Ombudsman
New South Wales

Operation Prospect:
Second report on developments

A special report to Parliament under sections 27 and 31 of the *Ombudsman Act 1974*

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Foreword

This is the third report to the Parliament on the Operation Prospect investigation undertaken by the NSW Ombudsman between 2012-16. The first report was the six volume report entitled *Operation Prospect* tabled in the Parliament on 20 December 2016. The second report entitled *Operation Prospect: A report on developments* was tabled on 9 May 2017.

This third report is a combined report under sections 27 and 31 of the *Ombudsman Act 1974*.

The report under s 31 advises the Parliament of developments on three matters that were discussed in the earlier two reports: the implementation of recommendations; the referrals to the Director of Public Prosecutions; and the status of the legal proceedings challenging the investigation and report.

The report under s 27 records that I am not satisfied that the NSW Crime Commission has taken sufficient steps in response to my recommendations in the earlier reports. The Minister for Police, as the Minister responsible for the Crime Commission, is required to respond in a statement to the Parliament within 12 sitting days of this report being tabled.

I said in the earlier two reports that my objective was to conclude this investigation and subdue the controversy that has surrounded it. That objective is unchanged, and is furthered by placing information about relevant developments on the public record. My term as Acting Ombudsman concludes shortly after this report is tabled, and I expect this to be the last special report to Parliament on this investigation. To the extent that this report identifies unresolved issues with the NSW Crime Commission they are matters that now fall within the jurisdiction of the Law Enforcement Conduct Commission.

Professor John McMillan AO
Acting Ombudsman

December 2017

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Special report to the Parliament under section 31 of the *Ombudsman Act 1974*

1. Implementation of recommendations

The Operation Prospect report *(OP report)* made 38 recommendations that were variously addressed to the New South Wales Crime Commission (NSWCC), the New South Wales Police Force (NSWPF), the Director of Public Prosecutions (DPP) and the Attorney General.[1]

As explained in *Operation Prospect: A report on developments (OP developments report)*, I was satisfied with the response of the NSWPF and the DPP to the recommendations I made to those agencies.[2] I discuss the response of the NSWCC to the recommendations addressed to it in the following chapter of this report.

I am aware that discussion has been occurring within government about the 14 recommendations I made to the Attorney General to consider options for legislative change, mostly relating to the establishment of a position of Public Interest Monitor. There has been no formal public statement by the Attorney General in response to the *OP report* recommendations.

It is desirable, in my view, that a statement is soon made by the Attorney that either records the Government response or invites public discussion on options for legislative change. The *OP report* contained a lengthy chapter on improving warrant application and authorisation processes.[3] A central concern is the need for robust legislative and procedural safeguards to protect personal privacy and ensure that people are not subject to unwarranted government surveillance.

The view expressed in the *OP report* was that current safeguards in NSW are inadequate and should be reviewed having regard to the legislation of other Australian jurisdictions. The NSW Parliament Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission has signalled its interest in the Government's response to the *OP report* recommendations.[4]

The number of warrants issued annually to NSW law enforcement authorities to use listening and surveillance devices and to undertake telecommunications interception can exceed 3,000. Protection of the public in the face of frequent use of covert surveillance technologies is an important public policy issue.

2. Referrals to the Director of Public Prosecutions

The *OP developments report* noted that the Ombudsman was preparing some matters arising in the *OP report* for referral to the DPP.[5] The number of referrals is not given in that report or in this report, in order to protect the privacy of those who are the subject of referral action pending any public action by the DPP.

The referral action required the preparation of lengthy briefs of evidence for the DPP's consideration. All referrals have occurred, though one cannot be finalised until we receive further information that was requested some time ago from the NSWCC.

The DPP has advised the Ombudsman that he has determined not to commence criminal proceedings against a number of those who were the subject of referral action. I have written to each of those persons to advise them of the DPP's decision and that no further action will be taken by the Ombudsman's office.

1. The recommendations are summarised in NSW Ombudsman, *Operation Prospect: A report on developments (May 2017) (OP developments report*), Section 1.7.
2. *OP developments report*, Chapter 4. Two recommendations were made to the NSWPF, and one recommendation to the DPP.
3. *OP report*, Chapter 19, Volume 5.
4. Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, *2017 Review of the Annual Reports of oversight bodies* ('Committee on the Ombudsman annual review report'), Report 2/56-October 2017, at para 1.41.
5. *OP developments report*, Section 2.4.2.

As to one referral, the DPP advised that no action would be taken as the brief of evidence disclosed conduct in relation to a Commonwealth and not a NSW State offence. This matter has not been taken further as the *Ombudsman Act 1974* authorises the disclosure of information only to the NSW DPP.[6] I note that this issue has been addressed in the *Law Enforcement Conduct Commission Act 2016*, which enables the Commission to refer evidence of criminal offences and disciplinary infringements to appropriate prosecutorial authorities in other jurisdictions.[7]

As to some other referrals, the DPP advised there was either insufficient evidence to support a criminal prosecution or that discretionary factors dictated that it is not in the public interest to commence proceedings.

The respective roles of the Ombudsman and the DPP in prosecution decisions was explained in the *OP report* and the *OP developments report*.[8] Referrals to and decisions of the DPP are made in accordance with the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales* (Prosecution Guidelines), which sets out three criteria that are applied when determining whether or not the public interest requires that a matter be prosecuted. The Ombudsman's role is limited to considering only the first of these criteria, which is 'the *prima facie* test': whether or not the admissible evidence available is capable of establishing each element of the offence. The DPP's role is to make a decision having regard to this and to two other criteria – whether there is a reasonable prospect of conviction, and whether there are discretionary factors that dictate that a criminal charge should not proceed in the public interest.

I am satisfied, on the basis of the briefs of evidence referred to the DPP and the DPP's response, that it was appropriate to make each of the referrals. I was aware that evidentiary and discretionary considerations may result in the DPP deciding not to prosecute in certain cases. Some of the discretionary factors were alluded to in the referral briefs, and were drawn in part from submissions that parties had made to the Ombudsman during the OP investigation. However, they were not matters that I could attach weight to in deciding if the prima facie test was met and a matter should be referred.

There are still some matters with the DPP on which we await advice as to whether certain persons will be charged with criminal offences.

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

On 6 December 2016, shortly before the *OP report* was tabled, Mr Kaldas applied to the Supreme Court for an interlocutory injunction restraining me from making public any determination adverse to him in the *OP report*. The application was dismissed on 20 December 2016 and the report was tabled and published the same day.[9]

In addition to seeking an interlocutory injunction, Mr Kaldas' application questioned the validity of various steps taken in the conduct of the Operation Prospect investigation. These claims returned to the Supreme Court in early 2017, in an amended and extended form that also questioned the validity of various aspects of the *OP report* and its publication.

Section 35A of the Ombudsman Act provides that civil proceedings can only be brought against the Ombudsman or an officer of the Ombudsman with the leave of the Supreme Court and only on the basis that the Court is satisfied there is a 'substantial ground' for contending that the Ombudsman or officer acted in bad faith. Mr Kaldas' application neither alleged bad faith nor sought the leave of the Supreme Court.

6. *Ombudsman Act 1974* s 31AB(1),(2). A broader disclosure power in the *Royal Commissions Act 1923* (NSW) s 12A(2) authorises disclosure of information to a prosecutorial authority of another jurisdiction, but does not apply to the particular evidence that was the subject of the referral to the NSW DPP.
7. *Law Enforcement Conduct Commission Act 2016* (NSW) s 28(1)(d).
8. *OP report*, Chapter 2, Section 2.1.5 (Volume 1, p 56); *OP developments report*, Section 2.4.
9. *Kaldas v Barbour* [2016] NSWSC 1880 (20 December 2016, Garling J). Three other defendants in the Supreme Court proceedings were the former Ombudsman (Mr Barbour), a former Deputy Ombudsman (Ms Waugh) and the Attorney General of New South Wales.

In order to determine whether Mr Kaldas' claims could proceed, the Supreme Court referred a number of legal questions to the NSW Court of Appeal, including a question about the constitutional validity or operation of s 35A. The constitutional question arose from the decision of the High Court in *Kirk v Industrial Court of New South Wales*.[10] In *Kirk*, the High Court had to rule on the constitutional validity or operation of a 'statutory privative provision' which provided that decisions of the Industrial Court could not be challenged or called into question in other courts. The High Court held that the provision did not prevent the Supreme Court from exercising its supervisory jurisdiction to review decisions of the Industrial Court for jurisdictional error.

The rationale of *Kirk* was that it is beyond the competence of a State legislature to limit the supervisory jurisdiction of its Supreme Court to the point that the Court no longer fits the reference in Chapter III of the Australian Constitution to 'the Supreme Court of a State'. The supervisory jurisdiction of State Supreme Courts to enforce limits on the exercise of State executive and judicial power was described by the High Court in *Kirk* as 'a defining characteristic of those courts'.[11]

The NSW Court of Appeal heard argument on the separate legal questions in June 2017, and gave its decision in October 2017.[12] The Court held that s 35A of the Ombudsman Act was not invalid on the grounds of the *Kirk* doctrine, and that s 35A applied to Mr Kaldas' claims. Among the considerations referred to by the Court were the limited scope of the *Kirk* doctrine as defined by the High Court, that Mr Kaldas had sought a declaration and not a prerogative writ to which the *Kirk* doctrine applied, and that a report of the Ombudsman does not directly affect rights even though a report can adversely affect a person's reputation. The Court also awarded costs against Mr Kaldas.

Mr Kaldas applied to the High Court on 17 November 2017 for special leave to appeal against the decision of the Court of Appeal in relation to the operation of s 35A. It is expected that the application for special leave will be heard by the High Court in early 2018, and if granted, will be set down for a full hearing at a later date.

10. (2010) 239 CLR 531; [2010] HCA 1.
11. (2010) 239 CLR 531 at 580-1; [2010] HCA 1 at [98].
12. *Kaldas v Barbour* [2017] NSWCA 275 (24 October 2017, Bathurst CJ, Basten and Macfarlan JJA).

Report to the Parliament under section 27 of the *Ombudsman Act 1974*

Section 27 of the Ombudsman Act provides as follows:

> **27 Default in consequent action**
>
> (1) Where the Ombudsman is not satisfied that sufficient steps have been taken in due time in consequence of a report under section 26, the Ombudsman may make a report to the Presiding Officer of each House of Parliament and must also provide the responsible Minister with a copy of the report.
>
> (2) The responsible Minister must make a statement to the House of Parliament in which the Minister sits in response to the report not more than 12 sitting days after the report is made to the Presiding Officer.

I drew attention to s 27 in the *OP developments report* in a section headed 'NSWCC's refusal to apologise'.[13] I noted that the *OP report* recommended that the NSWCC provide written apologies to 16 people in respect of actions that were taken during the Mascot Task Force investigations. The NSWCC had earlier published a Response to the *OP report*, in which the Commission stated that it 'has no intention to make apologies as recommended'.

I criticised the NSWCC Response on a number of grounds in the *OP developments report*. I was critical of the NSWCC's reasoning – for example, the Commission's view that it bore no responsibility for the actions of NSWPF officers in the Mascot Task Force. I explained that the responsibility of organisations to apologise when people are wronged has become a central principle of remedial justice. The principle has been given legislative sanction by an amendment to the *Civil Liability Act 2002* (NSW)[14] and similar legislation in other Australian jurisdictions and internationally.

I was particularly critical of the general nature of the NSWCC's response, which failed to respond separately to each recommendation and explain why an apology would not be given to each of the 16 people identified in the recommendations. The *OP developments report* had restated the facts to support each apology and called on the Commission to address each matter individually. I foreshadowed that if that did not occur I would consider making a report to the responsible Minister under s 27 of the Ombudsman Act.

The issue was discussed soon after at hearings conducted by the NSW Parliament Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, during the Committee's review of the annual reports of those three agencies.[15] The Commissioner of the NSWCC, Mr Hastings QC, advised the Committee that the NSWCC had decided to issue an apology to one person who was the subject of 'unacceptable and inexcusable' conduct of a senior NSWCC official. Beyond that apology, the Commissioner advised that 'we are not intending to make any further apologies'.[16] I observe that the apology issued by the NSWCC was not in fact one that had been recommended in the *OP report*, and was an apology made by the Commission on its own initiative.

In subsequent correspondence between myself and Mr Hastings, he advised that the NSWCC would further consider the recommendations having regard to the *OP developments report*. Mr Hastings advised in October 2017 that the NSWCC had decided 'to issue qualified apologies to a number of persons for the conduct of officers of the New South Wales Police Force which was found to be unreasonable where it is accepted that the Commission had "a measure of responsibility" for what occurred during the Mascot

13. *OP developments report*, Section 5.7.
14. *Civil Liability Act 2002* s 69.
15. Committee on the Ombudsman annual review report, above note 4 The Committee hearings were conducted on 12 May 2017.
16. Committee on the Ombudsman annual review report, at para 1.26.

investigation'.[17] The phrase 'measure of responsibility' was taken from the *OP report*, where I concluded that 'the NSWCC bears a measure of responsibility' for the conduct of police officers working under the Mascot reference, based on a combination of factors that I outlined.[18]

The persons to whom the NSWCC proposed to issue an apology were those identified in the *OP report* as Mr F, Officer H, Mr J, Officer T, Officer X, Officer F, Officer M, Ms E, Officer Q, and 'Bourke'. The Commissioner's letter did not specifically explain why apologies would not be given to each of the six other people – identified in the *OP report* as Mr N, Officer C1, Officer P, Officer L, Officer G and Mr A (two apologies). A generic explanation was given in the Commissioner's letter for not apologising to those people:

> *The Commission does not propose to apologise to persons who may have been affected by what was found to be unreasonable conduct by officers of the New South Wales Police Force in applying for or deploying listening devices, but for whom there were reasonable grounds for suspecting that they had engaged in criminal or corrupt conduct.*

The Commissioner subsequently provided me with a copy of the apologies written to ten people. The common form of the apologies was that the letters summarised my recommendations from the *OP report*, and observed:

> *Whilst the officers of the New South Wales Police Force involved were not at the direction and control of the Crime Commission, it accepts that it had a measure of responsibility for the fact that their actions occurred in the course of the Mascot investigation.*
>
> *The Commission therefore apologises for the fact that you were subjected to such action.*

Before explaining why in my view it is unreasonable that the NSWCC has not apologised to the further six people, I will make three general observations.

First, I record my satisfaction that the NSWCC has retreated from its earlier refusal to issue any apologies and has apologised to ten people. I will not comment on the content of those apologies as that is now a matter that rests with those who received the apologies.

Secondly, it is disheartening that the NSWCC has not apologised to the remaining six people. I reiterate the view expressed in the *OP developments report* that apologies are an important and highly regarded remedial justice option. The deep-rooted experience of the NSW Ombudsman's office over many years is that apologies can be highly valued by those who receive them. A sincere apology given to a person by a senior agency officer is often viewed as a reassuring acknowledgement of unreasonable administrative action for which the agency accepts responsibility.

An apology is often a powerful tool in resolving a person's grievance against an organisation. The acceptance of that principle over the past twenty years by public and private sector organisations across Australia has been a hallmark of institutional civility and accountability. This was borne out in a recent Ombudsman survey of complaint handling in NSW government agencies, which found that an apology was one of the top 3 complaint outcomes and was given in 39% of cases.[19]

Against that backdrop, I am at a loss to understand why the NSWCC has been so reluctant to embrace the practice of apologising to individuals for actions taken during the Mascot investigations. Those investigations were run by the NSWCC, under a reference to the NSWCC, on NSWCC premises, in accordance with NSWCC

17. Letter, Mr Peter Hastings QC, Commissioner, New South Wales Crime Commission, to Professor John McMillan, Acting NSW Ombudsman, 20 October 2017.
18. *OP report*, Chapter 4, Section 4.6.2.2 (Volume 1, p 119).
19. NSW Ombudsman, Report to the Customer Service Council, November 2017, on a review of the implementation of six Complaint Handling Commitments that apply to all government agencies. Recent publications that examine the importance now attached to apologies include Victorian Ombudsman, *Apologies* (April 2017) and an international collection on 'The Place of Apology in Law' in *Onati Socio-Legal Series*, Vol 7, No 3 (July-September 2017).

policies and procedures, by police officers inducted into the NSWCC, and relying on the resources, powers and senior staff of the NSWCC. My view, as explained in evidence to the Parliament Committee, is that the NSWCC stands alone and aloof from this key Australian development of acknowledging and apologising for wrongful administrative conduct.

I firmly believe that six individuals are still deserving of an apology. The *OP Report* was selective as to the small number of people to be given an apology from among the large number who were Mascot targets or were named in NSWCC warrants. I expect the six individuals not given an apology will be deeply and understandably offended to read the NSWCC explanation that they were reasonably suspected of criminal or corrupt conduct. That is why I have decided to bring this matter to the attention of the Minister for Police under s 27 of the Ombudsman Act.

Thirdly, I was interested to note that the NSWCC's action of making some apologies was the subject of a newspaper article a week or so after the apologies were made.[20] The newspaper article provided a breakdown of the people given apologies, quoted from the apology issued to Mr Kaldas, and recorded his praise of the NSWCC for apologising.

I draw attention to this newspaper report as selective media reporting and unexplained information disclosures was a much-contested issue during the Operation Prospect investigation.[21] The newspaper report contains detail that, while not entirely accurate, could only have been sourced in one of three ways – by a release of information from the Ombudsman's office, a release of information from the NSWCC, or independent research carried out by the media as to who among the sixteen people anonymised in the *OP report* was given an apology. I think the third of those options is improbable. As to the first option, I am satisfied that there was no release of information from the Ombudsman's office. As to the second option, there is no statement on the NSWCC website about apologies being issued.

I turn now to examine the reason given by the NSWCC for not apologising to six individuals. As stated above, the Commission's reason for differentiating between those six people and others to whom apologies were given is that it would not apologise to those 'for whom there were reasonable grounds for suspecting that they had engaged in criminal or corrupt conduct'. I will confine my analysis to that reason, and briefly refer to the facts as summarised in the *OP developments report* in support of the recommendations that apologies be given.

Mr N[22]

The *OP report* found that Mr N, a former NSWPF officer, was selected as a Mascot investigation target based on questionable information that was not properly examined. For example, one incident mentioned in 25 affidavits had occurred 30 years earlier and was sourced to uncorroborated comments made in passing by one officer. There was no evaluation of whether another allegation of leaking information constituted criminal or corrupt conduct that fell within the scope of the Mascot investigation.

Mr N was nevertheless named in 95 listening device warrants, 51 listening device affidavits and two telecommunications interception affidavits. The Police Commissioner acted on a recommendation in the *OP Report* to apologise to Mr N for providing an inadequate response when he queried whether he was investigated.

20. Mark Morri, 'Lack of apology no longer bugs cops', *Daily Telegraph*, 7 November 2017.
21. Eg, NSW Parliament, General Purpose Standing Committee No 4, *Progress of the Ombudsman's investigation "Operation Prospect"*, Report 31 (August 2015) pp 24-35; and *OP developments report*, Section 5.1.
22. Discussed in *OP report*, Chapter 7, Section 7.3 (Volume 2, pp 224-235), and *OP developments report*, Section 5.7, pp 33-34.

Officer C1[23]

There is no record of the Mascot Task Force devising a strategy to target Officer C1 for investigation of suspected criminal or corrupt conduct. The only two items of information linking Officer C1 to corrupt conduct were that he was mentioned by a NSWCC informant as having been present at an arrest five years earlier that involved corrupt conduct by some officers, and he was listed as a possible invitee to a social function that may be attended by people suspected of corruption.

Officer C1 was named in 63 listening device warrants, 29 listening device affidavits and 4 telephone interception warrants. The affidavits and warrants did not explain why his conversations were to be recorded or listened to. Nor, the *OP report* found, was there a proper or rigorous analysis of the two items of information that apparently led to Officer C1 being targeted for investigation. It is possible that he was confused with his brother who was also a police officer against whom allegations had been made.

Officer P[24]

Officer P, a former NSWPF officer, 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 that she might do so again. The *OP report* was critical of the strength and reliability of the evidence on which the initial decision to investigate her was based, and of the failure adequately to test or assess that information in the context of other available information. No proper assessment was undertaken of whether it was appropriate to make her the subject of an integrity test, or to name her in 81 listening device warrants, 48 listening device affidavits, 12 telecommunications interception affidavits and 4 telecommunication interception warrants applying to her home and mobile telephone services.

The *OP report* recounted the distress suffered by Officer P when she was later informed (upon being inducted into the NSWCC to work on the Mascot reference) that she had earlier been a subject of investigation.

Officer L[25]

Officer L was a member of the Mascot Task Force who was made the subject of an internal investigation by his co-workers. The item of information that led to him being investigated was a comment by an arrested person that Officer L may have extorted money from him and others. The internal integrity test of Officer L failed to substantiate the allegation. The *OP report* was critical of the decision to conduct the integrity test, finding that the information that triggered the investigation was unreliable and could have been assessed in a more straightforward manner (such as checking Officer L's duty books to establish his whereabouts on the relevant day, or undertaking a standard photo identification process with other supposed witnesses).

The *OP report* recounted the distress suffered by Officer L upon suspecting and later confirming that he was a subject of investigation by his co-workers.

Officer G[26]

Officer G was a police officer who was named in 33 listening device affidavits and 15 listening device warrants. The Mascot Task Force records do not contain reliable evidence that would form grounds on which to suspect Officer G of criminal or corrupt conduct. He had worked with a police officer who was a Mascot target, and the decision to investigate Officer G was apparently based on a comment by the other officer that was misrepresented in a more serious light in a listening device affidavit.

23. Discussed in *OP report*, Chapter 7, Section 7.4 (Volume 2, pp 235-241), and *OP developments report*, Section 5.7, pp 34-35.
24. Discussed in *OP report*, Chapter 8, Section 8.2 (Volume 2, pp 250-268), and *OP developments report*, Section 5.7, p 36.
25. Discussed in *OP report*, Chapter 12, Section 12.2 (Volume 3, pp 387-415), and *OP developments report*, Section 5.7, p 42.
26. Discussed in *OP report*, Chapter 12, Section 12.3 (Volume 3, pp 415-425), and *OP developments report*, Section 5.7, p 43.

Mr A[27]

Mr A was a retired NSWPF officer who operated a pawn broking business in a NSW regional town. During his police service he was involved in arresting a person for attempted armed robbery, who was later recruited as a NSWCC informant and code-named Paddle.

The Mascot Task Force deployed Paddle to approach Mr A under the pretext of pawning an item, but in fact to record their conversation on a concealed listening device that Paddle was wearing. The operational objective was to obtain information about the misconduct of other officers who were involved in Paddle's arrest.

There was no allegation in NSWCC records that Mr A was suspected of criminal or corrupt conduct during his police service - only that he participated in an arrest where the suspects were allegedly verballed by other police officers.

The *OP report* found that the plan to deploy Paddle to speak to Mr A was flawed, as the contact constituted a breach of Paddle's bail condition that he not communicate with any person who was likely to be called as a prosecution witness. The *OP report* also noted that Mr A said he felt intimidated at being approached unexpectedly at his pawn broking business by a person he had previously arrested and who he knew had a history of serious firearms offences.

Mr A raised his concerns at the time with a police officer and in a formal complaint to the NSWPF. The Police Commissioner acted on a recommendation in the OP report to apologise to Mr A for how his complaint was handled.

27. Discussed in *OP report*, Chapter 6, Section 6.3.2 (Volume 3, pp 191-197), Chapter 14, Sections 14.5 and 14.9 (Volume 4, pp 462-478 and 504-516), and OP *developments report*, Section 5.7, pp 43-44.

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