Asserting the inquiry power: parliamentary privilege trumps statutory secrecy in New South Wales

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'This inquiry is one of the most significant in any Australian parliamentary jurisdiction in its use of committee powers to obtain evidence under privilege that is subject to statutory secrecy provisions. The Legislative Council will not accept attempts by future state governments or their agencies to hide behind statutory secrecy when the Council or its committees are seeking to comply with the key role of scrutiny of the executive.[1]'

Introduction

The tension between statutory secrecy and parliamentary privilege is not a new phenomenon in New South Wales. It has often arisen as an issue during parliamentary inquiries that centre on executive accountability. However the recent 'Operation Prospect' inquiry in the NSW Legislative Council saw a significant breakthrough. Instead of objecting to the committee's powers to seek highly sensitive information, otherwise protected by secrecy provisions, senior public servants, including police officers and the Ombudsman, chose to fully co-operate and provide information in public under parliamentary privilege.

The significance of this for the Council cannot be overlooked, particularly given that only six months earlier another committee had met with significant executive resistance when seeking to inquire into matters covered by secrecy provisions. What changed in this brief period of time to set a new precedent? This paper will examine the relationship between statutory secrecy provisions and parliamentary inquiries in the Legislative Council, particularly in the context of the recent inquiry into the conduct and progress of the Ombudsman's investigation 'Operation Prospect'.

Background to Operation Prospect

In 2003, the NSW Police 'Strike Force Emblems' was established in response to allegations that warrants were improperly obtained during Operation Mascot, an investigation into police corruption that commenced in the late 1990s. The warrants authorised a large number of people, mostly police officers, to have their private conversations 'bugged'. The Emblems investigators believed the warrants had been improperly obtained, but were left frustrated, as the NSW Crime Commission was unwilling to release key documentation, such as the affidavits for the warrants, due to statutory secrecy provisions. Although the strike force produced a report in 2004, it has not been made public or acted on by the police hierarchy.

In 2012, after further complaints and media interest, these matters were finally referred to the NSW Ombudsman, who then launched 'Operation Prospect'. While this investigation was meant to bring finality to the matter, the still to be completed Ombudsman's inquiry has been criticised for taking too long, for being held in 'secret' and for focusing on the 'whistleblowers' who leaked documents and brought these serious concerns to light.

For these reasons a parliamentary select committee was established in November 2014 to inquire into the conduct and progress of the Ombudsman's inquiry. The whole issue has been complicated by the fact that the two Deputy Commissioners potentially vying for the soon to be vacated Commissioner of Police role are key players in the original surveillance operation. Deputy Commissioner Catherine Burn was part of the Operation Mascot team that organised the bugging, while Deputy Commissioner Nick Kaldas was one of those officers bugged and who had been named on 80 listening device warrants.

[1] Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", Legislative Council, *Inquiry into the conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015), p 5.

Statutory secrecy

Several laws in New South Wales contain statutory secrecy provisions, making it a criminal offence for certain information to be disclosed. Examples include the *Police Integrity Commission Act 1996*, *Crime Commission Act 2012*, *Ombudsman Act 1974, Casino Control Act 1992* and *Independent Commission Against Corruption Act 1988*. The penalty for breaching secrecy can be severe, with a maximum penalty under the Ombudsman and Police Integrity Commission Acts being 50 penalty units ($5,500) and/or imprisonment for 12 months[2] and the maximum penalty under the *Crime Commission Act 2012* is 100 penalty units ($11,000) and/or imprisonment for two years.[3]

While statutory secrecy provisions operate to protect the privacy of government actions such as for highly sensitive police operations, they do not easily reconcile with Parliament's important role in scrutinising the executive and holding it publicly to account.

It has been a long held position of Australian parliaments that statutory secrecy provisions 'have no effect on the powers of the Houses and their committees to conduct inquiries, and do not prevent committees seeking information covered by such provisions'.[4]

Odgers notes that the basis of this principle is that the law of parliamentary privilege provides absolute immunity to the giving of evidence before a House or a committee' and 'it is a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words'.[5]

This is consistent with the position of the New South Wales Legislative Council.[6] Over the past 15 years, Legislative Council committees have strongly asserted their powers to seek information that would otherwise be covered by statutory secrecy provisions; while the executive has pushed back, relying on past Crown Solicitor's advice to refuse to provide information.

Information is power

This paper follows on from a paper that the Clerk of the NSW Legislative Council co-authored last year titled 'Information is power: recent challenges for committees in the NSW Legislative Council' which outlined a number of ongoing challenges facing committees in obtaining information from the executive, including information covered by statutory secrecy provisions.[7]

The paper suggested that committees should deal with executive non-compliance by taking care to use their powers judiciously and rely on those powers that are beyond doubt. The paper also cautioned against acquiescing to challenges to the existence of inquiry powers and to instead find

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[2] *Ombudsman Act 1974*, 19A (*3)*, *Police Integrity Commission Act 1996*, s 52 (3).
[3] *Crime Commission Act 2012*, s 45 (3).
[4] *Odgers' Australian Senate Practice*, 13th Edition, 2012, p 66.
[5] *Odgers' Australian Senate Practice*, 13th Edition, 2012, p 66.
[6] Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice,* (Federation Press, 2008), pp 512-516; General Purpose Standing Committee No.1, NSW Legislative Council, *Allegations of bullying in WorkCover NSW* (2014), p 11.
[7] Ms Beverly Duffy and Mr David Blunt, *Information is power: recent challenges for committees in the NSW Legislative Council*, Legislative Council, Parliament of New South Wales, 2014.

creative solutions to obtain information. The paper argued that over time the Legislative Council would build a robust body of precedent and resolutions that would assert its powers.[8]

Accordingly, the paper noted the advice of Mr Bret Walker SC that members of Parliament, both individually and collectively, should continue to assert their powers, which in the fullness of time will come to be known as the 'true state of affairs'.[9]

The following are examples of Legislative Council committees asserting their powers to obtain information covered by statutory secrecy provisions.

Budget Estimates 2000-2001 – Casino Control Authority

The conflict between privilege and statutory secrecy came to prominence during a Budget Estimates hearing in 2000 when witnesses from the Casino Control Authority refused to provide General Purpose Standing Committee No. 4 with information on the basis of secrecy provisions in the *Casino Control Act 1992*. During evidence, members asked the witnesses questions such as 'Do you believe that the casino is operating free of criminal influence?', with each inspector indicating they would be in breach of the Act if they were to respond to such a question.[10]

Following this initial hearing, the Crown Solicitor provided advice to the then Minister that the inspectors should only answer questions at a further hearing under the following circumstances:

(i) they do so in the exercise of functions under the *Act;*
(ii) the Casino Control Authority certifies that it is necessary in the public interest that the information be divulged to the Committee; or
(iii) the Committee is expressly or impliedly authorised to obtain it by the person to whom the information relates.[11]

At this further hearing the inspectors tabled a letter which stated that:

> As public servants we are bound to follow the legal advice provided by the Crown Solicitor. The course of action that will be followed in answering questions is for officers to assess whether an answer to a Member's question would divulge information acquired in the exercise of their functions under the Casino Control Act. When that is the case officers will take the questions on notice, and responses to the questions will be prepared and forwarded to the Casino Control Authority. The Authority will be asked whether it is in a position to certify that it is necessary in the public interest for that information to be divulged to the committee.[12]

The Clerk of the Parliaments then obtained the first in what was to become a series of advices from Mr Bret Walker SC on statutory secrecy. Mr Walker's view contrasted greatly with that of the Crown Solicitor and noted that the provisions relied on by the witnesses were 'not apt to deprive the Council or the committee of its pre-existing power, both at common law and

[8] Ms Beverly Duffy and Mr David Blunt, *Information is power: recent challenges for committees in the NSW Legislative Council*, Legislative Council, Parliament of New South Wales, 2014, pp 13-14.
[9] Ms Beverly Duffy and Mr David Blunt, *Information is power: recent challenges for committees in the NSW Legislative Council*, Legislative Council, Parliament of New South Wales, 2014, p 1.
[10] General Purpose Standing Committee No. 4, NSW Legislative Council, *Budget Estimates 2000-2001*: Volume 2, Report 5, (2000), p 2.
[11] General Purpose Standing Committee No. 4, NSW Legislative Council, *Budget Estimates 2000-2001*: Volume 2, Report 5, (2000), Appendix 1 to report.
[12] General Purpose Standing Committee No. 4, NSW Legislative Council, *Budget Estimates 2000-2001*: Volume 2, Report 5, (2000), p 2.

according to the *Parliamentary Evidence Act [1901]*, to inquire into public affairs as members see fit'.[13]

Budget Estimates 2012-2013 – Strike Force Emblems Report

Mr Walker's advice was repeated in a later opinion, obtained from him in 2012, when, during another General Purpose Standing Committee No. 4 Budget Estimates hearing, Deputy Police Commissioner Catherine Burn declined to answers questions relating to the internal police report by Strike Force Emblems (see text box above) on the basis of secrecy provisions in the *Crime Commission Act 2012*.

Mr Walker again confirmed that a person bound by statutory secrecy provisions would not be in breach of those provisions if they disclosed information to a committee of the Legislative Council.[14]

On this occasion the committee did not press the matter, as the then Police Minister tabled a letter stating that the Ombudsman would be inquiring into the Strike Force Emblems report and the initial investigations of Operation Mascot that had led to the strike force. The committee did not hold a supplementary hearing into the matter as initially planned and deferred any consideration on self-referring terms of reference about the legality of the listening device warrant until after the Ombudsman's inquiry, which was then expected to take six months. However, the committee noted it may reconsider this position if the Ombudsman's report is delayed much longer than anticipated.[15]

Although the committee did not pursue the line of questioning on this occasion; it did assert through a motion moved and agreed to, that the committee had the power 'to ask and compel answers to questions that would require the disclosure of information that may otherwise be caught by statutory secrecy provisions'.[16] Through this process the committee at the same time withheld from using its powers until a more appropriate juncture while asserting the Legislative Council's position regarding secrecy.

Allegations of bullying in WorkCover – 2013-2014

In 2013-14 General Purpose Standing Committee No. 1 conducted an inquiry into allegations of bullying in WorkCover NSW; an organisation tasked with ensuring that all New South Wales employees work in an environment that is safe and free from physical and psychological harm. Throughout the inquiry the committee was frustrated with WorkCover's attempts to prevent it from obtaining important information relevant to the issues it was examining.

One reason cited by WorkCover NSW for not co-operating with the committee's requests for sensitive information was its obligations according to the *Privacy and Personal Information Protection Act 1998*. The Act makes certain disclosures of information an offence; however it does not

[13] General Purpose Standing Committee No.4, NSW Legislative Council, *Budget Estimates 2012-2013*, Report 26, (2012) Appendix 3. The committee's report includes an Appendix with two legal advices from Bret Walker SC, dated 2 November 2000 and 24 October 2012, dealing with the powers of committees and statutory secrecy provisions.
[14] General Purpose Standing Committee No.4, NSW Legislative Council, *Budget Estimates 2012-2013*, Report 26, (2012), pp 1-2 and Appendix 3.
[15] General Purpose Standing Committee No.4, NSW Legislative Council, *Budget Estimates 2012-2013*, Report 26, (2012), p 2 and p 47.
[16] General Purpose Standing Committee No.4, NSW Legislative Council, *Budget Estimates 2012-2013*, Report 26, (2012), p 46.

expressly exclude Parliament's powers according to these sections. Emboldened by previous advice from Mr Walker, the committee strongly asserted that it had the right to obtain such information.

In its June 2014 report, the committee commented that WorkCover NSW had shown a 'serious disregard for the Legislative Council's role in scrutinising the executive'.[17] The Chief Executive Officer of WorkCover NSW strenuously defended the rationale for not providing certain information to the committee:

> I reject the assertion that I have been 'withholding certain information inappropriately'. There is no basis to assert that I acted inappropriately in circumstances where, as a public servant, I acted in accordance with legal advice from the Crown Solicitor that it was not lawful for me to disclose certain information.[18]

As this shows, barely one year ago, government agencies continued to rely on Crown Solicitor's advice as the basis for not acquiescing to Legislative Council committee requests for information covered by statutory secrecy.

NSW Department of Premier and Cabinet legal opinion

A different executive perspective was provided in April 2014 when the NSW Solicitor General and Ms Mitchelmore of Counsel provided advice to the Department of Premier and Cabinet on the powers of the Legislative Council to compel the production of documents from the executive.

The legal opinion briefly covered the matter of statutory secrecy, and in essence agreed with the position of the Council and Mr Walker that the Legislative Council obtaining information covered by secrecy provisions 'accords with the role of the Parliament in a system of responsible and representative government'. However a caveat was placed on this statement by noting that 'the matter can hardly be free from doubt and it is not possible to predict with confidence what view a court might take on this issue'.[19]

Inquiry into the conduct and progress of the Ombudsman's inquiry 'Operation Prospect'

The Council's recent experience with the select committee inquiry into Operation Prospect was remarkably different to the WorkCover NSW inquiry, despite the inquiries only occurring six months apart. Although the committee anticipated resistance to the exercise of its powers, its concerns were largely not realised. To the contrary, witnesses co-operated with the committee in providing highly sensitive information much of which would, in any other context, be prohibited from disclosure. This experience set a new precedent for the Legislative Council, with a great deal of information covered by statutory secrecy provided to the committee by individuals and agencies.

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[17] General Purpose Standing Committee No.1, NSW Legislative Council, *Allegations of bullying in WorkCover NSW*, Report 40, (2014), p 12.
[18] General Purpose Standing Committee No.1, NSW Legislative Council, *Allegations of bullying in WorkCover NSW*, Report 40, (2014), p 12.
[19] Legal opinion, *Question of powers of legislative council to compel Production of documents from executive*, NSW Solicitor General and Counsel to the NSW Department of Premier and Cabinet, April 2014, pp 7-8.

In November 2014 a Legislative Council select committee was established to inquire into the conduct and progress of 'Operation Prospect'. The Ombudsman had in 2012 been tasked with investigating allegations of misconduct by officers of the NSW Police Force, the Crime Commission and the Police Integrity Commission in relation to certain investigations they had carried out between 1998 and 2004. The Ombudsman's investigation had been criticised by some stakeholders for being protracted, conducted in secret and for targeting the whistleblowers that brought the complaints to light. Crossbench and opposition members of the Legislative Council pushed for the select committee inquiry, determined to find out why the Ombudsman was taking so long to report.

Concerns regarding the secrecy of the Ombudsman's investigation stemmed from s 17 of the *Ombudsman Act 1974*, which requires that the Ombudsman must conduct investigations 'in the absence of the public' and from recent amendments in 2012 that inserted non-disclosure (secrecy) provisions into the Act. For example, s 19A (1) states:

> The Ombudsman may direct that:
> (a) any evidence given before an inquiry held by the Ombudsman, or
> (b) the contents of any document, or a description of any thing, produced to the Ombudsman, or
> (c) any information that might enable a person who has given or may be about to give evidence before an inquiry to be identified or located, or
> (d) the fact that any person has given or may be about to give evidence before an inquiry,
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> must not be published, or must not be published except in such manner, and to such persons, as the Ombudsman specifies.[20]

During debate on the establishment of the inquiry, a member of the committee stated that there has been:

> [n]o public accounting from the Ombudsman; no efforts of public hearings … Every part of this Ombudsman's inquiry was shrouded in secrecy … This is a secret investigation by the Ombudsman into whistleblowers. He wants to find out who put the small amount of information into the public domain … [It] is the job of the Parliament to shine light where nobody else is willing to do it.[21]

Negotiating secrecy provisions - Inquiry terms of reference

The Clerk's paper last year began with the line: 'Information is the lifeblood of parliamentary democracy'. This comment rings true for the committee's inquiry into Operation Prospect, because if the executive, Ombudsman and individual witnesses had not accepted the Legislative Council's power to seek information covered by secrecy provisions, the inquiry would have been significantly weakened. In addition, individual police officers and other potential witnesses would have been extremely apprehensive of the statutory punishments in place for breaching secrecy.

To highlight the extent of secrecy provisions constraining witnesses, the Ombudsman, during his investigation, issued non-disclosure orders to all his inquiry participants when summoning them, meaning that individuals could not publicly disclose that they had been called to give evidence before him, let alone divulge what was said during that hearing.

[20] *Ombudsman Act 1974*, s 19A.
[21] LC Debates, 12 November 2014, p 2471.

In anticipation that these issues could prove a significant hurdle to the inquiry, the terms of reference explicitly stated:

> That the House makes clear its understanding that a statutory secrecy provision in statute does not affect the power of the House or of its committees to conduct inquiries and to require answers to lawful questions unless the provision alters the law of parliamentary privilege by express words…[22]

The terms of reference also highlighted that this view was supported by a number of authorities, including the two previous advices the Clerk had obtained from Mr Walker and most recently the advice from the NSW Solicitor General and Ms Mitchelmore.

In addition, given the scrutiny the Ombudsman might face by the committee and the potential for opposition to the committee's questions, there was also a specific reference that 'statutory secrecy provisions in the *Ombudsman Act 1974* do not affect the powers of the committee to require answers to lawful questions'.[23]

Initial resistance

From the outset, the government opposed the establishment of the inquiry, with a former Police Minister making an impassioned speech in the House about respecting statutory secrecy and his reasons for keeping the Strike Force Emblems Report confidential in 2012:

> There are probably senior police on both sides of the argument listening to this debate, but the fact is that I would never agree to release a report that potentially would put at risk internal informants—internal witnesses—who could have been giving information about the most serious crimes. [Members] throw out lines about transparency, accountability and all that as if they actually mean something. I wonder how they would feel if following the release of such a report an internal informant's body washed up on a beach. That is the risk when we are dealing with serious crimes and why things need to be managed properly.[24]

The Ombudsman also expressed his displeasure with the committee's inquiry as he argued it had the potential to jeopardise the integrity of his investigation. Prior to the committee being established he wrote to the Premier expressing his concerns that the committee would 'frustrate and impede the progress of Operation Prospect, a matter that would not be in the public interest'. The letter also brought into question the legitimacy of the select committee as the matters it was to inquire into fell 'within the purview of the standing Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission' which has the 'statutory function … to monitor and review the exercise of [his] powers under the *Ombudsman Act 1974* and the *Police Act 1990*'. This letter was incorporated into Hansard by the Leader of the Government during debate on the motion to establish the committee.[25]

It should be noted that while there is a statutory committee tasked with oversighting the Ombudsman, under law it cannot 'investigate a matter relating to particular conduct' or 'reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint'.[26]

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[22] LC Minutes, 12 November 2014, p 277.
[23] LC Minutes, 12 November 2014, p 277.
[24] LC Debates, 12 November 2014, p 2473.
[25] LC Debates, 12 November 2014, p 2462.
[26] *Ombudsman Act* 1974, s 31B (2).

Following the establishment of the committee, the Ombudsman provided a short letter to the Chair of the joint statutory Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission about Operation Prospect and forwarded a copy to the Chair of the Legislative Council committee. A few weeks later, after receiving a letter calling for submissions to the committee inquiry, the Ombudsman replied that his initial letter to the joint statutory committee could 'serve' as his submission to the committee's inquiry.

The committee also received a letter from the former Inspector of the Police Integrity Commission who argued that the committee's explanatory documentation in relation to statutory secrecy was inconsistent and that the committee could give no real guarantee that parliamentary privilege would protect inquiry participants from breaches of statutory secrecy.

It was not a promising start.

Further Walker advice sought

In order to enhance the confidence of inquiry participants to participate in the inquiry, advice was once again sought from Mr Walker on a number of matters including the effect of statutory secrecy provisions in the *Ombudsman Act 1974* on parliamentary privilege. Mr Walker's advice again confirmed the Council's position on statutory secrecy, stating:

> It remains the case that there are no words or necessary implication to be seen in these statutory provisions that amount to the abrogation by Parliament of this aspect of parliamentary privilege.[27]

Mr Walker asserted that the provisions of the *Ombudsman Act 1974* suggest that the Parliament clearly does not intend the executive to be 'paramount over one of its Houses (or its committees)' and that the Act 'cannot sensibly be read as substituting the Ombudsman as an authority superior to the Legislative Council'.[28]

He also dispelled the Ombudsman's queries regarding the legitimacy of the select committee and advised that provisions concerning the joint committee are 'quite inapt to impose a restriction on the power of the House [through the select committee] to inquire into such matters'.[29]

Mr Walker further stated in his advice that he strongly favoured the service of a summons if the committee was substantively questioning witnesses on matters they might otherwise not be permitted to answer and to make it abundantly clear that the committee can compel answers to questions that may reveal information covered by statutory secrecy provisions.[30]

The Clerk of the Parliaments also provided members a flowchart indicating possible scenarios and briefed the committee on all the permutations if witnesses refused to attend a hearing after

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[27] Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", NSW Legislative Council, *Inquiry into the conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015), Appendix 5, p 2 of the advice.
[28] Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", NSW Legislative Council, *Inquiry into the conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015), Appendix 5, p 2 of the advice.
[29] Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", NSW Legislative Council, *Inquiry into the conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015), Appendix 5, p 2 of the advice.
[30] Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", NSW Legislative Council, *Inquiry into the conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015), Appendix 5, pp 3-4 of the advice.

being issued a summons or refused to answer lawful questions during a hearing, as required under the *Parliamentary Evidence Act* 1901.

Privilege trumps secrecy: witnesses respond

The following month, any initial concerns that the committee would be unable to obtain information quickly dissipated once submissions started being received.

Public submissions were predominately made by current and former police officers and former senior NSW Crime Commission officials as well as journalists. Many of these submissions outlined in detail information covered by secrecy provisions under the Ombudsman, Crime Commission and Police Integrity Commission Acts.

Under the protection of privilege, submission authors stated that they had been summoned by the Ombudsman to give evidence, with many describing what had been discussed at those private hearings. Submission authors also outlined under privilege their views and knowledge of Operation Mascot, the disputed warrants used in the investigation and the subsequent Emblems report into the matter, as well as a range of sensitive information such as details of criminal matters and names of informants.

As recommended by Mr Walker, all 20 witnesses were issued with summons to appear before the committee, with all complying. Many witnesses requested to be accompanied by a legal representative to advise them, but not give evidence on their behalf. The committee agreed to all requests for a legal representative to be present to advise but not speak on behalf of the witness. It is believed that the government authorised the Legal Representation Office to cover this cost for current and former public officials that had previously appeared before the Ombudsman, which was important as the Council's committees do not have capacity to fund the legal expenses of witnesses.

Deputy Commissioner Burn

The dramatic turnaround and acceptance of the Legislative Council's powers to examine matters covered by statutory secrecy provisions is no better exemplified than by the evidence of Deputy Commissioner Burn, who went from a position in 2012 of refusing to answer questions on Strike Force Emblems before a Budget Estimates committee, to her appearance in the final hearing of the Operation Prospect inquiry in 2015, where she detailed in public the specific allegations of suspected corruption she had investigated against her fellow Deputy Commissioner 15 years ago.

At the start of the inquiry Deputy Commissioner Burn made a brief submission that in general terms expressed her innocence regarding the allegations that had been publicly aired against her, but requested that her submission be kept confidential.

Upon the publishing of other submissions on the inquiry website and a resolution from the committee that Deputy Commissioner Burn provide reasons as to why her submission should remain confidential, she contacted the committee to withdraw her request for confidentially and instead requested that her submission be made public forthwith and uploaded to the committee's website. This request was agreed to and was the first time in 15 years that Deputy Commissioner Burn had publicly provided her perspective on the matter. It also allowed the committee's public evidence to consist of a more balanced view, as prior to this many published submissions had been critical of Ms Burn's involvement in Operation Mascot.

During evidence, Ms Burn noted that the inquiry was the first opportunity for her to publicly defend herself against allegations that had been levelled against her for the past 15 years. She stated that she had never once breached secrecy provisions and she has 'had to endure allegations and innuendo in the media for many years without any ability to respond. This has had a detrimental impact on [her] reputation and a horrible impact on [her] family'.[31] She also stated:

> Contrary to allegations that I am hiding behind secrecy provisions, this is simply not the case. It is precisely because of those secrecy positions that I have been unable to defend myself at every step of the way due to the requirements of the law not to disclose such information. I have never compromised those provisions and aside from internal interviews and occasional requests due to court or administrative matters, I have not spoken about these matters to anyone since I left Operation Mascot in November 2002. This has been to my absolute detriment.[32]

Outside of the hearing room, a representative of Deputy Commissioner Burn was asked by the media if Ms Burn would clarify her initial evidence before the committee at a subsequent hearing. In response the representative noted the importance of parliamentary privilege and stated that '[Ms Burn] is bound by strict secrecy laws and cannot comment on these matters outside parliament'; [33] a significant acknowledgement of the acceptance of the inquiry power of Legislative Council committees while respecting the seriousness of statutory secrecy provisions.

The Ombudsman

One of the watershed moments of the inquiry came the day before the first public hearing when the Ombudsman, who had previously stated that the letter to the joint statutory committee could serve as his submission to the select committee, presented a 37 page document about the operation of his investigation and historical information pertinent to the committee's inquiry. This correspondence was received one day after the Ombudsman had been served his summons to appear before the committee to give evidence. The correspondence provided a great deal of insight into matters relating to the inquiry and was extremely useful to the inquiry process. It did also include a formal claim of public interest immunity over some issues relating to his Operation Prospect inquiry that may arise during evidence:

> My claim in particular focuses on the potential prejudice of evidence that may be given before the Select Committee to the avenues and methods of inquiry that have been, are being or will be pursued in Operation Prospect and the identity of persons who have provided confidential evidence or assistance to Operation Prospect, and the nature or content of the evidence given by these persons.[34]

Despite this claim of public interest immunity, during his evidence the Ombudsman revealed information previously not in the public domain, including that Deputy Commissioner Kaldas had been named in 35 affidavits and on 80 listening device warrants during Operation Mascot and a journalist, Mr Steven Barrett, had been named on 52 warrants. This information prompted Deputy Commissioner Kaldas to respond later during his evidence that even the infamous murderer Neddy Smith had not been the subject of 80 warrants. The Ombudsman also provided

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[31] Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", Evidence, Deputy Commissioner Burn, 10 February 2015, p 3.

[32] Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", Evidence, Deputy Commissioner Burn, 10 February 2015, p 3.

[33] Daily Telegraph, *Bugging inquiry: Deputy Chief Catherine Burn's job is on the line*, Andrew Clennell and Alicia Wood, 6 February 2015, p 2.

[34] Correspondence from the NSW Ombudsman to the Chair of the Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", 28 January 2015, p 1. See: http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/204801A280928B01CA257DDB007F3453.

some details about who had given evidence to his inquiry and for how long, and even went *in camera* to provide some very sensitive information about his inquiry.[35]

During his public evidence, the Ombudsman noted that he was in a difficult position but was willing to co-operate with the committee to the extent he could:

> I am endeavouring to walk a very fine line here. I want to be, in every way possible, cooperative and provide assistance to this Committee. At the same time, I have an obligation to the inquiry that I am conducting to ensure that I do not do anything which unnecessarily jeopardises it and, very particularly, the safety, welfare and health of many of the people who are involved in this matter.[36]

However, there was one particular issue in which the Ombudsman did not comply with the committee's request for information. The committee had requested copies of letters of resignation from the Ombudsman's staff who had worked on Operation Prospect. The letters were sought on the basis that they may document criticism of the Ombudsman's investigation. The Ombudsman refused to provide this information to the committee, citing that he was constrained by the *Privacy and Personal Information Protection Act 1988*. When questioned about this matter, the Ombudsman offered some information about his staffing issues but refused to provide redacted copies of the information sought by the committee, stating that he would only provide it if there was a 'formal substantive request made pursuant to a summons or a formal request for that information'.[37] At this point the committee chose not to pursue the evidence further, nothwithstanding the power to do so.

Other high profile public officials

Other high profile public officials also divulged information covered by secrecy during the hearings including current and former police commissioners and other high ranking NSW Police Force officers as well as the current Inspector of the Police Integrity Commission. These officials were all candid in their responses and answered all questions asked of them by the committee.

Further, in answers to questions taken on notice, the Inspector of the Police Integrity Commission provided the committee with a number of highly confidential historical documents, including the controversial Strike Force Emblems Report, internal police communications surrounding that report and a report on the legality of the disputed warrant. Police Commissioner Scipione also provided documents in answers to questions on notice, including internal police correspondence surrounding the Emblems report.

Finally, the last days before the committee reported saw a flurry of correspondence from past and present senior public officials detailing their views about what happened during the Mascot investigation and its aftermath and traversing material that would otherwise be in breach of statutory secrecy provisions. This additional correspondence saw the committee meeting only a matter of hours before the report was tabled and the select committee ceased to exist in order to make the documentation public.

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[35] Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", Evidence, NSW Ombudsman, 3 February 2015, p 26.
[36] Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", Evidence, NSW Ombudsman, 3 February 2015, p 7.
[37] Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", Evidence, NSW Ombudsman, 3 February 2015, p 21.

Once the gates of statutory secrecy were opened, it seemed everyone wanted to have their say put on the public record.

Judicious use of the inquiry power

While one of the key aims of the inquiry was to publicly air matters that had been kept confidential for well over a decade, it is important to note the committee's judicious approach to assessing the status of each document or hearing transcript before deciding on publication, or maintaining the document as confidential.

The committee did not publish all information that it had been provided. This ultimately led to a number of documents being kept partially or fully confidential, including the Strike Force Emblems Report. Another example of the committee cautiously using its powers was its decision regarding the publication status of the disputed warrants and affidavit from the Mascot investigation that were received as attachments to a number of submissions. These highly sensitive documents included the names of over 100 people, some of whom would still to this day be unaware that they had been covertly investigated due to corruption allegations. Following a number of items of correspondence to the committee outlining serious privacy and welfare concerns, the committee resolved to keep these documents entirely confidential.

The committee also heard from a number of witnesses *in camera*. Wherever possible Legislative Council committees respect the wishes of witnesses and keep certain parts or entire transcripts confidential. For this inquiry the committee published some *in camera* evidence following correspondence with witnesses and kept other evidence fully confidential. However, the committee resolved to quote select paragraphs from two confidential transcripts in the final report against the directions of the witnesses. This was conveyed to the witnesses, with one, the Ombudsman, strongly objecting in principle to the use of any *in camera* evidence. The Ombudsman requested that if the committee was to publish some of his *in camera* evidence, more of it should be included in the report to ensure the context of his remarks was clear. This request was agreed to by the committee.[38]

Was the inquiry worthwhile?

There are important public policy and privacy reasons in favour of including secrecy provisions in particular statutes. Because of this, there must always be a good reason for Parliament to utilise parliamentary privilege and enforce its strong and far-reaching powers. While there is no denying that this inquiry was a successful demonstration of the powers of the Legislative Council, it is important that these powers are used in a way that upholds the institution's integrity and purpose.

At the commencement of the inquiry, there were significant concerns that the Ombudsman's investigation was not operating as it should. The inquiry had cost a large amount of public money with no clear end in sight, operated in complete secrecy and rumours had started to spread that the Ombudsman was targeting whistleblowers rather than those involved in the original bugging operation during the private hearings.

The Ombudsman, while being a public official, is independent of the executive. Unlike similar bodies such as the Police Integrity Commission and NSW Crime Commission which both have

[38] Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", NSW Legislative Council, *Inquiry into the conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015) p227.

independent inspectors; for the Ombudsman, Parliament is the ultimate and only level of accountability. Therefore, if Parliament cannot effectively oversight the Ombudsman by inquiring into matters covered by secrecy, then essentially the Ombudsman is free from accountability or oversight.

Considering the significant concerns that surrounded Operation Prospect, it was imperative that the select committee judiciously use its powers to inquire into how the Ombudsman was conducting his inquiry and why it was taking him so long to complete it. It also offered the Ombudsman a platform to respond to his detractors and set the record straight.

Through this inquiry, the committee was able to conclude that it was satisfied the Ombudsman would 'properly investigate the propriety of listening device warrants and that his inquiry is not merely a witch-hunt to track down the person or persons who brought this matter to light'[39]. However, the inquiry also revealed inherent problems with the Ombudsman's investigation, primarily that it included two conflicting terms of reference: the allegations that warrants were illegally obtained, and the leaking of related documents 12 years later. The committee concluded that these 'should have been considered as separate matters, either as separate inquiries, or through the release of an interim report or a series of reports' as it delayed the finalisation of the inquiry and 'created a confusing situation whereby persons involved in the investigation were treated as both complainants and as perpetrators or colluders'.[40]

Additionally, the select committee inquiry provided a public forum for the airing of grievances and a discussion of the perceived wrongs committed by police and other public officials almost 15 years ago, free from the threat of agencies with the power to prosecute for divulging that information. For many individuals, one of the most important parts of this inquiry was the opportunity to publicly clear their name after so many years, an opportunity that could not be provided without the protection of parliamentary privilege.

The committee also received evidence regarding the inherent problems with the current system for granting surveillance device warrants and with the current system of police oversight. These revelations prompted the committee to make recommendations for reviews to be conducted into these matters.

On the morning that the committee tabled its report the Government announced that it would appoint former shadow Attorney-General Andrew Tink to conduct an inquiry into the current system of police oversight, to report by August 2015.[41] In addition, it was reported in the media shortly after the inquiry that judges will now be required to give written reasons for issuing warrants for covert surveillance.[42]

What changed?

Why did the NSW Police Force and the Ombudsman accept the Legislative Council's power to seek information that would otherwise be covered by statutory secrecy provisions?

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[39] Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", NSW Legislative Council, *Inquiry into the conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015), p108-109.

[40] Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", NSW Legislative Council, *Inquiry into the conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015), p 110.

[41] Media release, The Honourable Mike Baird MP, Premier of New South Wales, *Baird government to improve police oversight*, 25 February 2015.

[42] SMH, *Judges now required to give written reasons for issuing warrants for covert surveillance*, Ms Louise Hall, 13 May 2015.

One explanation could be that the government (in this case the NSW Police Force), the Ombudsman and other current and former senior public officials finally ceded to what Mr Walker described as the 'true state of affairs', where the continual assertion by the Council of its powers, supported by the recent NSW Solicitor General advice, led it to give way to the realisation that parliamentary privilege trumps secrecy provisions.

However this view may be too simplistic. It is also possible that once individuals started to provide under privilege information covered by secrecy, including documentation such as warrants and affidavits, the NSW Police Force and the Ombudsman had little option if they wanted to avoid only one side of the story being told. Many key inquiry documents were received from people as individuals rather than in any official capacity. It is highly unusual for a committee to receive so many official documents from so many unofficial sources. This differed greatly from the WorkCover inquiry, where the agency itself was in control of the documentation and relied on the advice of the Crown Solicitor to not provide the information.

During the Operation Prospect inquiry, once the committee had received information covered by secrecy provisions and had judiciously published a selection of it, the NSW Police Force and Ombudsman were put in a difficult position. It would have been unthinkable for to be silent and only have one side of the story, and a damning one at that, publicly available.

It was also in the interests of high-profile stakeholders to provide information to the inquiry, while for the Ombudsman the inquiry provided an opportunity to publicly defend his investigation. It could be said that the committee ended the inquiry with a much better understanding and appreciation of the complexities involved in the Ombudsman's Operation Prospect inquiry.

Beyond the Prospect inquiry

The unanswered question from this inquiry is whether the executive in NSW has now conceded that privilege trumps secrecy, or if this inquiry was merely a one off, where due to unique circumstances, public officials chose to give evidence about matters covered by secrecy under the protection of parliamentary privilege.

Having only recently frustrated the Legislative Council by its withholding of information during the WorkCover NSW inquiry, it was surprising that the government so readily ceded to the Parliament's powers.

Difficulties could arise in future if the government refuses to acquiesce to the Parliament's powers regarding secrecy. What would the Legislative Council do? Would it merely state its case, backed up by the recent precedent in its favour; or would it push the issue to a conclusion, despite the earlier wise counsel of Mr Walker to continue to build a body of precedent to assert its powers and cement the true state of affairs while avoiding wherever possible these types of matters being considered by the courts?

One option could be to push for similar legislative amendments to Queensland that make it abundantly clear that parliamentary privilege is not affected by statutory secrecy.[43], Whatever is decided, it might be too early to think that just because of this one inquiry the whole battle between statutory secrecy and parliamentary privilege has been won in NSW.

[43] s 13(B), *Acts Interpretation Act 1954* (QLD).

What is clear is that whatever happens from here, the bar has been set, and the Legislative Council will continue to challenge attempts by the government and its agencies to hide behind statutory secrecy provisions to avoid scrutiny. This precedent will make it very difficult indeed for a future government to argue that committees do not have the right to seek information covered by statutory secrecy.