

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 supplementary questions and corrected transcript**

I am writing in response to a letter from Ms Higgins, dated 23 June 2015, which was accompanied by an uncorrected transcript, questions on notice and supplementary questions. The following are my responses to questions on notice and supplementary questions, and my corrections to the transcript are attached.

**Question on notice**

I believe that the totality of my evidence before the Committee, and particularly my answer to Mr Kahn at pages 24-25, provides an answer to Mr Searle's question at page 22 of the transcript. I note that at page 35 at the conclusion of my evidence, Mr Searle indicates that he is content with my evidence sufficiently addressing his question on notice.

**Supplementary questions one and two**

Any correspondence, and the content of any correspondence, in which my office has sought advice from the Director of Public Prosecutions is subject to legal professional privilege. Accordingly, I will not provide the Committee with information about the contents of any such request for advice, and I will not provide the Committee with a copy of any correspondence requesting advice.

**Supplementary question three**

I have attached a copy of the final, signed Memorandum of Understanding between my office and the Office of the Director of Public Prosecutions.

#### Supplementary question four

The following budgetary information is provided for the period up to and including 31 May 2015 (the figures to the end of June 2015 not yet being available).

| Category of expenses      | Actual (\$000) |
|---------------------------|----------------|
| Employee related expenses | 4,423          |
| Other operating expenses  | 1,271          |
| Capital                   | 402            |
| Total                     | 6,096          |

Yours sincerely

Bruce Barbour  
Ombudsman

26/6/15

## **ARRANGEMENT FOR REFERRAL BY NSW OMBUDSMAN TO OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS (NSW) OF *OPERATION PROSPECT* MATTERS**

1. This Memorandum of Understanding (MOU) is made on the **6<sup>th</sup>** day of May 2015 between the NSW Ombudsman and the Office of the Director of Public Prosecutions (NSW). This MOU applies to all referrals made by the NSW Ombudsman to the Office of Director of Public Prosecutions (NSW) of *Operation Prospect* matters from the above date.

### **PURPOSE**

2. The purpose of this arrangement is to enable charges arising out of *Operation Prospect* to be laid, whenever appropriate, and prosecuted promptly, and to set out in general terms the responsibilities of the NSW Ombudsman and Office of the Director of Public Prosecutions (ODPP) in relation to:
  - a) the furnishing by the NSW Ombudsman to the ODPP of admissible evidence obtained as the result of *Operation Prospect*, pursuant to the provisions of s.31AB and s.34(1)(b6) of the *Ombudsman Act 1974*; and
  - b) liaison arrangements between the NSW Ombudsman and the ODPP to ensure that:
    - i. any evidence furnished by the NSW Ombudsman to the ODPP is provided in a timely manner and presented in an orderly, comprehensive and accurate form;
    - ii. the ODPP assigns an appropriately senior officer to consider such evidence in a timely and efficient manner;
    - iii. the ODPP provides advice in a timely manner to the NSW Ombudsman about whether or not a prosecution should be commenced.

### **FURNISHING OF EVIDENCE**

3. The NSW Ombudsman will (and in any event within 4 months of the end of *Operation Prospect*) provide copies of statements, exhibits annexed to relevant statements and any other relevant admissible material to the ODPP, together with a covering letter outlining what charges have been identified by the NSW Ombudsman as being open on the evidence. The letter will outline the evidence obtained during *Operation Prospect* and any relevant legal and evidentiary issues.
4. The letter should:
  - a) identify each of the proof elements for the identified charge(s);
  - b) identify any known or expected difficulties of proof;
  - c) identify which witnesses have indicated that they are willing to give evidence, and

particulars of the manner in which this willingness was conveyed to the NSW Ombudsman;

- d) identify which witnesses have indicated that they are not willing to give evidence and particulars of the manner in which this unwillingness was conveyed to the NSW Ombudsman;
- e) identify and explain the significance of the documents included in the brief (preferably in the form of a table attached to the letter);
- f) advise if there is any particular urgency, and, in the case of matters in which summary charges are considered appropriate, advise of the last date on which proceedings can be instituted.

5. Admissible material involves the following:

- a) signed witness statements including a jurat;
- b) banker's affidavits, producing banking records;
- c) evidence not subject to s.36 of the *Ombudsman Act 1974* (unless such evidence relates to an offence under s.37 of the *Ombudsman Act 1974*);
- d) exhibits, annexed to the relevant statements, not to a general statement by an Ombudsman investigator.

6. Admissible material does not include, and the NSW Ombudsman will not furnish unless and until requested by the ODPP:

- a) evidence subject to s.36 of the *Ombudsman Act 1974*, except in relation to an offence under s.37 of the *Ombudsman Act 1974*;
- b) the *Operation Prospect* investigation report.

7. In cases where a significant witness refuses to provide a statement, transcripts of relevant portions of that witness's evidence given under objection may be provided with the brief in order that the ODPP may consider whether such witness should be called without a statement having been provided. However, the transcript of evidence of such a witness will be provided with the brief only if the prior approval of the Managing Lawyer for ODPP Group 6 has been obtained.

8. The ODPP will not furnish preliminary advice on an incomplete brief, except in special extenuating circumstances as agreed between the persons stipulated in paragraph 38 below.

9. Where potential offences are summary offences, the NSW Ombudsman will ensure that the documentation referred to in paragraph 3 is provided to the ODPP as soon as practicable and the ODPP will ensure that the advice as to whether any criminal charges are available is rendered in a timely manner, allowing the NSW Ombudsman sufficient time for a NSW Ombudsman officer to cause a CAN to be issued in accordance with the advice.

10. In matters in which any charges identified by the NSW Ombudsman are time-limited summary offences, the NSW Ombudsman brief will be provided as early as is practicable, and in any event not later than three months before the time will expire. Within eight weeks of the ODPP receiving the material referred to in paragraph 3, the ODPP will advise the NSW Ombudsman if criminal charges are available or will provide a progress report. Where charges are available, the ODPP will identify them and provide the appropriate wording for the CANs and a statement of facts.

#### **INDICTABLE OFFENCES**

11. Upon receipt of the documentation referred to in paragraph 3, the ODPP will assign the matter to an appropriately senior ODPP lawyer. The ODPP will advise the NSW Ombudsman of the name of the lawyer to whom the matter has been referred, his/her telephone number and other contact details within two weeks of the receipt of the documentation. The assigned lawyer will arrange a conference with relevant NSW Ombudsman officers within three months of receipt of the documentation.
12. At the conference, a timetable for the answering of requisitions and the furnishing of advice by the ODPP as to whether criminal charges are available will be agreed, and confirmed in writing by the ODPP.
13. Any variation to this timetable, including any requests for further requisitions, should be raised by the ODPP lawyer by way of initial discussion and then confirmed in writing.
14. The ODPP will aim to provide advice to the NSW Ombudsman as to whether criminal charges are available as quickly as practicable after receipt of the brief, and at least within 6 months for standard matters and within 12 months for complex matters, subject to the NSW Ombudsman providing responses to any requisitions issued within the agreed timeframes. The Managing Lawyer for ODPP Group 6 will nominate whether a matter is standard or complex when allocating the matter to an ODPP lawyer.

#### **INDICATION OF EARLY GUILTY PLEA**

15. In cases where NSW Ombudsman officers have been advised that a person who has been the subject of *Operation Prospect* wants to plead guilty, a brief of evidence may be provided that is streamlined but contains the evidentiary material capable of supporting the elements of the charge.
16. In cases where there are co-offenders, and a plea of guilty is being offered on the basis that evidence will be given against other offenders and recognition sought for such cooperation on sentence, NSW Ombudsman officers will also provide the evidence then available in respect of the co-offenders, a detailed summary of that evidence, and an indication of how the cooperation offered would assist in the prosecution of such co-offenders, but will not be required to provide full briefs of evidence in respect of all such possible co-offenders at the time of the consideration by the ODPP of the proposed guilty plea.

## REQUISITIONS

17. Upon receipt of the material referred to in paragraph 3, and before or at the conference referred to in paragraph 11, the ODPP may raise requisitions, in writing, identifying any additional evidence or other material required to be obtained by the NSW Ombudsman.
18. The NSW Ombudsman will obtain additional evidence as requested by the ODPP. If any questions of law arise, clarification and advice will be sought from the ODPP, preferably through another conference.
19. Where the ODPP, after receiving a response to requisitions, raises additional requisitions necessary to complete the brief of evidence, the ODPP advice as to the charges to be laid will be provided within six weeks of receiving the additional material, or the ODPP will provide a progress report prior to the expiration of the six weeks, indicating the date by which it is expected the advice will be provided.

## INSTITUTING A PROSECUTION

20. If, after consideration of the advice of the ODPP, the NSW Ombudsman is of the view that other charges (based on the same evidence) are preferable to those advised by the ODPP, the NSW Ombudsman will consult with the ODPP regarding the laying of those CANs.
21. Upon receipt of appropriate wording for the CANs and statement of facts and a decision by the NSW Ombudsman to proceed, the nominated NSW Ombudsman case officer will prepare CANs and then proceed to issue the CANs, obtain a date and serve the CANs upon the Defendant. Prior to obtaining a date for the CANs, the NSW Ombudsman case officer will consult with the ODPP about a suitable return date. If for any reason the CANs are not served within four weeks of receipt of the ODPP's advice to prosecute (or such shorter period as is appropriate where statutory time limits apply), the NSW Ombudsman will advise the ODPP in writing of its intended action.
22. The NSW Ombudsman will file the affidavit of service and court copy of the CANs with the registry of the relevant court and advise the ODPP when this has been done.
23. The NSW Ombudsman case officer will provide a copy of the CANs and the affidavit of service to the ODPP lawyer within three working days of service.
24. The ODPP will appear on the return date of the CANs and will take over the prosecution at that time under s.9 of the *Director of Public Prosecutions Act 1986*.
25. In respect of indictable offences, the NSW Ombudsman will serve a disclosure certificate on the ODPP prior to the brief of evidence being served on the accused. The disclosure certificate will be in the same form as Schedule 1 to the *Director of Public Prosecutions Regulation 2010* relating to the duty of disclosure upon police officers.
26. The ODPP will specify in writing to the NSW Ombudsman the documents required to be included in the brief of evidence to be served upon the defendant.
27. The NSW Ombudsman case officer will prepare a notice, pursuant to s.75 of the *Criminal Procedure Act 1986*, and serve it and a copy of the brief of evidence in



accordance with the relevant practice note of the Local Court. A copy of the s.75 notice as served on the defendant will be provided by the NSW Ombudsman officer to the ODPP lawyer with carriage of the matter within three working days of service upon the defendant.

28. The disclosure certificate and s.75 notice will specify the documents and other contents of the brief of evidence through a detailed description.

## **COSTS**

29. The NSW Ombudsman is responsible for meeting the expenses of security arrangements for NSW Ombudsman witnesses who are the subject of witness security arrangements.
30. The ODPP is responsible for meeting the cost of witness expenses for those witnesses who are not the subject of witness security arrangements. These expenses include travel costs in all prosecutions conducted by the ODPP and any order for costs to be paid to the defendant if the prosecution fails.
31. The NSW Ombudsman will bear the costs relating to the investigation of the charge and the obtaining of evidence.
32. The ODPP and the NSW Ombudsman may make arrangements for the sharing of costs associated with the preparation of evidence for trial.
33. The NSW Ombudsman will be responsible for arranging for the attendance of witnesses at the hearings. The ODPP will provide the NSW Ombudsman with information, updated as necessary explaining payment of costs and related matters. The NSW Ombudsman will forward relevant aspects of this information to witnesses.

## **SUMMARY HEARINGS, COMMITTAL AND TRIAL**

34. The ODPP will provide subpoenas to the NSW Ombudsman within an adequate time to permit the NSW Ombudsman to attend to service.
35. The ODPP lawyer with the carriage of a prosecution will liaise with relevant NSW Ombudsman officers in relation to witnesses and exhibits that will be required at hearings.
36. The NSW Ombudsman is generally responsible for the storing and transporting of NSW Ombudsman exhibits and original documentation. The NSW Ombudsman will arrange for attendance by appropriate NSW Ombudsman officer(s) at hearings.

## **DECISION NOT TO PROCEED**

37. The ODPP will convey to the NSW Ombudsman, in writing when requested, short reasons why prosecutions are not commenced or continued. In particular, it will advise if it be the case that a prosecution cannot be continued because a witness has become unavailable or has declined to provide evidence.

## **POINTS OF CONTACT**

38. The official points of contact, and the points of contact for all matters of a serious or sensitive nature, will be the NSW Ombudsman case officer and the Managing Lawyer for ODPP Group 6.
39. As well as liaising in respect of specific issues that might arise, these officers will meet at least once every two months to discuss the progress of preparation of advice by ODPP lawyers and the progress of responses to requisitions by NSW Ombudsman officers.
40. The usual points of contact for each prosecution will be between the relevant ODPP lawyer and the NSW Ombudsman case officer.
41. The address for all correspondence between the NSW Ombudsman and the ODPP is:

To the NSW Ombudsman:

Legal Counsel to the NSW Ombudsman  
Office of the NSW Ombudsman  
Level 24, 580 George St  
SYDNEY NSW 2000

To the ODPP:

Solicitor for Public Prosecutions  
Office of the Director of Public Prosecutions  
DX 11525 SYDNEY DOWNTOWN

**Bruce Barbour**  
Ombudsman

**Lloyd Babb SC**  
Director of Public Prosecutions