordinary police, but not vice versa.

iv. Authority to access information held by other public or private entities.

In addition to its access to other information through its communications links with SEFO and its successor, the EOS Committee can also conduct investigations in other parts of the public administration, as well as in private companies, if such investigations will allow for clarification of matters that fall within its jurisdiction.¹⁷

v. Dual complaint-processing and inspection function.

The EOS Committee sees advantages in combining, but also in separating, the two functions of complaint-processing and inspections. On the one hand, combining the two functions allows for improved monitoring, resource efficiency, and avoidance of proliferation of classified documents (insomuch as one body, rather than two, is carrying out the complaints-handling and inspection functions). On the other hand, it notes that an agency that performs regular inspections of the intelligence agencies' files can become too close to their decision-making and operations to independently examine complaints, in which case separation of the two functions might be desirable. However, the Committee noted that there are precautions that can be taken to avoid such 'capture', including declining to provide advice prior to operations being undertaken or to provide input on the development of procedures or policies. Indeed, the EOS Committee is prohibited from such activities by its governing statute, and believes, as did the legislator, that this is an important safeguard of independence.¹⁸

¹⁷ *Intelligence Monitoring Act*, s. 3.

¹⁸ Section 2 of the *Intelligence Monitoring Act* states that "(t)he Committee may not instruct the monitored bodies or be used by these for consultations." For a discussion of the intent of this provision, which was to distinguish between review and ongoing direction, and to ensure a requisite degree of Committee independence, see F. Sejersted, "Intelligence Oversight in Norway", (Geneva Centre for the Democratic Control of Armed Forces: 2003), pp. 30-31.

IV. SWEDEN¹⁹

a. Parliamentary Ombudsmen

i. Dual complaint-processing and inspection function.

The Parliamentary Ombudsmen's office has both a complaints-processing function and an inspection power. Even though the Ombudsmen is a complaints institution of secondary recourse in most instances²⁰, its complaints-processing function consumes the majority of the office's resources²¹. As a result, it has little time to carry out inspections of the public authorities within its purview. For example, the office normally visits only three police locations each year. This means that there can be as many as 25 years in between inspections of a particular public authority by the Ombudsmen's office. In addition, in the last fifteen years, the Ombudsmen's office has only conducted two 'own initiative' investigations into the Security Police²²; and in the last twenty years, it has conducted no such investigations of Sweden's other intelligence agencies.

ii. Jurisdiction over both the police and intelligence agencies.

The Ombudsmen's office has general jurisdiction over public authorities, and divides its responsibilities among the four elected Ombudsmen. For example, the police force and the Security Service are the responsibility of the Chief Ombudsman, but the military-

¹⁹ The Commission has received some helpful clarification on certain points made in the discussion of Sweden in the "International Models" paper. First, the term *Rikspolis*, which was used in the paper for Sweden's national police service, more properly describes the police board that generally oversees the police service. Second, at p. 69, the paper referred to European Union "directives". These are more properly described as European Union "framework decisions". Finally, the paper states that the police and intelligence services fall under the direction of their respective ministers. Since Sweden does not have a system of ministerial responsibility, it should be clarified that these agencies operate under general government guidelines and legislation but that ministers do not head and are not "responsible" for these agencies.

²⁰ Due to the generalist, supervisory structure and small size of the Ombudsman's office, individuals often make use of other complaints or resolution mechanisms before approaching the Ombudsman's office. In addition, the Ombudsmen have the power to refer complaints to other "appropriate" authorities for resolution: *Act with Instructions for the Parliamentary Ombudsmen* (1986:765) ("*Ombudsmen Act*"), s. 18. In some cases the Ombudsmen's office requests to be informed of the outcome of such referrals.

²¹ The office is comprised of 4 Ombudsmen, each with an area of responsibility that includes numerous public authorities; and 55 employees, 30 of whom are lawyers. The Ombudsmen's office received approximately 5100 complaints last year. For a discussion of the volume of complaints in the Ombudsmen's office, see B. Wieslander, *The Parliamentary Ombudsman in Sweden*, 2d revised ed. (The Bank of Sweden Tercentenary Foundation: 1999), pp. 49-59.

²² The most recent of these was an investigation into the execution by the Security Police of an order by the Swedish government to deport two Egyptian citizens. The investigation was completed in March, 2005.

See <http://www.jo.se/Page.aspx?MenuId=106&MainMenuId=106&Language=en&ObjectClass=DynamX DocumentSFS Decision&Id=16251662>.

operated intelligence agencies are under the responsibility of another Ombudsman.²³ While such division of responsibility among the four Ombudsmen affords specialization and efficiency, the Ombudsmen also meet regularly to share information and discuss cases, especially those involving two or more public authorities. Indeed, the office is considering more formalized joint inspections of public authorities whose work is integrated or inter-related, in order to give a more comprehensive picture for monitoring purposes. The Ombudsmen's office observed that in an increasingly complex public sector, it is advantageous to have the capacity to see a full picture and to share information. On the other hand, it noted that intelligence agencies and police involved in national security activities require a form of dedicated review, one that allows for regular and specialized supervision, which the generalist ombudsman model does not afford.

V. UNITED KINGDOM

a. Police Ombudsman for Northern Ireland

i. *Overlapping jurisdiction with RIPA authorities.*

The Police Service for Northern Ireland (PSNI) is subject not only to the complaints-based jurisdiction of the Police Ombudsman, but also to the inspections and complaints-processing of the *RIPA* authorities. By these latter, we mean those bodies created by the *Regulation of Investigatory Powers Act 2000*, whose jurisdiction is defined by investigative *activity* (e.g. intercepts, surveillance), and who generally monitor any public authority engaging in the defined activities.²⁴ The Ombudsman notes that a complaint may effectively fall into the jurisdiction of both her office and a *RIPA* authority, and that investigations can proceed concurrently. The review activities essentially differ however, as do the remedial powers. The *RIPA* authorities are principally concerned with ensuring that the authorisations for the prescribed investigative activities meet formal requirements, and, with the exception of the complaints-based Investigatory Powers

²³ The reason for this division is largely historic. There used to be one Ombudsman for all public authorities except the military, and another Ombudsman for the military. The functions of the military Ombudsman have now been incorporated into the Parliamentary Ombudsmen's office, but a separation of responsibilities has been maintained.

²⁴ In the case of the Police Service for Northern Ireland, intercept and surveillance activities are monitored by the Interception of Communications Commissioner, the Investigatory Powers Commissioner for Northern Ireland and the Office of the Surveillance Commissioners; and complaints related to such activities are investigated by the Investigatory Powers Tribunal. *Regulation of Investigatory Powers Act 2000* (U.K.), 2000, c. 23 ("*RIPA*"). See also the discussion of the *RIPA* authorities below, and in the "International Models" paper, pp. 86-89.

Tribunal, they have only the power to make adverse findings and recommendations.²⁵ The Ombudsman looks at the conduct of police officials, including the practices and decisions that lead to the information found in such authorisations. The Ombudsman also has the power to make binding disciplinary orders.

ii. Investigations that run concurrently with police investigations.

In addition to the possibility of overlap with *RIPA* investigations, the Ombudsman's office frequently conducts investigations of PSNI conduct concurrently with the PSNI's criminal investigations, including terrorism investigations, into the same or related events. At times, both the Ombudsman's office and the PSNI require access to the same evidence, and there is negotiation about such access as the investigations run parallel. On occasion the Ombudsman has even taken primacy of an alleged crime scene.

While investigations may run parallel, we are advised that the Ombudsman's office does not generally comment on the investigation while it is still active, but only after the fact. However, the Ombudsman's office has been consulted by the PSNI on the formulation of guidelines and policies, and the Ombudsman has provided advice in these circumstances. The Ombudsman views that such measures can help avoid questionable activity or complaints at a later point, and are therefore worthwhile.

It is worth noting that if in the course of its investigation the Ombudsman's office finds potentially exculpatory evidence, it has an obligation to disclose it. We are advised that the issue of whether the Ombudsman must disclose potentially exculpatory, but 'classified', evidence has not yet arisen. While the Ombudsman has an obligation to disclose potentially exculpatory evidence, it does not have an obligation to disclose information that may *assist* the prosecution, and it does not voluntarily make such disclosures. It argues that to do so would be to undermine public confidence in the office, as its role is not to assist the prosecution.

²⁵ *RIPA*, ss. 52ff. See also the discussion below of the *RIPA* authorities.

iii. Distinguishing between national security law enforcement and conventional law enforcement.

The Ombudsman observed that in her experience, there is little distinction between national security law enforcement and other law enforcement, and suggested that it would be extremely difficult to draw a line between them for review purposes. In the Northern Ireland experience, terrorist groups carry out all manner of ordinary crimes, such as fuel smuggling, bank robberies, cigarette smuggling, drug smuggling, petty crimes; and there is seldom a way to be certain from start to finish of an investigation that it belongs in the counter-terrorism section of the police or elsewhere. Investigations routinely move back and forth between or run in duplicate in several sections of the police force, including the counter-terrorism section.

iv. Integration.

PSNI activities are integrated with other domestic forces, including the Armed Forces, and there has been some discussion of whether the Ombudsman's office should have access to information from those other bodies for the purpose of fulfilling its mandate.²⁶ For the moment, this is not the case.

v. Police powers.

The Ombudsman has all of the coercive powers of a police force. These include the power to arrest individuals who decline to assist in her investigations process. The Ombudsman has used this power a number of times.

b. Independent Police Complaints Commission

i. Overlapping jurisdiction with RIPA authorities.

The IPCC is a generally complaints-based review body, which means that it cannot, for the most part, conduct investigations or inspections in the absence of complaints. It does, however, have the power to “call in” certain matters for investigation even in the absence of a complaint²⁷, and the authority to examine the “efficiency and effectiveness” of police forces’ complaints-handling, and to monitor complaints-handling generally, as it

²⁶ See for example: House of Commons Northern Ireland Affairs Committee, “The Functions of the office fo the Police Ombudsman for Northern Ireland”, 23 February 2005, pp. 22-23.

²⁷ *Police Reform Act 2002* (U.K.), 2002, c. 30 (“*Police Reform Act*”), Schedule 3, para. 4(1)(c).

has appeal jurisdiction.²⁸ Its jurisdiction over the police forces of England and Wales is additional to the inspection, authorisation and complaint-processing mandate of the *RIPA* authorities²⁹, whose function-based jurisdiction covers defined covert investigative activities, including wiretaps, surveillance, use of human sources and investigation of encrypted data^{30 31}.

The IPCC advises that the intelligence and covert investigative activities of the police forces, including the Special Branch, also fall within its remit, but that there has been no test yet of whether there would be any objections to this proposition, or difficulties with such overlapping jurisdiction. One possibility is that while the *RIPA* authorities inspect warrants for such activities, and in certain cases issue the warrants, the IPCC would review the police conduct behind the information in the warrants.

ii. Cooperation with other accountability bodies.

The IPCC's jurisdiction actually overlaps with a number of additional public authorities, including access-to-information and human-rights authorities, and numerous commissions and ombudsmen. Where an impugned matter or course of conduct has involved more than just police forces, the IPCC has sometimes engaged in joint investigations with other accountability bodies. For example, it has worked with the Prisons and Probation Ombudsman and the Healthcare Commission on certain matters. A "statutory gateway"³² was also recently created to allow for information exchange and cooperation between the IPCC and the Parliamentary Ombudsman, both of whom have

²⁸ *Police Reform Act*, s. 18(2)(a) and Schedule 3, s. 3(3).

²⁹ The Interception of Communications Commissioner, the Office of Surveillance Commissioners and the Investigatory Powers Tribunal. See *RIPA*; and the discussions of the *RIPA* authorities in the "International Models" paper, pp. 86-89, and below.

³⁰ *RIPA*. See discussion of *RIPA* authorities in the "International Models" paper, pp. 86-89, and the discussion below.

³¹ The IPCC's jurisdiction is also additional to that of Her Majesty's Inspectorate of Constabulary, which generally monitors the efficiency and effectiveness of police forces' programs and reports to the executive branch. See discussion in the "International Models" paper pp. 83-84, and below. The IPCC is precluded from looking into "direction and control" matters, as these are considered to be the purview of HMIC.

Police Reform Act, s. 14.

³² The Department for Constitutional Affairs defines a "statutory gateway" as an express statutory power to share personal data whether permissive or mandatory. See for example "Public Sector Data Sharing – A guide to Data Sharing Protocols", November 2003,

<http://www.dca.gov.uk/foi/sharing/toolkit/infosharing.htm>.

review jurisdiction over certain aspects of the new Revenue and Customs department.³³ That is, the IPCC and the Parliamentary Ombudsman “may disclose information to each other for the purposes of the exercise of” their respective mandates, and “may jointly investigate” certain matters.³⁴ Statutory gateways have been devised in the UK to address overlapping jurisdiction, the potential for duplication and the diminished observation and accountability that can result when multiple review bodies have only ‘silo’ vision. Statutory gateways allow, inter alia, “data sharing” between public bodies, and the Department for Constitutional Affairs has published guidance on the applicable laws, and the protocols that various bodies can establish.³⁵ Data sharing can include national security information, provided applicable rules are respected.

iii. Jurisdiction over multiple bodies, including law enforcement bodies housed outside the police forces.

The IPCC has jurisdiction over all police forces in England and Wales, including the Metropolitan Police Service, the Special Branches in each of the forces, numerous specialized police forces such as the British Transport Police, and certain specialized police organizations, such as the National Criminal Intelligence Service (NCIS) and the National Crime Squad (NCS)³⁶. The IPCC will also shortly have jurisdiction over certain aspects of the Revenue and Customs department³⁷, and the Serious Organised Crime Agency, which will merge the NCIS and the NCS, as well as certain other services, such as the part of the Immigration Service which deals with criminally organised immigration offences.

The jurisdiction of the IPCC is therefore enormous, includes diverse law enforcement and accompanying intelligence activities, and includes many forces whose activities are integrated. The IPCC advises that it is too early in its existence to comment on whether there are advantages to its ability to observe such integrated activities, or whether there

³³ The *Commissioners for Revenue and Customs Act 2005* (U.K.), 2005, c. 11 (“*Revenue and Customs Act*”) combines the Inland Revenue, and Customs and Excise departments into a single department called Her Majesty’s Revenue and Customs (“HMRC”). Pursuant to this statute, the IPCC will shortly have jurisdiction over certain aspects of HMRC.

³⁴ *Revenue and Customs Act*, ss. 28(3) - (4).

³⁵ See <http://www.dca.gov.uk/foi/sharing/toolkit/infosharing.htm>; and <http://www.dca.gov.uk/foi/sharing/toolkit/lawguide.htm#part3>.

³⁶ The National Criminal Intelligence Service and the National Crime Squad will be combined in a new agency, the Serious Organised Crime Agency, as of April, 2006. The IPCC will have jurisdiction over this new agency.

³⁷ *Revenue and Customs Act*, s. 28.

will be challenges to its jurisdiction over both national security and conventional law enforcement activities. It also notes that it is primarily a complaints-based body, and that it does not investigate or review 95% of the complaints that are in the system against the police.³⁸

iv. Jurisdiction over national security activities of police forces.

The IPCC's jurisdiction over all police forces and other authorities in England and Wales is independent of whether such bodies are engaged in national security investigations or not.³⁹ Indeed, the police forces have agreed to refer to the IPCC any complaints that they receive regarding the use of their counter-terrorism powers⁴⁰. The IPCC has a number of people with the requisite security clearance to access and review national security information, and it has proper storage and viewing facilities. The IPCC advises that it has not yet encountered difficulty accessing information on national security files, but that the issue has not been substantially tested yet. The IPCC is only one year old, and in the few national security matters that it has had to scrutinize, the scope of information that it required was limited. The IPCC has also conducted investigations into "highly sensitive" police corruption allegations, in which the police expressed concern that the sensitive information and investigation be handled appropriately, but in which the police did not object to its disclosure or use.

v. Investigations that run concurrently with police investigations.

The IPCC advises that its investigations often intersect with or parallel police investigations, including national security investigations; and that while there are

³⁸ The IPCC's governing statute allows complaints to be filed with police forces, police authorities or with the IPCC, and creates mechanisms for notice and referral of complaints, and for 'calling in' by the IPCC of certain matters in the absence of complaints (see the *Police Reform Act*, Schedule 3). The IPCC advises that there are approximately 20 000 complaints in the system; but that they see only about 1000, some of which are filed directly with them, some of which have been referred by the police, and some of which have been appealed to them by complainants following a police investigation. The IPCC has formulated guidelines to determine which cases should be referred to the police for investigation and which cases should stay with the IPCC for investigation.

³⁹ This jurisdiction includes the Special Branches, though as noted above, this proposition has not been tested yet, and much of their work would be subject to *RIPA* scrutiny.

⁴⁰ There is statutory authority behind this agreement, inasmuch as the IPCC can "call in" complaints or other matters for investigation by the IPCC. *Police Reform Act*, Schedule 3, s. 4(1)(c). Rather than the IPCC calling in all such complaints individually, the police forces have agreed to simply refer all such complaints.

practical issues to address, such as access to evidence that is required by both bodies, each has been able to carry out its mandate without interference in the other's.

The IPCC advises that it has no obligation to turn information over to prosecutors, but that it often does so in the interests of justice. For example, when it has come across evidence of potential criminal activity, it has passed this information on to the prosecution.

vi. Police powers.

Like the Police Ombudsman for Northern Ireland, the IPCC has police powers at its disposal.⁴¹

c. RIPA authorities

i. Function-based, but limited, scrutiny.

The general logic of the *Regulation of Investigatory Powers Act 2000 (RIPA)* is that certain investigative activities carry such risk for individual rights and liberties that some form of enhanced scrutiny is required. This proposition applies no matter who carries out the investigative activity (i.e. police, intelligence agencies, or other public authorities) and no matter what the objective of the investigative activity (e.g. conventional law enforcement, national security law enforcement or intelligence, regulatory enforcement, etc.).

RIPA therefore establishes a function-based monitoring regime, in which certain investigative activities, no matter who carries them out, are matched with certain authorisation rules and certain inspection bodies. Generally stated, the regime is as follows:

- interceptions of communications are inspected by the Interception of Communications Commissioner (ICC), no matter who carries them out;
- covert surveillance and human source activities are inspected, and in some cases authorised, by the Office of the Surveillance Commissioners (OSC) where law enforcement and other agencies carry them out, and by the Intelligence Services Commissioner (ISC) where the intelligence services carry them out;

⁴¹ *Police Reform Act*, s. 19(4) of Schedule 3, Part 3.

- investigations of encrypted data will be inspected by the OSC, once that Part of *RIPA* comes into force;
- complaints regarding any of these activities are investigated and adjudicated by the Investigatory Powers Tribunal (IPT).

Importantly, whereas in Canada many of these activities would require prior judicial scrutiny in order to be authorised, in the UK, these activities can be authorised, depending on the agency and activity, by either the responsible minister, senior officials of the agency, or by the OSC or ISC. The *RIPA* bodies, who generally must be former or sitting judges, largely step in after the fact and review these authorisations in order to ensure that statutory and other applicable policy and procedural requirements have been met. The *RIPA* inspection bodies therefore play a role that is in some ways better compared to that of courts in Canada, rather than to that played by a body such as SIRC, inasmuch as they provide judicial scrutiny of information that is presented in support of requests for authorisations, and not of the information-gathering or other activities behind the request. They also have no power to scrutinize activity that is outside their mandates, nor to determine whether prescribed activity has been undertaken without authorisation.

Indeed the *RIPA* bodies carry out their functions with relatively few staff and few inspections. The Interception of Communications Commissioner, for example, has no staff, other than a secretariat which he shares with certain other *RIPA* bodies, and carries out inspections of each agency under his purview only a couple of times a year, spending approximately a half day at each agency.⁴² The Office of Surveillance Commissioners, which has approximately 950 public authorities under its purview⁴³, consists of a Chief Surveillance Commissioner, six part-time Commissioners, three part-time Assistant Commissioners, and seven full-time Inspectors. The Office visits each of the law enforcement agencies within its purview once a year for a period of several days, and each of the other public authorities within its purview at intervals of more than a year for approximately a day.

⁴² However, the ICC has just taken on the mandate of inspection of the use by approximately 400 public authorities of “communications data” (data about the medium, location, time etc. of a communication, rather than the content of the communication), and is therefore seeking staff to assist him in this mandate.

⁴³ Annual Report of the Chief Surveillance Commissioner, 2000-2001, p. 5.

ii. *Separation of inspection and complaint-processing functions, with provision for “assistance”.*

These bodies do not have investigate or adjudicate complaints, as this function is carried out by the Investigatory Powers Tribunal. The Tribunal has received hundreds of complaints since its establishment. It has just upheld a complaint for the first time.

While the inspection and complaint-processing functions are separated by *RIPA*, the statute requires that the various inspection bodies give the Tribunal “all such assistance” as it may require in carrying out its mandate.⁴⁴ The *RIPA* authorities advise that the Tribunal has not yet had recourse to this provision, though there is certain information to which the Tribunal has access by virtue of its shared secretariat with the ICC and the ISC.

d. Her Majesty’s Inspectorate of Constabulary

Her Majesty’s Inspectorate of Constabulary (HMIC), is an inspection service that reports to the Home Secretary on the effectiveness and efficiency of the police forces in England and Wales. It carries out annual and thematic inspections, as well as inquiries into certain matters at the request of the Home Secretary. While their mandate is to inspect for effectiveness and efficiency, their work often touches matters of propriety and compliance with law, which they address either through personal interaction with the police forces, through discussions in their reports of ‘best practices’, through inquiry reports as requested by the Home Secretary, and through certain themes such as ethics.

HMIC has just been given jurisdiction over the new Customs and Revenue department, following an inquiry into the former Customs and Excise department and a recommendation that it be subject to external scrutiny.⁴⁵

⁴⁴ *RIPA*, ss, 57(3), 59(3), 68(2), 68(8).

⁴⁵ Review of criminal investigations and prosecutions conducted by HM Customs and Excise by the Hon Mr. Justice Butterfield, 15 July 2003.

V. AUSTRALIA

a. Commonwealth Ombudsman

i. Jurisdiction over multiple and varied agencies.

Australia's Commonwealth Ombudsman has jurisdiction over approximately 150 public authorities, including the Australian Federal Police, most of the intelligence agencies, the Australian Crime Commission (which integrates representatives of both federal and state and territory level forces), and a number of other federal agencies such as the customs and immigration authorities. It receives approximately 20,000 complaints a year, 5% of which involve law enforcement activities. The Ombudsman refers the gross majority of complaints to other internal and external complaint processing bodies, but identifies individual and potential systemic cases for investigation by its own office. In support of its referrals of complaints to police forces for primary investigation, the Ombudsman's office noted that there is much theoretical and empirical work that asserts that the forces are best-placed to investigate, and more likely to learn from the complaints when they are handled internally. It notes that its system still plays an important monitoring, trend-tracking and secondary-recourse role.

The Ombudsman's office describes its model of accountability as "generalist", with "clusters of specialties". It states that it is a desirable model, principally because there is much commonality among complaints against public authorities: individuals want public officials to discharge their functions with due respect for the rules that regulate those functions. The Ombudsman's office states that its broad jurisdiction allows it to observe and draw on such commonalities in fulfilling its mandate, and avoids the tendency toward 'capture' of a review body. The Ombudsman's office also states that its multi-agency review jurisdiction also allows it to observe the full scope of integrated activities.

The Ombudsman's office stated that intelligence activities are a specialized activity that probably do require separate review. But it urged that there is more commonality among complaint themes for conventional and national security policing than one might otherwise think: in essence, individuals want police officers to respect applicable laws and procedures, no matter what type of investigation is being carried out. They also note that national security policing will always be a small and closely-related part of

general policing, and that separation of the two may not be possible or desirable. They noted the benefits of collaboration among review bodies.

ii. Cooperation with other accountability bodies.

In fulfilling its mandate with respect to the integrated Australian Crime Commission (ACC), the Ombudsman has the authority to enter into investigation “arrangements” with other accountability bodies that have jurisdiction over members of the ACC.⁴⁶ Although the Ombudsman’s office has not yet entered into any such arrangements, the rationale for this statutory mechanism appears to be an acknowledgment that there could be accountability “gaps” arising in part from the fact that many members of the ACC are “seconded” from numerous other domestic agencies and therefore covered by various legislative frameworks, and in part from the fact that the ACC combines both federal-level and state-level personnel.⁴⁷

However, the Ombudsman’s office often works informally with many other review bodies, including in particular the Inspector-General of Intelligence and Security, in reviewing matters that touch both areas of responsibility. They are constrained to a certain extent by secrecy and privacy legislation, but otherwise they have found joint investigations and other forms of cooperation highly useful. One of the more prominent current examples is the several joint reviews by the Ombudsman and the Inspector-General of those instances where the Australian Security Intelligence Organisation has received authorisation, pursuant to new counter-terrorism legislation, to utilize the AFP to detain and question individuals on its behalf.⁴⁸ Because of such integrated police and intelligence activities, which can include state police as well, the Parliamentary Joint

⁴⁶ *Ombudsman Act 1976* (Cth), s. 8.

⁴⁷ Indeed, such “cross-jurisdiction” and “integration” issues are increasingly common for the Ombudsman, and in Australia generally. For example, a recent review of the use and sharing of DNA material among law enforcement agencies (both at the federal and state/territory level), made a number of recommendations to address similar accountability gaps and overlaps. It proposed that review bodies coordinate, in order to determine who should take the “lead role” when numerous agencies have jurisdiction, and in order to “cover any jurisdictional gaps” created by federalism considerations. “Report of Independent Review of Part ID of the Crimes Act 1914 – Forensic Procedures”, ch. 5, p. 77 (available at: <http://www.ag.gov.au/www/criminaljusticeHome.nsf/AllDocs/286A7B3772CECA5DCA256C0D00189DBA?OpenDocument>). In addition, the Ombudsman discussed the accountability gaps that are arising from increasing integration in his 2003-2004 Annual Report, at p. 55. See also the discussion of the Inspector-General below, which highlights a recommendation by a Parliamentary Joint Committee for “greater liaison between” the Ombudsman, state ombudsmen and the Inspector-General.

⁴⁸ *Australian Security Intelligence Organisation Act 1979* (Cth), s. 34B.

Committee on the ASIO, ASIS and DSD recently recommended that “consideration be given” to “greater liaison between” the Ombudsman, the state ombudsmen, and the Inspector-General, including the development of a memorandum of understanding or protocol governing possible joint reviews of combined ASIO/police operations.⁴⁹

The Ombudsman’s office is also making increasing use of its inspection and “own motion” investigation powers to address issues arising from integrated activities. It also notes the necessity of such powers in particular in areas of activity in which complaints are unlikely.

b. Inspector-General of Intelligence and Security

i. Jurisdiction over multiple intelligence agencies.

The Inspector-General’s office noted several advantages of multi-agency jurisdiction: synoptic view of the activities of the various intelligence agencies; ability to ensure consistent interpretations by the agencies of their shared legislation; and ability to scrutinize integrated and information-sharing activities. It noted, however, that a review body with such multi-agency jurisdiction has to be properly resourced in order to fulfill its mandate.

ii. Cooperation with other accountability bodies.

While the governing statute only makes provision for consultation with the Auditor-General⁵⁰, so as to avoid duplication of inquiries, the Inspector-General noted that it would be useful if there were statutory provision for consultation with the Commonwealth Ombudsman’s office. He noted the cooperation that already exists between his office and the Ombudsman’s office⁵¹, and suggested that it could likely be formalized through memoranda of understanding. He also noted the Parliamentary Joint Committee’s recommendation for such formalized cooperation, discussed above.

⁴⁹ Parliamentary Joint Committee on ASIO, ASIS and DSD, “Review of administration and expenditure for ASIO, ASIS and DSD”, tabled March 14, 2005, p. 22.

⁵⁰ *Inspector-General of Intelligence and Security Act 1986* (Cth), s. 16.

⁵¹ See discussion above of Commonwealth Ombudsman.

The Inspector-General can also be directed by the Prime Minister to inquire into certain matters⁵², which can include inquiry into the actions of agencies outside its ordinary statutory purview. For example, the Inspector-General was recently asked by the Prime Minister to look into whether there was any intelligence that warned of the 2003 bombing in Bali. This review included the Australian Federal Police.⁵³

VI. UNITED STATES

a. Inspector General of the Department of Justice

i. Multiple forms of scrutiny of the Department of Justice, including the FBI.

The jurisdiction of the Inspector General of the Department of Justice includes the FBI, which is involved in both national security law enforcement and related intelligence activities. The Inspector General's review activities with respect to the FBI include inspections (program evaluations for effectiveness and efficiency); audits (evaluation of the financial aspects of programs); investigations (investigations for propriety or effectiveness and efficiency, pursuant to complaints or other sources of information); and special reviews (more complex and often multi-disciplinary investigations).⁵⁴

ii. Complaints-handling.

The Inspector General's office, which has about 400 staff, has jurisdiction over 110,000 people, and receives approximately 10,000 complaints per six-month period. Since it does not have the resources to investigate such a high volume of complaints, the Inspector General's office makes decisions, based generally on the seriousness of the allegation, as to whether to investigate a complaint itself, or whether to refer it to other internal or external bodies. The Inspector General's office monitors trends in complaints, sometimes aggregates them for systemic investigation (see discussion below), and periodically carries out inspections of the complaints-handling function of the bodies to whom it refers complaints.

⁵² *Inspector-General of Intelligence and Security Act 1986* (Cth), s. 9.

⁵³ Inspector-General of Intelligence and Security, Annual Report 2002-2003, Annex 2 – Bali Inquiry Report.

⁵⁴ *Inspector General Act of 1978*, 5 U.S.C. Appendix, §§ 1-12 (1978) (“*Inspector General Act*”), s. 2; various semi-annual reports to Congress.

iii. Express mandate to review allegations of abuses of civil rights and civil liberties.

In addition, although the Inspector General's jurisdiction already included review of civil rights and civil liberties matters, section 1001 of the *PATRIOT Act*⁵⁵ required the Inspector General to designate an official to "review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice"; to take measures to publicise this mandate; and to submit semi-annual reports to Congress on its fulfillment of this mandate. The Inspector General has received thousands of complaints pursuant to s. 1001, many of which it has used to carry out systemic investigations, such as its 2003 investigation of alleged misconduct and abuses of individuals held on immigration charges in connection with Sept. 11th investigations.⁵⁶ It advises that although many of the complaints could not have been substantiated on their own, the fact and process of aggregating them allowed for conclusions of misconduct and systemic problems nonetheless.

iv. Sole-agency jurisdiction, and cooperation with accountability bodies.

The Inspector General noted that review jurisdiction over only one body – the Department of Justice – although internally varied, allows for the development of critical institutional knowledge and expertise. Further, in his view, US government departments and agencies are too big and too complex to allow for a workable and effective Inspector General model with jurisdiction over all government actors involved in national security and intelligence.

However, he noted that cooperation and information-sharing between review bodies is necessary and desirable. The Inspectors General often jointly investigate matters that touch on two or more areas of responsibility, either at their own initiative or as directed by Congress. They have also established an Intelligence Community Inspectors General Forum, in order to bridge areas of responsibility, and determine whether there are common themes or matters that require joint investigative action. This Forum appears to

⁵⁵ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 ("PATRIOT Act").

⁵⁶ See Inspector General of the Department of Justice, "The September 11 Detainees: A review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks", dated June 2003; and the "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York", dated December 2003.

have been established in part as a consequence of discussion several years ago about a 'super Inspector General' for intelligence and law enforcement activities.⁵⁷ The Inspector General also urged that some form of comprehensive observation of the full picture of national security agency action and interaction is necessary, which role is played in the United States by Congress, which receives semi-annual reports and hear testimony from all Inspectors General.

v. Jurisdiction over an agency engaged in both conventional law enforcement and national security law enforcement, including intelligence activities.

The FBI carries out both conventional law enforcement and national security law enforcement, including related intelligence activities. The Inspector General reviews all such activity, and asserts that when such activities are carried out by one body and are inter-related, it is important that one agency conduct the review as well. While there may be some differences in how certain activities are monitored or assessed, it is clearly preferable when the activities are housed in one body, to have one body review them all.

vi. Executive branch veto over disclosure of information, but accountability for use of such veto to Congress.

The Inspector General's reports are generally public, though on some occasions certain information or reports will remain classified. The Attorney General can prohibit disclosure by the Inspector General of "sensitive information" (including information concerning ongoing criminal proceedings, undercover operations, the identity of sources, intelligence matters, and national security information), but if s/he does so, s/he must state his/her reasons for doing so to Congress.⁵⁸ The Inspector General advises that this power has only been invoked once, in 1998, which delayed disclosure of a report by six months.⁵⁹

⁵⁷ See for example the House of Representatives Report on a bill to enact the Intelligence Community at, Rept 104-620, June 13, 1996, s. 132 and accompanying analysis, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_reports&docid=f:hr620p1.104.pdf. This bill did not pass, but a number of Inspectors General established a Forum nonetheless.

⁵⁸ *Inspector General Act*, s. 8E. The Inspector General advises that this section is generally interpreted to allow the Attorney General to prohibit disclosure of "sensitive information" only, and not the actual investigation or other scrutiny that the Inspector General might choose to undertake.

⁵⁹ Office of the Inspector General of the Department of Justice, "Epilogue", dated July 1998, to its "CIA-Contra-Crack Cocaine Controversy: a review of the Justice Department's investigations and prosecutions", dated December 1997. See <http://www.usdoj.gov/oig/special/9712/epilogue.htm>.

vii. Powers.

The Inspector General has subpoena powers applicable to non-federal government actors, and is directed by statute to use other methods than subpoenas to obtain information from federal government actors⁶⁰. However, in general, federal government actors cooperate in the provision of information. Information is often obtained through contact with other Inspectors General.

The Inspector General's office has police powers, including the power to carry firearms, make arrests, and seek and execute search and seizure warrants.⁶¹ It should be noted that the Inspector General's investigations can include criminal investigations.

b. Inspector General of the Department of Homeland Security

i. Introduction.

The Department of Homeland Security (DHS) was created by the *Homeland Security Act of 2002*⁶², which merged 22 separate agencies, including the law enforcement divisions of the former immigration and customs services. The new Bureau of Immigration and Customs Enforcement includes an Office of Intelligence, as do other agencies within the DHS. The DHS also has an Information Analysis and Infrastructure Protection directorate, which includes an integrated Homeland Security Operations Center and Information Network.

The Inspector General of the DHS has jurisdiction over all 180,000 DHS employees and DHS activities, including the law enforcement and intelligence functions. It has approximately 525 staff.

ii. Similar functions, powers and procedures to those of the IG for the Department of Justice.

Like the Inspector General for Department of Justice, the Inspector General of DHS carries out audits, inspections and investigations; it reviews both law enforcement and intelligence activity; and it carries out its complaint-processing function by referring the

⁶⁰ *Inspector General Act*, s. 6.

⁶¹ *Inspector General Act*, s. 6(e)(1).

⁶² *Homeland Security Act of 2002*, Pub. L. 107-296, 116 Stat. 2135 ("*Homeland Security Act*").

majority of complaints to other internal and external bodies, largely based on an assessment of the seriousness of the complaint.⁶³ The Inspector General of DHS has developed guidelines to manage its complaint referrals, as well as memoranda of understanding with various internal bodies. Like the Inspector General for the Department of Justice, the DHS Inspector General has police for power for enforcement and investigation purposes.

The Inspector General of DHS also works in cooperation with other Inspector Generals' offices in certain cases where matters touch more than one area of responsibility; and participates in the Intelligence Community Inspectors General Forum. As in other countries and in the offices of other Inspectors General, increasing integration is creating questions about accountability and jurisdiction. For example, the Homeland Security Operations Center and the Joint Terrorism Task Forces are integrated entities that are either under DHS auspices or include DHS elements.

The Inspector General of DHS is also subject to similar executive-branch authority over the disclosure of "sensitive matters", but this power has not yet been used.⁶⁴

iii. Sole-agency jurisdiction.

The office of the Inspector General of DHS shares the Department of Justice IG's view that sole-agency jurisdiction is the superior model in the context of the United States, provided that there are other agencies that have "cross-executive jurisdiction" over certain specialized matters, such as the Government Accounting Office, the Office of Management and Budget, and the Office of Information Security.

iv. Establishment of an Officer for Civil Rights and Civil Liberties.

Not only did the *Homeland Security Act of 2002* create an express civil rights and civil liberties accountability mandate similar to that imposed upon the Inspector General of the Department of Justice, but it established an Officer for Civil Rights and Civil Liberties within the DHS.⁶⁵ Pursuant to his statutory responsibility, this Officer has produced semi-annual reports on the implementation of his mandate. He has also entered into a

⁶³ *Inspector General Act*; various semi-annual reports to Congress of the Inspector General of the DHS.

⁶⁴ *Homeland Security Act*, s. 811.

⁶⁵ *Homeland Security Act*, s. 705.

MOU with the Inspector General's office to "prevent duplication of effort and ensure the most effective, efficient and appropriate deployment of resources."⁶⁶ This MOU, among other things, sets out decision-making procedures as to whether the Inspector General's office or the civil rights and liberties office will carry out primary investigation of the complaint.

c. Inspector General of the CIA

The Inspector General of the Central Intelligence Agency operates in a similar fashion to the Inspectors General already discussed, inasmuch as it conducts, audits, inspections and investigations of the agency over which it has jurisdiction; carries out both criminal and administrative investigations; refers complaints to other bodies in many circumstances; conducts joint investigations on certain occasions, either by initiative or at the direction of Congress; and participates in the Intelligence Community Inspectors General Forum.

The Inspector General of the CIA believes that sole-agency jurisdiction is the superior model for review of the CIA, since its functions are specialized and complicated, and concentration on one institution allows for the necessary specialization in the body responsible for accountability as well.

⁶⁶ Memorandum of Understanding between the Officer for Civil Rights and Civil Liberties and the Inspector General.

Appendix A: List of foreign review/oversight bodies with whom the Commission conducted direct information-gathering

Country	Institution
Australia	Commonwealth Ombudsman
Australia	Inspector-General of Intelligence and Security
Belgium	Standing Committee for the monitoring of Intelligence Services ("Committee I")
Belgium	Standing Police Monitoring Committee ("Committee P")
Germany	G-10 Commission
Germany	Parliamentary Control Commission
New Zealand	Inspector-General of Intelligence and Security
New Zealand	Police Complaints Authority
Norway	Committee for Oversight of the Intelligence Surveillance and Security Services ("Utvalget for kontroll med etterretnings-, overvåknings- og sikkerhetstjeneste")
Sweden	Parliamentary Ombudsmen's Office ("Riksdagens ombudsmän")
Sweden	Records Board ("Registernämnden")
United Kingdom	Independent Police Complaints Commission
United Kingdom	Interception of Communications Commissioner
United Kingdom	Investigatory Powers Tribunal
United Kingdom	Her Majesty's Inspectorate of Constabulary
United Kingdom	Office of Surveillance Commissioners
United Kingdom (Northern Ireland)	Police Ombudsman for Northern Ireland
United States	Office of the Inspector General, Department of Justice
United States	Office of Inspector General, Central Intelligence Agency
United States	Office of Inspector General, Department of Homeland Security

Appendix B: List of acronyms

ACC	Australian Crime Commission (Australia)
ASIO	Australian Security Intelligence Organisation (Australia)
CIA	Central Intelligence Agency (US)
Committee I	Standing Committee for the Monitoring of Intelligence Services (Belgium)
Committee P	Standing Committee for the Monitoring of Police Forces (Belgium)
DHS	Department of Homeland Security (US)
EOS Committee	Committee for Oversight of the Intelligence, Surveillance and Security Services (Norway)
FBI	Federal Bureau of Investigation (US)
HMIC	Her Majesty's Inspectorate of Constabulary (UK)
HMRC	Her Majesty's Revenue and Customs (UK)
ICC	Interception of Communications Commissioner (UK)
IG	Inspector General (US)
IPCC	Independent Police Complaints Commission (UK)
IPT	Investigatory Powers Tribunal (UK)
ISC	Intelligence Services Commissioner (UK)
MOU	Memorandum of Understanding
OSC	Office of the Surveillance Commissioners (UK)
PSNI	Police Service for Northern Ireland (UK)
RIPA	Regulation of Investigatory Powers Act 2000 (UK)
SE	Surêté de l'État (Belgium)
SEFO	Norwegian acronym for Special Investigating Body for Police Matters (Norway)
SGR	Service Général du Renseignement et de la Sécurité des Forces armées (Belgium)
SIRC	Security Intelligence Review Committee (Canada)