

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

Name: Mr Nick Kaldas (through Arthur Moses SC)

Date received: 1/07/2015

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THE OMBUDSMAN'S INVESTIGATION 'OPERATION PROSPECT'**

**Submissions for the Deputy Commissioner of Police, Naguib
(‘Nick’) Kaldas APM**

1 These submissions to the General Purposes Standing Committee No. 4 (‘this Committee’) have been made for the purposes of this Committee’s Inquiry into the Progress of the Ombudsman’s Investigation ‘Operation Prospect’. They are made on behalf of Mr Naguib (‘Nick’) Kaldas APM, the Deputy Commissioner of Police (Field Operations).

2 The Committee has given attention to the article ‘NSW Deputy Commissioner Nick Kaldas may face charges from Ombudsman inquiry’, which was written by Nick McKenzie and Richard Baker and was published in *The Sydney Morning Herald* on 17 April 2015 (‘the *Herald* article’). Mr Kaldas has an obvious and proper interest in the subject matter of this Committee’s inquiry and in relation to the apparently unlawful release of information that ultimately led to the *Herald* article.

3 Mr Kaldas is acutely aware of the need for public bodies and officials to afford natural justice to those whose interests are affected by their proceedings. He respectfully notes therefore that even this Committee, in this inquiry, must afford necessary natural justice. Accordingly, many of the submissions that follow do not urge final conclusions, but draw attention to issues in respect of which relevant parties might be invited to respond.

Short chronology of key developments

4 It is convenient first to provide a short chronology of key developments relevant to the *Herald* article, its subject-matter and related issues:

11 Oct. 2012 The Ombudsman's 'Operation Prospect' commenced by way of a referral made that day by the Inspector of the Police Integrity Commission.

12 Nov. 2014 The Legislative Council established the Select Committee on the conduct and progress of the Ombudsman's inquiry 'Operation Prospect' ('the Select Committee').

19 Nov. 2014 The Ombudsman (Mr Barbour), presumably having reached the firm conclusion that the material warranted him doing so, referred material to, and sought the advice of, the Director of Public Prosecutions ('the DPP') in respect of whether or not Mr Kaldas should be prosecuted in respect of evidence he gave to a hearing held for the purposes of Operation Prospect ('the referral').

Mr Barbour, the same day, advised the Select Committee: 'I have, quite properly at this stage of the investigation, reached no firm conclusions and made no findings on the evidence.'¹

9 Dec. 2014 Mr Barbour held a private meeting with the Commissioner of Police (Mr Scipione), a person involved in the subject matter of Operation Prospect as well as a witness, and informed him of the reference to the DPP of material relating to Mr Kaldas.² It is assumed that Mr Scipione had lawyers acting for him in the

¹ B. Barbour, letter to Lee Evans MP (19 November 2014) at p. 6, provided to the Legislative Council's Select Committee on the conduct and progress of the Ombudsman's inquiry 'Operation Prospect' ('the Select Committee') under cover of a letter of the same date to the Hon. Robert Borsak MLC.

² A. Scipione, evidence to the Legislative Council's General Purpose Standing Committee No. 4, 26 June 2015, provisional transcript at p. 2.

proceedings before Mr Barbour yet they do not appear to have been present during this private meeting. Mr Scipione has testified that he did not inform anyone about the content of the discussion (presumably this includes his lawyers).

28 Jan. 2015 Mr Barbour advised the Select Committee: 'I have reached no conclusions and made no findings *about the alleged conduct that is the subject of the inquiry*' (emphasis added).³

3 Feb. 2015 Mr Barbour testified to the Select Committee, saying, *inter alia*:⁴

'I do not engage in private meetings with individuals who are involved in this matter to discuss any issues the subject of my inquiry

. . . I have not made any findings and I will only do so after I have completed gathering all relevant evidence, analysing and reflecting upon that evidence and, significantly, after any persons who may be adversely affected by any findings have had an opportunity to respond to them.

Deputy Commissioner Kaldas was examined for one day, while Deputy Commissioner Burn was examined for four days. These raw figures are sufficient to indicate the primary focus of the inquiry.

. . .

[W]here I or a member of my staff has reason to believe that a witness has direct evidence about a matter or matters that are relevant to any areas of inquiry which form part of Operation Prospect, I will ask that witness about that matter or matters irrespective of whether the witness has also made a complaint about one of the other aspects of the inquiry. . .

[T]hat I have taken that course cannot rationally support an assertion that I have permitted the investigation to become sidetracked about what are said to be ancillary issues.'

³ B. Barbour, letter to the Hon. Robert Borsak MLC (28 January 2015) at p. 1.

⁴ B. Barbour, evidence to the Select Committee, 3 February 2015, provisional transcript at pp. 2–3.

17 Apr. 2015 The *Herald* article was published. It said, *inter alia*:⁵

‘The NSW Ombudsman is considering referring Deputy Commissioner Nick Kaldas to the Director of Public Prosecutions to face criminal charges for allegedly misleading the [Ombudsman’s] inquiry into the NSW police bugging scandal [*i.e.*, Operation Prospect].

...

Legal sources have confirmed that advice has been sought by Ombudsman Bruce Barbour, who believes there is a *prima facie* case that Mr Kaldas intentionally misled the ombudsman's office.’

Late Apr. '15 Mr McKenzie told the NSW Crime Commission’s Director (Criminal Investigations), Tim O’Connor, that he (Mr McKenzie) had been talking to a person or persons within the Ombudsman’s Office and that person or those persons would regard a charging of Mr Kaldas as a ‘victory’.⁶

23 Apr 2015 It was reported by various media agencies that Mr Scipione would serve up to two years more as Commissioner of Police after an extension to his contract.

19 June 2015 Three statutory declarations were made by staff of the Ombudsman’s Office. One of them said that the deponent had had contact with Mr McKenzie (but Operation Prospect was not discussed).⁷

Mr Barbour testified to this Committee, saying, *inter alia*:

‘[T]he author of [the *Herald*] article has categorically stated that the information [about the referral to the DPP] did not come from anybody in my office. . . . [T]he journalist . . . contacted our office on 15 April to indicate that he was preparing a story and what was in the story. . . .’⁸

⁵ N. McKenzie & R. Baker, ‘NSW Deputy Commissioner Nick Kaldas may face charges from Ombudsman inquiry’, *smh.com.au* (accessed 29 June 2015).

⁶ T. O’Connor, letter to the Hon. Robert Borsak (17 June 2015) at p. 4.

⁷ B. Barbour, letter dated 23 June 2015 to the Chair of this Committee, the Hon. Robert Borsak MLC, enclosing three redacted statutory declarations.

⁸ B. Barbour, evidence to the Legislative Council’s General Purpose Standing Committee No. 4, 19 June 2015, provisional transcript at p. 18.

He testified that three of his investigators had previously worked in Melbourne, and was asked by Mr Shoebridge MLC: 'In respect of those investigators, you say you have taken statutory declarations from them?'⁹ Mr Barbour answered, and continued his evidence, thus:

'Correct. . . . The statutory declarations confirmed to my complete satisfaction that there had been no contact from any of those people with the journalist'¹⁰

[M]y staff . . . had not had any discussions with Mr McKenzie or the journalist . . . or indeed any other journalist.'¹¹

Asked by the Hon. Mr Searle MLC 'Other than your office and the Director of Public Prosecutions . . . what other Government agencies would have had access to this information [about the referral to the DPP], if any?', Mr Barbour answered:

'Well, none. Apart, of course, from the confidential information provided to this Committee.'¹²

Asked by Mr Shoebridge 'On the last occasion when you appeared . . . you said you had not reached any firm conclusions . . . ?', Mr Barbour answered, and continued his evidence, thus:

'Correct, and I still haven't. [*Question from Mr Shoebridge: 'Yet . . . your office had referred potential charges against one of the witnesses That was a firm conclusion, was it not?'*] But they are two entirely separate issues.'¹³

⁹ B. Barbour, evidence to the Legislative Council's General Purpose Standing Committee No. 4, 19 June 2015, provisional transcript at p. 19.

¹⁰ B. Barbour, evidence to the Legislative Council's General Purpose Standing Committee No. 4, 19 June 2015, provisional transcript at p. 19.

¹¹ B. Barbour, evidence to the Legislative Council's General Purpose Standing Committee No. 4, 19 June 2015, provisional transcript at p. 21.

¹² B. Barbour, evidence to the Legislative Council's General Purpose Standing Committee No. 4, 19 June 2015, provisional transcript at p. 22.

¹³ B. Barbour, evidence to the Legislative Council's General Purpose Standing Committee No. 4, 19 June 2015, provisional transcript at p. 32.

25 June 2015 A statutory declaration was executed by a person from the Ombudsman's Office, declaring that he or she had contact with Mr McKenzie on 1 April 2015, but not about Operation Prospect.¹⁴ (It is not known whether the deponent was one of the three staff members who made statutory declarations on 19 June 2015.)

Has there been an unlawful disclosure of information?

5 It is now known that Mr Barbour did refer to the DPP material relating to Mr Kaldas, and did seek the DPP's advice about it. There is sufficient correlation of those facts with the content of the *Herald* article to reasonably conclude that the article, far from being a fabrication, was based on information that must have had its origins either in a leak from the Ombudsman's Office or in a leak from the Office of the DPP.

6 There is no suggestion that the leak came from the DPP's Office, and the Committee should find that it did not.

7 Section 34 of the *Ombudsman Act 1974* provides: 'The Ombudsman shall not, nor shall an officer of the Ombudsman, disclose any information obtained by the Ombudsman or officer in the course of the Ombudsman's or officer's office' except as permitted by that Act. The section directs attention not to who may have been the journalists' source but to who in the Ombudsman's Office may have disclosed the information that eventually made its way into the *Herald* article, probably through more than one intermediary. Similarly, Mr Kaldas is not concerned to know who the journalists' source may have been (he recognises the important role of journalists and the need for protection of their sources).

¹⁴ A redacted copy of the statutory declaration has been published on the Parliamentary website.

8 On 19 June 2015, Mr Barbour strenuously testified that he had had no contact with the journalist(s) and that he was satisfied that no member of the staff of the Ombudsman's Office was the journalists' source (note that the term 'staff' does not include the Ombudsman himself: see ss. 9 and 32 of the *Ombudsman Act 1974*).

9 If the evidence of Mr Scipione on 26 June is accepted, it is now known that Mr Barbour himself was one person who disclosed the information: he told Mr Scipione on 9 December 2014. Mr Barbour has not revealed the basis in law, if any, upon which he relied to make this disclosure in the face of s. 34 of the *Ombudsman Act*. Mr Barbour has not denied telling anyone else, having made only the more limited denial that he told no government agency except the DPP and the Select Committee.

10 Mr Scipione has denied telling anyone else of the information that he received from Mr Barbour. However, the fact remains that someone must have made the disclosure that ultimately made its way, via unknown persons, to the *Herald*. At this stage, Mr Barbour is the only person from the Ombudsman's Office known to have made a disclosure about the referral of Mr Kaldas to the DPP.

11 Thus, although the journalists' source has not been revealed, at least one source of disclosure from the Ombudsman's Office has been revealed—Mr Barbour. Whether or not his disclosure to Mr Scipione was unlawful should not be determined before giving Mr Barbour the opportunity of responding to Mr Scipione's evidence. Whether or not Mr Barbour made a disclosure of the relevant information to another person (not being a government agency) remains an unanswered question.

Has Mr Barbour misled a parliamentary committee?

Referral of material about Mr Kaldas to the DPP

12 On 19 November 2014, Mr Barbour reached the firm conclusion that he should refer to the DPP material relating to Mr Kaldas. The firmness of that conclusion is demonstrated by the fact that he made the referral.

13 On that very day—19 November 2014—Mr Barbour in writing told the Select Committee that he had not reached any firm conclusions. This statement was not qualified or limited, say by confining it to the issues under investigation by Operation Prospect. This Committee, it is respectfully submitted, may wish to hear from Mr Barbour on how his written statement of 19 November can be reconciled with his action on the same day.

14 On 28 January 2015, Mr Barbour wrote again to the Select Committee: ‘I have reached no conclusions and made no findings *about the alleged conduct that is the subject of the inquiry*’ (emphasis added). It is thus apparent that by then Mr Barbour had realised that there was a distinction between a conclusion about the subject-matter of Operation Prospect (*e.g.*, a conclusion about whether or not a warrant had been obtained improperly in 2000 or a person had been improperly targeted during the Mascot/Boat/Florida investigations) and ancillary matters such as whether or not a person had given misleading evidence during a hearing held by the Ombudsman. If that distinction is recognized, it can be seen that the precisely framed statement quoted above from Mr Barbour’s 28 January communication was accurate.

15 However, given that on 19 November 2014 he had made the unqualified statement that he had reached no firm conclusion, this Committee might consider that Mr Barbour was obliged, when introducing the fine distinction that he introduced on 28 January, both to draw attention to the distinction he was now making and to clarify and correct his earlier statement. He did neither. This Committee may wish to hear from Mr Barbour on whether or not he was perpetuating a misleading of the Select Committee.

16 This Committee might also wish to hear from Mr Barbour on the significance of these two propositions in his evidence to the Select Committee on 3 February 2015:

- that comparing the length of the examination of Mr Kaldas in Operation Prospect (just one day) with the length of the examination of Deputy Commissioner Burn's (four days) was 'sufficient to indicate the primary focus of the inquiry' in Operation Prospect; and
- that he had not 'permitted the investigation to become sidetracked [by] ancillary issues'.

In combination, these two statements are capable of indicating that Mr Barbour considered Mr Kaldas to be involved in relatively minor issues and that he (Mr Barbour) was not being side-tracked by those minor issues. The Committee may consider that the two statements sit uneasily with the significant step of referring to the DPP material about Mr Kaldas, and it may wish to hear from Mr Barbour about it.

Statutory declarations made by investigators working for the Ombudsman

17 Mr Barbour testified to this Committee on 19 June 2015 that he was satisfied by assurances from three relevant staff that they had not had contact with the journalist who wrote the *Herald* article. He gave strength to that evidence by further testifying that he had taken statutory declarations from them.

18 He also testified: ‘I have sought statutory declarations and had them sworn under oath.’¹⁵ . . . The statutory declarations confirmed to my complete satisfaction that there had been no contact from any of those people with the journalist’.¹⁶ Bearing in mind the wording of this evidence, and that a mere assurance that a statutory declaration exists is no better than an assurance of any other fact, the plain implication of Mr Barbour’s evidence—which was not merely that he had been told that statutory declarations had been made but that they had been made—was that Mr Barbour had seen and read three statutory declarations by the time he gave his evidence, and that they were from the relevant staff, and that they all said that they had not had contact with Mr McKenzie.

19 So far as has subsequently been revealed by the release of (redacted) copies of four statutory declarations (three dated 19 June and one dated 25 June 2015), only two people made statutory declarations to the effect that they had had no contact with Mr McKenzie. One statutory declaration dated 19 June and the statutory declaration dated 25 June referred to the deponent or deponents (it is not known if the same person made both declarations) having contact with Mr McKenzie on 1 April 2015.

20 The conclusion that Mr Barbour said that he had firmly reached, and which he suggested that this Committee should accept, was incorrect. It was not true ‘that there had been no contact from any of those people with the journalist’. Mr Barbour should be given an opportunity to explain.

¹⁵ B. Barbour, evidence to the Legislative Council’s General Purpose Standing Committee No. 4, 19 June 2015, provisional transcript at p. 18.

¹⁶ B. Barbour, evidence to the Legislative Council’s General Purpose Standing Committee No. 4, 19 June 2015, provisional transcript at p. 19.

21 This Committee, it is respectfully submitted, should also give Mr Barbour the opportunity of reconciling his evidence to the effect that he had seen three statutory declarations before he gave evidence and was thereby satisfied that no one relevant had had contact with Mr McKenzie and the subsequent appearance that only two statutory declarations were to that effect. He should also be given the opportunity to demonstrate that the statutory declarations existed—as sworn documents, not merely drafts—before he gave his evidence, and that he had actually read them after they were sworn and before he testified to this Committee.

Why was material about Mr Kaldas referred to the DPP at an early stage?

22 The referral to the DPP of material about Mr Kaldas just five days after the decision to constitute the Select Committee gives rise to a question about whether Mr Barbour's action was a retaliatory action taken in displeasure at Mr Kaldas for his perceived blameworthiness for the inconvenience and embarrassment involved in the constituting of the Select Committee. It also gives rise to a question about whether Mr Barbour's action had a tactical motivation such that by the time the Select Committee had completed its work the following year it might be possible to say that Mr Kaldas had been charged with an offence of dishonesty. These are matters on which no conclusion can yet be drawn, but they are questions that arise from the circumstances. It is open to this Committee to address them.

23 The concern is made greater by the unorthodox nature of Mr Barbour's action. It is of course not unique for an inquiry to ask the DPP to consider a prosecution before the inquiry has been completed (especially if it is for an offence the commencement of a prosecution for which is time-limited). It is, however, an uncommon course. Far more common is the course of offering affected persons the opportunity to be heard on the possibility of an adverse finding or recommendation followed by, in appropriate cases, a report containing a recommendation that the DPP consider a prosecution. The adoption of the unusual course in this matter is unexplained and concerning.

24 The Committee is entitled to know from Mr Barbour why he took the unorthodox approach of an early referral without prior notice to Mr Kaldas let alone affording him procedural fairness.

25 The Committee touched upon the issue on 19 June 2015 in this exchange:¹⁷

Mr DAVID SHOEBRIDGE: Did you give that procedural fairness to Mr Kaldas?

Mr BARBOUR: No.

Mr DAVID SHOEBRIDGE: Why not?

Mr BARBOUR: Because, as I indicated to you, that particular issue is the subject of legal professional privilege. I do not believe it would be appropriate to answer that question.'

With respect, Mr Barbour's basis for declining to answer the question was nonsense. There must have been a reason for Mr Barbour's seeking the DPP's advice and referring material, and his reason for seeking advice and referral material cannot possibly be the subject of legal professional privilege. Mr Barbour would be able to give his reason without disclosing the content of any advice he may have received.

26 It is convenient also to note that neither the DPP's advice to the Ombudsman (when it is given), nor the request for it, attracts legal professional privilege. That privilege operates to maintain the confidentiality of communications¹⁸ that were confidential¹⁹ and were made in the course of a lawyer-client relationship²⁰ for the dominant purpose of giving or obtaining legal advice²¹ or of preparing or conducting pending or reasonably anticipated litigation.²²

¹⁷ B. Barbour, evidence to the Legislative Council's General Purpose Standing Committee No. 4, 19 June 2015, provisional transcript at p. 23.

¹⁸ *Baker v. Campbell* (1983) 153 CLR 52 at 122-3, *O'Reilly v. Commissioners of the State Bank of Victoria* (1982) 153 CLR 1 at 22-23, *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 562 and *Mann v. Carnell* (1999) 201 CLR 1 at 8 [16]; *Brown v. Foster* (1857) 1 H & N 736; 156 ER 1397; *National Crime Authority v. S* (1991) 29 FCR 203 at 218

¹⁹ *O'Reilly v. Commissioners of the State Bank of Victoria* (1982) 153 CLR 1 at 22-3; *Re Griffin* (1887) 8 LR (NSW) 132 at 134; *R v. Braham & Mason* [1976] VR 547 at 549.

²⁰ *Minter v. Priest* [1930] AC 558 at 568.

²¹ *Minet v. Morgan* (1873) LR 8 Ch App 361.

²² *Southern Equities Corporation Limited v. West Australian Government Holdings Limited* (1993) 10 WAR 1 and s. 119 of the Evidence Act; see also *Grant v. Downs* (1976) 135 CLR 674 at 682; *Wheeler v. Le Marchant* (1881) 17 Ch D 675.

- 27 Accepting that most of these criteria were satisfied, one was not: the DPP and the Ombudsman do not stand in a lawyer–client relationship; the DPP’s functions are prescribed by statute and do not include providing legal advice to other agencies.²³

Is there evidence of bias on the part of Mr Barbour?

- 28 There can be no doubt that the Ombudsman must discharge his functions without bias.²⁴ Ostensible (or apprehended) bias is sufficient to attract relief at law, and the test was stated by the High Court in *Livesey v. New South Wales Bar Association*:²⁵

‘That principle is that a [decision-maker] should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. . . .’

To like effect is the High Court’s most recent statement of the law, in *Isbester v. Knox City Council*,²⁶ where it was said ‘The question whether a fair-minded lay observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made.’

- 29 Where there is a reasonable apprehension that a decision-maker might not bring an impartial mind to the proceedings or to the decisions to be taken, he or she must disqualify himself or herself from the proceedings and decision. If the decision has already been taken then it is to be quashed.

²³ *Director of Public Prosecutions Act 1986*, ss, 7 and 20.

²⁴ *Annetts v. McCann* (1990) 170 CLR 596; *Ainsworth v. Criminal Justice Commission* (1992) 175 CLR 564; *Mahon v. Air New Zealand Ltd* [1984] AC 808; *Gibson v. O’Keefe* (Unreported, Supreme Court, 20 May 1998).

²⁵ (1983) 151 CLR 288 at 293-294. See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 per Gleeson CJ and McHugh, Gummow and Hayne JJ at [6]: ‘Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror) . . . , the governing principle is that, subject to qualifications relating to waiver . . . , a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.’

²⁶ [2015] HCA 20 at [20].

30 Given that Mr Barbour’s term as Ombudsman ended on 30 June 2015, the important principle is that the presence of bias in the conduct of a proceeding can require not merely removal of the biased official but also the undoing of tainted decisions already made, perhaps even abandonment and restarting of the proceeding itself.

31 In *Isbester*, the Knox City Council convened a Panel of three officers to conduct a hearing. The decision, however, was to be made not by the whole Panel but by the Chairperson. The Council’s Co-ordinator of Local Laws was a member of the Panel and participated in its deliberations, but she was not the Chairperson and she did not make the decision. The decision was challenged on the basis that there was a reasonable apprehension that the Co-ordinator might not have brought an impartial mind to the deliberations. Even though the Co-ordinator had not made the decision, the High Court upheld the challenge and quashed the decision. Kiefel, Bell, Keane and Nettle JJ held:²⁷

‘the participation of others [on the Panel] does not overcome the apprehension that [the Co-ordinator’s] interest in the outcome might affect not only her decision-making, but that of others.

. . .

Natural justice required . . . that she not participate in the decision and because that occurred, the decision must be quashed.’

Gaegler J held:²⁸

‘the involvement of [the Co-ordinator] in the deliberative process resulted in a breach of the implied condition of procedural fairness so as to take the decision of [the Chairperson] beyond the power conferred by [the statute] I would reject the contention that the decision of the Court of Appeal should be affirmed on the ground that a fair-minded observer would not reasonably apprehend bias on the part of [the Chairperson].’

32 If it is held that Mr Barbour himself might reasonably be apprehended to have been biased, then the reasoning in *Isbester* applies with greater force to Operation Prospect, for his authority and consequential influence and impact on decisions were greater than the Co-ordinator’s.

²⁷ *Isbester v. Knox City Council* [2015] HCA 20 at [48] and [50].

²⁸ *Isbester v. Knox City Council* [2015] HCA 20 at [70].

33 With limited exceptions, the evidence given to this Committee and to the Select Committee cannot be used in other proceedings. That militates in favour of this Committee's making available findings and recommendations that properly arise from the evidence before it.

34 Unless this Committee is satisfied that adequate explanations to the contrary have been provided (at present there are no adequate explanations), it may conclude that there is a reasonable apprehension of bias on the part of Mr Barbour with respect to Mr Kaldas in his conduct of Operation Prospect, and that, under Mr Barbour's leadership, the Ombudsman's Office more generally has been commensurately tainted. The factors supporting that conclusion include:

- Mr Barbour's secret meeting with a witness, Mr Scipione, whose own conduct was being examined by Mr Barbour, was inappropriate. It clearly gives rise, at the very least, to an apprehension of bias. Mr Scipione's own conduct and by extension credibility as a witness was being examined by Mr Barbour in relation to allegations that a unit which was under his supervision had acted unlawfully in relation to a number of police officers and at least one civilian. One of those persons who was the victim of the alleged unlawful conduct was Mr Kaldas. However, Mr Barbour took the extraordinary step of confiding in a witness in the Inquiry as to an action that he was taking against another witness. This inappropriate step hopelessly compromised Mr Barbour and directly calls into question his impartiality. For reasons that are not Mr Scipione's fault, it has put him in a difficult position as a result of the inappropriate dissemination of information to him during a secret meeting which should never have happened.
- Mr Barbour's explanation for the meeting and the reasons for the disclosure (which either strains credibility or demonstrates a lack of judgment), if accepted, do not militate against there being an apprehension of bias. The very fact of the meeting and the circumstances in which it occurred are enough to raise an apprehension of bias.

- The unorthodox and so far unexplained decision to refer to the DPP material about Mr Kaldas without the Ombudsman's completing his inquiries, affording Mr Kaldas the usual incidents of natural justice in such matters, and making the referral to the DPP pursuant to the recommendations in the final report has the particular significance that it has been, or should have been, obvious for a considerable period that Mr Barbour might not be able to complete Operation Prospect before his term as Ombudsman expired. The circumstances give the appearance of Mr Barbour, knowing that he might not control the final report and recommendations, being determined nonetheless to take serious action against Mr Kaldas even if he could not otherwise reach conclusions.
- There has been a lack of clarity and candour—and perhaps even been misleading conduct—in Mr Barbour's evidence and written information to the Select Committee in respect of the referral to the DPP of material relating to Mr Kaldas.
- The information received from Mr O'Connor was not confined to advancing an expressly speculative theory about who may have been the journalists' source. It also included the more direct information that investigators within the Ombudsman Office would consider a charging of Mr Kaldas as a 'victory'. Such an attitude speaks of an investigation that has become tainted by an unacceptable bias or at least gives rise to an apprehension of bias.

35 Whilst acknowledging that there are no set categories of what will amount to an apprehension of bias, it is noted that the conduct of the Ombudsman potentially falls within three of the four categories referred to by French CJ in *British American Tobacco Australia Services Limited v Laurie*.²⁹

- First, Mr Barbour's conduct, particularly when taken as a whole, gives rise to an apprehension of bias.

²⁹ (2011) 242 CLR 283 at [38].

- Secondly, Mr Barbour, in meeting with Mr Scipione, has had contact with a person who is involved in the proceedings before him (Mr Barbour).
- Thirdly, the meeting gives rise to an apprehension that Mr Barbour may have knowledge of extraneous information, including in relation to assessing a witness's credibility, not otherwise before him in the proceedings.

36 Furthermore, there is evidence of pre-judgment in the relevant sense.³⁰ As stated above, Mr Barbour had already (by at least November 2014) formed a firm view to make the referral to the DPP. Such a decision demonstrates that Mr Barbour may have already reached a final view in relation to Mr Kaldas' actions and credibility.

37 It must also be remembered that there need not be any finding of wrongdoing or improper intentions on the part of Mr Barbour for there to be an apprehension of bias. As explained by the High Court in *Isbester*, a conclusion that there is a reasonable apprehension of bias 'does not imply that [the decision maker] acted otherwise than diligently, and in accordance with [their] duties . . . or that [they were] not in fact impartial'.³¹

The departure of Mr Barbour

38 Mr Barbour's term as Ombudsman expired on 30 June 2015. He did not seek an extension. So far as is apparent, he did not offer his services as a Deputy Ombudsman in order to complete Operation Prospect. On 19 June 2015, he explained this decision in these terms:

'I made the decision given the nature of the appalling comments that have been made about me, about my office and about the length of my term that it was in the best interests of my office for me not to seek a further term. I again draw your attention to the fact that the Deputy Chair of this Committee has said on a number of occasions that for me to have received

³⁰ *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 per Gleeson CJ and Gummow J at [71]-[72].

³¹ *Isbester v. Knox City Council* [2015] HCA 20 at [50].

a shortened term represented in all likelihood me forcing the Premier to reappoint me. In other words, I can only infer from that that were I to seek a further term I would be doing so to extend Operation Prospect and I would be forcing the Premier to reappoint me. . . .

I am not cutting and running!

. . .

[I did not seek an extension] Because I am criticised either way, and because it is not in the best interests of the office.'

To the extent, which is considerable, that Mr Barbour's decision not to make himself available to complete Operation Prospect was based on criticism, or the risk of criticism, of himself, which he does not seem to consider legitimate or accurate, Mr Barbour has apparently made his decision not because it was the proper decision but because he was capitulating to critics. That would, if true, be a dereliction of duty, comparable to that of acceding to an unmeritorious application for a judge to disqualify herself or himself for bias, in respect of which the High Court has said: 'it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of pre-judgment or bias.'³²

39 Be that as it may, in spite of Mr Barbour's unwillingness to accept it,³³ the new Ombudsman has a near impossible task. Some 100 witnesses have given evidence during hearings held for Operation Prospect over some 80 days.³⁴ It is inconceivable that none of the evidence so given has come into conflict with other evidence so given: if there were no such conflict then there would not have been a need to hold such lengthy hearings. The resolution of such conflicts is traditionally and properly undertaken by reference to the demeanour of the witnesses (amongst other factors). Plainly, the new Ombudsman at the very least will have to recall witnesses in order to assess their evidence. Mr Barbour in his evidence would go no

³² *Livesey v. New South Wales Bar Association* (1983) 151 CLR 288 at 294

³³ B. Barbour, evidence to the Legislative Council's General Purpose Standing Committee No. 4, 19 June 2015, provisional transcript at, e.g., pp. 27 and 33.

³⁴ B. Barbour, evidence to the Legislative Council's General Purpose Standing Committee No. 4, 19 June 2015, provisional transcript at p. 31.

further than saying that recalling witnesses will be ‘a matter for the incoming Ombudsman’³⁵ and acknowledging that, more generally, the new Ombudsman would have a ‘challenging task’.³⁶

40 This Committee would do the new Ombudsman, and the community more generally, a considerable service by acknowledging what Mr Barbour would not in his evidence before this Committee including:

- that many parts, if not all, of Operation Prospect will have to be re-opened;
- that many decisions previously made will have to be considered again; and
- that serious consideration will need to be given by the new Ombudsman to reversing the ill-effects of the reasonably apprehended bias of his predecessor.

Procedural matters

41 As already noted, Mr Kaldas respectfully accepts that natural justice must be afforded before findings of the kind suggested above can be made. That does not mean that further hearings are unavoidable. A procedure available to the Committee is to engage in correspondence to notify affected persons of questions to which answers are still sought and of potential findings to which response is invited.

42 On the other hand, it is open to the Committee to convene further hearings, and to summon persons to appear.

43 Once those procedures, and any others that this Committee deems appropriate, have been completed, this Committee may proceed to make its findings and recommendations.

³⁵ B. Barbour, evidence to the Legislative Council’s General Purpose Standing Committee No. 4, 19 June 2015, provisional transcript at p. 31.

³⁶ B. Barbour, evidence to the Legislative Council’s General Purpose Standing Committee No. 4, 19 June 2015, provisional transcript at p. 27.

44 Should the Committee be satisfied that there is a sufficient basis for finding that any witness may have given false or misleading evidence to this Committee or the Select Committee on oath or affirmation then this Committee may refer the matter to the DPP for consideration of an appropriate charge, or it may refer the matter to the Privileges Committee for consideration of the question of whether or not anyone has been in contempt of parliament³⁷ (although Parliament is always most restrained in so acting).

45 Likewise, if the Committee were satisfied to a sufficient degree that any person has engaged in conduct that was intended as a reprisal against another person in respect of that other person's role in the Select Committee proceedings or in the proceedings of this Committee then this Committee would be entitled to refer the matter to the Privileges Committee. Similarly, a person who has misled either Committee while not on oath or affirmation (*e.g.*, in correspondence) may be liable to being referred to the Privileges Committee. (Again, the traditional restraint of Parliament in such matters is noted.)

Conclusion

46 The following conclusions and recommendations should be made by the Committee:

- the *Herald* article had its origins in a leak from the Ombudsman's office;
- Mr Barbour should be given an opportunity to respond to Mr Scipione's evidence before there is any finding as to whether Mr Barbour made an unlawful disclosure to Mr Scipione;
- Mr Barbour should be given an opportunity to address this Committee as to whether he misled the Select Committee, in particular in relation to the events and statements of 19 November 2014 and 3 February 2015;

³⁷ See *Parliamentary Evidence Act 1901*, s. 185.

- this Committee should address the issue as to why Mr Barbour referred material about Mr Kaldas to the DPP at an early stage;
- there is a reasonable apprehension of bias on the part of Mr Barbour with respect to Mr Kaldas in his conduct of Operation Prospect, and that, under Mr Barbour's leadership, the Ombudsman's Office more generally has been commensurately tainted; and
- an acknowledgment that:
 - many parts, if not all of Operation Prospect will have to be re-opened;
 - many decisions previously made will have to be considered again; and
 - serious consideration will need to be given by the new Ombudsman to reversing the ill-effects of the reasonably apprehended bias of his predecessor.

47 A person in the position of Mr Barbour as Ombudsman must afford procedural fairness to all persons appearing before him. Procedural fairness requires that there be no possibility of a party or the public entertaining a reasonable apprehension that the Ombudsman might not bring an impartial and unprejudiced mind to the resolution of the question involved.³⁸ Regrettably this apprehension has arisen with respect to Mr Barbour.

48 The disclosure of information to journalists regarding a potential referral to the DPP was not authorised and involved unlawfulness. At this stage it is not known who made this disclosure to the journalists. However, what is presently known is that Mr Barbour appears to have made an unauthorised and secret disclosure of information to Mr Scipione—a witness in the proceedings whose own actions were supposed to be under investigation by Mr Barbour. The fact of the disclosure was kept secret from Mr Kaldas and his lawyers. It was only disclosed under questioning before this Committee.

³⁸ *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 262.

49 The conduct of Mr Barbour and the apprehension of bias that arises with respect to him is such that the hearings before the Ombudsman are invalidated and must be held again afresh. This is an issue which will be raised with the incoming Ombudsman.

50 Finally, the combination of the unorthodox referral to the DPP of material about Mr Kaldas, combined with the possibly unlawful (and therefore possibly defamatory) disclosure of that fact to Mr Kaldas's own Commissioner and with the ultimate disclosure of that fact to the public, has done Mr Kaldas enormous reputational and personal harm, including in the form of inevitable stress. None of this harm can be wholly removed even if the DPP decides not to prosecute or if Mr Kaldas is vindicated by a court. Mr Kaldas accepts that this Committee cannot make a finding on the question that has been sent to the DPP. He respectfully urges, however, that if this Committee is satisfied (after having heard from Mr Barbour) that the referral to the DPP was unorthodox or was a product of bias against Mr Kaldas then the Committee should so find. Such a finding will not remove the harm done to him, but it will ameliorate it in circumstances in which he has little other effective remedy.

DATED: 1 July 2015

ARTHUR MOSES SC
New Chambers