

20 July 2015

The Hon Robert Borsak MLC
Chair
Inquiry into the progress of Operation Prospect
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

Dear Mr Borsak

NSW Ombudsman – response to questions of 3 July 2015

I am writing in response to your letter to former Ombudsman Bruce Barbour of 3 July 2015. As my office indicated in its acknowledgement of the letter, Mr Barbour provided the office with an authority to open, review and respond appropriately to any correspondence provided to the office addressed to him. Having read your letter, I formed the view that your questions, along with the attached second submission from Senior Counsel representing Deputy Commissioner Kaldas, related directly to the work of this office and therefore required a response from me. I provided the questions and the submission to Mr Barbour, who raised no objection to this course of action. I have incorporated Mr Barbour's comments in the responses to many of the issues raised. I have provided Mr Barbour with a copy of this response prior to providing it to you, and he agrees with its contents.

There are a number of issues raised within your questions and the submission which I will, however, touch on briefly in this covering correspondence. The first is the claim that, in providing information to Commissioner Scipione, Mr Barbour in some way breached section 34 of the *Ombudsman Act 1977*. As the response to the question demonstrates, this claim has no foundation in law and does not accurately represent what took place or why it was done.

Much of the focus of the questions concerns the baseless suggestion that this office was the source of a leak of information to the journalist Mr McKenzie. The Committee knows full well that that is not so, because Mr McKenzie has made that perfectly clear, on more than one occasion. The statutory declarations confirm that position.

One further matter is relevant to the source of the leak. The story that was published in the Sydney Morning Herald is in a key respect inaccurate. The Ombudsman was not then "considering referring" the matter to the DPP, and no one in the Ombudsman's office involved in Operation Prospect could have believed that he was. The matter had already been referred the previous year.

If the Committee's interest is in locating the source of the leak, the starting point of its inquiry should be a full declaration by members of the Select Committee that earlier this year inquired into the conduct and progress of the Ombudsman's Inquiry "Operation Prospect". Two points can be stated with certainty about that Committee. First, the Committee was informed in what was then confidential paragraph 34 of the former Ombudsman's statement about the status of the referral to the Director of Public Prosecutions of Deputy Commissioner Kaldas.

Secondly, one or more members of that Committee leaked confidential material to the media. This can be stated with certainty because on 24 February 2015 the Daily Telegraph published a story which accurately revealed some of the content of the forthcoming Committee report in advance of the report being tabled, or otherwise released. Apart from Committee staff, few if any other persons had access to that information.

I would note that the Deputy Chair informed the media that he had written to the Independent Commission Against Corruption alleging unauthorised release of information from either this office and the Office of the Director of Public Prosecutions. From his public statements and media releases on this issue, it does not appear he has made a similar referral in relation to the members of the Select Committee and any other parties within Parliament with access to the confidential paragraph.

There is also reason to suspect that while the Select Committee's inquiry was ongoing, Deputy Commissioner Kaldas may have been informed of the content of confidential paragraph 34 of the former Ombudsman's statement. In his second round of evidence to that Committee, he stated in substance that he believed the concealed paragraph referred to him. There was nothing in the context of the preceding or following material that could give rise to that inference, and nothing in the former Ombudsman's evidence that could give rise to that inference. If Deputy Commissioner Kaldas was also aware at that earlier time of the content of paragraph 34, then he or someone he in turn spoke to, might be one other potential source of the leak that should be investigated. I note in this respect that you as Chair of each of the two Committees were reported to have engaged at an early point in "secret inquiry talks" with the Deputy Commissioner, according to the article in the Australian on 15 November 2014, "NSW deputy police chief, state MP in secret inquiry talks". A full declaration of any discussions that you had with the Deputy Commissioner after the time of the receipt of the former Ombudsman's statement would allow one possible source of the leak to be discounted.

Before further baseless allegations of leaking are levelled at this office, I would invite members of the former Committee to make full public disclosure of confidential communications that they may have had with journalists, or with Deputy Commissioner Kaldas, concerning the subject matter of the inquiry since the former Ombudsman's statement with its confidential paragraph 34 was provided to the Committee. One sound starting point for the Committee's inquiries would be to identify the source of the leak to the Daily Telegraph on or about 24 February 2015. That would be a more productive starting point than the pursuit of an office that, according to the journalist himself, was not the source of the leak.

At several stages, the submission attached to your letter and, by extension, the questions included in your correspondence, suggest that the former Ombudsman misled two Parliamentary inquiries. As the attached answers to questions demonstrate, this allegation is without foundation. Far from seeking to mislead the Committee, the former Ombudsman clearly sought to be as forthcoming as he felt he was legally able to be in his responses to both the Select Committee and the General Purpose Standing Committee. This is evidenced by the level of information and detail provided to the Select Committee within the office's claim for public interest immunity. I would note that, without this information, the Select Committee would have had little, if any, information on which to base its introductory chapter dealing with the history of the matters the subject of investigation as part of Operation Prospect.

These are but two of a number of areas where the tone of the questions provided by the Committee indicates a clear, unquestioning acceptance of the arguments put forward by the legal representatives of an interested party to the investigation. The tone of the questions that have been directed to this office makes tolerably clear to any impartial observer that at least some members of the Committee are not engaged in any exercise of proper Parliamentary oversight. Rather, those members are engaged in the pursuit of a partisan agenda directed at inflicting damage on the reputation of this office. Given the unblemished reputation that this office has earned over 40 years, and the critical independent role that it plays in oversighting public administration, this is at the least regrettable.

The confidence of the Parliament, and of the broader community, in this office is built on its reputation. It is this same reputation that encourages complainants to come forward and raise issues with us, and also means that agencies are accepting of the vast majority of recommendations the office makes. The wording of questions such as those in your correspondence, based on unsound legal arguments, baseless innuendo and unnecessarily personal attacks can do considerable damage to that reputation, and I believe have the potential to have a broader impact on the office's effectiveness.

The answers to the questions posed by the Committee deal with much of what is in the submission made by lawyers representing Deputy Commissioner Kaldas. As to the suggestion of bias, it is without merit. If Deputy Commissioner Kaldas believes otherwise upon advice, it is open to him to pursue the matter in a court of law, which is the proper forum for such allegations to be determined.

In conclusion, I am surprised that the Committee would consider it appropriate that the Ombudsman be called upon to engage generally with submissions made by a person interested in an inquiry that the office is conducting. The allegation of bias made in those submissions is itself eloquent of the inappropriateness of a decision-maker being called upon to respond generally to submissions made by an interested party.

If the Committee does make the submission prepared on behalf of Deputy Commissioner Kaldas publicly available, I would expect that this correspondence and the attached answers would be released at the same time.

Yours sincerely

Chris Wheeler
Acting NSW Ombudsman

Answers to questions

1. *When did you become aware that any of the investigators working on Prospect had had contact with Nick McKenzie in 2015?*

As the staff member in question states in their statutory declaration, the staff member made both the Deputy Ombudsman and Principal Legal Officer aware of the contact on 15 April 2015. The Principal Legal Officer then provided this information to the former Ombudsman on the same day.

2. *Noting that the statutory declarations were signed on the same day you gave evidence to the Committee (19 June 2015), what time were the statutory declarations signed by each investigator?*

The three statutory declarations of 19 June 2015 were signed in the morning on 19 June 2015, before the former Ombudsman gave evidence before the General Purpose Standing Committee. It is important to note that Mr O'Connor's correspondence was placed on the Committee website on the afternoon of 18 June 2015.

3. *When (date and time) were you provided with signed copies of the statutory declarations of each investigator?*

The former Ombudsman was provided with signed copies of the three statutory declarations soon after they were signed on the morning of 19 June.

4. *Did you see any previous version of those statutory declarations, and if so, when?*

The former Ombudsman was provided with the statutory declarations in draft form shortly before they were signed on the morning of 19 June.

5. *Why did you delay giving the statutory declarations to the committee until after you had given evidence?*

The former Ombudsman did not "delay" providing the statutory declarations to the Committee. He was not under any obligation to give them to the Committee. The Committee wrote to the former Ombudsman on 22 June 2015, and the Ombudsman provided the statutory declarations in confidence the next day.

6. *Why did you claim you would only release the statutory declarations following a summons, and then provide them of your own volition after giving evidence?*

The former Ombudsman did not "claim" anything. He stated that he would consider a request for the statutory declarations in response to a summons. The former Ombudsman's primary concern was the health and wellbeing of his staff. When the Committee requested copies of the statutory declarations in correspondence on 22 June, after consideration, and an opportunity to discuss this course with the affected staff members, the Ombudsman provided them in confidence to assist the Committee. They were provided in response to a written request, not "of his own volition", to a Committee that has powers to issue a summons for documents. They were provided in an effort to cooperate and assist the

Committee's deliberations, a fact that appears to have been lost, having regard to the loaded form of the Committee's question.

7. *Why did you repeatedly tell the inquiry that the statutory declarations (unseen by the inquiry at that time) confirmed your staff had no contact and no communication with the journalist, when in fact one statutory declaration is silent on that question, and the other makes it clear the officer did have communication with the journalist in April 2015?*

The former Ombudsman dealt with this issue in his correspondence to the Committee dated 22 June 2015, sent after he had the opportunity to read the uncorrected transcript of proceedings which the Committee had placed on its website. In that letter, he said:

Each of the investigators making a statutory declaration states that he did not have any discussion with Mr Nick McKenzie about Operation Prospect. The declarations confirm the evidence I gave to the Committee in response to questions regarding contact between officers of my office and Mr McKenzie (see page 19 of the uncorrected transcript which has been published on the Parliament's website; see also page 32):

*Mr Barbour: I have already indicated to you that under statutory declaration they have indicated that **they did not discuss any issues in relation to Operation Prospect or Deputy Commissioner Kaldas with Mr McKenzie.***[emphasis added]

On reviewing the transcript yesterday I noted that at several points I provided briefer responses which, if read without the context of my other answers, may convey the impression that the relevant officers had provided me with statutory declarations stating that they had not had any contact with Mr McKenzie.

To ensure there is no ambiguity in my evidence on this issue, I wish to clarify that according to the statutory declaration of one of the Operation Prospect investigators, Mr McKenzie contacted the staff member on 1 April 2015. As indicated in that staff member's statutory declaration, Mr McKenzie knew the staff member from some years ago, and whilst in Sydney for other reasons invited the staff member for coffee, which was declined. There was no discussion in the course of the conversation, on the part of either Mr McKenzie or the officer, about Operation Prospect, anything to do with the Ombudsman's office or any of the matters that were the subject of Mr McKenzie's article.

In so far as the question suggests that one of the statutory declarations is "silent" on whether the staff member spoke with Mr McKenzie, each of the statutory declarations was directed to the issue that is a focus of the Committee's inquiry, that is whether any of the persons had any discussion with Mr McKenzie regarding operational matters. The staff member who swore the first statutory declaration clearly stated that he had "never spoken with Mr Nick McKenzie in relation to any matters relating to Operation Prospect, including any of those matters that were the subject of Mr McKenzie's article". That statement, which constituted a complete answer to the matter that is the subject of the Committee's terms of reference, satisfied the former Ombudsman, as it should satisfy the Committee.

The former Ombudsman provided this information at the earliest opportunity having reviewed the uncorrected transcript of his evidence. A similar clarification was made by Deputy Commissioner Kaldas after his evidence to the Select Committee earlier this year.

The terms of that clarification, which was significant, are to be found in the letter from his solicitors dated 2 February 2015 to the Chair of the Select Committee, and in his subsequent evidence to the Committee, that he had not been completely candid in the answers he gave to the Ombudsman.

8. *How do you explain the fact that you gave unambiguous evidence to the inquiry that you were satisfied there was no contact from your officers at all, when the truth is the opposite?*

The suggested “fact” is baseless. The question is a selective and hence an inaccurate reading of the former Ombudsman’s evidence, and is addressed by the answer provided above. From the outset the former Ombudsman was satisfied that the source of the leak was not within his office, because the journalist had said so, and has now repeated that statement publicly.

9. *Why did you repeatedly say that only a third party or Mr McKenzie could explain conversations with Mr McKenzie, when one and possibly two of your officers had spoken to Mr McKenzie?*

The former Ombudsman was referring to conversations referenced in Mr O’Connor’s correspondence with the Committee. One officer had a discussion with Mr McKenzie, the terms of which are recounted in his statutory declaration. This question is not an accurate reflection of the former Ombudsman’s evidence, and is addressed by the answer to question seven. Indeed, the question is a calculated distortion of the former Ombudsman’s evidence.

10. *Why, when asked what was the content of the statutory declarations, did you not disclose to the inquiry that one of your officers had received a call from the journalist on 1 April 2015?*

The former Ombudsman’s evidence was directed to the inquiry Term of Reference which concerns the circumstances in which operational information was divulged to media. As stated this officer did not discuss the Ombudsman’s office or Operation Prospect in this short telephone call. The relevant information was provided to the Committee as outlined in the answer to question seven. From the outset the former Ombudsman was satisfied that the source of the leak was not within his office, because the journalist had said so, and has now repeated that statement publicly. That was confirmed by the statutory declarations.

11. *Why, when asked whether “any of your officers had indicated they had spoken to Mr McKenzie”, did you fail to answer that question and instead say. “I have already indicated to you that under statutory declaration they have indicated that they did not discuss any issues in relation to Operation Prospect or Deputy Commissioner Kaldas with Mr McKenzie”?*

The answer given was precisely accurate. The former Ombudsman’s evidence was directed to the inquiry Term of Reference which concerns the circumstances in which operational information was divulged to media. This question is not an accurate reflection of the former Ombudsman’s evidence, and is addressed by the answer to question seven. The Committee’s terms of reference were not directed to issues of limited social contact.

12. *Why did you not seek further clarification from the author of the first statutory declaration regarding whether he/she had any contact with the journalist this year?*

All Prospect staff were asked if they had spoken to **any** journalist at **any** time about **any** aspect of Operation Prospect, including the staff member who signed the first statutory declaration. All answered in the negative.

Each of the statutory declarations was directed to the issue that is the focus of the Committee's inquiry, namely whether any of the persons had any discussion with Mr McKenzie regarding operational matters. As the first staff member who swore the first statutory declaration clearly states within the statutory declaration:

Since my commencement at Operation Prospect, I have never spoken with Mr Nick McKenzie in relation to any matters relating to Operation Prospect, including any of those matters that were the subject of Mr McKenzie's article.

There was no need to seek further clarification from the staff member.

13. *How, when one officer has admitted he spoke to Mr McKenzie two weeks before the article and one officer was silent on whether and when he spoke to Mr McKenzie, could you possibly be satisfied that the leak did not come from your office?*

This question is premised upon a selective and inaccurate reflection of the content of the statutory declarations. The question suggests that one of the statutory declarations is "silent" on whether the staff member spoke with Mr McKenzie.

The first statutory declaration clearly states that:

Since my commencement at Operation Prospect, I have never spoken with Mr Nick McKenzie in relation to any matters relating to Operation Prospect, including any of those matters that were the subject of Mr McKenzie's article.

The second statutory declaration clearly states that:

I have never met or had any conversations with Mr McKenzie

I have never spoken with or provided any information to Mr McKenzie in relation to any matters relating to Operation Prospect, including any of those matters that were the subject of Mr McKenzie's article.

The third statutory declaration clearly states that:

On 1 April 2015 Mr Nick McKenzie called me on my mobile and asked if I would like to have a coffee with him. I declined his request. We spoke about matters unrelated to the NSW Ombudsman's office. At no time during this conversation did he or I mention Operation Prospect, or anything at all to do with the NSW Ombudsman's office, nor did we speak about any of those matters that were the subject of Mr McKenzie's article.

All three of these statutory declarations clearly answer both the allegation that the members of staff provided information to Mr McKenzie to inform his article, but also the claims outlined in Mr O'Connor's correspondence to the General Purpose Standing Committee.

Further, as noted above all Prospect staff were asked if they had spoken to **any** journalist at **any** time about **any** aspect of Operation Prospect, including the staff member who signed the first statutory declaration. All answered in the negative.

The question is demonstrative of pre-judgement bias on the part of its drafter and is a clear distortion of the evidence that has been given to the Committee by the former Ombudsman and the journalist concerned. As the former Ombudsman stated repeatedly, from the outset the former Ombudsman was aware that the source of the leak was not within his office, because the journalist had said so, and has now repeated that statement publicly. That was confirmed by the statutory declarations.

14. *What was the legal basis under s 34 of the Ombudsman's Act for disclosing the information regarding the referral to the DPP to Commissioner Scipione in December 2014?*

Commissioner Scipione's evidence before the General Purpose Standing Committee on 26 June 2015 was as follows:

... On 9 December last year I met the Ombudsman to discuss the need to put into place appropriate legal representation, support and welfare arrangements for officers that were going to appear before the then upcoming upper House select committee. In the context of discussing possible impacts with officers' health and welfare, the Ombudsman indicated that he had referred a matter to the DPP and it was in relation to Deputy Commissioner Kaldas. I indicated then that if it was decided to take the matter further, any early advice that I could get would assist me in ensuring that appropriate welfare support was put in place. I have heard nothing further since from the Ombudsman or anyone else.

∴ The disclosure was authorised by s 34(1)(b2) of the *Ombudsman Act 1974*. The section provides an exception to the general prohibition of the disclosure of information covered by section 34 in the following circumstances:

- (b2) *to any person if the Ombudsman believes on reasonable grounds that disclosure to that person is necessary to prevent or lessen the likelihood of harm being done to any person (but only if the Ombudsman also believes on reasonable grounds that there is a risk of harm (including self-harm) being done to any person)*

The action taken by this office was informed by information provided to this office by Deputy Commissioner Kaldas. It is not appropriate for this office to supply that information. Since a serious, and baseless, allegation has been made against the former Ombudsman, the Committee should either obtain that information from Deputy Commissioner Kaldas or make a finding that there is no evidence from which the allegation can be made out.

15. *Who else did you disclose that information to?*

The former Ombudsman discussed the referral with legal counsel in confidence in preparation for hearings before the Select Committee and the General Purpose Standing Committee. The former Ombudsman also, at the time of budgetary concerns being raised by the Director of Public Prosecutions about referrals being made to his office arising out of Operation Prospect, had a discussion with the then Attorney General. This was to stress the need for sufficient funds to be available to ensure such referrals to the Director could be dealt with appropriately at that time or in the future.

16. *Why did you refer the brief of evidence regarding Deputy Commissioner Kaldas to the DPP on 19 November 2014, just five days after the Joint Select Committee was formed by the Legislative Council? Why then?*

The General Purpose Standing Committee has now made the confidential paragraph from the Ombudsman office's public interest immunity claim publicly available on its website. As the paragraph states:

One witness acknowledged, in the course of his evidence given before me on 5 September 2014, that some of the evidence he had earlier given before me had been deliberately false. That evidence has been referred to the Director of Public Prosecutions, on 19 November 2014.

That paragraph, when read alongside the evidence before the Select Committee, correspondence from Deputy Commissioner Kaldas' solicitor dated 2 February 2015, Deputy Commissioner Kaldas' evidence before the Select Committee on 10 February 2015, and email correspondence to the General Purpose Standing Committee from the DPP of 25 June 2015, confirm that Deputy Commissioner Kaldas was the subject of a referral to the DPP.

Section 21 of the *Royal Commissions Act 1923* states that:

21 False and misleading testimony

- (1) *Any witness before a commission who gives testimony that is false or misleading in a material particular knowing it to be false or misleading, or not believing it to be true, is guilty of an indictable offence.*

Maximum penalty: Imprisonment for 5 years.

That did not involve any finding, or the formation of any view, about any substantive matter in Operation Prospect. Since the conduct was admitted, no finding of any kind was necessary.

The former Ombudsman sought legal advice on whether the matter should be referred to the Director of Public Prosecutions on Monday 8 September 2014, the Monday following the hearing on Friday 5 September 2014

He initiated preparation of a brief of evidence soon afterwards. The principal legal officer whose task that would otherwise have been was scheduled to start a period of leave the following day. As a consequence preparation of the brief was not concluded until 19 November 2014. Steps toward a referral were initiated well before any discussion of a Parliamentary inquiry began.

The timing of the referral was dependent on ensuring all relevant information had been collated and could be included for the consideration of the Director.

17. *When did you become aware that summary offences such as those in section 37 of the Ombudsman Act must be charged within six months (or they are statute barred by section 179 of the Criminal Procedure Act 1986)?*

The former Ombudsman has throughout his time in office always been aware of the statute of limitations applying to offences under the Ombudsman Act.

18. *What were the circumstances in which you become aware of that fact?*

See the answer to question 17 above.