

19 November 2014

The Hon Robert Borsak MLC  
Chair  
Select Committee on the Conduct and Progress of  
the Ombudsman's Inquiry titled Operation Prospect  
Parliament of New South Wales  
Macquarie Street  
SYDNEY NSW 2000

### **Operation Prospect**

Dear Mr Borsak,

Please find attached, for your information, a copy of my letter of 19 November 2014 to Mr Lee Evans MP, in his capacity as the Chair of the Joint Committee on the Office of the Ombudsman, the Police Integrity Commission and the Crime Commission, and to the Members of Joint Committee.

I am providing a copy of my letter to you in light of the issues that I have addressed therein.

Yours sincerely



Bruce Barbour  
**Ombudsman**

19 November 2014

Mr Lee Evans, MP  
Chair  
Parliamentary Committee on the Office of the Ombudsman,  
the Police Integrity Commission and the Crime Commission  
Parliament of New South Wales  
Macquarie Street  
SYDNEY NSW 2000

## **Operation Prospect**

Dear Mr Evans,

I am writing to you as the Chair of the Parliamentary Joint Committee established pursuant to Part 4A of the *Ombudsman Act 1974*. You will be aware of the recently established Legislative Council Select Committee on the conduct and progress of Operation Prospect.

My purpose in writing is to ensure that you, and the other members of the Committee, are kept as fully informed as possible about Operation Prospect, in light of the special role of Parliamentary oversight which Part 4A of the Ombudsman Act confers upon your committee. I am providing a copy this letter to the Hon Robert Borsak MLC, in his capacity as the Chair of the select committee, for his information.

Operation Prospect is an investigation currently being conducted by my office into allegations of misconduct by officers of the NSW Police Force, the NSW Crime Commission and the Police Integrity Commission in relation to certain investigations conducted by these agencies between 1998 and 2004. These included a large number of investigations under the NSW Crime Commission references 'Mascot' and 'Mascot II'. The latter were NSW Crime Commission investigations staffed by Crime Commission staff and NSW Police Force officers. They concerned allegations of serious and extensive misconduct by officers of the NSW Police Force, including allegations of involvement by then serving police officers in offences of money laundering, perverting the course of justice, tampering with evidence and receipt of corrupt benefits. The Police Integrity Commission subsequently conducted public hearings into aspects of Mascot and Mascot II under the auspices of Operation Florida.

Although the allegations are of extensive and serious misconduct by senior law enforcement officers, they have remained untested for more than a decade. This situation persisted notwithstanding that in 2003 the NSW Police Force conducted an investigation of the allegations under 'Strike Force Emblems'.

## Operation Prospect

As the Committee is aware, on 11 October 2012 the Inspector of the Police Integrity Commission the Hon David Levine AO RFD QC, referred these matters to my office under s 90(1)(f) of the *Police Integrity Commission Act 1996*. The referred matters are broad and concern the allegations of serious misconduct that are outlined above. These referred matters are the subject of investigation in Operation Prospect, together with related complaints that have been made to my office under the *Ombudsman Act 1974* and Part 8A of the *Police Act 1990*.

My office is conducting Operation Prospect with the following comprehensive scope and purpose:

*The Ombudsman is investigating matters relating to the conduct of members and officers (executive and staff) (howsoever described) of the NSW Police Force ('NSWPF'), NSW Crime Commission ('NSWCC') and the Police Integrity Commission ('PIC') connected with the NSWCC references 'Mascot' and 'Mascot II', Operation Florida and associated operations, strike forces and task forces; and additionally into the unlawful and/or improper dissemination of material from hardcopy files and/or the computer systems of the NSW Police Force, the NSWCC and the PIC.*

*In relation to the above, the Ombudsman will examine allegations of conduct concerning:*

- *The use of false and misleading information in warrant applications and supporting affidavits under the Listening Devices Act 1984 (NSW) and Telecommunications (Interception and Access) Act 1979 (Cth).*
- *Improper targeting or investigation of individuals.*
- *Mishandling of informants/undercover operatives.*
- *Unlawful and/or improper dissemination of material from hardcopy files and/or the computer systems of the NSW Police Force, the NSWCC and the PIC.*
- *Improper interference.*
- *The provision of misinformation and/or making false statements.*
- *Other wrong conduct.*

As part of this investigation Operation Prospect is examining allegations relating to the unlawful and/or improper dissemination of confidential material held by the NSW Police Force, the NSW Crime Commission and the Police Integrity Commission. This segment of Operation Prospect, which has occupied limited hearing and interview time and has not involved extensive resources, is incidental to the key issues that are being examined, but is inseparable from them. The key issues are allegations of misconduct by officers of the NSW Police Force, the NSW Crime Commission and the Police Integrity Commission in relation to the investigations conducted under the NSW Crime Commission references 'Mascot' and 'Mascot II'.

### Jurisdiction and powers

At the time of the PIC Inspector's referral, my office did not have a sufficient jurisdiction in relation to the conduct of members and officers of the NSW Crime Commission and the Police Integrity Commission, nor did my office possess the full complement of statutory powers to conduct an effective investigation of this kind. This was because many of the allegations relate to serious and extensive misconduct ordinarily investigated by agencies such as the Police Integrity Commission and the Independent Commission Against Corruption. The necessary additional jurisdiction and powers were conferred by the Parliament through the provisions of the *Ombudsman Amendment Act 2012*, which commenced on 26 November 2012.

The Ombudsman Amendment Act amended the *Crime Commission Act 2012* to include a new section 80A that caused the NSW Crime Commissioner and a NSW Crime Commission officer to be compellable to give evidence or produce a document before the Ombudsman relevant to a matter referred by the NSW Crime Commission Inspector or the PIC Inspector to the Ombudsman. The Ombudsman Amendment Act also amended the Police Integrity Commission Act to include a new section 60(2) that caused the PIC Commissioner and a PIC officer to be compellable to give evidence or produce a document before the Ombudsman relevant to a matter that has been referred by the NSWCC Inspector or the PIC Inspector to the Ombudsman.

Additional powers were provided under the Ombudsman Amendment Act in the form of a new section 19(4) to enable the Ombudsman to engage counsel assisting and cognate new section 35A(3) to provide counsel assisting and a legal representative representing a person at a hearing with the same protection and immunity as a barrister appearing for a party in proceedings in the Supreme Court.

The conferral of such jurisdiction and powers reflects, as I have understood the purpose of the amendments, the seriousness with which Parliament regards such allegations. Reflecting that understanding, I have conducted the investigation mindful of the need to balance expeditious progression with thorough exploration of the evidence, and fairness to the many individuals who may be affected. It is of the utmost importance that, when completed, the investigation report will meet public scrutiny, including the scrutiny to which it will inevitably be subjected by those whose reputations, careers or other interests may be affected by it.

### Secrecy powers and private hearings

New sections 19A, 19B and 19C of the Ombudsman Act provide the Ombudsman with equivalent powers to those exercised by the PIC and ICAC Commissioners to make non-disclosure directions to witnesses who give evidence in hearings and to persons who receive production notices and summonses. The provisions of section 19A of the Ombudsman Act are modelled on the identical provisions of section 52 of the *Police Integrity Commission Act 1996* and section 112 of the *Independent Commission Against Corruption Act 1988*. The provisions of section 19B of the Ombudsman Act are modelled on the identical provisions of s 53 of the Police Integrity Commission Act. The provisions of section 19C of the Ombudsman Act are modelled on the identical provisions of section 54 of the Police Integrity Commission Act and section 114 of the Independent Commission Against Corruption Act.

Analogous provisions are found in federal legislation. Despite suggestions to the contrary in some media reports, these provisions are in no sense exceptional, and are essential to the proper conduct of an investigation such as Operation Prospect.

Because of the importance of minimising the risk of collusion between witnesses and potential witnesses, many of whom are well known to each other, and in order to protect the confidentiality of lines of enquiry and the safety and welfare of prospective witnesses, I have routinely given a non-disclosure direction to each witness who has been examined. Having regard to the importance of the oversight role of your committee, I would have viewed sympathetically any request by a witness for a variation of a direction to permit disclosure for the purposes of a complaint to your committee, to the extent to which such a variation could be accommodated with the considerations to which I have just referred. I have not received any such request. Indeed, I have not received any request for a substantive variation of a non-disclosure direction.

It is important to note that all witnesses called to give evidence in Operation Prospect have had access to legal representation. The Attorney General has assigned the Legal Representation Office to provide legal assistance without charge to persons who are required to give evidence or produce documents in the investigation, and some witnesses have chosen to be represented by eminent members of the Sydney bar and senior solicitors. No witness has been refused legal representation and no witness or legal representative has objected to a non-disclosure direction being made under s 19A of the Ombudsman Act in relation to their evidence. This is because the direction serves an important protective function not only for the integrity of the investigation, but also for a witness who can give evidence confident that it will not be publicly aired except to the extent permitted and required by law. I have been particularly concerned to take whatever steps were appropriate to protect the health and welfare of all witnesses.

As I am sure you and the other members of the Committee would expect, I am deeply concerned at assertions I have engaged in some form of oppression of witnesses described in media reports as 'whistleblowers'. These assertions are baseless and entirely inconsistent with my fair and rigorous conduct of Operation Prospect and with my separate role as the chair of the Public Interest Disclosures Committee. It is difficult to attribute any legitimate purpose to damaging comments of this nature. No proceeding has been commenced alleging oppressive or other misuse of my statutory powers. No such allegation has been made in the course of the conduct of the hearings.

I am required by the Ombudsman Act to conduct hearings in private session. This is a matter that has been the subject of some controversy in regard to Operation Prospect. Section 17 of the Ombudsman Act provides that "*an investigation under this Act shall be made in the absence of the public*" and I cannot, accordingly, conduct a hearing in public session. If I were to do so I would be in breach of the Ombudsman Act, be acting unlawfully and place at significant risk the integrity of the investigation. A private hearing under the Ombudsman Act is an investigative tool that has the same forensic purpose as a private hearing conducted by the Independent Commission Against Corruption or the Police Integrity Commission. Evidence that is obtained in private hearings by my office is properly used to inform the investigation in the same manner as it is in an investigation conducted by the Independent Commission Against Corruption or the Police Integrity Commission. That I am required by

the Ombudsman Act to conduct hearings in private session does not, however, mean that I cannot publicly report on the outcomes of Operation Prospect. Section 31 of the Ombudsman Act provides my office with a broad power to make a 'special report' to the Presiding Officer of each House of Parliament "at any time". My office can also recommend that a special report "be made public forthwith". In relation to Operation Prospect, I have publicly indicated that this office will produce such a report accompanied by such a recommendation. This will ensure the report is made public.

Despite these legislative requirements, it is important to note that this is not a secret investigation. I have provided information on my office's website; I have included information in my office's annual report to Parliament, and I have answered any questions you and the other members of the Committee have put to me at general meetings relating to Operation Prospect. At the early stages of the investigation, my office established a dedicated email address and telephone line for those wishing to contact our office with information. Finally, we have sought by way of newspaper advertisement any submissions from those wishing to provide them. We have received a large number of complaints relevant to the scope and purpose outlined above. We have ensured we have kept complainants to our office informed of progress wherever possible.

#### Operation Prospect logistics

Operation Prospect is now the largest investigation that my office has conducted and has required the detailed analysis and review of an extensive amount of information and documents spanning a 14 year time period. As noted in my letter to the Premier of 11 November 2014, which was read onto Hansard in the Legislative Council on 12 November:

*Our detailed analysis and review has led us to identify a large amount of further information relevant to the investigation and to require the production of that further information under s 18 of the Ombudsman Act. That further information must, of course, also be subjected to a detailed analysis and review.*

*By reason of the sensitivity of the subject matter of the investigation and the fact it is ongoing, I am unable to provide particulars about the evidence that Operation Prospect has disclosed to date. But I can indicate that Operation Prospect has advanced well into its hearing stage and that more than 100 separate interviews and hearings using the Ombudsman's powers under sections 18 and 19 of the Ombudsman Act have been conducted. The evidence obtained from these interviews and hearings, together with the documentary and other material obtained from statutory productions, will inform the next stage of Operation Prospect, that is, my obligation to report on the conduct that is the subject of the investigation. I intend to finish the hearing phase by the end of 2014 and to complete Operation Prospect in the first half of 2015, when I will provide a report to the Parliament with a recommendation that it be made public forthwith.*

The investigation is proceeding as quickly as fairness and its efficacy and thoroughness can permit. I believe there was a limited understanding of the scale of Operation Prospect at the time of its announcement by the then Premier on 7 October 2012 and referral by the PIC Inspector on 11 October 2012. On 11 October 2012, I wrote to the then Premier confirming

the arrangements that would need to be put in place to facilitate the investigation. This included noting that the office was not in a position to resource an investigation of the potential size and breadth within my current budget and existing staffing level. Accordingly additional funding had to be secured and experienced specialist staff recruited. While Operation Prospect was fully staffed by April 2013, notices to produce records relevant to the investigation had already been issued to the NSW Crime Commission, the NSW Police Force and the Police Integrity Commission. The relevant timeframes are as follows:

- On 15 October 2012, I issued the NSW Crime Commission with an initial summons to produce a wide range of documents and information.
- On 18 October 2012, I issued the NSW Police Force with an initial summons to produce a wide range of documents and information.
- On 31 January 2013, I issued the Police Integrity Commission with an initial summons to produce documents and information.
- On 22 April 2013, Operation Prospect was fully staffed. A special purpose area of my premises had been secured and fitted out to accommodate Operation Prospect staff, new information technology equipment to be used in an isolated operating environment, and the physical storage space necessary for a large volume of paper records, given the time frame of the conduct we were examining.

In most cases the relevant records of the above agencies had been archived or were on legacy information technology systems, and sometimes stored as hard copies and as electronic records. Under these circumstances, each agency had to dedicate significant resources and time to locate and produce the records required under the initial summonses, and Operation Prospect took over 40 separate deliveries of records/documents between October 2012 and February 2014 in connection with these initial three summonses alone. The large amount of information returned to us as paper records was scanned by an external provider, an exercise which took a team of scanning staff working on site over a month to complete. When the paper records had been digitised we transferred them to a purpose built information management database so as to be able to sort, order, search and interrogate our information holdings.

At this time over 70, non-continuous, days of hearings and interviews have been conducted with 102 persons, and over 60 summonses and production notices have been issued, with agencies producing records and other material relevant to Operation Prospect on approximately 100 separate occasions. Each document production and transcript of evidence has been assessed and analysed by investigators and this has led to the issue of additional summonses and production notices for further information.

I have, quite properly at this stage of the investigation, reached no firm conclusions and made no findings on the evidence. Additionally, the opportunity for those affected by the investigation to respond to that evidence has not yet been provided. I am deeply concerned that any public exposure of the matters under investigation by Operation Prospect and the evidence obtained to date, with no chance for a full and proper consideration of that evidence and a procedurally fair process of determining facts and findings, will see us little advanced over the unhappy situation that has continued since the Emblems investigation in 2003.

Throughout my time as Ombudsman I have viewed the Parliamentary oversight performed by the Parliamentary Joint Committee as one of the primary accountability mechanisms to which I am subject. I will endeavour to continue, to the fullest extent permitted by Part 4A of the Ombudsman Act, to ensure that your committee is kept fully informed about the progress of relevant matters.

I hope this letter assists the Committee by providing a factually correct account of the scope and purpose of Operation Prospect and its conduct to date. I am happy to clarify any aspect of the matters that I have outlined above in a hearing before the Committee, should the Committee consider this to be an appropriate course.

Yours sincerely

A handwritten signature in black ink, appearing to read "B A Barbour". The signature is written in a cursive style with a large initial "B" and "A".

Bruce Barbour  
**Ombudsman**

cc The Hon Robert Borsak MLC  
Chair  
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