Ombudsman
New South Wales

Operation Prospect:
A report on developments

A Special Report to Parliament under s 31 of the *Ombudsman Act 1974*

May 2017

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Foreword

The NSW Parliament Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission expressed the following view about the Operation Prospect investigation in its *2016 Review of the Annual Reports of Oversighted Bodies*:

> The Committee looks forward to the Operation's conclusion and hopes that the Ombudsman's final report will bring clarity and closure for those who were affected by the events under investigation.[1]

I expressed a similar hope in the Foreword to the Operation Prospect Report tabled in the Parliament on 20 December 2016. I said I hoped 'there will be a preparedness in all quarters to accept this report as a thorough and definitive examination of a troubled era'.

There were some positive signs after the Report was tabled. A number of people (including those directly involved) contacted the Ombudsman's office to commend it for a meticulous and balanced analysis that shed much-needed light on the events in dispute. Media reporting of the Operation Prospect Report was widespread in the three days following the tabling of the Report but was relatively quiet after that. The Commissioner of Police – in an action that I commend – wrote to me within a few days of the Report to inform me that the NSW Police Force had taken steps to consider and act on all findings and recommendations in the Report applying to it.

Yet there were different signals from other quarters that were seemingly driven by an objective of keeping the controversy alive or refusing to accept a view of events other than their own. This was perhaps not surprising in a dispute that gained traction in 2002 and never lost momentum thereafter.

The Ombudsman's office responded individually to some of the criticisms, but was generally circumspect about engaging in frequent debate. There were two practical reasons for that restraint. There was active litigation underway initiated by one party adversely mentioned in the Report, and any public discussion of the Report tended to get drawn into the Government-initiated process to appoint a new Commissioner of Police.

There are subsequent developments of which I should keep the Parliament informed. This includes how the Ombudsman's office has responded to enquiries, the progress in referring matters to the Director of Public Prosecutions, the stage reached in the litigation, and the implementation of recommendations.

A large element of this report comments on the criticisms of the Operation Prospect Report that have been published in the media. Many of those criticisms were framed in general terms that make attractive headlines, but went no further. The detailed and factual response in this report to the criticisms is intended to reinforce the message that Operation Prospect dealt properly with all relevant issues and that further investigation is not required.

Of particular concern to me as Ombudsman was the Response that the NSW Crime Commission (NSWCC) released publicly in March 2017 prior to any formal notification to my office. I responded at the time in a media statement[2] that the NSWCC Response contained 'unfounded and inflammatory claims' that I would address more fully in a special report to the Parliament at a later date.

This report does that, and in particular draws individual attention to each of the recommendations in the Operation Prospect Report that apply to the NSWCC. It is always open to a public sector agency to reject an individual Ombudsman finding or recommendation. However, a central theme in the *Ombudsman Act 1974* is that public sector agencies must respond to Ombudsman recommendations in a reasoned manner that is specifically directed to each individual recommendation. It has never been acceptable for an agency to reject all recommendations on a single categorical basis – and certainly not, in this instance, where the Operation Prospect Report recommended that 17 individuals each be given a written apology by the NSWCC in respect of wrongful (and in some instances unlawful) administrative action taken against them in an investigation conducted by the NSWCC.

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1. Report 1/56 (June 2016) at para 7.25.
2. NSW Ombudsman, 'Ombudsman Comment on NSW Crime Commission Response to the *Operation Prospect report*', *Media Release*, 15 March 2017.

The concluding chapter of this report also raises a larger issue for the Parliament's attention. The history of accountability in Australia, seen through the lens of Ombudsman experience, is that powerful organisations often resist probing scrutiny of their administration when this first occurs. There can be a backlash in litigation threats and exaggerated criticism of the oversight body. On the other hand, the equally profound experience of Ombudsman offices is that over time a different mood can prevail. There can be a growing recognition of the benefits of independent scrutiny, and a constructive exchange can occur between the agency and the oversight body concerning proposed findings and recommendations.

It is expected that this report will mark the end of the Ombudsman's role in commenting on the matters examined in the Operation Prospect Report – save for a few continuing matters referred to in this Report. The Ombudsman's jurisdiction over police complaints will soon move to the Law Enforcement Conduct Commission, and the Ombudsman has no continuing jurisdiction over the NSWCC. It is for the Parliament and others to decide, taking into account all the matters raised in this report, whether further debate or consideration is helpful, or if this matter can be put to rest.

Professor John McMillan AO
Acting Ombudsman

May 2017

Contents

Foreword c

Chapter 1. Operation Prospect – a short history 1

1.1. The Mascot references to the NSW Crime Commission (1999-2000) 1

1.2. The Mascot controversy and the PIC Inspector's inquiry (2002) 1

1.3. The Emblems inquiry (2003-04) 2

1.4. Referral of the Emblems report to the PIC Inspector (2012) 2

1.5. The Ombudsman and Operation Prospect (2012) 3

1.6. The Operation Prospect investigation (2012-16) 3

1.7. The Operation Prospect Report (2016) 4

Chapter 2. Ombudsman activity following tabling of the Operation Prospect report 7

2.1. The Ombudsman's continuing role 7

2.2. Distribution of the report 8

2.3. Status and variation of the non-disclosure directions 9

2.4. Referrals to the Director of Public Prosecutions 9

2.5. Status of the legal proceedings challenging the investigation and report 11

Chapter 3. Commentary following publication of the Operation Prospect report 12

3.1. Responding to complaints and criticisms 12

3.2. Range of issues investigated 12

3.3. Scope of the investigation 13

3.4. Whistleblowers and Operation Prospect 15

3.5. Finding of unlawful conduct 16

3.6. Suitability of the Ombudsman's office to conduct the Operation Prospect investigation 18

Chapter 4. Implementation of recommendations 20

4.1. New South Wales Police Force 20

4.2. Director of Public Prosecutions 20

4.3. Attorney General 21

4.4. Other responses 21

Chapter 5. Criticisms made by the NSW Crime Commission 22

5.1. Introduction 22

5.2. Ombudsman's competence to undertake Operation Prospect 23

5.3. Procedural fairness 24

5.4. Compliance with the Ombudsman Act and other matters 28

5.5. NSWCC responsibility for the conduct of the Mascot Task Force 30

5.6. Allocation of responsibility for Mascot errors 31

5.7. NSWCC's refusal to apologise 32

Chapter 6. The NSWCC and Mascot – a final observation 45

Chapter 1. Operation Prospect – a short history

1.1. The Mascot references to the NSW Crime Commission (1999-2000)

Operation Prospect investigated allegations and complaints either about or connected to two references made to the New South Wales Crime Commission (NSWCC) by the NSWCC Management Committee in February 1999 (Mascot) and November 2000 (Mascot II).[3] The Mascot references were covertly investigated by the NSWCC from 1999-2001, with the assistance of officers from the New South Wales Police Force (NSWPF) who were sworn into the NSWCC for the purposes of the investigation.

The Mascot investigation was into police corruption, both historical and contemporary, based initially on information provided to the NSWCC in December 1998 by a serving NSWPF officer, codenamed 'Sea'. The Mascot investigation was largely undertaken by the use of concealed listening devices (LDs) and telephone interception (TI) and, to a lesser extent, covert integrity testing. Many of the conversations that were recorded on listening devices involved Sea wearing a concealed body-worn LD.

Over the course of the investigation the Mascot Task Force obtained 475 LD warrants to record 295 people, and 246 TI warrants to intercept the telephone communications of 95 people.[4] The Task Force conducted ten integrity tests on fellow officers.[5]

Some of the LD warrants named a large number of people to be recorded – for example, 119, 114 and 113 people, respectively, in three of the warrants.[6] Many people were named in a large number of LD warrants – for example, one person was named in 253 warrants, and another in 168 warrants.[7] The Operation Prospect Report found that it was impossible in some instances – and unlikely in many others – that all those who were named would be recorded. Further, often no reason was given in affidavits supporting the application for a warrant as to why many people were named in the warrants – for example, reasons were given for the inclusion of only 24 of 119 names in one affidavit, and 69 of 112 in another.[8]

In June 2000 the Police Integrity Commission (PIC) joined the NSWCC and NSWPF to pursue the allegations of police corruption identified by Mascot. PIC conducted private and public hearings between October 2001 and late 2002 under the auspices of Operation Florida, and published a two volume report in June 2004.

A number of police officers were prosecuted or dismissed, or resigned or were the subject of internal management action.[9]

1.2. The Mascot controversy and the PIC Inspector's inquiry (2002)[10]

An LD warrant naming 114 people became public in April 2002 as a result of it inadvertently being served in a prosecution brief that arose from the Mascot investigations. Those listed included former and serving police officers, a barrister and a journalist. The warrant listed the offences that were under investigation as money laundering, corruption, corruptly receiving a benefit, conspiracy to pervert the course of justice, and tampering with evidence.

The public circulation of the warrant stirred immediate interest and controversy. In the space of four days, multiple complaints and queries were received by the NSWCC and NSWPF, the matter was covered in the print and electronic media, the Police Association of NSW made high level representations, senior police officers who were named in the warrant sought an explanation at senior levels of government, the agency heads of the

3. The background to the Operation Prospect investigation is explained in Chapters 1 and 2 of the Operation Prospect Report ('OP report').
4. OP report, Chapter 19, Section 19.3 (Volume 5, p 721).
5. OP report, Chapter 17, Section 17.2 (Volume 5, p 637).
6. The warrants are discussed, respectively, in OP report Chapter 7 (Volume 2, p 221) (LD warrant 109/1999), Chapter 13 (Volume 3, p 427) (LD warrant 266/2000) and Chapter 9 (Volume 3, p 298) (LD warrant 95/2000).
7. See Table 6 in OP report, Chapter 19, Section 19.4.4 (Volume 5, p 726).
8. OP report, Chapter 19, Section 19.4.1 (Volume 5, p 723).
9. OP report, Chapter 3, Section 3.4.2 (Volume 1, p 99).
10. Examined in OP report, Chapter 13 (Volume 3, p 427-454).

NSWCC and NSWPF both received and provided advice, officials with knowledge of the Mascot investigations were called on to prepare written advice, and the Minister for Police formally referred the controversy to the Inspector of the PIC for review.

The PIC Inspector completed his review in less than 14 days. He concluded that, subject to one minor irregularity in the LD warrant, there was no basis to criticise either the LD warrant or the supporting LD affidavit. Operation Prospect concluded from an analysis of the evidence that in reaching his findings the Inspector relied heavily on written material provided to him by the NSWCC, and possibly on discussions with NSWCC staff.

The PIC Inspector's report was not made public, but was circulated to a number of officers and agencies. On the basis of what was known the NSW Police Association resolved that they did not accept the Inspector's findings and called for a separate and comprehensive investigation. The Association continued to agitate for this over the next year. Law firms representing people named on the warrant also took up the issue, seeking further information from the NSWCC.[11] These requests were refused by the NSWCC. Complaints were also made to both the NSWCC and the NSWPF.

1.3. The Emblems inquiry (2003-04)[12]

In July 2003, the NSWPF responded to the complaints by establishing an investigative strike force, called Strike Force Emblems. The Emblems inquiry was hampered by the refusal (after much discussion) of Commissioner Bradley of the NSWCC to provide relevant documents to Emblems, notably the supporting affidavit to the LD warrant containing 114 names that had entered the public domain. The Commissioner relied on a secrecy provision in the Act establishing the NSWCC, notwithstanding that the NSWCC Management Committee gave approval for the Commissioner to provide relevant documents to the NSWPF. The Commissioner explained his stance, at the time and in evidence to Operation Prospect, on the basis that he lacked confidence in the ability of the Emblems inquiry to be conducted impartially and professionally.

The practical consequence at the time was that Strike Force Emblems produced a final report in March 2004 that was not highly regarded because of the limited information on which it was based. The findings in the Emblems Report that were strongly critical of the Mascot Task Force and the NSWCC were not generally supported or implemented.

Many people felt that their complaints, that had led to the formation of the Emblems Strike Force, had not been effectively addressed. The controversy about the warrants and the Mascot investigations continued to grow over the next ten years. A frequent complaint – including by the Opposition – was that the Emblems Report should be publicly released.

At the same time, the NSWPF was receiving other complaints and conducting internal investigations about the activities of the Special Crime and Internal Affairs Command (SCIA), which had provided officers to the Mascot Task Force located at the NSWCC. The internal NSWPF investigations included Operation Banks (1999), Strike Force Sibutu (2001) and Strike Force Tumen (2002).

1.4. Referral of the Emblems report to the PIC Inspector (2012)

After a change of government in 2011, the Minister for Police referred to the PIC Inspector in May 2012 the question of whether the Emblems Report should be publicly released. This coincided with fresh complaints about Mascot and related matters being received by the PIC Inspector, the NSWPF and the Ombudsman.

A new issue raised in some complaints was that confidential NSWCC and NSWPF records concerning Mascot and police internal investigations had entered public circulation, as illustrated in media articles between May to September 2012.[13] It transpired (from later investigation by Operation Prospect) that at least eight individuals had received copies of documents drawn from the Mascot, Emblems, Sibutu and Tumen investigations, including investigation records, court documents, NSWPF records of interview, legal advices and informant information.

11. OP report, Chapter 18, Section 18.3 (Volume 5, p 688).
12. The Emblems Strike Force is discussed in OP report, Chapter 18 (Volume 5, p 687-714).
13. Examined in OP report, Chapter 22 (Volume 6, pp 821-874).

None of the agencies that had received complaints had the jurisdiction to investigate all aspects of the controversy: the PIC Inspector could not review the actions of the NSWCC, the Ombudsman could not review the actions of the NSWCC and could only investigate PIC matters referred by the Inspector, and the NSWPF had no lawful access to the documents held by the NSWCC.

The PIC inspector reported his view to the Minister for Police in November 2012 that it was not in the public interest to publicly release the Emblems report. The Inspector noted that there were deficiencies in the report, that it contained confidential and personal information and that the Ombudsman's investigation into Strike Force Emblems and a range of related matters had been announced the previous month.

1.5. The Ombudsman and Operation Prospect (2012)

In October 2012 the Premier announced that the Ombudsman would conduct 'an independent investigation of Strike Force Emblems and any relevant matters leading up to it'.[14] To enable a comprehensive investigation, amendments were made to the *Ombudsman Act 1974*, the *Crime Commission Act 2012* and the *Police Integrity Commission Act 1996*.[15] Additional funding was provided to the Ombudsman to establish a special investigation unit.

Following the Premier's announcement the PIC Inspector referred to the Ombudsman[16] allegations before the Inspector relating to Operations Mascot, Florida and Emblems, Strike Forces Sibutu and Tumen, and to the improper dissemination of confidential information held by NSWCC, NSWPF and PIC. At the same time the Ombudsman notified the Commissioner of Police[17] that he would take over the complaints that were currently before Strike Force Jooriland, which had been established by the NSWPF in September 2012. Essentially, these were complaints relating to the Mascot investigations in 1999-2002 and the unlawful dissemination of confidential NSWCC and NSWPF documents in 2012.

The Ombudsman's office had also received separate complaints about Mascot and related matters, and these were also included within the Operation Prospect investigation. We continued to receive fresh complaints after the investigation was announced. In all, we received 330 complaints, enquiries and public interest disclosures regarding the matters under investigation. The Ombudsman also relied on own motion investigation powers[18] to include additional matters in the investigation.

1.6. The Operation Prospect investigation (2012-16)

The Operation Prospect investigation was conducted between October 2012 and December 2016.[19] It was conducted jointly under the Ombudsman Act, Part 8A of the *Police Act 1990* and the *Royal Commissions Act 1923*.

The investigation was conducted in five overlapping stages: a short establishment phase; obtaining and analysing source documents from the agencies; conducting hearings and interviews; preparing provisional statements that were provided to interested parties for comment as part of a procedural fairness process; and further hearings, procedural fairness and final report writing.

An estimated one million or more records (document pages) were produced in response to the notices and summonses issued to parties. These records were produced in stages, comprising approximately 290 separate productions of 1,794 boxes of records and materials and 340 bundles of information. Most records came from three agencies – the NSWCC, NSWPF and PIC. The PIC records were mostly produced by February 2013, the NSWPF records by February 2014, and the NSWCC records by October 2014. The NSWCC was unable to locate some records, such as many emails and records stored on officers' computer drives.[20]

14. OP report, Chapter 1, Section 1.2.1 (Volume 1, p 45).
15. The amendments are summarised in the OP report, Volume 1, Appendix 1 (p 141).
16. Under s 90(1)(f) of the *Police Integrity Commission Act 1996*.
17. Under s 156 of the *Police Act 1990*.
18. In s 13 of the *Ombudsman Act 1974* and s 159 of the *Police Act 1990*.
19. See OP report, Chapter 2 (Volume 1, pp 51-84), where additional detail is given about the statistical record of the Operation Prospect investigation.
20. OP report, Chapter 2, Section 2.3.2.3 (Volume 1, p 66).

Operation Prospect also obtained a great deal of evidence through interviews and hearings. In all, 107 hearings and 67 interviews were conducted with 131 witnesses over 89 non-consecutive days. The last interview was conducted in April 2016, and the last hearing in June 2016.

Statements of provisional adverse findings, comments and recommendations were prepared by the Ombudsman and sent to the affected parties for comment and response.[21] These totalled 1,425 pages and were sent to 38 parties. The parties were given the opportunity, in preparing their submissions in reply, to inspect all documents referred to in the provisional statements. An estimated 112 document inspections were undertaken by 27 parties, over 103 days lasting until October 2016.

Thirty-five of the 38 affected parties made a written submission to Operation Prospect in reply to the provisional statements. The 61 submissions from these parties comprised 1,626 pages.

1.7. The Operation Prospect Report (2016)

The Operation Prospect Report (OP report) was presented to and tabled in the NSW Parliament on 20 December 2016. It was presented as a special report jointly under s 31 of the Ombudsman Act and s 161 of the Police Act.

The six volume/22 chapter Report totalled 918 separate pages of text, appendixes and covering pages. The report refers extensively to source documents and the submissions of the parties (noted in 5,259 footnote references).

The Report recorded 93 individual findings – 65 against individual officers, 25 against the NSWCC and three against the NSWPF. As to the individual officers: 50 findings were made against 18 NSWPF police officers and staff; 13 findings were made against four NSWCC officers; and two findings were made against one PIC officer.

The 25 findings against the NSWCC were all made on the basis that the conduct of the Commission was either unreasonable and/or otherwise wrong.[22] The findings were mostly tied to wrongful actions that were taken by members of the Mascot Task Force in the course of the sustained or misdirected investigation of individuals. Adverse findings for those wrongful actions were recorded against the NSWCC on the basis that the Commission was responsible for the Mascot references and for the supervision of staff working on the references. Further, there was a failure by the NSWCC to ensure that officers acted in accordance with the policies, practices and procedures of the NSWCC with regard to such matters as the preparation of affidavits and warrant applications. The OP report explains that a finding of ‘unreasonable’ or ‘otherwise wrong’ action is to be understood as a finding that a public authority has not complied with standards of good administration.[23]

The three findings against the NSWPF[24] were similarly made in respect of administrative failures for which the NSWPF should be held responsible. These were the failure to conclude the investigation of an officer in a timely manner; failure to provide adequate reasons to an officer who had complained; and failing to deal with another officer’s complaint in a timely and appropriate manner.

Nearly half the findings against individual officers were in relation to errors and shortcomings in affidavits and other investigation documents they deposed to or authored. Those actions were found to be either unreasonable or based on a mistake of fact. At a number of points the OP report explained that these findings were made against the officers who first swore affidavits that contained inaccurate content, but not against officers who later swore ‘rollover’ affidavits with the same content.[25] The findings against the initial deponents were made on the basis that there is a special responsibility on the deponent of an affidavit to ensure the accuracy and reliability of information to which they are attesting. However, the Report acknowledged that these errors by the initial and rollover deponents were not intentional or deliberate but stemmed from defective work practices in the NSWCC and the Mascot Task Force.

21. These were sometimes referred to (including in the OP report) as ‘submissions’, because they were drawn from the internal submissions prepared for Operation Prospect by Counsel Assisting.
22. Under s 26(1) of the *Ombudsman Act 1974*.
23. OP report, Chapter 2, Section 2.5.4 (Volume 1, p 82-83).
24. Under s 26(1) of the *Ombudsman Act 1974*.
25. Eg, OP report, Chapter 6, Section 6.2.4.2 (Volume 2, pp 186-187), and a ‘Note to Readers’ in the inside front cover of Volume 1 of the OP report.

Findings were made against individual officers for a range of other conduct. This included failing to deal with a perceived conflict of interest, failing to report the unexpected and anonymous receipt of confidential official information, failing to secure confidential information to avoid its unauthorised dissemination, and the confrontational and inappropriate questioning of an officer. There were also a number of findings against senior NSWPF and NSWCC officers (for unreasonable conduct) regarding the way in which their supervisory, guidance and managerial functions were discharged.

There were two findings against NSWPF officers for 'unlawful conduct',[26] specifically, facilitating the deployment of a police informer in a manner that constituted a breach of a bail condition. The meaning of 'unlawful conduct' is discussed at greater length in Section 3.5 of this report. All that needs be said at this stage is that the term 'unlawful' in the Police Act has a broader meaning than terms such as 'offence', 'illegal conduct' and 'corrupt conduct'.

There are also 13 findings in the Report that a NSWPF or NSWCC officer may have engaged in conduct that constituted an offence. The offences relate to matters such as falsely swearing evidence, improperly influencing a witness, unauthorised use of a listening device, unlawfully communicating telephone intercept information, improperly handling government property, and failing to produce information required by the Ombudsman.

The OP report made 38 recommendations. Twenty-one recommendations were addressed to the NSWCC: as to 15 recommendations, that the NSWCC provide written apologies to 17 people; as to five recommendations, that it destroy the records of private conversations that were unlawfully recorded; and as to one recommendation, that the NSWCC and the NSWPF conduct a review of the existing protocols for joint operations between the organisations.

There were two separate recommendations addressed to the NSWPF to provide written apologies to two former officers.

A recommendation was made to the Director of Public Prosecutions (DPP) that the 'Prosecution Policy and Guidelines' be reviewed.

Fourteen recommendations were addressed to the Attorney General to consider options for legislative change, mostly relating to the establishment of a position of Public Interest Monitor. The Monitor would play a role in assessing and testing the validity of warrant applications during the court approval process.[27]

In addition to the formal findings and recommendations, the OP report recorded adverse comments against a number of named and unnamed officers, for conduct related to the Mascot investigations and the unauthorised dissemination of confidential information. Two adverse comments are especially noteworthy.

One concerned the actions taken by senior NSWCC and NSWPF officers in April 2002 following the public circulation of the warrant containing the names of 114 people.[28] The senior officers were called on at the time to prepare briefings on whether there were defects in the warrant and the inappropriate inclusion of names. While the officers who performed this task clearly took it seriously and had no intention of misleading or justifying the indefensible, the Report found that they glossed over or explained away some obvious problems with both the warrant and the supporting affidavit (that was not in public circulation). The Report observed:

> There was an opportunity in that period to stand back from a 'brewing' controversy and make a frank and objective assessment of the concerns that were being raised. Although those who looked at the issue treated it seriously, they failed to provide the explanation and the answers that people were looking for. The result, as the Operation Prospect investigation shows, is that the controversy continued to grow for another decade – to the point that the NSW Government accepted the need for a comprehensive and extensive inquiry into the Mascot warrants and related issues (carried out by Operation Prospect).[29]

26. Under s 122(1)(c) of the *Police Act 1990*.
27. See OP report, Chapter 19, Section 19.9.3 (Volume 5, p 759-762).
28. Discussed in OP report, Chapter 13 (Volume 3, pp 427-454).
29. OP report, Chapter 13, Section 13.8.7 (Volume 3, p 453).

A similar adverse comment in the OP report concerned the refusal of the NSWCC to make documents available to the NSWPF for the Emblems inquiry in 2003-04.[30] The Report notes that Commissioner Bradley approached the complaints and requests by Emblems in a serious and considered manner and in good faith. However, the Report concluded that the Commissioner gave insufficient weight to practical means of assisting the Emblems inquiry and resolving the complaints that were being investigated:

> Emblems could not do a comprehensive investigation and follow through on its preliminary view that there were names on [the warrant in public circulation] for which there was no apparent justification. Emblems then delivered a report that was not well regarded, even within the NSWPF … The complaints the NSWPF had received from the Police Association and people named in the warrant were not effectively addressed. As a result, the controversy about the warrant and the Mascot investigations continued to grow over the next ten years.[31]

30. Discussed in OP report, Chapter 18 (Volume 5, pp 687-714).
31. OP report, Chapter 18, Section 18.21.3 (Volume 5, p 711).

Chapter 2. Ombudsman activity following tabling of the Operation Prospect report

2.1. The Ombudsman's continuing role

The Operation Prospect investigation has been compared to an investigation by a Royal Commission or special inquiry. The comparison is apposite as regards the important and controversial nature of the matters under investigation, the reliance on coercive evidence-gathering powers to conduct the investigation, and the finalisation of the investigation with a special report to the Parliament.

An important difference, however, is that the Ombudsman has a continuing role after publication of an investigation report. It is normal for a Royal Commission or similar inquiry to be disbanded at the time its report is tabled. Executive action that is required to implement the report, or to access the records of the inquiry, is taken by other executive agencies.

The Ombudsman's continuing jurisdiction and role is relevant to the following processes that are discussed in this report:

- The Ombudsman has a continuing interest in the response of the four bodies to which recommendations are addressed in the OP report – the NSW Crime Commission (NSWCC), NSW Police Force (NSWPF), Director of Public Prosecutions (DPP) and Attorney General. This is discussed in Chapters 4 and 5 of this report. The *Ombudsman Act 1974* provides that the Ombudsman may require advice from an agency as to the action it will take in consequence of an Ombudsman report.[32] If not satisfied that sufficient steps are being taken in due time in response to a report, the Ombudsman may make a further report to the Parliament, and the Minister responsible is required to make a statement to the Parliament within 12 sitting days.[33]
- The OP report anticipated that matters would be referred to the DPP under the Ombudsman Act s 31AB.[34] This is discussed in section 2.4 of this report.
- Findings were made in the OP report against currently serving NSWPF officers. The *Police Act 1990* provides that, as soon as practicable after receiving a report from the Ombudsman that contains recommendations or comments about police conduct, the Commissioner is to notify the Ombudsman of the action that has or may be taken.[35] This is discussed in section 4.1 of this report. For this purpose, the NSWPF has requested access to OP records held by the Ombudsman's office. Although the Ombudsman's police complaints jurisdiction will soon transfer to the Law Enforcement Conduct Commission (LECC), OP records presently remain in the possession, custody and control of the Ombudsman's office.[36]
- As required by the Ombudsman Act,[37] we wrote to a number of people who made complaints investigated by Operation Prospect to explain how their complaints were resolved. We also provided copies of the tabled report to a number of individuals who were the subject of findings or comments in the report. Some of those to whom we wrote have responded with further enquiries that have been answered.
- The Ombudsman's jurisdiction to investigate police conduct complaints has continued, after the unexpected delay in the commencement of LECC. We have received a small number of fresh complaints about matters that either arise from the OP report or that might have fallen within the scope of Operation Prospect had the complaints been received at an earlier time. As required by the Police

32. *Ombudsman Act 1974* s 26(5).
33. *Ombudsman Act 1974* s 27.
34. OP report, Chapter 2, Section 2.1.5 (Volume 1, pp 56-57). The *Law Enforcement Conduct Commission Act 2016* (NSW), Schedule 3 Part 2 cl 16(1) provides that the Ombudsman many continue to exercise functions under the Ombudsman Act or the Police Act for the purpose of commencing proceedings for offences arising out of Operation Prospect.
35. *Police Act 1990* s 158.
36. The *Law Enforcement Conduct Commission Act 2016* (NSW) Schedule 3 deals with the transfer by the Ombudsman to LECC of records relating to investigations conducted under the Police Act.
37. *Ombudsman Act 1974* ss 26(4) and 29(1), discussed in OP report, Chapter 2, Section 2.1.4 (Volume 1, pp 54-55).

Act, these complaints have been referred to the NSWPF for initial investigation.[38] It is likely that any monitoring or further oversight of the NSWPF's actions will be undertaken by the LECC when it commences operation. It is appropriate in this context to note that the Police Act provides that the Commissioner and the Ombudsman, in deciding whether to investigate a complaint, may take into account that 'the conduct complained of occurred too long ago to justify investigation'.[39] Generally, in response to correspondence we have received requesting further investigation of matters related to Operation Prospect, we have advised that the investigation was finalised with the tabling of the report and that the office does not intend (nor has the resources) to undertake further investigation of matters.

- As discussed in section 2.5 of this report, judicial review proceedings commenced in December 2016 in relation to the Operation Prospect investigation and report continue before the Supreme Court. The Ombudsman is a defendant in those proceedings.
- The Ombudsman's office was contacted a number of times by media organisations in the months following the tabling of the OP report for information or comment on particular matters. Some of the media articles and responses are referred to in this report.
- This special report to the Parliament under s 31 of the Ombudsman Act is a further example of the continuing role the Ombudsman may play in relation to investigations the office has undertaken.

Special funding was provided to the Ombudsman's office to handle this additional work in 2016-17, and may be continued for the 2017-18 financial year. A small team of five staff are working full-time on Operation Prospect related matters at the date of this report to Parliament.

2.2. Distribution of the report

It was always the intention of the Ombudsman's office to provide a hard copy of the six volume OP report to many of the parties who were directly involved in the investigation – such as public authorities, complainants and officers against whom adverse findings were made. In some instances it was a legal requirement to provide a copy of the report to a party, and in other instances it was deemed considerate to do so.[40]

In the circumstances prevailing at the time of tabling the report it was not possible to have hard copies of the report available to all relevant parties on the day of tabling. The report was tabled on the same day that the Supreme Court dismissed the application for interlocutory relief to restrain the Ombudsman from tabling the report.[41]

The report was published on the Ombudsman website shortly after on the same day. Letters were also sent that day to many of the interested parties to notify them of this development, to provide a link to the Report, and in many instances to advise them of an adverse finding in the Report applying to them or of how their complaint had been resolved. Parties were advised that a hard copy of the report would be provided on request.

The printing of the report could not commence until it had been tabled. The printing was not completed until late January 2017 because of the Christmas-New Year business shut-down. Some volumes of the printed report contained a misprint because of an error in the electronic design file sent to the printer: specifically, some fourth level section headings defaulted to a base number (for example, the heading numbered 6.2.3.1 was printed as 1.1.1.1). These volumes of the report were reprinted by February 2017. Hard copies were then distributed to parties who requested this.

Upon request, parties were kept informed of these continuing delays and of the explanation. Inaccurate information was given by one or other parties to media outlets that reported the OP report had been recalled and was being revised. This led to concerned enquiries from some other parties.

It is important to restate that no alteration has been made to the OP report tabled in the Parliament on 20 December 2016 and published that day on the Ombudsman website. An identical hard copy of the tabled report has been provided to parties on request.

38. *Police Act 1990* s 132.
39. *Police Act 1990* s 141(1)(d). Other factors that may be taken into account include that 'the complaint is frivolous, vexatious or not made in good faith' (s 141(1)(b)) and that 'the subject-matter of the complaint is trivial' (s 141(1)(c)).
40. The reporting requirements are discussed in OP report, Chapter 2, Section 2.1.4 (Volume 1, pp 54-55).
41. *Kaldas v Barbour* [2016] NSWSC 1880 (20 December 2016, Garling J).

Parties who have requested that amendments be made to the published report to reflect their disagreement with particular statements have similarly been advised that it is not open to me to do so, as the OP report has been tabled in the Parliament.

2.3. Status and variation of the non-disclosure directions

The summons to each witness required to give evidence to Operation Prospect stipulated that the witness must not disclose information about the summons to any person.[42] A similar non-disclosure direction was issued in respect of evidence given in an interview or hearing.[43]

The OP report explained that these non-disclosure directions remained in force after the publication of the report, to the extent that a direction was issued to a party who was anonymised in the report or the direction applied to evidence not revealed in the report.[44] This restriction was necessary to ensure the continued confidentiality of personal information and law enforcement information that was gathered during the investigation. However, the extensive range of information that was exposed to public view in the OP report meant that there was considerable scope for unhindered public discussion of the matters under investigation.

The status of the non-disclosure directions was explained to parties upon request. Inaccurate information was given by one or other parties to media outlets that reported the Ombudsman's office was attempting to shut down criticism of the OP report.[45] Steps were taken where possible by the Ombudsman's office to counter and correct this inaccuracy.

It has always been open to a party to request that the Ombudsman vary a non-disclosure direction. A number of requests have been received and variations made, sometimes after clarifying with a party the reason for or scope of a requested variation. Variations have been made, for example, to enable a party to consult a legal practitioner, to speak to a parliamentarian, to provide further information to the Ombudsman's office, or to seek professional counselling.

2.4. Referrals to the Director of Public Prosecutions

2.4.1. Ombudsman's referral of matters to the DPP

The Ombudsman Act provides that the Ombudsman may, at the conclusion of an investigation into a public authority, determine that the conduct of a public authority was contrary to law.[46] The Police Act provides that the Ombudsman may, at the conclusion of an investigation into police conduct, report that the conduct of a police officer constituted an offence or corrupt conduct.[47] The Ombudsman may also furnish to the Director of Public Prosecutions (DPP) or the Independent Commission against Corruption (ICAC), at any time, information obtained by the Ombudsman in discharging functions under any Act.[48]

The Ombudsman Act also creates a number of offences relating to the exercise of the Ombudsman's investigative functions. These offences are similar to those in legislation governing the proceedings of commissions of inquiry and of anti-corruption bodies such as ICAC. The Ombudsman Act makes it an offence for a person to refuse or wilfully fail, without lawful excuse, to comply with any lawful requirement of the Ombudsman or an officer of the Ombudsman, or to wilfully make a false statement to, mislead or attempt to mislead the Ombudsman or an officer of the Ombudsman.[49]

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42. Under *Ombudsman Act 1974* s 19B.
43. Under *Ombudsman Act 1974* s 19A.
44. OP report, Chapter 2, Section 2.4.3 (Volume 1, p 73).
45. Eg, 'Ombudsman warns witnesses', *The Australian*, 3 February 2017; 'Top cop hopefuls face "gag order"', *The Australian*, 22 February 2017.
46. *Ombudsman Act 1974* s 26(1)(a). The term 'public authority' extends to individuals employed in a Public Service agency: s 5(1).
47. *Police Act 1990* ss 122(1)(a),(b), 157.
48. *Ombudsman Act 1974* s 31AB; see also s 34(1)(b6),(c).
49. *Ombudsman Act 1974* s 37(1)(b),(c). See also *Royal Commission Act 1923* s 21 ('False and misleading testimony'), which applies to inquiries held by the Ombudsman by virtue of Ombudsman Act s 19(2).

As noted in the OP report, the Ombudsman concluded that some of the conduct of public authorities investigated by Operation Prospect was contrary to law, and some of the conduct of police officers may have constituted an offence.[50]

The Ombudsman is currently preparing some matters arising out of the OP report for referral to the DPP under the Ombudsman Act. These referrals are being made in accordance with the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (Prosecution Guidelines)[51] and a Memorandum of Understanding (MOU) between the Ombudsman and the DPP. It is anticipated that all referrals will be made by the end of May 2017.

2.4.2. Roles of Ombudsman and DPP in criminal prosecutions

While the Ombudsman may refer matters to the DPP, the decision to prosecute is made by the DPP. This is reflected in the *Law Enforcement Conduct Commission Act 2016*, which provides that:

(a) the Ombudsman does not have the power to commence proceedings for an offence unless the DPP has advised the Ombudsman in writing that the proceedings may be commenced, and

(b) while the DPP may liaise with the Ombudsman, he or she is to act independently in deciding to advise that proceedings for the offence may be commenced.[52]

Those provisions reflect the distinct roles played by the Ombudsman and the DPP in relation to Operation Prospect and all other investigations conducted by the Ombudsman. Guideline 4 of the Prosecution Guidelines sets out the three criteria to be considered in deciding whether to commence a prosecution. The role of the Ombudsman, in deciding to refer a matter to the DPP, is limited to the first of those criteria, described in the Guidelines as 'the *prima facie* test':

(1) whether or not the admissible evidence available is capable of establishing each element of the offence.

Provided this threshold is met, the Ombudsman is required to make a referral to the DPP, who will then consider the remaining two criteria, which are:

(2) whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law; and if not

(3) whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

Guideline 4 also elaborates on the matters that the DPP may consider under criterion 3 in deciding if it would be contrary to the public interest to prosecute a person (for example, the triviality of a matter, that a prosecution would be counter-productive, the staleness of the alleged offence, the degree of culpability of the alleged offender, that a prosecution would be unduly harsh or oppressive, or the cooperation of the alleged offender).

It is important to stress that the decision to prosecute is that of the DPP, an independent prosecution authority. The Ombudsman's role, as an investigative body, is limited to reporting on the investigation undertaken and considering whether criterion 1 is satisfied. The Ombudsman has no prosecutorial discretion and so no involvement in determining whether criteria 2 and 3 are met. Nor will the Ombudsman be expressing any opinion on those criteria.

The delineation between the prosecutorial and investigative roles is also drawn in Prosecution Guideline 13. The Guideline states: 'The Director prosecutes. The police (and some other agencies) investigate. The Director has no investigative function and no power to direct police or other agencies in their investigations.'

A further consideration to be borne in mind is that evidence obtained by an agency such as the Ombudsman, via traditional investigative methods as well as the taking of evidence, will not always be admissible for the purposes of a criminal prosecution. This of course would have a bearing on the advice given by the DPP as to the prospects of securing a conviction (criterion 2).

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50. OP report, Chapter 2, Section 2.1.5 (Volume 1, p 56).
51. http://www.odpp.nsw.gov.au/prosecution-guidelines.
52. *Law Enforcement Conduct Commission Act 2016*, Schedule 3 Part 2 cll 16(4), (5).

As noted in the OP report,[53] the relatively limited role played by the Ombudsman in referring matters to the DPP has not always been clearly understood.

The Ombudsman's office understands the reluctance of some individuals to provide witness statements, particularly having regard to the time that has elapsed since the conduct occurred, the circumstances in which the conduct occurred, and the fact that the person whose conduct has been investigated may have been a colleague. However, the Ombudsman has a duty to draw to the attention of the DPP prima facie evidence of conduct of police officers and other public authorities that may constitute a criminal offence, in order to allow the DPP to decide whether prosecutions should be commenced. Officers of all government agencies have a duty to assist the Ombudsman in that function.

A final matter to note is that the MOU between the Ombudsman and the DPP provides that the DPP will aim to advise the Ombudsman as to whether criminal charges are available as quickly as possible after receipt of the brief from the Ombudsman, and at least within six months for standard matters and within twelve months for complex matters.

We are aware that parties who may face charges are understandably anxious that a decision is made as quickly as possible. This point will be noted in liaison between the Ombudsman and the DPP.

2.5. Status of the legal proceedings challenging the investigation and report

The Acting Ombudsman is defending Supreme Court proceedings brought by Mr Kaldas in connection with Operation Prospect and the OP report. These proceedings are still before the Court. A brief outline of the proceedings is given below.

On 6 December 2016 Mr Kaldas sought an interlocutory injunction restraining the Acting Ombudsman from making public any determinations adverse to Mr Kaldas in the OP report. This order was sought as part of substantive proceedings in which Mr Kaldas has claimed that any such determinations are invalid. The defendants to these proceedings are the Acting Ombudsman, the former Ombudsman (Mr Bruce Barbour) and a Deputy Ombudsman (Ms Linda Waugh).[54] The issues raised concern the Ombudsman's powers to investigate and make determinations, and the way in which Ombudsman investigations are conducted.

Mr Kaldas' application to restrain publication of the OP report was dismissed on 20 December 2016.[55] The Ombudsman tabled the Report in the Parliament the same day, and it was also released publicly that day.

Mr Kaldas' claim against the defendants returned to the Supreme Court in early 2017. A preliminary question arose about s 35A of the Ombudsman Act, which provides that civil proceedings can only be brought against an Ombudsman, former Ombudsman, or present or former officers of the Ombudsman with the leave of the Supreme Court, and only on the basis that the Court is satisfied that there is 'substantial ground' for contending that these individuals acted, or omitted to act, in bad faith. Mr Kaldas has raised a constitutional argument about the validity of this and a related provision of the Ombudsman Act, which provides that the Ombudsman is neither competent nor compellable to give evidence in legal proceedings.[56] The constitutional issue is being determined as a separate question by the NSW Court of Appeal on 8-9 June 2017.

53. OP report, Chapter 2, Section 2.1.5 (Volume 1, p 56).
54. The Attorney General was originally also a defendant to these proceedings, as there was a question as to whether the Ombudsman could actively defend the proceedings. The proceedings have since been discontinued as against the Attorney General. Ms Waugh was Deputy Ombudsman at the time that proceedings were commenced, but her appointment has since ended.
55. *Kaldas v Barbour* [2016] NSWSC 1880 (20 December 2016, Garling J).
56. *Ombudsman Act 1974* s 35.

Chapter 3. Commentary following publication of the Operation Prospect report

3.1. Responding to complaints and criticisms

Since the tabling of the OP report on 20 December 2016, a number of complaints and criticisms of the Report have been notified to the Ombudsman's office. Some of these were made in correspondence to the office, and some were aired in the media. We are aware also that some complaints about the OP report have been made to the Premier.

We have individually considered and responded to all complaints addressed to our office. We also issued two media releases in response to specific criticisms attributed to the NSW Crime Commission (NSWCC),[57] and I have responded to a few media requests for comment or clarification.

This section explains my response to the main issues raised. Some of these issues had also been raised prior to the tabling of the report, and are dealt with only briefly in this chapter. Earlier criticisms were also addressed both in the Operation Prospect Report and in a Progress Report that I made to the Parliament in November 2015.[58]

I am constrained in replying in detail to some criticisms because of confidentiality restrictions in the *Ombudsman Act 1974* that apply both generally and to the Operation Prospect investigation.[59] The Ombudsman is also a party to Supreme Court proceedings brought by one of the persons whose conduct was the subject of investigation in Operation Prospect, and no comment will be made specifically about contested issues in that litigation.

3.2. Range of issues investigated

One line of criticism was that the Operation Prospect investigation was too narrow – that the OP report did not deal directly with all problems or issues arising in the Mascot investigation in 1999-2002. For example, there have been complaints that the Report did not directly examine whether many people were justifiably mentioned in listening device affidavits and warrants, and that it did not examine the accuracy of all facts stated in affidavits.

There are three responses to this criticism. First, it was not within the scope of Operation Prospect to examine all such issues. As explained above,[60] the scope of the investigation was framed by four lines of inquiry: matters referred to the Ombudsman by the PIC Inspector, complaints received by the NSWPF that the Ombudsman took over, complaints separately received by the Ombudsman's office, and the Ombudsman's decision to investigate some matters on an own motion basis.

All matters in those categories were canvassed in the OP report or in subsequent correspondence with parties. In particular, we wrote to each complainant following the publication of the Report to advise them as to the outcome of their complaint, as required by the Ombudsman Act and the *Police Act 1990*.

Secondly, it was impractical and unnecessary to examine the circumstances of each person named on a warrant or in an affidavit. As noted above,[61] 475 LD warrants were issued to the Mascot Task Force, supported by 107 affidavits that named 295 people whose private conversations were to be listened to or recorded. In addition, 246 telephone interception warrants were issued to Mascot, supported by 111 affidavits that named 95 people whose telephone communications could be intercepted. Some of the LD warrants and affidavits named over 100 people, and some affidavits were as long as 82 pages.[62]

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57. 'Operation Prospect Report', 13 March 2016; and 'Ombudsman comment on the NSW Crime Commission response to the Operation Prospect report', 15 March 2016. Both media releases are available on the Ombudsman website, www.ombo.nsw.gov.au.
58. 'Operation Prospect – Progress Report by the Acting Ombudsman', 4 November 2015, presented to General Purpose Standing Committee No 4 of the Legislative Council.
59. *Ombudsman Act 1974* (NSW) ss 19A, 19B, 34.
60. Section 1.5 of this report. See also OP report, Chapter 1, Section 1.2.2 (Volume 1, p 46).
61. Section 1.1 of this report. See also OP report, Chapter 19, section 19.3 (Volume 5, p 721).
62. OP report, Chapter 2, section 2.3.6 (Volume 1, p 70).

It would have been an impossible task to investigate the individual circumstances of each person named in a warrant. This could only be done by assessing, more than 15 years later, whether the deponents of each of 218 affidavits had a reasonable basis at the time for the views or suspicions they held about the 390 people named in the warrants. Nor would such an inquiry yield findings of any contemporary value, particularly because many of those named may be unaware of that fact.

Instead, Operation Prospect thoroughly examined the circumstances of all people who complained about being named: indeed, this was done at a level of detail that has itself been criticised for being divorced from the practical circumstances confronting Mascot officers at the time. Furthermore, the Report reached findings that the NSWCC and the Mascot Task Force adopted a flawed approach in allowing so many names to be included in warrants and affidavits without proper justification.

Thirdly, the same points apply to the suggestion that Operation Prospect should have separately examined the accuracy of each fact stated in an affidavit or in Mascot documentation. For example, there has been criticism that the OP report quoted from affidavits that referred to particular events or conversations that – people now claim – never in fact occurred. Surprisingly, this criticism was sometimes made by former police officers and legal practitioners who would well know that it is in the nature of an affidavit in support of a warrant that it refers to facts that may not have been tested or verified: indeed, the purpose of the warrant may be to facilitate investigation of matters of that kind.

That said, the Ombudsman's office has since looked separately at each alleged factual inaccuracy that has been notified to us since the publication of the OP report. I am satisfied that the Report accurately refers to the Mascot source documents and that in some instances other facts verify the matters stated in the source documents that people now claim to be inaccurate.

3.3. Scope of the investigation

A converse line of criticism was that the Operation Prospect investigation was too broad – that it examined matters that should not have been included within the scope of investigation.

A criticism made a number of times during Operation Prospect was that it should not have examined events in 2010 and 2012 concerning access to and unauthorised dissemination of confidential NSWCC, NSWPF and PIC records. Those events are the subject of Volume 6, Chapters 20-22 of the OP report. The chapters record 11 findings against five NSWCC and NSWPF officers, including five findings that an offence may have been committed.

The argument put at the time was that Operation Prospect was established to examine complaints and allegations relating to the Mascot references, including Strike Force Emblems. Those events occurred between 1999-2004. To investigate matters occurring in 2010-2012 was inappropriate, it was said, for two reasons.

One was that it would lengthen the investigation and distract from its intended focus. The other was that it made people who were aggrieved by the events of 1999-2004 a target of the expanded investigation. Those people, it was said, had campaigned for a comprehensive investigation into the Mascot era. To the extent that they were involved in the events in 2010-12 (for example, circulating or leaking internal documents), they were being unfairly and improperly targeted and victimised by Operation Prospect. A variation of this argument, examined in the next section of this report, is that they were whistleblowers who were being victimised.

This criticism of Operation Prospect has been restated a number of times following the tabling of the Report. Among those to support the criticism are the former Premier and Attorney General, who were in government in October 2012 when Operation Prospect was established. The former Premier, the Hon Barry O'Farrell, commented that the Ombudsman's office had focussed the investigation 'on those who blew the whistle and brought forward these serious allegations' of illegal bugging and false swearing of affidavits.[63] The former Attorney General, the Hon Greg Smith, commented that 'the inquiry into the police bugging scandal strayed from [its] terms of reference and appeared to target those who originally reported the matter'.[64]

63. Letter to the Editor, (Barry O'Farrell), 'Whistleblower protection', *The Australian*, 23 December 2016.
64. Letter to the Editor, (Greg Smith), 'Lack of oversight in police bugging inquiry', *Daily Telegraph*, 24 December 2016.

The criticism that the investigation of events in 2010-2012 was a time-wasting distraction from the other lines of inquiry investigated by Operation Prospect can effectively now be put to one side, given that the OP report has been published. It should nonetheless be noted that the OP report addressed the issue by including an estimate of the resources devoted to the investigation of events in 2010-12.[65] The figures are that one OP investigator worked part-time on this issue for part of 2013;[66] one investigator worked full-time on the issue for parts of 2014, with part-time assistance from a junior staff member; between 10-20% of the time in interviews and private hearings was devoted to the issue; and 110 of the 918 pages of the Report (12%) examined the issue.

The following points can be made in response to the larger debate about the scope of Operation Prospect and the allegations that it impermissibly strayed beyond its original terms.

The Premier's announcement in October 2012 that the Ombudsman would conduct an independent investigation referred only to the Emblems Report.[67] That can be explained on the basis that the Government, while in Opposition, had asserted that the Emblems Report should be published, and had referred this issue to the PIC Inspector in May 2012, following pressure from the Police Association.[68] During 2012 the PIC Inspector received new complaints both about the Mascot investigations and about the unauthorised dissemination of NSWPF and NSWCC records.[69] Accordingly, those matters were before the PIC Inspector at the time that he referred the matters to the Ombudsman in October 2012. The PIC Inspector's letter of referral to the Ombudsman noted that 'events have overtaken the relative simplicity of the matter' that the Premier had asked him to investigate in May 2012; he had received 'wide ranging allegations from various sources in the relatively short period from the 11 May 2012'; and that an expanded investigation by the Ombudsman was 'more appropriate in circumstances where the history goes back to the last decade of the last century and the more so to protect the good name of the NSW Police, the administration of the Police and the reputations of the many people whose names have been exposed, lawfully and unlawfully, over the last few months'.[70]

The unauthorised dissemination of internal records was a trigger for the Government announcement in October 2012 that the Ombudsman would conduct a comprehensive investigation. The PIC Inspector's jurisdiction did not extend to the full range of issues that had been raised in complaints.

Both the Ombudsman and the NSWPF had also received complaints about the unauthorised dissemination of confidential records in 2012. It was clear from the outset that this topic would fall within the scope of Operation Prospect. For example, the Ombudsman's media statement the day following the Premier's announcement noted that the investigation would 'involve both historical and *contemporary* matters' (emphasis added), and would be 'complex and extensive'.[71]

It was evident from other documents in the early stages of Operation Prospect that it would be examining events in 2010-12. For example, the first formal Notice of Investigation issued by the Ombudsman under s 16 of the Ombudsman Act to the Commissioner of the NSWCC on 15 October 2012 and the Commissioner of the NSWPF on 18 October 2012, stated that the Ombudsman was conducting an investigation into the actions and inactions of NSWCC and NSWPF officers in relation to Operations and Strike Forces referred to in the Notices, as well as 'the actions and inactions of … officers in dealings with and disclosures of confidential information related to the investigations and/or obtained by the strike forces'.[72] The summonses issued to parties to produce documents or give evidence similarly described the investigations as including 'allegations of conduct concerning … Unlawful and/or improper dissemination of material from hardcopy files and/or the computer systems of the NSW Police Force, the NSWCC and the PIC'.[73]

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65. OP report, Chapter 2, section 2.3.8 (Volume 1, pp 70-71).
66. The average staffing numbers for Operation Prospect were 10 staff in 2013-14, 9.58 in 2014-15, 12.87 in 2015-16, and 12.23 in 2016-17: see OP report, Chapter 2, section 2.3.7 (Volume 1, p 70).
67. The Hon Barry O'Farrell MP, 'Strike Force Emblems', Media release, 7 October 2012
68. OP report, Chapter 1, Section 1.1.4 (Volume 1, pp 43-44).
69. OP report, Chapter 1, Section 1.1.1 (Volume 1, p 40).
70. Letter from the Hon David Levine, Inspector of the PIC to Mr Bruce Barbour, NSW Ombudsman, 11 October 2012.
71. OP report, Chapter 1, Section 1.2.1 (Volume 1, p 45).
72. OP report, Chapter 1, Section 1.2.2 (Volume 1, p 46).
73. Letter, Ombudsman to NSWPF Commissioner, 10 October 2012 (tabled 11 October 2012, Budget Estimates 2012-2013, General Purpose Standing Committee 4).

This issue had also been raised before the Legislative Council Select Committee on the Conduct and Progress of Operation Prospect in 2014-15. The report of the Select Committee concluded: 'The committee is of the view that the Ombudsman is conducting a proper, thorough and hopefully conclusive investigation into a matter that is both incredibly important and incredibly complex'.[74]

The importance of including the unauthorised dissemination of official records within the scope of Operation Prospect was underscored by the specific allegations made in some complaints that gave rise to the investigation. For example, six complaints that were received by either the NSWPF or the Ombudsman between September 2012 – January 2013 alleged that the unauthorised dissemination of documents was 'corruption involving the release of highly confidential information to the media'; involved 'the unlawful, wholesale and multiple leaking of complaint investigation reports' and was driven by the malice of some officers designed to damage other police officers; that the information leaked 'goes to the heart of a covert police investigation involving a police informer', and the leaking was a criminal offence that compromised the integrity of all internal police investigations'; the leaking left the complainant feeling 'outraged that this document is in circulation and bringing them into disrepute'; the leaking was 'a very negative and destructive process for all concerned, particularly being orchestrated in a public forum' and risked compromising a person's professional standing 'in the apparent pursuit of personal agendas'; and the disclosure 'has the potential to ruin my police career, and impact negatively on a number of high profile investigations' currently before courts.

In short, the events occurring in 1999-2003 and 2010-12 were linked to a common dispute. The central objective of Operation Prospect has always been to examine, evaluate and report publicly on disputed events between 1999-2012 that make up this controversy.[75]

Finally, it is important to record that a fundamental and essential feature of the independence of the Ombudsman is that he or she has the discretion to define the scope of an investigation falling within the terms of the Ombudsman Act. The Ombudsman Act provides that the Ombudsman shall conduct an investigation as he or she thinks fit, and may investigate matters on an own motion basis.[76] The Ombudsman is not subject to direction as to how an investigation will be conducted. Whatever may now be said by former Government officers as regards their expectations of the scope of Operation Prospect, it was always for the Ombudsman to define that scope.

3.4. Whistleblowers and Operation Prospect

A recurring criticism has been that the Ombudsman's investigation of matters occurring in 2010-12 constituted reprisal action against whistleblowers.

Some complaints about the Mascot Task Force that were lodged with the PIC Inspector, the NSWPF and the Ombudsman were public interest disclosures within the terms of the *Public Interest Disclosures Act 1994* (PID Act). A matter is a public interest disclosure (PID) if a public official honestly believes, on reasonable grounds, that the information they are disclosing to one of those bodies shows or tends to show wrongdoing, including corrupt conduct and serious maladministration.[77]

The PID Act provides a number of protections for a person who makes a PID. Two that are relevant to the present discussion are protection against reprisal action and protection against adverse actions. Section 20 of the PID Act provides that an offence is committed by any person 'who takes detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure'. Section 21 provides that 'A person is not subject to any liability for making a public interest disclosure and no action, claim or demand may be taken or made against the person for making the disclosure'.

74. NSW Parliament, Legislative Council, Select Committee on the Conduct and Progress of the Ombudsman's Inquiry into 'Operation Prospect': *The conduct and progress of the Ombudsman's inquiry 'Operation Prospect'* (Feb 2015), p 108.
75. See OP report, Foreword, Chapter 1 (Volume 1, p i).
76. *Ombudsman Act 1974* (NSW) s 13(1).
77. *Public Interest Disclosures Act 1994* (NSW) Part 2. There are differences in wording in the PID Act, that are not presently material, according to whether the disclosure was made to the Ombudsman, the NSWPF or the PIC Inspector: see ss 8, 11, 12A.

The Ombudsman is responsible for oversighting the implementation and operation of the PID Act.[78] Those responsibilities include promoting the object of the Act, which is to encourage and facilitate the disclosure of wrongdoing in the public sector, including by protecting people from reprisal action for making PIDs.[79] The Ombudsman's office also provides advice and guidance to agencies, promotes public awareness and understanding of the Act, and monitors agency compliance with their responsibilities under the Act, which includes an obligation to have appropriate policies to receive, assess and properly handle PIDs.[80]

The Ombudsman's office takes those responsibilities seriously. Consequently, we took notice of all allegations notified to our office during Operation Prospect that a person may have suffered reprisal action for making a PID in relation to the investigation. I am satisfied that no credible evidence was provided to the Ombudsman's office of reprisal or detrimental action falling within the terms of the PID Act.

Two points of explanation should be noted. First, the fact that a person has made a PID on a topic does not preclude investigation either of that topic or of the conduct of the person making the disclosure. Specifically, the Ombudsman's office was not prevented by the PID Act from investigating a person's possible involvement in events in 2010 and 2012 concerning access to and unauthorised dissemination of confidential law enforcement records, by reason that the person had made a PID about Mascot actions in 1999-2002. Shortly stated, the PID Act does not prevent the operation of the normal investigative and management functions of government, by reason only that a person has made a PID on a related matter. This is clearly stated in the objects clause in the PID Act, which provides that 'Nothing in this Act is intended to affect the proper administration and management of an investigation authority or public authority'.[81]

Secondly, the PID Act contains a legal test for reprisal action, namely, that detrimental action was taken against a person substantially in reprisal for making a PID. The investigation by Operation Prospect of the conduct of a number of police officers was not done in reprisal for any of those persons making a PID. The investigation was instigated independently of any disclosure that a person may have made, and in accordance with the requirements of the Ombudsman Act and the Police Act.

In a recent case the court noted that the motivation for taking detrimental action against a person is a key element of the offence of prohibited reprisal action. Specifically, the court noted that in the context of the PID Act reprisal 'denotes an act of revenge or retribution from an action of another'.[82] Further, the Court noted that 'substantially' means that a person's disclosure 'formed an important real or actual basis for the alleged reprisal'.

3.5. Finding of unlawful conduct

The OP report included findings of 'unlawful conduct' against two NSWPF officers, in respect of similar conduct.[83] It related to the deployment in May 1999 of an informant, code-named Paddle.

At the time of the deployment Paddle was facing serious charges for attempted armed robbery in 1994. One of his bail conditions was that he not communicate with any person who may be called as a Crown witness. The Mascot team devised a plan for Paddle to approach a retired NSWPF officer (Mr A) who had been involved in Paddle's arrest in 1994, but in 1999 was the proprietor of a pawn-broking shop. Paddle would be wearing a concealed listening device and, on the pretext of pawning an item, would engage Mr A in conversation about his arrest in 1994. The objective was to obtain evidence of the misconduct of other NSWPF officers who participated in Paddle's arrest.

It was foreseeable that Mr A, as an arresting officer, might be called as a prosecution witness in Paddle's pending trial; he had already given evidence in the proceedings. Consequently, the plan for Paddle to approach Mr A on two occasions resulted in a breach of Paddle's bail conditions, for which he was later arrested by other officers who were unaware of the secret deployment.

78. *Public Interest Disclosures Act 1994* (NSW) s 6B.
79. *Public Interest Disclosures Act 1994* (NSW) s 3.
80. *Public Interest Disclosures Act 1994* (NSW) s 6D.
81. *Public Interest Disclosures Act 1994* (NSW) s 3(2).
82. *DPP v Murray Kear* (unreported, New South Wales Local Court, Grogin G, 16 March 2016).
83. OP report, Chapter 14, Section 14.5.8 (Volume 4, p 478), Findings 48 and 49.

The OP report noted that it is not a criminal offence for a person to breach a bail requirement. It is, however, a contravention of a court order and can lead to the person being brought before a court to address the breach of bail (as occurred in this case).[84] There was no evidence before Operation Prospect that any officer involved in deploying Paddle knowingly acted wrongly or was motivated by an improper agenda. They likely believed their actions to be justified and proper as part of a broader strategy to gather information about suspected corruption by other NSWPF officers.[85]

However, the OP report went on to conclude that NSWCC and NSWPF officers involved in the deployment plan must accept responsibility for a misconceived plan that resulted in a person facing serious criminal charges being deployed in breach of his bail conditions. The phrase 'neglectful oversight' was used to describe the actions of the two officers against whom the unlawful conduct finding was made.[86] In summary, the deployment was carefully planned; both officers played a central role in devising the plan and guiding its implementation; they were experienced in criminal investigation; they were aware that Paddle had a lengthy criminal record and was on bail facing trial on a serious charge; the officers conferred with each other on numerous occasions about Paddle's deployment; the bail condition was of a standard kind that is imposed to avoid an accused interfering with or intimidating witnesses; and it was reasonable in those circumstances to expect that the officers would examine the legal risks in the activities the informant may be instructed to undertake and would check the informant's bail conditions.

The OP report explained that the term 'unlawful conduct', as used in section 122(1)(c) of the Police Act, 'can apply broadly to conduct that does not constitute a punishable offence but that contravenes a legal rule or direction that should be observed by the person engaging in the conduct in question'.[87]

On Friday 17 February 2017 I received a letter from a solicitor representing Deputy Commissioner Burn, enclosing a Memorandum of Advice signed by Mr Bruce McClintock SC. The opinion rejected the definition of 'unlawful conduct' that I gave in the OP report, and its application to Ms Burn. The legal Advice was referred to in media stories the following week and thereafter.[88]

I replied privately to the solicitor's letter on 6 March 2017, expressing the view that Senior Counsel's Advice inaccurately summarised the findings in the OP report. I have received further correspondence on the matter from the solicitors dated 28 March 2017. The letter requested that if I dealt with this matter in this special report to Parliament that I should refer to their submission and consider appending it to my report. I have not appended it, as the purpose of this report is to canvass a wide range of developments that have occurred since the OP report was tabled, and it would be inconsistent with that objective to give undue prominence to any one of the developments. However, I will summarise the main areas of disagreement.

There are essentially two issues – the meaning of the term 'unlawful conduct' in s 121(1)(c) of the Police Act, and its application to the conduct of Ms Burn and another officer.

I will not deal at length with the second issue in this report. Essentially, it involves disagreement on what findings can be drawn from the evidence that is set out in the OP report. Senior Counsel's Advice and the solicitor's letter emphasised that there was no direct evidence that Ms Burn was aware of Paddle's bail condition, and her evidence to Operation Prospect was that she was unaware of it. My findings of fact and inferences are set out in the OP report and are summarised above.

As to the first issue, Mr McClintock SC was of the view that the term 'unlawful' should bear its ordinary meaning as defined in the *Macquarie Dictionary* – specifically, 'not lawful, contrary to law, illegal, not sanctioned by law'. This definition was referred to in the solicitor's later letter as a 'broad' definition; the letter stated that '"unlawful" conduct should be construed as conduct that is against the law or illegal without reaching the seriousness of an offence or falling within the concept of corruption'. On that approach, it was submitted, Ms Burn had not breached any law and could not accordingly be found to have engaged in unlawful conduct.

84. OP report, Chapter 14, Section 14.5.7.2 (Volume 4, p 473).
85. OP report, Chapter 14, Section 14.5.8 (Volume 4, p 477).
86. OP report, Chapter 14, Section 14.5.7.4 (Volume 4, p 476).
87. OP report, Chapter 14, Section 14.5.8 (Volume 4, p 478).
88. Eg, 'Race for top job heats up' and 'Unlawful decision doesn't stack up', *Daily Telegraph*, 20 February 2017; and 'Catherine Burn confirms application for police commissioner job, what are her chances?', *ABC News online*, 20 February 2017.

I explained in my letter of 6 March 2017 to the solicitors that I adhered to the view I expressed in the OP report as to the meaning of 'unlawful conduct'. I firstly disagreed that one need go no further than the dictionary definition of 'unlawful'. Courts have noted the limited use that can be made of dictionary definitions when interpreting legal terms and concepts in a statute.[89] An essential feature of the present statutory context is that the term 'unlawful' in s 122 of the Police Act has a broader meaning than 'offence' and 'corrupt conduct', and it appears alongside other terms of broad meaning (such as 'unreasonable' and 'mistake of fact') that together constitute grounds on which the Ombudsman may express the view that there has been defective or wrongful administrative conduct.

Furthermore, my view is that the Macquarie dictionary definition of 'unlawful' is in fact consistent with the view I expressed in the OP report. The definition spans a range of different concepts, including 'contrary to law' and 'not sanctioned by law'. In my view, that equates with one meaning I gave in the OP report, namely, conduct 'that contravenes a legal rule or direction that should be observed by the person engaging in the conduct in question'.

I nevertheless acknowledge that the finding of unlawful conduct against Ms Burn figured prominently in many media stories on the OP report. Some stories did not necessarily capture the qualified reasoning in the OP report, that a finding of 'unlawful conduct' is to be construed broadly and is to be understood differently to phrases such as 'illegal conduct', 'corrupt conduct' and 'offence'.

In the OP report I was not unmindful – as I acknowledged – that there may be an added sting in the phrase 'unlawful conduct', and for that reason I explained the broad sense in which the term is to be understood.[90] The term is repeated in the *Law Enforcement Conduct Commission Act 2016* s 9(4)(c) as a ground on which the LECC may reach an adverse finding in relation to police conduct. By contrast, s 26(1)(a) of the Ombudsman Act uses the term 'contrary to law'.

The Government may wish to consider whether it would be desirable to amend the LECC Act to use the term 'contrary to law' rather than 'unlawful conduct'. In my view, the former term better captures the notion that the action taken by an officer is contrary to law, without necessarily being reprehensible in a normative sense. For example, a decision is 'contrary to law' if it is made without a proper delegation in place, or on a mistaken interpretation of the law. It may distract from the technical essence of such a legal error to describe it as 'unlawful conduct'.

3.6. Suitability of the Ombudsman's office to conduct the Operation Prospect investigation

The Ombudsman's office has previously acknowledged that Operation Prospect was an exceptional investigation and presented challenges not normally arising in Ombudsman work. In evidence to the Joint Parliamentary Committee in 2016 (while the inquiry was underway) I observed that, if faced in future with a similar government request to undertake an investigation of this scale, the office would need to carefully consider the appropriateness of doing so.[91] I went on to express my unqualified confidence in the ability of the office to conduct the investigation.

I expressed the same views in an interview with a journalist in March 2017, after the OP report had been tabled. I commented that an alternative mode of inquiry was always a special inquiry headed by a judicial officer.[92] That comment was referred to in one media article but with an incorrect slant – 'McMillan has acknowledged that in hindsight a Special Commission of Inquiry might have been a better way of investigating the matter'.[93] This has been picked up in other commentary.

For the record I should clarify that I do not believe there was a better alternative than the Ombudsman's office to conduct the Operation Prospect investigation. Nor should my comments be taken to mean that the Ombudsman's office was not adequately skilled or resourced to undertake the task. The unique – and perhaps, unprecedented – nature of the investigation is explained at length in the OP report and is referred to above

89. Eg, *TAL Life Ltd v Shuetrim* [2016] NSWCA 68 at [80]; and *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498 at 505 [28].
90. OP report, Chapter 2, Section 2.5.5 (Volume 1, pp 83-84).
91. NSW Parliament, Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission, *2016 Review of the Annual Reports of Oversighted Bodies*, Report 1/56, June 2016, para 7.15.
92. Sean Nicholls, 'Bugging inquiry defended', *Sydney Morning Herald*, 16 March 2017.
93. Sean Nicholls, 'The public deserves an apology', *Sydney Morning Herald*, 17 March 2017.

in Chapter 1 of this report. The Mascot controversy had been unresolved for over a decade and showed signs of growing intensity. The matter had previously been investigated, including by the PIC Inspector who was a former Supreme Court Judge. Ten years later the controversy was referred again by the Minister for Police to the PIC Inspector, who again was a former Supreme Court Judge. The Inspector decided that the Ombudsman's office would be a more suitable agency to conduct an investigation and referred the matter to the Ombudsman. In challenging circumstances, the Ombudsman's office completed the investigation and published a six volume report that, in my view, is professional, thorough, balanced and fair.

There is no reason to assume that any other form of inquiry would not have encountered the same challenges that faced the Ombudsman's office. These included forming a specialist investigation team, housed in special premises, and with a purpose-designed records system and software; participating in parliamentary inquiries; handling complaints, inquiries and public interest disclosures; dealing with litigation threats; and conducting an extended procedural fairness and document inspection process.

An additional merit of the Ombudsman's investigation, as explained in Chapter 2 of this report, is that the Ombudsman has been able to play a continuing role across a number of fronts – responding to complaints and enquiries, following up on recommendations, preparing matters for referral to the DPP, assisting other agencies to respond to the OP report, and addressing criticisms that misrepresent the investigation and the Report.

A special inquiry or royal commission could not discharge any of those roles once its report was handed to government. There is a greater risk, in those circumstances, that a controversy can continue unabated, or that findings and recommendations arising from a prolonged inquiry will lie unaddressed on the table.

Chapter 4. Implementation of recommendations

As noted above in Section 1.7, the OP report made 38 recommendations that were addressed to the NSWCC, NSWPF, DPP and Attorney General. The NSWCC response to the recommendations is dealt with in the following chapter of this report, Chapter 5. The response of the other three bodies will be summarised in this chapter.

4.1. New South Wales Police Force

The then Commissioner of the NSWPF, Mr Andrew Scipione AO APM, wrote to me on 23 December 2016 to advise of the nature of the action the NSWPF proposed to take as a result of the report.[94] I note that this was three days after the OP report had been tabled, and I commend the NSWPF for this prompt and constructive response.

The Commissioner's letter noted that the OP report contained adverse findings against a number of currently serving and former police officers and the NSWPF. The letter advised that an extraordinary Complaint Management Team had been established under the chairmanship of a Deputy Commissioner, assisted by several Assistant Commissioners, to consider the adverse findings against serving police officers. The process would be conducted in accordance with the requirements of Part 9 of the Police Act ('Management of Conduct within the NSW Police Force').

It was anticipated that it may be necessary for the Ombudsman's office to provide the NSWPF with access to the record holdings of Operation Prospect. The Ombudsman's office has written to the officers involved about this matter.

The NSWPF has subsequently advised that it has accepted the two recommendations to provide written apologies to former officers.[95] I understand that these apologies have been provided, signed by the Commissioner, and that as to one apology the Commissioner arranged for the apology to be hand-delivered by a senior police officer, after the recipient (a former officer) indicated that he would regard the apology as lacking sincerity unless this was done.

I have not been advised by the NSWPF as to whether action has been taken on a third recommendation, that the NSWPF and NSWCC conduct a joint review of the existing protocols for joint operations between both agencies.[96]

4.2. Director of Public Prosecutions

The OP report recommended that the DPP review the Prosecution Policy and Guidelines, to clarify the authority to offer an inducement to an informant in an investigation under a NSWCC reference about a matter that is the subject of DPP proceedings.[97]

The Director advised by letter on 23 August 2016, in response to a similar draft recommendation, that the issue would be considered in the wider context of a review of the entirety of the Prosecution Guidelines. The Director noted that such a review was in contemplation but that it was a substantial undertaking that would require consultation with stakeholders including the Attorney General.

94. Section 158(1) of the *Police Act 1990* requires the Commissioner to advise the Ombudsman 'as soon as practicable' after receiving a report under s 157 of the action proposed.
95. OP report, Recommendation 2, Chapter 7, Section 7.3.9 (Volume 2, p 235); and Recommendation 21, Chapter 14, Section 14.9.14 (Volume 4, p 516).
96. OP report, Recommendation 24, Chapter 16, Section 16.9.1 (Volume 5, p 631).
97. OP report, Recommendation 23, Chapter 14, Section 14.10.15 (Volume 4, p 542).

4.3. Attorney General

The OP report made 14 recommendations to the Attorney General to consider options for legislative change, mostly relating to the establishment of a position of Public Interest Monitor.[98] The Monitor would play a role in assessing and testing the validity of warrant applications during the court approval process.

We have been advised informally that the Attorney General's Department is examining these recommendations with a view to the Attorney General formally responding.

4.4. Other responses

The discussion in Chapter 19 of the OP report of the warrant approval process, and recommendations for reform, were provided in draft form in late 2016 to the Chief Justice of the Supreme Court. The Court did not offer comment on the draft proposals.

On the day the Operation Prospect was tabled, Deputy Commissioner Catherine Burn issued a media statement commenting on the Report.[99] Among the points made in that statement were:

- Ms Burn had not previously commented publicly on the Operation Prospect investigation, or confirmed that she had given evidence, because of the non-disclosure orders applying to participants.
- She was pleased that the Ombudsman's report exonerated her in respect of serious allegations of dishonest and corrupt conduct about her role as Mascot team leader. Those allegations had been made publicly, she had been unable previously to respond to them, and she believed the allegations were agenda-driven and entirely without foundation.
- She rejected the adverse findings in the Ombudsman report about her performance in the team leader role, and believed that the findings failed to appreciate the circumstances in which police officers worked in the Mascot team, and held them to a standard of perfection that was impractical and unrealistic.
- Ms Burn's statement drew attention to the successful work of the Mascot Task Force in continuing the work of the Wood Royal Commission in addressing systemic and entrenched police corruption.
- Ms Burn acknowledged that there were mistakes and failures in the Mascot investigation, but this was to be understood in the context of the covert, fast-paced and dangerous investigation work the team was undertaking.
- Significant improvements had been made to police systems and processes in the last 17 years.

The Police Association of NSW also issued a statement on the day the OP report was tabled.[100] The statement expressed the view that the Operation Prospect investigation, along with oversight by other bodies, had been inherently unfair to police officers and had an emotional and career impact upon some.

98. See OP report, Recommendations 25-38, Chapter 19, Sections 19.9.5, 19.10.1.1, 19.10.2.1, 19.10.3.1, 19.11.1.4, 19.11.2.1 (Volume 5, pp 715-774). These recommendations are also summarised in Volume 1, pp 29-31.
99. Media statement from Deputy Commissioner Catherine Burn regarding the 'Operation Prospect' report, 20 December 2016.
100. Police Association of New South Wales, 'Holding Statement: Operation Prospect Report', 20 December 2016.

Chapter 5. Criticisms made by the NSW Crime Commission

5.1. Introduction

The NSWCC was a central focus of the Operation Prospect investigation, as explained in Chapter 1 of this report. Many of the adverse findings and recommendations in the OP report were directed to the NSWCC.

Two months prior to the tabling of the OP report the NSWCC wrote to me, criticising the investigation and threatening litigation to restrain the tabling of the report.[101] The NSWCC provided a copy of that letter (with a small number of redactions) to three other parties who were known to be critical of the Operation Prospect investigation. The letter gained wide publicity in the media shortly thereafter.[102] I replied to the NSWCC, but did so privately.[103]

Two months after the OP report was tabled I became aware that a NSWCC response to the OP report was in the hands of the media. The response was reported publicly by the press[104] before the NSWCC formally provided the response, dated 21 February 2017, to me on 14 March 2017. Again, there was wide publicity of the NSWCC's criticisms of the Operation Prospect investigation and report.[105]

The thrust of the NSWCC response was that the OP report contained legal and factual errors, that the NSWCC had been denied natural justice during the investigation, that the Ombudsman's office did not have the ability or credentials to conduct this investigation, and that the NSWCC did not intend to accept the recommendations addressed to it.

I described the NSWCC's claims at the time in a media release as 'unfounded and inflammatory'.[106] As foreshadowed in the media release, I will respond in this report to the NSWCC's criticisms. A particular reason for doing so is that the NSWCC has rejected in a categorical manner, 15 recommendations in the OP report for written apologies to be given to 17 people who in my view were the victims of wrongful and unlawful administrative action for which the NSWCC bears responsibility. I will outline individually why, as the Report recommends, each of those persons deserves an apology.

I will firstly comment on two general features of the NSWCC Response.

The Response uses provocative language throughout to describe the OP report. Examples are 'fundamental misconceptions and errors', 'inherent defects and bias', 'devalued by errors', 'inaptitude', 'blatant failure', 'gross breach', 'illogical', 'superficiality', 'completely without merit', 'bizarre', 'ridiculous', 'inherently misconceived', 'conveniently ignored', and 'patently erroneous'. I cannot think of another instance in which a government agency has responded publicly to an Ombudsman investigation in that manner.

It is difficult to refute allegations of that kind in a reasoned manner, and I shall not attempt to do so. I will simply give two illustrative examples of what I regard as extravagant criticism in the Response.

101. Letter, NSWCC Commissioner to Ombudsman, 26 October 2016.
102. Eg, 'Arch enemies unite to block cop bug report', *Daily Telegraph*, 4 November 2016; 'Crime body slams Kaldas wire inquiry', *Weekend Australian*, 5 November 2016; 'Bombshell for top cop', *Sydney Morning Herald*, 5 November 2016; 'NSW Crime Commission slams inquiry into Kaldas bugging operation', *The Australian*, 5 November 2016; 'Deputy Police Commissioner Catherine Burn likely to face adverse finding, letter reveals', *Sydney Morning Herald*, 5 November 2016.
103. Letter, Ombudsman to NSWCC Commissioner, 4 November 2016. Other correspondence at the time was: Letter, NSWCC Commissioner to Ombudsman, 31 October 2016; Letter, NSWCC Commissioner to Ombudsman, 9 November 2016; Letter, Ombudsman to NSWCC Commissioner, 10 November 2016.
104. 'Kaldas report buried', *Daily Telegraph*, 11 March 2017.
105. Eg, 'Commission slams "flawed" Ombudsman bugs report', *Sydney Morning Herald*, 15 March 2017; 'Top police blamed for bugging operation', *The Australian*, 15 March 2017; 'NSW's top cop recruitment in chaos', *Daily Telegraph*, 15 March 2017; 'Bugging scandal report criticised', *Newcastle Herald*, 16 March 2017; 'Bugging inquiry defended', *Sydney Morning Herald*, 16 March 2017. The issue was also reported widely on radio and television at the time.
106. NSW Ombudsman, 'Ombudsman Comment on NSW Crime Commission Response to the *Operation Prospect* report', Media Release, 15 March 2017.

One example was in the discussion of procedural fairness, in which the NSWCC treats as authoritative a comment a barrister made about Operation Prospect. The NSWCC Response states: 'Ian Temby QC, a very senior and experienced practitioner in this area and someone who is normally moderate in his terminology, described the process as "a grotesque injustice"'.[107] That comment was made by Mr Temby in a submission on behalf of a party (former Commissioner Bradley), months before the Operation Prospect report was published. There is an elementary distinction in law between a submission and an independent opinion.

Another example is that the NSWCC Response closes by referring to a recent letter from the Ombudsman's office to parties who had given evidence reminding them that they are still subject to 'a section 19 direction' that restricts disclosure of evidence. The NSWCC correctly notes that the reference in the Ombudsman letter should have been to s 19A of the Ombudsman Act, not s 19, but adds: 'The letters are a further reflection of the lack of expertise apparent throughout the investigation.'[108] The NSWCC Response goes on to make a similarly extravagant claim that the letters effectively seek to prevent public discussion of the OP report by those adversely mentioned in it. That is wrong, as discussed earlier in this report.[109]

A second general feature of the NSWCC Response is that it refers frequently to what it claims was unfair treatment given in both the Operation Prospect investigation and the Report to the former NSWCC Commissioner, Mr Phillip Bradley. Many of the points the NSWCC makes in its Response had not earlier been made in its submissions to Operation Prospect. The Response observed: 'The interests of the NSWCC and Bradley are essentially the same'.[110]

The Ombudsman's office accepted during the investigation that the NSWCC and Mr Bradley had overlapping interests, and permitted them to discuss their evidence and submissions. However, it should be noted that Mr Bradley retired as Commissioner in November 2011. Operation Prospect commenced a year later. As a general principle of public administration, the interests of an agency and those of a former agency head are not 'essentially the same' if, years later, there is an independent inquiry into the administration of the agency during the former headship.

There is, in my view, cause for unease in the failure of the NSWCC in its Response to demonstrate that it has applied an independent and objective mind to the analysis of problems in the work of the Mascot Task Force or given any consideration to potential conflicts of interest that might arise in circumstances of this kind. The NSWCC Response notes: 'Since Mascot, most of the staff of the NSWCC involved have long gone.'[111] Later the Response notes: 'The issues identified by the Report are not likely to be repeated. They were the product of unusual circumstances'.[112] There is little elsewhere in the NSWCC Response of that detached and reflective viewpoint.

5.2. Ombudsman's competence to undertake Operation Prospect

The NSWCC Response disputes the Ombudsman's competence to undertake Operation Prospect. The Response comments that a consistent requirement in NSW legislation is that 'the heads of agencies vested with the function of carrying out investigations with the assistance of coercive examination powers have "special legal qualifications"'.[113] Had that requirement been followed for this investigation, the Response claims, 'many of the deficiencies and errors which plague the investigation and Report might have been avoided'.[114]

The Response refers to four statutes that use the term 'special legal qualifications' (or include a similar provision).[115] Those statutes provide that a person is not eligible to be appointed as a Commissioner of the NSWCC, LECC, PIC or ICAC unless the person is a former Judge of a superior court of record or eligible to be appointed as such. The eligibility for appointment as a Judge of the Supreme Court of NSW is that the person has held judicial office in Australia, or is 'an Australian lawyer of at least 7 years' standing'.[116]

107. NSW Crime Commission, 'Response to Operation Prospect Report', dated 21 February 2017 (NSWCC Response), para 2.9.
108. NSWCC Response, para 12.4.
109. Section 2.3
110. NSWCC Response, para 2.8.
111. NSWCC Response, para 1.14.
112. NSWCC Response, para 6.7.
113. NSWCC Response, para 1.15.
114. NSWCC Response, para 1.15.
115. *Police Integrity Commission Act 1996*, Schedule 1, cl 1; *Crime Commission Act 2012*, Schedule 1, cl 1; *Law Enforcement Conduct Commission Act 2016*, Schedule 1, cl 1; *Independent Commission Against Corruption Act 1988*, Schedule 1, cl 1.
116. *Supreme Court Act 1970* s 26(2).

There were only two 'heads of agency' in the Ombudsman's office during the conduct of Operation Prospect – Mr Bruce Barbour and myself. We are both eligible to be appointed to an Australian superior court. As to myself, I was admitted to legal practice in Australia over 40 years ago, and have practised law continuously as a solicitor, tribunal member, consultant, agency head and researcher and lecturer. Mr Barbour was admitted to legal practice in 1995 and practised law continuously in Australia as a government lawyer, tribunal member and agency head.

The NSWCC's comment that 'coercive examination powers' should be exercised only by persons eligible to be appointed to a superior court should also be questioned. The only coercive investigation powers that the Ombudsman and staff exercised during Operation Prospect were to take evidence under oath and to require the production of documents. Those powers are conferred on the Ombudsman (and delegates) by the Ombudsman Act, and include powers exercisable under the *Royal Commissions Act 1923*. The Ombudsman's office has routinely exercised those powers for over 40 years. Furthermore, there are thousands of tribunal members and investigators around Australia who can exercise the same powers to take evidence under oath and to require the production of documents.

A second way the NSWCC Response disputes the Ombudsman's competence is in alleging that there were 'inherent defects and bias in the Report'.[117] The NSWCC made this allegation in the context of a legal contention that the OP report contained legal errors that justified the NSWCC in 'substantially disregarding' it and treating it as a Report of 'limited weight'.[118] I am the author of the OP report,[119] and consequently the person to whom the allegation of 'inherent bias' applies.

The allegation of inherent bias against a statutory office holder is a serious allegation. There is a well-established case law on what constitutes disqualifying bias in Australian law. Importantly, there is a two-stage test – identifying what it is that might have led to a decision-maker deciding a matter other than on its legal and factual merits; and, secondly, articulating a logical connection between the decision-maker's default and deviation from deciding a case on its merits.[120] An allegation of bias must be 'firmly established'.[121]

The NSWCC Response does not refer to any case law in support of its claim that I displayed inherent bias. The only particulars of the allegation that it gives are the conclusions drawn in the OP report regarding control and direction of the Mascot Task Force and integrity testing.[122] This does not logically explain why I deviated from the course of preparing a report that was based on the evidence before me.

I also note below that the NSWCC Response makes two allegations of bad faith on my part – that I took 'deliberate action' to circumvent the reporting requirements of the Ombudsman Act, and 'intentionally sought' to avoid my statutory notification obligations.[123]

5.3. Procedural fairness

5.3.1. Introduction

A repeated claim in the NSWCC Response is that it was denied procedural fairness during the Operation Prospect investigation. This claim was put at a high level of generality, with no elaboration of the legal principles or case law to support the claim. I examine below the NSWCC's specific claims, but it is first necessary to make two points about the principles of procedural fairness and how they were observed during Operation Prospect.

117. NSWCC Response, para 1.13; see also paras 7.13, 8.14, 8.19.
118. NSWCC Response, paras 1.13 and 1.3.
119. See OP report, 'About this report', Volume 1, p 1: 'This report was prepared by Professor McMillan, in his capacity as Acting Ombudsman. It represents his views, opinions and findings in relation to the matters investigated, which he reached after considering the evidence, submissions and information assembled during the course of Operation Prospect.'
120. *Isbester v Knox City Council* (2015) 255 CLR 135 at 146; [2015] HCA 20 at [21] per Kiefel, Keane & Nettle JJ.
121. *Reg v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group;* (1969) 122 CLR 546 at 553-554 [7]. This principle was recently affirmed in *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; [2011] HCA 2.
122. NSWCC Response, paras 7.13 and 8.19.
123. Section 5.4.2.

The first point is that there is no fixed body of rules as to the requirements of procedural fairness. Following are two classic statements:

> 'There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.'[124]

> '[T]he books are full of cases which illustrate both the impossibility of laying down a universally valid test by which to ascertain what may constitute [an opportunity to be heard] in the infinite variety of circumstances that may exist, and the necessity of allowing full effect in every case to the particular statutory framework within which the proceeding takes place.'[125]

The implication of those points is that the bald assertion – 'we were denied natural justice' – carries no weight without particularising what was required and how that did not occur. As Gleeson CJ observed in an oft-quoted comment, '[f]airness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.'[126]

I discussed the application of procedural fairness principles in Operation Prospect in both the First Progress Report to Parliament and the OP report.[127] The discussion referred extensively to case law on which the Ombudsman's office based its approach. A key point in the analysis was that an Ombudsman investigation is not an adversarial legal proceeding that is conducted to resolve a dispute defined by opposing parties. Indeed, the Ombudsman's role is confined to publishing a report that contains opinions, findings and recommendations.

The NSWCC expresses a contrary view in its Response. It states, 'The investigation was adversarial in nature', and it describes my view as 'a fundamental error'.[128] I find that a surprising comment. There is, for example, extensive case law that investigations by ICAC are inquisitorial and not adversarial, and that misunderstanding on this point has led to incorrect assertions about how investigations should be conducted.[129] The NSWCC does not refer to any case law in support of its view that this was an adversarial proceeding. The specific contentions of the NSWCC that I discuss below reflect, in my opinion, the mistaken view that Operation Prospect was an adversarial proceeding.

The other general point to make is that the Ombudsman's office took extensive steps to ensure that procedural fairness was observed to the fullest extent practicable.[130] These steps included conducting interviews and hearings with parties; providing parties with a provisional statement of adverse findings and recommendations; allowing a submission in reply; facilitating document inspection after service of the provisional statements; granting extensions of time for document inspection and submissions in reply; and replying orally and in writing to individual enquiries, including by providing further particulars of adverse findings. The statistics regarding those activities are given earlier in this report.[131]

So far as the NSWCC was concerned, it was given 1,187 pages of provisional analysis. The only material from the provisional statements not shown to the NSWCC was the provisional findings and material relating to other parties.

The NSWCC made five submissions in reply – of 8, 7, 10, 4 and 1 pages.[132] For the most part the NSWCC submissions dwelt on what it regarded as the unfairness of the Operation Prospect investigation process, on matters such as cross-examination, access to unredacted documents and denial of procedural fairness. There was specific discussion of the facts of only one of the individual cases discussed later in this report, although

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124. *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 per Tucker LJ.
125. *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 503 per Kitto J.
126. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14; [2003] HCA 6 at [37].
127. 'Operation Prospect – Progress Report by the Acting Ombudsman', 4 November 2015, at pp 9-10 ('First Progress Report'); OP report, Chapter 2, Section 2.5.1 (Volume 1, pp 78-80).
128. NSWCC Response, para 2.13.
129. Eg, *Duncan v ICAC* [2016] NSWCA 143 at [690]; *McCloy v Latham* [2015] NSWSC 1879.
130. See OP report, Chapter 2, Sections 2.4.8 and 2.5.1 (Volume 1, pp 76, 78-80).
131. Section 1.6.
132. NSWCC Submissions to Operation Prospect dated, respectively, 1 December 2015, 16 December 2015, 29 July 2016, 6 September 2016, 19 October 2016.

the facts of all cases were contained in the provisional statements provided to the NSWCC.[133] Nor did the submissions deal with two of the matters addressed in the Response, namely, integrity testing and the investigation relating to Officer F.

I will now discuss three of the NSWCC's specific procedural fairness claims.

5.3.2. Cross-examination of witnesses

The NSWCC Response repeats the claim, made in each of its submissions, that it should have had the opportunity to cross-examine witnesses. This was a request the NSWCC first made in a meeting with the Ombudsman in October 2014 when the Operation Prospect investigation began. The Ombudsman denied the request. There was no departure from that practice during Operation Prospect. Parties were given the opportunity to be legally represented in hearings and, as noted above, were given extensive access to the Operation Prospect provisional findings and the opportunity to inspect documents on which the findings were based.

I explained in both the first Progress Report to the Parliament and in the OP report why cross-examination was not permitted, and the legal basis for this ruling.[134] It is surprising that the issue is still being asserted so categorically. Shortly stated, it is an implausible contention in this context.

It is well-established in Australian law that the doctrine of procedural fairness does not embrace a right to cross-examine witnesses appearing before an investigative hearing.[135] It was both unnecessary and impractical in Operation Prospect to allow cross-examination. It was unnecessary as the investigation was not resolving a dispute between adversaries, but was gathering evidence to enable the Ombudsman to prepare a report that contained opinions and findings. It was impractical because of the number of parties (131 witnesses) who were appearing in 104 private hearings and examinations.

Had the NSWCC been granted the right to cross-examine witnesses, many other parties could have insisted on the same opportunity. Nor was it clear what purpose cross-examination could serve. The evidence gathering process extended over many months, and in many instances it was not clear whether the views being expressed by a witness about their participation in the Mascot investigations (as an investigator or a subject) would be relevant either to the evidence yet to be given by other witnesses or to the views the Ombudsman would form. The process was akin to the following description of an inquisitorial process:

> [H]ypotheses are formed and subjected to continuous assessment … suspicions and inferences are tested and refined. Some are confirmed, others are not. Hypotheses are likewise re-evaluated and re-shaped as the process continues. A series of possibilities may be considered and discarded during the course of a particular inquiry.[136]

In summary, providing the NSWCC and other parties with the right to cross-examine on any issue arising in Operation Prospect would, as the High Court has noted in another investigative context, have made the investigation 'so protracted as to render it practically futile'.[137]

5.3.3. Access to evidence and submissions

The NSWCC claims that it should have had the opportunity to 'peruse the totality of evidence given by witnesses [and] see the submissions of other parties'.[138]

Once again the NSWCC asserts a right that, if granted, would have to be granted to many other parties involved in Operation Prospect. It is a claim that is fundamentally at odds with the Ombudsman's inquisitorial style of conducting an investigation in private (as required by the Ombudsman Act[139]).

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133. There was criticism in three submissions of the draft findings against the NSWCC in relation to the deployment of Paddle: submissions of 16 December 2015, 29 July 2016, 6 September 2016.
134. First Progress Report, p 13; OP report, Chapter 2, Section 2.5.2 (Volume 1, p 80).
135. *NCSC v News Corp Ltd* (1984) 156 CLR 296 at 313-4; *Hurt v Rossall* (1982) 43 ALR 252 at 258-9; *Bungaden Co-operative v Battle* [2010] NSWSC 160 at [25].
136. *Duncan v Ipp* [2013] NSWCA 189 at [217].
137. *NCSC v News Corp Ltd* (1984) 156 CLR 296 at 314 (in the context of a private investigation conducted by the NCSC).
138. NSWCC Response, para 1.7.
139. *Ombudsman Act 1974* (NSW) s 17.

It is also a claim that finds no support in Australian law. This was explained in the OP report:[140]

> [T]he 'hearing rule' component of natural justice requires that a person against whom adverse comment may be given, or an adverse finding may be made, is advised of the nature of the comment or finding and given a reasonable opportunity to respond.[141] More specifically, these persons should be told of the nature and purpose of the investigation, the issues to be considered, and the nature and content of the information that might be taken into account in the course of coming to a conclusion that may be adverse to them.[142] They are also to be given an opportunity to respond.[143] However, informing a person of the nature and content of material that may be taken into account does not mean that they are entitled to access and inspect all the material that has been gathered in the investigation and that may be referred to.[144] Nor are they entitled to access all of the 'adverse' material submitted by other persons; such a practice has been described as 'unworkable, because it would lead to an infinite regression of counter-disputation'.[145] Finally, there is no obligation for a decision maker to provide a preview of his or her proposed findings or conclusions,[146] provisional views,[147] or mental processes.[148]

It is clear from that summary that the Ombudsman's office indeed went further than the law requires in ensuring procedural fairness in Operation Prospect.

5.3.4. Access to an unredacted copy of the provisional statements

The NSWCC Response claims that there was a denial of procedural fairness because '[d]espite repeated complaints the documents provided were redacted, particularly in places where proposed adverse findings against individuals were recorded'.[149] As explained above, the only material withheld from the 1,187 pages of provisional analysis given to the NSWCC was the provisional findings and material relating to other parties.

This, too, is a standard practice adopted in administrative investigations that are conducted in private, as explained in the OP report:

> To honour the requirement that natural justice be accorded to each interested person, it was necessary to quarantine provisional conclusions and findings pertaining to each person from other interested persons until each had been given a chance to respond. To have done otherwise, and enable parties to comment on the provisional conclusions and findings relating to other parties, would be to defeat the purpose of the procedural fairness process. It would entail disclosure of adverse comments about parties before they had an opportunity to submit that the adverse comments should not be sustained.[150]

There were many changes made to the provisional findings and opinions based on the submissions of parties, including in relation to the NSWCC and Mr Bradley. The efficacy of the procedural fairness process would have been undermined if the NSWCC, along with other parties, was given access to all provisional findings.

The ultimate issue, however, is whether the NSWCC suffered any 'practical injustice' by being denied access to the provisional findings against other parties. As nothing directly relating to the findings against the NSWCC was redacted from the material provided to it, it is hard to understand its explanation that '[i]t was not until the completed Report was provided that a clearer picture emerged of the full breadth of the findings', or that the redacted submissions 'precluded the NSWCC from meaningfully addressing the basis upon which recommendations have been made for adverse findings against it'.[151]

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140. OP report, Chapter 2, Section 2.5.1 (Volume 1, p 79).
141. *Glynn v Independent Commission Against Corruption* (1990) 20 ALD 214; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, pp 590-591 (cited with approval *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [32]); *Obeid v Ipp* [2016] NSWSC 1376 at [96].
142. *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29 at [83], *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, pp 590-591.
143. *Glynn v Independent Commission Against Corruption* (1990) 20 ALD 214.
144. *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [27]-[29].
145. *Minister for Local Government v South Sydney City Council* [2002] NSWCA 288 at [267].
146. *Lawrie v Lawler* [2016] NTCA 03 at [192]; *Victims Compensation Fund Corporation v Nguyen* (2001) 52 NSWLR 213, p 220.
147. *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; 241 CLR 594 at [9].
148. *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, pp 590-591; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [32].
149. NSWCC Response, para 1.11.
150. OP report, Chapter 2, Section 2.5.1 (Volume 1, p 80).
151. NSWCC Response, paras 1.11, 2.6.

5.4. Compliance with the Ombudsman Act and other matters

5.4.1. Introduction

The NSWCC Response makes a number of other allegations about legal and procedural flaws in the Operation Prospect investigation and Report. Some of these are not of direct legal relevance to the NSWCC (for example, that the Ombudsman failed to provide a proper notice to the Minister prior to tabling the OP report, or failed to comply with s 16 of the Ombudsman Act in the notice provided to Mr Bradley). Those matters will be discussed briefly, principally to dispel the allegation that there were legal errors which, the NSWCC claims, affect the credibility and validity of the Report and justify the NSWCC in substantially disregarding it.

Some other matters in the Response involve a disagreement with the reasoning in the OP report on responsibility for integrity testing and the Mascot investigation of Officer F. The common theme in those topics is the allegation that the OP report unfairly reached findings or expressed views that are adverse to Mr Bradley.

Those are not matters that were addressed by the NSWCC in its submissions to Operation Prospect, even though they were matters canvassed in the provisional statements that were provided to the NSWCC. Accordingly, they are not discussed in this report. To do so would, in effect, be to re-open the investigation once the Report had been finalised. I nevertheless add that I have considered the views expressed in the NSWCC Response, and I stand by the analysis in the OP report.

5.4.2. Finalisation and publication of the Operation Prospect Report

The NSWCC Response claims that I failed to comply with the requirements of the Ombudsman Act in finalising the OP report. Indeed, the Response goes so far as to claim that I took 'deliberate action … to circumvent those requirements' and that I 'intentionally sought to avoid the obligations under s 25 of the Act'.[152] Those are serious claims that I acted dishonestly and in bad faith.

The course I followed in finalising the OP report was to prepare a single report that I presented to Parliament as a special report under s 31 of the Ombudsman Act and s 161 of the Police Act. I foreshadowed that I would adopt that approach in both the First and the Second Progress Reports to the Parliament and in evidence to the Joint Parliamentary Committee in 2016.[153] I explained the Ombudsman's reporting powers in the OP report.[154]

I would add two other matters. One is that, before tabling the Report, I obtained an opinion from Senior Counsel to confirm the course of action that I proposed to take. The second is that alleged non-compliance with the reporting mechanisms was not found by Garling J to give rise to a serious question to be tried when the matter was before the Court in *Kaldas v Barbour*.[155]

The thrust of the NSWCC contention is that a special report to the Parliament cannot include findings and recommendations, as provided for in s 26 of the Ombudsman Act. It is hard to understand why that limitation would be read into the Ombudsman's power to report to the Parliament, which is expressed broadly in s 31 of the Ombudsman Act to be a power to report 'on any matter arising in connection with the discharge of the Ombudsman's functions'.

Similar powers are found in other NSW statutes.[156] It is demonstrably in the public interest that the Parliament should be fully informed by statutory oversight agencies about their work. The Ombudsman's office has adopted that course since its establishment, and has made a substantial number of special reports to the Parliament on a great range of topics and with as many recommendations. This is the first occasion, to my knowledge, on which an agency has framed a purported legal objection to this course of action.

152. NSWCC Response, paras 1.10, 4.7.
153. See Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission, *2016 Review of the Annual Reports of Oversighted Bodies*, Report 1/56 (June 2016) at para 7.6.
154. OP report, Chapter 2, Section 2.1.4 (Volume 1, p 54).
155. [2016] NSWSC 1880.
156. Eg, *Government Information (Information Commissioner) Act 2009*, s 38; *Children and Young Persons (Care and Protection) Act 1998*, s 188.

A related allegation by the NSWCC is that I failed to comply with the requirement in s 25 of the Ombudsman Act to inform the responsible Minister of my intention to publish a report under s 26.[157] By implication, a failure to meet this requirement is a matter that would appropriately be raised with me by the responsible Minister. The matter has not been raised. I add that the Premier, as the responsible Minister, was formally notified of my intention to table and publish a report. This intention was also widely known in and outside government.

5.4.3. Issuing notices of investigation

As noted in section 3.3 of this report, a Notice of Investigation was issued under s 16 of the Ombudsman Act to the NSWCC on 15 October 2012.

However, the NSWCC Response claims that the Ombudsman's office failed to comply with s 16 as regards issuing a notice to Mr Bradley. The contention is that the s 16 notice was issued after Mr Bradley had been required to give evidence (for which a summons had been issued in accordance with s 19 of the Act).

This is a practice that was explained at length in both the first Progress Report to the Parliament and in the OP report.[158] A notice was not issued under s 16 until a decision was made to make a person's conduct 'a subject of investigation'. Frequently, this decision was not made until the person's evidence had been received and analysed in conjunction with other documentary and oral evidence.

It is hard to see that any person suffered any prejudice as a result of receiving a s 16 notice after giving evidence. This was, for instance, the process adopted by the Cole Commission.[159] The summons requiring a person to give evidence set out the broad topics for investigation. A witness could ask to be legally represented. The evidence given by a person under oath must be truthful. A public official cannot claim any ground of privilege that may be available in another forum, such as the privilege against self-incrimination.[160]

5.4.4. Review of NSWCC procedures and practices

The NSWCC Response makes the following criticism of the OP report:

> Recommendations have been made to review current practices, reporting structures and training based on findings on circumstances which existed 17 years ago, without any attempt to enquire as to current practices. Those recommendations are largely irrelevant.[161]

In fact, only one such recommendation was made in the OP report.[162] The recommendation was that the NSWPF and the NSWCC jointly review the existing protocols for joint operations for both organisations, on matters such as reporting structures, supervision and training.

This recommendation was prefaced by the express acknowledgement that both the NSWPF and the NSWCC had 'undergone a significant change process since the Mascot investigations' and, accordingly, that 'it would be of no utility in this report to include recommendations to change the structure, systems and procedures of either organisation'.[163]

It is a routine feature of Ombudsman reports – as, indeed, of the reports of oversight agencies generally – to recommend that an agency review its processes to ensure that systemic failures from a former era are not repeated. If an agency feels that that work has already been done, it is a simple matter to explain that the objective has been met.

157. NSWCC Response, para 1.10.
158. First Progress Report, at pp 10-12; OP report, Chapter 2, Section 2.4.5 (Volume 1, pp 74-5).
159. See *Ferguson v Cole* [2002] FCA 1411 at [13].
160. *Ombudsman Act 1974* (NSW), s 36.
161. NSWCC Response, para 1.12.
162. OP report, Recommendation 24, Chapter 16, Section 16.9.1 (Volume 5, p 631).
163. OP report, Chapter 16, Section 16.9.1 (Volume 5, p 631).

5.5. NSWCC responsibility for the conduct of the Mascot Task Force

A central theme in the NSWCC Response is that it was not responsible for the actions of police officers who constituted the Mascot Task Force.[164] This contention relied heavily on s 27A(2) of the *New South Wales Crime Commission Act 1985*, which provided that a police task force is 'under the control and direction of the Commissioner of Police', subject to directions or guidelines issued by the NSWCC Management Committee. The NSWCC Response describes the Ombudsman's failure to understand the import of s 27A(2) as 'a fundamental error which permeates almost the entire Report'.[165]

This issue is considered in some depth in Chapter 4 of the OP report, which discusses the NSWCC's submissions[166] which were to the same effect as the comments in the NSWCC Response. In discussing s 27A(2), the OP report noted that the Direction and Guidelines issued by the Management Committee provided that 'In assisting the Commission, the Police Task Force will ensure that the directions of the Commission relevant to the Commission's investigations are complied with'.[167]

More to the point, however, the OP report reached its conclusion about the NSWCC's responsibility based on a range of documentary and oral evidence. The conclusion was summarised as follows:

> The NSWCC's responsibility for the conduct of police officers working under the Mascot reference is founded on a combination of factors. The Mascot investigations were being run by the NSWCC under a reference to the NSWCC. The Mascot investigations used NSWCC resources. Police working on the Mascot Task Force were inducted into the NSWCC and were required to read and comply with NSWCC policies and procedures. NSWPF officers inducted into the NSWCC were subject to the secrecy provisions in the NSWCC Act and are still subject to those today. The Mascot investigations made extensive use of NSWCC informants. The LDs and TIs used by Mascot to inform the investigation were sought under the auspices of the NSWCC. Mascot investigators were required by the NSWPF Internal Affairs Investigation Manual to follow NSWCC policies when using LDs and TIs in the investigation. The investigators sought the advice of NSWCC legal officers in preparing documentation, and NSWCC senior staff approved LD and TI applications … The chapters in this report refer to frequent instances of NSWCC staff participating in Mascot meetings, being part of the flow of correspondence, responding to queries about the Mascot investigations, and scrutinising compliance by Mascot staff with NSWCC policies and procedures in the LD and TI application processes. In those circumstances, systemic failings in Mascot processes are failures for which the NSWCC bears a measure of responsibility.[168]

Three other matters are confirmatory of that conclusion. First, the OP report refers to the Patten Report in 2011 which expressed a similar view about NSWCC processes.[169] After noting that the Commission operated under a 'flat management structure' in which a 'large number of staff in practice reported directly to Mr Bradley on particular matters', the Patten Report observed: 'Many people I interviewed, both inside and outside the Commission, remarked on Mr Bradley's involvement in an extraordinary number of decisions at the Commission, including very detailed decisions about operational matters.'[170]

Secondly, the OP report refers throughout to numerous NSWCC documents that record the involvement of NSWCC staff, including Mr Bradley, in strategic and operational decisions in the Mascot investigations. Similarly, the discussion below of the recommendations that the NSWCC apologise to individuals, points to evidence that substantiates the NSWCC's participation in the underlying actions. Chapter 16 of the OP report, titled 'Systemic failures in Mascot processes and practices', includes evidence from a large number of NSWPF officers of their interaction with and reliance upon NSWCC officers. It is relevant too that a large number of LD warrants were granted in the early months of the Mascot investigations, when it could be expected that the NSWCC would play a pivotal role in establishing a proper foundation for the Mascot investigations.[171] For example, a warrant naming 119 people was granted less than five weeks after the first Mascot reference was made to the NSWCC.[172]

164. NSWCC Response, paras 7.1-7.19.
165. NSWCC Response, para 7.1.
166. OP report, Chapter 4, Section 4.6.2.2 (Volume 1, pp 117-119).
167. OP report, Chapter 4, Section 4.6.2.2 (Volume 1, p 118).
168. OP report, Chapter 4, Section 4.6.2.2 (Volume 1, p 119).
169. *Report of the Special Commission of Inquiry into the New South Wales Crime Commission*, Mr David Patten, 30 November 2011 ('Patten Report').
170. Para 84 of the Patten Report, quoted in the OP report, Chapter 4, Section 4.6.1 (Volume 1, p 116).
171. See Figure 4 on when warrants were granted, in OP report, Chapter 19, Section 19.3 (Volume 5, p 722).
172. OP report, Chapter 7, Section 7.1 (Volume 2, p 221).

Thirdly, a telling development in the history of the Mascot controversy was the refusal of the NSWCC to provide documents to the NSWPF in 2003-04 to assist the Emblems inquiry.[173] This refusal was explicable only on the basis that the NSWCC had some responsibility for the Mascot investigations and would not cooperate with a police inquiry of which it was critical. The fact that the NSWPF did not have alternative or duplicate records to support the Emblems inquiry is likewise indicative (as discussed in the next section). The failure of the Emblems inquiry to resolve the Mascot controversy was a major factor in the decision of the NSW Government nearly a decade later to ask the Ombudsman to conduct an independent inquiry.

5.6. Allocation of responsibility for Mascot errors

The NSWCC's denial of responsibility was linked to an argument that the OP report had illogically attributed all responsibility and blame for the Mascot investigations to the NSWCC, and not to either the NSWPF or the PIC.[174]

The NSWCC raises a legitimate issue. A quandary in every Ombudsman investigation into the actions of multiple actors is to decide how to frame the findings and recommendations. If wrongful conduct occurred, should that result in an adverse finding against individual officers, against a leadership team within an agency, against the agency, against multiple agencies, or should the default be classified only as an inadvertent systemic failure?

This was an acute issue in Operation Prospect, as a fair reading of the OP report will show. Many adverse findings were recorded against the NSWCC, for the reasons explained in the previous section. The Mascot investigations were conducted under two references to the NSWCC, using coercive investigation powers exercisable by the NSWCC, in accordance with NSWCC policies and procedures, and relying heavily on NSWCC-registered informants.

Adverse findings are also registered against a number of senior NSWPF officers and the former PIC Commissioner. At many points the Report is critical of NSWPF officers without formally registering an adverse finding against any NSWPF officer. The Report also examined complaints that were made in respect of the actions of two former Commissioners of Police, but concluded that there was no evidence to substantiate the complaint allegations.[175] It is therefore incorrect to claim, as the NSWCC Response does, that the OP report attributes 'sole responsibility' to the NSWCC, 'with no responsibility at all attributed to the NSWPF', and 'to blame the NSWCC for virtually every act of misconduct identified'.[176]

The OP report did not adopt the option suggested by the NSWCC of making a finding against the NSWPF on each occasion that a finding was made against the NSWCC. The reason, simply stated, is that the Mascot references were formally the responsibility of the NSWCC, and there was insufficient evidence before Operation Prospect to ascribe a greater measure of institutional blame and responsibility to the NSWPF.

The need to delineate the actions of the NSWCC and NSWPF is illustrated (as noted in the preceding section) by the discussion in Chapter 18 of the OP report of the difficulties faced by the Emblems inquiry. The NSWPF had established the Emblems inquiry to deal with complaints it had received about the actions of the Mascot Task Force. The NSWPF did not have the records necessary to investigate those complaints, and the NSWCC refused access to the records. Chapter 18 explains the numerous steps taken by Commissioner Moroney of the NSWPF to support the Emblems inquiry and to broker a solution to the access impasse. His evidence to Operation Prospect was that the controversy 'had boiled up to a point where [grievances that] could have been resolved and resolved quickly' [were instead] 'allowed to fester'; the grievances 'needed to be aired formally by way of an investigation'; he felt 'there was a push back, that if we don't talk about this issue it will simply go away'; and he was concerned 'there were a number of officers serving and by then retired who had felt aggrieved about the process, and I felt that for their sake more than anything else the matter needed to be aired and aired publicly, and then independently reported to the two oversight agencies'.[177]

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173. See Chapter 18 of the OP report.
174. NSWCC Response, paras 1.4, 7.3, 7.4, 7.14.
175. As to a complaint that Commissioner Ryan gave misleading information in a *60 Minutes* interview, see OP report, Chapter 13, Section 13.8.4 (Volume 3, p 451). As to a complaint against Commissioner Scipione, see OP report, Chapter 18, Section 18.23 (Volume 5, p 713).
176. NSWCC Response, paras 5.4, 7.3, 7.4.
177. OP report, Chapter 18, Section 18.20 (Volume 5, pp 708-9).

The NSWCC is now on record in support of the view that the NSWPF should bear a larger measure of responsibility for the actions of the Mascot Task Force. That is a matter that, in effect, will now be brought to the NSWPF's attention both through the NSWCC's Response and through this report. At the end of the day, however, the NSWCC cannot escape responsibility by claiming that another agency was also responsible.

5.7. NSWCC's refusal to apologise

The OP report made 17 recommendations for 19 written apologies to be given to people – 2 apologies by the NSWPF and 17 by the NSWCC. The actions for which the apologies were to be given were: inappropriately naming the person in a listening device or telephone interception affidavit or warrant (10 apologies); unlawfully recording the person's private conversation (4); wrongly targeting the person for investigation (2); and failing to investigate properly the person's complaint or grievance (3). The NSWPF's acceptance of the two recommendations applying to it are discussed in section 4.1 of this report.

The NSWCC Response states that 'the NSWCC has no intention to make apologies as recommended'.[178] The NSWCC gave three reasons:

- *'[T]he NSWCC has not had the opportunity to examine the evidence relating to the circumstances of the conduct for which it is said an apology should be made'*.[179]

  This is incorrect, as discussed in sections 1.6 and 5.3 of this report. The NSWCC was given the opportunity to examine each document that has been referred to in both the provisional statement given to the NSWCC and in the text and footnotes of the OP report. The reasoning in support of each recommendation is set out in the OP report.
- *'[O]n nearly each occasion the conduct was perpetrated by police officers and it is not the NSWCC who should apologise for their actions'*.[180]

  To the extent that police officers engaged in wrongful conduct, individual findings are made against a number of officers. Those who are currently serving police officers must respond to those findings under Part 8A of the *Police Act 1990*. However, an apology for wrongful conduct should properly come from an agency. For the reasons discussed in the previous two sections of this chapter, it was thought appropriate to ascribe primary institutional responsibility to the NSWCC rather than to the NSWPF for the conduct of the Mascot investigations.

  A further point is that the OP report did not recommend that the NSWCC apologise in respect of every adverse finding that was made against the NSWCC or an NSWPF officer.[181] The recommendations for apologies were tied to particular findings that were judged to be appropriate for that remedy.
- *'[A] number of the persons suggested to be requiring an apology were justifiably the subject of investigation in relation to allegations of serious criminal activity, and it would be nonsensical to apologise to them for suggested irregularities in the course of investigating them'*.[182] The NSWCC also stated that while there may have been irregularities in the investigations of some people *'there were reasonable grounds for investigating them for serious criminal offences, and it is illogical to apologise to them for not investigating them properly'*.[183]

  The NSWCC does not specify which of the 17 people come within this rationale, of being the subject of 'allegations of serious criminality'. The OP report was discerning as to which people were owed an apology. For example, one warrant named 119 people, but the supporting affidavit only gave an explanation as to why 24 people were named in the warrant.[184] The OP report recommended that a written apology be given by the NSWCC to only two of the people named in the warrant.[185]

178. NSWCC Response, para 5.2.
179. NSWCC Response, para 1.6
180. NSWCC Response, para 1.6.
181. For example, there was no recommendation for apologies to be made to Officer A (OP report, Chapter 6, Section 6.2 (Volume 2, pp 178-189)), Officer B (OP report, Chapter 6, Section 6.3 (Volume 2, pp 190-220)).
182. NSWCC Response, para 1.6.
183. NSWCC Response, para 5.3.
184. LD affidavit 105-111/1999 and LD warrant 109/1999, discussed in the OP report, Chapter 7, Section 7.2 (Volume 2, p 222-223).
185. Mr N and Officer C1, discussed in OP report, Chapter 7, Sections 7.3 and 7.4 (Volume 2, pp 224-241).

> Nor does the NSWCC explain what is meant by 'irregularities in the course of investigating them'. The OP report identified serious errors, not mere irregularities, including unlawfully recording people by covert listening devices, naming people in listening device warrants without any supporting explanation in the supporting affidavits, and including inaccurate allegation information about people in sworn affidavits.
>
> It is, in any case, a remarkable claim by a law enforcement agency that 'irregularities' in the course of investigation are excusable on the basis that the person being investigated was the subject of an *allegation* of serious criminality. The NSWCC claim is fundamentally at odds with the rule of law and principles of good administration.

It is unacceptable for the NSWCC to group all recommendations together and reject them collectively. The responsibility of organisations to apologise when people are wronged has become a central principle of remedial justice.[186] A number of the people for whom apologies were recommended in the OP report had complained after learning they were named in affidavits and warrants (including one warrant that became public) in relation to an investigation into alleged police corruption and criminality.

The essence of an apology is an acknowledgment of what went wrong; this requires that attention be paid to the individual circumstances of a case. As the NSW Premier observed when introducing amendments to the *Civil Liability Act 2002* in 2002, 'Injured people often simply want an explanation and an apology for what happened to them'.[187] The 2002 amendment was an important milestone in remedial justice in removing legal barriers to apologies by providing that an apology is not relevant to the determination of legal faulty or liability.

It is therefore important to restate the facts on which each of the recommendations for an apology to be given by the NSWCC were based. If the NSWCC rejects any or all of those recommendations, it should explain individually why it does so. If the NSWCC fails to do so, or fails adequately to do so, two courses of action are open.

First, the Ombudsman may make a report to the Parliament under s 27 of the *Ombudsman Act 1974* on the failure of an agency to take sufficient steps in response to an Ombudsman recommendation. The Minister responsible for the agency is then to make a statement on the matter to the Parliament within 12 sitting days. It would be regrettable if this issue had to be taken that far. It is nonetheless a step that will be considered if necessary in light of the core Ombudsman principle that a well-placed, sincere and timely apology can be a necessary response to organisational failure affecting individuals.

Secondly, any person who is aggrieved by the NSWCC's failure to issue an apology to them may complain to the Inspector of the NSW Crime Commission under s 62 of the *Crime Commission Act 2012*.[188] The Inspector may make a report or recommendation following the investigation of a complaint.

The facts on which each of the recommendations in the OP report were based are as follows.

Recommendation 1 – Mr N[189]

The OP report recommended that the NSWCC give Mr N a written apology -

> *... for naming him in multiple LD and TI affidavits and LD warrants without:*
>
> - *first undertaking a proper and rigorous analysis to justify that course of action*
> - *properly explaining in the affidavits either why Mr N was being named or why it was considered necessary to listen to or record his private conversations.*

The salient facts relating to Mr N are:

- He is a former NSWPF officer who was named in 95 LD warrants, 51 LD affidavits and two TI affidavits. The 95 LD warrants and 37 of the LD affidavits named him as a person whose private conversations were to be recorded or listened to.

186. NSW Ombudsman, *Apologies – A Practical Guide* (2nd ed, 2009).
187. Hansard, NSW Legislative Assembly, 23 October 2002 (cited in NSW Ombudsman Fact Sheet, *Apologies*).
188. The position of Inspector will cease to exist upon the commencement of the *Law Enforcement Conduct Commission Act 2016*, when the Inspector's powers and functions will be assumed by the Law Enforcement Conduct Commission.
189. Discussed in OP report, Chapter 7, Section 7.3 (Volume 2, pp 224-235).

- Mr N was selected as a Mascot investigation target in part because of information given to the NSWCC in 1998-9 by Sea, who was a registered NSWCC informant. Operation Prospect traced the investigation of Mr N through various NSWCC documents that are referenced in the Report – a profile prepared by a NSWCC analyst, the Schedule of Debrief, Information Reports, Weekly Activity Reports, a Record of interview, transcripts, internal memoranda, a letter, LD and TI affidavits that were checked and approved by NSWCC officers, and LD warrants granted on the application of the NSWCC.
- The OP report made a number of criticisms of the actions taken in respect to Mr N: he was selected as a Mascot target based on questionable information that was not properly examined; none of the LD affidavits squarely addressed the requirements of s 16(1) of the *Listening Devices Act 1984* by linking his conduct to a prescribed offence; important information was omitted from some affidavits; it was questionable whether one of the allegations against Mr N (leaking information) fell within the scope of the Mascot investigation; 25 affidavits referred to an incident 30 years earlier that was based on uncorroborated comments made in passing by one officer; and there were multiple errors in the affidavits and warrants that pointed to a lack of administrative rigour in the NSWCC document preparation processes.
- The police officer who swore some of the affidavits naming Mr N gave evidence to Operation Prospect that he was a junior police officer at the time, he worked as part of a team at the NSWCC, he received no formal training in preparing LD affidavits, and he relied on senior officers (including NSWCC legal advisers) to check his work. This accords with other oral and documentary evidence before Operation Prospect, as discussed in Chapter 16 of the Report.
- The OP report made adverse findings against one NSWPF officer and the NSWCC.[190] The Report noted that a contributing factor in the multiple failings relating to Mr N was the NSWCC's failure to implement its own policies, practices and procedures in preparing affidavits and warrant applications.
- These matters were set out in the Ombudsman's provisional statement of findings and recommendations that was given to the NSWCC on 16 June 2015.[191] The only material redacted from the provisional statement was five paragraphs containing provisional findings against other persons. The NSWCC response dated 16 December 2015 did not address any of the content in the provisional statement.

Recommendation 3 – Officer C1[192]

The OP report recommended that the NSWCC give Officer C1 a written apology -

... for naming him in multiple LD and TI affidavits and LD warrants without:

- *first undertaking a proper and rigorous analysis to justify that course of action*
- *properly explaining in the affidavits either why Officer C1 was being named or why it was considered necessary to listen to or record his private conversations.*

The salient facts relating to Officer C1 are:

- Officer C1 was a NSWPF officer during the Mascot investigations and was still serving on 20 December 2016. He was named in 63 LD warrants, 29 LD affidavits and 4 TI affidavits. The 63 LD warrants and 22 of the LD affidavits named him as a person whose private conversations were to be recorded or listened to.
- Officer C1 was mentioned in multiple warrants and affidavits based, apparently, on two items of information: NSWCC informant Sea mentioned in his debrief in 1999 that Officer C1 was present at an arrest in 1994 that involved corrupt actions by some officers; and Officer C1 was among the list of possible invitees to the King send-off in 2000. There is no record of Mascot devising a strategy to investigate Officer C1, apart from the plan to record the conversations of those attending the King send-off.
- There was no explanation given in the multiple affidavits or warrants as to why Officer C1's conversations were to be recorded or listened to, beyond a mention in some affidavits of the two items of information listed in the previous dot point. It is possible that Officer C1 was mentioned in some affidavits because of confusion with his brother, who was also a police officer against whom allegations had been made.

190. OP report, Chapter 7, Section 7.3.8 (Volume 2, pp 234-235).
191. Provisional statement, Segment 3 (Volume 2, paras 1234-1278).
192. Discussed in OP report, Chapter 7, Section 7.4 (Volume 2, pp 235-241).

- Operation Prospect traced the investigation of Officer C1 through various NSWCC documents that are referenced in the Report – Records of interview, the Schedule of Debrief, Information Reports, internal memoranda, LD and TI affidavits that were checked and approved by NSWCC officers, and LD warrants granted on the application of the NSWCC.
- The police officer who swore the affidavit naming Officer C1, which was copied in many other affidavits, gave evidence to Operation Prospect that he was a junior police officer at the time, working as part of a team at the NSWCC. He stated that he received no formal training in preparing LD affidavits, and he relied on senior officers (including NSWCC legal advisers) to check his work. This accords with other oral and documentary evidence before Operation Prospect, as discussed in Chapter 16 of the Report.
- The Report made adverse findings against one NSWPF officer and the NSWCC.[193] The Report noted that a contributing factor in the multiple failings relating to Officer C1 was the NSWCC's failure to implement its own policies, practices and procedures in preparing affidavits and warrant applications.
- These matters were set out in the Ombudsman's provisional statement of findings and recommendations that was given to the NSWCC on 16 June 2015.[194] The only material redacted from the provisional statement was two paragraphs containing provisional findings against other persons. The NSWCC response dated 16 December 2015 did not address any of the content in the provisional statement.

Recommendation 4 – Mr F[195]

The OP report recommended that the NSWCC give Mr F a written apology -

… for naming him in multiple LD affidavits and LD warrants:

- *in a way that did not accurately and fairly represent (in some affidavits) the information the NSW Crime Commission held at the time about Mr F*
- *without properly explaining (in some affidavits) either why Mr F was being named or why it was considered necessary to listen to or record his private conversations.*

The salient facts relating to Mr F are:

- He is a former NSWPF officer who was named in 90 LD warrants and 30 LD affidavits. The 90 LD warrants and 27 of the LD affidavits named him as a person whose private conversations were to be recorded or listened to.
- There is no record of Mascot devising a strategy to investigate Mr F. He was selected as an investigation target based, in part at least, on a comment about Mr F that was made in a recorded conversation between NSWCC informant, Sea, and another Mascot target. Operation Prospect found that the comment was ambiguous, but was construed in Mascot documents as indicating corrupt activity by Mr F. The misrepresentation of the recorded conversation was included in 26 LD affidavits.
- Another criticism in the OP report is that Mr F was named without explanation in five LD affidavits as a person whose conversations were to be recorded or listened to; and in three LD warrants without explanation in the supporting LD affidavit.
- The police officer who swore the affidavit that first misrepresented the conversation about Mr F gave evidence to Operation Prospect that he relied on other NSWCC staff to prepare draft affidavits.
- The Report made adverse findings against two NSWPF officers and the NSWCC.[196] The Report noted that a contributing factor in the issues relating to Mr F was the NSWCC's failure to implement its own policies, practices and procedures in preparing affidavits and warrant applications.
- These matters were set out in the Ombudsman's provisional statement of findings and recommendations that was given to the NSWCC on 16 June 2015.[197] The only material redacted from the provisional statement was two paragraphs containing provisional findings against other persons. The NSWCC response dated 16 December 2015 did not address any of the content in the provisional statement.

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193. OP report, Chapter 7, Section 7.4.9 (Volume 2, pp 240-241).
194. Provisional statement, Segment 3 (Volume 2, paras 1187-1233).
195. Discussed in OP report, Chapter 7, Section 7.6 (Volume 2, pp 242-248).
196. OP report, Chapter 7, Section 7.6.4 (Volume 2, p 247).
197. Provisional statement, Segment 3 (Volume 2, paras 1055-1090).

Recommendation 5 – Officer P[198]

The OP report recommended that the NSWCC give Officer P a written apology -

> *... for naming her in multiple LD and TI affidavits and warrants and making her the subject of an integrity test. Those actions were based on information that was not properly tested or assessed in the context of other available information, and without adequate examination of whether it was appropriate to use those intrusive investigation methods in relation to her.*

The salient facts relating to Officer P are:

- She is a former NSWPF officer who was named in 81 LD warrants, 48 LD affidavits, 12 TI affidavits and 4 TI warrants. The 81 LD warrants and 29 of the LD affidavits named her as a person whose private conversations were to be recorded or listened to. The 4 TI affidavits authorised the interception of her home and mobile telephone services.
- Officer P was selected as a Mascot investigation target based on a suspicion that she may have leaked confidential information to police officers who were under investigation, and might do so again. Operation Prospect traced the investigation of Officer P through various NSWCC documents that are referenced in the Report – Information Reports, transcripts, a Contact Advice Report, minutes of Mascot team meetings (two attended by NSWCC Commissioner Bradley and other senior NSWCC officers), LD and TI affidavits that were checked and approved by NSWCC officers, and TI warrant applications approved by Commissioner Bradley.
- The OP report made a number of criticisms of the actions taken in respect to Officer P: the strength and reliability of the evidence on which the initial decision to investigate Officer P was based was weak; the way that evidence was presented in affidavits did not accurately reflect the available information and excluded exculpatory evidence; the strategy to test her integrity and monitor her actions by intercepting her home and mobile telephone services over a period of 30 days was not justified; and the TI supporting affidavits were inadequate to support an application for TI warrants applying to Officer P's telephone services.
- The police officer who swore the first affidavit naming Officer P (the contents of which were copied in many subsequent affidavits) gave evidence to Operation Prospect that he was a junior police officer at the time, he worked as part of a team at the NSWCC, he received no formal training in preparing LD affidavits, and he relied on senior officers (including NSWCC legal advisers) to check his work.
- The Report made adverse findings against three NSWPF officers, Commissioner Bradley and the NSWCC.[199] The Report noted that a contributing factor in the issues relating to Officer P was the NSWCC's failure to implement its own policies, practices and procedures in preparing affidavits and warrant applications.
- These matters were set out in the Ombudsman's provisional statement of findings and recommendations that was given to the NSWCC on 16 June 2015.[200] The only material redacted from the provisional statement was eight paragraphs containing provisional findings against other persons. The NSWCC response dated 16 December 2015 did not address any of the content in the provisional statement.

Recommendations 6 and 7 – Officer H[201]

The OP report recommended that the NSW Crime Commission –

- *provide Officer H with a written apology for repeatedly recording his conversations without appropriate authorisation,*
- *... [and] destroy all recordings (and associated transcripts) of the unlawfully recorded conversations between Sea and Officer H.*

198. Discussed in OP report, Chapter 8, Section 8.2 (Volume 2, pp 250-268).
199. OP report, Chapter 8, Section 8.2.11 (Volume 2, p 267-268).
200. Provisional statement, Segment 3 (Volume 2, paras 285-373).
201. Discussed in OP report, Chapter 8, Section 8.3 (Volume 2, p 268-290).

The salient facts relating to Officer H are:

- He is a former NSWPF officer who was named in 20 LD warrants, 10 LD affidavits, 4 TI warrants and 4 TI affidavits. The 20 LD warrants and 8 of the LD affidavits named him as a person whose private conversations Mascot sought to listen to or record.
- Of the 25 occasions on which Officer H was recorded, 10 were in contravention of the LD Act as there was no warrant in place to authorise the recording. This failure arose from the lack of systems for cross-checking between Mascot officers who prepared the affidavits and warrants and those who deployed NSWCC informant, Sea, to record conversations.
- Over a 6 month period, Mascot had pursued a strategy of subjecting Officer H to an integrity test, whereby Sea approached Officer H on a number of occasions to encourage him to covertly and unlawfully sweep the Manly Detectives office for hidden listening devices. Sea was tasked to record these meetings. Despite the content of those recordings being used and discussed on multiple occasions in meetings and Information Reports, Mascot investigators failed to consider whether the recordings were appropriately authorised. The apparent reason was that there was no system in place to ensure routine cross-checking of the targets of active investigation strategies against new warrant applications.
- Another criticism in the OP report was that none of the affidavits that named Officer H contained sufficient justification for recording him, and some of the affidavits contained misleading information.
- The Report made adverse findings against the NSWCC.[202] The NSWCC was responsible for the actions of members of the Mascot Task Force in implementing a flawed investigation strategy that resulted in Officer H's private conversations being recorded in contravention of the Listening Devices Act.
- These matters were set out in the Ombudsman's provisional statement of findings and recommendations that was given to the NSWCC on 16 June 2015.[203] The only material redacted from the provisional statement was eight paragraphs containing provisional findings against other persons. The NSWCC response dated 16 December 2015 did not address any of the content in the provisional statement.

Recommendation 8 – Mr J, Officer T, Officer X[204]

The OP report recommended that the NSWCC provide separate written apologies to Mr J, Officer T and Officer X –

> *... for the fact that they were inappropriately named in warrants and affidavits in the period 4 April to 16 November 2000 (as to Mr J and Officer T) and to 21 December 2000 (as to Officer X).*

The salient facts relating to these people are:

- Mr J is a civilian. He was named in 36 LD warrants and 12 LD supporting affidavits.
- Officer T was an officer in the NSWPF during the Mascot investigations. He was named in 35 LD warrants and 12 LD supporting affidavits.
- Officer X was an officer in the NSWPF during the Mascot investigations. He was named in 42 LD warrants and 14 LD supporting affidavits.
- Mr J, Officer T and Officer X were in a list of 30 people who had been named on an LD warrant because they had been invited to a function to mark the departure from the NSWPF of Detective Sergeant King, a long-time associate of the NSWCC informant, Sea. There was no evidence to support the statement in the supporting LD affidavit that all the people who had been invited to the function had been involved in, or had knowledge of, corrupt conduct. Mascot investigators did not appear to have considered whether those invited to the function should be considered individually, rather than as a homogenous group. There was an obvious distinction between Mr J, Officer T and Officer X, and other invitees: none of them was the subject of any allegation of corruption, and none of them was ever investigated by Mascot.

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202. OP report, Chapter 8, Section 8.3.10 (Volume 2, p 290).
203. Provisional statement, Segment 3 (Volume 2, paras 738-821).
204. Discussed in OP report, Chapter 9, section 9.4 (Volume 3, pp 307-316).

- The defects in this LD warrant were carried over into subsequent warrants and affidavits. Mascot still sought to listen to or record every member of the invited group some months after the function. Operation Prospect found there was no apparent rationale for that strategy. There was a collective failure, for which NSWCC was responsible, to ensure that statements made in supporting LD affidavits were supported by the evidence.
- The Report made adverse findings against three NSWPF officers and the NSWCC.[205] The Report noted that the actions taken by Mascot indicated a lack of administrative rigour in the NSWCC's document preparation processes, which was contrary to its own policies, practices and procedures. The Report refers to NSWCC documents and other evidence of NSWCC knowledge of and participation in the preparation of LD warrants for the King send-off.
- These matters were set out in the Ombudsman's provisional statement of findings and recommendations that was given to the NSWCC on 16 June 2015.[206] The NSWCC response dated 16 December 2015 did not address any of the content in the provisional statement.

Recommendation 9 – Officer F[207]

The OP report recommended that the NSWCC give Officer F a written apology for –

- *naming him in multiple LD affidavits and LD warrants in a way that did not accurately and fairly represent (in some affidavits) the information that the NSWCC held about him at the time*
- *obtaining a TI warrant on his former home telephone number where he no longer lived.*

The salient facts relating to Officer F are:

- Officer F is a former senior police officer. He was named in 77 LD warrants that were supported by 27 LD affidavits. He was named as a person whose telephone calls were to be listened to in one TI affidavit supporting 3 warrants on telephone services on his telephone, Sea's telephone, and at Officer F's former home. He was also named in 3 other TI affidavits as an involved person.
- Officer F was one of the 30 people who had been named on an LD warrant as invitees to the King send-off function. There was no evidence to support the statement in the supporting LD affidavit that all the people who had been invited to the function had been involved in, or had knowledge of, corrupt conduct. The defects in this LD warrant were carried over into 14 subsequent LD affidavits and 42 subsequent LD warrants that named Officer F.
- Mascot had other information, in addition to his attendance at the King function, on which it based its decision to investigate Officer F. However, Operation Prospect found that these were allegations or comments that carried little force and were little more than unsubstantiated and uncorroborated suspicions. Also, some of the comments were misrepresented in a way that supported a suspicion about Officer F's conduct.
- At one stage of Mascot's investigation, TI warrants were obtained to intercept Officer F's mobile and home telephone services, in connection with a suspicion that Officer F had received and communicated leaked information about Sea. Operation Prospect found that the information before Mascot did not reasonably support reaching such a suspicion for using an invasive TI. The supporting TI affidavit also mistakenly stated that Officer F lived at his family home. This meant that the TI warrant permitted interception of the telephone being used by Officer F's wife and children.
- The Report made adverse findings against 4 NSWPF officers, a PIC officer, a NSWCC officer and the NSWCC.[208] The Report noted that a contributing factor in the issues relating to Officer F was the failure of officers to sufficiently evaluate the alleged bases for targeting him. The Report referred to NSWCC documents and other evidence that reflected the NSWCC's knowledge of and involvement in the strategy to target Officer F, including through telephone interception, although the Report also noted that Commissioner Bradley raised concerns at the time about the investigation.

205. OP report, Chapter 9, Section 9.8.2 (Volume 3, pp 315-316).
206. Provisional statement, Segment 3 (Volume 2, paras 993-1043, 1133-1150).
207. Discussed in OP report, Chapter 10 (Volume 3, pp 317-360).
208. OP report, Chapter 10, Section 10.8 (Volume 3, pp 358-360).

- These matters were set out in the Ombudsman's provisional statement of findings and recommendations that was given to the NSWCC on 16 June 2015.[209] The only material redacted from the provisional statement was 15 paragraphs containing provisional findings against other persons. The NSWCC response dated 16 December 2015 did not address any of the content in the provisional statement.
- In its response to the OP report, the NSWCC wrote: 'there is conduct referred to in the report by an officer of the NSWCC in the course of investigating the person referred to as Officer F which, if it was as described, was unacceptable and amounted to misconduct. This was not the subject of an adverse finding against the NSWCC or specified as a basis for recommendation for apology. Despite this, if enquiries establish that the conduct was in fact as reported, consideration will be given to apologising to the person concerned.'[210] The conduct to which NSWCC refers was the conduct of a senior NSWCC officer that was the subject of an adverse finding against the officer,[211] and conduct for which the NSWCC is ultimately responsible. The OP report recommended that the NSWCC provide Officer F with an apology for other failings as discussed above, but not for that specific conduct.

Recommendations 10 and 11 – Officer M[212]

The OP report recommended that the NSWCC –

- *provide a written apology to Officer M for the repeated unlawful recording of his private conversations in contravention of section 5 of the Listening Devices Act 1984*
- *… [and] destroy all recordings (and associated transcripts) it holds of the private conversations between Officer M and Sea.*

The salient facts relating to Officer M are:

- Officer M was a police officer who was a co-worker of NSWCC informant, Sea. He was recorded by Sea on 10 occasions. Three were unintentional (Officer M unexpectedly joined a conversation that was being lawfully recorded), but seven other recordings were intentional. They were in contravention of the LD Act as there was no warrant in place to authorise these recordings, and Officer M was unaware of being recorded and had not given express consent.
- Operation Prospect concluded that Mascot officers had directed Sea to make four of the intentional recordings. There was no record of Sea being tasked to make the other three. However, the Report did not make adverse findings against any individual officer because it appears that all officers proceeded on the basis they were acting in accordance with a valid warrant.
- The report concluded that these events were an example of systemic weaknesses in Mascot's use of LDs and LD product, stemming from the routine and accepted processes at the NSWCC in deploying Sea and dealing with LD product. On that basis, and since Sea was a registered NSWCC informant, the Report concluded that the NSWCC should apologise to Officer M and destroy the unlawful LD product that it held.
- These matters were set out in the Ombudsman's provisional statement of findings and recommendations that was given to the NSWCC on 16 June 2015.[213] The only material redacted from the provisional statement was two paragraphs containing provisional findings against other persons. The NSWCC response dated 16 December 2015 did not address any of the content in the provisional statement.

209. Provisional statement, Segment 3 (Volume 2, paras 477-731).
210. NSW Crime Commission, 'Response to Operation Prospect Report', 21 February 2017, para 5.5.
211. OP report, Chapter 10, Section 10.8 (Volume 3, p 359).
212. Discussed in OP report, Chapter 11, Section 11.2 (Volume 3, pp 362-370).
213. Provisional statement, Segment 3 (Volume 2, paras 1461-1506).

Recommendations 12 and 13 – Ms E[214]

The OP report recommended that the NSWCC -

- *provide a written apology to Ms E for the repeated unlawful recording of her private conversations in contravention of section 5 of the Listening Devices Act 1984*
- *… [and] destroy all recordings (and associated transcripts) it holds of the private conversations between Sea and Ms E.*

The salient facts relating to Ms E are:

- She was a solicitor at the Legal Representation Office and was providing legal advice and representation to NSWCC informant, Sea, in relation to a summons he had received to appear in proceedings before the Police Integrity Commission.
- Sea recorded his conversations with Ms E on four occasions. One recording was unintentional (she joined a conversation that was lawfully being recorded), but the other three recordings (of 48, 43 and 20 minutes duration) were intentional. They were in contravention of the LD Act as there was no warrant in place to authorise these recordings, and Ms E gave evidence to Operation Prospect that she was unaware the conversations were being recorded and would not have given consent to the recordings.
- Operation Prospect concluded that Mascot officers had not directed Sea to make these recordings, and that he may unilaterally have decided to do so. While some Mascot officers and a NSWCC analyst were aware of some recordings that were referred to in NSWCC transcripts, Information Reports and Weekly operation reports, the officers had not turned their mind to the unlawful conduct. Accordingly, no finding was made against an individual officer for causing the unlawful recordings to occur or knowingly transcribing them.
- The Report concluded that these events illustrated systemic weaknesses in Mascot's use of LDs and LD product, stemming from the routine and accepted processes at the NSWCC in deploying Sea and dealing with LD product. On that basis, and since Sea was a registered NSWCC informant, the Report concluded that the NSWCC should apologise to Ms E and destroy the unlawful LD product that it held.
- These matters were set out in the Ombudsman's provisional statement of adverse findings and recommendations that was given to the NSWCC on 16 June 2015.[215] The only material redacted from the provisional statement was seven paragraphs that discussed whether provisional findings should be made against individual NSWPF and NSWCC officers. The NSWCC response dated 16 December 2015 did not address any of the content in the provisional statement.

Recommendation 14 – Officer Q[216]

The OP report recommended that the NSWCC –

- *provide a written apology to Officer Q for unlawfully recording his private conversations in contravention of section 5 of the Listening Devices Act 1984*
- *… [and] destroy all recordings (and associated transcripts) it holds of the 4 March 1999 conversation.*

The salient facts relating to Officer Q are:

- Officer Q was a former co-worker of NSWCC informant, Sea. His private conversations were recorded by LD on 2 occasions, and a telephone conversation between him and another officer was intercepted on one occasion. One LD recording was unintentional (Officer Q was part of conversations that were lawfully being recorded) but the other recording (on 4 March 1999) was intentional. The recording was in contravention of the LD Act as there was no warrant in place to authorise it. The telephone intercept was authorised by a TI warrant relating to the telephone service of the other officer.

214. Discussed in OP report, Chapter 11, Section 11.3 (Volume 3, pp 370-375).
215. Provisional statement, Segment 3 (Volume 2, paras 1507-1546).
216. Discussed in OP report, Chapter 11, Section 11.4 (Volume 3, pp 375-379).

- Although Mascot recorded allegations about Officer Q, it appears they were never actively investigated. Mascot never instructed or encouraged Sea to engage in conversation with Officer Q and never included Officer Q's name in any LD warrants, TI warrants or supporting affidavits. It therefore appears that Sea unlawfully recorded the conversation on 4 March 1999.
- Operation Prospect concluded that Mascot officers had not directed Sea to make the recording, and that he may unilaterally have decided to do so. There is no evidence that any officer who transcribed and dealt with that LD product was aware that the recording had been made in contravention of the LD Act. Accordingly, no finding was made against an individual officer for causing the unlawful recordings to occur or knowingly transcribing them.
- The Report concluded that this was another example of systemic weaknesses in Mascot operations. On that basis, and since Sea was a registered NSWCC informant, the Report concluded that the NSWCC should apologise to Officer Q and destroy the unlawful LD product that it held.
- These matters were set out in the Ombudsman's provisional statement of findings and recommendations that was given to the NSWCC on 16 June 2015.[217] The only material redacted from the provisional statement was four paragraphs containing provisional findings against other persons. The NSWCC response dated 16 December 2015 did not address any of the content in the provisional statement.

Recommendation 16 – Bourke[218]

The Report recommended that the NSWCC provide a written apology to Bourke –

> *… for incorrectly naming him as a person to be listened to or recorded in 23 listening device affidavits and 69 listening device warrants, and in the 'facts and grounds' paragraphs of five other affidavits.*

The salient facts relating to Bourke are:

- Bourke is a retired police officer. He was named as a person who would be listened to or recorded in 69 LD warrants, 28 LD affidavits, the 'facts and grounds' paragraphs of 5 further affidavits, and many other Mascot documents. He was not the subject of any allegations investigated by Mascot.
- The Report found that the inclusion of his name in those various documents can only be explained on the basis of a repeated misspelling. Another officer with the same first name, whose last name is spelt 'Burke', was an officer of interest.
- This error resulted from Mascot's prevailing practice of copying information directly from Information Reports into their affidavits, and then rolling over the text of those affidavits. This practice was part of a systemic failure of the NSWCC, which was responsible for the actions of members of Mascot in preparing affidavits supporting LD and TI warrant applications, and for supervising Mascot members to ensure that statements made in supporting affidavits were accurate.
- These matters were set out in the Ombudsman's provisional statement of findings and recommendations that was given to the NSWCC on 16 June 2015.[219] The only material redacted from the provisional statement was four paragraphs containing provisional findings against other persons. The NSWCC response dated 16 December 2015 did not address any of the content in the provisional statement.

217. Provisional statement, Segment 3 (Volume 2, paras 1280-1305).
218. Discussed in OP report, Chapter 11, section 11.5 (Volume 3, pp 379-386).
219. Provisional statement, Segment 3 (Volume 2, paras 1306-1344).

Recommendation 17 – Officer L[220]

The OP report recommended that the NSWCC provide Officer L with a written apology –

> *... for the distress and injury caused by the unsatisfactory manner in which an investigation was undertaken into allegations against him.*

The salient facts relating to Officer L are:

- Officer L was a member of the Mascot taskforce from September 2001 – September 2002.
- Following receipt of information alleging that Officer L was one of two police officers who had extorted money from a known drug dealer, Officer L was made the subject of an internal investigation by his co-workers in Mascot. The OP report criticised Mascot's decision to hastily investigate one of their colleagues, instead of referring the matter to the Police Integrity Commission in accordance with established protocols.
- There were also significant flaws in the way the investigation was conducted. Mascot failed to consider or pursue straightforward investigative options, such as checking Officer L's duty books to establish his whereabouts on the relevant day, or undertaking a standard photo identification process with the drug dealer and other witnesses. Instead, Mascot devised a scenario whereby another officer would interview the drug dealer at Mascot offices, but ask Officer L to 'mind' him while the other officer was on an errand. The drug dealer was given an LD to wear, and instructed to have a conversation with Officer L about being one of the officers who had stolen his money. Officer L flatly denied this and, due to the unusual circumstances, quickly realised what was happening.
- The information presented in the LD affidavit supporting the LD warrant was inaccurate, misrepresented material, and did not include important exculpatory material (for example, that the drug dealer's description of the two officers who had allegedly stolen from him did not match Officer L).
- The evidence did not clearly show that any particular officers made the key decisions to manage the allegation against Officer L in this way. Accordingly, the Report made an adverse finding against the NSWCC based on the following factors: the investigation strategy against Officer L formed part of the Mascot references; the Commissioner of the NSWCC and senior NSWPF officers working on the Mascot reference were participants in adopting and implementing the strategy; the strategy was hastily devised; proper consideration was not given to the strength of available evidence to justify the strategy or to other investigative options; and the strategy did not take adequate account of the potential adverse career and emotional impact on Officer L.
- The Report made an adverse finding against the Commissioner of the NSWCC for approving an internal investigation by Mascot officers into the allegation instead of referring it to PIC. The report also made adverse findings against the police officer who was the deponent of the deficient LD affidavit.
- These matters were set out in the Ombudsman's provisional statement of findings and recommendations that was given to the NSWCC on 16 June 2015.[221] The only material redacted from the provisional statement was six paragraphs containing provisional findings against other persons. The NSWCC response dated 16 December 2015 did not address any of the content in the provisional statement.

220. Discussed in OP report, Chapter 12, Section 12.2 (Volume 3, pp 387-415).
221. Provisional statement, Segment 3 (Volume 2, paras 374-476).

Recommendation 18 – Officer G[222]

The OP report recommended that the NSWCC provide Officer G with a written apology –

... for inaccurate information about him being included in affidavits.

The salient facts relating to Officer G are:

- Officer G was a police officer who had previously worked with an officer who was a Mascot target (MSO11). Officer G was named in 33 LD supporting affidavits and 15 LD warrants. Five of those affidavits and 15 associated warrants named him as a person whose private conversations Mascot sought authority to lawfully record.
- The reason for Mascot's interest in Officer G was a statement made by MSO11 in a conversation with NSWCC informant, Sea, that Sea lawfully recorded. A summary of that statement was included as an allegation in the Schedule of Debrief. That summary account was re-phrased in an LD affidavit in a way that changed its meaning and described conduct of a different, and possibly more serious, nature.
- The Report made adverse findings against the NSWPF officer who was the deponent of the deficient affidavit, and the NSWCC.[223] The Report noted that the NSWCC was responsible for the actions of the Mascot Task Force in preparing affidavits and for ensuring that the content in affidavits was accurate.
- These matters were set out in the Ombudsman's provisional statement of findings and recommendations that was given to the NSWCC on 16 June 2015.[224] The only material redacted from the provisional statement was four paragraphs containing provisional findings against other persons. The NSWCC response dated 16 December 2015 did not address any of the content in the provisional statement.

Recommendations 20, 22 – Mr A[225]

The OP report recommended that the NSWCC provide a written apologies to Mr A –

- *for the deployments of Paddle on two occasions to speak to Mr A, in breach of a bail condition that was designed to ensure Paddle did not approach a potential Crown witness such as Mr A*
- *for arranging for Paddle to record his conversation with Mr A with a concealed LD*
- *... for the New South Wales Crime Commission's failure to investigate allegations - that were received by or known to officers who were working under the NSWCC's supervision - about the actions of a registered New South Wales Crime Commission informant (Paddle) in speaking to Mr A contrary to Paddle's bail conditions.*

Mr A's circumstances are discussed earlier in this report, in relation to a finding of unlawful conduct made against two NSWPF officers, and to the NSWPF's acceptance of an Ombudsman recommendation that it apologise to Mr A for not dealing properly with his complaint.[226] The salient facts relating to Mr A are:

- He is a former NSWPF officer who was involved in arresting a NSWCC informant, codenamed Paddle, suspected of participating in an attempted armed robbery.
- NSWCC informant, Sea, had alleged to Mascot that the arresting officers (including Sea) had acted corruptly, including engaging in assault and verballing the accused, including Paddle. Following the arrest, Paddle was charged with criminal offences and granted conditional bail, which included a condition that he not communicate with any person who was likely to be called as a prosecution witness. Mr A had given witness evidence in one of Paddle's court proceedings.

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222. Discussed in OP report, Chapter 12, Section 12.3 (Volume 3, pp 415-425).
223. OP report, Chapter 12, Section 12.3.6 (Volume 3, p 425).
224. Provisional statement, Segment 3 (Volume 2, paras 1091-1132).
225. Discussed in OP report, Chapter 14, Sections 14.5 and 14.9 (Volume 4, pp 462-478 and 504-516).
226. Respectively, sections 3.5 and 4.1.

- While still on bail, Paddle was recruited as a NSWCC informant. Mascot deployed Paddle to approach Mr A at a pawn broking business that he operated, under the pretext of pawning an item, but to have a conversation about the alleged verballing and record it on a body-worn LD. Paddle had two conversations with Mr A. One of the conversations referred to Mr A's involvement as a witness in Paddle's forthcoming trial.
- After these conversations, Mr A's concerns at being approached by Paddle were raised directly by him with a police officer, who spoke about the matter to Mascot investigators; and in a formal complaint to the NSWPF. The Office of the Director of Public Prosecutions also sent a fax to the Commissioner of the NSWCC alerting him to documents expressing concerns that Paddle's approaches to Mr A were in breach of Paddle's bail conditions. The NSWCC took no action in response.
- The OP report found that the plan to deploy Paddle to speak to Mr A was flawed, because of the potential breach of Paddle's bail conditions. The Report found no evidence that any officer identified, considered or assessed these risks.
- The Report made adverse findings against the two NSWPF officers with primary responsibility for the deployment of Paddle, and the NSWCC.[227] The Report noted that the NSWCC was responsible for actions of the Mascot Task Force in deploying a registered NSWCC informant. The Report was critical of both the NSWPF and the NSWCC for the way that complaints and concerns about Paddle's deployment were handled.
- These matters were set out in the Ombudsman's statement of provisional adverse findings and recommendations that was given to the NSWCC on 16 June 2015.[228] The only material redacted from the provisional statement was 28 paragraphs containing provisional findings against other persons. The NSWCC addressed criticised the draft findings against it in relation to the deployment of Paddle in three submissions, on 16 December 2015, 29 July 2016, 6 September 2016.

227. OP report, Chapter 14, Section 14.5.8 (Volume 3, pp 477-478).
228. Provisional statement, Segment 1.

Chapter 6. The NSWCC and Mascot – a final observation

I have observed many times that Operation Prospect was a controversial and complex investigation for the NSW Ombudsman's office. The difficulty was exacerbated by the frequent criticism of the investigation – by interested parties and their legal representatives, and within the media and the Parliament. That level of controversy was perhaps to be expected.

What was exceptional, by contrast, was the hostility displayed by the NSWCC shortly before the OP report was tabled and also afterwards. The NSWCC is a public sector agency, but one that had not been subject previously to external scrutiny of the kind that occurred in Operation Prospect.

This was a matter remarked on by the Patten Report into the NSWCC in 2011.[229] One of the Report's findings was that the Commission exercises 'extraordinary powers' and that 'existing accountability mechanisms have indeed proved to be inadequate for such a complex and powerful agency as the Commission'.[230] Among the Patten Report recommendations were that the NSWCC implement a procedure for dealing with complaints and that an independent Inspector be appointed to audit the Commission's operations and to handle complaints.[231] The Patten Report also commented that, while it encountered much praise for the work of the NSWCC, 'there has also been not inconsiderable criticism', which the Report said was exemplified by one witness's description of the NSWCC's work as 'the end justifies the means'.[232]

As explained in section 1.4 of this report, the Ombudsman's office was asked to conduct Operation Prospect as no other agency at that time had jurisdiction to investigate all aspects of the controversy. Legislative change was necessary for the Ombudsman to proceed.

There are historical parallels for the NSWCC's hostility towards the Ombudsman's office in this investigation. As I commented in the Foreword to this report, the history of accountability in Australia, seen through the lens of Ombudsman experience, is that powerful organisations often resist probing scrutiny of their administration when this first occurs. I will give some examples.

In an article surveying the history of the NSW Ombudsman, Deputy Ombudsman Chris Wheeler observed that 'For a number of years after its establishment, the Ombudsman faced significant opposition from across the NSW public sector'.[233] He gave as an example credible allegations made in 1983, shortly after the office gained jurisdiction to investigate police complaints, that NSW police undertook surveillance of senior Ombudsman staff and compiled dossiers on their activities. The Commissioner of Police also instituted (unsuccessful) judicial review proceedings in the early years to combat Ombudsman inquiries.[234]

Public sector attitudes have changed markedly and the NSW Ombudsman now enjoys consistent public support across government agencies, including by the NSWPF. A pleasing indication of the changed attitude is the prompt response of the Commissioner of Police to the OP report, accepting all findings and recommendations.

Another example from NSW of the same historical pattern is in relation to the jurisdiction of the NSW Ombudsman over private sector bodies that fall within the reportable conduct jurisdiction.[235] In the early years of this new jurisdiction the Annual Reports of the NSW Ombudsman were critical of compliance by some bodies with their legislative responsibilities to report and investigate child abuse allegations. For example, the

229. *Report of the Special Commission of Inquiry into the New South Wales Crime Commission*, Mr David Patten, 30 November 2011 ('Patten Report').
230. Patten Report, paras 263, 265; see also Finding 6 (p 6).
231. Patten Report, Recommendations E (p 10) and H (p 12).
232. Patten Report, para 308.
233. Chris Wheeler, 'Review of administrative conduct and decisions in NSW since 1974 – an ad hoc and incremental approach to radical change' (2012) 71 *AIAL Forum* 34 at 43.
234. Eg, Moroney v The Ombudsman [1982] 2 NSWLR 591; The *Ombudsman v Moroney* [1983] 1 NSWLR 317; *Commissioner of Police v Deputy Ombudsman* (1990), unreported, NSWSC, McInerney J, 3 December 1990).
235. Part 3A of the *Ombudsman Act 1974* (NSW).

Ombudsman's 2003-04 Annual Report was critical of the Catholic school sector for not notifying and dealing with allegations against clergy, for delay in notifying and investigating other matters, failing to respond to Ombudsman requests for information, and non-compliance with reporting obligations.[236]

Just over a decade later the Bishop of the Catholic Diocese of Maitland-Newcastle wrote to the NSW Attorney General on behalf of the 11 NSW Catholic Dioceses to urge the Government to support legislative change to extend the reportable conduct scheme to expand the Ombudsman's jurisdiction over church schools.[237] The Anglican Archbishop of Sydney, on behalf of the Anglican Dioceses in NSW, wrote to the Attorney General in support of this proposal.

There are comparable examples from other Australian jurisdictions of an initial resistance to Ombudsman oversight giving way to strong endorsement of this mechanism. In Victoria, for example, the early years of the Ombudsman were marked by frequent litigation instituted by agencies to restrain the Ombudsman from investigating complaints against prisons and legal officers.[238] By contrast, in 2015 the Victorian Government supported all 25 recommendations in the Ombudsman's far-reaching report on Victorian prisons.[239]

Similarly, the early years of the Commonwealth Ombudsman were marked by a high-profile dispute between the Ombudsman and The Treasury.[240] In recent times The Treasury has instigated or supported the adoption of Ombudsman-type mechanisms such as the Inspector-General of Taxation, the Australian Small Business and Family Enterprise Ombudsman, and the merger into a 'super' Ombudsman service of the Financial Ombudsman Service, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.

Of immediate relevance too is that the Commonwealth Ombudsman encountered strong resistance from the Australian Federal Police in the early scrutiny years. The resistance was described thus by a Senior Assistant Ombudsman: 'many police are not merely still hostile to outside investigation of complaints, they are also fearful that a formal complaints process will encourage malicious, unfounded allegations, unfairly put their careers in jeopardy, and excessively fetter the ways in which they go about their duties'.[241]

That description no longer holds sway. In stark contrast is the recent action of the Australian Federal Police Commissioner, Mr Andrew Colvin, in pro-actively announcing that an AFP investigator had breached the *Telecommunications (Interception and Access) Act 1979,* by accessing the call records of a journalist without a warrant, and that the APF had self-referred the matter to the Commonwealth Ombudsman for investigation.[242]

That can only be described as model behaviour by a law enforcement agency to address the wrongful exercise of coercive information gathering powers. The resistance of the NSWCC to the Ombudsman's Operation Prospect investigation stands in stark contrast.

The Ombudsman has no continuing jurisdiction to investigate the conduct of the NSWCC. That will be a function of the Law Enforcement Conduct Commission. Supervisory oversight of the NSWCC is also the responsibility of the Management Committee of the NSWCC and the NSW Parliament Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission. Those other bodies may care to take note of this report.

236. NSW Ombudsman, *Annual Report 2003-2004*, p 56. See also *Annual Report 2002-2003*, p 87; and *Annual Report 2004-05*, p 144.
237. See NSW Ombudsman, *Strengthening the oversight of workplace child abuse allegations*, Special Report to Parliament, February 2016.
238. *Booth v Dillon (No 1)* [1976] VR 291, *Booth v Dillon (No 2)* [1976] VR 434, *Booth v Dillon (No 3)* [1977] VR 143, *Glenister v Dillon* [1976] VR 550, *Glenister v Dillon (No 2)* [1977] VR 151.
239. Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, September 2015, at p 153.
240. Commonwealth Ombudsman, *First Annual Report 1978*.
241. See H M Selby, '"Softly, Softly": Working with Police' in 'The Ombudsman through the looking glass 1977-1985' (1985) 12 *Canberra Bulletin of Public Administration* 271 at 272.
242. See 'AFP Commissioner addresses media regarding a self-report submitted to the Commonwealth Ombudsman', 28 April 2017, www.afp.gov.au/news-media/media-releases/afp-commissioner-addresses-media-regarding-self-report-submitted.

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