

**Supplementary
Submission
No 12a**

**INQUIRY INTO THE CONDUCT AND PROGRESS OF THE
OMBUDSMAN'S INQUIRY "OPERATION PROSPECT"**

Organisation: Police Association of NSW

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NEW SOUTH WALES PARLIAMENT

SELECT COMMITTEE INQUIRY INTO THE CONDUCT AND PROGRESS OF THE OMBUDSMAN'S INQUIRY "OPERATION PROSPECT"

SUPPLEMENTARY SUBMISSION OF THE POLICE ASSOCIATION OF NEW SOUTH WALES

1. The Police Association of New South Wales ("the Association") has made detailed submissions to the Select Committee into the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect" which were received by the Select Committee on 12 January 2015 and were published as "Submission No. 12". Submissions made to the Select Committee and evidence given at the public hearings of the Select Committee have revealed some important additional material which was not available to the Association and upon which the Association wishes to make submissions. This supplementary submission concerns the health and welfare concerns of its members who have appeared and may appear before the Ombudsman as part of Operation Prospect.

Impact of the Ombudsman Act on the Health and Welfare of Police Officers

2. The Association's primary concern is that non-publication directions made by the Ombudsman and secrecy provisions in the *Ombudsman Act 1974* have prevented its members from seeking or continuing to receive medical treatment. That is, police officers seeking medical treatment related to matters the subject of the Ombudsman's inquiry have either avoided such treatment because it would necessarily involve publication to the medical practitioner of the protected material or not disclosed that material when being treated, despite its relevance to proper and complete treatment. The relevant provisions are ss. 19A, 19B and 19C of the *Ombudsman Act 1974*. The issue is addressed in the Association's first submission at pp 2-3.

3. The Act provides for the following offences punishable by 50 penalty units or 12 months imprisonment:
 - a. Sub-section 19A(3) prohibits the making of a publication in contravention of a non-publication direction given by the Ombudsman or his delegate;
 - b. Sub-section 19B(1) prohibits a person present at an inquiry from publishing any evidence given before the inquiry or the contents of any document produced to the inquiry;
 - c. Sub-section 19C(1) prohibits a person who is required to produce a statement or document or a person who is summonsed to give evidence or produce a document to the inquiry from disclosing any information about the requirement or summons if it is likely to prejudice an investigation.
4. It is apparent that communication of relevant material with a spouse or relative, a colleague, a superior officer, or a medical practitioner are all prohibited if they come within the terms of the provision. The Ombudsman accepts that an unvaried non-publication direction regularly issued under s.19A will prohibit the discussion of information with a medical health professional: Submission of the Ombudsman 21 Jan 2015, Annexure C, [142].
5. The Association accepts that there are sound and proper reasons for those provisions and does not challenge them or the policy behind them. However, it is concerned that the administration of the provisions has compromised the ability of police officers to obtain necessary medical treatment.
6. The Ombudsman readily acknowledges the need for such treatment for police officers. At page 8 of his submission to the Select Committee of 28 January 2015 [38-39] he says that "many of the persons who have provided information to [Operation] Prospect ... have a range of medical conditions, including mental health issues" and that he has sought to support such persons. He says that there have been eight police witnesses who have advised that they suffer from a mental health condition directly related to the matters being considered by the inquiry or their careers as police officers. He also said that a further four officers put forward medical evidence that they were too unwell to give evidence. All four of those officers have been excused from giving evidence, some after providing initial evidence to the inquiry. This is the first time the Association has been provided with this

important information about the welfare of our members. It may be assumed that those officers are unable to speak with their Association because of the non-disclosure and secrecy provisions of the *Ombudsman Act 1974*.

7. The Association understands that involvement of its members in the current inquiry may cause anxiety, distress, and exacerbation of mental health conditions in the following stages of any inquiry: anticipation that the officer will be called to give evidence; the provision of oral evidence to the inquiry; anticipation of being recalled to give evidence or being the subject of an adverse finding; anticipation that he or she may be disciplined including losing his or her job; and anticipation that criminal charges may be ultimately laid against him or her. The Association's position is that police officers should be able to seek proper and complete medical assistance while they progress through any of those steps.

Mental Health Issues for Police Officers

8. When asked about psychological injury and mental health in the NSW Police Force, the Hon. Stuart Ayres, Minister for Police and Emergency Services has said: "I have met with a number of current and former police officers and their welfare remains my highest priority."¹
9. In 2011-12, the NSW Government replaced the old Death and Disability Scheme with a commercial insurance arrangement. Associated with this was a review of injury management practices, deployment policies and rehabilitation and support programs. The rationale of the new scheme was to prevent injury or maximise recovery from injury, rather than allowing injuries to worsen or become permanent, to the stage where medical discharge was the only option.
10. The rate of reported injury due to 'mental stress' in the NSW Police Force has reached as high as 4.87 claims per 100 full time officers in the past 9 years (now down to 2.15). In relation to the most serious injuries, in 2011-12, of a total of 526 Partial Permanent Disability (PPD) claims paid under the Death and Disability scheme, 86% were 'psych' related, and 97% had a psychological injury component.² Preventative and support services for psychological related injuries are a crucial part of the success of the new scheme; reducing the prevalence and severity of psychological injury

¹ Anna Patty, 'Police on the scrap heap: the effect of the job on mental health', *The Sydney Morning Herald*, Date: December 2, 2014.

² Auditor-General's Report, Performance Audit, Effectiveness of the new Death and Disability Scheme: NSW Police Force, 2014.

amongst NSW Police Officers will mitigate the negative effects of one of the most significant burdens on police officer wellbeing and financial costs for the Death and Disability Scheme.

11. The NSW Police Force provides counselling to police officers through a number of services. This includes the *Employee Assistance Program (EAP)* which provides police officers and their families with access to counselling services from registered psychologists. The provider is external to the NSW Police Force.
12. Officers and their families are able to access an immediate telephone service 24 hours a day, or can arrange face-to-face sessions. The sessions can provide short-term crisis intervention, or assist with referrals to specialist intervention services. Police officers can utilise 6 sessions with psychologists over 2 years, and can apply for more if this amount is used up.
13. The Association's concern is that the abovementioned programs aimed at tackling mental health issues for members of the NSW Police Force as well as medical treatment provided independently to police officers may be compromised by the operation of ss.19A-19C of the *Ombudsman Act 1974*.

Concerns About the Ombudsman's Approach to Health and Welfare of Officers

14. The Ombudsman has provided assistance to the Select Committee by describing the manner in which he assists those who need or desire medical attention associated with the giving of evidence to the inquiry in Operation Prospect. The two main avenues for assistance are: first, by granting a variation to a s. 19A non-publication direction (on request) to allow for communication by the police officer with a medical practitioner; and secondly, by providing counselling services through a third-party counseling service called Davidson Trahaire Corpsych ("DTC").
15. The involvement of a police officer in an inquiry is likely to commence with a summons, or a requirement under s. 18 of the *Ombudsman Act 1974*. The Ombudsman has informed us that those receiving a summons are told of the availability of legal and welfare services: Letter to the Police Association of 22 December 2014.
16. In his submission to the Select Committee of 28 January 2015 the Ombudsman states that, generally, a non-disclosure direction is given at the commencement of a closed hearing involving an officer either by him or the presiding officer. He says that s. 19A permits a variation to be made to the

order during the examination or afterwards. Although in correspondence with the Chair of the Parliamentary Committee on the Office of the Ombudsman, the Police Integrity Commission and the Crime Commission dated 19 November 2014 the Ombudsman indicated that the power had not been used, in his submission to the Select Committee he says that it is his experience "that witnesses' legal representatives will actively seek variations ... whenever they are required": Annexure C [141]. He says that there are a number of legitimate reasons why a variation might be granted including medical and welfare assistance and each variation is assessed on a case by case basis: [141].

17. In oral evidence to the Select Committee the Ombudsman said that there was no blanket procedure which advised people giving evidence that a variation could be made but that if it was considered appropriate to do so the person would be advised: Proceedings of the Committee, 3 Feb 2015 p 6. He said that a number of variations had been made on request: p 6.
18. Deputy Commissioner Nick Kaldas gave evidence that he was concerned that he could not discuss his evidence with his doctor or a psychologist: Proceedings of the Committee, 30 Jan 2015 p 4. He further said he was in "no state" during the giving of evidence to understand he could seek a variation to the non-publication order that affected him: p 5.
19. Mr Steve Barrett gave evidence to the Select Committee that he was not advised that a variation to a non-publication direction could be given: Proceedings of the Committee, 29 Jan 2015 pp 20-21. Mr Neil Mercer gave similar evidence: Proceedings of the Committee, 30 Jan 2015 p 37
20. The Association has the following concerns about this process:
 - a. A person appearing before the Ombudsman's inquiry is not formally advised in writing, at the earliest possible stage, that they may seek a variation to any non-publication direction;
 - b. A person appearing before the inquiry is not formally advised in writing, at the time at which he or she gives evidence, that a variation can be made;
 - c. As a result of (a) or (b) the person concerned may miss the primary opportunity to seek a variation;
 - d. The requirement for a variation stands in the way of a police officer revealing protected material in a routine medical appointment, or a

medical appointment where such disclosure is required for proper treatment but is not anticipated;

- e. The Ombudsman has not adopted a general exception in s. 19A non-publication directions for publication of protected material to a medical practitioner;
- f. There may be a need for a variation so as to obtain medical treatment many years after the inquiry has concluded and after the end of any legal representation arrangements.

A Suggested Approach

- 21. In the Association's view there is substantial merit in the Ombudsman adopting an approach where each non-publication direction under s. 19A given to a police officer provides an automatic exception for publication to a medical practitioner, psychologist or counsellor for the purposes of medical treatment. While the Association appreciates that there may be many reasons why a variation might be granted, it is apparent that there are a substantial number of police officers who would benefit from such an exception. The Ombudsman himself referred to 12 police officers who advised the Ombudsman of a mental health condition should be free to discuss matters protected by a relevant non-publication order. Given the prevalence of psychologically related injuries across the NSW Police Force there is a reasonable justification for adopting such a common exception in all such non-publication directions affecting police officers.
- 22. Where there are reasonable and justifiable concerns by the Ombudsman about disclosure of relevant material to a medical practitioner, a variation can be made of the Ombudsman's own motion to ensure the proper protection of that information.
- 23. It is, of course, worth noting that during Operation Prospect the Ombudsman says he has interviewed 102 people and issued 60 summonses and production notices: Letter to the Chair of the Parliamentary Committee on the Office of the Ombudsman, the Police Integrity Commission and the Crime Commission, 19 November 2014, p 6. It is likely then that there are a large number of s. 19A non-publication directions which contain no exception for disclosures to a medical practitioner, psychologist or counsellor for the purposes of medical treatment. In the Association's view there is substantial benefit to those police officers affected by a non-publication direction, in the

Ombudsman reviewing those non-publication directions to determine whether each should be varied to adopt a similar exception.

24. Accordingly the Association proposes the following recommendations be made by the Select Committee:

Recommendation 1: That in inquiries involving police officers including Operation Prospect, the Ombudsman adopt a practice in the making of a s. 19A non-publication direction of excepting the publication of relevant material by a person to a medical practitioner, psychologist or counsellor for the purpose of medical treatment.

Recommendation 2: That the Ombudsman review each non-publication direction made during Operation Prospect which affects a police officer so as to determine whether the direction should be varied to allow for the publication of relevant material by a person to a medical practitioner, psychologist or counsellor for the purpose of medical treatment.

The Need for a Comprehensive Approach Across Oversight Agencies

25. Similar issues to those experienced by police officers in Operation Prospect regarding access to medical advice and treatment arise in the processes of investigation and inquiry undertaken by the NSW Crime Commission and the Police Integrity Commission. The Association considers that there is merit in exploring whether a similar policy to alleviate this problem can be adopted across all three agencies, including by way of legislative amendment.

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President
Police Association of NSW

6 February 2015