

**Submission
No 27**

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

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The Hon. Robert Borsak MLC
Chair
Legislative Committee Select Committee on the Conduct and Progress
of the Ombudsman's Inquiry "Operation Prospect"
Parliament of New South Wales

via email: robert.borsak@parliament.nsw.gov.au

Dear Mr Borsak

**Submission to the Legislative Council Select Committee on the Conduct and Progress
of the Ombudsman's Inquiry "Operation Prospect"**

Please accept this late submission to the Committee.

I am a solicitor at a NSW Community Legal Centre. Over the past five years, I have advised and assisted in hundreds of police complaint matters. I am not directly involved in a professional or personal capacity with Operation Prospect, but I am well-versed in the post-Wood Royal Commission police oversight structure.

Submissions have been made to the Committee which, in my view, may reflect on Mascot/Emblems/Prospect but do not have weight when applied to police complaints generally. I wish to briefly address some of those issues.

Time and resource constraints lead me to make these submissions in my personal capacity.

It is important to emphasise that Emblems and Prospect are essentially investigations in to a complaint that unreliable or false information was used to obtain a warrant for listening devices. That is not an unusual complaint. The unusual aspect of this complaint is who the complainants are, and their exceptional ability to have the matter continue to be investigated. By comparison, the default approach of the NSWPF and the Ombudsman is that if the occurred more than one year ago, that is too long ago for it to be investigated.

Also exceptional are the resources dedicated to investigating (and re-investigating) this listening device complaint. To my knowledge, this is a unique case in that regard.

I have primarily taken my understanding of the timeline from the PIC submission. That submission leads me to note the following:

1. The NSWCC had been approached by Sea/M5 in late 1998. The NSWCC conducted its own corruption-focused investigation for nearly 18 months before the PIC became involved. The PIC did not directly involve themselves in the use of Sea/M5 to gather intelligence.
2. The PIC did conduct investigations and public hearings in to serious misconduct and corruption based on evidence flowing, at least in part, from Sea/M5. These investigations made a number of sustained findings.
3. In April 2002, the Inspector of the PIC conducted a preliminary investigation in to listening device warrant 266/2000 used in Sea/M5's operations. This could be considered the first complaint investigation relating to Sea/M5. Ordinarily in the NSW police complaint system, a complaint receives one investigation with internal oversight and one paper-based external review.
4. In 2003, the Police Association made a complaint about the same warrant. The ordinary complainant would likely be told that the matter had already been investigated and that no further action would be taken. I presume that further substantive information was provided by the Association which led to Emblems.
5. Strike Force Emblems was established to investigate a Police Association complaint. This was a decision by the NSW Police Force to investigate allegations of serious misconduct (by Mascot) in the investigation of allegations (by Sea/M5) of serious corruption. It would have been far more preferable for such an investigation, if needed, to be handled by an independent body. Instead, because of the involvement of the NSWPF, the NSWCC and the PIC in the initial investigations, all of the entities with the resources to conduct active investigations now had an apprehended conflict of interest.
6. The Ombudsman appears to have been tasked with Operation Prospect not by virtue of it being squarely with the statutory objects of the agency, but simply by being the last man standing who was not involved in the Sea/M5 operation. This is the predominant failure of the multi-agency system in this case.
7. It can also be argued that the reason for the creation of Operation Prospect was the refusal to rest on the findings of the Inspector of the PIC's report in 2002. I do not have sufficient information to do more than raise it as a possibility.

Also relevant to the Committee's deliberations are several issues raised by the Police Association in their submission of 12 January 2015:

8. In discussing the serious issue of mental health management of witnesses and complainants, the Association places a high standard on the Ombudsman in terms of responsibility for the welfare of complainants and witnesses. It is relevant that ordinary

members of the public do not receive counselling support during the investigation of their complaints against police.

9. The Association highlights the interaction between secrecy provisions, oversight and mental health. I suggest that serious consideration must be given to the idea that the secrecy and coercion powers given to several government agencies in NSW have become counterproductive in the current environment. The pressure placed on witnesses, and on suspects entitled to the presumption of innocence is remarkably high. The price paid by all of those involved may already be as high as any punishment that the evidence might support. It should, however, be remembered that we as a society have implemented a series of policies which accept this. We accept shattering mental trauma to innocent parties as part of the price of doing business in the criminal justice system. Mascot serves as a reminder that suspects can be innocent.
10. The Association also submits on the issue of delay. A key element of the length of the Mascot/Emblems/Prospect saga is the involvement of police officers in the Mascot and Emblems investigations. This internal component has added to the persistent and toxic fallout from the allegations. If the PIC were accepted as the authoritative agency to conduct police corruption investigations, and police had not been investigating colleagues, it may have quelled some degree of the internal disquiet in the NSWPF. That said, the consistent pattern is for between 33-37% of police complaints to be made by other police officers.¹ Internal disquiet is the status quo.
11. The Police Association takes the view that structural change is necessary. They seek greater procedural fairness for the officers involved in investigations. This fails to acknowledge that the vast majority of annual complaint investigations are conducted within a structure that affords almost no rights to the complainant and unfettered discretion to the Commissioner. There is a problem with the structure, but it is not in its fairness to officers. I suggest it is unnecessary to express a view about structural changes when the entire aspects of the structure have not been examined.
12. It is notable that the Police Association quotes from the McClelland Review, but fails to acknowledge that that review was triggered by high-profile matters where officers of the NSWPF (including within the Professional Standards Command) failed to act with integrity.² It is also worth noting that the PIC that investigated each of those matters successfully.³
13. In brief reply to the budgetary observations of the Police Association, I can safely state that the evidentiary strength needed to sustain even the most basic misconduct

¹ NSW Ombudsman Annual Report 2013-14, Fig. 25

² The Critical Incident investigations into the deaths of Roberto Laudisio Curti and Adam Salter, and the prosecution of Corey Barker.


³ PIC Operations Calyx, Barmouth, and another operation which did not hold public hearings.

allegations against a police officer is higher than for almost any other class of respondent. Some allowance must be given to the obstacles that face the PIC, or any person who seeks disciplinary or prosecutorial action against a member of the NSWPF. This apprehension of needing to overcome massive opposition to misconduct findings is rational, given the vigorous advocacy that the Association provides to its members throughout the complaint process and in the NSW Industrial Relations Commission. There are necessary budgetary consequences when such a strong defence is expected.

14. The Association's suggested alternative structure is:
"Most allegations of misconduct or corruption by police could be investigated by the NSWPF with an appropriate external agency monitoring the investigation where necessary and serious allegations could go to an oversight agency that also dealt with other matters beyond policing."⁴
That situation is strikingly similar to the joint NSWPF/NSWCC/PIC investigation that got us here in the first place. For that reason alone, it is not a suggestion worth following. It is also a system that would further reduce the limited transparency or accountability generated by the current complaints system. Mascot-type scenarios will continue to arise, so long as police do the majority of complaint investigations.
15. In relation to oversight agencies making different findings, the Association's submission should be given little weight. Confidence in the justice system is undermined more by police cover-ups⁵ than by differing oversight findings.
16. With regard to the Association's comments about the success of the NSWPF's own complaint handling, please draw no conclusions from that. The standards required from Part 8A of the *Police Act 1990* and the NSWPF Complaint Handling Guidelines make it exceptionally easy for the NSWPF to obtain a pass mark. I am happy to provide extensive further information in relation to the performance of the current system, however I am conscious of the importance of the primary matters before the Committee.

I thank you for giving consideration to this submission, and hope that it is of some use to the Committee.

Yours sincerely



⁴ Police Association submission, p 23

⁵ As found in PIC Operations Calyx and Barmouth