

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

Dear Mr Borsak,

Inquiry into the conduct and progress of the Ombudsman's inquiry 'Operation Prospect'

I am writing in response to your letter of 5 December 2014.

As the select committee is aware, I received correspondence from Mr Scott Weber of the Police Association of NSW on 2 December 2014 highlighting the Association's concerns about the welfare of police officers who are subject to non-disclosure directions made in closed investigation hearings. I responded to the matters raised by Mr Weber by way of a letter on 4 December 2014, and in my correspondence outlined the steps that my office takes generally in the conduct of investigations, and in particular in our conduct of Operation Prospect, to ensure that the welfare needs of witnesses are attended to. I attach a copy of my letter to Mr Weber for the select committee's information.

The statutory provisions that enable the making of non-disclosure directions by a presiding officer at a closed investigation hearing are ordinarily drafted to be of general application. Provisions of this type can be found in the enabling legislation of a range of investigative agencies at both State and Federal level, and s 19A of the *Ombudsman Act 1974* is modelled on the preceding provisions of s 112 of the *Independent Commission Against Corruption Act 1988* and s 52 of the *Police Integrity Commission Act 1996*. In applying these provisions, the officer presiding at a closed hearing must make a general direction but is enabled to vary, at any time thereafter, the ambit of that general direction.

The select committee would appreciate that the underlying rationale of a statutory non-disclosure direction in this context is primarily to protect the integrity of an investigation by keeping confidential the avenues and methods of the investigation and the evidence that has been obtained, and preventing collusion. There is additionally the important purpose of protecting the identity (and thereby the safety, health and welfare) of persons who have provided confidential and sensitive information to an investigation. Accordingly, the provisions that enable non-disclosure directions require that they be made in general terms at the commencement of a closed investigation hearing.

The select committee would be aware that most statutes that enable the making of general non-disclosure directions also permit the presiding officer to vary the ambit of the direction. Variations to a general non-disclosure direction can be made by the presiding officer during the course of a particular hearing or at any time thereafter, to accommodate the legitimate needs of a witness to disclose information about matters that have been the subject of their evidence. Medical and welfare assistance is a significant, but not the only, legitimate need that a witness may have to disclose information, so variations to facilitate these needs must be assessed by the presiding officer on a case-by-case basis.

Accordingly, and in short answer to the select committee's enquiry, witnesses are not precluded from discussing information covered by statutory non-disclosure directions with (for example) a mental health professional, provided that an appropriate variation to a general non-disclosure direction has been made. Such a variation can be made on the application of the witness or on the motion of the presiding officer where he or she identifies that a variation needs to be made, and the witness may then disclose investigation-related information to their mental health professional for the purpose of discussing their circumstances without breaching the direction. It has been our experience that witnesses' legal representatives will actively seek variations on behalf of their clients whenever these are required. This is additionally facilitated by the ready accessibility for all Operation Prospect witnesses of no-cost legal representation and legal advice through the Legal Representation Office.

The select committee would be aware that I received further correspondence from Mr Weber on 9 December 2014. In his letter, Mr Weber has raised particular issues in relation to my letter to him of 4 December 2014. While I do not doubt the sincere concerns of Mr Weber in raising these issues, the statutory provisions that enable a presiding officer to make non-disclosure directions are, as I have indicated, ordinarily drafted to be of general application. In applying these provisions, the presiding officer must make a general direction but is enabled to vary, at any time thereafter, the ambit of that general direction. Mr Weber's pivotal concern that a witness must "*seek [the] permission [of a presiding officer] to access a fundamental right: the right to access appropriate medical care*" is, in light of the matters that I have outlined in my letter to him, simply a précis of the law which a presiding officer is bound to apply. Please find attached a copy of my reply to Mr Weber's letter of 9 December 2014, for the select committee's information.

I trust that my letter and the attachments hereto will assist the select committee in developing a protocol.

Yours sincerely



Bruce Barbour
Ombudsman

22/12/14

4 December 2014

Our reference: ADM/2014/13

Your reference:

Contact: Yenda Clifton

Telephone: (02) 9286 1000

Mr Scott Weber
President
Police Association of New South Wales
P O Box A1097
SYDNEY SOUTH NSW 1232

Dear Mr Weber

Welfare considerations for NSW Police Officers Medical Treatment

I refer to your letter dated 2 December 2014 addressed to a number of people including myself. I have noted your concerns and share some of them. Obviously the most relevant investigation that my office is currently conducting in which police witnesses are likely to be called is Operation Prospect and so the following comments are made in relation to that investigation.

At the commencement of Operation Prospect, one of our initial priorities was to establish what we considered to be the necessary services for individuals who may become involved in Operation Prospect. We approached the Attorney-General to broaden the scope of the Legal Representation Office (LRO) to provide free, legal representation to all individuals required to attend interviews or hearings, and we engaged the services of Davidson Trahaire Corpsych to provide confidential and free counselling to any individual involved in Operation Prospect.

The welfare of all witnesses called in Operation Prospect is paramount and we have taken many steps to ensure that support is provided where needed, relevant and permitted by legislation. Where a witness is summonsed to a hearing the relevant covering letter contains the following paragraphs detailing the services specified above:

Access to counselling service:

Operation Prospect has identified that involvement in this matter may cause stress to individuals or their families. Accordingly, we have arranged the following confidential counselling service to be available for all those involved. The service is entirely confidential and there is no ability by Operation Prospect to identify who, if anyone utilises it. Should you or your family wish to contact the service the details are:

Service: Davidson Trahaire Corpsych (DTC)
Contact details: 1300 360 364
Quote Ref: XXXXX

All counsellors are qualified, experienced professionals who have extensive training and experience in counselling. All expenses for any initial consultation are paid for by the NSW Ombudsman at no cost to you.

It can be provided face to face, over the telephone, or via video counselling, whichever is more convenient for you.

Access to legal advice or representation:

Please find enclosed information regarding the availability of legal assistance by the NSW Government's Legal Representation Office.

Where we have been made aware of any welfare or health issues of individuals we have provided support. In some instances officers have sought a variation to the direction that they must not disclose that they have given evidence pursuant to s19A(1) of the *Ombudsman Act 1974* (the Act) to enable them to speak openly and without restriction to their medical professional about giving evidence. Such a variation where requested has always been granted. Should any witness wish to seek a variation to a direction for the purpose of seeking medical treatment for a condition or illness arising from their involvement in Operation Prospect, they are welcome to contact Operation Prospect directly so that consideration can be given to whether any variation of the direction is needed or appropriate.

In addition to the above, if we form a view there may be a serious and/or immediate welfare concern for an individual who is a current serving police officer, we contact and speak directly to that officer's Commander to ensure the officer receives appropriate support.

In this context, it is also important to note that the NSW Ombudsman's jurisdiction relates to most public sector employees and many staff of non-government agencies. As such, considerations relating to the health and welfare of witnesses extend to any person who may be required to attend a hearing or otherwise involved in an Ombudsman investigation, and is not limited to current serving police officers or Operation Prospect.

I hope the above clarifies for the Association the arrangements in place for individuals involved in Operation Prospect in respect of welfare issues and concerns.

Yours sincerely

A handwritten signature in black ink, appearing to read 'B Barbour', written in a cursive style.

Bruce Barbour
Ombudsman

Mr Scott Weber
President
Police Association of New South Wales
PO Box A1097
SYDNEY SOUTH NSW 1232

Dear Mr Weber,

Welfare considerations for NSW police officers' medical treatment

I am writing in response to your letter of 9 December 2014. As you would be aware, I have always endeavoured to maintain a constructive relationship with the Police Association and it is with considerable disappointment that I note the intemperate tone in which you have raised your concerns about my letter of 4 December 2014. I will nonetheless seek to deal with the issues you have raised in a productive manner.

While I do not doubt the sincerity of your concerns notwithstanding the manner in which you have raised them, I should begin by clarifying that the statutory provisions that enable the making of non-disclosure directions by a presiding officer at a closed investigation hearing are ordinarily drafted to be of general application. Provisions of this type can be found in the enabling legislation of a range of investigative agencies at both State and Federal level, and s 19A of the *Ombudsman Act 1974* is modelled on the preceding provisions of s 112 of the *Independent Commission Against Corruption Act 1988* and s 52 of the *Police Integrity Commission Act 1996*. In applying these provisions, the officer presiding at a closed hearing must make a general direction but is enabled to vary, at any time thereafter, the ambit of that general direction.

You would of course appreciate that the underlying rationale of a statutory non-disclosure direction in this context is primarily to protect the integrity of an investigation by keeping confidential the avenues and methods of the investigation and the evidence that has been obtained, and preventing collusion. There is additionally the important purpose of protecting the identity (and thereby the safety, health and welfare) of persons who have provided confidential and sensitive information to an investigation.

Even though non-disclosure directions must be made by a presiding officer in general terms at the commencement of a closed hearing, most provisions that enable the making of general non-disclosure directions (including s 19A of the *Ombudsman Act*) also permit the presiding officer to vary the ambit of the direction. Variations to a general non-disclosure direction can be made by the presiding officer during the course of a particular hearing or at any time thereafter, to accommodate the legitimate needs of a witness to disclose information about matters that have been the subject of their evidence. Medical and welfare assistance is a significant, but not the only, legitimate need that a witness may have to disclose information,

so variations to facilitate these needs must be assessed by a presiding officer on a case-by-case basis.

In short, police officers are not precluded from discussing information covered by statutory non-disclosure directions with (for example) a mental health professional, provided that an appropriate variation to a general non-disclosure direction has been made. Such a variation can be made on the application of the witness or on the motion of the presiding officer where he or she identifies that a variation needs to be made, and the witness may then disclose investigation-related information to their mental health professional for the purpose of discussing their circumstances without breaching the direction. It has been our experience that witnesses' legal representatives will actively seek variations on behalf of their clients whenever these are required. This is additionally facilitated by the ready accessibility for all Operation Prospect witnesses of no-cost legal representation and legal advice through the Legal Representation Office, which can in some circumstances include the witness's choice of legal representative.

In light of these matters, your pivotal concern that a witness must "*seek [the] permission [of a presiding officer] to access a fundamental right: the right to access appropriate medical care*" is simply a précis of the law which a presiding officer is bound to apply.

That said, I can advise that the comprehensive welfare services that are provided to Operation Prospect witnesses under our agreement with Davidson Trahaire Corpsych ('DTC') exceed any similar services provided by the ICAC or the PIC. DTC's counselling service is completely confidential and our arrangement with DTC is structured so that my office is not advised of, and cannot request, the identity of persons who have sought counselling. My office pays an upfront fee for DTC to provide up to six sessions of counselling if the counsellor is of the view that these are required, so the full extent of the service is not confined simply to an initial consultation if the counsellor believes that additional sessions are needed. In this circumstance the counsellor can seek approval within DTC for additional sessions and the cost of any ongoing sessions is taken to be part of the upfront fee that is paid by my office. Because we are not charged per counselling session my office has no knowledge of, and cannot request from DTC, particulars such as the number of persons who have sought counselling or the number of counselling sessions that have been provided. On any reasonable view, DTC's counselling services are provided in a manner that is entirely appropriate and independent from my office.

You should note that, while the service provided by DTC is a counselling service and not a medical service, the counsellors are trained to refer a client to other services, including medical practitioners, as needed. I should add that DTC's counselling service is additionally available to witnesses' family members.

With this in mind, you would appreciate that as a practical matter the first notice that a witness receives from an investigative agency that they are summoned to appear before an inquiry is also the first opportunity that the agency has to inform that witness of the availability of legal and welfare services. This is something of an intractable difficulty for any agency and, of course, witnesses do not all react in the same way in this circumstance. Again, our experience is that a great deal can be achieved by our investigators who contact the witness before serving a summons and talk the witness through the matters that are set out in the documents that are to be served on them. The witness is also provided with the contact particulars of an Ombudsman officer should any further information be required.

In this regard it has been my consistent view in relation to Operation Prospect that a disclosure made by a witness to a counsellor or medical practitioner for the purpose of that witness's welfare is unlikely to prejudice the investigation. Again, an assessment of this nature can be made by the presiding officer and communicated to the witness at any time after the service of the summons, on a case-by-case basis.

Your rash assertion that my office has been grossly negligent in regard to the above matters is utterly refuted.

It is appropriate that we communicate information to a police officer's Commander where there is a significant concern about that officer's welfare. Although the information that can be communicated to a Commander is necessarily limited, it is sufficient to bring to the Commander's attention that there may be a potentially adverse risk to the welfare of an officer under his Command and to enable the officer's welfare to be monitored.

You would appreciate that it is not appropriate for me to provide, in the present context, any comment on the issues you have raised in relation to officers of the NSW Crime Commission. Nor is it appropriate that I make any public statement in relation to the above matters.

I trust that the additional considerations that I have set out in this letter will go some way towards assisting your better understanding of my letter of 4 December 2014.

Yours sincerely



Bruce Barbour
Ombudsman

22/12/14