

General Purpose Standing Committee No. 4

Progress of the Ombudsman’s investigation “Operation Prospect”

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Terms of reference

On 2 June 2015, General Purpose Standing Committee self-referred an inquiry into the progress of the Ombudsman's investigation "Operation Prospect" into police bugging and in particular:

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

That the committee report on or before Monday 20 July 2015.

The committee later resolved to extend the reporting date to 8 September 2015¹.

¹ *Minutes*, General Purpose Standing Committee No. 4, 28 July 2015, p 2.

Committee membership

The Hon Robert Borsak MLC	The Shooters and Fishers Party	<i>Chair</i>
Mr David Shoebridge MLC	The Greens	<i>Deputy Chair</i>
The Hon Trevor Khan MLC*	The Nationals	
The Hon Shayne Mallard MLC	Liberal Party	
The Hon Greg Pearce MLC*	Liberal Party	
The Hon Adam Searle MLC*	Australian Labor Party	
The Hon Lynda Voltz MLC	Australian Labor Party	

- * Mr Adam Searle substituted for Mr Shaoquett Moselmane for the duration of the inquiry.
 Mr Trevor Khan substituted for Mrs Bronnie Taylor for the duration of the inquiry.
 Mr Greg Pearce substituted for Mr David Clarke for the duration of the inquiry.

Table of contents

	Chair's foreword	viii
	Summary of recommendations	ix
	Findings	x
Chapter 1	Introduction	1
	Terms of reference	1
	Conduct of the inquiry	1
	Submissions	1
	Public hearings	2
	Statutory secrecy	2
	Summoning of witnesses	2
	Legal representation	3
	The committee's order for papers	3
	Report structure	4
Chapter 2	Operation Prospect	5
	Background	5
	Committee comment	6
	Update on the investigation	7
	Concerns about the investigation	9
	Length of investigation	9
	Impact of Mr Barbour's departure	12
	Committee comment	14
Chapter 3	Referral of Deputy Commissioner Kaldas to the Director of Public Prosecutions	17
	The referral	17
	Evidence provided by the Ombudsman during the select committee inquiry	18
	Evidence provided by Deputy Commissioner Kaldas during the select committee inquiry	19
	Evidence from the Commissioner of Police and Director of Public Prosecutions	20
	Deputy Commissioner Kaldas' alleged offence	20
	Concerns about the referral	21
	Timing of the referral	21
	Alleged lack of procedural fairness	22
	Committee comment	24

	Leaking of information about the referral to the media	24
	The newspaper articles	25
	Committee comment	25
	Source of the leak	26
	Did the leak come from within the Ombudsman's office?	26
	Did the Office of the Director of Public Prosecutions leak the information?	30
	Did the leak come from within the Attorney General's office?	31
	Did the leak come from within the NSW Police Force?	32
	Allegations the leak originated from the previous select committee	33
	Committee comment	33
	Apprehension of bias	35
	Committee comment	36
Appendix 1	Submissions	39
Appendix 2	Witnesses at hearings	40
Appendix 3	Answers to questions on notice	41
Appendix 4	Sydney Morning Herald Article	42
Appendix 5	Minutes	45

Chair's foreword

Since its establishment in 2012, the Ombudsman's investigation 'Operation Prospect' has attracted ongoing criticism. Not only has it taken much longer than originally anticipated, it is also now likely to face further delays as a result of the former Ombudsman's departure on 30 June 2015. Understandably, the prolonged nature of the investigation is having a negative impact on certain individuals. This is hardly surprising given many of the issues the Ombudsman is investigating have dragged on for over a decade.

The committee believes that the complexity of the investigation, and its drawn-out timeframe, have been significantly affected by the former Ombudsman's decision to simultaneously investigate the substantive issues regarding the warrants, as well as the leaking of confidential documents. Had the Ombudsman focused solely on the warrant issues first, it would likely have led to these matters being resolved before the former Ombudsman left office.

A factor now likely to add further delay is the new Acting Ombudsman, Professor McMillan, having to acquaint himself with all of the evidence. While we make no criticism of Professor McMillan, we believe that any person taking on this task will experience difficulties, given the charged and contested nature of the issues, the volume of material and the fact that they did not take the evidence themselves.

Our main concern is in bringing finality to these matters, for everyone involved. To this end, we have recommended that the NSW Government provide Professor McMillan with the resources necessary to ensure the timely finalisation of Operation Prospect. Further, we have recommended that Professor McMillan provide our committee with a written report by 1 November 2015 as to the progress of the investigation, including the anticipated timeframe for completion.

Also examined during this inquiry was the leaking of confidential information related to Operation Prospect. On 17 April 2015 the Sydney Morning Herald published an article that revealed Deputy Commissioner Kaldas had been referred to the Director of Public Prosecutions for allegedly giving false evidence during his examination before the Ombudsman's Operation Prospect inquiry. Unfortunately, how this information came to be divulged to a journalist still remains unknown, despite our attempts to uncover the source.

In examining this issue, the committee found the former Ombudsman, Mr Barbour, and the then Acting Ombudsman, Mr Wheeler, particularly unhelpful. Both were frustrated with the scrutiny to which the Ombudsman's office was subjected. As an organisation responsible for scrutinising matters of public administration, I would expect much more from the Ombudsman's office in terms of their engagement with a parliamentary committee.

I would like to thank inquiry participants, fellow committee members and the committee secretariat. I commend this report to the House.



Hon Robert Borsak MLC
Committee Chair

Summary of recommendations

- Recommendation 1** 7
That the NSW Government implement the recommendations of the Select Committee on the Conduct and Progress of the Ombudsman’s Inquiry “Operation Prospect”.
- Recommendation 2** 15
That the NSW Government provide the Acting Ombudsman with the resources necessary to ensure the timely finalisation of Operation Prospect.
- Recommendation 3** 15
That the Acting Ombudsman provide a written report to General Purpose Standing Committee No. 4 by 1 November 2015 outlining the progress of Operation Prospect, including an anticipated timeframe for the completion of the investigation.
- Recommendation 4** 16
That the NSW Government repeal the provisions under which Operation Prospect and associated matters are being conducted by the Ombudsman’s office.
- Recommendation 5** 16
That the NSW Government proactively develop a strategy about how it will act to resolve the issues involved in Operation Prospect, should the Ombudsman’s inquiry into the police bugging matter miscarry.
- Recommendation 6** 16
That, should the inquiry into the leaking of confidential material miscarry, that aspect ought properly be the matter of an ordinary police investigation rather than any special form of inquiry.

Findings

Finding 1

15

That the delay and other difficulties in completing Operation Prospect has significantly damaged the inquiry and undermined confidence in the integrity of any final report it delivers.

Chapter 1 Introduction

This chapter provides an overview of the establishment and conduct of the inquiry, as well as relevant procedural matters. It also includes a brief outline of the structure of this report.

Terms of reference

- 1.1 On 2 June 2015, General Purpose Standing Committee No. 4 self-referred an inquiry into the progress of the Ombudsman's investigation "Operation Prospect".
- 1.2 The full terms of reference are set out at page iv. The terms of reference included examination of the circumstances in which the potential and/or proposed prosecution of a Deputy Police Commissioner arising from "Operation Prospect" was divulged to the media.
- 1.3 The committee initially resolved that the report be tabled by 20 July 2015, but this date was subsequently extended to 8 September 2015.
- 1.4 A recent Legislative Council inquiry also considered issues related to the Ombudsman's investigation "Operation Prospect". It was conducted by the Select Committee on the Conduct and Progress of the Ombudsman's inquiry "Operation Prospect", and its report was tabled on 25 February 2015.² That report, including a summary of the committee's findings and recommendations, is available on the committee's website www.parliament.nsw.gov.au/conductandprogress.

Conduct of the inquiry

Submissions

- 1.5 Given this was the second inquiry considering issues related to the Ombudsman's investigation "Operation Prospect", the committee specifically invited submissions from individuals who appeared as a witness during the last inquiry, rather than making a general call for submissions.
- 1.6 The closing date for submissions was 15 June 2015, however, the committee continued to accept submissions after this date.
- 1.7 The committee received six submissions and three supplementary submissions. The full list of submissions is set out in Appendix 1.

² Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", NSW Legislative Council, *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015).

Public hearings

- 1.8 The committee held two public hearings, on 19 and 26 June 2015, at which six witnesses appeared. A full list of witnesses who appeared at the hearings is included in Appendix 2. Transcripts of hearings are available on the committee's website www.parliament.nsw.gov.au/operationprospect.

Statutory secrecy

- 1.9 Witnesses were reminded of the advice obtained during the previous inquiry from Mr Bret Walker SC, dated 14 January 2015, who confirmed the position of the Legislative Council with respect to statutory secrecy, that being that such provisions do not have any application to Parliament unless by express enactment.³
- 1.10 Witnesses were generally forthcoming with their evidence and the committee appreciates their assistance in this regard.
- 1.11 Further information about the powers of the Legislative Council in relation to statutory secrecy provisions were outlined in Chapter 1 of the select committee's report into the conduct and progress of the Ombudsman's inquiry "Operation Prospect".⁴

Summoning of witnesses

- 1.12 As was the practice in the last inquiry, most witnesses were summoned to appear, except for the Attorney General, the Hon. Gabrielle Upton MP, her Chief of Staff and Mr Nick McKenzie, a Sydney Morning Herald journalist. While summoning witnesses is unusual for committees in the Legislative Council, it was based on advice from Mr Walker, who stated that he strongly favoured the service of a summons if the committee was substantively questioning a witness on matters they might otherwise not be permitted to answer.⁵
- 1.13 While the Attorney General accepted the committee's invitation to appear, it should be noted that under the *Parliamentary Evidence Act 1901* members of the Legislative Council or Legislative Assembly cannot be summoned to give evidence.⁶
- 1.14 By contrast, there is no legal barrier to ministerial staff being summoned, as occurred in the 2003 'Orange Grove inquiry' conducted by General Purpose Standing Committee No. 4.⁷ However in this inquiry, after the Attorney General's Chief of Staff Mr Kevin Wilde declined to appear, the committee decided not to summons him.

³ Mr Bret Walker SC, Opinion, Legislative Council's Inquiry on Ombudsman's 'Operation Prospect', 14 January 2015.

⁴ Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", NSW Legislative Council, *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015) pp 3-5.

⁵ Mr Bret Walker SC, Opinion, Legislative Council's Inquiry on Ombudsman's 'Operation Prospect', 14 January 2015.

⁶ *Parliamentary Evidence Act 1901*, s 4(1).

⁷ Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), pp 502-503.

- 1.15** The committee also decided not to issue a summons on Mr Nick McKenzie, a journalist for the Sydney Morning Herald. All members of the committee were of the view that it was not appropriate in the present case for a parliamentary committee to attempt to compel a journalist to give evidence that would reveal that journalist's sources, even had this been possible in light of the journalist residing in a different state.

Legal representation

- 1.16** Similar to the previous select committee inquiry, a number of witnesses were accompanied by their legal representatives at the hearings. Although this is not the usual practice, it was permitted by the committee because of the sensitive nature of the issues involved in the inquiry.

The committee's order for papers

- 1.17** During his appearance at the hearing on 19 June 2015, the committee asked the then Ombudsman, Mr Bruce Barbour, to provide the statutory declarations he referred to in his evidence. However, Mr Barbour told the committee that he would only provide them if he was subject to a formal order from the committee or the House.⁸
- 1.18** Subsequently, at a meeting of the committee on 19 June 2015, the committee made an order for papers under standing order 208(c), in order to obtain copies of the statutory declarations. While the Ombudsman ultimately decided to provide the committee with these documents, so as to assist the committee with its inquiries, he stated in reply correspondence that he disagreed that standing order 208(c) conferred powers on the committee to compel him to produce the documents.⁹
- 1.19** Despite the Ombudsman's view, the committee asserts that it does in fact have the power to order the production of documents, with this power being delegated to it by the House.
- 1.20** It is interesting to note the view of the Director of Public Prosecutions Mr Lloyd Babb SC in this regard, who acknowledged during the course of this inquiry that the committee did indeed have the power to compel him to produce certain documents: 'I understand the powers of this committee to compel provision'.¹⁰
- 1.21** *New South Wales Legislative Council Practice* provides insight as to what the actual powers of committees are in respect of ordering the production of documents. Pursuant to standing order 208(c), a committee does have the power to compel the production of documents. Should such an order be resisted, it is up to the House to deal with the consequences of the failure to produce by way of motion and make determinations as it sees fit.¹¹

⁸ Evidence, Mr Bruce Barbour, NSW Ombudsman, 19 June 2015, p 19.

⁹ Correspondence from Mr Bruce Barbour, NSW Ombudsman, to Chair, 23 June 2015, p 2.

¹⁰ Evidence, Mr Lloyd Babb SC, Director of Public Prosecutions, Office of Director of Public Prosecutions, 19 June 2015, p 13.

¹¹ Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), pp. 538-542.

Report structure

- 1.22** **Chapter 2** focuses on the progress of "Operation Prospect" since the last inquiry. In particular, it considers concerns about the lack of progress and lack of clarity as to when the investigation will be finalised.
- 1.23** **Chapter 3** examines the Ombudsman's referral of Deputy Commissioner Kaldas to the Director of Public Prosecutions for allegedly giving false evidence at an Operation Prospect hearing. It also examines how details of this referral were leaked to a journalist and published in a newspaper article.

Chapter 2 Operation Prospect

This chapter provides background information about the Ombudsman’s investigation “Operation Prospect”, as well as an update on its progress. It also explores concerns about the investigation’s lack of progress and the uncertainty as to when it will be finalised.

Background

- 2.1** Operation Prospect is an investigation being undertaken by the NSW Ombudsman. It was established in 2012 following a broad referral from the Inspector of the Police Integrity Commission and subsequent legislative amendments providing the Ombudsman with powers necessary to conduct the inquiry.¹²
- 2.2** The focus of the Ombudsman’s investigation is to examine allegations of misconduct by officers of the NSW Police Force, the NSW Crime Commission and the Police Integrity Commission in relation to controversial operations conducted by these agencies between 1998 and 2004.¹³
- 2.3** Central to the Operation Prospect investigation are allegations that a large number of people suspected of police corruption were improperly ‘bugged’,¹⁴ including current Deputy Commissioner Nick Kaldas. In this context, the investigation is examining the use of false and misleading information in warrant applications and affidavits, as well as the improper targeting of individuals and mishandling of informants and undercover operatives.¹⁵
- 2.4** The Ombudsman is also examining allegations related to the unlawful or improper dissemination of confidential documents pertaining to these historic police operations, under its reference which originated from Strike Force Jooriland, an earlier investigation originally conducted by the NSW Police Force.¹⁶
- 2.5** The full context and background to Operation Prospect is outlined in the 2015 report of the Select Committee on the Conduct and Progress of the Ombudsman’s Inquiry “Operation Prospect”.¹⁷

¹² Correspondence from Mr Bruce Barbour, NSW Ombudsman, to Chair, Select Committee on the Conduct and Progress of the Ombudsman’s Inquiry “Operation Prospect”, 28 January 2015, p 3.

¹³ Correspondence from Mr Barbour NSW Ombudsman, to Chair, Select Committee on the Conduct and Progress of the Ombudsman’s Inquiry “Operation Prospect”, 28 January 2015, p 1.

¹⁴ Correspondence from Mr Bruce Barbour, NSW Ombudsman, to Chair, Select Committee on the Conduct and Progress of the Ombudsman’s Inquiry “Operation Prospect”, 28 January 2015, pp 19-20.

¹⁵ Correspondence from Mr Bruce Barbour, NSW Ombudsman, to Chair, Select Committee on the Conduct and Progress of the Ombudsman’s Inquiry “Operation Prospect”, 28 January 2015, p 4.

¹⁶ Correspondence from Mr Bruce Barbour, NSW Ombudsman, to Chair, Select Committee on the Conduct and Progress of the Ombudsman’s Inquiry “Operation Prospect”, 28 January 2015, pp 24-28.

¹⁷ Select Committee on the Conduct and Progress of the Ombudsman’s Inquiry “Operation Prospect”, NSW Legislative Council, *The conduct and progress of the Ombudsman’s inquiry “Operation Prospect”* (2015), pp 9-22.

- 2.6 The select committee, established by the Legislative Council in late 2014, inquired into a range of matters related to the conduct and progress of Operation Prospect. In particular, it explored concerns raised in the media and some submissions that the Ombudsman's investigation was taking too long, being conducted in secret and that there was a greater focus on the leaking of documents, rather than the substantive allegations related to the warrants.¹⁸
- 2.7 The report, tabled in February 2015, made a number of findings and recommendations, some of which are related to the substantive issues the Ombudsman is himself investigating, and others related to the conduct of Operation Prospect generally.¹⁹

Committee comment

- 2.8 The committee notes that the Government's response to the previous select committee's inquiry is due on 25 August 2015. The full list of the select committee's recommendations is that:
- the NSW Government establish an open and independent inquiry to review the current system for granting surveillance device warrants, to:
 - ensure legislative compliance
 - promote the integrity of the system
 - consider the establishment of an Office of Independent Counsel to provide independent legal representatives to test the veracity of surveillance device warrant
 - the Premier of New South Wales and the Commissioner of Police publicly apologise to any persons who are found by the Ombudsman to have been inappropriately named on listening device and/or telephone intercept warrants obtained by Special Crimes and Internal Affairs
 - the NSW Government amend secrecy provisions to provide for an automatic exemption to non-disclosure directions for publication to a medical practitioner, psychologist, or counsellor for the purposes of medical or welfare assistance, in the following statutes:
 - *Ombudsman Act 1974*
 - *Crime Commission Act 2012*
 - *Police Integrity Commission Act 1996*
 - *Independent Commission Against Corruption Act 1988*
 - the Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission conduct an inquiry into the *Ombudsman Act 1974*, with particular emphasis on Part 3 regarding investigations and conciliations
 - the Premier of New South Wales and the Minister for Police and Emergency Services demonstrate to the community that Deputy Commissioners Kaldas and Burn can

¹⁸ Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"*, pp 93-110.

¹⁹ Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"*, pp xii – xiii.

maintain a professional relationship, pending the Ombudsman's report expected in June 2015

- the NSW Government establish a single, well-resourced police oversight body that deals with complaints quickly, fairly and independently, and that the Legislative Council Standing Committee on Law and Justice inquire into and report on the most appropriate structure to achieve this.

- 2.9** To date, some of the select committee's recommendations have been actioned, albeit in ways perhaps not contemplated by the committee. For example, the NSW Government has commissioned Mr Andrew Tink, former Shadow Leader of the House and former Shadow Attorney General, to conduct a review of police oversight, whereas the select committee recommended the Standing Committee on Law and Justice inquire into the most appropriate structure for a single well-resourced police oversight body. Other recommendations from the previous select committee's inquiry appear to have not been implemented at all.
- 2.10** We are of the opinion that at present the joint parliamentary oversight committee does not have the jurisdiction to conduct a review of the Ombudsman's legislation,²⁰ and that this should be progressed by way of a select committee of the Legislative Council.
- 2.11** As the committee supports the previous select committee's recommendations, we recommend that the NSW Government implement the recommendations of the Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect".

Recommendation 1

That the NSW Government implement the recommendations of the Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect".

Update on the investigation

- 2.12** Operation Prospect has been operating for almost three years. To date, the investigation has cost the NSW Government over \$6 million.²¹
- 2.13** When Mr Bruce Barbour, the then Ombudsman, appeared before the select committee in February 2015, he outlined the progress of the investigation. By that stage, he had held over 100 hearings and regarded the investigation as 'significantly advanced', although 'incomplete'.²²
- 2.14** In terms of its progress since then, the committee was advised that Operation Prospect has moved into its final stages. Adversely affected individuals have been notified and provided with an opportunity to respond to proposed findings against them, as confirmed by the following notice which was placed on the Ombudsman's website:

²⁰ Section 31B(1)(b) of the *Ombudsman Act* 1974 appears to be limited to existing powers under the Act.

²¹ Answers to questions on notice, Mr Bruce Barbour, NSW Ombudsman, 26 June 2015, p 2.

²² Correspondence from Mr Bruce Barbour, NSW Ombudsman, to the Chair, Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", 28 January 2015, p 7.

Operation Prospect is now in the procedural fairness stage. Counsel Assisting the Inquiry has provided a series of detailed submissions on the evidence collected and the hearings conducted throughout the life of the operation. Each submission has been carefully reviewed and incorporated with other relevant material from the investigation to form the basis of provisional findings and recommendations. Finalised submissions have now been sent to potentially adversely affected persons for their consideration and to allow them to make submissions on the evidence and any provisional findings for the consideration of the Ombudsman.²³

- 2.15** Thirty three individuals have been advised that they are adversely affected.²⁴ As a matter of procedural fairness, each has been given an opportunity to respond, with some having requested extensions of this time.²⁵
- 2.16** In terms of the Ombudsman's report, Mr Barbour explained that contextual, historic and background information has already been drafted. Other parts of the report will be formulated from the submissions prepared for affected individuals, which Mr Barbour noted is standard procedure for any major investigative agency.²⁶
- 2.17** However, the final report will not be completed by Mr Barbour, given his term as Ombudsman ended on 30 June 2015. His successor, Professor John McMillan AO, was appointed as Acting Ombudsman for a two-year period, from 1 August 2015.²⁷
- 2.18** In a media release issued a week after he started in the new position, Professor McMillan explained the approach he would take to finalising the investigation:

In taking charge of this investigation I am currently analysing the evidence collected throughout the life of the investigation, reviewing the transcripts and recordings of hearings that were earlier conducted, and considering the complaints, submissions and other correspondence from interested parties.

In doing so I have taken note of critical comments about the investigation that have been made in the media, in Parliamentary committee hearings, and in submissions and correspondence. That includes comments about the length of time of the investigation, the direction of the investigation, the potential reputational or other harm to persons adversely affected, who should be called as a witness, allegations of bias in the investigation, and the difficulty facing a new Ombudsman in gaining a comprehensive understanding of all aspects of the investigation. In short, I am apprised of the importance, complexity and the scale of the task before me.

If I consider there is a need to conduct further hearings or to rehear evidence on a contested issue I will take that course. In the meantime it is important that all affected parties who have been provided with an opportunity to make a submission take the

²³ NSW Ombudsman, *Operation Prospect* (23 July 2015), <<https://www.ombo.nsw.gov.au/what-we-do/our-work/operation-prospect>>; Evidence, Mr Bruce Barbour, NSW Ombudsman, 19 June 2015, pp 22- 23.

²⁴ Media release, Professor John McMillan, Acting NSW Ombudsman, 'Operation Prospect', 10 August 2015.

²⁵ Evidence, Mr Barbour, 19 June 2015, p 23.

²⁶ Evidence, Mr Barbour, 19 June 2015, p 25.

²⁷ NSW Ombudsman, *Operation Prospect* (28 July 2015), <<https://www.ombo.nsw.gov.au/what-we-do/our-work/operation-prospect>>.

opportunity to do so in accordance with the timetable provided by the Ombudsman's office...²⁸

Concerns about the investigation

2.19 This section addresses a number of concerns raised in relation to the progress of the Ombudsman's investigation 'Operation Prospect'.

Length of investigation

2.20 There are ongoing concerns that the investigation is taking too long and that the 'delays' are having a detrimental impact on those involved. There is also a lack of clarity as to when the investigation will be finalised.

Timeframe for completion of the investigation

2.21 In February 2015 Mr Barbour anticipated that Operation Prospect would be finalised by the end of June.²⁹ However, he recently acknowledged that the investigation will require more time.³⁰

2.22 He would not, however, provide the committee with a clear date as to when the investigation is expected to be finalised: 'I honestly do not want to be in a position where I need to put down a firm date because, clearly, the carriage of this matter will be with the new Ombudsman'.³¹

2.23 While Mr Barbour conceded that Operation Prospect may be finalised 'potentially later than August [2015]', he emphasised that he did 'not want to mention any dates' as 'they end up being forwarded and communicated as suggestive of a delay'.³²

2.24 Mr Stephen Barrett, a former journalist and one of the people named on the warrants, expressed a concern that the investigation may continue even longer than August, potentially for another 12 months, given the Ombudsman has been advertising employment contracts of this length for staff to assist with Operation Prospect.³³ However, Ms Linda Waugh, Deputy Ombudsman, explained that this does not indicate the anticipated timeframe for completion

²⁸ Media release, Professor John McMillan, Acting NSW Ombudsman, 'Operation Prospect', 10 August 2015.

²⁹ Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect, *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"*, p 24; NSW Ombudsman, *Operation Prospect* (11 June 2015), <<https://www.ombo.nsw.gov.au/what-we-do/our-work/operation-prospect>>.

³⁰ Evidence, Mr Barbour, 19 June 2015, p 28.

³¹ Evidence, Mr Barbour, 19 June 2015, p 25.

³² Evidence, Mr Barbour, 19 June 2015, p 28.

³³ Submission 4, Mr Stephen Barrett, p 2.

of the investigation, as the length of contracts being offered are a requirement of the public sector rules.³⁴

Ongoing impact on individuals

- 2.25** Mr Barret and Mr Brian Harding, who was also named on the warrants, argued that they have been adversely affected by 'delays' with Operation Prospect.³⁵ Mr Barrett also contended that the extended length of the investigation was a 'significant drain on public funds'.³⁶
- 2.26** Like Mr Barrett and Mr Harding, the Commissioner of Police, Mr Andrew Scipione, 'assumed' that the investigation would be resolved by June 2015. Acknowledging the impact the investigation is having on individuals, he stated 'the sooner we can get this resolved, the better for all concerned'.³⁷
- 2.27** While Mr Scipione conceded to having to engage external consultants to help unite his executive team, he emphasised that the performance of the NSW Police Force has not been impacted by his senior officers being involved in the investigation, and that it has in fact improved over this time.³⁸

Ombudsman's response

- 2.28** Despite the perception of 'delays', Mr Barbour asserted that the 'inquiry is on track', noting that since the investigation began he has always maintained that it would be complex, protracted and resource intensive:

From the outset of this investigation, I have been at pains to clearly articulate that it will be a very protracted and very resource-intensive investigation. It has been to my best endeavour, when pressed, to try to put forward dates when I believe that it will be complete, but that has always been predicated on the basis that this is an extremely long, involved, complex investigation that will take time.³⁹

- 2.29** Ms Waugh has also assured individuals involved in Operation Prospect that they are not 'stalling' or 'delaying' the investigation.⁴⁰ Both she and Mr Barbour have stated that the investigation has been affected by matters outside of their control, like the previous select committee inquiry:

³⁴ Correspondence from Ms Linda Waugh, Deputy Ombudsman to Mr Brian Harding, 19 May 2015, attached to Submission 5, Mr Brian Harding; Correspondence from Ms Linda Waugh, Deputy Ombudsman to Mr Stephen Barrett, 19 May 2015, attached to Submission 4, Mr Stephen Barrett.

³⁵ Submission 5, Mr Brian Harding, p 2; Submission 4, Mr Stephen Barrett, p 2.

³⁶ Submission 4, Mr Stephen Barrett, p 3.

³⁷ Evidence, Mr Andrew Scipione APM, Commissioner of Police, NSW Police Force, 26 June 2015, p 9.

³⁸ Evidence, Mr Scipione, 26 June 2015, pp 9-10.

³⁹ Evidence, Mr Barbour, 19 June 2015, p 22.

⁴⁰ Correspondence from Ms Waugh to Mr Harding, 19 May 2015, attached to Submission 5, Mr Brian Harding; Correspondence from Ms Waugh to Mr Barrett, 19 May 2015, attached to Submission 4, Mr Stephen Barrett.

I have done my best to set dates and to try to meet them, but there are a range of activities that clearly are outside my control. One of those was the select committee inquiry that was conducted earlier this year, which inevitably caused considerable time line difficulties for the investigation and inquiries.⁴¹

- 2.30** Also affecting the timeline have been requests for extensions from adversely affected individuals who require more time to respond to allegations against them. The Ombudsman highlighted the importance of accommodating these requests to ensure procedural fairness is provided to these individuals:

We have asked people to respond as quickly as they can. We have typically given either a four- or six-week turnaround time. One of the things that we are mindful of—and I am sure the committee would recognise the importance of this—is to ensure that we offer procedural fairness to people who are adversely affected. We have had requests already from legal representatives and individuals for an extension of time.⁴²

- 2.31** Mr Barbour also emphasised the importance of providing procedural fairness to affected individuals, given the seriousness of the matters and the impact it may have on people's professional reputations:

Given the very serious matters that are attended to by these particular documents, the impact that they can have on people's careers and reputations, and that they may well raise criminal actions in the future, I am extremely concerned that people receive sufficient time to provide proper, comprehensive comments. Anything other than that would not be fair.⁴³

- 2.32** Mr Barbour reflected on the volume of work required in the procedural fairness stage, given the complexity of submissions they needed to prepare against adversely affected individuals:

The material has gone to 23 individuals who are adversely affected. Some have received individual submissions, some multiple submissions. All submissions have had to be redacted to ensure that people only receive matters that relate directly to them. To give you an indication of the scale of what we are working towards, the third and fourth submissions alone amount to almost 700 pages of information, with 2,000 footnotes and various references.⁴⁴

- 2.33** However, lawyers representing both Mr Barret and Mr Harding rejected the explanation of providing procedural fairness as a sound reason for the 'delays'. They argued that the Ombudsman should have factored it in to the original timeframe, given procedural fairness is a fundamental requirement of any investigation:

We do not accept the reasons set out by the Ombudsman for the further delay. It is well known, and it must have been known to the Ombudsman when he commenced his investigation, that any persons adversely affected or potentially adversely

⁴¹ Evidence, Mr Barbour, 19 June 2015, p 22; Correspondence from Ms Waugh to Mr Harding, 19 May 2015, attached to Submission 5, Mr Brian Harding; Correspondence from Ms Waugh to Mr Barrett, 19 May 2015, attached to Submission 4, Mr Stephen Barrett.

⁴² Evidence, Mr Barbour, 19 June 2015, p 23.

⁴³ Evidence, Mr Barbour, 19 June 2015, p 23.

⁴⁴ Evidence, Mr Barbour, 19 June 2015, p 23.

mentioned in any findings must be afforded an opportunity to comment on the evidence and any provisional findings that may affect them. This is a fundamental principle of law. It is perverse in the extreme for the Ombudsman to now blame the delay on those persons who may potentially have adverse findings made against them requiring time to respond to the evidence in the matters raised by the Ombudsman. Simply put, the time required to respond by those persons adversely affected should have been factored into the Ombudsman's estimate for the time required to undertake its investigations and publish its findings.⁴⁵

2.34 In relation to suggestions that the investigation should not have taken this long, Mr Barbour pointed out that Operation Prospect was not fully operational and staffed until April 2013, which he argued ought to be considered a more appropriate start date for the investigation. He suggested that this would mean that the investigation has only been underway for two years and two months.⁴⁶

2.35 Mr Barbour also rejected any comparisons between the time taken for Operation Prospect and the Wood Royal Commission, arguing that such comparisons are 'incomprehensible and wrong' given the significant differences in staffing, funding and resources:

The Wood Royal Commission lasted for more than three years, it spent in excess of \$60 million, and had by its conclusion utilised 250 staff. There were five counsel and senior counsel assisting, supported by six support staff; there were six operation directorate staff; and there were 33 team investigators and 18 team solicitors. I could go on listing the staff. All that such a comparison does is undermine Operation Prospect and give voice to those who would like nothing more than that it be terminated. It is an inappropriate comparison; clearly they are not comparable.⁴⁷

Impact of Mr Barbour's departure

2.36 Mr Barbour's term as Ombudsman ended on 30 June 2015, before Operation Prospect could be finalised. Professor McMillan was appointed as the new Acting Ombudsman, commencing in the position on 1 August 2015.⁴⁸

2.37 Given Mr Barbour had carriage of Operation Prospect for close to three years, the committee sought to understand the impact his departure may have had on finalising the investigation.

2.38 While Mr Barbour acknowledged that there has been a voluminous amount of material involved in the investigation, including transcripts that 'run to thousands of pages', he emphasised that it will be up to Professor McMillan to work out how best to approach the task of finalising the investigation.⁴⁹ He asserted that the challenges faced by the new Ombudsman are not insurmountable:

⁴⁵ Submission 4, Mr Stephen Barrett, p 3; Submission 5, Mr Brian Harding, p 2.

⁴⁶ Evidence, Mr Barbour, 19 June 2015, p 28.

⁴⁷ Evidence, Mr Barbour, 19 June 2015, p 29.

⁴⁸ NSW Ombudsman, *Operation Prospect* (23 July 2015), <<https://www.ombo.nsw.gov.au/what-we-do/our-work/operation-prospect>>.

⁴⁹ Evidence, Mr Barbour, 19 June 2015, p 26.

I do not see it as being impossible. I certainly see it as being a challenging task, but one that is well within the capacity of the person who has been appointed as Ombudsman.⁵⁰

2.39 Mr Barbour emphasised Professor McMillan’s experience, which he contended will help him take on the ‘challenging task’ of finalising Operation Prospect:

He [Professor McMillan] is an extremely experienced person. He is a professor of law. He is a former Commonwealth Ombudsman. He is currently the Australian Information Commissioner. I have absolutely no doubt that he will determine the best way of approaching these issues.⁵¹

2.40 Mr Barbour insisted that the change in Ombudsman before Operation Prospect is finalised does not amount to an ‘unsatisfactory process’. He said ‘I do not accept the proposition that this will cause an inappropriate deviation or some sort of inappropriate outcome’.⁵²

2.41 He did, however, acknowledge that having a new Ombudsman finalise Operation Prospect was a different outcome to what had been planned, given he also at one time anticipated completing the investigation by 30 June 2015. Although Mr Barbour agreed that the report would be finalised by a person who did not hear the evidence, he disagreed that this would jeopardise the credibility of the investigation or report.⁵³

2.42 As to why Mr Barbour did not seek an extension of his term on becoming aware the investigation would not be completed by the end of June 2015, he argued that it was in the public interest given the ongoing criticism he has faced:

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.⁵⁴

2.43 Mr Barbour also expressed concern that he would have been ‘criticised either way’, whether or not he had requested an extension of his term, stressing that such disparagement of a person in his position ‘is not in the best interests of the office’.⁵⁵ He emphasised the importance of protecting the reputation of the Ombudsman’s office as a key integrity agency:

It must be remembered that what is being attacked by people in relation to Operation Prospect is one of the major integrity agencies of this State. This is but one investigation that is underway.⁵⁶

2.44 Mr Barbour rejected any suggestion that he was ‘cutting and running’, rather than seeing the investigation through. He maintained that leaving office on 30 June 2015 was always what he intended to do, as confirmed by what he told the select committee in February 2015. Mr

⁵⁰ Evidence, Mr Barbour, 19 June 2015, p 27.

⁵¹ Evidence, Mr Barbour, 19 June 2015, p 32.

⁵² Evidence, Mr Barbour, 19 June 2015, pp 31-32.

⁵³ Evidence, Mr Barbour, 19 June 2015, pp 30-32.

⁵⁴ Evidence, Mr Barbour, 19 June 2015, p 29.

⁵⁵ Evidence, Mr Barbour, 19 June 2015, p 29.

⁵⁶ Evidence, Mr Barbour, 19 June 2015, p 30.

Barbour stated that he is not 'doing anything other than leaving at the conclusion of [his] term', as planned.⁵⁷

Committee comment

- 2.45** There was a reasonable expectation amongst many interested parties that Operation Prospect would be finalised by the end of June 2015. However, here we are in August 2015 and the investigation has still not been finalised, despite it having continued for almost three years.
- 2.46** We agree with the finding of the previous select committee that the investigation has been delayed by the Ombudsman undertaking two issues - the legality of warrants and leaking of confidential information. The committee is of the opinion that the Ombudsman ought to have focused on completing the primary inquiry before embarking on the matter of the leaking of confidential information. This would have maximised the chances of the primary inquiry being completed before the previous Ombudsman left office.
- 2.47** Understandably, the prolonged nature of the investigation is causing individuals a significant amount of angst and stress, particularly given that the original timeframe for the investigation continues to be 'extended', even if for genuine reasons.
- 2.48** The committee is concerned that no new timeframe has been provided as to when the investigation will be completed. While we accept that this is a matter for the new Ombudsman, we believe it is reasonable that those involved in the investigation be given an indication as to when the matter will conclude.
- 2.49** As Mr Barbour left office on 30 June 2015, Professor McMillan now has the challenging task of finalising Operation Prospect. While the committee has confidence in Professor McMillan's skills and experience, it would have been preferable for Mr Barbour to finish what he started, particularly when Mr Barbour has been at pains to emphasise the complexity and volume of the material that is the subject of the investigation. Yet now it is that same material which the new Ombudsman must come to grips with and make findings on. Clearly this situation is unsatisfactory.
- 2.50** In saying this we make no criticism of the capacity of Professor McMillan but note that any person taking on this task would experience difficulties due to the volume of material, the contested and charged nature of the issues, and the fact he did not take the evidence himself. These will all bear on whether the new Acting Ombudsman can satisfactorily complete these inquiries.
- 2.51** While the committee hopes the Acting Ombudsman and those who are the subject of the inquiries can work out a process that is acceptable to all, we have our doubts as to whether in the circumstances this is a practical possibility. The committee is of the opinion that the factors identified earlier are likely to make any reasonable resolution almost insuperable.
- 2.52** Mr Barbour's explanation for not seeking an extension is difficult to accept. Claiming it is in the 'public interest' to leave in light of the criticism he has faced as Ombudsman fails to recognise the impact his departure has on the progress of the investigation. There is little

⁵⁷ Evidence, Mr Barbour, 19 June 2015, p 30.

doubt that the length of time being taken to complete Operation Prospect has produced very significant criticism. We understand why people seeking an answer to a bugging scandal that has been unresolved for more than a decade would be deeply critical of an investigation that will take close to, if not more than, three years to complete.

- 2.53** The committee does not accept the need to give procedural fairness to persons potentially affected by adverse findings as a legitimate explanation for the delay that has occurred since the previous select committee's report. The need to give procedural fairness is an inherent part of any such inquiry. Therefore the time needed to ensure this occurred should never have been a surprise to the former Ombudsman or his office.
- 2.54** Our key concern is in bringing finality to these matters, for everyone involved. These issues have continued for far too long and it is in the public interest that they be resolved fairly and expeditiously. Therefore, the committee recommends that the NSW Government provide the NSW Acting Ombudsman with the resources necessary to ensure the timely finalisation of Operation Prospect.

Recommendation 2

That the NSW Government provide the Acting Ombudsman with the resources necessary to ensure the timely finalisation of Operation Prospect.

- 2.55** The committee further recommends that the Acting Ombudsman provide a written report to General Purpose Standing Committee No. 4 by 1 November 2015 outlining the progress of Operation Prospect, including an anticipated timeframe for the completion of the investigation.

Recommendation 3

That the Acting Ombudsman provide a written report to General Purpose Standing Committee No. 4 by 1 November 2015 outlining the progress of Operation Prospect, including an anticipated timeframe for the completion of the investigation.

- 2.56** The committee also finds that the delay and other difficulties in completing Operation Prospect has significantly damaged the inquiry and undermined confidence in the integrity of any final report it delivers.

Finding 1

That the delay and other difficulties in completing Operation Prospect has significantly damaged the inquiry and undermined confidence in the integrity of any final report it delivers.

- 2.57** In hindsight, the jurisdiction conferred on the Ombudsman (following support in both Houses by the Government and Opposition) to conduct these inquiries should not have been enacted by Parliament and should be removed from the legislation. The Ombudsman's office

is not a suitable vehicle for such inquiries. Therefore, the committee recommends that the NSW Government repeal the provisions under which Operation Prospect and associated matters are being conducted by the Ombudsman's office.

Recommendation 4

That the NSW Government repeal the provisions under which Operation Prospect and associated matters are being conducted by the Ombudsman's office.

- 2.58** Should the Ombudsman's inquiry into the police bugging matter miscarry, the committee is of the view that the Government should proactively develop a strategy about how it will act to resolve the issues. Given the time this matter has been outstanding, it would be unfair to leave it unresolved. Therefore, the committee recommends that the NSW Government proactively develop a strategy about how it will act to resolve the issues involved in Operation Prospect, should the Ombudsman's inquiry into the police bugging matter miscarry.
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Recommendation 5

That the NSW Government proactively develop a strategy about how it will act to resolve the issues involved in Operation Prospect, should the Ombudsman's inquiry into the police bugging matter miscarry.

- 2.59** In the view of the committee, should the inquiry into the leaking of confidential material miscarry that aspect ought properly be the matter of an ordinary police investigation rather than any special form of inquiry.
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Recommendation 6

That, should the inquiry into the leaking of confidential material miscarry, that aspect ought properly be the matter of an ordinary police investigation rather than any special form of inquiry.

Chapter 3 Referral of Deputy Commissioner Kaldas to the Director of Public Prosecutions

This chapter examines the Ombudsman's referral of Deputy Commissioner Kaldas to the Director of Public Prosecutions for allegedly giving false evidence at an Operation Prospect hearing. It also looks at how information about this referral was divulged to the media in April 2015. Finally, this chapter also considers claims of bias made by Deputy Commissioner Kaldas in relation to the Ombudsman's investigation.

The referral

- 3.1** On 19 November 2014, Mr Bruce Barbour, the then Ombudsman, referred Deputy Commissioner Nick Kaldas to the Director of Public Prosecutions for allegedly giving false evidence during a hearing for Operation Prospect on 5 September 2014.⁵⁸
- 3.2** Deputy Commissioner Kaldas was named on a number of listening device and telephone intercept warrants during covert police corruption operations conducted in the late 1990's and early 2000's. He first raised concerns about the warrants in about 2002, alleging that they were improper and that he had been inappropriately targeted during the operation. In the years that followed, Deputy Commissioner Kaldas and others who felt they had been inappropriately targeted fought to have their complaints addressed, culminating over 10 years later in the Ombudsman's investigation known as Operation Prospect.⁵⁹
- 3.3** In addition to allegations of unlawful and improper 'bugging', Operation Prospect is also investigating the unlawful and/or improper dissemination of confidential documents from the agencies involved in the original operations.⁶⁰
- 3.4** Deputy Commissioner Kaldas was questioned by the former Ombudsman in relation to this issue, as he was provided with a number of leaked documents.⁶¹ Deputy Commissioner Kaldas is alleged by the former Ombudsman to have given false evidence in relation to this matter at the 5 September hearing.⁶²

⁵⁸ Evidence, Mr Andrew Scipione APM, Commissioner of Police, NSW Police Force, 26 June 2015, pp 2-3; Email from Executive Officer, Office of the Director of Public Prosecutions, to secretariat, 25 June 2015.

⁵⁹ The background and context to Operation Prospect is covered in the previous select committee's report: Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", NSW Legislative Council, *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015).

⁶⁰ Correspondence from Mr Bruce Barbour, NSW Ombudsman, to the Chair, Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", 28 January 2015, p 4 and pp 24-28.

⁶¹ Evidence, Mr Nick Kaldas APM, Deputy Commissioner, NSW Police Force, 30 January 2015, pp 5-6, from the previous inquiry into the conduct and progress of the Ombudsman's inquiry "Operation Prospect".

⁶² Evidence, Mr Kaldas, 10 February 2015, p 30.

Evidence provided by the Ombudsman during the select committee inquiry

- 3.5 In a letter to the earlier select committee dated 28 January 2015, the Ombudsman comprehensively outlined matters related to the terms of reference for the Operation Prospect investigation. In this letter, Mr Barbour requested that paragraph 34, which was provided separately, be kept confidential on the basis of a public interest immunity claim.⁶³ The Ombudsman stated:

The Select Committee will note that paragraph 34 of the attached Claim ("paragraph 34") is redacted from that document. The redaction is by reason that the information contained in paragraph 34 could tend to identify the witness referred to therein in a potentially adverse manner. I have accordingly provided paragraph 34 to the Select Committee under seal as a separate and confidential document.⁶⁴

- 3.6 The information preceding paragraph 34 also provided context to the Ombudsman's claim for immunity and request for confidentiality:

33. There is one additional matter that I should disclose to the Committee in this context. However, as disclosure of this matter publicly has, in my opinion, the potential to cause grave and irreparable prejudice to the individual to whom it relates, I request that the Committee withhold the following paragraph (redacted in the attached public version of the statement) from publication of any kind, except to members of the Committee.⁶⁵

- 3.7 The select committee agreed to the Ombudsman's request and published the letter with confidential paragraph 34 redacted. Importantly, paragraph 34, which was subsequently published by the current committee, stated:

CONFIDENTIAL PARAGRAPH 34

34. One witness acknowledged, in the course of his evidence given before me on 5 September 2014, that some of the evidence he had earlier given before me had been deliberately false. That evidence has been referred to the Director of Public Prosecutions, on 19 November 2014...⁶⁶

⁶³ Correspondence from Mr Bruce Barbour, NSW Ombudsman, to the Chair, Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", 28 January 2015.

⁶⁴ Correspondence from Mr Bruce Barbour, NSW Ombudsman, to the Chair, Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", 28 January 2015.

⁶⁵ Correspondence from Mr Bruce Barbour, NSW Ombudsman, to the Chair, Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", 28 January 2015, p 7.

⁶⁶ General Purpose Standing Committee No. 4 was provided with paragraph 34 by agreement of the Legislative Council on 24 June 2015. The committee resolved to publish this paragraph on 26 June 2015. Paragraph 34 was provided as an attachment to correspondence from Mr Bruce Barbour, NSW Ombudsman, to the Chair, Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", 28 January 2015.

- 3.8 The Ombudsman did not divulge to the committee the identity of the person referred to the Director of Public Prosecutions.⁶⁷

Evidence provided by Deputy Commissioner Kaldas during the select committee inquiry

- 3.9 Deputy Commissioner Kaldas appeared before the select committee on 30 January 2015 and was questioned in relation to his possession of confidential documents, including copies of warrants and affidavits. In evidence that was given initially at the hearing and later clarified by correspondence dated 2 February 2015, the committee was advised that Mr Kaldas received some documents anonymously, and others from a certain individual (who was named).
- 3.10 The manner in which Mr Kaldas was examined by the Ombudsman was outlined in a letter to the select committee:

6. As you are aware, one of the important criticisms that Deputy Commissioner Kaldas makes in relation to Operation Prospect is that when the Deputy Commissioner was called to give evidence before the Ombudsman, the entire focus of the examination was directed to the circumstances in which Deputy Commissioner Kaldas came into possession of documents and what he did with those documents thereafter. Put another way, the whole focus of the Ombudsman was directed to the way in which whistleblowers became aware and dealt with the information which came into their possession in relation to the serious wrongdoing some years before.

7. For reasons that have already been explained in the submission by Deputy Commissioner Kaldas, this was contrary to:

7.1 his hope that the Ombudsman's inquiry would be directed to the wrongdoing referred to in the then Premier's press release dated 12 October 2012, Hansard dated 20 November 2012, the Ombudsman's call for information [undated] and the Fact Sheet published by the Ombudsman on his website; and

7.2 the indication given to the then legal representatives of Deputy Commissioner Kaldas would be relatively short and "friendly" thus reinforcing the impression that the examination would be directed towards the substantive wrongdoing.

8. What occurred during the examination had the effect, on our instructions, of Deputy Commissioner Kaldas believing he had been "ambushed" and him believing that Operation Prospect was miscarrying in the sense that it would not identify and expose the wrongdoing.

9. These tactics and this line of inquiry had the effect that Deputy Commissioner Kaldas found it impossible to cope adequately with the examination of the Ombudsman - particularly in the afternoon and early evening. Deputy Commissioner Kaldas had given assurances to Mr Giorgiutti that he would not inform anyone in relation to documents he received from the NSW Crime Commission and initially in his examination before the Ombudsman he gave a partial, incomplete and incorrect

⁶⁷ Paragraph 34 from correspondence from Mr Bruce Barbour, NSW Ombudsman, to the Chair, Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", 28 January 2015.

account. By the end of the day, this information was provided to the Ombudsman but in the context of a sustained attack on the credit of Deputy Commissioner Kaldas.⁶⁸

- 3.11** Subsequently, when Deputy Commissioner Kaldas appeared before the select committee on 10 February 2015, he again admitted to making an 'incorrect statement' to the Ombudsman:

If I can refer to the Ombudsman's evidence redacted at paragraph 34. I assume from the context, and I may be wrong, that that may refer to me. As I have already told the Committee, the Ombudsman's examination of me made me feel as if I had been ambushed... The tactics used... meant I found it impossible to cope adequately with the examination... In this context, and trying to protect someone who at one point provided me with information, I made an incorrect statement to the Ombudsman...⁶⁹

Evidence from the Commissioner of Police and Director of Public Prosecutions

- 3.12** Confirmation that the referral on 19 November 2014 did in fact relate to Deputy Commissioner Kaldas came from two sources during this inquiry, the Commissioner of Police and Director of Public Prosecutions.
- 3.13** On 9 December 2014, the Ombudsman informed Mr Andrew Scipione, the Commissioner of Police, that a matter involving Deputy Commissioner Kaldas had been referred to the Director of Public Prosecutions.⁷⁰
- 3.14** The Director of Public Prosecutions also confirmed that the referral he received on 19 November 2014 specifically named Deputy Commissioner Kaldas:

The correspondence sent to the DPP by the Ombudsman on 19 November 2014 mentions Mr Kaldas by name and sets out the nature of the question upon which advice is sought.⁷¹

Deputy Commissioner Kaldas' alleged offence

- 3.15** It is an offence under the *Ombudsman Act 1974* to 'wilfully make any false statement to or mislead, or attempt to mislead, the Ombudsman'. The maximum penalty for this offence is 10 penalty units.⁷² Criminal proceedings for this offence are to be instituted within six months and are to be dealt with summarily before the Local Court.⁷³

⁶⁸ Correspondence from Mr Robert Ishak, William Roberts Lawyers, on behalf of Deputy Commissioner Kaldas, to Chair, 2 February 2015, pp 2-3, from the previous inquiry into the conduct and progress of the Ombudsman's inquiry "Operation Prospect".

⁶⁹ Evidence, Mr Kaldas, 10 February 2015, p 30, from the previous inquiry into the conduct and progress of the Ombudsman's inquiry "Operation Prospect".

⁷⁰ Evidence, Mr Scipione, 26 June 2015, pp 2-3.

⁷¹ Email from the Executive Officer, Director of Public Prosecutions, to the secretariat, 25 June 2015.

⁷² *Ombudsman Act 1974*, s 37(1)(c).

⁷³ *Criminal Procedure Act 1986*, s 179; *Ombudsman Act 1974*, s 38.

- 3.16** According to section 19 of the *Ombudsman Act 1974*, the Ombudsman also has the powers, authorities, immunities and protections conferred by the *Royal Commission Act 1923*.⁷⁴ Section 21 of the *Royal Commission Act* outlines the offence of giving false and misleading testimony:

21. False and misleading testimony

(1) Any witness before a commission who gives testimony that is false or misleading in a material particular knowing it to be false or misleading, or not believing it to be true, is guilty of an indictable offence.

Maximum penalty: Imprisonment for 5 years.⁷⁵

- 3.17** In correspondence to the committee on 20 July 2015, Mr Chris Wheeler, Acting Ombudsman, referred to section 21 of the *Royal Commission Act 1974*, which suggests that this provision forms the basis of the offence Deputy Commissioner Kaldas is alleged to have committed.⁷⁶
- 3.18** Whether or not section 21 of the *Royal Commission Act* has any relevance in the present circumstances is not a question that has been explored in the evidence before this committee.

Concerns about the referral

- 3.19** A number of concerns were raised in relation to the Ombudsman's referral of Deputy Commissioner Kaldas to the Director of Public Prosecutions. The timing of the referral was questioned on two grounds, firstly, because it occurred not long after the establishment of the select committee inquiry, and secondly, because it occurred before the investigation has been finalised. A third but related concern regarding the referral was that it was made without Deputy Commissioner Kaldas being afforded procedural fairness.

Timing of the referral

- 3.20** The previous select committee inquiry was established on 12 November 2014 and the referral of Deputy Commissioner Kaldas to the Director of Public Prosecutions occurred only a week later.
- 3.21** Mr Arthur Moses SC, counsel representing Deputy Commissioner Kaldas, questioned whether the referral was 'retaliatory action' for the first inquiry being established into the Ombudsman's investigation:

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.⁷⁷

⁷⁴ *Ombudsman Act 1974*, s 19(2).

⁷⁵ *Royal Commissions Act 1923*, s 21, as cited in correspondence from Mr Chris Wheeler, Acting NSW Ombudsman, to Chair, 20 July 2014, p 9.

⁷⁶ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 9.

⁷⁷ Supplementary submission 6a, Mr Nick Kaldas, Deputy Commissioner, NSW Police Force, p 11.

- 3.22** This argument was, however, rebuffed by Mr Wheeler who stated that 'steps towards a referral were initiated well before any discussion of a parliamentary inquiry began'. Mr Wheeler explained that Mr Barbour had sought legal advice in relation to whether the matter should be referred to the Director of Public Prosecutions on 8 September 2014, three days after the hearing and two months before the select committee was established.⁷⁸
- 3.23** Mr Wheeler also explained that immediately after Deputy Commissioner Kaldas gave evidence on 5 September 2014 as part of Operation Prospect, the Principal Legal Officer at the Ombudsman's office, whose task was to prepare the brief, took planned leave. This meant that the brief was not finalised until 19 November 2014, the date it was referred to the Director of Public Prosecutions. Mr Wheeler said that 'the timing of the referral was dependent on ensuring all relevant information had been collated and could be included for the consideration of the Director'.⁷⁹
- 3.24** A second concern about the timing of the referral was that it occurred before the Ombudsman has finalised the investigation. Mr Moses suggested that it is 'uncommon', although 'not unique', for an inquiry to ask the Director of Public Prosecutions to consider a prosecution before an inquiry had been completed. He suggested that it is 'far more common' for adversely affected persons to be given an opportunity to respond to allegations against them before the investigation is finalised:

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.⁸⁰

Alleged lack of procedural fairness

- 3.25** The third concern regarding the referral of Deputy Commissioner Kaldas to the Director of Public Prosecutions is that it occurred without Mr Kaldas being afforded procedural fairness, that is, an opportunity to respond to the allegations against him.
- 3.26** Mr Barbour has on a number of occasions, both during this inquiry and the previous select committee inquiry, stressed the importance of providing procedural fairness to individuals adversely affected in Operation Prospect. On 3 February 2015, when appearing before the select committee, he advised:

We also have procedural fairness obligations that are in play. This is an administrative investigation into alleged misconduct; it is essential, as part of that process and, indeed, it is part of my legislative mandate, that we ensure that we offer procedural fairness to anybody whom we might make adverse comment or adverse findings about.⁸¹

⁷⁸ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 10.

⁷⁹ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 10.

⁸⁰ Supplementary submission 6a, Mr Nick Kaldas, Deputy Commissioner, NSW Police Force, p 11.

⁸¹ Evidence, Mr Barbour, 3 February 2015, pp 12-13, from the previous inquiry into the conduct and progress of the Ombudsman's inquiry "Operation Prospect".

3.27 More recently, Mr Barbour noted that procedural fairness is required ‘only where it is relevant to do so’. He explained that it may not be required in all cases:

In relation to any suggestion of that kind as a result of an investigation of matters where a view might be formed, then that would be appropriate if it were part of an administrative investigation. That would not necessarily be the case in relation to the referral of all criminal charges. It would depend on when, where and what they are.⁸²

3.28 Counsel for Deputy Commissioner Kaldas argued that Mr Kaldas should have been given an opportunity to respond to the allegations before they were referred to the Director of Public Prosecutions. Mr Moses relied on the High Court case of *Kioa v West* (1985) 159 CLR 550, where it was accepted that generally there is a common law duty to afford procedural fairness where a person’s rights and interests are affected:

...there is a common law duty to act fairly, in the sense of affording procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.⁸³

3.29 While Mr Barbour acknowledged that he did not provide Mr Kaldas with an opportunity to respond to the allegations before the evidence was referred to the Director of Public Prosecutions, he told the committee that he could not provide the basis for this decision, as the issue was covered by legal professional privilege: ‘that particular issue is the subject of legal professional privilege. I do not believe it would be appropriate to answer that question’.⁸⁴

3.30 However, counsel for Deputy Commissioner Kaldas rejected Mr Barbour’s basis for declining to explain his decision. Mr Moses asserted that Mr Barbour’s claim of legal professional privilege is ‘nonsense’. It was argued that Mr Barbour could have disclosed the reason for not providing Deputy Commissioner Kaldas procedural fairness without disclosing the legal advice he had received. Mr Moses also questioned whether legal professional privilege even applied, given his opinion that the Ombudsman and Director of Public Prosecutions do not have a lawyer-client relationship.⁸⁵

3.31 Despite this argument, Mr Wheeler may have given the committee an indication as to why procedural fairness was not provided. Mr Wheeler stated that the referral:

...did not involve any finding, or the formation of any view, about any substantive matter in Operation Prospect. Since the conduct was admitted, no finding of any kind was necessary.⁸⁶

⁸² Evidence, Mr Barbour, 19 June 2015, p 23.

⁸³ *Kioa v West* (1985) 159 CLR 550 at 584 as cited in Submission 6, Mr Nick Kaldas, Deputy Commissioner, NSW Police Force, p 1.

⁸⁴ Evidence, Mr Barbour, 19 June 2015, p 23.

⁸⁵ Supplementary submission 6a, Mr Nick Kaldas, Deputy Commissioner, NSW Police Force, pp 12-13.

⁸⁶ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 10. Extract published by resolution of the committee, 21 August 2015.

Committee comment

- 3.32** The committee accepts that the referral of Deputy Commissioner Kaldas to the Director of Public Prosecutions on 19 November 2014 occurred at a time when more relevant information had been collated. As such, we are unable to find that the referral occurred as retaliatory action for the select committee being established.
- 3.33** On the issue of procedural fairness, we recognise that it may be difficult to reconcile the Ombudsman's evidence about the importance of providing procedural fairness with his own actions that have denied it to Deputy Commissioner Kaldas. However, matters like these are never straightforward.
- 3.34** Mr Barbour should have been able to inform the committee as to the basis for his decision to refer the matter without providing procedural fairness. The committee rejects the notion that he was prevented from doing so on the basis of legal professional privilege. It is highly likely Mr Barbour could have explained the reasons for his decision without referring to the legal advice he had received. One possible explanation, however, is that Mr Barbour did not want to discuss the referral at all as it could have prejudiced any future prosecution of Deputy Commissioner Kaldas. If this is the case, it would have been preferable for Mr Barbour to state it.
- 3.35** The committee recognises that there may be circumstances in which procedural fairness is not required. Mr Wheeler's comments in this regard are interesting, as he stated that the referral did not involve any 'finding' or the 'formation of any view about any substantive matter'. In light of these comments, it may be that procedural fairness was not provided on the basis that Deputy Commissioner Kaldas admitted to making an 'incorrect statement', such that no finding from the Ombudsman was necessary.
- 3.36** In this context, a distinction must be drawn between matters in which a witness has admitted to making an 'incorrect statement' during evidence, to that where a deliberate falsehood is made. The latter case would require a 'finding' or the 'formation' of a view about a substantive matter, which would require the person alleged to have made the statement to be given the opportunity to answer the allegation (natural justice). Only where there is an admission about making a deliberately false statement would there be no such requirement.
- 3.37** In light of these issues, and without evidence from the Ombudsman to explain the basis for his decision, the committee finds that procedural fairness should have been provided to Deputy Commissioner Kaldas before the referral was provided to the Director of Public Prosecutions. This finding is made on the basis that natural justice should ordinarily be accorded to a person, except in circumstances where it is clearly established that the requirement is removed or does not apply. Because the former Ombudsman has not provided the basis on which he acted we are not able to find that the requirement of natural justice towards Deputy Commissioner Kaldas was removed or did not apply.

Leaking of information about the referral to the media

- 3.38** In April 2015, a media article revealed that a Deputy Commissioner of the NSW Police Force may face criminal charges in relation to the Ombudsman's investigation 'Operation Prospect'. Essentially, the referral of Deputy Commissioner Kaldas to the Director of Public

Prosecutions by the Ombudsman on 19 November 2014 had been leaked to the media. This section details what the article said and the impact its publication had on Mr Kaldas.

The newspaper articles

- 3.39** On the 17 April 2015, an article entitled ‘NSW Deputy Commissioner Nick Kaldas may face charges from Ombudsman Inquiry’ was published in the Sydney Morning Herald. The article was written by Mr Nick McKenzie and Mr Richard Baker, investigative reporters, and is included at Annexure 4.⁸⁷
- 3.40** The article stated that the NSW Ombudsman was considering referring Deputy Commissioner Nick Kaldas to the Director of Public Prosecutions for criminal charges for allegedly misleading the Ombudsman during evidence as part of ‘Operation Prospect’. It said that ‘Mr Kaldas was alleged to have misled the Ombudsman about the source of documents leaked to him in 2012 by former senior NSW Crime Commission official John Giorgiutti’.⁸⁸
- 3.41** It also said that a ‘senior NSW police official was aware of the push inside the Ombudsman’s office to refer Mr Kaldas to the DPP’. According to the article, this source also stated that such a move would be ‘highly vexed’, as there were ‘strong mitigating circumstances’ in terms of Mr Kaldas’ conduct.⁸⁹
- 3.42** The publication of this information has had a detrimental impact on Deputy Commissioner Kaldas:

Learning of such allegations for the first time in the media is a significant breach of procedural fairness and has caused distress to Deputy Commissioner Kaldas and his family as well as damage to Deputy Commissioner Kaldas’ reputation. It may have also impacted upon a decision of the Executive to extend the appointment of the current Commissioner.⁹⁰

Committee comment

- 3.43** The unauthorised disclosure of confidential material in a highly sensitive inquiry is always a serious matter. In this case, it has caused Deputy Commissioner Kaldas understandable

⁸⁷ Similar articles appeared in The Australian and the Daily Telegraph. Mr Nick McKenzie and Mr Richard Baker, ‘NSW Deputy Commissioner Nick Kaldas may face charges from Ombudsman Inquiry’, Sydney Morning Herald (17 April 2015) < <http://www.smh.com.au/nsw/nsw-deputy-commissioner-nick-kaldas-may-face-charges-from-ombudsman-inquiry-20150416-1mmczo.html>>

⁸⁸ Mr Nick McKenzie and Mr Richard Baker, ‘NSW Deputy Commissioner Nick Kaldas may face charges from Ombudsman Inquiry’, Sydney Morning Herald (17 April 2015) < <http://www.smh.com.au/nsw/nsw-deputy-commissioner-nick-kaldas-may-face-charges-from-ombudsman-inquiry-20150416-1mmczo.html>>

⁸⁹ Mr Nick McKenzie and Mr Richard Baker, ‘NSW Deputy Commissioner Nick Kaldas may face charges from Ombudsman Inquiry’, Sydney Morning Herald (17 April 2015,) < <http://www.smh.com.au/nsw/nsw-deputy-commissioner-nick-kaldas-may-face-charges-from-ombudsman-inquiry-20150416-1mmczo.html>>

⁹⁰ Submission 6, Mr Nick Kaldas APM, Deputy Commissioner, NSW Police Force, p 1.

distress. We empathise with Deputy Commissioner Kaldas for the impact this has had on his personal life and career.

Source of the leak

3.44 Given the publication of highly confidential information in the article, the committee attempted to ascertain where the leak emanated from. Could it have come from the Ombudsman's office, where the Operation Prospect investigation is being undertaken? Or could it have originated from the Office of the Director of Public Prosecutions, the Office of the Attorney General or the NSW Police Force Executive, given senior officials in each of these offices may have been aware of the information?

Did the leak come from within the Ombudsman's office?

3.45 The Operation Prospect team is comprised of approximately 15 people, all of whom have knowledge of operational information, such as the referral of Deputy Commissioner Kaldas to the Director of Public Prosecutions.⁹¹ Three of these people are ex-investigators who previously worked in Melbourne, where Mr McKenzie (the journalist who wrote the article) is based.⁹²

Mr O'Connor's suspicions

3.46 Mr John Giorgiutti, former solicitor to the NSW Crime Commission, informed the committee that on 4 June 2015, he had a 'chance' conversation with Mr Tim O'Connor, Director of Criminal Investigations with the NSW Crime Commission, where Mr O'Connor disclosed to him that he knew who leaked the story about Deputy Commissioner Kaldas being referred to the Director of Public Prosecutions.⁹³

3.47 Mr O'Connor confirmed this conversation took place, and outlined in a letter to the committee his suspicion that the leak had come from within the NSW Ombudsman's office, from an investigator attached to Operation Prospect who had previously worked in Melbourne.⁹⁴

3.48 Mr O'Connor explained that his 'suspicions' were based on a conversation he had with Mr McKenzie, one of the authors of the article, about a week to ten days following the publication of the story. He said that Mr McKenzie told him that that:

- he had been talking to person/persons within the Ombudsman's office in Sydney
- those persons were investigators who had previously worked in Melbourne
- he did not regard these people as great investigators
- those persons regarded the charging of Mr Kaldas a victory

⁹¹ Evidence, Mr Barbour, 19 June 2015, pp 21-22.

⁹² Evidence, Mr Barbour, 19 June 2015, pp 19 and 32.

⁹³ Submission 2, Mr John Giorgiutti, p 14.

⁹⁴ Correspondence from Mr Timothy O'Connor, Director, Criminal Investigations, NSW Crime Commission, to Chair, 17 June 2015, pp 3-4.

- the fact that these persons regarded it as a victory was disturbing as Mr McKenzie thought that they had lost perspective.⁹⁵

3.49 Mr O'Connor reflected on this conversation, telling the committee that his impression was that Mr McKenzie wanted to 'vent'.⁹⁶ He said that Mr McKenzie seemed 'offended' by the comments from his source, probably because of the context, given Deputy Commissioner Kaldas was being perceived to be a victim of the 'bugging': 'I think he just saw the perverse nature or the irony of a victim being charged'.⁹⁷

Mr McKenzie's response

3.50 Despite Mr O'Connor's suspicions, Mr McKenzie, one of the authors of the article, denied that the source of the story was somebody inside the Ombudsman's office. He would not, however, disclose to the committee who his source was, as he claimed it was 'privileged and confidential' information. Mr McKenzie also declined to appear before the committee.⁹⁸

3.51 Mr O'Connor accepted Mr McKenzie's evidence to the committee, outlined in an email, stating that Mr McKenzie is a journalist of 'very high integrity'.⁹⁹

3.52 Mr O'Connor submitted that his suspicions and Mr McKenzie's statements 'are not incompatible', suggesting that while the direct source of the leak may not be from the Ombudsman's office, the person Mr McKenzie had been talking to may have confirmed the information. Mr O'Connor said that Mr McKenzie could have been 'talking to persons from the Ombudsman's office about any manner of things and the leak ... relating to the referral to the DPP could have come from some other person, other than them'.¹⁰⁰

Mr Barbour's response

3.53 The then Ombudsman, Mr Bruce Barbour, appeared before the committee on 19 June 2015 and categorically denied that the leak came from his office. He said that he first became aware of the Sydney Morning Herald story two days before it was published. This was because Mr McKenzie had contacted his office to inform him of what was to be covered in the article and to seek his comments in relation to the matter. Mr Barbour did not take any action other than to make a file note of the contact.¹⁰¹ No comments were made to the journalist.¹⁰²

3.54 In response to Mr O'Connor's suspicions that the leak came from an investigator attached to Operation Prospect, Mr Barbour told the committee that he had obtained statutory

⁹⁵ Correspondence from Mr O'Connor to Chair, 17 June 2015, p 4.

⁹⁶ Evidence, Mr Timothy O'Connor, Director, Criminal Investigations, NSW Crime Commission, 26 June 2015, pp 12-13.

⁹⁷ Evidence, Mr O'Connor, 26 June 2015, p 14.

⁹⁸ Email from Mr Nick McKenzie to General Purpose Standing Committee No. 4, 22 June 2015, p 1.

⁹⁹ Evidence, Mr O'Connor, 26 June 2015, p 15.

¹⁰⁰ Evidence, Mr O'Connor, 26 June 2015, p 15.

¹⁰¹ Evidence, Mr Barbour, 19 June 2015, pp 18-19.

¹⁰² Correspondence from Ms Linda Waugh, Deputy Ombudsman, to Mr Robert Ishak, Williams Roberts Lawyers, 16 April 2015, attached to Submission 6, Mr Nick Kaldas, Deputy Commissioner, NSW Police Force.

declarations from the three of his Operation Prospect staff who are ex-Melbourne investigators.¹⁰³

3.55 Mr Barbour said that he was 'completely satisfied' that there was no leak from within his office. He felt assured of this because of the inquiries he had made with his staff, as well as Mr McKenzie's own public statement that the source was not from the Ombudsman's office:

I am satisfied—completely satisfied—as a result of those inquiries and also the assurances of the journalist that there has been no leak of information in relation to the subject matter of that article or indeed any other.¹⁰⁴

3.56 Mr Barbour also argued that the statutory declarations confirmed that there has been no contact between his staff and Mr McKenzie:

The statutory declarations confirmed to my complete satisfaction that there had been no contact from any of those people with the journalist and of course that accords with the information from the journalist.¹⁰⁵

3.57 However, Mr Barbour did not provide copies of the statutory declarations on the day he gave evidence to the committee. He did, however, provide these documents on 23 June 2015, in response to an order for documents from the committee (as explained in paragraph 1.17).¹⁰⁶

3.58 The statutory declarations were signed on the morning of 19 June 2015, just prior to Mr Barbour's scheduled appearance before the committee on the same day.¹⁰⁷

3.59 According to the statutory declarations one of the investigators denies ever having had any contact with Mr McKenzie. A second investigator stated that in previous employment in 2013 there may have been some contact with Mr McKenzie but he had 'no specific recollection of having spoken with him'. That investigator's statutory declaration then went on to say: 'Since my commencement at Operation Prospect, I have never spoken with Mr Nick McKenzie in relation to any matters relating to Operation Prospect, including any of those matters that were the subject of Mr McKenzie's article.'¹⁰⁸

3.60 The third investigator stated that they had spoken to Mr McKenzie on the phone on 1 April 2015, but that this conversation did not canvas any matter related to the Ombudsman's office or Operation Prospect. This investigator explained that they knew Mr McKenzie because of previous work positions and interactions dating back to 2004.¹⁰⁹

3.61 In the cover letter for these documents, Mr Barbour stated that 'each of the investigators making a statutory declaration states that they did not have any discussion with Mr Nick McKenzie about Operation Prospect'.¹¹⁰

¹⁰³ Evidence, Mr Barbour, 19 June 2015, p 19.

¹⁰⁴ Evidence, Mr Barbour, 19 June 2015, pp 18 and 20.

¹⁰⁵ Evidence, Mr Barbour, 19 June 2015, p 19.

¹⁰⁶ Correspondence from Mr Bruce Barbour, Ombudsman, to Chair, 23 June 2015, p 1.

¹⁰⁷ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 4.

¹⁰⁸ Correspondence from Mr Barbour to Chair, 23 June 2015, pp 3-4.

¹⁰⁹ Correspondence from Mr Barbour to Chair, 23 June 2015, pp 5-6.

¹¹⁰ Correspondence from Mr Barbour to Chair, 23 June 2015, p 1.

- 3.62** In the letter Mr Barbour clarified his earlier evidence, emphasising that although one of the ex-investigators had declared they had contact with Mr McKenzie on 1 April 2015, this was not in relation to Operation Prospect:

To ensure that there is no ambiguity in my evidence on this issue, I wish to clarify that according to the statutory declaration of one of the Operation Prospect investigators, Mr McKenzie contacted that staff member on 1 April 2015. As indicated in that staff member's statutory declaration, Mr McKenzie knew the staff member from some years ago, and whilst in Sydney for other reasons invited the staff member for coffee, which was declined. There was no discussion in the course of the conversation, on the part of either Mr McKenzie or the officer, about Operation Prospect, anything to do with the Ombudsman's office or any of the matters that were the subject of Mr McKenzie's article.¹¹¹

- 3.63** Mr Barbour also said that the declarations confirmed the evidence he gave to the committee, although he noted that some of his responses could have been taken out of context:

On reviewing the transcript yesterday I noted that at several points I provided briefer responses which, if read without the context of my other answers, may convey the impression that the relevant officers had provided me with statutory declarations stating that they had not had any contact with Mr McKenzie.¹¹²

- 3.64** Subsequently, the committee requested additional information from the investigator who admitted to having contact with Mr McKenzie on 1 April 2015. This person provided a second statutory declaration, dated 25 June 2015, outlining the circumstances in which they knew Mr McKenzie and the circumstances in which the conversation on 1 April 2015 occurred. This declaration was consistent with the first, repeating that matters related to Operation Prospect were not discussed during the conversation the investigator had with Mr McKenzie.¹¹³

Mr Wheeler's response

- 3.65** As the committee found it difficult to reconcile Mr Barbour's evidence at the hearing on 19 June 2015 with the contents of the statutory declarations, the committee wrote to him on 3 July 2015 to request further information. However, as Mr Barbour's term as Ombudsman expired on 30 June 2015, Mr Chris Wheeler, the Acting Ombudsman, responded to the committee's questions, although with input from Mr Barbour.¹¹⁴
- 3.66** In response to the committee's question as to why Mr Barbour did not directly disclose to the committee at the time of the hearing that one of the investigators had been contacted by Mr McKenzie on 1 April 2015, Mr Wheeler contended that Mr Barbour's evidence was directed to the inquiry's terms of reference:

The former Ombudsman's evidence was directed to the inquiry Term of Reference which concerns the circumstances in which operational information was divulged to

¹¹¹ Correspondence from Mr Barbour to Chair, 23 June 2015, pp 1-2.

¹¹² Correspondence from Mr Barbour to Chair, 23 June 2015, pp 1-2.

¹¹³ Correspondence from Mr Barbour to Chair, 23 June 2015, p 2.

¹¹⁴ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 1.

media... The Committee's terms of reference were not directed to issues of limited social contact.¹¹⁵

- 3.67** Mr Wheeler rejected any claim that Mr Barbour had not been completely candid with the committee:

At several stages, the submission attached to your letter and, by extension, the questions included in your correspondence, suggest that the former Ombudsman misled two Parliamentary inquiries. As the attached answers to questions demonstrate, this allegation is without foundation. Far from seeking to mislead the Committee, the former Ombudsman clearly sought to be as forthcoming as he felt he was legally able to be in his responses to both the Select Committee and the General Purpose Standing Committee.¹¹⁶

- 3.68** Mr Wheeler also expressed his dissatisfaction at having leaking allegations levelled against the Ombudsman's office, given the importance of their reputation:

The confidence of the Parliament, and of the broader community, in this office is built on its reputation. It is this same reputation that encourages complainants to come forward and raise issues with us, and also means that agencies are accepting of the vast majority of recommendations the office makes...unsound legal arguments, baseless innuendo and unnecessary personal attacks can do considerable damage to that reputation, and I believe have the potential to have a broader impact on the office's effectiveness.¹¹⁷

Did the Office of the Director of Public Prosecutions leak the information?

- 3.69** Mr Lloyd Babb, Director of Public Prosecutions, was aware that Deputy Commissioner Kaldas was facing potential criminal charges arising out of Operation Prospect. The Ombudsman had written to his office on 19 November 2014 seeking advice in relation to the matter, with this correspondence specifically mentioning Deputy Commissioner Kaldas by name.¹¹⁸
- 3.70** Given the sensitivity of the information in the Ombudsman's letter, Mr Babb restricted who in his office would have access to the material. This meant that only four other people in his office had knowledge of the information contained in the letter, including his Executive Officer, a Deputy Director, a solicitor and a Senior Crown Prosecutor.¹¹⁹
- 3.71** Mr Babb said that he trusted these staff members implicitly and was confident that none of them would have leaked the information. He also asked each of these persons directly as to whether they had leaked any information to the media, to which they all said they did not.¹²⁰

¹¹⁵ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 6.

¹¹⁶ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 2.

¹¹⁷ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 3.

¹¹⁸ Email from the Office of the Director of Public Prosecutions, to secretariat, 25 June 2014, p 1.

¹¹⁹ Evidence, Mr Lloyd Babb SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, 19 June 2015, pp 12-13.

¹²⁰ Answers to questions on notice, Office of the Director of Public Prosecutions, 24 June 2015, p 1.

- 3.72** Following receipt of the correspondence from the Ombudsman on 19 November 2014, Mr Babb called the Ombudsman's legal counsel to advise that his office could not provide advice unless funding was provided and a memorandum of understanding was established between the agencies.¹²¹
- 3.73** Mr Babb then sought funding from the Attorney General, writing to the former Attorney General, the Hon. Brad Hazzard MP, on two occasions, on 12 December 2014 and 4 February 2015.¹²² A reply from NSW Treasury was received by Mr Babb's office on 8 April 2015, confirming that his organisation was being provided with funding to advise on charges arising out of Operation Prospect. Importantly, none of these letters mentioned Deputy Commissioner Kaldas' name.¹²³

Did the leak come from within the Attorney General's office?

- 3.74** As a result of Mr Babb's requests for funding, the Attorney General's office was aware that the Ombudsman had requested assistance from the Director of Public Prosecutions in relation to criminal charges arising out of Operation Prospect.
- 3.75** As already noted, Mr Babb wrote two letters to the then Attorney General, the Hon. Brad Hazzard MP, to seek additional funding, but both letters did not mention that advice had been sought in relation to potential criminal charges against Deputy Commissioner Kaldas.¹²⁴
- 3.76** Mr Barbour also had a discussion with Mr Hazzard in relation to budgetary concerns raised by Mr Babb, although it is not clear whether Deputy Commissioner Kaldas' name was mentioned during this conversation.¹²⁵
- 3.77** The current Attorney General, the Hon. Gabrielle Upton MP, said that she only became aware that Deputy Commissioner Kaldas was facing potential criminal charges when she read the article in the Sydney Morning Herald on 17 April 2015.¹²⁶
- 3.78** In fact, the Attorney General strongly refuted any allegation that the leak came from her or her office:

I have sought relevant assurances from my ministerial staff that my office did not disclose confidential information in connection with this matter. Again, I want to make it clear: There was no leak from me or my office.¹²⁷

- 3.79** However, the Attorney General would not provide further information as to what steps she took to obtain such assurances. She said she would not disclose the 'inner workings of [her]

¹²¹ Evidence, Mr Babb, 19 June 2015, p 10.

¹²² Evidence, Mr Babb, 19 June 2015, pp 11-12.

¹²³ Answers to supplementary questions, Office of the Director of Public Prosecutions, 24 June 2015, p 1.

¹²⁴ Answers to supplementary questions, Office of the Director of Public Prosecutions, 24 June 2015, p 1.

¹²⁵ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 9.

¹²⁶ Evidence, Hon. Gabrielle Upton MP, Attorney General, 19 June 2015, p 5.

¹²⁷ Evidence, Ms Upton, 19 June 2015, p 2.

office'.¹²⁸ She did, however, state that neither she, nor staff in her office, have had contact with Mr McKenzie or Mr Baker, the authors of the article.¹²⁹

Did the leak come from within the NSW Police Force?

3.80 Given the Sydney Morning Herald article referred to a 'senior NSW police official' as the source of certain comments, the committee explored whether the leak may have come from within the NSW Police Force, particularly within the Executive team.

3.81 As mentioned earlier, the Commissioner of Police, Mr Scipione was aware that Deputy Commissioner Kaldas had been referred for charges, from a meeting he had with the Ombudsman on 9 December 2014, where health and welfare matters arising out of Operation Prospect were discussed.¹³⁰

3.82 However, the Commissioner of Police said that he did not disclose this information to anyone in his office, including his Deputy Commissioners or Assistant Commissioners.¹³¹ He also assured the committee that he personally was not the source of the information in the article.¹³²

3.83 Mr Wheeler, Acting Ombudsman, rejected any assertion that the disclosure of information to Mr Scipione by the former Ombudsman contravened the non-disclosure requirements of the *Ombudsman Act 1974*. He noted an exception to the prohibition on disclosure in the following circumstances:

(b2) to any person if the Ombudsman believes on reasonable grounds that disclosure to that person is necessary to prevent or lessen the likelihood of harm being done to any person (but only if the Ombudsman also believes on reasonable grounds that there is a risk of harm (including self-harm) being done to any person).¹³³

3.84 Mr Wheeler disputed any claim that Mr Barbour breached the disclosure requirements of the *Ombudsman's Act 1974* by providing this information to the Commissioner. He said that such claims 'ha[ve] no foundation in law and do not accurately represent what took place or why it was done'.¹³⁴

3.85 Mr Wheeler also suggested that there are other reasons as to why this disclosure was necessary, although he said it was 'inappropriate' for him to expand on it:

The action taken by this office was informed by information provided to this office by Deputy Commissioner Kaldas. It is not appropriate for this office to supply that information. Since a serious, and baseless, allegation has been made against the former Ombudsman, the Committee should either obtain that information from Deputy

¹²⁸ Evidence, Ms Upton, 19 June 2015, p 5.

¹²⁹ Evidence, Ms Upton, 19 June 2015, p 7.

¹³⁰ Evidence, Mr Scipione, 26 June 2015, pp 2-3.

¹³¹ Evidence, Mr Scipione, 26 June 2015, p 3.

¹³² Evidence, Mr Scipione, 26 June 2015, p 7.

¹³³ *Ombudsman Act 1974*, s 34(1)(b2).

¹³⁴ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 1.

Commissioner Kaldas or make a finding that there is no evidence from which the allegation can be made out.¹³⁵

Allegations the leak originated from the previous select committee

3.86 During this inquiry, both the former Ombudsman and Acting Ombudsman have suggested that members of the previous Legislative Council select committee may be the source of the leak.

3.87 On 19 June 2015, Mr Barbour contended that there may have been a 'breach of security' by select committee members or staff, given access members had to confidential information about the referral of a matter to the Director of Public Prosecutions:

...it should be recognised that information was provided in confidence to Committee members, and those Committee members were on notice in relation to matters relating to this from 3 February and have had access to the information, as I assume also have staff. I am not sure what inquiries have been undertaken by Committee members in relation to whether or not there has been any breach of security by Committee members who have had the information. To be asking questions now about information that all Committee members were previously advised of is disingenuous in the extreme.¹³⁶

3.88 Mr Wheeler suggested that the committee obtain statutory declarations from all members of the previous select committee, given they were privy to the confidential information in paragraph 34:

If the Committee's interest is in locating the source of the leak, the starting point of its inquiry should be a full declaration by members of the Select Committee that earlier this year inquired into the conduct and progress of the Ombudsman's Inquiry "Operation Prospect"... the Committee was informed in what was then confidential paragraph 34 of the former Ombudsman's statement about the status of the referral to the Director of Public Prosecutions of Deputy Commissioner Kaldas.¹³⁷

3.89 It should be noted, however, that paragraph 34 to which the select committee was privy, did not identify Deputy Commissioner Kaldas as the subject of the referral. Moreover, Deputy Commissioner Kaldas admitted in public to making an 'incorrect statement' to the Ombudsman, during the select committee's hearing on 10 February 2015.¹³⁸

Committee comment

3.90 Details of the Ombudsman's referral of Deputy Commissioner Kaldas to the Director of Public Prosecutions should never have appeared in a newspaper article. Not only did it adversely impact Mr Kaldas, it also publicly undermined the integrity of Operation Prospect.

¹³⁵ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 9.

¹³⁶ Evidence, Mr Barbour, 19 June 2015, p 20.

¹³⁷ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 1.

¹³⁸ Evidence, Mr Kaldas, 10 February 2015, p 30, from the previous inquiry into the conduct and progress of the Ombudsman's inquiry "Operation Prospect".

- 3.91** To attempt to uncover who leaked this information, given the journalist has refused to reveal his source, the committee took evidence from a number of individuals, including those who would have had direct knowledge of the referral.
- 3.92** With respect to the Attorney General, Director of Public Prosecutions and Commissioner of Police, the committee finds it highly unlikely that they were the source of the leak.
- 3.93** As to whether someone within the Ombudsman's office was responsible for the leak, the committee notes that both Mr Barbour and Mr Wheeler have strenuously denied any involvement in this matter. Despite evidence from Mr O'Connor, and a statutory declaration in which one investigator attached to Operation Prospect admits having had contact with the journalist in question, the former Ombudsman said he felt 'assured' that the leak was not from within the Ombudsman's office.
- 3.94** This assurance fails to address the fact that a second investigator did not expressly deny having spoken with Mr McKenzie since commencing work with Operation Prospect. That investigator's statement was only that the investigator had not spoken with Mr McKenzie 'in relation to any matters relating to Operation Prospect, including any of those matters that were the subject of Mr McKenzie's article'.
- 3.95** Unfortunately though, when appearing before the committee, Mr Barbour's evidence did not accurately convey to the committee the content of the statutory declarations that he had read in the hours before he gave his evidence to the committee. He relied heavily on the statutory declarations as evidence to counter Mr O'Connor's suspicions that someone within Operation Prospect leaked the story, but he was not upfront in telling the committee that one of the investigators had admitted to having contact with the journalist on 1 April 2015.
- 3.96** Mr Barbour, having read the statutory declarations before the hearing, should have informed the committee of these details during his evidence. His failure to do so at that time was particularly unhelpful. By not advising the committee of the contact that he knew had occurred between his office and Mr McKenzie, despite being directly asked about any contact, Mr Barbour prevented the committee from being able to question him regarding the matter. There can be no doubt that the potential leaking of material from the Ombudsman's office to the journalist was a matter squarely before the committee at the time.
- 3.97** Mr Wheeler's explanation of this, namely that the Ombudsman was limiting his answers to the terms of reference, is simply unsatisfactory. This answer is particularly unsatisfactory given point 5 of this committee's terms of reference relates to 'the circumstances in which the potential and/or proposed prosecution of a Deputy Police Commissioner arising from "Operation Prospect" was divulged to the media'. Experienced officers such as Mr Wheeler and Mr Barbour would have expected that those details were entirely relevant to the terms of reference for this inquiry.
- 3.98** There was an unauthorised leak of information. On the evidence before the committee, the source was most likely to have been from either the Office of the Director of Public Prosecutions or the Office of the Ombudsman. Both offices deny being the source. The evidence is that an officer of the Ombudsman had contact with the journalist in question two weeks before the article by Mr McKenzie appeared.

- 3.99** While that person states he spoke with Mr McKenzie, he also states there was no discussion of Operation Prospect. In the circumstances of Mr McKenzie writing that article, it appears to the committee inherently unlikely a journalist in the position of Mr McKenzie speaking to a person working on the matter would not have at least asked about Operation Prospect.
- 3.100** While being the source of the leak is denied, the committee did not hear evidence directly from the employee concerned, being provided only with the statutory declaration by Mr Barbour. The journalist Mr Nick McKenzie – while making denials in writing that the Office of the Ombudsman was the source – refused to come and give that evidence on oath. Further, the denial by Mr McKenzie did not state that a person or persons in the Office of the Ombudsman did not confirm the information contained in his news article.
- 3.101** As the committee was not able to test the evidence, we are not able to form a concluded view. The committee is, however, of the view that the leak was significant and of concern, such that there should be an investigation into the matter by the NSW Police Force.
- 3.102** The committee notes that both Mr Barbour and Mr Wheeler appear to have become frustrated with the scrutiny to which the Ombudsman’s office has been subjected during this inquiry. As officers who have led an agency that is responsible for scrutinising matters of public administration, we would expect that they would recognise the importance of oversight. The committee is deeply concerned with the manner in which the former Ombudsman, including through the correspondence of the then Acting Ombudsman Mr Wheeler, engaged with this committee. Much more should be expected from the Ombudsman’s office when it engages with a parliamentary committee.

Apprehension of bias

- 3.103** In a submission to the committee, Deputy Commissioner Kaldas’ counsel questioned the former Ombudsman’s impartiality in conducting Operation Prospect. Essentially it was argued that Mr Barbour has been biased in his conduct towards Deputy Commissioner Kaldas.
- 3.104** Mr Arthur Moses SC, counsel representing Deputy Commissioner Kaldas, relied on the following factors to support the apprehension of bias:
- a meeting Mr Barbour had with Mr Scipione on 9 December 2014, which was claimed to be ‘inappropriate’ given Mr Scipione was himself a witness involved in Operation Prospect, and given Mr Barbour disclosed details of his referral of Deputy Commissioner Kaldas to the Director of Public Prosecutions (discussed also at paragraph 3.79)
 - the Ombudsman’s decision to refer Deputy Commissioner Kaldas to the Director of Public Prosecutions, without affording him procedural fairness, and before Operation Prospect was finalised (discussed from paragraph 3.24)
 - evidence from Mr O’Connor, Director of Criminal Investigations with the NSW Crime Commission, who was told that investigators within the Ombudsman’s office would have considered the charging of Mr Kaldas as a ‘victory’.¹³⁹

¹³⁹ Supplementary submission 6a, Mr Nick Kaldas, Deputy Commissioner, NSW Police Force, pp 15-16.

- 3.105** In relation to Mr O'Connor's evidence about the investigators attitude towards the charging of Deputy Commissioner Kaldas, it was argued that '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'.¹⁴⁰
- 3.106** The importance of the Ombudsman in exercising impartiality was emphasised: 'There can be no doubt that the Ombudsman must discharge his functions without bias'.¹⁴¹ It was argued that any reasonable apprehension of bias would require the decision maker, in this case Mr Barbour, to disqualify himself from the proceedings. It was also suggested that any decision made by Mr Barbour should be quashed if he is shown to be biased.¹⁴²
- 3.107** Any suggestion that Mr Barbour did not act impartially as Ombudsman were however, strongly refuted. Mr Wheeler, who corresponded with the committee in relation to these concerns, stated that the allegations of bias are 'without merit'. Further, he asserted that 'If Deputy Commissioner Kaldas believes otherwise upon advice, it is open to him to pursue the matter in a court of law, which is the proper forum for such allegations to be determined'.¹⁴³
- 3.108** Mr Wheeler also contended that it was inappropriate for the Ombudsman to respond to any allegation of bias, given the person making the allegation is involved in an ongoing inquiry:

I am surprised that the committee would consider it appropriate that the Ombudsman be called upon to engage generally with submissions made by a person interested in an inquiry that the office is conducting. The allegation of bias made in those submissions is itself eloquent of the inappropriateness of a decision maker being called upon to respond generally to submissions made by an interested party'.¹⁴⁴

Committee comment

- 3.109** While the meeting Mr Barbour had with Mr Scipione raises questions, it is itself not sufficient to suggest that the former Ombudsman displayed bias against Mr Kaldas. We agree it appears concerning, in the context of Mr Scipione being involved in Operation Prospect, but without further information, we cannot find that this meeting was 'inappropriate' or evidence that Mr Barbour has acted in a biased manner.
- 3.110** Although the evidence from Mr O'Connor was alarming, namely the suggestions that investigators within Operation Prospect would regard the charging of Mr Kaldas as a 'victory', we have no further evidence that corroborates these comments. The ex-investigators from Melbourne deny any contact with the journalist about matters pertaining to Operation Prospect, and Mr McKenzie, the journalist, also denied the comments and declined to appear before the committee.
- 3.111** In light of these issues, the committee is not in a position to determine whether Mr Barbour, the former Ombudsman, has acted with bias towards Deputy Commissioner Kaldas. On the

¹⁴⁰ Supplementary submission 6a, Mr Nick Kaldas, Deputy Commissioner, NSW Police Force, p 16.

¹⁴¹ Supplementary submission 6a, Mr Nick Kaldas, Deputy Commissioner, NSW Police Force, p 13.

¹⁴² Supplementary submission 6a, Mr Nick Kaldas, Deputy Commissioner, NSW Police Force, p 13.

¹⁴³ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 3.

¹⁴⁴ Correspondence from Mr Wheeler to Chair, 20 July 2014, p 3.

limited material before this committee, while there are matters that many would see as raising reasonable concerns, there is not sufficient material on which to make a finding one way or another.

Appendix 1 Submissions

No	Author
1	Confidential
2	Mr John Giorgiutti
3	Mr Neil Mercer (Partially confidential)
4	Mr Stephen Barrett
5	Mr Brian Harding
6	Mr Nick Kaldas
6a	Mr Nick Kaldas

Appendix 2 Witnesses at hearings

Date	Name	Position and Organisation
Friday 19 June 2015 Parliament House Sydney	Hon Gabrielle Upton MP	Attorney General
	Mr Lloyd Babb SC	Director of Public Prosecutions
	Mr Bruce Barbour	Ombudsman, NSW
	Ms Linda Waugh	Deputy Ombudsman, NSW
Friday 26 June 2015 Parliament House Sydney	Mr Andrew Scipione APM	Commissioner of Police, NSW Police Force
	Mr Timothy O'Connor	Director, Criminal Investigations, NSW Crime Commission


Appendix 3 Answers to questions on notice

The committee received answers to questions on notice from:

- Mr Andrew Scipione, Commissioner of Police, NSW Police Force
- Mr Bruce Barbour, NSW Ombudsman
- Mr Lloyd Babb SC, Director of Public Prosecutions.

Appendix 4 Sydney Morning Herald Article

NSW Deputy Commissioner Nick Kaldas may face charges from Ombudsman inquiry



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NSW Deputy Commissioner Nick Kaldas may face charges from Ombudsman inquiry

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May face charges: NSW Deputy Commissioner Nick Kaldas. Photo: Peter Rae

The NSW Ombudsman is considering referring Deputy Commissioner Nick Kaldas to the Director of Public Prosecutions to face criminal charges for allegedly misleading the inquiry into the NSW police bugging scandal.

The revelation is among the most sensational developments of the Ombudsman's controversial probe into the bugging affair and comes when Mr Kaldas is a contender to become the next NSW police chief commissioner.

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.

The alleged offending occurred when Mr Kaldas was grilled during a lengthy confidential ombudsman's hearing, in which witnesses are required by law to answer all questions honestly.

Mr Kaldas is alleged to have misled the Ombudsman about the source of documents leaked to him in 2012 by former

<http://www.smh.com.au/nsw/nsw-deputy-commissioner-nick-kaldas-may-face-charges-from-ombudsman-inquiry-20150416-1mmcz0.html>[10/08/2015 8:58:10 AM]

NSW Deputy Commissioner Nick Kaldas may face charges from Ombudsman inquiry

senior NSW crime commission official John Giorgiutti.

If a person is charged and found by a court to have misled the Ombudsman during a confidential hearing, they can face a range of penalties, including a fine or, in extreme cases, a jail sentence.

The documents leaked to Mr Kaldas detailed the improper practices of anti-corruption investigators who conducted extensive monitoring, without due cause, of the phone calls and activities of Mr Kaldas and other police officers between 1999 and 2001.

Any move to charge Mr Kaldas would be extremely controversial as the respected deputy commissioner is a victim of this improper monitoring.

Mr Kaldas is also a whistleblower who helped to expose the improper surveillance.

However, the Ombudsman and the NSW DPP must also weigh up the need to uphold the law that requires all witnesses, including whistleblowers and victims, to give truthful answers during ombudsman hearings.

The DPP can decide not to prosecute if he believes a case is not in the public interest.

As part of an inquiry codenamed Prospect, the Ombudsman is investigating the improper bugging and surveillance of senior police that occurred between 1999 and 2001.

But the Ombudsman is also investigating whether the subsequent leaking of documents about this improper surveillance involved misconduct by police officials.

Some of those involved in the leaking or receiving of these documents have defended their conduct. They claim the files were leaked to police and journalists in 2012 to expose the misconduct that had taken place a decade before.

Mr Barbour recently rebuffed this claim before a NSW parliamentary committee. He told the committee that the leaking may have breached the law and, in some cases, involved highly sensitive documents whose release could not be justified on public interest grounds.

"My task is to apply the law as it has been set down by the parliament ... To suggest that my inquiry has focused on targeting whistle blowers is quite simply false," Mr Barbour told the committee.

However, the parliamentary committee's final report included criticism of the Ombudsman's decision to investigate both the bugging scandal and the leaking of documents, saying the dual inquiry had the potential to turn whistleblowers into suspects.

It is likely that the DPP will also examine whether Mr Giorgiutti should be prosecuted for his role in leaking documents, although Mr Giorgiutti also insists he is a whistleblower and should be subject to protection.

A senior NSW police official aware of the push inside the Ombudsman's office to refer Mr Kaldas to the DPP said the move was highly vexed.

The source said that while it appears clear that Mr Kaldas intentionally misled the Ombudsman about Mr Giorgiutti's role in leaking him certain files, there were strong mitigating circumstances that may be used to explain the conduct.

For instance, Mr Kaldas appears to have been trying to protect himself and his source as whistleblowers. But the senior police officer also said the Ombudsman could not allow senior public servants to breach the law about giving truthful answers. All such cases should be referred to the DPP, the source said.

Mr Kaldas has also told a NSW parliamentary inquiry -- which recently concluded he should be given an apology for the manner in which he was monitored in 1999-2001 -- that he was placed under extreme pressure by the Ombudsman's investigators.

Mr Kaldas said while he had expected to be treated as a whistleblower who helped expose

<http://www.smh.com.au/nsw/nsw-deputy-commissioner-nick-kaldas-may-face-charges-from-ombudsman-inquiry-20150416-1mmczo.html> [10/08/2015 8:58:10 AM]

NSW Deputy Commissioner Nick Kaldas may face charges from Ombudsman inquiry

the bugging scandal, he instead was faced with "a concerted attack on my integrity and credibility" that felt like "a well-planned attack to silence me as one of the main complainants".

If Mr Kaldas is charged, it will also spark fresh debate about the Ombudsman's use of his extraordinary powers, which include the power to compel a witness to answer questions, and whether there is sufficient oversight of the Ombudsman.

Earlier this year, Mr Kaldas' lawyers wrote to the parliamentary committee conceding that he had given a "partial, incomplete and incorrect account" to the Ombudsman of who had leaked him the files after he was "ambushed" by ombudsman investigators.

"These tactics and this line of inquiry had the effect that Deputy Commissioner Kaldas found it impossible to cope with the examination of the Ombudsman – particularly in the afternoon and early evening."

Mr Kaldas' lawyers also stated that, after further intense questioning, Mr Kaldas later corrected his earlier account and named the source of some of the documents leaked to him.

Appendix 5 Minutes

Minutes No. 2

Tuesday 2 June 2015

General Purpose Standing Committee No. 4

Members' Lounge, Parliament House, Sydney, at 2.00 pm

1. Members present

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Mallard

Mr Moselmane

Mr Pearce (substituting for Mr Clarke)

Mr Searle (substituting for Ms Voltz)

Mrs Taylor

2. Draft minutes

Resolved, on the motion of Mr Shoebridge: That draft minutes no.1 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 1 June 2015 – Letter from Mr Shoebridge, Mr Borsak and Ms Voltz requesting a meeting of GPSC No. 4 to consider a proposed self-reference into Ombudsman's Operation Prospect Inquiry into police bugging.

4. Inquiry into the progress of the Ombudsman's investigation 'Operation Prospect'

4.1 Terms of reference

The committee considered the self-reference for an inquiry into the progress of the Ombudsman's investigation 'Operation Prospect'.

Mr Shoebridge moved: That the committee adopt the following terms of reference for the inquiry:

That the General Purpose Standing Committee Number 4 inquire into and report on the progress of the Ombudsman's Operation Prospect Inquiry into police bugging, and in particular:

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

6. Any other related matters.

That the Committee report on our before 20 July 2015.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Moselmane, Mr Searle, Mr Shoebridge.

Noes: Mr Mallard, Mr Pearce, Mrs Taylor.

Question resolved in the affirmative.

4.2 Proposed timeline

Resolved, on the motion of Mr Shoebridge: That the following timeline be adopted for the inquiry:

- Submission closing date – Monday 15 June 2015
- Hearing(s) – Friday 19 June 2015 (from 11.00am) and Friday 26 June 2015 (as a reserve date)
- Report deliberative – Tuesday 14 July 2015
- Report tabled – Monday 20 July 2015

4.3 Stakeholder list

Resolved, on the motion of Mr Shoebridge: That all witnesses who appeared at hearings at the previous Inquiry into the conduct and progress of the Ombudsman's investigation 'Operation Prospect' be invited to make a submission to the inquiry and submissions be open to the public on the inquiry webpage.

4.4 Witness list

Resolved, on the motion of Mr Shoebridge: That the following witnesses be invited to appear before the committee at a public hearing, for 1.5 hours each:

- Mr Bruce Barbour, NSW Ombudsman and Ms Linda Waugh, Deputy Ombudsman
- Mr Nick Kaldas, Deputy Police Commissioner
- Office of the Director of Public Prosecutions
- Hon Gabrielle Upton, Attorney General and representatives from her office.

Resolved, on the motion of Mr Searle: That all witnesses the committee resolves to give evidence be served with a summons, with the exception of the Attorney General.

4.5 Legal representation of witnesses

Resolved, on the motion of Mr Moselmane: That the committee agree to all requests from witnesses to be accompanied by a legal representative during the hearings, subject to the legal representative sitting behind the witnesses and not taking an active role during proceedings.

4.6 Advertising

The committee noted that the inquiry will be advertised via twitter, stakeholder letters and a media release distributed to all media outlets in New South Wales.

5. Next meeting

The committee adjourned at 2.25 pm, until 11.00 am Friday 19 June 2015.

Tina Higgins
Committee Clerk

Minutes No. 3

Wednesday 3 June 2015

General Purpose Standing Committee No. 4

Members' Lounge, Parliament House, Sydney, at 7.00 pm

1. Members present

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Clarke

Mr Khan (substituting for Mrs Taylor)

Mr Mallard

Mr Searle (substituting for Mr Moselmane)

Ms Voltz

2. Draft minutes

Resolved, on the motion of Mr Shoebridge: That draft minutes no.2 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 3 June 2015 – Letter from the Government Whip to Director, advising that Mr Khan will be substituting for Mrs Taylor for the duration of the inquiry.
- 3 June 2015 – Email from the Opposition Whip to Director, advising that Mr Searle will be substituting for Mr Moselmane for the duration of the inquiry.

4. Conduct of the inquiry into the progress of the Ombudsman's investigation 'Operation Prospect'**4.1 Witnesses**

Mr Shoebridge moved: That:

- all witnesses the committee resolves to give evidence be served with a summons, with the exception of the Attorney General and any ministerial and departmental staff that may attend with the Attorney General, including the Chief of Staff.
- Mr Scipione, the Commissioner of Police, be invited to appear before the committee as a witness at the hearing.
- all witnesses be allocated 1 hr to give evidence at the hearing, with the exception of the Ombudsman and Deputy Ombudsman who will be allocated 1.5 hours.

Question put.

Committee divided.

Ayes: Mr Borsak, Mr Shoebridge, Mr Searle, Ms Voltz.

Noes: Mr Clarke, Mr Khan, Mr Mallard.

Question resolved in the affirmative.

5. Next meeting

The committee adjourned at 7.25 pm, until 11.00am Friday 19 June 2015.

Tina Higgins

Committee Clerk

Minutes No. 4

Tuesday 16 June 2015

General Purpose Standing Committee No. 4

Room 1254, Parliament House, Sydney, at 1.06 pm

1. Members present

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair (by teleconference)*

Mr Khan (substituting for Mrs Taylor)

Mr Mallard

Mr Searle (substituting for Mr Moselmane)

Ms Voltz

2. Draft minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 3 be confirmed, subject to a minor amendment to the list of substitutions.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 15 June 2015 – Email from Mr Mal Brammer to the Chair, declining to make a submission to the inquiry.
- 15 June 2015 – Letter from the Government Whip to Director, advising that Mr Pearce will be substituting for Mr Clarke for the duration of the inquiry, except for the hearing on 19 June 2015.
- 15 June 2015 – Letter from the Government Whip to Director, advising that Dr Phelps will be substituting for Mr Clarke for the hearing on 19 June 2015.
- 12 June 2015 – Email from Mr Jason Walsh, Policy Director, Office of the Attorney General, to secretariat, regarding the Attorney General's acceptance of the committee's invitation to provide evidence and the Chief of Staff declining the invitation.
- 9 June 2015 – Email from Mr John Giorgiutti to the Chair, requesting financial assistance with the preparation of his submission.
- 4 June 2015 – Email from Mr Mark Galletta to Chair, declining the invitation to make a submission to the inquiry.
- 4 June 2015 – Letter from the Inspector of the Police Integrity Commission to the Chair, declining the invitation to make a submission to the inquiry.

- 4 June 2015 – Letter from the Office of the Commissioner, requesting that the Commissioner of Police be able to appear at the hearing on the 26 June 2015 due to overseas travel.

Sent:

- 10 June 2015 – Email from Clerk Assistant – Committees to Mr John Giorgiutti, advising that the committee cannot provide any financial assistance towards the preparation of his submission.

4. Inquiry into the progress of the Ombudsman’s investigation ‘Operation Prospect’

4.1 Partially confidential submissions

Mr Searle moved: That the committee authorise the publication of submission no. 4, and that the secretariat be authorised to draw the Ombudsman’s attention to the contents of paragraph 20 of submission 4, so that he is given an opportunity to respond before or during his evidence to the committee on 19 June 2015.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Noes: Mr Khan, Mr Mallard.

Question resolved in the affirmative.

4.2 Confidential submissions

Resolved, on the motion of Mr Shoebridge: That the committee keep submission no. 1 confidential.

Mr Searle moved: That the committee authorise the publication of submission no. 3, with the exception of the last two paragraphs on page 1 and the first two paragraphs on page 2, which are to be kept confidential.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Noes: Mr Khan, Mr Mallard.

Question resolved in the affirmative.

Resolved, on the motion of Mr Searle: That the committee keep submission no. 2 confidential until the matter is revisited on Friday 19 June 2015, and that the secretariat be authorised to write to Mr Tim O’Connor and Mr Steve Wilkinson:

- a) providing them with an extract from submission no. 2 headed ‘Tim O’Connor’ on page 14 (with the exception of paragraph 3 under that heading)
- b) asking for a response to the following questions:
 - i. Did the meeting described by Mr Giorgiutti occur?
 - ii. Did you state to Mr Giorgiutti ‘I know who leaked the story’?

- iii. Do you know who leaked the story that the Ombudsman was considering referring Deputy Commissioner Kaldas to the Director of Public Prosecutions? If so, who was it and how do you know this information?
 - iv. Do you have any additional information that could assist the committee to identify the source of the leak?
- c) seeking a response by close of business on Thursday 18 June 2015
 - d) advising Mr O'Connor that the secretariat has also written to Mr Wilkinson, and vice versa
 - e) requesting that the matter and the contents of Mr Giogiutti's submission be kept confidential, except for discussions with a legal representative.

4.3 Attachments

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of attachment 1 to submission 4.

4.4 Summoning of the Attorney General's Chief of Staff

Mr Shoebridge moved: That the Attorney General's Chief of Staff, Mr Kevin Wilde, be summoned to give evidence alongside the Attorney General at the hearing on 19 June 2015.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Shoebridge.

Noes: Mr Khan, Mr Mallard, Mr Searle, Ms Voltz.

Question resolved in the negative.

4.5 Reconsideration of Mr Kaldas as a witness

Resolved, on the motion of Mr Searle: That Mr Kaldas not be called as a witness and the summons for his appearance on 19 June 2015 be withdrawn.

4.6 Additional witnesses

That consideration of whether any further additional witnesses should be called to give evidence at the hearing on 26 June 2015 be deferred until the meeting on Friday 19 June 2015.

5. Next meeting

The committee adjourned at 1.42 pm, until 11.15 am, Friday 19 June 2015.

Tina Higgins
Committee Clerk

Minutes No. 5

Thursday 18 June 2015

General Purpose Standing Committee No. 4

Room 1254, Parliament House, Sydney, at 3.45 pm

1. Members presentMr Borsak, *Chair*Mr Shoebridge, *Deputy Chair*

Mr Khan (substituting for Mrs Taylor)

Mr Mallard

Mr Pearce (substituting for Mr Clarke)

Mr Searle (substituting for Mr Moselmane)

Ms Voltz

2. Correspondence

The committee noted the following items of correspondence:

Received:

- 17 June 2015 – Letter from Mr Tim O'Connor to Chair, responding to evidence provided to the committee.
- 17 June 2015 – Letter from Mr Steve Wilkinson to Chair, responding to evidence provided to the committee.

Sent:

- 16 June 2015 – Letter from Chair to Mr Tim O'Connor, seeking a response to evidence provided to the committee.
- 16 June 2015 – Letter from Chair to Mr Steve Wilkinson, seeking a response to evidence provided to the committee.

3. Inquiry into the progress of the Ombudsman's investigation 'Operation Prospect'**3.1 Public submissions**

Resolved, on the motion of Mr Shoebridge: That the committee authorise:

- a) the publication of submission no. 5, attachment 1 to submission no 5, submission no 6, and attachments 1-4 to submission no. 6
- b) the secretariat to draw the Ombudsman's attention to the publication of these documents prior to his appearance before the committee on 19 June 2015.

3.2 Publication of correspondence and additional witness

Mr Searle moved: That:

- a) the committee authorise the publication of letters from the Chair to Mr Tim O'Connor and Mr Steve Wilkinson dated 16 June 2015, at or after 5.00 pm on Thursday 18 June 2015
- b) the committee authorise the publication of Mr O'Connor and Mr Wilkinson's responses, each dated 17 June 2015, at or after 5.00 pm on Thursday 18 June 2015

- c) the committee authorise the secretariat to draw the Ombudsman's attention to the publication of these documents prior to his appearance before the committee on 19 June 2015
- d) That Mr O'Connor be served with a summons to attend to give evidence on Friday 19 June 2015 at or around 11.00 am, or alternatively on Friday 26 June 2015.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Noes: Mr Khan, Mr Mallard, Mr Pearce.

Question resolved in the affirmative.

Mr Searle informed the committee that he is professionally and personally acquainted with Mr Peter Singleton, a former Commissioner of the NSW Crime Commission.

4. Next meeting

The committee adjourned at 4.40 pm, until 12.45 pm, Friday 19 June 2015.

Tina Higgins

Committee Clerk

Minutes No. 6

Friday 19 June 2015

General Purpose Standing Committee No. 4

Macquarie Room, Parliament House, Sydney, at 12.47 pm

1. Members present

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Khan (substituting for Mrs Taylor)

Mr Mallard

Dr Phelps (substituting for Mr Clarke)

Mr Searle (substituting for Mr Moselmane)

Ms Voltz

2. Draft minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 4 and no. 5 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 18 June 2015 – Copy of a letter dated 23 April 2015 from Mr Shoebridge to the Independent Commission Against Corruption, regarding the leaking of information concerning Mr Kaldas.

- 18 June 2015 – Copy of a letter dated 13 May 2015 from Mr Shoebridge to the Independent Commission Against Corruption, regarding the leaking of information concerning Mr Kaldas.
- 18 June 2015 – Copy of a letter dated 27 May 2015, from the Independent Commission Against Corruption to Mr Shoebridge, regarding the leaking of information concerning Mr Kaldas.

4. Inquiry into the progress of the Ombudsman’s investigation ‘Operation Prospect’

4.1 Questions on notice and supplementary questions

Resolved, on the motion of Mr Shoebridge: That supplementary questions be lodged with the Committee Clerk within one day (excluding Saturday and Sunday) following the receipt of the hearing transcript, with witnesses requested to return answers to questions on notice and supplementary questions within three calendar days of the date on which the questions are forwarded to the witness.

4.2 Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness gave evidence under a former oath:

- Hon Gabrielle Upton MP, Attorney General.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Lloyd Babb SC, Director of Public Prosecutions.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Bruce Barbour, NSW Ombudsman
- Ms Linda Waugh, Deputy Ombudsman

The evidence concluded and the witnesses withdrew.

The public and the media withdrew.

The public hearing concluded at 4.05 pm.

4.3 Confidential submissions

Mr Shoebridge moved: That the committee authorise the publication of submission no. 2 (Mr Giorgiutti), excluding attachments.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Noes: Mr Khan, Mr Mallard, Dr Phelps.

Question resolved in the affirmative.

4.4 Committee's order for papers

Mr Searle moved: That, under standing order 208(c), the committee order the production of the statutory declarations from investigators working on the Ombudsman's inquiry 'Operation Prospect' by 10.00am 23 June 2015 and that if such documents are not provided, the Chair seek an order for papers through the House under Standing Order 52.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Noes: Mr Khan, Mr Mallard, Dr Phelps.

Question resolved in the affirmative.

4.5 Response from Mr Nick McKenzie

Resolved, on the motion of Mr Searle: That the secretariat:

- i. write to Mr Nick McKenzie to seek a response to Mr Giorgiutti's and Mr O'Connor's evidence and invite him to appear at the next hearing
- ii. circulate the draft letter to committee members
- iii. advise Mr McKenzie that his response to is sought by 10.00am Thursday 25 June 2015.

4.6 Advice from the Clerk

Resolved, on the motion of Mr Searle: That advice be sought from the Clerk on accessing a confidential document from another committee and compelling the attendance of witnesses in other jurisdictions.

The Clerk also undertook to establish the appropriate way for the committee to access the confidential paragraph provided by the Ombudsman in his correspondence to the Select Committee of 28 January 2015.

5. Next meeting

The committee adjourned at 4.35 pm, until 9.15 am Friday 26 June 2015.

Tina Higgins
Committee Clerk

Minutes No. 7

Tuesday 23 June 2015

General Purpose Standing Committee No. 4

Member's Lounge, Parliament House, Sydney, at 2.15 pm

1. Members present

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Khan (substituting for Mrs Taylor)

Mr Mallard

Mr Pearce (substituting for Mr Clarke)

Mr Searle (substituting for Mr Moselmane)

Ms Voltz

2. Draft minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 6 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 23 June 2015 – Confidential correspondence from the Ombudsman to the committee, relating to the committee's order for documents under Standing Order 208(c).
- 22 June 2015 – Email from Mr Nick McKenzie to committee, responding to the committee's questions and invitation to appear as a witness.
- 19 June 2015 – Email from Mr Shoebridge's office, attaching the Premier's response to the question without notice asked by Mr Shoebridge in the House on 13 May 2015.

Sent:

- 22 June 2015 – Correspondence from Chair to Mr Nick McKenzie seeking a response to the committee's questions and inviting him to appear as a witness.
- 22 June 2015 – Correspondence from the secretariat to the Ombudsman, relating to the committee's order for documents under Standing Order 208(c).

4. Inquiry into the progress of the Ombudsman's investigation 'Operation Prospect'**4.1 Public hearing on 26 June**

The committee noted that Mr Nick McKenzie has declined the committee's invitation to appear at the hearing on Friday 26 June and Mr Timothy O'Connor has been summoned to appear.

Mr Pearce joined the meeting.

4.2 Supplementary questions

Mr Searle moved: That the following supplementary question be included in the list of supplementary questions being sent to the Ombudsman:

'The Committee was informed by the DPP that his office and the office of the Ombudsman have entered into a Memorandum of Understanding regarding the provision of advice from his office to the Office of the Ombudsman about possible charges arising from Operation Prospect.'

Will you provide to the Committee a copy of the Memorandum of Understanding? If not, why not?'

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Noes: Mr Khan, Mr Pearce.

Question resolved in the affirmative.

Mr Mallard joined the meeting.

4.3 Committee's order for papers

Resolved, on the motion of Mr Shoebridge: That the secretariat write to the Ombudsman to:

- i. request reasons as to why the statutory declarations he provided to the committee on 23 June 2015 should be kept confidential
- ii. ascertain whether he would have any concerns about the publication of these documents if the individual names of investigators are redacted.

Resolved, on the motion of Mr Searle: That members propose questions for inclusion in a letter to *** Investigator, Operation Prospect, Ombudsman's Office, with the Chair being authorised to approve the letter before it is distributed.

4.4 Correspondence from Mr Nick McKenzie

Resolved, on the motion of Mr Shoebridge: That the committee authorise the publication of the correspondence from Mr McKenzie dated 22 June 2015.

5. Next meeting

The committee adjourned at 2.30 pm, until 9.15 am Friday 26 June 2015.

Tina Higgins

Committee Clerk

Minutes No. 8

Friday 26 June 2015

General Purpose Standing Committee No. 4

Macquarie Room, Parliament House, Sydney, at 9.06 am

1. Members present

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Khan (substituting for Mrs Taylor)

Mr Mallard

Mr Pearce (substituting for Mr Clarke)

Mr Searle (substituting for Mr Moselmane)

Ms Voltz

2. Draft minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 7 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 26 June 2015 – Correspondence from an investigator attached to the Operation Prospect investigation, concerning the leaking of confidential information.
- 25 June 2015 – Correspondence from the Commissioner of Police, relating to his appearance at the hearing on 26 June 2015.
- 25 June 2015 – Email from the office of the Crime Commissioner, relating to a request for Mr O'Connor's evidence to be heard in camera.
- 25 June 2015 – Email from the Office of the Director of Public Prosecutions, relating to correspondence the committee requested in supplementary questions.
- 24 June 2015 – Correspondence from the Ombudsman to the Chair, outlining reasons for documents provided to the committee to be kept confidential.
- 23 June 2015 – Email from Mr John Giorgiutti to committee, relating to the leaking of confidential information.

Sent:

- 24 June 2015 – Correspondence from the Chair to an investigator attached to the Operation Prospect inquiry, requesting information in relation to evidence received by the committee.
- 23 June 2015 – Correspondence from the secretariat to the Ombudsman, seeking reasons for documents provided to the committee to be kept confidential.

4. Inquiry into the progress of the Ombudsman's investigation 'Operation Prospect'

4.1 Supplementary submissions

Mr Khan moved: That supplementary submission no. 2a not be published.

Question put.

The committee divided.

Ayes: Mr Khan, Mr Mallard, Mr Pearce, Mr Searle, Ms Voltz.

Noes: Mr Borsak, Mr Shoebridge.

Question resolved in the affirmative.

Mr Shoebridge moved: That the committee authorise the publication of supplementary submission no. 2b.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Shoebridge.

Noes: Mr Khan, Mr Mallard, Mr Pearce, Mr Searle, Ms Voltz.

Question resolved in the negative.

Ms Voltz moved: That supplementary submissions nos. 2a and 2b be kept confidential.

Question put.

The committee divided.

Ayes: Mr Khan, Mr Mallard, Mr Pearce, Mr Searle, Ms Voltz.

Noes: Mr Borsak, Mr Shoebridge.

Question resolved in the affirmative.

4.2 Answers to questions on notice and supplementary questions

Resolved, on the motion of Mr Searle: That the committee authorise the publication of:

- answers to questions on notice and supplementary questions received from Mr Lloyd Babb, Director of Public Prosecutions, excluding the three attached items of correspondence.
- email correspondence from Ms Fiona Parsonage from the Office of the Director of Public Prosecutions, dated 25 June 2015, subject to any concerns expressed by Mr Babb about publication of this document.

4.3 Confidential evidence referred to the committee

Resolved, on the motion of Mr Searle: That the secretariat, on behalf of the Chair, write to the Ombudsman to ascertain whether he has any concerns about the proposed publication of paragraph 34 of his letter dated 28 January 2015, addressed to the Select Committee on the progress and conduct of the Ombudsman's investigation 'Operation Prospect'.

4.4 Confidential documents provided by the Ombudsman

Mr Searle moved: That the committee authorises the:

- a) publication of correspondence from the Ombudsman, dated 23 June 2015, including the four statutory declarations, subject to the redaction of identifying information and proposed redactions being circulated to the committee and then provided to the Ombudsman for further comment before publication.
- b) secretariat to inform the Ombudsman that unless fresh evidence arises, the committee is unlikely to be calling the investigators as witnesses.

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Noes: Mr Khan, Mr Mallard, Mr Pearce.

Question resolved in the affirmative.

4.5 *In camera* request

Resolved, on the motion of Mr Shoebridge: That the evidence of Mr O'Connor will be heard in public, unless Mr O'Connor makes a request to go *in camera* because his evidence concerns matters related to his duties at the NSW Crime Commission, and the committee agrees.

4.6 Reporting timeframe

At this stage the report will be tabled on 20 July 2015.

If a further hearing is required, the committee discussed the possibility of extending the reporting date.

4.7 Report deliberative

In accordance with the committee's earlier resolution, the report deliberative will be held on 14 July 2015. The committee agreed for this meeting to commence at 12.00pm.

4.8 Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness gave evidence under a former oath:

- Mr Andrew Scipione, Commissioner of Police, NSW Police Force.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Timothy O'Connor, Director, Criminal Investigations, NSW Crime Commission.

The evidence concluded and the witness withdrew.

The public and the media withdrew.

The public hearing concluded at 11.00 am.

5. Next meeting

Sine die.

Tina Higgins
Committee Clerk

Minutes No. 9

Friday 3 July 2015

General Purpose Standing Committee No. 4

Members' Lounge, Parliament House, Sydney, at 9.33 am

1. Members present

Mr Borsak, *Chair*

Dr Kaye (substituting for Mr Shoebridge)

Mr Khan (substituting for Mrs Taylor) (*via teleconference*)

Mr Mallard (*via teleconference*)

Mr Pearce (substituting for Mr Clarke) (*via teleconference*)

Mr Searle (substituting for Mr Moselmane) (*via teleconference*)

Ms Voltz (*via teleconference*)

2. Draft minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 8 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 1 July 2015 – Correspondence from William Roberts Lawyers, attaching supplementary submissions on behalf of Deputy Commission Kaldas
- 29 June 2015 – Correspondence from the Ombudsman to the Chair, concerning the committee's proposed publication of confidential information
- 29 June 2015 – Email from Mr Shoebridge to the secretariat, advising that Dr Kaye will be substituting during the period of 1-13 July 2015
- 26 June 2015 – Email from the Executive Officer, NSW Ombudsman, to the secretariat, concerning the proposed redactions of statutory declarations provided by his office
- 26 June 2015 – Email from the Executive Officer, Director of Public Prosecutions, to secretariat, concerning the proposed publication of an email from their office
- 26 June 2015 – Email from an investigator attached to Operation Prospect, to the secretariat, providing a second statutory declaration
- 25 June 2015 – Email from Commission Solicitor, NSW Crime Commission, to the secretariat, in relation to a request for Mr O'Connor to appear in camera.

Sent:

- 26 June 2015 – Email from the secretariat to the Ombudsman's office, concerning the proposed redaction of statutory declarations and confidential information provided to the committee
- 26 June 2015 – Email from the secretariat to the Director of Public Prosecutions, concerning the committee's resolution to publish an email from their office.

4. Inquiry into the progress of the Ombudsman's investigation 'Operation Prospect'

4.1 Response from the former Ombudsman to additional questions and supplementary submission no. 6a

Mr Searle moved: That the committee:

- a) write to Mr Bruce Barbour requesting his response to supplementary submission no. 6a and to the questions agreed to by the committee within 14 days from the date of receipt of the committee's correspondence
- b) that the committee consider the publication status of supplementary submission no. 6a after the deadline for a response from Mr Barbour has passed, and that until then the submission remain confidential
- c) authorise the secretariat to advise Deputy Commissioner Kaldas' lawyers of the committee's resolution.

Question put.

The committee divided.

Ayes: Mr Borsak, Dr Kaye, Mr Searle, Ms Voltz.

Noes: Mr Khan, Mr Mallard, Mr Pearce.

Question resolved in the affirmative.

4.2 Confidential evidence referred to the committee

Resolved, on the motion of Mr Searle: That the document containing confidential paragraph 34, from the Ombudsman's correspondence dated 28 January 2015, addressed to the Select Committee on the conduct and progress of the Ombudsman's investigation 'Operation Prospect', be published.

4.3 Reporting timeframe

Resolved, on the motion of Dr Kaye: That the committee extend the reporting date to 14 August 2015.

4.4 Report deliberative

The committee noted that the report deliberative, currently scheduled for Tuesday 14 July 2015, will be rescheduled.

5. Next meeting

The committee adjourned at 9.47 am, *sine die*.

Sharon Ohnesorge
Committee Clerk

Minutes No. 10

Tuesday 28 July 2015

General Purpose Standing Committee No. 4

Members' Lounge, Parliament House, Sydney, at 2.03pm

1. Members present

Mr Borsak, *Chair*

Mr Shoebridge, *Deputy Chair*

Mr Khan (substituting for Mrs Taylor)

Mr Mallard

Mr Pearce (substituting for Mr Clarke)

Mr Searle (substituting for Mr Moselmane) (*via teleconference*)

Ms Voltz

2. Draft minutes

Resolved, on the motion of Ms Voltz: That draft minutes no. 9 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 20 July 2015 – Correspondence from Mr Chris Wheeler, Acting NSW Ombudsman, to Chair, responding to supplementary submission no.6a and questions from the committee.

- 7 July 2015 – Email from Mr Tom Millett, Executive Officer, NSW Ombudsman to Chair, acknowledging receipt of the Chair's letter to Mr Barbour dated 3 July 2015 and advising that the Ombudsman's Office would be responding on Mr Barbour's behalf.

Sent:

- 3 July 2015 – Letter from the Chair to Mr Bruce Barbour, former NSW Ombudsman, requesting a response to supplementary submission no. 6a and to questions from the committee.

4. Inquiry into the progress of the Ombudsman's investigation 'Operation Prospect'

4.1 Publication of documents

Resolved, on the motion of Mr Searle: That the following documents be published on the inquiry website at 10am Wednesday 29 July 2015:

- correspondence from Mr Chris Wheeler, Acting NSW Ombudsman, dated 20 July 2015, with the exception of:
 - the second last paragraph on page 8, including the quote
 - the first sentence in the last paragraph on page 8
 - the first and second paragraph on page 10
 - the end of the first sentence in the third paragraph on page 10, after '5 September 2014'
 - the fifth paragraph on page 10.
- supplementary submission no.6a (Mr Kaldas).

Resolved, on the motion of Ms Voltz: That the Ombudsman and Mr Kaldas be:

- advised of the committee's decision to publish supplementary submission no. 6a and a redacted version of correspondence from Mr Chris Wheeler, Acting Ombudsman, dated 20 July 2015, and provided with a copy of each document
- advised that the committee is not taking any further submissions.

4.2 Extension of reporting date

Resolved, on the motion of Ms Voltz: That the reporting date be extended until Tuesday 8 September 2015.

5. Next meeting

The committee adjourned at 2.47pm, *sine die*.

Tina Higgins
Committee Clerk

Draft Minutes No. 12

Friday 21 August 2015

General Purpose Standing Committee No. 4

Room 1254, Parliament House, Sydney, at 9.30am

1. Members presentMr Borsak, *Chair*Mr Shoebridge, *Deputy Chair*

Mr Khan (substituting for Mrs Taylor)

Mr Mallard

Mr Pearce (substituting for Mr Clarke)

Mr Searle (substituting for Mr Moselmane)

Ms Voltz

2. Draft minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 10 be confirmed.

Resolved, on the motion of Mr Searle: That minutes no.7 be redacted to remove the name of an investigator attached to Operation Prospect.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- 18 August 2015 – Correspondence from O'Brien Lawyers to Chair, enclosing correspondence between O'Brien Lawyers and the Ombudsman.
- 14 August 2015 – Correspondence from O'Brien Lawyers to Chair, attaching a copy of a letter they sent to the Ombudsman on behalf of Mr Harding and Mr Barrett.
- 29 July 2015 – Email from Mr John Giorgiutti to committee, requesting the committee reconsider the publication status of his supplementary submissions.

Resolved, on the motion of Mr Searle: That the secretariat advise Mr Giorgiutti that his supplementary submissions will remain confidential.

4. Inquiry into the progress of the Ombudsman's investigation 'Operation Prospect'**4.1 Consideration of Chair's draft report, entitled 'Inquiry into the progress of the Ombudsman's investigation 'Operation Prospect'.**

The Chair submitted his draft report entitled 'Inquiry into the progress of the Ombudsman's investigation 'Operation Prospect, which, having been previously circulated, was taken as being read.

Chapter 1

Resolved, on the motion of Mr Shoebridge: That paragraph 1.15 be amended by:

- i. Omitting 'as he resides in another jurisdiction.'
- ii. Inserting the following new paragraph at the end 'All members of the committee were of the view that it was not appropriate in the present case for a Parliamentary committee to attempt to compel a journalist to give evidence that would reveal that journalist's sources, even had this been possible in light of the journalist residing in a different state.'

Resolved, on the motion of Mr Khan: That the following new paragraph be inserted after paragraph 1.20:

New South Wales Legislative Council Practice provides insight as to what the actual powers of committees are in respect of ordering the production of documents. Pursuant to standing order 208(c), a committee does have the power to compel the production of documents. Should such an order be resisted, it is up to the House to deal with the consequences of the failure to produce by way of motion and make determinations as it sees fit. [FOOTNOTE: Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008), pp. 538-542.]

Chapter 2

Resolved, on the motion of Mr Khan: That paragraph 2.6 be amended by inserting 'raised in the media and some submissions that' after 'In particular, it explored concerns'.

Resolved, on the motion of Mr Khan: That paragraph 2.8 be amended by omitting 'was due on 25 August 2015' and inserting instead 'is due on 25 August'.

Resolved, on the motion of Mr Mallard: That paragraph 2.8 be amended by omitting 'Shadow Leader and Attorney General' and inserting instead 'Shadow Leader of the House and Shadow Attorney General'.

Resolved, on the motion of Mr Searle: That paragraph 2.9 be amended by:

- a) Omitting 'such as that the' and inserting instead 'The full list of recommendations is'
- b) Inserting all of the recommendations from the previous select committee report as bullet points.

Mr Khan moved: That the following paragraph 2.10 and recommendation be omitted:

'As the committee supports the previous select committee's recommendations, we recommend that the NSW Government implement the recommendations of the Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect" during its inquiry.'

Recommendation x

That the NSW Government implement the recommendations of the Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect" during its inquiry.'

Question put.

The committee divided.

Ayes: Mr Khan, Mr Mallard, Mr Pearce.

Noes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Question resolved in the negative.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.10 and recommendation 1 be amended by omitting 'during its inquiry' after 'Operation Prospect'.

Resolved, on the motion of Mr Searle: That the following new paragraph be inserted after paragraph 2.8:

'We are of the opinion that at present the Joint Parliamentary oversight committee does not have the jurisdiction to conduct a review of the Ombudsman's legislation [FOOTNOTE:

Section 31B(1)(b) of the *Ombudsman Act* 1974 appears to be limited to existing powers under the Act.] and that this be progressed by way of a select committee of the Legislative Council.’

Resolved, on the motion of Mr Khan: That paragraph 2.44 be amended by omitting ‘Our committee expected, as did many people,’ and inserting instead ‘There was a reasonable expectation amongst many interested parties’.

Resolved, on the motion of Mr Searle: That paragraph 2.45 be amended by:

- a) omitting ‘combining’ and inserting instead ‘undertaking’
- b) omitting ‘If these were not blended into a single inquiry, the Ombudsman would have likely resolved the substantive issues related to the warrants much sooner’ and inserting instead ‘The committee is of the opinion that the Office of the Ombudsman ought to have focussed on completing the primary inquiry before embarking on the matter of the leaking of confidential information. This would have maximised the chances of the primary inquiry being completed before the previous Ombudsman left office’.

Resolved, on the motion of Mr Searle: That paragraph 2.48 be amended by omitting ‘despite the capacity of Professor McMillan to take on the task’ and inserting instead:

‘In saying this we make no criticism of the capacity of Professor McMillan but note that any person taking on this task would experience difficulties due to the volume of material, the contested and charged nature of the issues, and the fact he did not take the evidence himself. These will all bear on whether any new Ombudsman can satisfactorily complete these inquiries. While the committee hopes the new Acting Ombudsman and those who are the subject of the inquiries can work out a process that is acceptable to all, we have our doubts as to whether in the circumstances this is a practical possibility. The committee is of the opinion that the factors identified earlier are likely to make any reasonable resolution almost insuperable.’

Mr Khan moved: that the following paragraph 2.49 be omitted:

‘Mr Barbour’s explanation for not seeking an extension is difficult to accept. Claiming it is in the ‘public interest’ to leave in light of the criticism he has faced as Ombudsman fails to recognise the impact his departure has on the progress of the investigation. We believe that Mr Barbour should have been extended in his position until Operation Prospect was finalised. This would have avoided delays that may arise as a result of Professor McMillan understandably wanting to acquaint himself with the evidence.’

Question put.

The committee divided.

Ayes: Mr Khan, Mr Mallard, Mr Pearce.

Noes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Question resolved in the negative.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.49 be amended by omitting ‘We believe that Mr Barbour should have been extended in his position until Operation Prospect was finalised. This would have avoided delays that may arise as a result of Professor McMillan understandably wanting to acquaint himself with the evidence’ and inserting instead:

‘There is little doubt that the length of time being taken to complete Operation Prospect has produced very significant criticism. We understand why people seeking an answer to a bugging scandal that has been unresolved for more than a decade would be deeply critical of an investigation that will take close to, if not more than, three years to complete.’

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted at the end of paragraph 2.49:

'The committee does not accept the need to give procedural fairness to persons potentially affected by adverse findings as a legitimate explanation for the delay that has occurred since the previous select committee's report. The need to give procedural fairness is an inherent part of any such inquiry. Therefore the time needed to ensure this occurred should never have been a surprise to the former Ombudsman or his office.'

Mr Shoebridge moved: That the following new finding be inserted after paragraph 2.50:

'Finding x

The delay and other difficulties in completing Operation Prospect caused by its expansion beyond the substantive question of the police bugging into detailed consideration as to how information about the bugging was disclosed, has significantly damaged the inquiry and undermined confidence in the integrity of any final report it delivers.'

Mr Searle moved: That the motion of Mr Shoebridge be amended by omitting 'caused by its expansion beyond the substantive question of the police bugging into detailed consideration as to how information about the bugging was disclosed'

Amendment of Mr Searle put and passed.

Original question of Mr Shoebridge, as amended, put.

The committee divided.

Ayes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Noes: Mr Khan, Mr Mallard, Mr Pearce.

Question resolved in the affirmative.

Mr Searle moved: That the following new paragraph and recommendation be inserted after paragraph 2.50:

'In hindsight, the jurisdiction conferred on the Ombudsman to conduct these inquiries should not have been enacted by Parliament and should be removed from the legislation. The office of Ombudsman is not a suitable vehicle for such inquiries.'

Recommendation x

The provisions under which Operation Prospect and associated matters are being conducted by the Office of the Ombudsman should be repealed.'

Mr Khan moved: That the motion of Mr Searle be amended by inserting '(following support in both Houses by the government and opposition)' after 'the jurisdiction conferred on the Ombudsman'

Amendment of Mr Khan put and passed.

Original question of Mr Searle put.

The committee divided.

Ayes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Noes: Mr Khan, Mr Mallard, Mr Pearce.

Question resolved in the affirmative.

Resolved, on the motion of Mr Searle: That the following new paragraph and recommendation be inserted after paragraph 2.50:

‘Should the Ombudsman’s inquiry into the police bugging matter miscarry, the committee is of the view that the Government should proactively develop a strategy about how it will act to resolve the issues. Given the time this matter has been outstanding, it would be unfair to leave it unresolved.’

Recommendation x

That, should the Ombudsman’s inquiry into the police bugging matter miscarry, the NSW Government should proactively develop a strategy about how it will act to resolve the issues.’

Mr Searle moved: That the following new paragraph and recommendation be inserted after 2.50:

‘In the view of the committee, should the inquiry into the leaking of confidential material miscarry that aspect ought properly be the matter of an ordinary police investigation rather than any special form of inquiry.’

Recommendation x

That, should the inquiry into the leaking of confidential material miscarry, that aspect ought properly be the matter of an ordinary police investigation rather than any special form of inquiry.’

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Noes: Mr Khan, Mr Mallard, Mr Pearce.

Question resolved in the affirmative.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.4 be amended by:

- a) inserting ‘former’ before ‘Ombudsman’
- b) inserting ‘by the former Ombudsman’ after ‘Deputy Commissioner Kaldas is alleged’.

Resolved, on the motion of Mr Shoebridge: That:

- a) paragraph 3.9 be amended by omitting ‘While he told the select committee that he did not have knowledge of where those documents came from, he later clarified this evidence in a letter to the committee, explaining’ and inserting instead ‘In evidence that was given initially at the hearing and later clarified by correspondence dated 2 February 2015, Mr Kaldas advised the committee’
- b) paragraph 3.10 be omitted and the following new paragraphs be inserted as a quote after paragraph 3.9 instead:

‘6. As you are aware, one of the important criticisms that Deputy Commissioner Kaldas makes in relation to Operation Prospect is that when the Deputy Commissioner was called to give evidence before the Ombudsman, the entire focus of the examination was directed to the circumstances in which Deputy Commissioner Kaldas came into possession of documents and what he did with those documents thereafter. Put another way, the whole focus of the Ombudsman was directed to the way in which whistleblowers became aware and dealt with the information which came into their possession in relation to the serious wrongdoing some years before.’

7. For reasons that have already been explained in the submission by Deputy Commissioner Kaldas, this was contrary to:

7.1 his hope that the Ombudsman's inquiry would be directed to the wrongdoing referred to in the then Premier's press release dated 12 October 2012, Hansard dated 20 November 2012, the Ombudsman's call for information [undated] and the Fact Sheet published by the Ombudsman on his website; and

7.2. the indication given to the then legal representatives of Deputy Commissioner Kaldas would be relatively short and "friendly" thus reinforcing the impression that the examination would be directed towards the substantive wrongdoing.

8. What occurred during the examination had the effect, on our instructions, of Deputy Commissioner Kaldas believing he had been "ambushed" and him believing that Operation Prospect was miscarrying in the sense that it would not identify and expose the wrongdoing.

9. These tactics and this line of inquiry had the effect that Deputy Commissioner Kaldas found it impossible to cope adequately with the examination of the Ombudsman - particularly in the afternoon and early evening. Deputy Commissioner Kaldas had given assurances to Mr Giorgiutti that he would not inform anyone in relation to documents he received from the NSW Crime Commission and initially in his examination before the Ombudsman he gave a partial, incomplete and incorrect account. By the end of the day, this information was provided to the Ombudsman but in the context of a sustained attack on the credit of Deputy Commissioner Kaldas.[FOOTNOTE: Correspondence from Mr Robert Ishak, William Roberts Lawyers, on behalf of Deputy Commissioner Kaldas, to Chair, 2 February 2015, pp 2-3].

Resolved, on the motion of Mr Shoebridge: that the following new paragraph be inserted after paragraph 3.17:

‘Whether or not section 21 of the *Royal Commission Act* has any relevance in the present circumstances is not a question that has been explored in the evidence before this committee.’

Mr Khan moved: That paragraphs 3.18 to 3.36 be omitted.

Question put.

The committee divided.

Ayes: Mr Khan, Mr Mallard, Mr Pearce.

Noes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Question resolved in the negative.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.31 be amended by omitting ‘at a time when all the relevant information had been collated’ and inserting instead ‘prior to the committee being announced’.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.32 be amended by omitting ‘never so straightforward’ and inserting instead ‘never straightforward’.

Resolved, on the motion of Mr Searle: That paragraph 3.35 be amended by omitting ‘of the issues the Ombudsman was substantively investigating. If no finding or view on any substantive matter was necessary, because an admission was made, why would the Ombudsman wait until the

investigation was finalised to refer the matter, given it was a peripheral issue to the substantive allegations being investigated as part of Operation Prospect?’ and inserting instead:

‘where a deliberate falsehood is made. The latter case would require a ‘finding’ or the ‘formation’ of a view about a substantive matter, which would require the person alleged to have made the statement to be given the opportunity to answer the allegation (natural justice). Only where there is an admission about making a deliberate false statement would there be no such requirement’.

Resolved, on the motion of Mr Searle: That paragraph 3.36 be amended by:

- a) omitting ‘is unable to make a finding’ and inserting instead ‘finds’
- b) inserting at the end ‘This finding is made on the basis that natural justice should ordinarily be accorded to a person, except in circumstances where it is clearly established that the requirement is removed or does not apply. Because the former Ombudsman has not provided the basis on which he acted we are not able to find that the requirement of natural justice towards Deputy Commissioner Kaldas was removed or did not apply’.

Resolved, on the motion of Mr Shoebridge: That:

- a) paragraphs 3.57 be amended by omitting ‘According to the statutory declarations, two of the three investigators denied that they have ever had contact with Mr McKenzie, although one of them said they may have interacted with him in a previous role’ and inserting instead ‘According to the statutory declarations one of the investigators denies ever having had any contact with Mr McKenzie. A second investigator stated that in previous employment in 2013 there may have been some contact with Mr McKenzie but had ‘no specific recollection of having spoken with him’. That investigator’s statutory declaration then went on to say: ‘Since my commencement at Operation Prospect, I have never spoken with Mr Nick McKenzie in relation to any matters relating to Operation Prospect, including any of those matters that were the subject of Mr McKenzie’s article’. [FOOTNOTE: Correspondence from Mr Bruce Barbour, NSW Ombudsman, to Chair, 23 June 2015, pp 3-4.]
- b) paragraph 3.58 be amended by inserting ‘dating back to 2004’ after ‘previous work positions and interactions’.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.91 be amended by inserting at the end ‘This assurance fails to address the fact that a second investigator, did not expressly deny having spoken with Mr McKenzie since commencing at Operation Prospect. That investigator’s statement was only that the investigator had not spoken with Mr McKenzie “in relation to any matters relating to Operation Prospect, including any of those matters that were the subject of Mr McKenzie’s article.’

Resolved, on the motion of Mr Shoebridge: That paragraph 3.92 be amended by omitting ‘Mr Barbour was not as comprehensive as he could have been with his evidence’ and inserting instead ‘Mr Barbour’s evidence did not accurately convey to the committee the content of the statutory declarations that he had read in the hours before he gave his evidence to the committee’.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.93 be amended by:

- a) inserting after ‘particularly unhelpful’ the following sentence:
‘By not advising the committee of the contact that he knew had occurred between his office and Mr McKenzie, despite being directly asked about any contact, Mr Barbour prevented the committee from being able to question him regarding the matter. There can be no doubt that the potential leaking of material from the Ombudsman’s office to the journalist was a matter squarely before the committee at the time Mr Barbour gave his evidence’
- b) inserting after ‘is simply unsatisfactory’ the following sentence:

'This answer is particularly unsatisfactory given point 5 of this committee's terms of reference relates to "The circumstances in which the potential and/or proposed prosecution of a Deputy Police Commissioner arising from "Operation Prospect" was divulged to the media'.

Mr Searle moved: That paragraph 3.94 be amended by omitting 'While we find it concerning that an investigator attached to Operation Prospect had contact with the journalist two weeks before the article appeared, on the basis of the statutory declarations and evidence provided by Mr Barbour we cannot be satisfied that the leak emanated from the Ombudsman's office' and inserting instead:

'There was an unauthorised leak of information. On the evidence before the committee, the source was most likely to have been from either the Office of the Director of Public Prosecutions or the Office of the Ombudsman. Both offices deny being the source. The evidence is that an officer of the Ombudsman had contact with the journalist in question two weeks before the article by Mr McKenzie appeared.

While that person states he spoke with Mr McKenzie, he also states there was no discussion of Operation Prospect. In the circumstances of Mr McKenzie writing that article, it appears to the committee inherently unlikely a journalist in the position of Mr McKenzie speaking to a person working on the matter would not have at least asked about Operation Prospect.

While being the source of the leak is denied, the committee did not hear evidence directly from the employee concerned, being provided only with the statutory declaration by Mr Barbour. The journalist Nick McKenzie – while making denials in writing that the Office of the Ombudsman was the source – refused to come and give that evidence on oath. Further, the denial by Mr McKenzie did not state that a person or persons in the Office of the Ombudsman did not confirm the information contained in his news article.

As the committee was not able to test the evidence, we are not able to form a concluded view.

The committee is, however, of the view that the leak was significant and of concern and that there should be an investigation into the matter by the NSW Police'.

Mr Shoebridge moved: That the motion of Mr Searle be amended by omitting 'As we were not able to test the evidence we are not able to form a concluded view' and inserting instead 'In the circumstances, of the options it seems more likely that a person at the Ombudsman's office at least confirmed the information to the journalist'.

Amendment of Mr Shoebridge put.

The committee divided.

Ayes: Mr Shoebridge

Noes: Mr Borsak, Mr Khan, Mr Mallard, Mr Pearce, Mr Searle, , Ms Voltz.

Amendment of Mr Shoebridge resolved in the negative.

Original question of Mr Searle put and passed.

Resolved, on the motion of Mr Pearce: That paragraph 3.95 be amended by omitting 'in certain matters and have displayed a more appropriate response conducive to the committee's attempt to undertake its scrutiny role'.

Mr Shoebridge moved: That paragraph 3.95 be amended by inserting at the end ‘The committee is deeply concerned with the manner in which the former Ombudsman, including through the correspondence of the then acting Ombudsman Mr Wheeler, engaged with this committee. Much more should be expected from the Ombudsman’s office when it engages with a parliamentary committee.’

Question put.

The committee divided.

Ayes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Noes: Mr Khan, Mr Mallard, Mr Pearce.

Question resolved in the affirmative.

Mr Khan moved: That paragraphs 3.96 to 3.104 be omitted.

Question put.

The committee divided.

Ayes: Mr Khan, Mr Mallard, Mr Pearce.

Noes: Mr Borsak, Mr Searle, Mr Shoebridge, Ms Voltz.

Question resolved in the negative.

Resolved, on the motion of Mr Shoebridge: That paragraph 3.104 be amended by omitting ‘It will be up to Deputy Commissioner Kaldas to pursue these allegations further if he chooses’ and inserting instead ‘On the limited material before this committee, while there are matters that many would see as raising reasonable concerns, there is not sufficient material on which to make a finding one way or another’.

Resolved, on the motion of Mr Pearce: That:

- a) the committee authorise the publication of excerpts of confidential material as quoted in the report on page 29
- b) the secretariat be authorised to update relevant information in the report if the NSW Government’s response to the previous select committee’s recommendations is received before tabling
- c) the draft report [as amended] be the report of the committee and that the committee present the report to the House
- d) the transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, minutes of proceedings and correspondence relating to the inquiry be tabled in the House with the report
- e) upon tabling, all unpublished attachments to submissions be kept confidential by the committee
- f) upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, minutes of proceedings and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee
- g) the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling
- h) the committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee

- i) dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;
- j) the report be tabled on Tuesday 25 August 2015.

5. Next meeting

9.00am Wednesday 2 September 2015 (Budget Estimates).

Tina Higgins
Committee Clerk