

**Submission  
No 4**

**INQUIRY INTO PROGRESS OF THE OMBUDSMAN'S  
INVESTIGATION 'OPERATION PROSPECT'**

**Name:** Mr Stephen Barrett (through O'Brien Lawyers)

**Date received:** 15/06/2015

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# O'BRIEN LAWYERS

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15 June 2015

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

**By Email: [GPSC4@parliament.nsw.gov.au](mailto:GPSC4@parliament.nsw.gov.au)**

Dear Mr Borsak

**RE: FURTHER SUBMISSION TO THE SELECT COMMITTEE ON THE  
CONDUCT AND PROGRESS OF THE OMBUDSMAN'S INQUIRY  
"OPERATION PROSPECT"  
STEPHEN BARRETT**

We refer to your email of 4 June 2015 inviting our client to provide further submissions on the progress of the Ombudsman Operation Prospect Inquiry into Police bugging, in particular:

1. The delay in finalising the report on the Operation Prospect Inquiry into Police bugging;
2. The cost of Operation Prospect;
3. The consequences of the conclusion of the term of office of the current Ombudsman on 30 June 2015 on both the enquiry and report and its ongoing impact on NSW Police;
4. The circumstances in which the potential and/or proposed prosecution of a Deputy Police Commissioner arising from the Operation Prospect was divulged to the media;
5. The role of the Attorney General's Office in considering any referrals from the Ombudsman relating to the inquiry; and
6. Any other related matters.

We are instructed as to the following and make the following further submissions:



1. We refer to submission of 13 January 2015 on behalf of Mr Barrett and we adopt the matters set out therein.
2. In providing our current submission on behalf of a client we assume that our client will continue to remain protected by parliamentary privilege as set out in the media release dated 24 November 2014.
3. Our client will be pleased to have this submission published by the Committee.
4. We have also provided submissions on behalf of Mr Brian Harding and our client adopts those submissions.

**The delay in finalising the report on Operation Prospect Inquiry into Police bugging**

5. The events leading to this inquiry date back to 1999 and 2000. The existence of the warrant and/or warrants became public in 2002 when our client *was* provided with a copy of the listening device warrant authorised by her Honour Bell J. The matters were further ventilated three years ago when our client was further provided with a copy of the supporting affidavit for the listening device warrant authorised by Bell J.
6. Self evidently those in command of the NSW Police Force knew of the existence of these warrants and for at least 3 years knew of the contents of the supporting affidavit relating to the Bell J warrant. It has been 13 years since our client became aware of the existence of at least the Bell J listening device warrant. Our client has previously repeatedly complained to law enforcement authorities and to his respective Local members in both State and Federal Parliament.
7. When our client was compulsorily examined by the Ombudsman he was assured by the Ombudsman that he would get to the bottom of the complaints made to his office. Further to the matters raised in our submissions of 13 January 2015 in relation to the questioning of our client at that compulsory examination as to the source of documents that came into his possession, the further delay by the Ombudsman in circumstances where his investigation is shortly to enter into its fourth year is having a devastating impact upon our client.
8. Our client became even further concerned when it was brought to his attention that the Ombudsman commenced advertising for officers to assist with Operation Prospect for a period of 12 months.
9. Our client was forwarded a letter from the Ombudsman's office dated 19 May 2015. We **enclose** herewith a copy of that letter.

10. We do not accept the reasons set out by the Ombudsman for the further delay. It is well known, and it must have been known to the Ombudsman when he commenced his investigation, that any persons adversely affected or potentially adversely mentioned in any findings must be afforded an opportunity to comment on the evidence and any provisional findings that may affect them. This is a fundamental principle of law. It is perverse in the extreme for the Ombudsman to now blame the delay on those persons who may potentially have adverse findings made against them requiring time to respond to the evidence in the matters raised by the Ombudsman. Simply put, the time required to respond by those persons adversely affected should have been factored into the Ombudsman's estimate for the time required to undertake its investigations and publish its findings.

### **The cost of Operation Prospect**

11. Our client has not been provided with details of the Ombudsman's cost for undertaking investigation into the Police bugging scandal. However, the time taken by the Ombudsman thus far is self evidently a public scandal and must represent a significant drain on public funds.
12. It is our view and we reiterate matters raised in our letter of 13 January 2015 that the proper approach is to have a properly constituted judicial inquiry. It is apparent that the principal reason for the delay in providing those persons adversely affected with time to consider and respond would be eliminated in circumstances where the evidence is properly tested. Whilst we appreciate that your committee has endeavoured to uncover the events from 15 years ago and is continuing, the matters raised by the Committee have not been properly tested by examination and by cross-examination on behalf of those affected, including our client, Mr Barrett.
13. It is equally self evident that an open public inquiry is the only means to properly test the allegations.
14. The costs and delay have only been aggravated by the Ombudsman's insistence that it should investigate the complainants as to the source of the documents that came into their respective possession. It is incomprehensible as to how a law enforcement or investigative body such as the Office of the Ombudsman, charged with investigating serious criminal conduct by senior members of law enforcement bodies can both investigate a complaint against those members and those complainants at the same time within the framework of the same investigation.

### **The consequences of the conclusion of the of the current Ombudsman on 30 June 2015 on both the inquiry and report and its ongoing impact on NSW Police.**

15. Although our client was informed by letter dated 19 May 2015 that the Ombudsman's term ends on 30 June 2015 our client has been provided with no information as to the effect that this will have on Operation Prospect in the sense of the ongoing investigation and the report.

**The circumstances in which the potential and/or proposed prosecution of a Deputy Police Commissioner arising from the Operation Prospect was divulged to the media**

16. This can only be seen as a deplorable situation, of Orwellian proportions, particularly, in light of the Ombudsman's correspondence directed to Mr Brian Harding in relation to a complaint relating to the dissemination of an open letter forwarded to us by the Ombudsman in relation to Mr Harding. We confirm that that correspondence and our response have previously been provided to this Committee.
17. Logically, the information that was leaked to the media must have emanated from either the Ombudsman's office or from the Attorney General's Department. Such a leak is on all fours with the type of leak being investigated by the Ombudsman. Again, we repeat, "Who guards the guards?" The irony of the situation would not be lost on your Committee nor on Mr Harding given the matters raised by the Ombudsman in his correspondence with Mr Harding as to his knowledge of the author of any leak of information.
18. We note that there has been a deafening silence by the Ombudsman in this regard. Nonetheless, we naturally assume however that the leak is in fact being investigated by the Ombudsman given his concerns in relation to previous leaks from other investigative bodies in his as yet unfinished inquiry. We doubt however, whether he has either the authority or the power to investigate the Attorney General's department, whilst at the same time investigating his own Office in relation to the leaks.

**The role of the Attorney General's office in considering any referrals from the Ombudsman relating to the inquiry**

19. We respectfully submit that given it is equally possible that any such leak could also have emanated from the Attorney General's office this is a further reason why there should be a judicial inquiry. This whole sorry state of affairs has become somewhat of a Gilbertian farce which can only be properly resolved to the satisfaction of those adversely affected and to the public at large by such a judicial inquiry as set out above.

**Any other related matters**

20. It is of particular concern to our client that as was revealed by the Ombudsman in his evidence before this Committee that our client was named on some 52 warrants. Until that disclosure by the Ombudsman our client was aware that only two warrants had entered the public domain. Our client *is* now concerned to learn of the fact that he was the subject of 52 warrants in these circumstances. Logically, the fact that our client was named in 52 warrants must have been known to the Ombudsman at the time of our client's compulsory examination. It is our submission that such an explosive disclosure should have been made to our client in the confines of that private compulsory examination. The information then would obviously be subject to non-publication orders that would flow from any compulsory examination by the Ombudsman.

21. It is our submission that this disclosure by the Ombudsman of our client being named on 52 warrants is illustrative of the Ombudsman's contemptuous disregard of our client's rights and reinforces our client's perception that the real purpose of the Ombudsman's inquiries was and remains to ascertain who disclosed the information and to pursue those persons.
22. We note that our client appears to be the only person named on the warrants who is unable to obtain funding for his legal representation through the Department of Justice. Self evidently, this is unjust.

Finally, please feel free to contact the writer if you have any queries or wish to discuss any matter raised herein.

Yours faithfully  
O'BRIEN LAWYERS

ANDREW O'BRIEN

Encl.

**PRIVATE & CONFIDENTIAL**

Mr Stephen Barrett  
[c/andrew@obrienlawyers.com.au](mailto:c/andrew@obrienlawyers.com.au)

19 May 2015

Dear Mr Barrett,

I am writing to provide you an update on the status of Operation Prospect.

The large segment of investigative work has now been finalised, and the procedural fairness and report writing processes are well underway. Counsel Assisting the Inquiry has provided a series of detailed submissions, which have been reviewed and are being prepared for the procedural fairness phase of Operation Prospect.

The first two submissions has been provided to the relevant adversely affected persons, and time frame extensions have already been required. Persons adversely affected must be afforded an opportunity to comment on the evidence and any provisional findings affecting them, and their comments must be carefully considered by the Ombudsman. As noted, extensions of time have been sought and granted, and it is likely that the Ombudsman will be required to consider similar requests in the future. This process is necessary to providing natural justice to persons who may be adversely affected by the investigation, but has the potential to impact upon the investigative timeliness. The extent of that impact is difficult to predict and as such it is not possible at this time to provide a timeframe for the release of a final public report. We had originally anticipated June for the tabling of the report, however it is evident, for the reasons outlined above, that the procedural fairness process is unlikely to be concluded by June.

At the time of providing this update to you, I am also aware that there has been an increase in public comment relating to Operation Prospect in recent weeks. Some of that commentary has included a number of inaccuracies, and while this office does not participate or involve itself in such commentary, it is important that you are provided with the correct information.

It has been suggested that the Ombudsman has requested several "extensions of time from the government" to complete and report publicly on Operation Prospect – this is incorrect information. The office is an independent one and the government has no role in setting timeframes for investigations such as Operation Prospect. Since the commencement of Operation Prospect, we have been asked repeatedly when it would be completed, and the Ombudsman has provided some indicative and qualified timeframes. However like all large scale inquiries, unexpected and unanticipated events occur, such as the Select Committee Inquiry or extension timeframes requests from affected persons, and for each of these the Prospect timeframes are impacted. We have endeavoured to keep you informed of these, and I would like to assure you that the timeframe changes have been necessary and are not "stalling" or "delaying" tactics as some have suggested.

There are also other reports in the media suggesting that our office is seeking to employ a number of "new" staff and that this is an indication that Prospect is another year from completion. As was explained to journalists before those articles were published, we have a number of Operation Prospect staff who are on temporary contracts which expire on 30 June 2015. We now know we will not be completed by that date and consequently need to extend these temporary employees. Unfortunately new public sector rules do not permit such extensions and we are required to publicly advertise these

positions. The advertisements state that the positions are temporary, and are for a period of six months with the option of extending for a further 12 months. This is the standard wording for short term positions within our office.

Finally, the Ombudsman's term ends on 30 June 2015. The Ombudsman has responded to a number of inquiries regarding his term to state that he will not be seeking reappointment. The Ombudsman has been in communication with government in relation to the end of his term, and I will ensure we provide you with an update on his replacement, and any impact this may have upon Operation Prospect, as soon as possible.

We will provide further updates as we proceed through the procedural fairness stages. Please note that our website also contains information on Operation Prospect – visit <http://www.ombo.nsw.gov.au/what-we-do/our-work/operation-prospect>.

Yours sincerely

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

Linda Waugh  
Deputy Ombudsman