

# Operation Prospect – Progress Report by the Acting NSW Ombudsman

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## Background

On 25 August 2015, General Purpose Standing Committee No. 4 of the NSW Legislative Council issued a report, *Progress of the Ombudsman’s investigation, “Operation Prospect”*. The report made six recommendations, the third of which was:

### **Recommendation 3**

*That the Acting Ombudsman provide a written report to General Purpose Standing Committee No. 4 by 1 November 2015 outlining the progress of Operation Prospect, including an anticipated timeframe for the completion of the investigation.*

I have prepared this report in response to that recommendation to inform the Committee and other interested parties of progress in the Operation Prospect investigation in recent months, and to indicate the expected timeframe for completing the investigation. This report also outlines the Ombudsman office response to numerous issues that have been raised in submissions we have received over the last three months about the scope and conduct of Operation Prospect. A public statement that I issued shortly after commencing as Acting Ombudsman on 1 August 2015 is reproduced at Appendix A.

The Operation Prospect investigation is guided by three objectives: the conduct and finalisation of the investigation must be efficient, thorough and fair.

- *Efficient* – Much of the public comment on Operation Prospect has stressed the need to complete the investigation as soon as possible. The investigation principally relates to events that occurred some years ago. It is important to the NSW Police Force, to government and the community that the investigation of these events is completed. I have also been told of the continuing and adverse emotional impact that ongoing investigation and analysis of the issues can have on current and former government officials and police officers. I am cognisant of the need to complete the investigation as soon as possible; doing so is a high priority in the Ombudsman’s office and the Operation Prospect investigation team.
- *Thorough* – The investigation results must be thorough and comprehensive. The scale of the investigation, as explained later in this report, points to the unresolved and disputed character of many events that are being investigated. There is a risk that controversy surrounding some events will not go away if the investigation is perceived to be inadequate. That is why considerable time has recently been spent on the procedural fairness stage of the investigation. It provides a valuable opportunity for parties to be informed of the direction of the investigation and to raise issues that may require further analysis or response.
- *Fair* – Provisional adverse findings, comment and/or recommendations have been issued to 33 parties. It is essential they have a proper opportunity to consider and respond to the provisional results, as indeed the law requires they must have. Many have chosen to do so either through or with the advice of legal counsel. All issues raised are being considered carefully, some by an interim response, and others in the final reporting. My advice to parties has stressed that I am undertaking this reconsideration with an open mind, both as to the opinions to be reached and the way those opinions should be framed or concluded.

## Work undertaken by Operation Prospect

Following is an outline of the work of the Ombudsman's office prior to the procedural fairness stage of the investigation. The procedural fairness process is necessarily tied to the earlier work, as many participants have sought access to or commented on evidence collected during the investigation. The following outline draws from detailed evidence given in 2015 by the former Ombudsman, Mr Bruce Barbour, to the Select Committee inquiring into the conduct and progress of Operation Prospect.

- *Hearings*: 89 formal hearings have been conducted under s 19 of the *Ombudsman Act 1974* ('the Act'), totalling 272 hours and 11 minutes; the last hearing was conducted on 31 March 2015
- *Interviews*: 64 persons have been interviewed under s 18 of the Act or voluntarily, totalling 116 hours and 2 minutes
- *Witnesses*: 125 persons have been witnesses, at either a s 19 hearing, a s 18 interview or a voluntary interview; this has occupied the equivalent of 78 whole days, based on a court day of 5 hours duration
- *Investigation of use of false and misleading information in warrant applications and supporting affidavits*: in response to summonses issued under s 18 of the Act, 210 affidavits comprising 6,134 pages in support of applications for 708 listening device and telephone intercept warrants have been produced, as well as 11 Mascot tape logs comprising 1,197 entries from recordings; each paragraph of each warrant had to be examined and traced back to source documents, that included 488 pages of debrief with the informant 'Sea' and over 138,831 documents comprising source minutes, information reports, contact advice reports, emails, surveillance reports, listening device and telephone intercept transcripts and audio recordings; the audio recordings extend to thousands of hours and the transcripts to tens of thousands of pages
- *Investigation of improper targeting or investigation of individuals*: based on analysis of the above documents, the investigation has examined whether individuals were appropriately investigated or specifically targeted by examining matters such as how long a person was targeted, the information and reasoning to support the decision, corroborative or exculpatory evidence, the method of targeting, and policing policies and procedures
- *Investigation of mishandling of informants/undercover operatives*: this has involved a review of 19 boxes of information provided by the NSW Crime Commission (NSWCC) and other documents including those referred to above, such as court and prosecution files and the Strike Force Emblems investigation report
- Investigation of unlawful and/or improper dissemination of material from hardcopy files and/or the computer systems of the NSWCC, NSW Police Force and Police Integrity Commission: this part of the investigation is looking at the release of over 20,000 pages of confidential hardcopy and digital material into the public domain.

Counsel Assisting the Operation Prospect investigation has made written submissions to the Ombudsman that have formed the basis of the statements of provisional adverse findings, comment and/or recommendations that have been notified to 33 parties. Five submissions were received from Counsel Assisting between 13 March and 5 June 2015. After further work on those submissions was undertaken by Operation Prospect staff, the provisional statements were sent to the parties for comment between 1 April and 29 June 2015.

The procedural fairness process is currently underway and involves the following activity:

- The provisional statements comprise 977 pages in total; each of 33 parties has been given a redacted portion that is relevant to that party

- The parties have been given the opportunity to inspect documents relevant to the provisional statements; inspections have been held over 49 days totalling 278 hours, and are continuing; the inspections require extensive preparation by Operation Prospect staff to identify and redact documents and respond to queries from parties
- 25 parties have made written submissions, totalling 746 pages; some parties have framed their submission as an interim submission that may be supplemented by a further submission; 2 parties have made 2 submissions; 3 parties have indicated they will not make a submission
- Many parties sought and were granted an extension of time to undertake document inspection and to make a submission; as a consequence, of the 27 submissions that have been received, 4 were received in June-July 2015, 11 in August, 6 in September, 5 in October and 1 in November
- Some parties, in submissions and other correspondence, have raised questions about the scope and conduct of Operation Prospect; those queries have generally been addressed by separate replies that are explained below.

Operation Prospect is at an advanced stage, but considerable work remains ahead. The submissions of the parties are still being received and can require a detailed review of the provisional statements and source documents. The source documents comprise more than 1 million pages, and 78 days of hearings and interviews. As explained later in this statement, I have also acknowledged that to ensure procedural fairness I may have to conduct a further oral hearing or provide a party with a fresh opportunity to respond to an adverse conclusion that has not previously been raised with the party.

While the procedural fairness process is underway work is being undertaken to prepare background and contextual information about Operation Prospect that may form part of a final report.

I anticipate that Operation Prospect will not be finalised until the first half of 2016. I will continue to provide the affected parties with updated information on the progress of the investigation and the estimated completion date in the coming months.

## Issues raised by affected parties

Following my appointment as Acting Ombudsman from 1 August 2015, I received correspondence from a number of parties with enquiries and submissions as to the further conduct of Operation Prospect. The correspondence was prompted both by the change in Ombudsman and by the provisional statements that some parties received in late June 2015.

The submissions have ranged widely, including that I should discontinue Operation Prospect, hold a directions hearing, clarify the status of the provisional statements issued to parties prior to my commencement, or not rely on prior oral evidence to support an adverse finding without re-hearing that evidence. Some submissions, if accepted, would extend significantly the time for completing the investigation.

I have thought it important that the Ombudsman's office should reply to this correspondence. This is an important step in resolving queries about the scope and conduct of Operation Prospect, and in some instances dispelling misconceptions about the investigation. The replies explain issues that are potentially relevant to all parties who have a direct or indirect interest in Operation Prospect. I have summarised below the main points in the correspondence that may be of wider interest.

## The investigation framework

Several parties have asked me to explain the scope and terms of reference of Operation Prospect. This query was sometimes tied to a submission that the party was prejudiced by uncertainty as to whether their conduct was a subject of investigation or how the investigation was proceeding.

I will outline the legal framework for Operation Prospect by discussing separately the Acts on which the investigation is based, the scope of the investigation, the inquiry powers and how the results of the investigation will be reported. The following explanation draws on material in documents that has been published by the Ombudsman's office during Operation Prospect.

### *The Acts on which Operation Prospect is based*

The investigation is principally conducted under the *Ombudsman Act 1974*. Three other relevant Acts that are discussed below are the *Police Integrity Commission Act 1996*, *Police Act 1990* and *Public Interest Disclosures Act 1994* (PID Act).

The Ombudsman Act s 13 provides that the Ombudsman may make the 'conduct of a public authority ... the subject of an investigation' under the Act if it appears to the Ombudsman that the conduct may be of a kind referred to in s 26 of the Act, and the conduct is not excluded under Schedule 1.

Section 26 lists the grounds on which the Ombudsman may make an investigation report that is to be given to an agency, a Minister or the Parliament. The grounds (which are often referred to collectively as maladministration) include that the public authority's conduct was contrary to law, unreasonable, unjust, oppressive, improperly discriminatory, based on improper motives or irrelevant grounds, based on a mistake of law or fact, or otherwise wrong.

'Conduct' is defined broadly in the Act to mean an action or inaction, or alleged action or inaction, 'relating to a matter of administration' (s 5(1)). The term 'administration' bears its ordinary meaning (except in relation to estate or trust administration, that is not relevant to this investigation: see s 5(1)).

The term 'public authority' is defined in s 5(1) in a form that includes the three agencies that are centrally involved in this investigation: the NSW Crime Commission, NSW Police Force and Police Integrity Commission. The term 'public authority' extends also to individuals, and can variously include 'any person employed in a Public Service agency' and 'any person in the service of the Crown or of any statutory body representing the Crown' (s 5(1)). A consequence of those definitions is that many individuals have been advised during Operation Prospect that their conduct is a subject of investigation.

An investigation of the conduct of a public authority can stem from a complaint to the Ombudsman under s 12 of the Act, or from the initiative (or own motion) of the Ombudsman (s 13(1)). The investigation can also stem from the operation of the Police Integrity Commission Act, the Police Act and the PID Act, which have an overlapping operation with the Ombudsman Act.

The Police Integrity Commission Act s 90(1)(f) provides that the Inspector of the Police Integrity Commission may refer matters relating to the Commission or its officers to other agencies for investigation. The Ombudsman cannot investigate a matter relating to the Commission or its officers unless it has been referred by the Inspector (s 125).

Part 8A of the Police Act sets out the framework for the Ombudsman's investigation of conduct of current and former police officers. The broad scheme of Part 8A is that complaints about police

conduct are investigated in the first instance by the Commissioner of Police (ss 132, 139), but can in the alternative be investigated by the Ombudsman if the Ombudsman decides it is in the public interest to do so (s 156). The Ombudsman also has an own motion power under Part 8A to investigate conduct of a police officer (s 159).

An investigation by the Ombudsman into police conduct is done under the Ombudsman Act (ss 156(1), 159(1) of the Police Act). The criteria (or focus) for the investigation are listed in s 122 of the Police Act, and are broadly similar to the maladministration grounds in the Ombudsman Act. Two additional grounds for a police conduct investigation are that the conduct constituted an offence or corrupt conduct (s 122(1)(a),(b)) – though in practice those grounds ordinarily become the subject of an investigation by the Police Integrity Commission (Policy Integrity Commission Act s 70).

Some of the complaints the Ombudsman is investigating in Operation Prospect are also public interest disclosures under the PID Act. A ‘public official’ who makes a ‘disclosure’ that falls under that Act gains protection against reprisal action. The term ‘public official’ extends to any individual who is employed by a public authority or who has public official functions (s 4A). The topic of a disclosure can be conduct of a public authority or officer that shows or tends to show corrupt conduct, maladministration, serious and substantial waste of public money or a government information contravention (s 14(1)). (The term ‘maladministration’ is defined in a similar way to the grounds for investigation under the Ombudsman Act, except that a disclosure directly to the Ombudsman is confined to action or inaction of a ‘serious nature’: s 11).

Disclosures under the PID Act are ordinarily investigated in the first instance by the public authority to which the disclosure relates or that employed the officer about whom the disclosure was made. The Ombudsman does however have an investigatory role that can arise in various ways including a referral from an authority (s 26(1)). An investigation of a public interest disclosure by the Ombudsman is conducted under the Ombudsman Act.

### ***The scope of Operation Prospect***

The matters under investigation have come to the Ombudsman’s office under the legislative avenues listed above. That is, the investigation stems from a referral by the Inspector of the Police Integrity Commission, an own motion decision of the Ombudsman to investigate matters that have been referred by other agencies, an own motion decision to investigate other matters that have come to the Ombudsman’s attention, complaints that were made either to the Ombudsman or that fell within Part 8A of the Police Act and disclosures that were made under the PID Act.

A consequence is that there are no terms of reference for the investigation (in the conventional sense), nor any single announcement or document that records the scope of the investigation. It is open to the Ombudsman under s 13 of the Ombudsman Act to frame or clarify the scope of the investigation as it progresses. For example, some matters that are under investigation stem from complaints that were made or referred to the office after the investigation was underway.

That said, the scope of the investigation has broadly remained the same from the outset, and has been described in similar terms in key documents (that refer to the ‘investigative streams’ or ‘lines of inquiry’). The key documents include the notices of investigation that have been given to public authorities under s 16 of the Ombudsman Act, the notices to produce records issued to public authorities under s 18 of that Act, and the summonses to persons to give evidence or produce documents under s 8 of the *Royal Commissions Act 1923*. The scope of the investigation was also

detailed in a letter by the former Ombudsman to the Select Committee inquiring into the conduct of this investigation.<sup>1</sup>

### *The inquiry powers relied upon in Operation Prospect*

The Operation Prospect investigation has been conducted under the Ombudsman Act. Similarly, the inquiry powers that have been exercised derive from that Act. The following key sections have been referred to in correspondence with parties:

- s 13: the Ombudsman may make the conduct of a public authority a subject of investigation, either upon receipt of a complaint or on the initiative (or own motion) of the Ombudsman
- s 13AA: the Ombudsman may make preliminary inquiries for the purpose of deciding whether to investigate the conduct of a public authority
- s 16: upon deciding to investigate the conduct of a public authority the Ombudsman is to give notice of that decision to any complainant, to the head of the public authority, and if practicable to the public authority
- s 17: an investigation under the Ombudsman Act is to be conducted in the absence of the public, that is, in private (s 34 makes it an offence for the Ombudsman or a staff member to disclose information except for a specified purpose that includes the discharge of functions under this or another Act)
- s 18: for the purposes of an investigation the Ombudsman may, in writing, require a public authority to give the Ombudsman a statement of information, to produce a document or other thing, or give a document
- s 19: the Ombudsman may hold an inquiry as part of an investigation, and may exercise powers conferred on a commissioner by the *Royal Commission Act 1923* (which includes a power to summon a person to give evidence as a witness: s 8)
- s 19A: the Ombudsman, if satisfied that it is necessary or desirable in the public interest, may direct that any evidence given at an inquiry, the contents of any document produced to the Ombudsman and information that identifies a witness to an inquiry, must not be published except as authorised by the Ombudsman; it is an offence to contravene a direction under this section (ss 19B and 19C are also relevant to disclosure of information about an inquiry or investigation)
- s 21: a person can be required to provide information or evidence for an investigation or inquiry notwithstanding that an objection could be made in a court of law on grounds of public interest, legal privilege or a duty of secrecy arising under statute or otherwise – although the Ombudsman cannot require a person to give information that is covered by the doctrine of Cabinet confidentiality (s 22)
- s 24: an opportunity to make submissions on the matters under investigation is to be given to a public authority that was given a notice under s 16; and before a report is made that contains adverse comment in respect of any person, the person is to be given an opportunity to make submissions on the substance of the grounds of the adverse comment
- s 31AB: the Ombudsman may furnish information obtained during an investigation to the Director of Public Prosecutions or the Independent Commissioner Against Corruption (although information disclosed for the purpose of a criminal prosecution must relate to an investigation of a matter referred to the Ombudsman by the Inspector of the Police Integrity Commission or the Inspector of the Crime Commission: s 34(1)(b6))

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<sup>1</sup> Letter of 28 January 2015 from NSW Ombudsman to Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", at paragraphs [14]-[23] of the public interest immunity claim in that letter.

- s 10: with some exceptions, the Ombudsman can delegate functions conferred by the Act upon an officer appointed as a special officer under s 9.

### ***Reporting the results of the investigation***

Separate reporting provisions are contained in the Ombudsman Act and the Police Act (as to matters investigated by the Ombudsman that fall under Part 8A of that Act). The main reporting provisions in the Ombudsman Act are the following:

- s 26: the Ombudsman is to prepare a report on an investigation if the Ombudsman finds maladministration in the conduct of a public authority; the report may recommend action to be taken in response; a copy of the report shall be given to the responsible Minister, the head of the relevant public authority, and the Department of the Premier and Cabinet if the public authority was a Public Service employee; and a copy of the report may be given to a complainant and to a public authority to whose conduct the report relates (for example, if the public authority is an individual)
- s 28: the Ombudsman shall provide a report to the responsible Minister and relevant public authority if the Ombudsman is of the opinion, following an investigation, that an official is guilty of misconduct to an extent that may warrant dismissal, removal or punishment
- s 29: if an investigation stems from a complaint under the Ombudsman Act, the Ombudsman shall report to the complainant on the results of the investigation and include such comments as the Ombudsman thinks fit
- s 31: the Ombudsman may at any time make a special report to each House of Parliament, and may recommend that the report be made public.

The reporting provisions in the Police Act are as follows:

- s 157: following the Ombudsman investigation of a complaint to which Part 8A of the Police Act applies, the Ombudsman must prepare a report that may include such comments and recommendations as the Ombudsman considers appropriate; a copy of the report is to be provided to the complainant, the Minister and the Commissioner of Police, who must then provide the copy to the police officer whose conduct was investigated
- s 158: upon receiving a report from the Ombudsman the Commissioner must notify the Ombudsman as soon as practicable of action that has or will be taken as a result of the report
- s 161: the Ombudsman may at any time make a special report to each House of Parliament on a police complaint investigation, and may recommend that the report be made public.

Later in this report I outline my proposed approach to reporting the investigation results of Operation Prospect.

### **Questions raised about the further conduct of Operation Prospect**

Three broad issues have been raised by parties as to the further conduct and finalisation of Operation Prospect. They relate to the change in Ombudsman, the reporting channel and the format of any report(s).

### ***Implications flowing from the change in Ombudsman***

The term of the former Ombudsman ended on 30 June 2015 and my term as Acting Ombudsman commenced on 1 August 2015. I have been asked to clarify whether the statements of provisional adverse findings, comment and/or recommendations that were issued during the term of the former

Ombudsman are still current; and whether I would hold a directions hearing to receive submissions on how the investigation should proceed.

Thirty-three parties were provided prior to 30 June 2015 with a provisional statement and invited to make a written submission in response by a specified date; in most instances the date fell after the commencement of my term on 1 August 2015.

The provisional statements were based on the submissions of Counsel Assisting this investigation, with the assistance of Operation Prospect staff. The statements contain provisional findings, comment and/or recommendations that the Ombudsman may adopt in finalising the investigation.

I have endorsed the process that was underway when I commenced office on 1 August 2015. Specifically, I have advised parties that they should take this opportunity to make full and complete submissions on the provisional statements that were issued under the former Ombudsman. I will not form any views on the matters under investigation until I have received and considered any submissions, and have considered the evidence relied upon to make the provisional findings, comment and/or recommendations. In short, I will approach the task with an open mind as to the opinions to be reached and the way those opinions should be framed or concluded. I may conduct further hearings or invite further evidence if I consider there is a need to do so. These matters were also explained in the public statement that I made shortly after commencing as Acting Ombudsman that is attached to this report.

Adopting that approach, I saw no need to hold a directions hearing to examine how the investigation should proceed. Indeed, I thought that doing so could be potentially confusing and complicating for parties who had already made a submission prior to 1 August 2015 or who were in the process of preparing one.

#### ***How Operation Prospect will be finalised and reported***

My intention is that the investigation should conclude with a special report to the Presiding Officer of each House of Parliament that is made under s 31 of the Ombudsman Act and s 161 of the Police Act. This joint report will deal as comprehensively as possible with the matters that have been investigated. In the normal course a report to the Parliament is made public.

I will also follow the reporting procedures that are set out in ss 26 and 29 of the Ombudsman Act and s 157 of the Police Act. A report or the results of an investigation to which those sections apply is to be given to the responsible Ministers and heads of agency, to an individual whose conduct has been investigated and to a complainant. The content and timing of those reports can differ from a report to the Parliament.

An unresolved issue is whether people should be identified in the special report to Parliament, either as witnesses, persons connected to the events under investigation, or persons against whom adverse views are expressed. The normal approach in Ombudsman reports that are made public is to anonymise personal details as far as possible, consistently with the statutory requirement that an Ombudsman investigation be conducted in private. Some parties have expressly – and forcefully – requested that their identity not be revealed in a public report.

It is premature at this stage to decide whether a thorough public report can be written without identifying at least some people. Some actions or conduct that has been investigated in Operation Prospect is already on the public record or known to a sizeable group of people. I will nevertheless bear in mind that it may be unreasonable or unnecessary to identify individuals in a public report.

### ***How the results of the investigation will be framed***

Section 26 of the Ombudsman Act refers to the Ombudsman making a report if the Ombudsman ‘finds that the conduct the subject of the investigation’ is of a certain kind (emphasis added). The report may include the Ombudsman’s recommendations (s 26(2)). Section 24 requires the Ombudsman to give a person an opportunity to make a submission if ‘there are grounds for adverse comment’ about the person in an Ombudsman report. Those three terms have all been used in the provisional statement provided to parties – that is, the statements have been described as a ‘statement of provisional findings, comment and/or recommendations’.

Two other relevant Ombudsman Act provisions should be noted. Section 29 provides that the Ombudsman shall report to a complainant on ‘the results of the investigation’, and may include ‘such comments’ as the Ombudsman thinks fit. Section 31AB provides that the Ombudsman may ‘furnish information’ obtained in an investigation to the Director of Public Prosecutions, subject to a limitation in s 34(1)(b6) that is explained above.

The Police Act uses different terminology. It refers to the Ombudsman making a report that includes ‘comments and recommendations’ (s 157(2)).

All that can be said at this stage is that I will bear those provisions in mind in deciding how to frame the reports that conclude this investigation. In doing so it may be relevant to have regard to case law that has considered similar issues. Three cases are illustrative, though each was decided under different statutory schemes. In *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625, the High Court held that ICAC was not authorised under its statute to include in a report a finding that a person may be guilty of a criminal offence or corrupt conduct. More recently in *Australian Communication and Media Authority v Today FM (Sydney)* (2015) 317 ALR 279, the High Court held, again referring to the statute under consideration, that ACMA could reach a finding that Today FM had breached a condition of its licence by using the licence in the commission of an offence. Lastly, in *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 134 ALD 238, the Federal Court held that the Commonwealth Ombudsman could not express a ‘finding’ of criminal guilt or disciplinary breach, as opposed to expressing an ‘opinion’, being the term used in the statute.

### **The requirements of natural justice in their application to Operation Prospect**

The Ombudsman’s obligation to observe the requirements of natural justice (or procedural fairness) is a frequent theme in the submissions I have received. Claims have been made that parties have been denied natural justice in the way that Operation Prospect has been conducted. Some parties have elaborated by referring extensively to case law that I should have regard to. Other legal submissions have tersely assumed that I am unaware of the legal duty to accord natural justice.

Section 24 of the Ombudsman Act requires that natural justice be observed by the Ombudsman in two ways:

- an opportunity to make a submission on the matters under investigation is to be given to a public authority that was given a notice under s 16, and
- before a report is made that contains adverse comment in respect of any person, the person is to be given an opportunity to make submissions on the substance of the grounds of the adverse comment.

The common law supplements those provisions in a number of ways that can be relevant to this investigation. An example is the requirement that a person be told of adverse information before the

decision maker that is credible, relevant and significant to the decision to be made (*Kioa v West* (1985) 159 CLR 550, 629).

I would make a few observations at this stage. The guiding principle is that the requirements of natural justice depend on the facts and circumstances of each case (*Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 503). As regards the obligation to provide a person with a fair opportunity to be heard and to correct or contradict prejudicial information, the critical time for deciding if that obligation has been met is towards the conclusion of the process of deciding or reporting (*Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 96).

A variety of circumstances are relevant in deciding the steps that should be taken in Operation Prospect to observe the requirements of natural justice. One is the requirement in s 17 of the Ombudsman Act that the investigation be conducted in private: this constrains the access that parties can be given to the evidence of other parties and witnesses, and to confidential law enforcement information. Another is that Operation Prospect is not an adjudication of a contested dispute between parties: it is an investigation that has the purpose of preparing a report that may express opinions and make recommendations for further action. Yet another is that the investigation is not complete: the submissions of the parties may require further hearings or consultation.

Operation Prospect has taken numerous steps to ensure that natural justice is observed to the fullest extent practicable. This includes interviewing some parties; examining parties at formal private hearings, and providing them with a transcript of their evidence; providing parties with an opportunity before some hearings to inspect documents; providing parties with a provisional statement of findings and recommendations and inviting a response; for that purpose, allowing parties to inspect documents and exhibits, including relevant extracts from the transcript of evidence of other parties; allowing an extension of time in many instances for document inspection and responses; and replying orally and in writing to individual enquiries, including by providing further particulars of adverse findings.

I am aware that additional steps may be required to ensure that parties are afforded natural justice. The next stage in the investigation is to consider the submissions of parties and to finalise the investigation results. A need may arise in doing so to provide a party with an opportunity to comment on an adverse conclusion that has not previously been raised with the party. One option that will be considered is to provide some persons with a relevant extract from the draft final report, and to invite comment within a strict timeframe.

Another requirement of natural justice that has been raised in correspondence I have received is the bias rule, specifically, that decision making must be, and be seen to be, impartial. I thought it important to examine and respond promptly to all allegations of bias. I have not been persuaded by any of the submissions I have received that there is a reason to discontinue the investigation.

Nor have I been persuaded that the integrity of the investigation is impaired by any alleged controversy relating either to the investigation or matters that are under investigation. It is not uncommon in inquiries of this nature that public notoriety occurs, and the inquiry must proceed in an orderly and principled manner.

### **Notice that a person is a subject of investigation**

Some parties have queried the adequacy of the notice they received under s 16 of the Ombudsman Act advising that their conduct is a subject of investigation in Operation Prospect. This was usually framed as a complaint that the person was led to believe from discussion with Operation Prospect staff that they were being summonsed as a witness and not as a person against whom adverse

findings may be made. Following a hearing the person later received a notice under s 16 of the Ombudsman Act advising that they are a subject of investigation and that the person's conduct could be the subject of an adverse finding or comment under the Ombudsman Act or the Police Act. Some parties claimed they may have acted differently had more been known, for example, they may have prepared differently for a hearing or obtained legal representation at an earlier stage.

As explained above, Operation Prospect is an investigation that is being conducted under s 13 of the Ombudsman Act, which provides that the Ombudsman may investigate the 'conduct of a public authority' if it appears to the Ombudsman that the conduct may constitute maladministration of a kind referred to in s 26 of the Act. (A similar provision in s 122 of the Police Act applies to police conduct that the Ombudsman may investigate.)

At the time of deciding to investigate the conduct or police conduct of a public authority the Ombudsman is required by s 16 of the Act to give a 'notice of investigation' to the authority that describes the conduct that is 'the subject of the investigation'. An individual may fall within the definition of 'public authority' under s 5 of the Act and, accordingly, be given a notice under s 16.

Notices under s 16 were issued to the NSW Police Force and the Crime Commission at the early stages of Operation Prospect, and the Police Integrity Commission was given a summons to produce documents. Notices were not given at that early stage to individuals who were later required under ss 18 or 19 of the Ombudsman Act to provide information or documents or to give evidence at a hearing. In most instances the decision to give a notice to an individual was made at the time the Ombudsman's office received the submissions of Counsel Assisting on which the statements of provisional adverse findings, comment and/or recommendations were based. The s 16 notice was issued concurrently with the person being invited to respond to the provisional statement. In a few instances a s 16 notice was issued at an earlier stage when a decision was made that the individual's conduct or police conduct would be a subject of investigation.

The decision to make an individual a subject of investigation can be based on an analysis of the information and oral evidence that is gathered both from that person and from others, and on the submissions of Counsel Assisting. The full list of authorities and individuals to be made a subject of investigation had not been decided when Operation Prospect commenced. As Operation Prospect is a broad and multi-segmented investigation into the actions of multiple public authorities and a range of conduct, the scope of the investigation, and the decision as to who is a subject of investigation, has been clarified during the course of investigation.

The Ombudsman's office has acted throughout to curtail the prejudice a person may suffer (real or perceived) as a consequence of receiving a notice under s 16 during the course of the investigation. The summons requiring a person to attend a hearing briefly explained the scope of Operation Prospect and particularised the conduct and allegations that may be examined in the hearing. Each summons included a page dedicated solely to the subject of legal assistance through the Legal Representation Office for those receiving the summons or notice.

It is important also to note that a witness who is a public authority is unlikely to have been disadvantaged by not being accompanied by a legal representative who could advise the person to object on a ground of privilege to answering a question or providing information or documents. As noted above, the effect of s 21 of the Ombudsman Act is that a witness who falls within the definition of a public authority cannot claim grounds of privilege that may operate in another forum, such as a public interest immunity claim or the privilege against self-incrimination. A public authority can only decline to answer a question or produce a document if a valid claim of Cabinet confidentiality is made out (s 22). This was explained in a document attached to the summonses that

were issued, titled “Advice to Legal Representatives in Inquiries pursuant to the provisions of section 19 of the Ombudsman Act 1974”.

Any person who has subsequently expressed concern that they are prejudiced by being given a s 16 notice at a late stage has been advised that it is open to them in a further submission to explain how this asserted prejudice or unfairness has tainted a provisional adverse finding, comment and/or recommendation against the person. However, any submission to that effect should rise above a general claim of unfairness and should explain and draw a connection between the claim of prejudice resulting from the time the s 16 notice was received and a particular finding, comment and/or recommendation.

### **Making adverse findings based on existing evidence**

It has been submitted that I cannot make an adverse finding on the basis of oral testimony that was given at a hearing at which the former Ombudsman presided. Another way this submission has been put is that a change in presiding officer should ordinarily lead to a recommencement of at least some elements of the investigation, particularly the reception of oral testimony and the analysis of evidence and presentation of draft findings. I will discuss separately the two issues of a change in presiding officer and receiving and acting on oral evidence.

The primary rule that operates in court and tribunal proceedings that are uncompleted at the time of the death, illness, resignation or incapacity of the presiding officer is that the court or tribunal should be reconstituted and commence the adjudication afresh (*Wentworth v Rogers (No 3)* (1986) 6 NSWLR 642, 649; *Bakarich v Commonwealth Bank of Australia (No 2)* [2012] NSWCA 390 [34]-[49]; *Martinuzzi v Fair Work Ombudsman* [2012] FCA 636 [10]-[23]). That rule, to which there are exceptions, is based on elementary principles of justice, including principles of natural justice or procedural fairness.

Parties have been advised of my view that the rule does not apply in the same way to an investigation conducted under the Ombudsman Act. It is not an inherent requirement of natural justice, in its application to administrative decision making and investigation, that the same officer should preside at all stages of the process, including the reception and analysis of evidence. It is commonplace in administrative decision making and investigation that the requirements of natural justice are met by different personnel at various stages of the process, or that a change in presiding officer occurs between the commencement and finalisation of the process.

The different practice in administrative proceedings may also be regarded as a necessary implication of the Ombudsman Act. The Act confers inquiry powers (that are delegable) upon a single statutory officer who is appointed for a fixed term and is expected to manage a large investigation caseload. It is inevitable that some – perhaps a large number of – matters will be uncompleted when there is a change in Ombudsman. Nor, in fact, did the former Ombudsman preside at all Operation Prospect hearings. Many were conducted by a Deputy Ombudsman under delegation from the Ombudsman (the Deputy is still part of the Operation Prospect staff). Many witness interviews were conducted by other staff, some of whom are continuing Ombudsman employees, others of whom have left.

Whether an oral hearing is required to meet the requirements of natural justice can be a less straightforward issue. While ‘there is no general rule that procedural fairness requires an administrative decision-maker to afford a person affected by the decision an oral hearing in every case ... in some circumstances a reasonable opportunity to be heard will involve some form of oral hearing’ (*Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 at [33], [39]). An important consideration is whether assessment of a person’s credibility is a central issue in the decision, and if so, whether that can be resolved adequately without regard to a person’s demeanour

in an interview or without direct interaction or questioning between a person and the decision maker (*WZARH* at [38]-[41]).

Other considerations that can be important were discussed by the High Court in *WZARH*. The Court held that a visa applicant had been denied procedural fairness after being interviewed by an immigration reviewer who was later replaced by another reviewer who made an adverse assessment of the application without interviewing the applicant. In addition to the potential importance of a credibility finding in the reviewer's assessment, the Court noted that the visa applicant was unaware of the changed process, he did not have an opportunity to make submissions on how the process should be completed without him being disadvantaged, he may have presented his case differently had he been aware of the changed process, and not all information before the first reviewer was reflected in the assessment by the second reviewer (at [45]-[46], [64]-[69]).

I have had regard to those considerations but do not believe that they require me at this stage to conduct a fresh round of oral hearings with the parties to whom a provisional adverse statement has been given. Factors on which I base that decision (and that distinguish this case from *WZARH*) include that it is not my role to make an assessment of an individual claim; the parties are aware of the change in presiding officer; I have full access to the documents and transcript evidence (including audio of the proceedings and interviews) on which the provisional adverse statements were based; parties have been invited to make submissions on all relevant issues that will be taken into account, and in particular may submit that it would be unfair or undesirable for me to rely on particular evidence given at a hearing or to rely on a provisional finding, comment and/or recommendation without conducting a further hearing or re-hearing evidence on a contested issue; I have not yet formed any view on the issues under investigation; it is too early to know whether my assessment of a person's credibility will be an influential factor in views that I reach, and if so, the basis of any credibility assessment; there may be 'logistical considerations' in conducting re-hearings at this stage (*WZARH* at [68]); and I have acknowledged that a need may arise at a later stage in this investigation to conduct a further oral hearing or to interview a party.

### Cross-examination of witnesses

A complaint by some parties is that they were not given the opportunity to cross-examine other witnesses during the hearings that were conducted in Operation Prospect.

For the conduct of those hearings the Ombudsman appointed Counsel Assisting, who led the examination of witnesses. Those called as witnesses were advised in writing that they could apply in advance to be legally represented during their examination. Many did apply and their requests were approved if no conflict arose as to the nominated legal representative.

The hearings were conducted in private as required by s 17 of the Ombudsman Act. The process was inquisitorial in nature and was essentially an evidence-gathering exercise to assist the Ombudsman to prepare a report on the investigation. The proceedings were not so analogous to contested adversarial proceedings before a court or tribunal as to give rise to a legitimate expectation that parties should be entitled to cross-examine other witnesses (*Hurt v Rossall* (1982) 43 ALR 252, 258-9; *NCSC v News Corporation Ltd* (1984) 156 CLR 296).

There are also practical constraints on allowing cross-examination during Operation Prospect. A large number of witnesses were examined over more than 70 days. It was not apparent at the time that witnesses were called for examination how their evidence may relate to that of other witnesses. Other steps, as outlined above, have instead been taken to ensure that procedural fairness requirements are properly met during Operation Prospect. This includes giving access to relevant extracts from the transcripts of evidence of other parties during the procedural fairness process.

## Conclusion

My view is that the Operation Prospect investigation will meet the three objectives stated at the beginning of this report: a thorough examination is being undertaken of important and unresolved issues concerning policing and public administration in NSW; reasonable steps are being taken to ensure that individuals and agencies involved in the investigation are treated fairly and have a full opportunity to express their views before any conclusions are reached; and the investigation is proceeding as efficiently as possible.

The investigation cannot be finalised until the procedural fairness phase that is currently underway is concluded properly. That is likely to extend into December 2015. I anticipate that Operation Prospect can then be finalised in the first half of 2016. The NSW Ombudsman's office is strongly committed to that goal.

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### Media statement – Professor John McMillan

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## NSW Ombudsman Operation Prospect

I recently commenced my two-year term on 1 August 2015. I feel it is appropriate to issue a brief public statement in relation to my office's ongoing investigation, Operation Prospect.

The background to and progress of the investigation is explained in correspondence by the office to the Select Committee into the conduct and progress of "Operation Prospect". I advise anyone seeking more detailed information about the work performed by this office to review this correspondence, which is on the [NSW Parliamentary website](#).<sup>1</sup>

The investigation has reached an advanced stage. Provisional findings have been notified to 33 parties. This is an important process which provides an opportunity to anyone who may be the subject of adverse findings or comment in a final report to make a submission in response. Those who have been invited to respond have the opportunity to inspect evidence on which the provisional findings are based. Our office has provided many of those wishing to make submissions with extensions of time, which extend to September in some cases.

In taking charge of this investigation I am currently analysing the evidence collected throughout the life of the investigation, reviewing the transcripts and recordings of hearings that were earlier conducted, and considering the complaints, submissions and other correspondence from interested parties.

In doing so I have taken note of critical comments about the investigation that have been made in the media, in Parliamentary committee hearings, and in submissions and correspondence. That includes comments about the length of time of the investigation, the direction of the investigation, the potential reputational or other harm to persons adversely affected, who should be called as a witness, allegations of bias in the investigation, and the difficulty facing a new Ombudsman in gaining a comprehensive understanding of all aspects of the investigation. In short, I am apprised of the importance, complexity and the scale of the task before me.

If I consider there is a need to conduct further hearings or to rehear evidence on a contested issue I will take that course. In the meantime it is important that all affected parties who have been provided with an opportunity to make a submission take the opportunity to do so in accordance with the timetable provided by the Ombudsman's office. I will look to make further public comment at a later time if I feel it is important to do so. I will not be making any further comment at this time.

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<sup>1</sup> Correspondence: *NSW Ombudsman to Chair regarding the conduct of Operation Prospect and public interest immunity matters*, 28 January 2015, Parliamentary Select Committee into the conduct and progress of "Operation Prospect".