Ombudsman
New South Wales

Operation Prospect

Volume 5
Chapters 16-19
Systemic and other issues

Report of the Acting NSW Ombudsman

A special report to Parliament under s. 31 of the *Ombudsman Act 1974* and s. 161 of the *Police Act 1990*

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Report Table of Contents

Volume 1: Introduction and background

Foreword ... i
Report table of contents ... vii
About this report ... 1
Table of findings ... 10
Table of recommendations ... 27
Abbreviations ... 32
Common abbreviations of legislation ... 33
Glossary ... 34
Chapter 1 Background and scope of Operation Prospect ... 39
Chapter 2 Operation Prospect – Approach and methodology ... 51
Chapter 3 Mascot investigations and Operation Florida ... 85
Chapter 4 Mascot structure, governance, and personnel ... 105
Chapter 5 Mascot methodology ... 123
Appendix 1 Legislative amendments to enable Operation Prospect ... 141
Appendix 2 Ombudsman jurisdiction ... 143
Appendix 3 Mascot legal and policy requirements ... 151

Volume 2: Mascot investigations – 1999

Chapter 6 Investigation of Officers A and B ... 177
Chapter 7 Investigation of Messrs F and N, and Officers C1 and J ... 221
Chapter 8 Investigation of Officers P, H and E ... 249

Volume 3: Mascot investigations – 2000 to 2002

Chapter 9 King send-off strategy and the associated warrants ... 297
Chapter 10 Investigation of Officer F ... 317
Chapter 11 Unauthorised recordings and incorrectly naming a person as an investigation subject ... 361
Chapter 12 Investigations of Officers L and G ... 387
Chapter 13 LD warrant 266/2000 becomes public ... 427

Volume 4: Mascot management of informants Paddle and Salmon

Chapter 14 Deployment and management of informant Paddle ... 455
Chapter 15 Deployment and management of informant Salmon ... 543

Volume 5: Systemic and other issues

Chapter 16 Systemic failures in Mascot processes and practices ... 575
Chapter 17 Other matters in connection to Mascot ... 633
Chapter 18 NSWCC interactions with Strike Force Emblems ... 682
Chapter 19 Improving warrant authorisation processes ... 715

Volume 6: Access to and disclosure of confidential records

Chapter 20 Access to and disclosure of confidential records – legal and policy considerations ... 775
Chapter 21 Internal access to and circulation of confidential records – events in 2010 ... 788
Chapter 22 Public dissemination of confidential records – events in 2012 ... 821
Appendix 4 List of confidential NSWPF and NSWCC documents improperly released ... 875

Volume 5 Table of Contents

Report table of contents i

Abbreviations vii

Common abbreviations of legislation viii

Glossary ix

Chapter 16. Systemic failures in Mascot processes and practices 575

16.1 Chapter overview 575

16.2 Cultural and human resource issues within Mascot 575

16.2.1 General comments of former Mascot staff members 575

16.2.2 Mascot officer comments about senior police officers 576

16.2.3 Mascot officer comments about senior NSWCC officers 578

16.2.4 The effect of secrecy requirements on staff 579

16.2.5 Ongoing and heavy workloads 580

16.2.6 Analysis 580

16.3 Induction processes for new Mascot officers 581

16.3.1 The induction experience of Mascot officers 581

16.3.2 Analysis 584

16.3.3 Finding 585

16.4 Specialist training for new Mascot officers 585

16.4.1 The training experience of Mascot officers 585

16.4.2 Analysis 588

16.4.3 Finding 589

16.5 Management, supervision and training for affidavit preparation 589

16.5.1 Mascot's use of LDs and TIs 589

16.5.2 NSWCC procedures 589

16.5.3 Evidence and submissions of Mascot staff 591

16.5.3.1 Previous experience 591

16.5.3.2 Training 592

16.5.3.3 Drafting processes and supervision and review 594

16.5.3.4 Naming individuals in affidavits 598

16.5.4 Evidence of key staff and management 600

16.5.4.1 Owen (NSWCC Solicitor) 600

16.5.4.2 Giorgiutti (Director and Solicitor to the NSWCC) 604

16.5.4.3 Standen (NSWCC Assistant Director, Investigations) 608

16.5.4.4 Bradley (NSWCC Commissioner) 610

16.5.4.5 Dolan (Superintendent - SCU Commander) 611

16.5.4.6 Burn (Inspector -Mascot Team Leader) 612

16.5.5 Analysis 613

16.5.6 Findings 618

16.6 Reliance placed on secondary documents and non-evidentiary material in affidavit preparation 619

16.6.1 Evidence about Mascot practices 619

16.6.2 Analysis 622

16.6.3 Finding 623

16.7 Reliance on warrants in deploying Sea....623
16.7.1 Evidence about Mascot practices....623
16.7.2 Analysis....624
16.7.3 Finding....625
16.8 Management of LD product....625
16.8.1 Transcribing LD product....626
16.8.2 Training in LD product management....627
16.8.3 NSWCC policies and procedures on LDs....628
16.8.4 Destruction of LD product....628
16.8.5 Analysis....630
16.8.6 Finding....630
16.9 Improving governance for current and future task forces....631
16.9.1 Recommendation....631

Chapter 17. Other matters in connection to Mascot....633

17.1 Broadening of the Mascot reference (Mascot II)....633
17.1.1 Establishment of Mascot II....633
17.1.2 Recollections about the section 25(1) Notice for the Mascot II Reference....635
17.1.3 Analysis....636
17.2 Mascot's use of integrity tests....636
17.2.1 Background to NSWPF integrity testing....637
17.2.2 Legislation and policy governing integrity tests....637
17.2.3 Difference between integrity testing and other police operations....639
17.2.4 Integrity tests conducted by Mascot in 2000....639
17.2.5 Unauthorised use of listening devices in two integrity tests....640
17.2.5.1 Integrity test in June 2000....640
17.2.5.2 Integrity test in August 2000....641
17.2.5.3 Analysis....642
17.2.6 Sea swears affidavit containing false information....642
17.2.6.1 Events leading up to the swearing of the affidavit....642
17.2.6.2 Mascot's response to Sea's conduct....644
17.2.6.3 Analysis....645
17.2.7 Bradley raised concerns about integrity tests and controlled operations....645
17.2.8 Integrity testing by Mascot in 2001....646
17.2.9 Decision-making about integrity testing....650
17.2.10 Bradley's continuing concerns....651
17.2.11 Previous investigations into integrity testing by Mascot....653
17.2.12 Analysis and submissions....653
17.2.13 Findings....655
17.3 Use of pseudonyms for Mascot persons of interest....655
17.3.1 Analysis....656
17.4 Allegation that SCIA misused telecommunications intercepts....657
17.4.1 Prohibition on disclosure of telephone intercept information....657
17.4.2 Events in July 2001....657
17.4.3 Evidence of Dolan and Brammer....658
17.4.4 Analysis and submissions....658
17.4.5 Findings....659

17.5 Impact of the delay in Mascot moving to an overt investigation 659
17.5.1 Promotional opportunities affected by unresolved allegations 659
17.5.2 Mascot's covert investigative phase 660
17.5.3 Mascot's overt investigative phase 662
17.5.4 Mascot's handling of the allegation against Officer O 665
17.5.4.1 Mascot records an allegation about Officer O 665
17.5.4.2 Mascot's investigation of the allegation about Officer O 666
17.5.4.3 Evidence of Mascot officers about delays 669
17.5.5 Analysis 670
17.6 Griffin's work with the NSWCC and as Commissioner of the PIC 671
17.6.1 Griffin's career history 671
17.6.2 Griffin's involvement in taking Sea's induced statement 672
17.6.3 Griffin's work with NSWCC informants 672
17.6.3.1 Sea672
17.6.3.2 Paddle 674
17.6.3.3 Bowand 675
17.6.4 Conclusions about the role performed by Griffin at the NSWCC 676
17.6.5 Association between Griffin and Bradley 676
17.6.6 Griffin's failure to disclose his relationship with Sea 677
17.6.6.1 Griffin's continuing contact with Sea 677
17.6.6.2 Griffin's role in Operation Florida 678
17.6.7 Analysis and submissions 679
17.6.8 Findings 680
17.7 Use of telephone interception by Operations Orwell and Jetz 680
17.7.1 Operations Orwell and Jetz 680
17.7.2 Operation Boulder 680
17.7.3 Review by the PIC Inspector 681
17.7.4 Analysis and conclusions 681
17.8 What happened to Sea? 682
17.8.1 Sea's safe house 683
17.8.2 Sea lodges a Hurt on Duty claim 684
17.8.3 Payments made to Sea 684
17.8.4 Compliance with NSWCC Informant Management Plan policy 686
17.8.5 Analysis 686

Chapter 18. NSWCC Interactions with Strike Force Emblems 687

18.1 Chapter overview 687
18.2 PIC Inspector reviews the warrant (April 2002) 688
18.3 Complaints to the NSWCC from officers named in the warrants 688
18.4 Task Force Volta established (September 2002) 689
18.5 Police Association seeks an investigation into Mascot 689
18.6 Start of Emblems (July 2003) 691
18.7 NSWCC Management Committee authorises access being given 692
18.8 Correspondence between NSWCC and NSWPF about access to documents 693
18.9 Legal advice obtained on providing access to NSWCC documents 694
18.10 Emblems continues to seek documents from the NSWCC 695
18.11 Media article and preliminary Emblems report (October 2003) 696
18.12 Alternative resolution options discussed 698

18.13 Initial discussions about referring Emblems conclusions to the DPP 699
18.14 Bradley's evidence about releasing documents to Emblems 701
18.15 Referral of Emblems to the Director of Public Prosecutions to consider sufficiency of evidence 702
18.16 Emblems discontinued (March/May 2004) 704
18.17 Bradley's submission to the Management Committee 707
18.18 Further meetings of the Management Committee about Emblems 708
18.19 NSWPF seeks advice from Office of the Director of Public Prosecutions 708
18.20 Reflections on Emblems by Bradley and Moroney 708
18.21 Analysis and submissions – interaction between NSWCC and Emblems 709
18.21.1 Framing the issues to be resolved 709
18.21.2 Approach taken by the NSWCC Commissioner 710
18.21.3 Assessment and comment 711
18.21.4 Current oversight arrangements for the NSWCC 712
18.22 Findings 713
18.23 Whether the Police Commissioner had read the Emblems report in May 2012 713
18.23.1 Analysis and conclusions 714

Chapter 19. Improving the warrant authorisation processes 715
19.1 Chapter overview 715
19.2 Background – privacy and laws for covert surveillance technologies in NSW 716
19.2.1 Introduction of listening and surveillance device laws 716
19.2.2 Introduction of telecommunications interception laws 718
19.2.2.1 Extending controls over TI powers to State law enforcement agencies 718
19.2.2.2 Concerns about the TI Act (Cth) 719
19.2.2.3 Concerns about the TI (NSW) Act 720
19.3 LD and TI warrants issued during the Mascot investigations 721
19.4 Issues identified in relation to the Mascot warrants 723
19.4.1 Naming individuals without reasons or sufficient evidence 723
19.4.2 Failing to distinguish subjects of investigation from others named 725
19.4.3 Rolling over successive warrants without investigative outcomes 725
19.4.4 Naming individuals who would not be recorded 725
19.4.5 Weak or inaccurate information or failing to note all relevant information 727
19.5 Legislative safeguards in force during Mascot investigations 728
19.5.1 Listening Devices Act 1984 728
19.5.1.1 Overview 728
19.5.1.2 Warrant authorisation process 729
19.5.1.3 Advance notice reports issued by the Mascot investigators 731
19.5.1.4 Post-authorisation section 19 reports 731
19.5.1.5 Post-authorisation reports issued by the Mascot investigators 732
19.5.1.6 Other legislative provisions protecting privacy and the public interest 733
***19.5.2 Telecommunications (Interception) Act 1979* (Cth) 733**
19.5.2.1 Legislative safeguards in the TI Act at the time of the Mascot investigations 734
19.5.2.2 Warrant authorisation process 735
19.5.2.3 Legislative provisions protecting privacy and public interest 736

19.6 Current laws for using covert surveillance technologies **737**

19.6.1 Surveillance Devices Act 2007 ..... ***737***

19.6.1.1 Overview 737
19.6.1.2 Warrant authorisation process 738
19.6.1.3 Accountability within the authorisation process 739
19.6.1.4 Giving reasons for decisions 741
19.6.1.5 Post-authorisation reports under the Surveillance Devices Act 2007 741
19.6.1.6 Inspection and monitoring of compliance with the SD Act 2007 742
19.6.1.7 Legislative provisions protecting privacy and the public interest 743

19.6.2 Telecommunications (Interception and Access) Act 1979 **(Cth)** **743**

19.6.2.1 Overview 743
19.6.2.2 Warrant authorisation process 743
19.6.2.3 Legislative provisions protecting privacy and the public interest 744

19.7 Current uses of covert surveillance technologies in NSW **746**

19.7.1 Data on SD warrants rejected and granted 746
19.7.2 Data on TI warrants granted and rejected 748
19.7.3 Comparing NSW with other jurisdictions 750
19.7.4 Factors driving the rising use of covert surveillance technologies 751

19.8 Protecting privacy and the public interest before granting a warrant **751**

19.8.1 Opportunities to intervene before a warrant is granted 752
19.8.2 Weaknesses in the current warrant authorisation processes 753
19.8.3 Mitigating against the vulnerabilities exposed by the Mascot warrants 754

19.9 Options for strengthening the warrant authorisation safeguards **755**

19.9.1 Increase the number of authorities to grant SD warrants 756
19.9.2 Expand and clarify the Attorney General's existing functions 758
19.9.3 Establish a Public Interest Monitor 759
19.9.3.1 What is a public interest monitor? 760
19.9.3.2 Functions of Queensland's Public Interest Monitor 760
19.9.3.3 Functions of Victoria's Public Interest Monitor 761
19.9.3.4 Role of the Public Interest Monitor in the application process 762
19.9.4 Preferred model for NSW 762
19.9.4.1 Need for a Public Interest Monitor in NSW 762
19.9.4.2 Defining the function of NSW's proposed Public Interest Monitor 763
19.9.5 Recommendations 765

19.10 Additional legislative changes to improve warrant authorisations **766**

19.10.1 Distinguish the 'targets' of covert surveillance from others named in the warrant 766
19.10.1.1 Recommendation 767
19.10.2 Require full disclosure of information adverse to warrant applications and make it an offence to fail to do so 768
19.10.2.1 Recommendations 769
19.10.3 Include a privacy-focused objects clause in the SD Act 769
19.10.3.1 Recommendation 770

19.11 Improving accountability after SD warrants are granted **770**

19.11.1 Reports on the results of surveillance 770
19.11.1.1 Post-authorisation reports under the LD Act 770
19.11.1.2 Unauthorised recordings not detected in reports 771
19.11.1.3 Post-authorisation reports and the Public Interest Monitor 772
19.11.1.4 Recommendations 772
19.11.2 Greater detail in the Attorney General's annual reports 772
19.11.2.1 Recommendations 774

Abbreviations

AAT	Administrative Appeals Tribunal
AFP	Australian Federal Police
AHU	Armed Hold Up Unit or Squad
ASIO	Australian Security Intelligence Organisation
CAR	Contact Advice Report
CIS	Complaints Information System
CMT	Complaints Management Team
COP	Commissioner of Police
COPS	Computerised Operational Policing System
COU	Covert Operations Unit
DEA	Drug Enforcement Agency
DPC	Department of Premier and Cabinet
DPP	Director of Public Prosecutions
DTC	Davidson Trahaire Corpsych
ERISP	Electronic Recorded Interview of Suspected Person
HOD	hurt on duty
IA	Internal Affairs
ICAC	Independent Commission Against Corruption
IPC	internal police complainant
IR	Information Report
ITTU	Information Technology and Telecommunications Unit
ITU	Integrity Testing Unit
IU	Investigations Unit
IWI	Interception Warrant Information
LAC	Local Area Command
LECC	Law Enforcement Conduct Commission
LD	listening device
LII	lawfully intercepted information
LRO	Legal Representation Office
MCSN	Major Crime Squad North
MCSS	Major Crime Squad South
MOU	Memorandum of Understanding
MSO	Mascot Subject Officer
NCA	National Crime Authority
NSW	New South Wales
NSWCC	NSW Crime Commission
NSWPD	NSW Parliamentary Debates
NSWPF	NSW Police Force
NSWPS	NSW Police Service
OAG	Operational Advisory Group
OCC	Operations Coordination Committee
ODPP	Office of the Director of Public Prosecutions
OIC	officer in charge

PCB	Police and Compliance Branch, NSW Ombudsman
PIC	Police Integrity Commission
PID	public interest disclosure
PODS	Police Oversight Data Store
POI	person of interest
PSC	Professional Standards Command
RMS	Roads and Maritime Services
R/N	Registered Number
SAP	Product name for the human resources information system of the NSWPF
SASC	Strategic Assessments and Security Centre
SCIA	Special Crime and Internal Affairs Command
SCU	Special Crime Unit
SPU	Special Projects Unit
SOD	Schedule of Debrief
SOP	Standard Operating Procedure
STIB	Special Technical Investigation Branch
TI	telephone interception
TIB	Telephone Interception Branch
UB	Undercover Branch
UCO	undercover operative

Common abbreviations of legislation

CAR Act	*Criminal Assets Recovery Act 1990* (NSW)
CO Act	*Law Enforcement (Controlled Operations) Act 1997* (NSW)
CO Regulation	Law Enforcement (Controlled Operations) Regulation 1998 (NSW)
Crime Commission Act	*Crime Commission Act 2012* (NSW)
Crimes Act	*Crimes Act 1900* (NSW)
Criminal Procedure Act	*Criminal Procedure Act 1986* (NSW)
LD Act	*Listening Devices Act 1984* (NSW) (Repealed)
LECC Act	*Law Enforcement Conduct Commission Act 2016* (NSW)
NSWCC Act	*NSW Crime Commission Act 1985* (NSW) (Repealed)
Ombudsman Act	*Ombudsman Act 1974* (NSW)
PIC Act	*Police Integrity Commission Act 1996* (NSW)
PID Act	*Public Interest Disclosures Act 1994* (NSW)
Police Act	*Police Act 1990* (NSW). This Act was previously called the - *Police Service Act 1990* (NSW)
Royal Commissions Act	*Royal Commissions Act 1923* (NSW)
SD Act	*Surveillance Devices Act 2007* (NSW)
TI Act	*Telecommunications (Interception and Access) Act 1979* (Cth). This Act was previously called the *Telecommunications (Interception) Act 1979* (Cth).
TI (NSW) Act	*Telecommunications (Interception and Access) (New South Wales) Act 1987*

Glossary

The terms listed below describe those used in this report and are included to assist the reader.

affidavit	A sworn statement that can be used to support an application, in particular for a listening device or telecommunication intercept warrant.
Armed Hold Up Unit	The Armed Hold Up Unit (AHU) was attached to the Major Crime Squad North of the NSWPF. Between approximately 1987 and 1997 the AHU consisted of two teams of approximately four officers each. Evidence was given in Operation Florida that the division into teams was based largely on the geographic location of officers' residences. Officers who lived on or near the central coast formed one team and officers from the Northern Beaches area of Sydney (including Sea) formed the other. The teams were only loosely defined and it was common for officers from different teams to assist each other.
Contact Advice Report	A report that is an account of any contact with an informant to be completed by the case officer.
controlled operation	A police operation conducted for the purpose of obtaining evidence and/or arresting any person that involves activity that, but for section 16 of the *Law Enforcement (Controlled Operations) Act 1997* would be considered unlawful.
covert operation	An operation where the role of the police is concealed from the targets of the operation and that utilises investigative methods such as undercover operatives, listening devices and telephone intercepts.
deployment	Tasking an informant or undercover operative to undertake a particular activity to assist an investigation.
deponent	A person who swears (or deposes) that the contents of an affidavit are true and correct to the best of their knowledge.
Duty Book	Duty Books may be issued to NSW police officers on criminal investigation or specialist duties. Officers are required to record the following in pen: • time commencing and completing each duty • places visited, people spoken to and actions taken • start, finish and meal times and rest days. Entries are required to be signed by the officer and checked regularly by supervisors.
c@ts.i	The complaints management system of the NSWPF. It is used to record, manage and report on complaints about police officers and local management issues.
exculpatory evidence	Evidence that suggests or points towards the innocence of a person.
e@gle.i	The investigation management system of the NSWPF that allows police officers to capture and report information gathered during the investigation of a crime.
green-lighting	When police permit people to undertake criminal activities such as robberies or drug dealing, in return for money and/or information. That is, it is not a controlled operation and is unlawful.
Gymea reference	In 1996 the Gymea reference was referred by the NSWCC Management Committee to the NSWCC to investigate organised crime (including drug trafficking and money laundering), and the associated involvement of corrupt police. The Gymea reference was reissued on a number of occasions between 1996 and 2003. It was initially staffed by NSWCC officers but expanded in 1997 to involve the Special Projects Unit of the NSWPF Internal Affairs Command.
handler	Officer assigned as the main contact point for a registered police or NSWCC informant.
hot spot	Location where a check conducted by a handheld battery operated device indicates a listening device may be installed.
inculpatory evidence	Evidence that suggests or points towards the guilt of a person.
[Ind]	Indistinct or indecipherable audio that is unable to be transcribed.
indemnity	Under section 32 of the *Criminal Procedure Act 1986*, police may apply to the Attorney General via the Director of Public Prosecutions for an indemnity from prosecution to be granted to a person for a specific offence or in respect of specified acts or omissions. The indemnity formally protects the person against prosecution for specified matters in exchange for assistance provided to investigators.
induced statement	An 'induced statement', or one taken following 'an inducement', is a formal statement taken from a person on the basis that the information provided will not be used against the person making the statement in any criminal proceedings.
Information Report	A written report completed by Mascot officers as a formal record of actions that occurred.
integrity test	Part 10A of the *Police Act 1990* empowers the NSWPF to conduct integrity testing of its own officers. Under section 207A a designated person may offer a police officer the opportunity to engage in certain behaviour to test the officer's integrity. The behaviour of the officer being tested is assessed against NSWPF policy and legislative requirements. The objectives of integrity testing are to test for corrupt conduct, defer corrupt behaviour and analyse NSWPF systems, processes and procedures to reduce potential corrupt activity.

Internal Affairs	The investigations unit within Special Crime and Internal Affairs, established in 1999.
letter of assistance	A letter provided by the NSWPF or the NSWCC to a sentencing judge that details assistance given by an offender to police with a view to seeking a sentence reduction for that offender. This practice is enshrined in section 23 of the Crimes (Sentencing Procedure) Act 1999.
listening device	Any instrument, apparatus, equipment or device capable of being used to record or listen to a private conversation simultaneously with its taking place (LD Act, s.3). The device could either be body worn or installed on premises, vehicles or an item such as a briefcase.
load/loading	To plant false evidence on a person suspected of criminal activity. Also, to 'load up', or 'load'.
Major Crime Squad North	The Major Crime Squad North (MCSN) of the NSWPF was located in Chatswood, Sydney from approximately 1985. There were a number of Units attached to the MCSN in this period including an Armed Hold Up Unit, a Homicide Unit, a Child Mistreatment Unit and an Arson Unit.
Major Crime Squad South	The Major Crime Squad South (MCSS) of the NSWPF was located at the Sydney Police Centre, Surry Hills. As with the Major Crime Squad North, there were a number of units attached to it including an Armed Hold up unit and a Homicide Unit. The MCSS is occasionally referred to as the "South Region" squad in this report.
Mascot reference	On 9 February 1999 the NSWCC Management Committee referred the Mascot reference to the NSWCC to investigate drug offences, money laundering and conspiracies to pervert the course of justice by a number of people including serving and retired police officers. The allegations under investigation initiated from the disclosures by a serving police officer code-named Sea regarding his involvement in corrupt and criminal activities and that of his colleagues. NSWCC staff and members of the Special Crime Unit of the NSWPF were utilised for this investigation.
Mascot Subject Officer	A person who was a serving police officer when named in Mascot's Schedule of Debrief as being involved in corrupt or criminal conduct and who was subsequently investigated by Mascot investigators.
Mascot target	A person who was investigated by Mascot investigators.
Mascot II reference	On 9 November 2000 the NSWCC Management Committee referred Mascot II to the NSWCC. This reference was broader than Mascot. It expanded the list of potential people to be investigated to include all former and serving police officers and the scope of the reference was extended to include the investigation of larceny and corruption offences. NSWCC staff and members of the Special Crime Unit of the NSWPF were utilised for this investigation.
NSWCC Management Committee	The NSWCC Management Committee is constituted under Part 3 of the New South Wales Crime Commission Act 1985 (NSWCC Act). During the Mascot references the Management Committee was made up of the Minister for Police, the NSWCC Commissioner, the Commissioner of Police, the Commissioner of the Australian Federal Police and the chairman or another nominated member of the then National Crime Authority, or from June 2003, the chair of the Board of the Australian Crime Commission. The principal functions of the Management Committee are set out in section 25 of the NSWCC Act and include referral by written notice matters relating to relevant criminal activities to the NSWCC for investigation.
Oberon and Oberon II references	The Oberon reference was granted in 1999 requiring the NSWCC to investigate a number of murders committed between 1970 and 1999. Also in 1999, the Oberon II reference was granted requiring the NSWCC to investigate the murder and conspiracy to murder a number of specified people.
Operation Boat	Operation Boat was a subsidiary of the Mascot investigations that used Sea to investigate allegations that officers had fabricated evidence.
Operation Boulder	Operation Boulder was established by the PIC in 2006 following an allegation by a target of Operation Orwell/Jetz, that Special Crime and Internal Affairs investigators had used false or misleading information to obtain telephone intercept warrants, and misused the information obtained by telephone interception. The PIC found there was no evidence to support the allegation and no further action was taken.
Operation Florida	In October 2001 the PIC commenced a public hearing program named Operation Florida based on the evidence collected by Mascot investigators. Operation Florida is also referred to as being the overt phase of Mascot. The PIC reported to Parliament in June 2004.
Operation Jade	In March 1997 the NSWCC notified the PIC of their suspicion that a former Task Force Bax investigator had disseminated confidential police information to a convicted criminal in the course of Task Force Bax. The NSWCC and PIC jointly established Operation Jade and held public hearings from November 1997. The PIC reported to Parliament in October 1998.
Operation Naman	In 2001 Operation Orwell was established by the NSWPF and located in SCIA to investigate allegations that police officers were involved in the corrupt manipulation of the NSWPF promotion system. Assistance was sought from PIC and in June 2001 the PIC established Operation Jetz. A taskforce of SCIA and PIC officers was set up and a report to Parliament was presented by the PIC in 2003.
	Operation Naman was established in 1999 by the NSWPF to investigate police misconduct in the 1994 arrest of Mr O, Mr M, and Paddle for the attempted armed robbery of a club in Coffs Harbour in 1994. Operation Naman was located in Internal Affairs.
Operation Orwell/Jetz	In 2001 Operation Orwell was established by the NSWPF and located in SCIA to investigate allegations that police officers were involved in the corrupt manipulation of the NSWPF promotion system. Assistance was sought from PIC and in June 2001 the PIC established Operation Jetz. A taskforce of SCIA and PIC officers was set up and PIC reported to Parliament in 2003.

Operation Pelican	In 2000 the PIC commenced an investigation into the police investigations of the death of Phillip Dilworth at Petersham in 1986, the shooting and wounding of Gary Mitchell at Concord in 1988, and the subsequent murder of Mitchell at Armidale in 1996. The PIC reported to Parliament in 2001. Operation Pelican was a joint investigation between PIC, SCIA and the NSWCC.
plant/planting	Police corruptly placing evidence of wrongdoing in a person's house, possession or vehicle, so they can then claim the evidence belongs to that person and arrest them. Examples include placing illicit drugs or guns in a person's home.
Professional Standards Command	The NSWPF established the Professional Standards Command (PSC) in 2003. It amalgamated three commands, including Special Crime and Internal Affairs. The PSC has responsibility for setting standards for performance, conduct and integrity within the NSWPF and is responsible for investigating serious criminal allegations and corrupt conduct by NSW police officers. It is the main point of contact for external agencies such as the NSW Ombudsman, the PIC, the NSW Coroner and the ICAC.
registered informant	A person formally registered with the NSWCC or the NSWPF who supplies information to assist investigations.
rollover warrants, applications or affidavits	A 'rollover' warrant is a colloquialism that means a warrant that effectively repeats or extends an earlier warrant. Affidavits supporting the extension of previous warrants were also known as 'rollover affidavits' or 'rollover applications'.
the Royal Commission	Royal Commission into the NSW Police Service was established by Letters Patent dated 13 May 1994. The Hon Justice James Wood was appointed as Commissioner. The terms of reference of the Royal Commission authorised and required it to investigate the existence and extent of systemic or entrenched corruption in the NSW Police Service as it was known then. The Royal Commission delivered its final reports in 1997.
Schedule of Debrief	The schedule that details the allegations made by Sea in his initial debrief about police corruption including details of offences, dates of offences, and the identities of individuals involved. The first Schedule of Debrief was handwritten and was completed on 13 January 1999, using information from the original debrief interviews with Sea between 7 and 11 January 1999. It was then converted into an electronic document in late January 1999 and was added to and altered throughout the Mascot investigations. Each allegation was allocated a number, referred to as 'SOD' by Mascot investigators.
Special Crime and Internal Affairs	In 1999 Special Crime and Internal Affairs (SCIA) replaced the Internal Affairs Command of the NSWPF in a restructure. The primary focus of SCIA was to investigate organised crime groups and any links with corrupt police. SCIA was divided into two divisions – Command and Operations – each made up of smaller units. The Command division included units responsible for liaising with the PIC and providing legal, advisory and support services. The Operations division contained five units – the Investigations Unit (known colloquially as Internal Affairs), the Integrity Testing Unit, the Special Crime Unit, the Strategic Assessment and Security Centre, and the System and Process Inspection Unit.
Special Crime Unit	In 1999 the NSWPF replaced the Special Projects Unit with the Special Crime Unit (SCU) in a restructure. The Special Crime Unit was located within SCIA.
Special Projects Unit	The Special Projects Unit (SPU) was established within the Internal Affairs Command of the NSWPF in 1997. Its role was to investigate organised crime groups that may have been assisted by corrupt police as part of the NSWCC Gymea reference.
Strategic Assessments and Security Centre	The Strategic Assessments and Security Centre of the NSWPF was located within SCIA and undertook a range of intelligence based work, such as compiling profiles of people of interest to investigations and risk assessments.
Strike Force Banks	Strike Force Banks was established by the NSWPF in 1997 to investigate complaints received about the activities of SCIA that were not related to Mascot.
Strike Force Emblems	In July 2003 the NSWPF established Strike Force Emblems to investigate a range of matters relating to the investigations conducted under the NSWCC Mascot and Mascot II references. Strike Force Emblems advised that it was unable to make a finding on many of the matters that fell within the investigation as it had been denied access to relevant source material by the NSWCC. The final report of Strike Force Emblems was never made public.
Strike Force Jooriland	Strike Force Jooriland was established in 2012 by the NSWPF within the Professional Standards Command to investigate a number of complaints received by the NSWPF regarding the Mascot investigations and the dissemination of confidential NSWCC and NSWPF records. The Professional Standards Command did not complete Strike Force Jooriland as it was taken over by Operation Prospect in 2012.
Strike Force Sibutu/ Operation Ivory	Strike Force Sibutu was established by the NSWPF in 2001 to investigate allegations by a former Integrity Testing Unit officer, that false and misleading information had been used by officers of that unit in LD and TI affidavits, and search warrant applications. Management and cultural issues within the Integrity Testing Unit were also investigated. The PIC's Operation Ivory concurrently investigated the allegation that false and misleading information had been used in LD and TI affidavits. The work of Strike Force Sibutu was included in the matters referred to the Ombudsman by the PIC Inspector in 2012.
Strike Force Tumen	Strike Force Tumen was established in 2002 by the NSWPF to investigate a series of complaints made by two former undercover police officers about the failure in duty of care and mismanagement by the Covert Operations Unit of the NSWPF. The work of Strike Force Tumen was included in the matters referred to the Ombudsman by the PIC Inspector in 2012.
supporting affidavit	An affidavit sworn in support of an application for a LD or TI warrant.

sweep	A check for the presence of any listening devices, using a handheld battery operated device. Also known as a 'scan'.
tasking	A piece of work assigned to a person.
Task Force Ancrum	Task Force Ancrum was established by the NSWPF in 1997 to investigate the conduct of Task Force Magnum investigators following allegations made by police officers during the Royal Commission. It was located in Internal Affairs.
Task Force Bax	Task Force Bax was established by the NSWPF in 1996 to investigate criminal activity in Kings Cross, Sydney following the emergence of evidence during the Royal Commission of corrupt relationships between police and organised crime in that area.
Task Force Borlu	Task Force Borlu was established by the NSWPF in 1997 to investigate the importation and distribution of cannabis by two individuals. Task Force Borlu was commanded by a Mascot Subject Officer.
Task Force Magnum	Task Force Magnum was established by the NSWPF in 1991 to investigate a series of armed robberies of armoured vehicles and other robberies. The Task Force Magnum team included police officers who later became targets of the Mascot investigations and of Operation Florida.
Task Force Volta	Task Force Volta was established in 2002 by the NSWPF to investigate 199 medium to low risk allegations that were not resolved by the Mascot investigations. It was located within Special Crime and Internal Affairs.
undercover operative	A person whose real identity is confidential and who is covertly deployed by a law enforcement agency to gain evidence of criminal activities as part of an investigation.
verbal/verballing	False evidence given by police that a suspect had confessed or made inculpatory remarks at the time of arrest or during an interview.

Chapter 16. Systemic failures in Mascot processes and practices

16.1 Chapter overview

The preceding chapters examined how the Mascot Task Force investigated allegations against a range of individuals. A large number of problems are highlighted, particularly in Mascot investigative strategies, the way that applications for listening devices (LDs) and telephone intercepts (TIs) were prepared, the way that informants were utilised, and how material informing the Mascot investigation was prepared.

A frequent comment in the preceding chapters is that these problems occurred because individual officers followed commonly accepted practices and processes within Mascot and the NSW Crime Commission (NSWCC). Often it was the accepted practices and processes that were inappropriate, wrong or poorly managed. This chapter draws together the threads from earlier chapters by outlining the systemic weaknesses and failures within Mascot processes that collectively contributed to the deficiencies in individual investigations.

A related problem given separate treatment is that Mascot induction and training processes were deficient. When officers start on the wrong footing, systemic weaknesses in work practices will be both magnified and entrenched. An unstable foundation will give rise to unsound results.

This chapter begins with a discussion of the workplace culture within Mascot, seen through the comments of some former Mascot officers. The comments that are selected represent the range of opinion expressed to Operation Prospect, but they are necessarily the views of individuals. Some officers expressed negative views of the Mascot work environment, while others had a positive experience in the Task Force. This sample of views offers a relevant perspective in understanding the pressures that individual officers faced, as well as the discontent and exhaustion they said they faced in undertaking demanding work that expanded in both scope and duration. At the risk of unfairly personalising the systemic themes that are addressed in this chapter, some comments are included about the style of supervision that some Mascot staff say they received. This personal dimension is included because individual Mascot staff thought it was relevant to the perspective they wished to bring to their work.

The systemic themes that are taken up in this chapter are:

- Induction of new officers
- staff supervision and training
- training and supervision in preparing affidavit
- sourcing information to include in affidavits
- the tasking and deployment of Sea
- managing LD product.

16.2 Cultural and human resource issues within Mascot

16.2.1 General comments of former Mascot staff members

An issue that has been raised from time to time in the years since the Mascot era is whether there was a negative cultural and management environment that contributed to the problems within Mascot investigations. In part this has been fuelled by media stories based on confidential NSW Police Force (NSWPF) strike force reports (Sibutu, Tumen and Banks) that were critical of management and leadership in Mascot investigations.[1]

1 See for example, Mercer, Neil. 'Bugging bombshell as secret files revealed', *Sydney Morning Herald*, 9 September 2012.

While a number of witnesses gave evidence to Operation Prospect that was critical of the culture and management practices, several others spoke positively of their experience working on Mascot investigations:

- A NSWCC analyst:

  My general memories are actually very warm. I suppose I liked working for the Commission, I got on with the people I worked with, was generally the case.[2]

- Another NSWCC analyst:

  I've got I've – I've got pride in Mascot ... I'm – I'm proud of what it achieved, I'm proud of what I contributed to it and I think people who worked in it, especially Cath Burn and – and some of the – and – and particularly some detective sergeants should be very proud of what they did. ... Um, wasn't perfect, some poor decision making occasionally I've heard, um, but no, I – I – I mean I – I refer to it indirectly in my job or indirectly in my job application certainly.3

- A Mascot investigator from 2000, when advised by Operation Prospect that other officers indicated they were unhappy working on the Mascot investigations, commented that if that was the case she was "oblivious to it".[4]
- A junior Mascot investigator from 1999 described Mascot as "a good working environment".[5]

A contrasting view was expressed by some other witnesses who told Operation Prospect of significant workplace disharmony and dissatisfaction, particularly in the later stages of Mascot. One theme was that Mascot managers were uninterested in the views of investigators or were unapproachable. Comments were also made about disagreements as to how the investigation should proceed, the pressures of working in a highly secret environment, and the ongoing heavy workloads.

16.2.2 Mascot officer comments about senior police officers

A number of comments were made by former Mascot staff about their key managers –Superintendent John Dolan (Commander of the Special Crime Unit or SCU) and Catherine Burn (Mascot Team Leader).

Some witnesses indicated that Burn and Dolan controlled every aspect of the investigation. Dolan's style was described by six witnesses as "autocratic".[6] A junior Mascot investigator said of Dolan's management style that there was "[a] lack of support, ah, overbearing demands, um, insufficient staff, ah, work hours" and a lack of training given for specialised roles.[7]

Burn was described as a micromanager,[8] "hands on"[9] and a manager who did not leave room for staff to deviate or make decisions that varied from her course.[10] Other former Mascot staff said Burn was dedicated and hard working,[11] smart,[12] professional and decisive:[13]

> *Cath was very, um, very strong and motivated to, you know, find out what was going on all the time. So she was always talking to us and always, yeah, she always knew everything that was going on.*[14]

2 Ombudsman Transcript, [a NSWCC analyst], [day] March 2014, p. 85.
3 Ombudsman Transcript, [a NSWCC analyst], [day] April 2014, p. 109.
4 Ombudsman Transcript, [a Mascot investigator], [day] March 2014, pp. 267-268.
5 Statement of Information (Interview), [a junior Mascot investigator], [day] May 2014, p. 7.
6 Statement of Information (Interview), [a Mascot investigator], [day] August 2013, p. 16; Statement of Information (Interview), [a senior Mascot investigator], [day] December 2013, p. 9; Statement of Information (Interview), [a Mascot investigator], [day] April 2014 p. 37; Statement of Information (Interview), [a Mascot investigator/case officer], [day] March 2014 p. 49; Ombudsman Transcript, [a senior Mascot investigator], [day] February 2014 p. 8; Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014 p. 35.
7 Ombudsman Transcript, [a junior Mascot investigator], [day] April 2014, p. 72.
8 Statement of Information (Interview), [a Mascot investigator], [day] August 2013, p. 16; Statement of Information (Interview), [a senior Mascot investigator], [day] May 2014, p. 26.
9 Statement of Information (Interview), [a Mascot investigator], [day] August 2013, p. 16.
10 Statement of Information (Interview), [a Mascot investigator], [day] January 2014, p. 8.
11 Statement of Information (Interview), [a junior Mascot investigator], [day] March 2014, p. 29.
12 Statement of Information (Interview), [a Mascot investigator/case officer], [day] March 2014, p. 46; Ombudsman Transcript, [a junior Mascot investigator], [day] April 2014, p. 116; Statement of Information (Interview), [a Mascot investigator], [day] April 2014, p. 40.
13 Statement of Information (Interview), [a senior Mascot investigator], [day] March 2014, p. 13.
14 Statement of Information (Interview), [a junior Mascot investigator], [day] March 2014, p. 143.

One junior Mascot investigator told Operation Prospect that Burn was:

> [T]*he type of person who would, um, not argue in overbearing but argue a point and very, very intelligent person, um, and I could have, ah, very intelligent conversation with her about pros and cons and arguments. Um, she, for me, ah, she wasn't, um, a point of you will do this, ah, she would, ah, provide an argument as to why we should do something and would listen to, ah, arguments as to what with, um, but very, very intense, intelligent person.*[15]

When asked if Burn would be receptive to arguments from others, the junior investigator replied:

> *Oh look, yeah, she would, um, she would listen to our arguments, ah, that we would put forward. Um, but also would, um, provide an argument back as to her views on the way, um, activities, ah, should be conducted. Um, she – I don't recall her ever, um, saying to us, or to me individually, um, you will do this, I am directing you to do this. Um, she's not that type of person or she's never been that type person for me or to me ... Um, but, um, very convincing in her arguments ... As I said, very intelligent person.*[16]

Others held a contrary view, that it was very much Burn who ran the day-to-day operation, stating that "what Cath said went".[17]

In her written submission, Burn rejected the suggestion that normal lines of reporting were not followed in Mascot or that she directed junior staff who were being supervised by others. She stated:

> *Within the Mascot team, the police reporting structure was the usual one, with Sergeants reporting to Senior Sergeants, Senior Sergeants reporting to me, and me reporting to Dolan ... I reject the suggestion that I told everyone what to do. I note, in relation to analysts such as* [a NSWCC analyst], *that police within Mascot were not responsible for supervision; this fell to more senior NSWCC figures such as Standen and Bradley as well as* [the NSWCC senior monitor]*...*[18]

A Mascot investigator who joined Mascot in October 2000 told Operation Prospect that some staff had a fear of speaking out, due to concerns of being ridiculed in front of the Mascot team.[19] The same officer expressed frustration at not being "trusted to even make simple decisions on your own investigation".[20] Another officer who started in Mascot as a Senior Sergeant in August 2000 recalled that staff views would sometimes just be dismissed, "and it got – got to a point where people didn't want to throw their hand up or say anything, because you virtually knew at the end of the day it was going to go one way".[21]

Another Mascot investigator and case officer told Operation Prospect that the investigative group started to question "the practices targeting and why we were doing certain things".[22]

Other officers who raised concerns about their health and the workplace conditions in the Mascot team gave evidence that their concerns were dismissed. One described raising quite serious health concerns but claimed he was told he needed to continue as he was in an important position.[23] Several officers made Hurt on Duty (HOD) claims either during their time at Mascot or in the years following. This includes officers who were later medically discharged from the NSWPF.

In response to comments made in submissions about Mascot culture and management practices, Burn submitted that it was relevant to consider the difficult relationship that she had with Dolan as her supervisor. She commented that she performed her role "under extremely difficult and dysfunctional circumstances, given my supervisor's domineering nature".[24] She commented that she "simply did not have the degree of authority or

15 Statement of Information (Interview), [a Mascot investigator/case officer], [day] March 2014, p. 46.
16 Statement of Information (Interview), [a Mascot investigator/case officer], [day] March 2014, p. 46.
17 Ombudsman Transcript, [a NSWCC analyst], [day] April 2014, p. 52.
18 Burn, C, Submission in reply, 25 September 2015, Appendix 4, p. 4.
19 Statement of Information (Interview), [a Mascot investigator], [day] August 2013,pp. 9-10.
20 Statement of Information (Interview), [a Mascot investigator], [day] August 2013, p. 26.
21 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 19.
22 Statement of Information (Interview), [a Mascot investigator/case officer], [day] March 2014, p. 101.
23 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 56.
24 Burn, C, Submission in reply, 25 September 2015, Appendix 2, p. 4.

control that is attributed to me throughout the Submissions, due to the particular role played by Dolan".[25] Burn's view was repeated in the evidence of some other witnesses.

Dolan, on the other hand, drew attention to the difficult and unpopular role that he was asked to perform in investigating corruption within the police force – he told Operation Prospect he "was the most hated man in the police service".[26] He elaborated on that point in a written submission[27] in which he noted that the majority of Mascot staff did not want to be there and did not enjoy the work, he did not have the support and confidence of senior staff in dealing with the enormous workload, and these tensions affected his health and led to him leaving the NSWPF on a hurt on duty claim.

16.2.3 Mascot officer comments about senior NSWCC officers

Evidence given to Operation Prospect by Mascot officers said they had limited opportunity or ability to discuss their concerns about Mascot's management or decisions with senior NSWCC officers.

Most NSWPF officers working on the Mascot investigations had limited contact with the Commissioner of the NSWCC, Phillip Bradley, outside of meetings.[28] Bradley was generally held in high esteem and was considered very knowledgeable about Mascot's work and progress.[29] However, he was not someone who Mascot officers would feel comfortable approaching to discuss management or workplace issues.[30]

A number of former Mascot officers did not have a positive view of the Solicitor to the NSWCC and Director of Operations, John Giorgiutti.[31] His dislike of police was noted by one officer.[32] A senior Mascot investigator gave evidence that he "got on fine" with Giorgiutti.[33] The same investigator said Giorgiutti raised with him his concern about Dolan's manner and demeanour, which Giorgiutti felt should be taken up with the Police Commissioner and the Commander of Special Crime and Internal Affairs (SCIA).[34] This may indicate a level of concern among some senior staff of the NSWCC about Dolan's conduct and influence – though it was a concern they did not take up directly.

Former Mascot officers recalled that Mark Standen, the Assistant Director in charge of the Mascot Investigations, was generally approachable,[35] very knowledgeable[36] and would assist with processing documents such as applications for TI warrants.[37] However, a number of witnesses said their recollection was that Standen was not significantly involved in the Mascot investigations,[38] and another could not recall Standen attending staff meetings.[39] A NSWCC analyst said that Standen was the manager of investigations from a Crime Commission perspective, but he did not attend many of the daily meetings and was more hands off.[40] These recollections of a number of staff may indicate that Standen did not provide the level of supervision and management that was adequate for the Mascot investigations.

25 Burn, C, Submission in reply, 25 September 2015, Appendix 2, p. 4.
26 Ombudsman Transcript, John Dolan, 31 October 2016, p. 2609.
27 Dolan, J, Submission in reply, 26 October 2016, pp. 2-4.
28 Ombudsman Transcript, [a Mascot investigator], [day] March 2014, p. 50; Ombudsman Transcript, [a NSWCC analyst], [day] April 2014, pp. 62-63.
29 Statement of Information (Interview), [a senior Mascot investigator], [day] December 2013, p. 11; Statement of Information (Interview), [a Mascot investigator], [day] January 2014, p. 11; Statement of Information (Interview), [a junior Mascot investigator], [day] March 2014, p. 31 ; Statement of Information (Interview), [a senior Mascot investigator], [day] March 2014, p. 19.
30 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 41.
31 Statement of Information (Interview), [a Mascot investigator], [day] August 2013, pp. 25-26; Ombudsman Transcript, [a Mascot investigator], [day] March 2014, p. 56.
32 Ombudsman Transcript, [a junior Mascot investigator], [day] March 2014, p. 69.
33 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 185.
34 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, pp. 21-22.
35 Statement of Information (Interview), [a Mascot investigator/case officer], [day] March 2014, p. 54; Ombudsman Transcript, [a junior Mascot investigator], [day] March 2014, p. 75; Ombudsman Transcript, [a NSWCC analyst], [day] April 2014, p. 21.
36 Ombudsman Transcript, [a junior Mascot investigator], [day] April 2014, p. 206.
37 Ombudsman Transcript, [a junior Mascot investigator], [day] April 2014, p. 50; Ombudsman Transcript, [a junior Mascot investigator], [day] April 2014, p. 206.
38 Statement of Information (Interview), [a junior Mascot investigator], [day] May 2014, p. 53; Statement of Information (Interview), [a Mascot investigator], [day] August 2013, p. 98; Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 41.
39 Statement of Information (Interview), [a junior Mascot investigator], [day] March 2014, p. 64.
40 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, pp. 20-21.

16.2.4 The effect of secrecy requirements on staff

Secrecy was a necessary element of Mascot processes. It was essential that Sea's role in Mascot was not revealed – for both his own safety and the results that he could deliver. Mascot was highly successful in keeping Sea's role secret.

The nature and complexity of the Mascot investigations also meant that individual staff members would not necessarily be aware of some aspects or lines of inquiry being undertaken. Staff would not be involved in operational decision-making on all issues.

While necessary and understandable, the secrecy appears to have contributed to the negative cultural atmosphere that developed as Mascot progressed. Some former Mascot staff described the secrecy they encountered within Mascot as inhibiting their ability to fully understand what they were being tasked to do and preventing them from speaking with family, friends and colleagues outside of Mascot. One junior Mascot investigator told Operation Prospect there was a lack of trust within Mascot and that things were kept secret from different team members.[41] Another Mascot investigator submitted that as he and others "were not privy to all information it is hardly surprising that ... mistakes or errors have been able to be identified" by Operation Prospect.[42]

A number of Mascot investigators told Operation Prospect about the pressure and problems arising from the secrecy requirements in Mascot. The following is a selection of their comments:

> *We were told we weren't even allowed to socialise with other police and we certainly weren't allowed to speak about anything we were doing.*[43]

> *But gees, there was – we – we were like mushrooms, you know, you sit in the dark, do your work and it was like a little caboose, you don't sort of turn around, you don't do anything, you went across the street and got a coffee, you come back, you sat at the caboose, you ate at the table and you didn't talk to anyone, you know, it was that kind of environment ...*[44]

> *And we used to talk every day because we couldn't talk to anybody outside... so it created an environment whereby it was basically like you were in your own bubble. You know, and you were terrified to talk to – who are you going to talk to?*[45]

> *... careers were put on hold because they wouldn't let you relieve or go to certain places to get experience, um, you weren't allowed to talk about the references you're working on and your job applications because if you go to a job application, what have you been doing the past three years, I can't tell you. So I – how are you going to get a job.*[46]

A related issue that appeared to cause disharmony was the experience of some investigators who joined Mascot in the later stages of the investigations. They felt excluded by the original investigators. One investigator told Operation Prospect that the original Mascot investigators were a distinct group from those who joined later. There was a divide between these two groups, and the group that arrived later generally held the greater concerns about Mascot processes.[47]

41 Ombudsman Transcript, [a junior Mascot investigator], [day] April 2014, pp. 48-49.
42 [A Mascot investigator], Submission in reply, [day] August 2015, p. 4.
43 Statement of Information (Interview), [a Mascot investigator], [day] April 2014, p. 24.
44 Ombudsman Transcript, [a junior Mascot investigator], [day] April 2014, p. 81.
45 Statement of Information (Interview), [a Mascot investigator], [day] August 2013, p. 42.
46 Statement of Information (Interview), [a Mascot investigator], [day] January 2014, p. 13.
47 Statement of Information (Interview), [a Mascot investigator /case officer], [day] March 2014, p. 28.

16.2.5 Ongoing and heavy workloads

Many Mascot investigators told Operation Prospect that the workload was demanding and relentless and took a toll on their physical and mental health.[48] One Mascot investigator told Operation Prospect that "there may have been some sloppy work carried out, I guess, under the – under the, um – pressure of the workload".[49] Another said that there was "pressure because the workload ...was huge for – for the amount of people".[50] A further investigator on Mascot stated:

> *... for most of the times it was pretty full on and, um, Ma'am Burn expected people to be available 24/7. I know there is no such thing, and - and this is contrary to normal police procedure, of, um, nobody got paid on-call allowance even though we were often called outside of hours. Um, so that obviously added to the stress ...*[51]

When Andrew Scipione started as Commander of SCIA in April 2001, he engaged a planning improvement advisor to conduct a review of SCIA. The review considered all of SCIA's work, but identified particular issues within the Mascot police team. Through debriefs with staff, the review identified a range of issues relating to human resources and leadership, including staff perceiving the leadership as being "autocratic" and staff experiencing "stress, burnout and family pressures".[52]

This is consistent with the evidence to Operation Prospect of a NSWCC analyst who said he recalled a couple of police officers in Mascot who had the normal grumblings about work, but may have been "just sick of it, the matter was dragging on and it – and it did drag on".[53]

Superintendent Mark Wright came to Mascot in 2002 as Commander. In part, his role was to address workplace issues. He described the pressures felt by Mascot staff in evidence to Operation Prospect:

> *Um, a lot of the staff – a lot of the staff that had really – when I say real issues, um, had left, ah, they were either off sick or they – or on leave or they had been moved elsewhere. Ah, and I was managing file*[s] *that were coming through about back paying for industrial award, you know, I - you know, officers being given a mobile phone, um, told that they had to hold it for the next year and a half, um, no-one else was allowed to – access to it, holidays 24/7, and there was no on-call allowance provided. So there was a range of those sort of issues.*[54]

Wright gave an example of the condition of one member of the Mascot staff before giving his views on a broader basis:

> *Um, but as I said, it was – it was more – the dealings I had with him was about getting him back on track and getting him support, as opposed to him actually telling me what the, you know, the issue was, whether it was – a lot of it was workload. A lot of it – the perception I got was they were just exhausted, they had just been flogged. Ah, that's pretty bad when others - but they just appeared to be drained, exhausted, they were under constant pressure ...*[55]

16.2.6 Analysis

While there was diversity in the views expressed by former Mascot staff members in their evidence to Operation Prospect, it appears there were significant cultural and management issues within Mascot that were not properly addressed. These issues arose in investigations and in the relations between police and NSWCC staff. As the Mascot investigations progressed and expanded, police officers were brought in who were

48 See for example, Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 56; Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 795.
49 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2014, p. 148.
50 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 55.
51 Statement of Information (Interview), [a Mascot investigator], [day] April 2014, pp. 188-189.
52 Anderson, J., *The improvement process for the Special Crime Unit Including the debrief of Florida Mascot: Business Improvement Final Report*, 2003, p. 9.
53 Ombudsman Transcript, [a NSWCC analyst], [day] April 2014, p. 54.
54 Statement of Information (Interview), Mark Wright, [day] March 2014, p. 27.
55 Statement of Information (Interview), Mark Wright, 27 March 2014, p. 84.

unfamiliar with the NSWCC and its investigative techniques. It was in the later stages of Mascot that significant disharmony and staff dissatisfaction appeared to be more of a problem.

Junior officers, it seems, did not feel confident to approach senior NSWCC officers to discuss problems or conditions at Mascot. This stemmed from a combination of organisational hierarchy, the conduct of NSWCC senior officers, and attitudes towards particular NSWCC officers.

The unwillingness – real or perceived – of both NSWCC and police management to listen to Mascot staff inhibited them from voicing their concerns or asking questions that could have been raised. This carried the distinct danger that decisions and directions could not be queried or challenged by officers who were asked to carry out particular tasks. It could compromise the ability of staff to stop and ask if what was being done was wrong. Combined with other pressures – secrecy in the workplace, high volume workload, and workplace pressure and stress over a sustained period – this cultivated an environment in which systemic failures and work practice deficiencies could emerge and continue for extended periods without recognition of the serious consequences arising.

The perceptions, views and experience of staff and investigators provide insight and context to understanding the issues outlined in the remainder of this chapter.

16.3 Induction processes for new Mascot officers

16.3.1 The induction experience of Mascot officers

A comprehensive induction process is an important means of informing and educating employees about the framework, procedures and expectations for their work. Induction training should alert new employees to the policies and practices that relate to their work, the lines of responsibility of the staff around them, and who to approach when there is a problem or question. The induction should also provide staff with details of their duties, how to perform them, relevant matters to consider, how their work integrates with the work of their colleagues and supervisors, and the overall objectives of the organisation.

Operation Prospect asked a number of witnesses about the NSWCC induction process that was followed when they joined Mascot. Standen – who was Assistant Director of the NSWCC – described the induction process as follows:

> [T]*he general process of induction was that a commission officer, usually* [A NSWCC staff member] *but occasionally* [another NSWCC staff member]*, dealt with inductions and that involved them meeting with the person or persons to be inducted, the provision of several manuals or at least a manual comprising multiple parts and the person to be inducted at some point, either then or I think later, signing a document to indicate that they had been provided with and had read the induction material. Then I think there's some formality to be completed by Phillip Bradley, the then Commissioner, to confirm the induction but that generally describes the process.*[56]

The staff who had previously worked on the NSWCC reference Gymea indicated there was no specific induction for Mascot, or that their induction involved reading an affidavit containing Sea's disclosures about corruption.[57] Some officers said that Dolan asked them to read an affidavit in support of a LD application and that they were then told they were unable to decline to join Mascot as they now knew what it was about.

56 Ombudsman Transcript, Mark Standen, 29 March 2016, p. 5.

57 Statement of Information (Interview), [a senior Mascot investigator], [day] December 2013, p. 6; Statement of Information (Interview), [a Mascot investigator], [day] March 2014, pp. 26-27; Statement of Information (Interview), [a Mascot investigator/case officer], [day] March 2014, p. 19; Statement of Information (Interview), [a junior Mascot investigator], [day] March 2014, pp. 7-8; Statement of Information (Interview), [a Mascot investigator], [day] April 2014, p. 13.

A senior Mascot investigator, who started as an investigator with Mascot in 2000 said:

> *John Dolan, um, pulled me into his office one afternoon and – and asked me whether I'd be receptive to that move, to swapping with* [a senior Mascot investigator]. *And I said that I wasn't quite sure. I didn't really know what was – it was very secretive what was going on, on the fifth floor. I said, I – although we had some idea that it was internally based, but – as opposed to the other references. Um, and I indicated that I wasn't – I wasn't keen. I certainly wasn't enthusiastic. He showed me a, ah – an affidavit, which was, um, to do with a – a listening device at that stage. He said, "Have a read of this. This will give you a bit of an idea of what's going on up there, and I'm sure you'll find it to your liking," or whatever. I've read through it. Um, and then the next day I replied to him and said, "Look, it's not something that I would like to do; a place that I would like to go to. I'm not receptive to it." He said, "Well look, it's too late. You've read the affidavit; you know what it's all about. You've got to go."*[58]

Another Mascot investigator had a similar experience. He told Operation Prospect:

> *I still vividly remember on the first day that I started there, um, John Dolan put a, um, a voluminous document – it was like a Sydney yellow pages telephone book – on the desk and said, "I want you to read this document" without having said anything to me whatsoever prior to that. "I want you just to read this document." So I started to read it and, um, it contained, um, information about a number of police who I knew. Um, a number of really high level serious allegations, corruption and, um, at the end of it – I sat there reading it for – for a substantial period of time. At the end of it, he said to me, he said, "What do you think?" And I said, "Thanks very much but it's not really for me." And he said, well, sorry, but, um, now, you've read it, there's no going back, basically, once you – now you've read the information you're now going to sign the secrecy agreement and, um, basically you're here* [coughs]. *I can't take the risk of you, um, revealing the information about the – the operation. So, um, welcome to the unit* [laughs].[59]

New police investigators were required to complete an induction form that listed some important documents to be read by new staff members. The NSWCC Investigation Manual was on the list but, surprisingly, the NSWCC LD and TI Manuals were not. One investigator who worked on Mascot from January 1999 until it was completed submitted that the failure by the NSWCC to require inductees to read the LD and TI manuals was "a serious oversight in the induction and training provide by the NSWCC to new recruits".[60]

Another Mascot investigator submitted to Operation Prospect that the induction documents were "not easily accessible" and were "lengthy and contain legalistic terminology much of which would have been beyond the comprehension of someone as inexperienced as [myself] at the time".[61]

Only one staff member who was questioned by Operation Prospect remembered anything more than signing the induction document and agreeing to read over relevant NSWCC policies. That person was a NSWCC analyst who remembered having a half day induction that involved meeting with the NSWCC Operations Support Manager, and also with Bradley.[62] None of the staff recalled their supervisors ever following up about whether they had indeed read the documents and manuals or understood them. Some did not recall being shown any particular policies or procedures at the time of joining Mascot.[63] Many officers indicated to Operation Prospect they did not recall familiarising themselves with the NSWCC policies and manuals at all.[64]

The absence of any formal induction left some officers feeling they did not understand what their role was and that of their team. One witness stated:

58 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2014, pp. 17-18.
59 Statement of Information (Interview), [a Mascot investigator], [day] August 2013, pp. 5-6.
60 [A Mascot investigator], Submission in reply, [day] November 2015, p. 21.
61 [A Mascot investigator], Submission in reply, [day] June 2015, p. 7.
62 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 6.
63 Ombudsman Transcript, [a junior Mascot investigator], [day] March 2014, p. 29; Ombudsman Transcript, [a NSWCC analyst], [day] April 2014, p. 31; Ombudsman Transcript, [a Mascot investigator], [day] March 2014, p. 20; Ombudsman Transcript [a junior Mascot investigator], [day] April 2014, p. 21; Ombudsman Transcript, [a junior Mascot investigator], [day] April 2014, p. 163; Statement of Information (Interview), [a junior Mascot investigator], [day] May 2014, p. 9.
64 Statement of Information (Interview), [a Mascot investigator], [day] March 2014, p. 27; Statement of Information (Interview), [a Mascot investigator], [day] April 2014, p. 126; Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 51.

I'll never forget it. They gave me a – a, um, a wad of paper, like, so big, said, "Read this. This is what you're doing. This is the job." And I didn't understand hardly any of it. I was so junior it was – just went over my head. I just thought, what the hell is this?[65]

Another witness, when asked about their induction stated:

Um, it was more, um, swearing in from Mr Bradley I think it was at the time, ah, signing some documentation, ah, and that was, ah, from memory that was pretty much it I think.[66]

Another Mascot officer advised in his submissions that "The induction package did not contain any background information regarding the particular operation [Mascot] to which [I] was to be assigned".[67]

Bradley told Operation Prospect that the induction process required inductees to read relevant NSWCC directions and guidelines and sign a secrecy undertaking:

The induction process was controlled by the issue of an access card. So you didn't get an access card until you'd gone through this process, which meant that you had to look at some documents, sign some pieces of paper to say you understood the secrecy provisions and this and that, and that you've read the directions and guidelines and there would be other things.[68]

When Bradley was asked if there was any system during his time as Commissioner to follow up whether or not staff actually familiarised themselves with the NSWCC policies and manuals listed on the induction form, he said "no",[69] and that he:

... basically took the view that these people were to be made aware of the fact that there were policy documents on particular topics, and that they had an obligation to familiarise themselves with them, and I'm sure that some of them would have familiarised themselves on occasions when it became an issue, such as in an informant management plan or something like that. In fact I suspected a lot of them had regard to the informant management plan.[70]

When asked if the absence of checking whether staff actually read the relevant NSWCC policies and manuals was a satisfactory process, Bradley responded:

Well, I drafted lots of things to govern relationships with employees, and essentially if you say to someone, "It is your duty to familiarise yourself with something as a condition of your access, induction, employment contract," and they don't, then you basically have a disciplinary tool. But I think as a practical measure, if you were to put hundreds of pages of material in front of a person during the induction process and expect them to read those documents, it wouldn't happen, and so the best you could hope for is to get an obligation from them to read those documents, and hope that they might, knowing that they may not.[71]

Bradley indicated that – if policy requirements were breached – the signed induction form gave the NSWCC an opportunity to take appropriate action against the staff, and that:

... having an obligation to familiarise yourself with things attached to your work is an important tool. I mean, you can say to them on an occasion when something goes wrong, 'Did you have regard to that when you said you would?'[72]

65 Ombudsman Transcript, [a junior Mascot investigator], [day] April 2014, p. 15.
66 Statement of Information (Interview), [a Mascot investigator/case officer], [day] March 2014, p. 19.
67 [A Mascot investigator], Submission in reply, [day] June 2015, p. 6.
68 Ombudsman Transcript, Phillip Bradley, 14 July 2014, p. 499.
69 Ombudsman Transcript, Phillip Bradley, 14 July 2014, p. 513.
70 Ombudsman Transcript, Phillip Bradley, 14 July 2014, p. 514.
71 Ombudsman Transcript, Phillip Bradley, 14 July 2014, p. 514.
72 Ombudsman Transcript, Phillip Bradley, 14 July 2014, p. 515.

Bradley acknowledged that a follow-up process that asked staff, within a few months of starting, to confirm in writing that they had read the policies would have been a simple way of ensuring compliance – but added:

> *Getting them to do that would be difficult. It would involve a lot of effort on the part of people to try and get them to do it, and they would regard it - there would be complaints about it being onerous or distracting, I imagine.*[73]

Bradley understood the importance of all staff being familiar and complying with NSWCC procedures. On 22 September 1999 Bradley sent an email to all NSWCC staff (including police officers working on references like Mascot) stating: "Persons submitting notices to me for signature are requested to read the Investigation Manual section dealing with this topic". [74] He sent a similar email in June 2000 after the Manual had been redrafted and notified to all staff. He reminded staff that:

> *A lot of work has gone into this document* [the NSWCC Investigation Manual]*. Bits of it are already out of date as practices change. We are currently reviewing ch. 8 to bring it into line with the analysts handbook. Pls read it carefully and raise any issues with* [a NSWCC staff member] *or your AD* [Assistant Director] *in the first instance.*[75]

Burn noted in her submission to Operation Prospect that the induction form she signed was dated 10 September 1998 and "was intended for more general purposes whilst I was still located at Internal Affairs". She stated: "I did not receive a specific induction into the NSWCC when I commenced with Mascot".[76]

16.3.2 Analysis

The induction process for new police officers joining the Mascot investigations involved signing an induction form and agreeing to read over relevant NSWCC policies and manuals. There was no induction training for new police officers joining the Mascot reference. Some of the police staff assigned to work on Mascot had little or no experience in investigations that heavily utilised electronic surveillance. Similarly, the NSWCC staff members who gave evidence to Operation Prospect also recalled similar experiences at induction – namely that it was brief and involved meeting with managers.

The induction processes were particularly inadequate for new police officers joining Mascot. Given the heavy reliance on electronic surveillance and the extensive use of LDs and TIs in Mascot investigations, the induction processes should have required confirmation that NSWCC procedures had been read and understood. Officers should have been given a briefing or training on the legal framework, processes and requirements relevant to their duties and roles on the Mascot investigations.

The responsibility for the inadequate induction process lies with the NSWCC and its senior officers. The NSWCC should have ensured that staff working on its references received adequate instruction and guidance about the nature of the work of the NSWCC – including the policies and legislation that governed the tools used by the NSWCC to conduct its operations. The senior police staff responsible for managing Mascot should also have recognised any gaps in the knowledge of staff conducting the investigation, and taken steps to ensure that those gaps were filled where appropriate. This issue is taken up again later in this chapter, where it is noted that the NSWCC retained supervisory and review responsibilities for affidavit preparation and warrant applications. The NSWCC officers who performed those supervisory and review roles should have recognised that there were gaps in staff knowledge, competence or compliance in LD and TI affidavit and warrant application processes.

73 Ombudsman Transcript, Phillip Bradley, 14 July 2014, p. 514.
74 Email from Commissioner Phillip Bradley, NSWCC to ALL (staff), NSWCC, 22 September 1999.
75 Email from Commissioner Phillip Bradley, NSWCC to ALL (staff), NSWCC, 21 June 2000.
76 Burn, C, Submission in reply, 25 September 2015, Appendix 2, p. 6.

16.3.3 Finding

69. NSW Crime Commission

The conduct of the NSW Crime Commission in failing to provide adequate induction training for new staff and investigators in the Mascot investigations was otherwise wrong in terms of section 26(1)(c) of the *Ombudsman Act 1974*. The induction training that was provided was inadequate to ensure that staff and investigators had the requisite knowledge of important NSW Crime Commission procedures and policies, particularly the listening device and telephone interception Manuals, and of the legal requirements the investigators were required to comply with in the Mascot investigations.

16.4 Specialist training for new Mascot officers

16.4.1 The training experience of Mascot officers

The inadequate induction training for Mascot staff was accompanied by inadequate specialist training after staff commenced work. An area of particular weakness was training in preparing affidavit and warrant applications, which is further discussed in section 16.5.

Operation Prospect found few records outlining any formal training provided to Mascot officers. This picture was confirmed in the oral evidence to Operation Prospect, that Mascot officers received little or no formal training about their duties in the Mascot Task Force. Some officers indicated that requests to undertake training were refused due to operational imperatives,[77] and that access to standard police training courses, expected to be done to keep up with operational skills, was restricted because the Mascot workload was too onerous to allow staff time out to do such courses.[78]

Operation Prospect received conflicting evidence about the experience that officers brought to the job in Mascot. A Mascot investigator indicated that a number of new staff had already completed NSWPF investigations or surveillance training,[79] and were expected to have the required knowledge to perform their duties. However, not all staff had such experience.[80] A junior Mascot investigator described a mixed level of experience amongst the Mascot investigators. She started as a junior officer with no investigations training. She completed the standard NSWPF detectives course while employed within Mascot, and recalled doing some surveillance training with Police Integrity Commission (PIC) staff.[81] Another Mascot investigator told Operation Prospect that staff continued with mandatory police training units. He said an education and training officer attached to SCIA came to the office from time to time to conduct such training.[82] A Mascot investigator, who at the time was at the rank of sergeant, told Operation Prospect that he provided some on-the-job training in surveillance to staff.[83]

Burn told Operation Prospect that the majority of staff who were brought into Mascot had completed the detectives training course:

> *The majority of them would have been designated detectives so they would have done the detectives training course, and – that's in the New South Wales Police Force and they would have done within that intelligence, warrants, affidavits in the course but also to become designated you actually have to work as a detective so you're also exposed to the practice of doing those things.*[84]

77 Statement of Information (Interview), [a Mascot investigator], [day] January 2014, p. 15; Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 248.
78 Statement of Information (Interview), [a senior Mascot investigator], [day] April 2014, pp. 9-10, 22.
79 Statement of Information (Interview), [a Mascot investigator], [day] January 2014, p. 16.
80 Statement of Information (Interview), [a junior Mascot investigator], [day] March 2014, p. 76.
81 Statement of Information (Interview), [a junior Mascot investigator], [day] March 2014, pp. 76-77.
82 Statement of Information (Interview), [a Mascot investigator], [day] March 2014, p. 26.
83 Statement of Information (Interview), [a Mascot investigator], [day] April 2014, p. 13.
84 Ombudsman Transcript, Catherine Burn, 15 July 2014, p. 543.

A significant number of former Mascot staff said they were not trained to perform the specific type of work they did in Mascot investigations, nor in the NSWCC procedures they were meant to implement and comply with. Many staff indicated that training was "on the job" instead of formal training.[85] One person indicated that the approach was to learn by "trial and error".[86] For example, one Mascot investigator told Operation Prospect:

Training was, um, pretty, um, limited of – of formal training I should say. ...

There was a lot of informal training that took place in terms of, you know, surveillance, um, techniques, ah, which were basically on the job training but, um, yeah, that's all I can say about that.[87]

Another Mascot investigator said that there was not really any particular induction or training and that "basically we turned up and the security fellow showed us around as access how to get in and out, and we were taken up into the our room upstairs".[88] He did not recall being given the NSWCC Investigation Manual to read.[89]

A NSWCC analyst for Mascot said "All – pretty much all the training is what I would describe as on-the-job".[90] She said that in the first six months she worked with Mascot, she would seek guidance from a more senior analyst, describing this as a "senior peer review".[91] Another NSWCC analyst with Mascot recalled receiving practical instructions about how to use the NSWCC TI system, and recalled some training on the "legal requirements" but ultimately felt there was "not a lot" of training for his role.[92]

A particular concern is that staff gave evidence they did not receive training for work that required particular expertise, and formed the basis of the Mascot investigative approach – for example, surveillance and informant management. A person who served as a NSWCC listening post monitor (monitoring TI product) said he was not given specific training as a listening post monitor, but his training was "kind of on the job".[93] Similarly, when he later became an analyst he was not given any specific training for this new role and he sought advice from colleagues about what he was required to do.[94] He said:

The – the – the issue is that they've employed somebody, um, you know, without any, sort of, training, or any – any, um, you know, without teaching me exactly what I need to know.[95]

He also indicated that when he worked in a joint task force on another NSWCC reference he received no training.[96] In general, his view was that in Mascot there was "not the level of training that's required, or, um, education", and he had more training and supervision in other workplaces "by a significant amount".[97]

A Mascot investigator who obtained her detectives designation while working as an investigator for Mascot described not knowing basic terminology about TIs when she started: "When I first got there they were talking about getting phones off, I didn't know what they were talking about, you know, so just the terminologies and stuff like that".[98] She described herself as having an underlying lack of confidence given she did not have experience in many of the duties of plain clothes officers.[99]

A Mascot investigator who worked as an investigator with Gymea for a few months before being recruited into Mascot did not recall any of the team she worked with being specifically trained to undertake surveillance duties: "none of us were – I don't recall any of us being specifically surveillance trained at the time".[100]

85 Ombudsman Transcript, [a NSWCC analyst], [day] March 2014, p. 88; Ombudsman Transcript, [a Mascot investigator], [day] March 2014, p. 24; Statement of Information (Interview), [a senior Mascot investigator], [day] May 2014, p. 15.
86 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 66.
87 Statement of Information (Interview), [a Mascot investigator], [day] March 2014, p. 26.
88 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 788.
89 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 808.
90 Ombudsman Transcript, [a NSWCC analyst], [day] March 2014, p. 87.
91 Ombudsman Transcript, [a NSWCC analyst], [day] March 2014, p. 89.
92 Ombudsman Transcript, [a NSWCC analyst], [day] April 2014, pp. 20-21.(
93 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 7.
94 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, pp. 88-89.
95 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 212.
96 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 217.
97 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 296.
98 Ombudsman Transcript, [a Mascot investigator], [day] March 2014, p. 24.
99 Ombudsman Transcript, [a Mascot investigator], [day] March 2014, p. 24.
100 Statement of Information (Interview), [a Mascot investigator], [day] April 2014, p. 74.

A senior Mascot investigator, whose role primarily involved surveillance, had no previous experience in doing surveillance work before the Mascot investigations. She said she did not receive any training in surveillance, and thought it would have been helpful to have had some.[101] She thought the other detectives she worked with did not have surveillance experience or training either.[102] She stated "Um, I –I –I'm not aware of anyone who had formal surveillance training".[103] When her duties came to involve applying for TIs and monitoring TI product she did not receive any training for these duties. She did not recall any training or briefing from anyone at the NSWCC.[104]

Another senior Mascot investigator also commented that a number of Mascot staff were deployed to do surveillance work without any training in doing that kind of work.[105] He told Operation Prospect that he complained to Dolan and Burn about the lack of training, but he felt his complaint fell on deaf ears.[106]

Operation Prospect received evidence that people staffing the listening posts and listening to TI product were temporary employees, often university students.[107] It is probable they had no background training in areas that would be a strong requirement for that type of work, such as training in TI processes and investigation.

A Mascot investigator told Operation Prospect he was never given any formal training in informant management before starting his role as Sea's handler or case officer, [108] stating: "They never put me through any courses for that".[109] He said it was the investigators who controlled the informant, and he was "virtually told what to do", often by verbal instructions.[110] He agreed that the risks associated with sending Sea out as an informant with LDs was poorly managed, particularly in light of the lack of training he and other handlers received.[111] He indicated that he was not given any guidance about what to do if Sea was suddenly exposed.[112] He thought the general plan was that if that happened, Sea would go into a safe house.[113]

Operation Prospect received evidence that staff tasked with doing undercover work had never received any training for those duties, despite the obvious danger associated with doing undercover work and interacting with serious criminals.[114] One officer said: "it was just what was – you were expected to do".[115] None of the witnesses indicated having received training in the procedures for managing NSWCC informants – which were different to procedures the NSWPF used to manage their informants.

One Mascot investigator submitted that "criticisms that [I have] attracted ... speak of a systemic failure in the investigation compounded by resource and training deficiencies".[116] Another Mascot investigator of the same rank submitted that he "was provided with limited training, in respect of operations and tests, at the NSWCC".[117] He further submitted that "there was no training or education of NSWCC investigators other than a miniscule amount identified".[118]

It appears that Sea was also not given any training in relation to the role he was tasked to perform as an informant.[119] He was not given formal training about using a body wire, but figured out how to wear one after a handler inserted one in his shirt.[120]

101 Statement of Information (Interview), [a senior Mascot investigator], [day] May 2014, p. 33.
102 Statement of Information (Interview), [a senior Mascot investigator], [day] May 2014, p. 33.
103 Statement of Information (Interview), [a senior Mascot investigator], [day] May 2014, p. 34.
104 Statement of Information (Interview), [a Mascot investigator], [day] April 2014, p. 115.
105 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 248.
106 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 56.
107 Ombudsman Transcript, [a NSWCC analyst], [day] March 2014, p. 4; Ombudsman Transcript, John Dolan, 31 October 2014, p. 2593; Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 251.
108 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 219.
109 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 150.
110 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 219.
111 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 150.
112 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, pp. 220-221.
113 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 221.
114 Ombudsman Transcript, [a junior Mascot investigator], [day] April 2014, pp. 72, 241.
115 Ombudsman Transcript, [a junior Mascot investigator], 14 April 2014, p. 241.
116 [A Mascot investigator], Submission in reply, 7 September 2015, p. 5.
117 [A Mascot investigator], Submission in reply, [day] November 2015, p. 41.
118 [A Mascot investigator], Submission in reply, [day] November 2015, p. 22.
119 Statement of information (Interview), [a Mascot investigator], [day] March 2014, p. 93.
120 Ombudsman Transcript, Sea, 21 August 2013, p. 36.

He had never previously performed any covert role[121] and gave the following evidence about how he initially approached his covert work for the NSWCC:

Q: *When you talked about, um, being - when this all first occurs and they say well, here's a device, we're going to get you to go undercover, you'd been given no training at all?*

A: *Correct.*

Q: *I appreciate you were a police officer at the time.*

A: *Mmm.*

Q: *But there's a particular skill of things to be cautious of when you're doing UC* [undercover] *work.*

A: *Yes.*

Q: *So I'm thinking about you going into those first situations. Um, how did you - were you just best guessing as to how you should handle yourself or how you should commence a conversation?*

A: *Yeah, I just did what I thought I had to do.*

Q: *Yeah, so you - - -*

A: *As in try to talk about things or - - -*

Q: *Yeah, yeah, so you made it up as you went?*

A: *Yeah.*[122]

16.4.2 Analysis

The evidence shows that little training or education was made available to Mascot staff in relation to the specialised duties they discharged and the related NSWCC policies and procedures. This was a significant shortcoming – as a number of officers gave evidence they had little previous training or experience in these specialist duties. Some staff provided guidance to colleagues, but peer support was of little value if those providing guidance had not themselves been adequately trained. It was also no substitute for formal training in specialist legal and operational work such as LD and TI warrant processes, surveillance and informant management.

Specialist training was particularly important for the exercise of invasive powers that were governed by rigorous legislative requirements. The lack of formal training programs increased the likelihood that poor practice could become entrenched by expediency, particularly in a busy work environment. The evidence is clear that staff copied from others or did what they were told to do. In this way, poor practices would be repeated and quickly become entrenched – as illustrated by the routine practice of copying and pasting from previous affidavits without independently reviewing the material being copied.

Another training weakness was that Sea did not receive training adapted to his role as an informant. His staff handlers also had little or no training in informant management and NSWCC procedures and practices. This weakness was compounded by Sea's recurring health issues during his time with Mascot. Sea and the Mascot investigations were both exposed to discernible risk by this lack of specialised training.

In summary, Mascot staff received inadequate training and this significantly contributed to the problems and errors that occurred during the investigations. The repeated occurrence of basic errors throughout the life of the Mascot investigations is evidence of this. The responsibility rested on the NSWCC to do more to ensure that appropriate training was given to police and civilian officers when they started working on the Mascot references – particularly on NSWCC policies and procedures and specialised duties such as informant management, surveillance, intelligence analysis and LD and TI warrant processes.

121 Ombudsman Transcript, Sea, 21 August 2013, p. 77.
122 Ombudsman Transcript, Sea, 21 August 2013, pp. 107-108.

16.4.3 Finding

70. NSW Crime Commission

The conduct of the NSW Crime Commission in failing to provide adequate specialist training for staff in the Mascot Task Force was otherwise wrong in terms of section 26(1)(c) of the *Ombudsman Act 1974*. This failure contributed significantly to serious problems and errors occurring in the Mascot investigations, and being repeated over a protracted period without detection.

16.5 Management, supervision and training for affidavit preparation

16.5.1 Mascot's use of LDs and TIs

The use of LDs and TIs was fundamental to the Mascot investigations. As outlined in Chapter 5, Sea wore a body wire LD for virtually the entire Mascot investigations and was required to record his conversations with multiple targets. A range of other LDs were also placed in fixed locations and used to capture evidence. This heavy reliance on obtaining evidence through recorded conversations meant that Mascot investigators were continually preparing affidavits and warrant applications for LDs and TIs. A TI warrant could be active for a period of up to 90 days, but a LD warrant only for a maximum of 21 days. This meant that LD warrant applications were by far the most frequent made by Mascot staff.

Problems occurring in affidavits and warrant applications were raised in earlier chapters, including:

- TI warrants taken out in relation to Officer P (Chapter 8) and Officer F (Chapter 10)
- the "King send-off" and associated affidavits, including LD warrants 95/2000 and 266/2000 (Chapter 9)
- the Mascot investigations into particular officers and individuals (Volumes 2 – 3).

A summary list of the defects and weaknesses in Mascot affidavit preparation is given in section 16.5.5 to better understand how these problems occurred – and frequently re-occurred – it is necessary to consider the written procedures that were in place at the time in the NSWCC for preparing and reviewing affidavits and warrant applications. It is also necessary also to consider the evidence of:

- deponents and other Mascot staff about their previous experience, the training they received at Mascot in affidavit preparation, and their experience during their work at the NSWCC
- the NSWCC solicitor, who witnessed all but one of the Mascot affidavits – and his recollection of his role and how affidavit and warrant application processes operated during Mascot
- senior officers of the NSWCC – and their recollections of their roles and how affidavit and warrant application processes operated during Mascot
- senior police officers – and their recollections of their roles and how affidavit and warrant application processes operated during Mascot.

Written submissions from Mascot officers and senior officers of the NSWCC are also considered and referred to.

16.5.2 NSWCC procedures

The NSWCC had two manuals that set out directions and procedures on how to apply for a LD or TI warrant, and how to comply with the reporting requirements after a warrant was authorised:

- The *Listening Devices Manual* (LD Manual). There were two versions of the LD Manual that were in force during Mascot – one dated 29 June 1998[123] and another dated December 1999.[124]
- The *Telecommunications Interceptions User Procedure Manual* (TI Manual).[125]

The LD Manual set out six important points about LD warrant applications. Points 1 to 3 are the most relevant preparing affidavits:

> *Matters to Note*
>
> *1. Strict compliance with the Listening Devices Act is essential.*
>
> *2. Documents must be accurate as to content and form; and all assertions in affidavits are supported.*
>
> *3. Commence with an original proforma not an earlier document.*
>
> *4. Comply with the reporting requirements.*
>
> *5. Do not inconvenience the Courts on Friday afternoon or weekends if it can be avoided.*
>
> *6. Be professional: attend appointments on time, with all relevant information.*[126]

Both the LD and TI manuals emphasised that staff preparing affidavits were expected to start the affidavit preparation with a fresh, blank proforma document. The proforma set out the appropriate document style. The LD Manual emphasised that the "Proforma must not be varied without Director's permission. Fresh proforma (NOT previous documents) must be used in each case".[127] Similarly, the TI Manual (both the 1998[128] and 2001 versions[129]) stated that case officers, who were responsible for preparing the affidavits in support of applications for TI warrants, were to use the precedent affidavit (proforma) and were to stipulate the grounds of the warrant application. Presumably the intention of using a blank proforma was to avoid copying and pasting from previous documents. This stipulation was not followed in practice.

The LD Manual contained a step-by-step guide that clearly outlined the responsibilities each officer had in preparing affidavits in support of LD applications. It included the following directions:

- The decision to apply for a LD was to be agreed upon in a weekly Task Force meeting, and the Assistant Director of Investigations (ADI) – Standen in the case of Mascot – was to give approval for every application, including renewals. The case officer was responsible for approaching the ADI.
- The ADI was to advise the solicitor of the forthcoming application.
- The investigator/case officer or another senior task force officer was to prepare the affidavit and submit it to the ADI for approval.
- The ADI was to check the affidavit, "ensuring all relevant information is provided and supported", and then submit the amended affidavit to the NSWCC solicitor – generally this was Neil Owen in the case of Mascot.
- The solicitor – Owen for all but one of the Mascot warrant applications – was then required to "settle [the] affidavit ... ensuring provisions of s 16 and s 17 [of the *Listening Devices Act 1984* (repealed) (LD Act)] are complied with", and was to seek the Director's advice if necessary. The Director at all relevant times was John Giorgiutti. The solicitor was to advise the deponent of any minor changes, but resubmit the affidavit to the ADI if significant changes were made. The deponent was required to make any amendments and "submit to [the] lawyer for final check".

123 NSWCC, *Listening Devices Manual,* 29 June 1998.
124 NSWCC, *Listening Device Manual,* December 1999.
125 NSWCC, *Telecommunications Interception User Procedure Manual*, 28 July 1998.
126 NSWCC, *Listening Devices Manual,* 29 June 1998, p. 2. The December 1999 version of the LD Manual contained the same six "Matters to Note", along with a seventh point which stated "Applications for listening device warrants are made only in relation to in-house Commission investigations". NSWCC, *Listening Devices Manual*, December 1999, p. 2.
127 NSWCC, *Listening Devices Manual,* 29 June 1998, p. 26; NSWCC; *Listening Device Manual,* December 1999, p. 29.
128 NSWCC, *Telecommunications Interception User Procedure Manual*, 28 July 1998, pp. 11-15.
129 NSWCC, *Telephone Interception Manual*, June 2001, pp. 35-40.

- The solicitor was to prepare the associated documentation, including the application and the warrants.
- The Director (Giorgiutti) was responsible for approving all the documents after the application had been prepared and checked by the NSWCC solicitor.[130]

The step-by-step guide also contained directions about the various notifications that were required to be made under the LD Act. (These are not directly relevant to this discussion.)

The 1998 TI Manual states it is the case officer who is responsible for preparing a draft affidavit for a TI warrant application. It required the draft affidavit to be vetted by the NSWCC's legal officer before it is provided to the Solicitor to the Commission. The Manual states:

> *The Solicitor to the Commission determines whether or not the application for the warrant will be proceeded with ... if the Solicitor to the Commission gives permission for the application to be made ... it will be necessary for the case officer and the legal officer assigned to the matter to finalise the draft affidavit and submit it to the Solicitor to the Commission for approval.*[131]

In June 2001 a reviewed manual changed the responsibilities for TI affidavits and warrant applications. The TI Manual thereafter stated that the case officer was to discuss the intention to apply for a TI warrant with the Assistant Director (Investigations), however under this new procedure, the proposed application was to be discussed and agreed upon at the weekly operations meeting. These meetings were attended by the Commissioner, Director, Assistant Director (Investigations), and the investigation team members assigned to the investigation being discussed. Once drafted by the case officer, the Assistant Director (Investigations) was required to check the affidavit and make amendments as required. The case officer was then to make the amendments and submit the application to the team lawyer. The lawyer was required to review and settle the affidavit, ensuring that all provisions of the *Telecommunications (Interception and Access) Act 1979* (Cth) (TI Act) had been complied with. The procedure notes that if any significant alterations were made to the affidavit after the legal review, it had to be resubmitted to the Assistant Director. The final approver of this TI procedure was the NSWCC Commissioner or relevant Assistant Director (Investigations).[132]

16.5.3 Evidence and submissions of Mascot staff

Operation Prospect conducted a large number of hearings and interviews with Mascot investigators (many of whom were deponents of Mascot affidavits) and NSWCC civilian staff. The following sub-sections summarise their evidence on their prior experience in preparing affidavits, the training they received at the NSWCC, and their experience of NSWCC processes during the Mascot investigations.

16.5.3.1 Previous experience

A number of Mascot investigators told Operation Prospect they had little or no experience in obtaining LD or TI warrants before starting work on the Mascot investigations.[133] This included two investigators who were deponents of problematic affidavits discussed in preceding chapters. One noted in his submission that he had little previous experience preparing warrant applications and affidavits for either LDs or TIs,[134] and the other noted that he had no prior exposure to LD warrant applications or any prior training before commencing work at the NSWCC.[135]

130 NSWCC, *Listening Devices Manual,* 29 June 1998, pp. 25-28.

131 NSWCC, *Telecommunications Interception User Procedure Manual*, 28 July 1998, pp. 11-12.

132 NSWCC, *Telecommunications Interception User Procedure Manual*, June 2001, pp. 22-24.

133 Ombudsman Transcript, [a Mascot investigator], [day] March 2014, p. 67; Ombudsman Transcript, [a junior Mascot investigator], [day] April 2014, pp. 58-59; Statement of Information (Interview), [a Mascot investigator], [day] April 2014, p. 115; Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, pp. 194-195; Statement of Information (Interview), [a junior Mascot investigator], [day] May 2014, p. 56; Statement of Information (Interview), [a senior Mascot investigator], [day] May 2014, p. 88.

134 [A Mascot investigator], Submission in reply, [day] August 2015, p. 11.

135 [A senior Mascot investigator], Submission in reply, [day] September 2015, p. 1.

Many officers held the substantive rank of Senior Constable or Sergeant when they commenced with the Mascot investigations. It is quite likely that they had limited or no exposure to investigations in electronic surveillance. Many officers were placed on temporary or section 66 of the Police Act appointments at Mascot. Both Burn and Dolan fall within that category – Burn's substantive rank was Detective Sergeant and Dolan's was Senior Sergeant. Some officers had detective experience and would have had training and experience in criminal investigation. Nevertheless, the evidence from many witnesses was of limited or no experience in preparing affidavits and warrant applications for TIs and LDs.

16.5.3.2 Training

The large majority of witnesses said that little to no training was provided in NSWCC procedures on preparing affidavits and warrant applications after they commenced at Mascot[136] – even though obtaining electronically recorded evidence was a primary investigative strategy used by Mascot. For example, a Mascot investigator told Operation Prospect he had never received any training in taking out applications for LDs or TIs.[137] A junior Mascot investigator who had worked on the Gymea reference before joining the Mascot reference told Operation Prospect she could not remember receiving any training in the LD and TI process.[138]

One Mascot investigator who prepared a number of Mascot affidavits told Operation Prospect that while he had acquired some prior knowledge about LD applications from a detective education program,[139] he could not specifically remember receiving training when he started working at Mascot. He noted also that the NSWCC had its own system and processes, there were many senior NSWCC people available to assist if assistance was required, and that he thought he did receive some training from one of the lawyers for the NSWCC.[140]

Another senior Mascot investigator told Operation Prospect that he had provided a single full day of training to Mascot investigation officers in "about 1999"[141] in relation to the requirements of the LD Act:

> *I did a bit of a briefing up on the TI Act, um, the Listening Devices Act, in regards to, you know, permitted purpose, usage of product, just, because a lot of – we had a lot of young staff and – and we, um, I was asked by – by John* [Dolan]*, and also* [then Team Leader on the Gymea reference]*, to do some team-specific theoretical training.* [142]

He went on to state that there was an awareness of the operational need for NSWPF officers working on the Mascot investigations to have such training, and that he was sent to a short course with the intention that he would provide similar training in future.[143] However, the senior investigator said that he only ever gave this training to Mascot officers on the one occasion:

> *And we realised, you know, that – that there was an educational need. So I guess, again, it was almost like putting on* [an education and training] *hat. And I – prior to that day, they put me on the training small groups course for a week or something for the purposes of – I think it was part of the overall model for me to train and provide that quality assurance in house. But in that time, it was the only time I ever did it.*[144]

136 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2014, pp. 21-22; Statement of Information (Interview), [a Mascot investigator], [day] January 2014, pp. 15-16; Statement of Information (Interview), [a senior Mascot investigator], [day] March 2014, p. 26; Ombudsman Transcript [a NSWCC analyst], [day] May 2014, pp. 7, 88, 211-212, 217, 223, 296; Ombudsman Transcript, [a senior Mascot investigator], day] April 2014, pp. 66-69; Ombudsman Transcript, [a Mascot investigator], [day] March 2014, p. 24; Statement of Information (Interview), [a Mascot investigator], [day] April 2014, p. 115; Statement of Information (Interview), [a junior Mascot investigator], [day] May 2014, p. 55; Statement of Information (Interview), [a senior Mascot investigator], [day] May 2014, pp. 33-34.
137 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 170.
138 Ombudsman Transcript, [a junior Mascot investigator], [day] May 2014, p. 10.
139 Ombudsman Transcript, [a senior Mascot investigator], [day] August 2014, p. 1078.
140 Ombudsman Transcript, [a senior Mascot investigator], [day] August 2014, p. 1079.
141 Statement of Information (Interview), [a senior Mascot investigator], [day] December 2013, p. 32.
142 Statement of Information (Interview), [a senior Mascot investigator], [day] December 2013, p. 32.
143 Statement of Information (Interview), [a senior Mascot investigator], [day] December 2013, p. 32.
144 Statement of Information (Interview), [a senior Mascot investigator], [day] December 2013, p. 32.

Assistant Commissioner Malcolm Brammer submitted that it was his recollection "there was an education and training program developed for the SCU including the Mascot officers"[145] – but the above evidence indicates that if this was the case, it did not result in the delivery of training to Mascot investigators other than in one session delivered in about 1999. In any case, training developed by SCIA on procedural issues would likely have been about NSWPF procedures, and not the NSWCC procedures which applied to Mascot investigators.

Another senior Mascot investigator who was the deponent on a small number of Mascot affidavits gave evidence that he "hadn't had any training of taking out LDs" during the time that he was at Mascot.[146] He stated that there was limited training given to NSWPF officers:

> *Look, we had a couple of training - pseudo training days. There was nothing specific as in - that I can recall for surveillance and others things like that we did* [at the NSWCC].[147]

Written submissions from former Mascot investigators consistently made reference to the absence of training on NSWCC LD and TI warrant application processes, as illustrated by the following selection of comments:

> [A Mascot investigator] *had received no specific training in relation to listening devices*[148]

> *There was no training in TI warrant applications ... no instructions or legal guidance on warrant applications.*[149]

> [Omissions and errors in the warrant application process made by one Mascot investigator] *resulted from a lack of training given to him to undertake the Affidavit tasks delegated to him and under-resourcing that existed in the Operation at that time."*[150]

> [T]*here were shortfalls in* [a senior Mascot investigator's] *induction and training by the NSWCC* [in affidavit deposition].[151]

The legal representative for one Mascot investigator who prepared approximately 40 Mascot affidavits, submitted on his behalf:

> *He had no formal training in regards to the drafting of affidavits in support of warrant applications. This clearly should have been done, but was not. It appears that he has relied on the instruction and advice of Ms Burn and NSWCC lawyers given he had not received specific legal training in the area. It would appear the lack of training was a shortcoming of the "system".*[152]

In her written submissions, Burn acknowledged there was little training within Mascot and that staff should have been trained in the process of applying for LDs and TIs.[153] She also noted that the opportunity for Mascot staff to attend external training was extremely limited.[154]

Bradley submitted that he had no say in the recruitment, selection, training or deployment or discipline of police.[155] Beyond that, Bradley did not make any submission to Operation Prospect on the specific question of the NSWCC providing training to staff and police officers on the LD or TI Acts, and the associated NSWCC manuals and procedures.

145 Brammer, M, Submission in reply, 14 September 2015, p. 24.
146 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 170.
147 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 250.
148 [A Mascot investigator], Submission in reply, [day] June 2015, p. 6.
149 [A senior Mascot investigator], Submission in reply, [day] October 2015, p. 2.
150 [A senior Mascot investigator], Submission in reply, [day] September 2015, p. 3.
151 [A senior Mascot investigator], Submission in reply, [day] November 2015, p. 15.
152 [A Mascot investigator], Submission in reply, [day] July 2015, p. 3.
153 Burn, C, Submission in reply, 25 September 2015, Appendix 4, pp. 3-4.
154 Burn, C, Submission in reply, 25 September 2015, Appendix 4, p. 4.
155 Bradley, P, Submission in reply, 28 September 2015, p. 8.

16.5.3.3 Drafting processes and supervision and review

The purpose of a LD or TI affidavit was to provide sworn evidence that could be relied upon by an authorising judge, magistrate or Administrative Appeals Tribunal (AAT) member. The deponent of the affidavit would swear to the truth and accuracy of their belief that certain offences had been or might be committed, that it was necessary for the investigation of the offences to obtain evidence by the use of a LD or TI, and that alternate methods of investigation were unlikely to succeed. The affidavits generally contained critical opinions about the investigation targets, as illustrated by the following examples from sworn Mascot affidavits:

- "I suspect [person X] was inferring that [person Y] could drop the goods in custody charge against [person Z]."[156]
- "I suspect the [document] was corruptly leaked"[157]
- "I suspect there has been corrupt contact between [person X] and [person Y]".[158]

Sea's body worn LD was operating almost continually throughout the Mascot investigations. This meant that many warrant applications effectively sought the extension of a previous warrant, as warrants were active for 21 days only. The new warrants were known colloquially as 'rollover' warrants and the supporting affidavits were in substantially the same terms as the preceding affidavits. Sometimes, new information would be added to the supporting affidavit, information would be removed, or the names of individuals to be recorded would be changed.

Operation Prospect heard consistent evidence which demonstrated that officers preparing rollover affidavits relied upon the information deposed to in earlier affidavits, without checking the source material themselves for accuracy. Generally, the evidence showed that Mascot staff copied from previous affidavits rather than starting with a blank pro forma as was required under both the LD and TI Manuals. Comments by various Mascot investigators confirmed this practice. For example, a junior Mascot investigator commented:

> *Q:* *Okay. How would you go about submitting or putting together one of those affidavits?*
>
> *A:* *I think a lot of them were rolled over from the original ones. So we'd add in new things.*
>
> *Q:* *Right. Did you check the material?*
>
> *A:* *Um, I can't say that I would have checked all of it.*[159]

Another junior Mascot investigator commented:

> *Q:* *---as you were saying before if you were the 30th person on – on the 30th rollover and you were the deponent and you'd assume that paragraphs one to 30 are correct and then you add in...*
>
> *A:* *Correct, yeah*[160]

In addition, a senior Mascot investigator noted:

> *Q:* *On – on page four of the first affidavit* [deposed by the witness]*, facts on ground on – on which the application is based, facts and grounds on which the application is based are as follows; the 16th December 1998 Sea confesses his involvement in official corruption and money laundering. ... He subsequently made due* [sic] *statement to which he outlined his criminal activities since 1984; did you ever read that induced statement?*
>
> *A:* *No ...*
>
> *A:* *Yeah, if it was a rollover and – I wasn't, um, and I'm now the one signing it, I would – I'd just take it from the previous one and I – but I'm thinking if it's a new one, then I would have listened to these or have knowledge of – of them.*[161]

156 LD affidavit 355/2000, p. 6.
157 LD affidavit 196-202 /2000, p. 9.
158 LD affidavit 196-202/2000, p. 15.
159 Statement of Information (Interview), [a junior Mascot investigator],[day] March 2014, p. 170.
160 Ombudsman Transcript, [a junior Mascot investigator], [day] May 2014, pp. 188-189.
161 Statement of Information (Interview), [a senior Mascot investigator], [day] May 2014, pp. 82-84.

As outlined in previous chapters, this process meant that incorrect information in one affidavit could be 'rolled over' into further affidavits, in some cases across a two year timeframe.

A number of officers explained in evidence why the procedure of starting with a blank proforma was not routinely followed. One officer who worked at Mascot as a detective from mid-2000 until the end of 2001, described the process of preparing affidavits as:

> *… once the affidavits were, seemed to be approved, it was just a constant rolling thing. Once they got them approved it was easy to roll - roll them over and go into the - all go into the next one because it – it had legitimised, um, the previous affidavits* [162] *... it's like a trained monkey. They'd tell you exactly what you had to do, where you got the information and you were just filling in the gaps and putting your name on it. So, in reality, you weren't the person who was controlling the affidavit. The managers of the unit were controlling the affidavit. You were just the poor stupid who went and put your name attached to it.*[163]

It should be noted that this officer was not a deponent of any Mascot affidavits and these statements reflect his observations or conversations with other Mascot staff.

A senior Mascot investigator who swore over 30 Mascot affidavits acknowledged that there "could be a propensity to or perhaps an incentive to just bring the old document up and start working on it, fix it around, just to shortcut things".[164] However, he could not remember if that is what happened.[165] He acknowledged that the responsibility of a deponent was to make sure the content of an affidavit was credible and to include relevant new information, but there would be a "degree of confidence in the first deponent that the information was credible and well-researched".[166] He did not think that the deponent was necessarily required to go back and review LD tapes to corroborate what another officer had put into an affidavit.[167]

The same officer agreed that it was a stressful work environment and there was limited time at certain stages of the investigation to do all the required work. However, he accepted that the stresses and the intensity of the work was "no excuse for compromising the integrity of those documents".[168] He agreed with the proposition that the time pressures on completing affidavits meant that shortcuts may be taken on occasions in affidavit preparation.[169]

Another senior Mascot investigator – who also worked as a police senior intelligence analyst and prepared a number of Mascot affidavits – acknowledged that an operational imperative was to actively take advantage of forthcoming events (such as social functions) by deploying Sea to obtain recorded corroborative evidence.[170] He told Operation Prospect that he worked off the template of affidavits that had previously been sworn within Mascot.[171] He indicated that he probably made the assumption that it was appropriate to copy content from an affidavit that had already been relied upon by a Supreme Court Justice in granting a warrant.[172]

Another Mascot investigator – who swore over 30 Mascot affidavits – recalled that he would send information to Owen (the NSWCC solicitor for Mascot) to update the affidavit, because Owen had the template with all the historical evidence. He would send Owen the new information and Owen would add it to the affidavit.[173] The Mascot investigator thought that Owen would know if a person's name was to be removed from an affidavit, as he would have been told. The investigator also thought that Owen received updates and was regularly briefed by Burn.[174] Owen, in his evidence, denied he was briefed in that way.[175]

162 Statement of Information (Interview), [a Mascot investigator], [day] August 2013, p. 31.
163 Statement of Information (Interview), [a Mascot investigator], [day] August 2013, p. 33.
164 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 680.
165 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 680.
166 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 669.
167 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 669.
168 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 759.
169 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2015, p. 10.
170 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 905.
171 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 922.
172 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 922.
173 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 797.
174 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 798.
175 Ombudsman Transcript, Neil Owen, 23 January 2014, p. 47.

A senior Mascot investigator – who swore a small number of affidavits – indicated that investigators would provide information to the NSWCC solicitors who would draft it into affidavit form.[176] He said:

> *From memory usually there would be a bit of a heads-up warning that this warrant is due to be rolled over and if we can continue it on a certain date, um, it would be given to someone, "Can you draft the information to get the rollover information?" take it down to the solicitor, sit with them and go through it and then they'd take it out and it would be done again.*[177]

This officer was not confident in preparing applications and had no previous experience in doing so.[178] He said he:

> *... was dubious of taking* [the LD applications] *out, definitely, because a lot of information, when you look at it all, that you're signing off on. But I thought at the time when I signed off I'd gone through it and it was right.*[179]

This officer also gave evidence that "mistakes were made" when Mascot officers deposed rollover warrants, because:

> *... there was no one obviously looking at it as each warrant was rolled over as into, okay, the parameters have changed. This person has got through that integrity test or he's spoken to him about it. He was never taken off that warrant. It just rolled over with that same name on there. It just continued.*[180]

The officer also acknowledged:

> *I didn't read every single name ... I'm just relying on the fact that it's a rollover warrant, it's the same as what we've been investigating. All we've got is adding new evidence in there.*[181]

He also stated he "wasn't confident with what was in there and it's so much material to understand and read".[182] The officer also expressed reservations with the process for checking affidavit content:

> *If - if I was at the Crime Commission and someone had put that onto an information report and then I put that into there, so whoever wrote it on there, you're acting in good faith that here it is in the system and that someone has said that and there's a document proving it. That's what this is to me, is I've got this in - in faith that this - someone has put that in the affidavit, sworn it, so it's right and then everything that was rolled over is correct. I mean, for me to go and take out one of these it would probably take me two or three days. I'd have to go back through every piece of evidence and get every transcript out and read it. We just didn't have. It was like the afternoon, it's got to be done, go do it. That was a deficiency there.*[183]

A junior investigator – who worked on the Mascot investigations from September 2000 to early 2002 – observed that the large volume of recordings meant that evidence was far more likely to be taken from un-proofed transcripts rather than from underlying recordings. He also noted:

> *Then from the first affidavit to the second affidavit might be an additional material and then that investigator, I would imagine, would at least on a bare minimum check every new piece of information to be satisfied by it and he may go back to the first one ... But as you go from one to 50 rollovers ... I – I can't imagine the – the – the officer signing on the 50th one comes all the way back to the start, you are accepting of, 'cause it's been put up before a – a judge and signed off. There would only – only be so much you would go back to proof and check yourself I would imagine.*[184]

176 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 52.
177 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, pp. 52-53.
178 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 201.
179 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 202.
180 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 197.
181 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 198.
182 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 201.
183 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 204.
184 Ombudsman Transcript, [a junior Mascot investigator], [day] May 2014, p. 1242.

A Mascot investigator – who swore over 30 Mascot affidavits – outlined the process Mascot followed for preparing affidavits:

> *So in Mascot for example, we'd say okay, we need a listening device warrant in relation to person X. We as a team and again we would discuss this with the Crime Commission lawyers and they would say okay, to support it you need to provide information that would be supportive of that. Then we would – then I would draft up material, it would go to the lawyers and they would then obviously massage it to ensure that it sounded like it was more articulate than how I may have presented it.*[185]

Another senior Mascot investigator said that the NSWCC solicitors assisted when there were applications for LDs and that he and other officers sought a lot of guidance from the solicitors in that regard. He did not recollect that he looked at the LD Act.[186] He said he may have looked at the LD Manual or relied on others around him.[187]

Most former Mascot investigators recalled the role that Owen played as the NSWCC solicitor.[188] They said that he had a role in checking affidavits, but most considered it was to check for form and format, rather than accuracy of information or fact checking.[189] Some investigators gave evidence that, instead of preparing an affidavit to be checked by Owen, they may at times send a memo to Owen with details and instructions about what to put in or take out of an old affidavit.[190] These details were sometimes quite scant. Owen would then prepare the draft affidavit and the investigator would review and check it before returning it to Owen.

One Mascot investigator – who swore over 30 Mascot affidavits – told Operation Prospect that the major difference with LD warrants being obtained at the NSWCC as opposed to using the NSWPF procedures was that the NSWPF was:

> *... very slow at approving the application ... going from a local level or from the investigator to the legal services to get to the Supreme Court, that was a very lengthy period of time ... Whereas at the Crime Commission, we could obtain the information, say in the morning, and by that afternoon we would have a listening device; so they were very efficient, if I can use the term, in obtaining a warrant.*[191]

It is clear from the evidence that shortcuts were taken in drafting and reviewing affidavits to expedite warrant applications.

Operation Prospect also received a number of written submissions from Mascot officers that commented on affidavit preparation, supervision and review. The following selection of comments is illustrative:

> *... swearing affidavits that were non-compliant with NSWCC procedures and the applicable legislation, was preceded and created by problems at the organisational level, including a lack of appropriate supervision that created the preconditions leading to the problems identified with warrant applications ...*[192]

> *There appeared to be no regularised procedure for checking and monitoring the quality and compliance of affidavits ... an issue linked intimately to the lack of supervision ...*[193]

185 Ombudsman Transcript, [a Mascot investigator], [day] August 2014, p. 1242.
186 Ombudsman Transcript, [a senior Mascot investigator], [day]August 2014, p. 1169.
187 Ombudsman Transcript, [a senior Mascot investigator], [day]August 2014, p. 1170.
188 Statement of Information (Interview), [a Mascot investigator], [day] January 2014, pp. 31-32; Statement of Information (Interview), [a senior Mascot investigator], [day] March 2014, p. 52; Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 53.
189 Statement of Information (Interview), [a senior Mascot investigator], [day] December 2013, p. 12; Ombudsman Transcript, [a senior Mascot investigator], [day] February 2014, p. 105; Statement of Information (Interview), [a Mascot investigator], [day] January 2014, pp. 84-85; Statement of Information (Interview), [a senior Mascot investigator], [day] March 2014, p. 53; Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 196.
190 NSWCC internal memorandum from unknown author to Solicitor Neil Owen, (document reference MALD0058), undated; NSWCC internal memorandum from unknown author to Solicitor Neil Owen, (document reference MALD0030), undated.
191 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 767.
192 [A senior Mascot investigator], Submission in reply, [day] October 2015, p. 1.
193 [A senior Mascot investigator], Submission in reply, [day] October 2015, p. 4.

> *... at the management level, a view was included that the affidavits, particularly rollovers, could be treated in a workday manner inconsistent with the LD manual and the applicable legislation.* [194]
>
> *As* [a Mascot investigator who] *was not legally qualified she relied upon Mr Owen to advise her on those issues. If information contained in the draft affidavit was deemed to be irrelevant then* [she] *relied upon Mr Owen to advise her and make the necessary changes to ensure that the warrant was valid and in accordance with the law ...*[195]
>
> *At all times* [the Mascot investigator] *acted in accordance with the practise and procedure that was in place at the NSWCC when she arrived. At no time did she instigate any practices or procedures. They were all in place when she arrived and she was instructed in the methods and manner of the established practices and procedures which she followed ....* [196]
>
> [A Mascot investigator placed] *reliance upon the lawyer's oversight when preparing Affidavit's and applications for LDs. This accorded with the procedures set out in the NSWCC LD Manual.*[197]

Submissions were also made to Operation Prospect about the preparation of rollover warrants by copying from previous affidavits:

> *Most importantly, it was the accepted practice that a variety of investigators were tasked with rolling over the warrants. It was not the single domain of one or two investigators. The systems were in place when* [the Mascot investigator] *arrived at the NSWCC and she worked and complied with the systems as directed.* [198]
>
> *... the problem that caused* [the rolling over of affidavits] *to occur was a systemic problem associated with the management and supervision of the system of work which was in place at that time.*[199]
>
> *... this practice* [of rolling over affidavits] *should not have occurred but was due to time pressures and operational imperatives.*[200]
>
> *It would have been unworkable to expect that every officer go back and check the original source for every matter referred to in the previous affidavit in a long term ongoing covert operation – Mascot would have been crippled by such an impractical and onerous demand, as would any investigation.*[201]
>
> *... it was clear that at the time of the running of Operation Mascot there was a large force of experienced officers working under very short turnaround time in relation to the collection, dissemination and updating of information. The number and sheer volume of the warrants required to be rolled over is only one example.*[202]

A few themes stand out in this evidence from Mascot investigators. The procedures contained in the LD and TI Manuals were not adhered to. While Owen reviewed affidavits, most believed this was more for form as opposed to providing any degree of supervision or review. Standen did not review all applications as required by the LD Manual. Overall, the evidence points to non-compliance with the procedures and processes for supervision and review. The practices that were adopted were ineffectual.

16.5.3.4 Naming individuals in affidavits

A common defect was that people were named in Mascot LD warrants and supporting affidavits without sufficient information being given in the affidavit to explain why Mascot sought to listen to or record the person. Sometimes no information was given about a named person. Generally, the affidavits analysed by Operation Prospect did not identify if people were named because they were suspects or because they were likely to be incidentally recorded. This deprived the judicial officer of information that was relevant to the decision to issue the LD warrant or to impose conditions on how the LD could be used.

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194 [A senior Mascot investigator], Submission in reply, [day] October 2015, p. 3.
195 [A Mascot investigator], Submission in reply, [day] September 2015, p. 4.
196 [A Mascot investigator], Submission in reply, [day] September 2015, p. 2.
197 [A Mascot investigator], Submission in reply, [day] September 2016, p. 29.
198 [A Mascot investigator], Submission in reply, [day] September 2015, p. 3.
199 [A junior Mascot investigator], Submission in reply, [day] July 2015, p. 6.
200 [A senior Mascot investigator], Submission in reply, [day] November 2015, p. 33.
201 [A Mascot investigator], Submission in reply, [day] August 2015, p. 9.
202 [A Mascot investigator], Submission in reply, [day] September 2015, p. 2.

A senior Mascot investigator explained that when he prepared an affidavit he generally went through the list to make sure there was information in the affidavit for each person.[203] He also said it probably should have been clear in the warrant or application if nothing adverse was known about a person who was going to be casually recorded, and this would signal that the person should be deleted from the affidavit and warrant once the reason for their inclusion (for example, a function) had taken place.[204] He agreed this distinction should be drawn in affidavits and warrants, so as not to mislead a judicial officer that everyone named was thought to be corrupt.[205]

A Mascot investigator – who prepared over 30 Mascot affidavits – provided some explanation about why people's names were included in affidavits without proper explanation:

> *... we were producing warrants in quite large numbers, large quantities. They were a continual process, daily process almost, sometimes of very short notice, and the only explanation I can say is, there was - that we would use a document in the application which had the history behind the informant and on some occasions, well, what I'm believing is that I did not incorporate that information possibly into the body of the affidavit, so it wasn't put in there. So that would be my fault as such and I didn't obviously check the application but then the application went to the Crime Commission's solicitor which proofed it and then from that point it went to the Supreme Court and the Supreme Court judge looked at it and approved it.*[206]

The same officer said he did not think Burn or Standen checked the affidavits as part of the usual procedure.[207] He did not think anyone – other than Owen – checked what he did in terms of matching names in an affidavit to names in the warrant.[208] This officer did not agree that it was misleading not to distinguish between investigation targets and people who may be unintentionally recorded, as some allegations had not been tested at the time the warrant was issued. Only after investigation would Mascot know if an officer was corrupt or otherwise.[209] He denied this represented a situation of 'guilty until proven innocent', stating that it was not his role to decide guilt. His role as an investigator was to gather evidence to be placed before a court or tribunal.[210]

He did agree however that the omission of an explanation for an officer's innocent inclusion in an affidavit could potentially damage that officer's reputation:[211]

> *In the applications that I sought, in all my applications, yes, I may have made a mistake and I will be, you know, I'll throw my hands up to that, if I can use that terminology. There was certainly no misleading. I may have inadvertently left things out, or I may have inadvertently included a paragraph that may have, should have been removed. Certainly, some of those documents are 80 pages, if not more. Look, I probably - in hindsight I should have maybe sat down there for hours and hours reading and double-proofing and quadruple checking of the names and lists, et cetera. I didn't do that. I was under the pump, if I can use that term, and I tried the best I could under the circumstances; so to say that I was casual, I totally deny that. Yes, I may have, should have paid a little more attention to those warrants.*[212]

He agreed that not explaining why officers were named in affidavits was "careless". The fact that affidavits were long documents did not remove the obligation to ensure their contents were true.[213] He emphasised that the three and a half years he worked at Mascot was a very stressful period; he felt "under the hammer" and a lot of officers burnt out because of the high workload.[214] He stated that if he made a mistake it was just like "so many other people".[215] He did acknowledge, however, that he did not tell his supervisors that he was not getting enough time to adequately read and prepare affidavits, stating "we just did what we were told to do".[216]

203 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 916.
204 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 916.
205 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 916.
206 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 771.
207 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 794.
208 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 793.
209 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 774.
210 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 774.
211 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 782.
212 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 783.
213 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 783.
214 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 795.
215 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 795.
216 Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 796.

16.5.4 Evidence of key staff and management

16.5.4.1 Owen (NSWCC Solicitor)

Owen was the NSWCC solicitor responsible for preparing and dealing with Mascot affidavits from January 1999 until his departure in April 2002. He qualified in 1976, was admitted to practice in NSW in 1991,[217] and commenced at the NSWCC in 1996 in the confiscation and criminal assets recovery area.[218] He later moved to the operations area – also known as the investigative area that included Mascot – and stayed there until he left the NSWCC.

Owen described his role being "essentially to look after electronic surveillance. I applied for warrants, TI warrants, LD warrants and other surveillance device warrants".[219] Owen submitted that he did not have any personal involvement in operational matters and relied on information he received from others to perform his duties.[220]

Although looking after electronic surveillance was his substantial work,[221] Owen could not recall if procedures at the NSWCC were explained to him. He thinks he was "probably" given a warrant or an application and told the process.[222] Owen thought he familiarised himself with the provisions of the legislation.[223]

When asked how he satisfied himself that the contents of an affidavit accurately reflected the evidence or information on which it was initially based, he said:

> *I relied on the deponent. It was the deponent's - it's invariably my practice to have the deponent read an affidavit and then to ask them to swear or affirm that they read the affidavit, that the contents are true to the best of their knowledge and belief, and so on … I just relied on their integrity, I guess. That they'd read it and were satisfied that it was true.*[224]

Owen was shown a copy of a memo providing content for inclusion in roll over affidavits relating to the investigation of Officer H and others.[225] Some of the information from the memo was not included in the supporting affidavit and warrant application. Owen was asked who would have made that decision and he confirmed it could have resulted from a conversation between himself and the deponent, or the decision could have been made by someone else on the Mascot team.[226] Owen was then asked about finalising the affidavit in those circumstances. He gave the following evidence about his role and the finalisation process:

> *Q: In between your first discussion with the deponent to an affidavit about the text of an affidavit and it actually being witnessed in front of you, was there another procedure where the affidavit had to go before it actually was formally sworn?*
>
> *A: I don't believe so. I don't think so.*
>
> *Q: All right?*
>
> *A: I mean, in the sense of there being an actual procedure, no, but that's not to say that it didn't happen.*
>
> *Q: And it may have happened. You just don't know?*
>
> *A: It may have. I don't know.*

217 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2327.
218 Ombudsman Transcript, Neil Owen, 23 January 2014, p. 4.
219 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2329.
220 Owen, N, Submission in reply, 14 December 2015, pp. 9-10.
221 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2330.
222 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2330.
223 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2330.
224 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2334.
225 NSWCC internal memorandum from unknown author to Solicitor Neil Owen, (document reference MALD0030), undated.
226 Ombudsman Transcript, Neil Owen, 21 October 2014, pp, 2337-2338.

Q:	*So in terms of the actual physical document, were you the person who in the end presented it to the deponent to swear it?*
A:	*Yeah.*
Q:	*So was the version that they ultimately signed yours?*
A:	*Yes; yeah. That would have been the case. I think - yeah; I was responsible for the document and for printing it out and then having the deponent read it and swear it, or I made it my responsibility.*
Q:	*So you would be the one who would hand them the later version?*
A:	*Yeah; yeah. When I started doing LD and TI work on other references before Mascot, a lot of the stuff I got from the place was substandard.*
Q:	*Substandard?*
A:	*Yeah, and so, yeah, I developed a habit of taking control of a document so at least it was reasonably coherent and covered all the things that needed to be dealt with.*
Q:	*So substandard in terms of the language used?*
A:	*The way they expressed themselves, yeah; yeah. ... Grammatically and, you know, yeah; not content but just the way they expressed things. ... There was ambiguity, things like that.*[227]

Owen said that he cleared up ambiguity by speaking to the person who provided the information.[228]

As to procedure, Owen said that the requirement in the LD Manual that affidavit preparation must start with an original pro-forma – and not an earlier document – was not complied with.[229] That is consistent with the evidence to Operation Prospect of other Mascot deponents.[230] Owen said he "always worked off a prior application and affidavit",[231] stating that he found it:

> *... more efficient to start off with the preceding document. I had a very high volume of work. I was not only working on Mascot, I was assisting maybe three or four other references and it was important for me to keep in my head the facts and to have a clear start each time I began to prepare an affidavit, so it was helpful for me to go to that one that went before, and then get the officer to give me information that updated that in any way and generally in writing, sometimes verbally and that way I knew what was new otherwise starting afresh – I mean, it's like reinventing the wheel in my view.*[232]

Owen did not agree that this was "expedient" methodology, instead describing it as "efficient".[233] He later submitted to Operation Prospect that there is nothing:

> *... inherently improper or unethical about using an earlier document as a drafting template for the preparation of an affidavit, provided the legal practitioner is satisfied that the deponent reviews the final affidavit, understands its contents, and swears/affirms that those contents are true and correct to the best of the deponent's knowledge and belief.*[234]

Owen said that Standen, Dolan and Burn were all aware of the practice of using a previous affidavit rather than a "pro-forma":

227 Ombudsman Transcript, Neil Owen, 21 October 2014, pp. 2355-2356.
228 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2356.
229 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2336.
230 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 919; Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 680; Ombudsman Transcript, [a Mascot investigator], [day] August 2014, p. 1184; Ombudsman Transcript, [a Mascot investigator], [day] August 2014, pp. 1271-1272; Ombudsman Transcript, [a Mascot investigator], [day] July 2014, p. 800.
231 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2336.
232 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2338.
233 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2339.
234 Owen, N, Submission in reply, 14 December 2015, pp. 3-4.

Q: *... I assume that you had obligations to perform your work in a particular way, and you have decided to do that work in a way which was inconsistent with the Commission's manual which provided guidance about how it ought to be done?*

A: *Yes*

Q: *What I'm asking you is, who would you have reported that to? Who would have ultimately authorised your departure from the manual?*

A: *I don't recall that happening. I don't recall there being a report or an authorisation. But certainly Mark Standen, John Dolan, Cath Burn were well aware of the practice that I adopted.*[235]

Owen said that a lot of the LD product would have been processed by monitors, and that the officers swearing the affidavits may not have actually read or listened to a recording. There would be "reliance on information and belief", with "the deponent relying on what they were told by other people who they regarded as reliable". He did not see any problem with that approach.[236]

Owen relied on the police officers working on the Mascot investigations to tell him what needed to stay in the affidavits or what was no longer accurate or relevant. He said it was the responsibility of the Mascot operational team to ensure affidavits remained accurate.[237] He did not recollect being given copies of Information Reports or documents and believed that his position was more likely to be purely directed towards affidavit preparation. He stated: "I wasn't involved operationally in any way with the Mascot investigation".[238] He went on to explain that the "way in which the devices were used was something that was totally outside my control, so it really wasn't a matter that was of any interest to me".[239] In his view, this was something that happened within the operational team: "Ultimately, you know, there was a senior officer who was responsible for everything that went on in that team ... it was Catherine Burn".[240]

Owen said that he thought accuracy was more important than efficiency.[241] He had not thought about errors that might be perpetuated in rollover affidavits, although he recognised the possibility once it was articulated to him.[242] He stated that he depended on the deponent or the person who provided information for the affidavit to check the accuracy of the contents of the affidavit.[243]

Owen understood that a large number of the names in particular affidavits, probably the bulk:

> *... were there because they were people who may be present at functions, reunions, send-offs, Christmas parties, barbecues and the like, who, against whom no allegations had been made, but who may participate in conversations, those innocent bystanders, and their conversations may be recorded.*[244]

He said that was an impression he formed as a result of things he was told. He was not sure who told him that, but it came from information from various officers he dealt with – such as Burn, but "not so much" Dolan.[245] He agreed – on looking at affidavits shown to him in his evidence to Operation Prospect – that there was no text in the affidavits that dealt with the status of the innocent bystanders at such social events. He was not able to explain why there was no such text.[246]

235 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2364.
236 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2335.
237 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2337.
238 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2337.
239 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2352.
240 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2338.
241 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2363.
242 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2363.
243 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2363.
244 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2368.
245 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2368.
246 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2368.

Owen acknowledged that it was important that a judicial officer be made aware that a LD would be used in circumstances where people who were not ‘persons of interest’ to the investigation may have their conversations recorded by the device, so that the judicial officer could make an informed decision about whether to grant the warrant.[247] In his view, because the body of the affidavit referred to persons suspected of wrongdoing, it was implicit that any others named in the warrant were not suspected of wrongdoing but were included as people who may be present when conversations were being recorded.[248] Owen considered that to be a sufficient identification of the people who did not have something adverse stated about them in the affidavit. When asked why that interpretation was open, Owen replied: “Simpliciter”.[249]

Owen went on to explain that because the affidavits mentioned functions and get-togethers, it would be reasonable to assume that those events were the context in which the other people may be recorded. Owen conceded that may not be the “best” assumption, but maintained it was an assumption that was open.[250] When pressed, he agreed that the assumption would also be open – in the absence of any contrary explanation – that those named were suspected by Mascot of knowing about or being involved in the prescribed offences that were listed in the introductory paragraphs of every affidavit.

On the question of who supervised him during this period, Owen’s evidence suggests it was unclear to him. In his original Operation Prospect hearing, Owen said it was “rubbery” who his supervisor was and stated that he performed an administrative role:

Q: *Okay. So who was your supervisor in the operations area?*

A: *I suppose John Giorgiutti was the Solicitor to the Commission. So ultimately he was ---*

Q: *Did you have a direct line supervisor or was it Mr Giorgiutti?*

A: *Well it’s kind of a bit rubbery I think. I worked very closely with Mark Standen.*

Q: *Yep.*

A: *But I didn’t actually report to Mark effectively.*

Q: *And so when you say work closely with Mark Standen, were you effectively giving him legal advice on his matters or ---*

A: *Well I wasn’t giving legal advice per se, my role was more in relation to the electronics surveillance ---*

Q: *Yep.*

A: *and basically to make applications for listening devices and telecommunications and interception warrants and just basically to manage the administration around that.*[251]

In a subsequent hearing, Owen was firmer in his evidence that his supervisor once he moved into the operational area was Giorgiutti, though Standen was the person to whom he reported. Owen also said when he started in the operational area that it was Standen, not Giorgiutti, who advised him his role was essentially to look after electronic surveillance.[252] Despite this, Owen stated that he did not think Standen had any involvement in Mascot.[253] He said he never discussed affidavits with Standen[254] nor did he have any recollection of Standen approving Mascot affidavits.[255] Owen was similarly unaware of the role, if any, that Giorgiutti had in relation to Mascot:

247 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2343.
248 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2343.
249 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2348.
250 Ombudsman Transcript, Neil Owen, 21 October 2014, pp. 2348-2349.
251 Ombudsman Transcript, Neil Owen, 23 January 2014, p. 5.
252 Ombudsman Transcript, Neil Owen, 21 October 2014, pp. 2328-2329.
253 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2344.
254 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2345.
255 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2345.

Q:	*And did Mr Giorgiutti witness and sit down and discuss with police officers, to your understanding, affidavits that they prepared in support of listening device applications?*
A:	*I don't recall ever seeing that ...*
Q:	*... Regarding Mascot, Do you – were you party to information as to what Mr Giorgiutti was doing in Mascot?*
A:	*No.*[256]

16.5.4.2 Giorgiutti (Director and Solicitor to the NSWCC)

Giorgiutti stated that he had no role in drafting, reviewing or settling any affidavits during Mascot. He gave the following evidence:

Q:	*You mentioned affidavits. Did you have any role in drafting or settling those during Mascot?*
A:	*No; no.*
Q:	*Do you know who did?*
A:	*Well, this is - - -*
Q:	*Don't worry about individual police officers but in terms of the Crime Commission?*
A:	*Yeah, well, look, this is the bit I was trying to get to in that investigation that I started in 2012.*[257] *The arrangement was that Standen, Mark William Standen was in charge of the Gymea or Mascot investigation and he reported to Bradley. It was a very – Phillip Bradley was passionate about this investigation; I've never understood why, but anyway he put together a team of people who he thought were best for that job. So we had* [a NSWCC civilian staff member]*, we had other people there doing things. Now, in terms* [of] *a lawyer for the affidavits we picked Neil Owen. Now Neil Owen's ... a very capable lawyer, and so he was the one there for the Commission. What I know also was that the police wanted to be sort of independent and so forth. They were getting their own legal advice from their lawyers.*
Q:	*Why do you say that?*
A:	*Well, I've seen the advices when I got some files when I got some files back from storage* [in 2012]*, but at the time I knew they were using* [a NSWPF legal officer]*, and I know the issue which is with* [LD warrant] *226. And I know what I was told about what* [the NSWPF legal officer] *had said, although I have never spoken to* [the NSWPF legal officer]*. I got all this from Mark Standen.*
Q:	*All right. Can I just - I'm just going to break that down. Is it your understanding that* [the NSWPF legal officer] *was actually advising Crime Commission police officers how to draft and complete their affidavits, or?*
A:	*No, no, no, no – sorry.*[258]

There are no NSWCC records, nor evidence from any witness, indicating that a NSWPF legal officer provided advice or reviewed Mascot affidavits at the time that warrant applications were being made – that is, during the Mascot covert stage. The NSWPF legal officer referred to by Giorgiutti did later work on Mascot matters, but this was in the overt stage and only in connection with referring matters to the Office of the Director of Public Prosecutions (ODPP).[259]

256 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2331.
257 Giorgiutti was referring to an internal NSWCC review that he commenced into Mascot warrants that was discontinued in October 2012.
258 Ombudsman Transcript, John Giorgiutti, 11 August 2014, p. 1343.
259 Ombudsman Transcript, [a NSWPF legal officer], [day] October 2013, p. 13.

Giorgiutti also gave evidence of his recollection of the affidavit preparation and review processes for the Mascot investigations:

A: *What Neil Owen did was, he was sent, a running sheet or something, or no draft affidavit because they were too busy, he would convert that to an affidavit.*

Q: *Did you know that at the time or---?*

A: *Yeah, that was his job. That was his job, and then he would make the application to the different judges.*

Q: *All right?*

A: *That was seen as, you know, we've got the best people, like sort of---*

Q: *What did you think about that process yourself, that the officers would send like a running sheet and then Neil would actually draft the affidavits. Did you think that was proper, improper or fine or - what did you think?*

A: *There was nothing wrong with it; there was nothing legally wrong it, but in practice the whole Crime Commission ran on a flat structure, so everyone reported to Phil; so there were no checks and balances, and so the fundamental problem – and from about '96 or thereabouts, that structure was put in place a bit later, I can't remember now, the whole model was a trust model. You trusted people to do the right thing. So where it goes wrong is, if, if someone does something wrong because either they don't know what they're doing or they actually do something wrong, there's no way in the world you will pick it up; there's no checks and balances, and so it was a trust model.*[260]

Giorgiutti was asked whether he 'ever' had any supervisory role in relation to the role being performed by Owen as the legal officer on the Mascot investigations. He said he did not.[261] He also stated that – although he was Solicitor on the Record at the NSWCC – he did not see any LD applications during the years that the Mascot investigations were proceeding –1999, 2000 and 2001.[262] Nothing came to his attention during those years that made him concerned that legal officers were acting in a way that was unlawful or problematic, or that LD and TI affidavits did not comply with statutory requirements.[263] On the other hand, it does not appear that Giorgiutti checked those matters. He was questioned about supervision and whether he saw Mascot LD applications during the three years that Mascot was operating:

A: *I've got no recollection of seeing any of them. There would be no reason for me to see them.*

Q: *Well, why not? You're solicitor on the record. Didn't you want to know what was being done under your name?*

A: [The then Crown Solicitor] *doesn't go and look at pleadings on a particular matter, no. No, it wasn't, wasnt, wasn't part of my role to do that.*

Q: *You might be surprised to know what* [the then Crown Solicitor] *does in relation to pleadings under his name, but we are really actually interested in what you did. You didn't see any role as solicitor on the record to examine---?*

A: *Whether, whether ---*

Q: *Wait - examine at any time during 1999, 2000 or 2001 a single listening device application. Is that the position?*

A: *In relation to Mascot, not that I can recollect, no.*

Q: *All right?*

260 Ombudsman Transcript, John Giorgiutti, 11 August 2014, pp. 1343-1344.
261 Ombudsman Transcript, John Giorgiutti, 24 October 2014, p. 2443.
262 Ombudsman Transcript, John Giorgiutti, 24 October 2014, p. 2444.
263 Ombudsman Transcript, John Giorgiutti, 24 October 2014, p. 2444.

A: *Unless someone raised something with me, I have no - given the way that, that, that the Commission worked with the flat structure with Bradley, unless someone came to me I would not go and look at it, no.*

Q: *Well, Mr Owen is not on a flat structure with Mr Bradley, is he?*

A: *He worked for, in the Standen team, and he reported to Standen who reported to Bradley.*

Q: *For all you know, every affidavit Mr Owen did was incompetent, incomplete and not legislatively compliant. Is that the position?*

A: *No.*

Q: *Well, how did you know what he was doing in Mascot was being completed appropriately?*

A: *He, he, he was a Crime Commission lawyer, he'd been there for whatever period of time; he'd been through a probation period, whatever, and there was no reason for me to doubt that - and he was a senior member of the profession, he'd worked* [overseas], *I think, there was no reason for me to think he wouldn't have the competence to put together a TI and LD. I mean, my kids could do it. It's not atomic science, you know.*

Q: *Did you train him how to do them in accordance with the Listening Device Act and/or the listening device manual that was in place at the Crime Commission?*

A: *No, I never trained anyone like that. We had---*

Q: *You never trained anyone?*

A: *In that.*

Q: *Alright, you just---*

A: *It wasn't part of my function. Sorry?*

Q: *Sorry, you go?*

A: *So I used to give seminars and whatever on a weekly or fortnightly basis and we might've done one on, on, on LDs and TIs more for analysts and those sorts of people, but not for lawyers.*

Q: *All right?*

A: *It's kindergarten sort of stuff, you know?*[264]

There was further examination on this issue, endeavouring to ascertain Giorgiutti's role in oversighting the preparation of affidavits and warrants:

Q: *Alright, but you, as solicitor on the record, are you saying, took no interest in whether those 100-plus people* [named in an affidavit] *were operationally relevant and justified by the affidavit that supported the warrant. Is that the position?*

A: *Well, yes, if you write that up it will look stupid. Look, the point is this---*

Q: *No, no, no. Please answer my question?*

A: *No, look. The point is this---*

Q: *No?*

A: *- there was no reason ---*

Q: *Mr Giorgiutti, I've asked you a question that was very straightforward. Did you, as solicitor on the record, take no interest at that point in whether the affidavit supported the naming of all those people on the warrant?*

264 Ombudsman Transcript, John Giorgiutti, 24 October 2014, pp. 2444-2445.

A: *Well, I object to the word 'no interest' because you want to paint me as someone - I had no - the point is there was no reason, given the way the Commission operated, for me to have any involvement in it because there was no issue about it …*[265]

It is possible, according to Giorgiutti, that Standen did some checks:

Q: *Allright. And did he check affidavits, as far as you know, Mr Standen?*

A: *Originally, way back in the dim dark, dim dark past---*

Q: *How dark? How dim? What year, roughly? Is it pre 1999?*

A: *Pre 99, at some point, Phillip used to check the telephone interception affidavits and I would check the listening device affidavits.*

Q: *All right. I was talking about Mr Standen checking---?*

A: *So what happened was that Phillip's affidavits were sort of in a sense easy to check, because they rolled over every 90 days. With the LD affidavits you had three weeks, and sometimes they would come at 25 past 4 and say, "We are seeing a judge at 4.30, can you read this affidavit." I said, "No", I said "I'm not going to read an affidavit with five minutes", you know, "you should have given it to me three days ago, so go away". "Oh, but we've got to toll* [sic] *it over." "I don't care what you have to do. I'm not going to spend time reading this stuff knowing that I'll have questions." And so they got to the point with the LDs and then the TIs, because the volumes of the TIs we were doing, because as the computer system, as our ability went up to do intercepts, the volume became too burdensome even for Phillip, so it got devolved down to the assistant directors, to Tim O'Connor, Mark Standen and whatever, and over time, like currently, it has been devolved down now to people who are sort of grade whatevers, and you don't want to know what they're doing now, but the point is it was devolved to Standen. Now, whether he checks or not, no-one knows, because you trusted him to do his job. If he didn't do it, you didn't know.*[266]

This devolution of responsibility appears to have occurred in mid-2001 in relation to TI affidavits and warrant applications. The June 2001 TI Manual shows that significant changes were made to the responsibility for affidavits and warrants, placing new responsibility on the relevant Assistant Director (which was Standen in the case of the Mascot investigations).

Giorgiutti was asked whether he ever saw Standen check affidavits, or had a discussion with Standen about doing so:

> *I can tell this, in the one that you're interested in, I became aware of 266, or whatever number you are talking about, because Standen came to me and said, or I was in his office. And he said, "Look, I'm concerned" - he said to me that they've got all these names in the warrant, and he said, "I think, I think one of those blokes is dead. Now, what do you think about these names?" I said, "What names" and he told me that they were putting all these names on the warrant. And I said, "Well, you just can't do that. You can only put the names on the warrants relevant to what you're doing for those three weeks." And they said - he said, "No, no, they've got advice here to put everyone on the warrant whose conversation could be captured." And I said, "Look, if you do that and one day you go and use that warrant for evidence, you are going to have to show a warrant* [with] *114 names" – whatever number, I'm making up 114 names now – "so what are you going to do about that?" He said, "They are going to black out the names." I said, "You can't do that, the magistrate will want the actual warrant."*[267]

265 Ombudsman Transcript, John Giorgiutti, 24 October 2014, p. 2451.
266 Ombudsman Transcript, John Giorgiutti, 11 August 2014, pp. 1344-1345.
267 Ombudsman Transcript, John Giorgiutti, 11 August 2014, p. 1345.

Giorgiutti explained that he had expressed his disagreement that warrants were not being used in the prescribed manner, but said that he did not have authority to make changes. He gave the following evidence regarding the number of people named on warrants:

A: *But the problem was that they weren't going back and telling the judge that's, that's in fact what was actually happening, and they were saying to me, "Yes, but legally we have to this other thing," I said, "Mate, look, forget about legally. You don't want to do this, because if you do it my way the judge could pull you up. You just want to be walking around hardwired, all day every day, talking to a bunch of people and see what comes out of the woodwork. You can't ---"*

Q: *Who did you say that to?*

A: *Well, to Standen. I was explaining to him, I was explaining to him why they couldn't do that, 'You can't do that'.*

Q: *Did you ever say those things to Bradley, or words to the same effect?*

A: *Well, I had the same conversation with Bradley because I said, "When they're saying they've got to put these names on the warrant", I said, "It's just bullshit, mate, because our name is not on the warrant." You know, because if they, if they were genuinely putting everyone's name on the warrant they were going to capture, they'd have me on there, just because I saw* [informant Sea] *quite often.*

Q: *Sorry, who else did you express that view to?*

A: *Just those two. Well, it might have arisen at a management team meeting or something. But I don't, I don't know. It would have been brushed, it would have been hosed down anyway so---*

Q: *But that's a pretty important thing, isn't it? If you as the director and chief Solicitor said at a management meeting that, that this is what's happening and you're not happy about it, wouldn't that be something that you would remember raising and what the responses were to it?*

A: *Look well, look yes, well, you know, you say that. But at the time, over the 20-odd years that were there, there was a lot of things happened at the Crime Commission and I just can't remember. Now I might have raised it, I might not have raised it. But Phillip was the decider.*[268]

Bradley does not recall any such conversation.[269]

16.5.4.3 Standen (NSWCC Assistant Director, Investigations)

Standen's role in the affidavit preparation process was to give initial approval for the use of a LD, and then to check the affidavit to ensure that "all relevant information is provided and supported".[270] Standen said there were two ways of preparing affidavits in support of LD applications. One method involved police officers handling 'Level 1' matters, which was adopted in NSWCC investigations other than Mascot:

> *... knock out a rough draft and then sit with my team lawyer, um, and the lawyer would prepare the – the documents, um, and then I would look at them after the lawyer had – had prepared them, make whatever changes I thought necessary, um, check that the – that the matters fell within the reference, that you know, all the – the requirements were met, and then the lawyer would make the appointment and obtain the warrants.*[271]

Standen differentiated between that method and what happened in Mascot, where – on his evidence – the police prepared the documents:

268 Ombudsman Transcript, John Giorgiutti, 11 August 2014, pp. 1348-1349.

269 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2996.

270 NSWCC, *Listening Devices Manual*, June 1998, p. 25.

271 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 7.

> *In the case of Mascot, the – the police prepared the documents, um, and then not in every case, but in – in most cases, and certainly where possible, and – and, um, subject to my availability, um, I would then look at the documents prepared by the police, in this case mostly* [by the NSWPF senior intelligence analyst]*. I would make changes to the document, write on it, um, give them back plus any verbal, um, suggestions or directions that I might have in relation to them. Um, I wouldn't then see the documents again. I would expect that those changes would be made. The documents would then be taken to my team lawyer, um, who would top and tail them if necessary, and then make the, ah, application with the – with the justice of the court, and obtain the – ah, the warrants. Um, so it – it – it wasn't practical nor – nor, um, desirable for me to be looking at warrants multiple times. I would read them once, make the changes, expect them to be made, and then, um, the applications would go ahead. Um, I recall in the early stages having to tutor, if I might use that word, um,* [the NSWPF senior intelligence analyst] *in, um, writing skills generally, and, um, the process – process of approaching, um, an affidavit, and he seemed quite, um, eager to learn, and took many things on board. Um, so that was – that was the process.*[272]

Standen's recollection was that it was the NSWPF senior intelligence analyst on the Mascot team who was tasked with the job of preparing affidavits:

> *And the process was that, in my - in my position, I was, ah, checking, ah, paperwork for warrants for, um, all of the Level 1 investigations, ah, the Level 5 investigations, and from time to time assisting, um, with matters from other floors within the Commission, so I saw a - a great many, um, warrants.*[273]

Level 1 and Level 5 are references to floors at the NSWCC. Level 5 is where Mascot was mostly conducted. Standen said he could be required to read a dozen to thirty warrant applications in a week, along with his other responsibilities as Assistant Director.[274]

As to Burn's role in looking at the documents, Standen said Burn may or may not have looked at the affidavits and that the process did not formally require her to do so:[275]

> *Cath may or may not have looked at the – the warrants and affidavits, I don't know, but she wasn't a – a step in the – a – a formal step in process. The process was the – the police would prepare them, I'd check them, they'd fix them, they'd take them to the team lawyer, or whichever lawyer, and the application, um, was made.*[276]

This evidence is consistent with the NSWCC written procedures set out in the LD and TI Manuals, which did not allocate a role to an Inspector or Team Leader in relation to affidavit review or approval.

Standen also commented on the practice of police investigators preparing rollover affidavits by cutting and pasting material from previous affidavits:

> *So, um, ah, it's – it's not the case and I assure every – every – well, I'm not saying that – that those things wouldn't have occurred if – if I had seen them, but I'd like to think that they wouldn't, because they aren't the type of things that I had an eye out for, in these warrants, because, the police tended to cut and paste horribly. You know, I used to try and I used to encourage them all the time to start from scratch with these things, you know, start with a clean slate, tell – the story in its most simple form, but beat your head up against a wall in that exercise. Cutting and pasting just seems to be the way they operate.*[277]

Operation Prospect asked Standen for his understanding about who should be named in affidavits and warrants. In contrast to Giorgiutti's evidence, Standen said Giorgiutti advised him there was a requirement to name every person who may be recorded in a warrant application. Standen said this issue arose with a (non-Mascot) warrant application for a device to be placed in a residential property where a teenager lived who was not of interest to NSWCC investigators. Standen said he was advised by Giorgiutti to include her name:

272 Ombudsman Transcript, Mark Standen, 21 March 2014, pp. 7-8.
273 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 6.
274 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 39.
275 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 14.
276 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 14.
277 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 39.

And he said, "Well have you – are you – have you included in the affidavit the fact that the, um – the device might be capturing the conversations of the – the teenager girl," or whatever age the child it was? And – and I said that, um, I hadn't or the documents didn't – didn't do that. And he said, "Well he said' "I've been looking at the Listening Device Act, and – and it says that you should nominate, where known, people whose conversations, um, will or are likely to be recorded during the - the, um – the terms of the warrant". And he said, "You should – you should put in the girl's details because the – the issuing justice may or may not, ah, issue the warrant, or might want to impose some conditions or restrictions as the Act allows them to do, um, in relation to that material".[278]

Standen also said that Giorgiutti gave him advice about a warrant application relating to informant Sea attending a function:

At which point I said to him, "Well, what about – what about this one where Sea's going to be at this function," I think at Leichhardt or some – some club, I can't remember what it was. "Um, where there's going to be a couple of hundred people, he's going to be wandering around like a social butterfly chatting to many, many people, some of who will be people of interest to the Mascot Investigation". And he said, "Well that's all the more reason – to tell the judge the people who might be recorded because on balance with – with, um privacy verses, ah, the necessity, the judge may decide not to issue that warrant at all in those circumstances." So I recall, um, making some written changes and corrections to the document and then handing them back to [the NSWPF senior intelligence analyst] *and telling him of the conversation that I had with Giorgiutti, explaining that principle to him, and left it with him to make those changes.*[279]

Standen said that it came to his attention that renewal applications would include the same list of names from earlier affidavits. He spoke to the NSWPF senior intelligence analyst about this and explained that the LD warrant should only list those individuals who Sea was reasonably expected to interact with in the warrant period. He told the analyst that as Mascot was in charge of informant Sea, they could plan who he would speak to in the next 21 days and tailor each warrant to the tasks Sea would be given. He noted that one of the named people was a police officer stationed "in the bush"[280] and said to the analyst: "there is no likelihood or no reasonable likelihood, ah, in the next 21 days that Sea is going to be having a conversation with this person".[281] He recalled making the comment: "like on your approach you might have well just attached the New South Wales Police phone list, and – and that's not the – that's not the purpose".[282]

Standen also gave evidence that he explained to the NSWPF senior intelligence analyst and Burn that the warrants needed to distinguish between those individuals who were a target of investigation and those whose conversations were likely to be recorded but who were not of interest to the investigation. As Standen put it, they were people "who were simply going to be picked up under that Giorgiutti principle, um, that – that I talked about earlier".[283]

16.5.4.4 Bradley (NSWCC Commissioner)

Bradley did not have a specific role in the LD affidavit preparation process. However, either he or the relevant Assistant Director was responsible for approving TI applications. Operation Prospect understands that in practice Bradley was responsible for approving all TI applications.

Bradley believed that the affidavit preparation and oversight process was as follows:

Well, there's the process and it's varied over the years but there's a manual which sets out the way in which the process is to be followed and so that the initiator, that is, the person who will become the deponent or the person who provides most of the information to the deponent, being the next person down from the source, whether it's electronic surveillance or a source or a human source, he knows, or she, that there are penalties for not getting it right, then that information goes to another person who has a fairly high

278 Ombudsman Transcript, Mark Standen, 21 March 2014, pp. 8-9.
279 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 9.
280 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 11.
281 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 12.
282 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 12.
283 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 12.

> *degree of knowledge of the matter, that being Standen, and then that goes to the lawyer, who in the Mascot context has much more - I won't call it direct information, but general information flowing to that person as a consequence of being in a cell of people who are receiving and passing around information, and then that goes to the director, and I think somewhere in there there's a superintendent of the police because if that's a police generated thing it might go superintendent - deponent, Superintendent, Standen, lawyer, who knows more than your average Crime Commission lawyer because he's in the cell, and then Giorgiutti who would know something of the matter but not much of a factual nature. So you couldn't expect Giorgiutti to go to Sea and say Is this right?; nor could you expect the lawyer to say "Well, I want Sea in here as well", and then the deponent goes off to the issuing officer at the Federal Court or the AAT* [Administrative Appeals Tribunal] *whichever it was then, and swears to those facts.*[284]

Bradley's understanding was that instructions about information to be included in LD and TI affidavits were sent by emails circulated among case officers, analysts, listening post monitors and lawyers.[285]

Bradley said the following about the systems in place for relaying information about the result of LD and TIs to NSWCC lawyers:

> *Well, my recollection is - and it's very vague - that the legal people in the Mascot environment were much more like team members and therefore sort of in the loop than they would be in other environments within the Crime Commission. So that you could go to one of a few lawyers if you had some general homicide matter or something like that that you were attending to. Whereas in Mascot there was only one or maybe two people that did it and they were sort of more exclusive to that team. Or perhaps - it's a bit hard to speculate. But perhaps they were the only lawyers you went to but they had other roles as well.*[286]

Bradley said that he emphasised to staff the obligation to include both exculpatory and inculpatory information in affidavits, and he discussed this with them from time to time. He could not recall any specific conversation at the time he gave evidence to Operation Prospect, but did recall that the conversation "wasn't just about inculpatory and exculpatory, it was about gilding the lily and other things that might happen".[287] He was of the view that legal and other NSWCC staff had to take instructions from someone and would not know if evidence was tainted, insufficient or incomplete unless they "spoke to the ultimate source".[288] He did not require his legal staff to check the source information.[289]

16.5.4.5 Dolan (Superintendent - SCU Commander)

Dolan gave evidence that his understanding was that LD and TI applications went through Standen, and then through Giorgiutti and Bradley.[290] Dolan said he did not have any role in preparing affidavits, as that task was performed by "the Crime Commission side".[291] Dolan also stated that he only scanned affidavits and did not thoroughly read them.[292]

Dolan said that police would provide the information for the people constructing the affidavit. After this the affidavit went through the hands of NSWCC staff, to apply to a judge.[293] He observed that he would not have thought that police officers needed training to know that the contents of an affidavit must be true.[294] He described the affidavits as a:

284 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2994.
285 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2966.
286 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2966.
287 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2967.
288 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2967.
289 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2967.
290 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2594.
291 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2594.
292 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2596.
293 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2594.
294 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2594.

... continuing story ... So we started off with a story and we added to the story as things were happening ... I would expect that they would take that information … from running sheets or from photographs or from the listening device material that had been transcribed.[295]

Later in his examination Dolan observed that he also thought a NSWPF legal officer had a hand in preparing affidavits and that the officer was an ex-police prosecutor.[296] As noted earlier, the evidence to Operation Prospect indicates that the NSWPF legal officer was only involved at the stage of referring matters to the DPP and not at the stage that warrant applications were being made.

As to rolling over affidavits and the repeated use of initial material, Dolan observed that the original affidavits were done by "very senior people ... Standen and... Bradley and Giorgiutti and the senior echelon".[297] Dolan emphasised that Burn's role was much more hands-on in affidavit preparation[298] and he understood that she and Standen checked the affidavits.[299] He told Operation Prospect that Burn was responsible for managing Mascot and making sure that the daily operational activities were undertaken according to law.[300]

16.5.4.6 Burn (Inspector -Mascot Team Leader)

Burn gave evidence that there was an obligation upon the investigator who would be swearing the affidavit to ensure it was accurate. As to her role, in her first Operation Prospect hearing Burn stated:

I read the affidavits so I was quite comfortable with the information in affidavits, I didn't read necessarily all of them but I think the people we had, the investigators, were predominately detectives who had experience in obtaining listening device or telecommunication warrants and, and there was a process in place at the Crime Commission and that was the process that was used.[301]

At a later hearing – after Burn had an opportunity to read some affidavits and had her attention directed to defects in them – she said: "I don't believe I checked any of [this officer's] or the other's affidavits". When pressed as to whether she meant to say she never checked any affidavits prepared by staff, she replied: "I can't say never. I, I don't recall. I don't recall reviewing affidavits, but, but I can't be definitive. I'm sorry...".[302]

Burn gave evidence that she did not see it as her function to review affidavits because there was already a process in place involving a NSWCC solicitor. She said:

I understand I'm the team leader, but I do not accept that my role was to review what was going into those affidavits for the accuracy. We had senior sergeants in the unit, we had sergeants in the unit, and we had a solicitor in the unit.[303]

Burn also emphasised that she had confidence in the abilities of other police officers who worked on Mascot and that she still had "no doubt to this day that they have the highest integrity". She did not have any concern about them, nor did she think that they could not do their jobs.[304]

Burn stated: "The solicitor and the person who applied for the affidavit are the ones who have to make sure that the information contained in that affidavit is accurate and it's relevant".[305] It was Burn's understanding that the solicitor had access to all material including primary source material, but she was unable to say whether the solicitor checked it.[306]

295 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2595.
296 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2607.
297 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2595.
298 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2610.
299 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2611.
300 Ombudsman Transcript, John Dolan, 31 October 2014, pp. 2663-2664.
301 Ombudsman Transcript, Catherine Burn, 15 July 2014, p. 542.
302 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2689.
303 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2687.
304 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2688.
305 Ombudsman Transcript, Catherine Burn, 11 November 2014, pp. 2686-2687.
306 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2701.

Burn knew that officers were rolling over affidavits rather than starting with an original pro forma. In her view, it was still their responsibility to make sure the information they deposed to was correct.[307] She agreed she was aware that officers copied information from previous affidavits rather than starting with an original pro forma document, and that this did not comply with the LD Manual.[308]

Burn reflected – in answer to a question that processes that were adopted had some problems – that:

> *Well I think on a couple of levels reflecting back I think that a lot of the processes that were in place were – probably could have – there could have been better processes, and I think you – it was alluded to before that some of the scrutiny around listening devices that the Crime Commission had in place wasn't as detailed as the New South Wales Police Force procedures. So when I reflect back, that was a concern in terms of processes and procedures and practices that the NSW Crime Commission operated under, and a lot of that has changed now. A lot of their procedures have changed, and there is a lot more scrutiny … yes, on reflection I still think it was quite a significant investigation, and, and if, it and there I think there were a lot of things that were done well, but when I do reflect I think that there are procedures and processes that could have been done a lot better, and might, and might have and might have put sort of I guess more, more confidence around what we're dealing with now.*[309]

16.5.5 Analysis

Three aspects of Mascot practices in affidavit preparation invite comment: defects and weaknesses in affidavit preparation; factors that contributed to those problems; and whether senior NSWCC and NSWPF officers shoulder some responsibility for those problems. This analysis will focus on the preparation of LD supporting affidavits, as these were far more numerous. A similar analysis would apply to the preparation of TI affidavits.

Not all affidavits or affidavit content contained defects and weaknesses. However, there were recurring problems that are noted throughout this report and can be shortly stated:

- inaccurate information about people and events was recorded in affidavits, along with allegations that were weak or old
- information was included in affidavits that was out-of-date and not updated to reflect more recent information available to Mascot
- allegations against people were stated as facts
- exculpatory information was not included
- statements that were presented as quotations did not always align correctly with the recorded statements
- no explanation was given as to why some names were included in affidavits, either in 'facts and grounds' paragraphs or as persons who Mascot sought to listen to or record
- the names in affidavits did not match exactly the names in warrant applications
- affidavits did not differentiate between people suspected of being involved in or having knowledge of corruption, and people who may be recorded as incidental bystanders at functions
- people were named in affidavits even though Mascot held no information to support investigation of those persons or had not tasked Sea to record them
- people's names were rolled over into later affidavits after the initial reason for naming a person had passed (for example, attendance at a function)
- affidavit deponents copied and pasted from earlier affidavits without independently reviewing the accuracy of the content or checking the content against primary source material.

307 Ombudsman Transcript, Catherine Burn, 12 November 2014, pp. 2776-2777.
308 Ombudsman Transcript, Catherine Burn, 12 November 2014, p. 2777.
309 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2700.

The factors that contributed to those problems can also be shortly stated:

- Mascot staff were not given adequate training in affidavit preparation and in NSWCC processes and legislative requirements, and many staff had limited or prior experience in drafting affidavits for warrant applications
- staff paid insufficient attention to the guidance provided in NSWCC manuals on affidavit preparation (for example, to commence each affidavit with a blank template or proforma, and not revise a prior affidavit)
- deponents assumed that information copied from existing affidavits or information reports was correct and had been verified
- deponents assumed that other staff had or would check the accuracy of affidavit content
- a high number of affidavits were required in a short time space, because the active LD warrant period was only 21 days, and because opportunities arose almost daily for Sea to record conversations that may yield valuable evidence
- the size of the Mascot team was small for the amount of work required, principally to confine the team to trusted officers
- no adequate system was in place in the NSWCC for quality control or review of affidavits.

The resulting picture is a process of affidavit preparation that was ad hoc, undisciplined and typified by shortcuts. This was a systemic failing for which the NSWCC was responsible. Should individual NSWCC and NSWPF senior officers be singled out for criticism for this systemic failure?

The NSWCC LD and TI Manuals set out clearly the procedures for affidavit preparation and LD and TI warrant applications (see section 16.5.2). The Manuals included key practical messages. They outlined the particular responsibilities of the deponent (case officer), the NSWCC Solicitor, the relevant Assistant Director and the Director and Solicitor to the Commission. Overall, it was clear that NSWCC staff were the authorisers, supervisors and reviewers in preparing and applying for warrants.

Although the Manuals gave adequate and appropriate instruction and guidance for completing affidavits and warrant applications, it is apparent that the procedures and guidance were not adequately followed in the Mascot investigations.

Bradley, as the Commissioner of the NSWCC, could appropriately rely on senior management who were responsible for the day-to-day running of Mascot to implement NSWCC procedures and ensure that administrative and legislative requirements were being met. He could equally rely on individuals who had designated roles (such as the deponent, legal officer, Assistant Director, and Solicitor on the Record) to perform their duties diligently.

Bradley submitted that for those reasons he should not be subject to any findings regarding non-compliance.[310] He referred in his submission and evidence to the role that he expected Standen, Owen, Giorgiutti and a 'police superintendent' to play in reviewing and oversighting the affidavit preparation process. Bradley's evidence suggests that he thought certain checks were occurring, that in fact were not. His submissions noted that he had since become aware of the documented problems in Mascot affidavit preparation and non-compliance with NSWCC procedures, but submitted that those failings "cannot be laid at Bradley's door".[311]

Bradley could have taken stronger action to ensure that the affidavit preparation and warrant application process was operating properly. He was aware of the expansion of the Mascot investigations, the ongoing deployment of Sea wearing body-worn LDs, the large number of Mascot investigation targets, the volume of intelligence being gathered and to be analysed, and he approved TI warrant applications. As a senior manager, Bradley should have recognised that those developments would impose pressures and strains on the investigation, of a kind that would require periodic appraisal. He was uniquely placed to require an assessment and reporting from the senior NSWCC staff on whom he relied.

310 Bradley, P, Submission in reply, 25 September 2015, p. 19.
311 Bradley, P, Submission in reply, 25 September 2015, p. 5.

In those circumstances it was not appropriate for Bradley to rest primarily on the assumption that others were checking affidavits and warrant applications to a satisfactory standard. The problems in the investigation were systemic and endemic for the duration of Mascot from 1999 to 2002. Questions had been raised both internally and externally during that period about the conduct of the investigations. That ought to have prompted Bradley to take steps to ensure that investigative processes were appropriate and that the NSWCC procedures designed to minimise errors and risk were being observed, and not being compromised or ignored. An example of Bradley's failure to take appropriate action in this period was his evidence that he did not instigate any process of checking whether staff actually read and understood the policies and procedures they were required to observe (see section 16.3.1).

For those reasons a finding is recorded below against Bradley for failing to monitor and ensure that NSWCC procedures were complied with in the preparation of affidavits and warrant applications to support the covert and intrusive use of listening devices and telephone interception.

Standen was the Assistant Director in charge of Mascot, and reported directly to Bradley. The LD manual assigned to the Assistant Director the responsibility of checking affidavits and "ensuring all relevant information is provided and supported". In a formal sense, Standen approved all LD applications and was responsible for checking each affidavit and ensuring that all relevant information was provided and supported. His role, in short, was central to the investigative strategy being undertaken by Mascot.

Standen's evidence is that he did perform this role and suggested changes to draft affidavits that he expected to be incorporated. He did not think it was necessary for him to further review those draft affidavits or seek confirmation that the affidavit had been changed. Because of other duties, he most likely did not see all affidavits. Standen did not resile in his evidence from his responsibilities. He acknowledged that he was aware of the practice of police officers of cutting corners and copying and pasting from other affidavits.

Other witnesses (for example, Owen) gave evidence that they could not recall Standen playing a role. Some Mascot staff were unaware of what Standen's role was. Standen did not make a written submission to Prospect on these issues.

Overall, it appears that Standen played a role that was sporadic and that he did not provide the degree of review and supervision that was needed and that fell within his responsibilities. On that basis, a finding is recorded below against Standen for failing to ensure that all affidavits were checked and complied with NSWCC procedures.

Giorgiutti held the senior position of Director and Solicitor to the NSWCC. Appropriately, the LD and TI Manuals assigned a crucial compliance responsibility to that position in oversighting the exercise of intrusive powers that required formal judicial or independent approval. The step-by-step guide in the LD Manual required all documents to be finally approved by the Director, who was specified as 'John Giorgiutti'. The TI Manual that applied from July 1998 to June 2001 stated:

> *When the draft affidavit has been vetted by the Commission's legal officer, the Case Officer should notify the Solicitor to the Commission that he is ready to have the application for an intercept considered.*
>
> *The Solicitor to the Commission determines whether or not the application for the warrant will be proceeded with.*[312]

The Manual went on to state that the Solicitor to the Commission will make that decision taking into consideration "the draft affidavit" and "matters required by the legislation" (as well as other issues such as availability of phone lines etc). Then, "If the Solicitor to the Commission gives permission for the application to be made and gives its approval of the draft affidavit", the Case Officer and legal officer are to finalise the draft affidavit and re-submit it to "the Solicitor to the Commission for approval".[313] (The Manual that was in place from June 2001 placed those responsibilities with the relevant Assistant Director, which in the case of Mascot was Standen).

312 NSWCC, *Telecommunications Interception User Procedure Manual*, 28 July 1998, p. 12.
313 NSWCC, *Telecommunications Interception User Procedure Manual*, 28 July 1998, p. 12.

Giorgiutti gave unsatisfactory evidence to Operation Prospect about how he discharged those responsibilities. Not only is it clear that he did not play the role designated in the Manuals of reviewing and settling affidavits in the Mascot investigations, but in evidence his demeanour indicated some frustration with the idea that as Solicitor on the Record he held this responsibility in respect of legal documents such as warrants and affidavits. In fact, Giorgiutti stated in evidence that he had no role in drafting, reviewing or settling any affidavits during Mascot. Owen's evidence confirmed that Giorgiutti was not involved in oversighting or approving affidavit preparation.

Giorgiutti raised similar points in his submission to Operation Prospect. He observed that the flat management structure that Bradley had introduced at the Crime Commission cut across normal lines of control and responsibility – "Unless someone raised something with me, I had no reason given the flat structure, unless someone came to me I would not go and look at it".[314] He also observed that he was "sort of kept out of the loop" because it was known that he was not "enthralled" by the Mascot investigation.[315]

Giorgiutti's approach was tantamount to an abdication of responsibility of the role that he should have played in affidavit review and approval in the Mascot investigations. This was unacceptable given his seniority, position and role. It was vitally important that the most senior legal officer in the NSWCC discharge this responsibility in respect of supervising a warrant application process that had to meet demanding legal requirements and that could result in significant intrusions into the privacy of people's conversations. Giorgiutti either knew or should have made it his business to know that procedures laid down in the LD Manual were not being followed. On that basis, a finding is recorded below against Giorgiutti for his failure to discharge his responsibility in reviewing and settling affidavits as required by the NSWCC LD and TI Manuals.

Owen played a central role in the affidavit preparation and warrant application process. The LD Manual stated that his role was to "settle [the] affidavit ... ensuring provisions of s16 and s17 [of the LD Act] are complied with", and to seek the Director's (Giorgiutti) advice if necessary.[316]

As the NSWCC solicitor responsible for finalising and witnessing Mascot affidavits from January 1999 until April 2002, Owen was uniquely placed to influence the quality of affidavits and to identify recurring weaknesses in affidavit style and content. It is clear from the evidence to Prospect that many Mascot officers relied upon Owen's oversight as both a quality control mechanism and as a reassurance that the affidavit drafting practices they followed were sanctioned. A number of witnesses, when questioned about practices such as rolling over affidavits and including names of people who were not necessarily Mascot targets, justified their actions by referring either specifically to Owen's oversight or generally to the NSWCC procedures for obtaining internal legal approval for affidavits.

There was some ambivalence in Owen's evidence about the depth of his oversight role. At some points he emphasised his role in checking affidavits for presentation, expression, grammar and clarity. He noted that he was not involved in the operational side of the Mascot investigations. At other times (and in his submission to Operation Prospect) he emphasised that he played a broader role:

- he assisted deponents to meet the requirements of the LD Act
- he requested further information if the information provided in an affidavit was lacking, deficient or unclear
- he asked deponents if the contents of an earlier affidavit remained up-to-date
- he checked if the names in a warrant application corresponded with those in the supporting affidavit
- he would not accept an affidavit being sworn unless satisfied that the deponent had read and understood the contents of an affidavit and believed it to be true.[317]

314 Giorgiutti, J, Submission in reply, 9 May 2016, p. 28, quoting from evidence given in Operation Prospect hearing on 24 October 2014, p. 2444.
315 Giorgiutti, J, Submission in reply, 9 May 2016, p. 28.
316 NSWCC, *Listening Devices Manual*, December 1999, p. 29.
317 Owen, N, Submission in reply, 14 December 2015, pp. 5-6.

Owen's submission also explained and defended some of the affidavit preparation practices that were criticised in the Operation Prospect hearings. For example, if an affidavit noted that Sea may be recording people at a social function, then in Owen's view it was not necessary to explain separately why each person was named in the warrant.[318] A difficulty with that explanation is that the LD Act required an authorising judge to have regard inter alia to "the extent to which the privacy of any person is likely to be affected".[319] Frequently, the Mascot affidavits did not address that requirement by distinguishing between those who were suspected of or had knowledge of corruption and those who may be incidentally recorded.

Owen also addressed the practice of copying from previous affidavits, submitting that it was both efficient and not contrary to any requirement in the LD Act. That is correct, but can quickly lead to error if a deponent is not directly asked whether they checked the veracity or accuracy of statements in the affidavit. It was not clear from Owen's evidence if this was a standard practice that he adopted.

Another aspect of Owen's submission that is not accepted is his view that his actions could only be criticised if there was evidence that he read or was provided with the relevant NSWCC manuals.[320] Owen said he had no recollection of ever seeing a manual, and was therefore unaware of the obligation to prepare affidavits from an original pro-forma.[321] The short response to that submission is that it fell squarely within the responsibilities of a NSWCC solicitor in Owen's role to be abreast of the agency's policy manuals and to ensure they were followed. There is the same difficulty in accepting Owen's submission that the problems in Mascot affidavit preparation were attributable to systemic NSWCC faults and not supervisory failure by NSWCC officials. Owen stated:

> *... any criticism relating to discrepancies between the practices stipulated in the LD Manual or TI Manual and the practices actually adopted, should be directed at the NSWCC generally, or those senior individuals responsible for promulgating the manuals and establishing systems for compliance.*[322]

It must nevertheless be acknowledged that Owen was not solely – or even primarily – to blame for the weaknesses in Mascot affidavit preparation. It is clear that he did discharge professionally his duty of ensuring that affidavits submitted to a judicial officer were styled appropriately and deposed to in accordance with legal formalities. In many situations, no more is of expected of a lawyer who witnesses an affidavit that is drafted by the deponent or by other staff of the agency. As Owen's submission noted, "A legal practitioner is not under an obligation, under the LD Act, the TI Act or otherwise, to conduct independent verification of facts asserted by a deponent in an affidavit".[323]

However, that minimalist role was not suitable for the circumstances of the NSWCC, and particularly in the Mascot investigation where heavy reliance was placed LD and TI warrant applications over an extended period. As noted above, Owen was uniquely placed to influence the quality of affidavits, to detect recurring weaknesses, and to inject some quality control into affidavit content as well as affidavit formatting. It is apparent that Owen did not properly meet that expectation of his role, and accordingly a finding is made below that Owen failed to ensure that the requirements of the LD Act and the TI Act were properly observed in the preparation of LD and TI affidavits and warrant applications.

Less need be said about the role of two senior NSWPF staff in the Mascot investigations – Dolan and Burn. Both noted in their evidence and submissions that they did not have a formal role in the affidavit review and application process. No role was assigned to them by the NSWCC Manuals.

The most that can be said is that they played an important albeit informal role – Dolan as the Superintendent in charge, and Burn as the day-to-day Mascot Team Leader. Some Mascot investigators recalled Burn reviewing at least some Mascot affidavits, and she did not discount that possibility in evidence. Her central role in day-to-day taskings and knowledge of previous recordings would also mean that she could give instructions and directions to staff on daily activities, including the tasks to be added to warrant applications.

318 Owen, N, Submission in reply, 14 December 2015, pp. 2-3.
319 *Listening Devices Act 1984* (repealed), s. 16(2)(b).
320 Owen, N, Submission in reply, 14 December 2015, p. 7.
321 Owen, N, Submission in reply, 14 December 2015, pp. 18-19.
322 Owen, N, Submission in reply, 14 December 2015, p. 8.
323 Owen, N, Submission in reply, 14 December 2015, p. 3.

Dolan's and Burn's membership of the Mascot management team – that met regularly and discussed all aspects of the investigations – meant they could also observe if problems were arising and if flawed practices were being followed. However, neither Dolan nor Burn was directly responsible for affidavit and warrant application approval and review, which was clearly the responsibility and duty of NSWCC staff under the relevant manuals.

16.5.6 Findings

Two of the findings apply to officers who occupied legal positions in the NSWCC (Giorgiutti and Owen). Schedule 1 of the Ombudsman Act excludes from the scope of the Ombudsman's jurisdiction the conduct of a public authority 'where acting as a legal adviser to a public authority or as a legal representative of a public authority': item 6. The findings that are made against Giorgiutti and Owen take account of that jurisdictional limitation.

The exclusion in Schedule 1, item 6, is to be construed narrowly. As explained in section 2.6 of Appendix 2 of this report, a NSW Parliamentary Committee, in discussion of the *Ombudsman Bill 1974*, said the exclusion was to be confined to matters failing within the doctrine of legal professional privilege. Legal professional privilege can be claimed in respect of documents and communications connected with the work of in-house or Government legal practitioners.[324] However, whether the privilege attaches to that material in a given instance will depend, among other things, on the degree of independence the legal practitioner has from his or her employers. Independence is a question of fact and degree[325] to be determined by having regard to factors such as how the practitioner's position is structured and executed, who he or she reports to, and the degree to which the practitioner personally delineated the legal and non-legal aspects of their work.[326]

In the circumstances discussed in this chapter as regards affidavit preparation, the necessary quality of independence has not been established in respect of the work of Giorgiutti and Owen. For this reason, their work would not have attracted legal professional privilege and has not been characterised as 'excluded conduct' for the purposes of Schedule 1, item 6.

71. Bradley

Bradley's conduct, as Chief Executive Officer of the NSW Crime Commission, in failing to monitor and ensure that NSW Crime Commission procedures were complied with in the preparation of affidavits and warrant applications to support the covert and intrusive use of listening devices and telephone interception, was conduct that was otherwise wrong in terms of section 26(1)(g) of the *Ombudsman Act 1974*.

72. Standen

Standen's conduct, as Assistant Director with responsibility for Mascot, in failing to ensure that all affidavits were checked and complied with NSW Crime Commission procedures, was conduct that was otherwise wrong in terms of section 26(1)(g) of the *Ombudsman Act 1974*.

73. Giorgiutti

Giorgiutti's conduct, as Director and Solicitor on the Record for the NSW Crime Commission, in failing to review and settle affidavits as required by the NSW Crime Commission LD and TI Manuals, was otherwise wrong in terms of section 26(1)(g) of the *Ombudsman Act 1974*.

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324 *Waterford v Commonwealth* (1987) 163 CLR 54; *Commonwealth v Vance* (2005) 158 ACTR 47 at 54-55, [2005] ACTCA 35; *Candacal Pty Ltd v Industry Research & Development Board* [2005] FCA 649; *Rilstone v BP Australia Pty Ltd* [2007] FCA 1557; *Gaynor v Chief of the Defence Force (No 2)* [2015] FCA 817.

325 *Seven Network Ltd v News Ltd* [2005] FCA 142 at [5].

326 *Seven Network Ltd* [2005] FCA 142; *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610; *Rilstone v BP Australia Pty Ltd* [2007] FCA 1557.

74. Owen

Owen's conduct, as NSW Crime Commission solicitor, in failing to ensure that the requirements of the *Listening Devices Act 1984* (NSW) (repealed) and the *Telecommunication (Interception) Act 1979* (Cth) were properly observed in the preparation of LD and TI affidavits and warrant applications, was otherwise wrong in terms of section 26(1)(g) of the *Ombudsman Act 1974*.

75. NSW Crime Commission

The conduct of the NSW Crime Commission, in failing to ensure that NSW Crime Commission staff and seconded NSW Police Force officers completed their work in accordance with the NSW Crime Commission LD and TI Manuals, was otherwise wrong in terms of section 26(1)(g) of the *Ombudsman Act 1974*.

16.6 Reliance placed on secondary documents and non-evidentiary material in affidavit preparation

16.6.1 Evidence about Mascot practices

Primary and source documents (including recordings) were available to Mascot staff. A prevalent practice was that reliance was instead placed on secondary sources (such as Information Reports) when LD and TI affidavits were being prepared. In strict legal terms, the primary and source documents contained evidence, whereas secondary documents had non-evidentiary status.

Operation Prospect encountered many instances in which Mascot information reports were inaccurate and imprecise, and these inaccuracies were copied into affidavits. This was illustrated in the Mascot investigations of Officer A (Chapter 6), Officer E (Chapter 8) and Officer F (Chapter 10). Statements made by or about those officers were written into information reports in a way that misrepresented, misquoted, misattributed or inaccurately paraphrased the original statements.

A number of witnesses gave evidence to Operation Prospect that the proper course before including information in an affidavit was generally to check the original sound recording or transcript.[327] However, transcripts were not always promptly available, and Mascot weekly reports often referred to transcript backlogs.[328] The frequent practice was that investigators (or sometimes analysts) would summarise the content of a LD or TI recording in an information report. An investigator would then review the recorded material and prepare a summary identifying the time on the summary at which particular things were said.[329]

The evidence of some Mascot officers was that information reports were sometimes started by one officer and completed by another.[330] Mascot officers regularly used the reports as a basis for preparing affidavits, rather than reverting to original source information. This shortcut led to inaccurate information in reports being carried through into affidavits. The error was compounded when the information was repeated in a rollover affidavit.

One senior Mascot investigator was questioned about the use of information reports in preparing affidavits. He stated that he never really turned his mind to their use, and explained that it was more "that's just the way you put stuff into the system".[331] He continued:

327 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, pp. 669-670; Ombudsman Transcript, [a Mascot investigator], [day] July 2014, pp.786.

328 NSWCC, *Confidential minutes of the Mascot team meeting*, 14 August 2000, p. 3; NSWCC/SCU, *Weekly operational report for week ending 5 January 2001*, dated 5 January 2001, p. 2.

329 See for example: NSWCC Information Report, *(SOD032) Informant contact with Sea, Tuesday (I) 21 November 2000. (CD/095),* reporting officers: [a senior Mascot investigator]/[a NSWCC analyst], [day] November 2000.

330 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2015, p. 31; Ombudsman Transcript, [a Mascot investigator], [day] March 2015, pp. 21-22.

331 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2015, p. 15.

... You know, hypothetically if somebody wanted to go and prepare an affidavit when they did a search and found this document might be of relevance, they could read the document, go back to the source documents which might be the contact advice report, there might be some notes attached to that, it might be the actual tape recording itself.[332]

His evidence was that he did not have a role in supervising junior officers about how to prepare accurate affidavit material.[333] He observed that the information report:

… is just a summary of what's on the tape that was given…

... you would still need to go back, get the tape, make the transcript of that grab, and put it into the – you know, the complying format so that it becomes evidence. This isn't evidence. This is just an information report, albeit the threshold for the affidavit might not be that high, but the tape is the original evidence, not this document.[334]

The same officer was asked whether he intended that information reports he prepared would substitute for the original evidence. He replied: "No. But it is a form of intelligence, and a lot of intelligence is used in the preparation of affidavits."[335] He stated that he thought Burn exercised control over how affidavits were being completed by more junior officers,[336] but he was not able to say how that related either to the way they put affidavits together or the reliability of the evidence therein.[337] He mentioned time pressures and the 21 day warrant period as factors that caused reliance on secondary source material.[338]

This officer stated that he could not say with certainty how an information report might support a warrant application after it left his desk.[339] He expressed the following view about reliance on information reports in affidavit preparation:

That's a training issue and probably if you knew about it you'd want to address it... If you're going to rely on that conversation, you'd probably want to check it against the tape if it was a direct quote because that's not a transcript, that's an information report.[340]

A civilian, senior monitor and NSWCC analyst, who worked directly on Mascot in 1999, said in her evidence that NSWCC officers transcribed LD recordings, which were then vetted by NSWPF officers working at Mascot. She could not immediately recall any instances of complaints about the accuracy of transcriptions.[341]

In her evidence, Burn agreed that the only proper way to prepare an affidavit was to check the recording, check the transcription and ensure this information was accurately included in the affidavit.[342] Burn also agreed that if a particular conversation was relied upon as evidence of corruption or knowledge of corruption to justify the deployment of a LD, the conversation should be accurately transcribed into the supporting affidavit.[343] When presented with examples of incorrect information in affidavits, Burn agreed that reliance on information reports rather than source information "was clearly a practice" at Mascot.[344] At the time, she did not know that Mascot officers were using information reports to provide affidavit content.[345] Had she known that was occurring, she "would have reminded them that they should refer to the source of the information for accuracy".[346]

332 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2015, p. 15.
333 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2015, p. 15.
334 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2015, p. 16.
335 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2015, p. 16.
336 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2015, p. 16.
337 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2015, p. 17.
338 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2015, p. 17.
339 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2015, p. 17.
340 Ombudsman Transcript, [a senior Mascot investigator], [day] February 2015, p. 17.
341 Ombudsman Transcript, [a NSWCC senior monitor and analyst], [day] May 2014, p. 47.
342 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2733.
343 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2733.
344 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2730.
345 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2730.
346 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2730.

Dolan gave evidence that he understood the practice in Mascot to be that NSWPF officers would swear the affidavits and provide the necessary information to support the claims in those affidavits. He could not say what structures were in place to ensure that recorded conversations were accurately reported in affidavits:

Q: Can I ask you this; as the investigation went on it's fair to say, isn't it, that some recorded conversations ended up being put in the affidavits as a reason behind needing to continue rolling over the listening device warrants?

A: Yes.

Q: What structures were in place to check the accuracy of what was being put in the affidavits against the transcripts of the listening device product?

A: I couldn't answer that.[347]

Dolan stated that the proper practice would be to base affidavit content on a transcript rather than a summary or an information report.[348] He expected that a transcript of a recorded conversation included in an information report would be reproduced accurately and in the correct order:

Q: OK. All right. In terms of accuracy in an information report, given that it may be used to prepare affidavits?

A: Yes.

Q: You would expect officers to put in accurately what the transcription of the conversation was, wouldn't you?

A: Word for word.

Q: Word for word? And in the order things were said as well?

A: Yes.

Q: So you wouldn't attribute a reply to something if it had actually been said before something?

A: That's correct.[349]

As noted in Chapter 10, Operation Prospect presented Dolan with an example of a statement that was misattributed to Officer F in an information report. He agreed that the statement was incorrect and not a fair reflection of the transcript of the recorded conversation. Dolan gave evidence that he could not understand why transcript information would be misquoted in a manner that made a target look more suspicious, and that it would be improper for that to occur.[350]

The written submissions that Operation Prospect received from former Mascot officers contained comments about this systemic weakness in Mascot processes. A former junior Mascot officer expressed the following view:

> *... it was accepted practice that when a warrant was "rolled over" with another officer that given the volume, number and sizes of warrants that the officer that took that warrant over relied on the information contained in that warrant. There was no practise or requirement that the officer should review all the evidence previously sworn in that previous affidavit. Indeed from an operational position that would have been impractical and impossible and was not the procedure in place.*[351]

347 Ombudsman Transcript, John Dolan, 31 October 2014, pp. 2595-2596.
348 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2647.
349 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2644.
350 Ombudsman Transcript, John Dolan, 31 October 2014, pp. 2646-2648.
351 [A Mascot investigator], Submission in reply, [day] September 2015, p. 4.

Another officer submitted that information derived from a previous affidavit sworn by a senior officer was considered to be reliable and could be rolled over in a fresh affidavit.[352] The same view was expressed by another officer, referring to:

> *... a systemic issue permitted by failures to properly oversee careful preparation of documentation adopting expediency over accuracy. Shortcuts were taken out of bona fide reliance on work and integrity of other officers. Time pressures and perceived operational imperatives led to this unsatisfactory practise.*[353]

16.6.2 Analysis

The Mascot investigations did not have processes in place to ensure that affidavit content accurately reflected the primary source information, such as LD recorded conversations. Several former senior Mascot officers agreed in evidence to Operation Prospect that supporting affidavits for LD and TI warrants included inaccurate information. A common problem was that inaccurate information in information reports was carried over into affidavits.

It appears that little training was provided to Mascot investigators on the importance of referring back to primary source material to confirm that information in affidavits was true and accurate. Some former Mascot officers who swore affidavits seemed not to appreciate this distinction, between primary source material and a summary of it in another document. A number of witnesses, including Burn and Dolan, acknowledged that the proper practice for a deponent would be to check the source information before quoting a recorded conversation in an affidavit (although their evidence was that they did not realise this was not occurring at the time). The witness evidence to Operation Prospect acknowledged that shortcuts were taken at Mascot and source information was not always checked.

Shortcuts were taken as Mascot officers felt under pressure to complete affidavits in short time frames, because of the heavy reliance on LDs and that warrants were only in force for 21 days at a time. It seems that Mascot officers also believed they could generally rely on the work of their colleagues without further checking, particularly if the information had been included in one or more previous affidavits that had been submitted to a judicial officer. There was also an assumption among some officers that a colleague would be responsible for ensuring the accuracy of statements in information reports and other affidavits. This assumption led to information being included in affidavits without the original source material being located and confirmed.

Summaries of LD product (including in information reports) would sometimes modify the original information in a significant and misleading way. The summary would then be relied upon in affidavit preparation, and would be “rolled over” into subsequent affidavits. A variation of this problem was that information would be presented in information reports and affidavits in a way that increased suspicion about the target of an investigation. It appears that the culture in Mascot was inherently suspicious and tended to portray information in a way that supported suspicion, omitted exculpatory information, and misrepresented inferences as facts.

The evidence before Operation Prospect suggests on balance that these practices were not calculated to deceive and were not driven by improper motive on the part of deponents. Witnesses in the Operation Prospect hearings often readily acknowledged the deficiencies in affidavits and that primary source information did not support the contentions and assertions made in affidavits. Overall, these systemic weaknesses were attributable to work pressures and sloppy work practices, rather than improper motive. Accordingly, no adverse finding is made in this section about the work of individual officers. The finding is directed instead to systemic failures in the work practices managed by the NSWCC. There are individual findings against officers in earlier chapters for reasons that are explained.

352 [A junior Mascot investigator], Submission in reply, [day] July 2015, p. 4.
353 [A junior Mascot investigator], Submission in reply, [day] July 2015, p. 3.

16.6.3 Finding

76. NSW Crime Commission

The NSW Crime Commission was responsible for the actions of members of the Mascot Task Force in preparing affidavits supporting LD and TI warrant applications. The NSW Crime Commission was responsible for the Mascot and Mascot II references and for supervising members of the Mascot Task Force to ensure that statements made in supporting affidavits were truthful, accurate and reflected the source material upon which statements and assertions were based. A contributing element was the failure of the NSW Crime Commission to implement its own policies, practices and procedures in conducting the Mascot references and preparing affidavits and warrant applications. The conduct in failing to provide adequate processes to ensure that affidavit content accurately reflected primary source information of the NSW Crime Commission was unreasonable and otherwise wrong in terms of section 26(1)(b) and (g) of the *Ombudsman Act 1974*.

16.7 Reliance on warrants in deploying Sea

16.7.1 Evidence about Mascot practices

Operation Prospect has reviewed an enormous volume of documentary and oral evidence about the Mascot investigations, as explained in Chapter 2. Operation Prospect has been unable to find evidence of any practice whereby Sea or his case officers were shown a copy of the warrant in place at the relevant times, nor advised of who could be lawfully recorded at that time. This led to unlawful recording of at least three people who are discussed in Chapters 8 and 11. There is limited evidence available to Operation Prospect about how Sea was tasked on each occasion. It is clear that farewells, lunches and meetings were treated as opportunities for Sea to try to corroborate allegations made in his original debrief or to gather evidence of contemporary allegations of corruption.

A senior Mascot investigator who was one of Sea's case officers (also known as a handler), gave evidence to Operation Prospect that he would brief Sea on an almost daily basis. His instructions would come via Burn who would tell him to task Sea to attend meetings or functions and "get him to prompt these questions". He agreed with the proposition that he was a "conduit" between his superiors and Sea and that his role was "trying to keep Sea at a level head I suppose, try and keep him, because he was stressed to the max as well".[354] The investigator took it on faith that a warrant was in place to enable Sea lawfully to use a LD to record those conversations:

Q: *So when you're deploying Sea to do this work, um, in terms of using a recording device, the instruction came from whoever was handling him; this is a conversation to be recorded?*

A: *Yep.*

Q: *And so how - how did you know that that was covered by a warrant?*

A: *Oh, I was just going under the faith that Burn had given us the instruction and that's where it was coming from?*

Q: *She didn't mention this is covered under warrant XXX?*

A: *Oh, not in a phone call. If she had rung me and said we need Sea to go and do this.*

Q: *So you were assuming that she had the warrant and went, right, in this 21 days, these people can be targeted and it was under that basis that she'd ring you and say - - -*

A: *Yes. Yep.*

354 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 67.

Q: *Yep.*

A: *As I said, Dolan and Burn were the ones giving the directions on where he was. Um, I'm assuming that all the warrants - because there was a board with all the warrants up and their due dates and things like that...*[355]

Burn did not agree with the above evidence, and stated it was the case officer's responsibility to prepare the affidavits.[356]

Sea told Operation Prospect that he assumed that there was always a valid warrant to allow him to record conversations by LD:

> *...* [y]*eah. But that was more - that was more to do with who we – who we – who might pop up on the – on the device and just making sure that it was okay to do it.*[357]

Former Mascot officers interviewed by Operation Prospect acknowledged that it may be unlawful to deploy Sea to record a person who was not named on a LD warrant. Their evidence was that no process was in place to check that Sea was only deployed to record people named in LD warrants. Some officers assumed there was a system in place, but could not identify that system or remember anyone checking to ensure that people to be recorded were named on warrants.

Another Mascot investigator gave similar evidence about cross-checking at the time of Sea's deployment to ensure he would only record people named in warrants, stating "there was no system for that".[358] He agreed this omission could be a dangerous practice.[359] He reiterated that point in his submission to Operation Prospect: "It was not the practice for the investigators to carry the warrants and these were held at the NSWCC. It was often the case investigators were advised over the phone that the warrant had been granted as they were in the field."[360]

Another officer heavily involved in the early stages of Mascot and debriefing Sea submitted: "I never saw any warrants while I was on the Mascot investigation".[361] A senior Mascot investigator thought there were systems in place to prevent people being recorded who were not named in warrants, but if Sea was tasked to record someone without a warrant it was "human error".[362] He agreed that recording of someone not named in a warrant was something that should not have happened.[363]

Dolan confirmed that it may breach legislative requirements to record the conversation of a person not named on a LD warrant.[364] Owen agreed it would be illegal if Sea was tasked to deliberately record people who were not on the relevant warrants.[365] Owen was asked how he satisfied himself that the deponents were not tasked in this way, and he replied: "I don't recall ever having that conversation with anyone".[366]

16.7.2 Analysis

There does not appear to have been any procedure in place at Mascot to ensure that a warrant was in place for Sea to record the particular conversations of people he was tasked to record. The evidence suggests that Mascot officers regularly operated on the assumption that a warrant was in place when Sea was deployed to record conversations.

355 Ombudsman Transcript, [a senior Mascot investigator], [day] April 2014, p. 136.
356 Burn, C, Submission in reply, 25 September 2015, Appendix 4, p. 9.
357 Ombudsman Transcript, Sea, 23 October 2013, p. 43. (2016/203609)
358 Ombudsman Transcript, [a Mascot investigator], [day] August 2014, p. 1182-1183.
359 Ombudsman Transcript, [a Mascot investigator], [day] August 2014, p. 1182.
360 [A Mascot investigator], Submission in reply, [day] September 2016, p. 14.
361 [A senior Mascot investigator], Submission in reply, [day] August 2015, p. 5.
362 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 696.
363 Ombudsman Transcript, [a senior Mascot investigator], [day] July 2014, p. 696.
364 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2637.
365 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2353.
366 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2352.

This posed a clear danger that both Sea and his handlers would act in contravention of the Listening Devices Act, as might other officers who relied on the LD product. As discussed in Chapters 5 and 11, section 5 of the LD Act contained a general prohibition on the use of LDs to record private conversations, with a number of listed exceptions. The prohibition in section 5 applied not only to the person using a LD but also to any person who caused the LD to be used.

Mascot should have had a system in place for checking warrants before Sea was tasked to record the conversations of particular people. If no warrant existed and it was operationally important to record the person, the NSWCC should have applied for a new LD warrant. It is clear that on some occasions Mascot investigators did prepare warrants that purposely listed all those to be recorded, as discussed in Chapter 9 in relation to the King send off.

Operation Prospect has decided not to record a finding against individual officers for this failure in Mascot work practices.

As to Sea, he was effectively used as an investigative tool by Mascot. He was not informed of strategic decisions, he was not involved in Mascot meetings, he had no direct input on who he would record on a day-to-day basis, and he was not privy to the contents of supporting LD affidavits or the names listed in warrants. Those decisions were made by Mascot investigators and passed on to him. It was nevertheless clear that Sea's safety and wellbeing were paramount to Mascot.

As to Sea's handlers, they too were not necessarily privy to the contents of supporting LD affidavits or the names listed on warrants. There is limited evidence as to who tasked Sea on each occasion. On a day-to-day basis Sea interacted with colleagues in order to elicit supporting evidence of his earlier allegations or of contemporary corruption. When Sea attended functions that Mascot investigators knew about, there is limited evidence that he was given firm instructions as to who he should record.

The failures that are discussed in this section occurred in the processes managed by the NSWCC. It was a systemic failing and a finding is made accordingly against the NSWCC. On the same basis, some chapters of this report explain that the defence of honest and reasonable mistake would be available to individual Mascot officers who caused Sea to record conversations in contravention of the LD Act. This defence is explained in Chapter 5.

16.7.3 Finding

77. NSW Crime Commission

The NSW Crime Commission was responsible for ensuring that members of the Mascot Task Force acted in accordance with the requirements of the *Listening Devices Act 1984* in deploying Sea to record private conversations with a concealed listening device. There was a failure to ensure that individuals who Sea was tasked to record were named in a LD warrant in place at the time. The conduct of the NSW Crime Commission was unreasonable and otherwise wrong in terms of section 26(1)(b) and (g) of the *Ombudsman Act 1974*. This failure also led to the private conversations of Officer H, Officer M and Ms E being recorded when no relevant warrant was in place. This conduct was based wholly on a mistake of fact in terms of section 26(1)(e) of the *Ombudsman Act 1974*.

16.8 Management of LD product

The Listening Devices Act imposed strict controls on the use that could be made of LD product obtained in contravention of the Act, as discussed in Chapter 5. An offence could be committed by a person who knowingly transcribed or communicated an unauthorised LD recording. The LD Act also required the destruction of some LD product, particularly of recordings that were not relevant to the prescribed offences being investigated.

This section discusses the failure of the NSWCC and Mascot investigators to comply properly with the legislative requirements. Inadequate training for Mascot staff and unclear guidance in NSWCC manuals and policy documents are also discussed.

16.8.1 Transcribing LD product

It appears that all Mascot LD tapes were logged and kept. This meant that both authorised and unauthorised recordings would be summarised, and on occasions formally transcribed and kept as a record.

A Mascot investigator did not recall any system to ensure that people's confidential communications that were not supported by a warrant were not used or transcribed.[367] He agreed that only with the benefit of hindsight did he realise that it was improper to record, transcribe and use the evidence from unintentionally recorded conversations, except in specific limited circumstances. In evidence to Operation Prospect he was asked:

> *Q:* *Was there any system at Mascot that identified where people had been inadvertently recorded that their conversation was not allowed to be transcribed?*
>
> *A:* *There was a system, the, in terms of - there wasn't a form procedure, but because of in line with the manual, and I think just general understanding was that, for example if Sea was at home and he was recorded in a conversation, in a conversation – if he accidentally turned the device on or had a general conversation with someone and it didn't relate to the matter, then that is not relevant to the investigation then -*
>
> *Q:* *Alright, it shouldn't be recorded?*
>
> *A:* *It shouldn't have been recorded, but if it was recorded then ---*
>
> *Q:* *It shouldn't be transcribed?*
>
> *A:* *Transcribed, and/or used in any sort of evidence obviously.*
>
> *Q:* *Alright and what about where there was no authority to record the conversation of a particular person who happened to be recorded. That's not allowed to be transcribed either, is it?*
>
> *A:* *No.*
>
> *Q:* *Even if that conversation might have had some juicy details that the investigation may have liked to have used, it would have been illegal to record it – sorry, transcribe it, wouldn't it? Was that your understanding as to the way things were done?*
>
> *A:* *It-*
>
> *Q:* *Sorry, I've asked you two questions?*
>
> *A:* *Yes. No. I was going to say a memory – sorry, a recording would have been given to the transcriber within the Crime Commission to then transcribe-*
>
> *Q:* *But how would they know that they weren't allowed to transcribe the conversation of Mr X because he's not on the warrant?*
>
> *A:* *I can't answer. I don't know. So it would come up – the transcript would to and fro between the investigative team and the transcribers. Now, whether that was then removed, or whether it was just never considered because it wasn't relevant to the case, I – unless you can give me a specific example showing me one where that has taken place…*[368]

Later in his evidence, the Mascot investigator was asked about his understanding at the time as to what recorded material was allowed to be typed, transcribed or summarised:

367 Ombudsman Transcript, [a Mascot investigator], [day] August 2014, p. 1312.
368 Ombudsman Transcript, [a Mascot investigator], [day] August 2014, pp. 1264-1265.

A: *… that it couldn't be published or released. Now, the definition of published, if it was – if a transcriber transcribed a whole conversation and there was a third party in there that may – that shouldn't have necessarily been in there, I don't – from memory I – we would never have – obviously if this matter – if a matter went to a criminal proceeding or another type of proceeding, then only the relevant portions in that transcript would be removed. So there is a – it is possible that those conversations may have been transcribed by the transcriber. Whether they were actually omitted to say "Conversation involving blah blah not relevant", I don't recall that.*[369]

Another Mascot investigator said that nobody told him when he worked for Mascot that it was not appropriate or lawful to transcribe unintentionally recorded conversations.[370]

Dolan said it was the job of the police officers working on Mascot, as opposed to NSWCC staff, to ensure that unauthorised recordings were not then transcribed.[371]

Owen did not recall discussing with the deponents of affidavits their obligation not to transcribe material that was incidentally recorded without the authorisation of a warrant. He did not know if any training on the requirements of the LD Act was given while he was at Mascot. Owen assumed that the officers would know the requirements of the LD Act in relation to transcribing material that was incidentally recorded.[372]

16.8.2 Training in LD product management

As discussed earlier in this chapter, Mascot staff were not given proper training in affidavit preparation. Operation Prospect heard evidence that there was also insufficient training in how to deal with LD product.

A former NSWCC analyst who worked on Mascot told Operation Prospect said that he received only limited training, referring to it as "kind of on the job".[373] He explained that he was, in practical terms, guided by a senior Mascot investigator about a lot of his work. He reported to the senior investigator and passed on to him anything of interest, including interesting conversations he heard in recorded conversations.[374] He said he worked closely with the senior investigator but did not know exactly how the Mascot reference worked[375] or the individual allegations that were under investigation.[376]

The NSWCC analyst agreed that it was most likely an analyst's responsibility to ensure that only authorised conversations were transcribed, but he was never told this. He did not remember what he was told about who was named on warrants and who could be recorded. He wondered whether other analysts knew to check these points.[377] He said he was not aware that warrants had to name the persons intended to be recorded.[378]

The NSWCC analyst said that the police who picked up the LD product from Sea would give a rough synopsis to the monitors, saying: "you're going to hear this sort of stuff on there, pay attention to these bits".[379]

One of his duties during Mascot was to look at the information on the Schedule of Debrief and assess whether the LD product supported an allegation.[380] He said: "there wasn't any great guidance ...You use your own judgement."[381] He said he was never told that "if so and so's name doesn't appear, um, you can't listen to the call".[382] He concluded that it was Burn who decided what sections of the LD product would be transcribed,

369 Ombudsman Transcript, [a Mascot investigator], [day] August 2014, p. 1266.
370 Ombudsman Transcript, [a Mascot investigator], [day] August 2014, p. 1182.
371 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2638.
372 Ombudsman Transcript, Neil Owen, 21 October 2014, p. 2353.
373 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 7.
374 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, pp. 14-15.
375 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 78.
376 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 75.
377 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 208.
378 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 155.
379 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 52.
380 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 83.
381 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 90.
382 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 150.

although he acknowledged that it was possibly others. When asked if every tape was transcribed he answered: "Nope. Definitely not."[383]

The NSWCC analyst had the understanding that it was adequate for transcription purposes if a NSWCC officer was named on the LD warrant as a person who could listen to the recorded material.[384] He said he would have assumed it was a lawful recording if Sea carried out the recording.[385] He did not consider it to be part of his brief to know whether Sea knew who he was allowed to record based on the warrants in place.

16.8.3 NSWCC policies and procedures on LDs

The versions of the NSWCC LD Manual that were in place during the Mascot investigations dealt principally with applying for LD warrants, registration procedures, custody of LD product and evidentiary matters. The Manuals did not provide instructions or guidelines for NSWCC officers in the use or deployment of LDs. The LD Manual did not address the obligation under the LD Act not to publish or communicate or retain the contents of a confidential conversation that had been unlawfully listened to or recorded.[386] Nor did the Manual address the restrictions that applied if a conversation was unintentionally recorded. In fact, section 6 of the LD Act that dealt with communication or publication of unlawfully recorded conversations was not specifically mentioned in the LD Manual.

The LD Manual noted that "[o]ne of the primary functions of a LD will of course be to obtain evidence of the commission of an offence",[387] and that evidence so obtained may need to be presented to a court. In relation to the effect of non-compliance with the LD Act, the Manual stated:

> *Legality*
>
> *If tapes are made from listening devices other than in accordance with the Act or by in any way exceeding the terms of the warrant they will, depending on the circumstances, be ruled inadmissible, and an entire prosecution case could collapse. It is imperative to ensure the Act is complied with.*[388]

The LD Manual indicated that the consequences of using a LD in a manner not authorised by the Act "are twofold":

> *(i) the evidence obtained may be ruled inadmissible; and*
>
> *(ii) breach of the LD Act is an offence.*[389]

The LD Manual did not explain in any detail what types of recordings may be in breach of the Act. The Manual did not explain that only conversations that had been recorded or listened to lawfully by a LD could be communicated, summarised, transcribed and kept by the NSWCC. Nor did the LD Manual explain that a recorded conversation could not be transcribed or summarised and kept by the NSWCC solely on the basis that it was relevant to Mascot's Terms of Reference.

The evidence to Operation Prospect showed that the NSWCC affidavit preparation practice was that all NSWCC staff were named in LD affidavits and warrants as persons permitted to 'use' the LD.

16.8.4 Destruction of LD product

Section 22 of the LD Act required that any evidence or information obtained by the use of a LD be destroyed as soon as practicable after it was made, if it did not relate directly or indirectly to the commission of a prescribed offence within the meaning of Part 4 of the LD Act.[390] This requirement applied to information that was lawfully

383 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 118.
384 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 149: This is a reference to the annexure to an affidavit which names Mascot staff.
385 Ombudsman Transcript, [a NSWCC analyst], [day] May 2014, p. 64.
386 Listening Devices Act, s. 6.
387 NSWCC, *Listening Devices Manual,* June 1998, p. 19; NSWCC, *Listening Devices Manual*, December 1999, p. 23.
388 NSWCC, *Listening Devices Manual*, June 1998, p. 20; NSWCC, *Listening Devices Manual*, December 1999, p. 23.
389 NSWCC, *Listening Devices Manual*, June 1998, p. 13; NSWCC, *Listening Devices Manual*, December 1999, p. 13.
390 Section 15 of the LD Act defines 'prescribed offence' to mean an offence punishable on indictment or of a class or description prescribed for purposes of Part 4 the Act.

recorded either pursuant to a warrant granted under Part 4 of the LD Act, or in connection with a serious narcotics offence or an imminent threat of serious violence to persons or substantial damage to property. It is an offence not to destroy LD product as required by section 22, punishable by up to 20 penalty units or imprisonment for a term of 12 months, or both.

In *Haddad & Treglia*, the NSW Court of Criminal Appeal observed:

The obligation to destroy under s. 22 does not extend to all information, except that concerning the offence for which the warrant was originally obtained. Information about any prescribed offence, within the meaning of s.15, can be retained.[391]

The NSWCC Investigation Manual, current as at December 1999, referred to the legislative requirement to destroy LD material and the process to be undertaken by officers:

Destruction of Listening Device Material

Section 22(2) ·of the Listening Devices Act 1984 contains provisions for destruction of tapes and transcripts obtained as a result of a listening device warrant. The Listening Devices Manual on the Intranet contains further information. Recommendations for destruction ·will be initiated by the Secretariat when assessing operational files for destruction. Approval to return LD material will then be sought from the relevant case officer/Assistant Director prior to destruction.[392]

The NSWCC Listening Devices Manual, current as at December 1999, under the heading "Destruction of tapes and transcripts", set out section 22 of the LD Act then stated:

The Commission has an obligation at the conclusion of each operation in which a listening device has been used to:

(i) *identify the records (tapes and transcripts, summaries, notes etc) brought into existence as a result of the use of the listening device; and*

(ii) *identify (either strengthening or weakening the prosecution's case) which of those records relate directly or indirectly to the commission of an offence, and arrange for the destruction of the remaining records. The only exception will be those cases where the defence have already indicated an interest in the 'irrelevant' material or are aware of its existence and might seek access to it.*

The responsibility for identifying irrelevant material is that of the case officer. He/she will require the assistance of the coordinating analyst to identify the irrelevant records held by the Commission (eg transcripts of irrelevant conversations) which must be destroyed. He/she will also need to check with the Commission's Financial Investigation Team before destruction, as the material may have significance for confiscation proceedings. Once all irrelevant material has been identified, it must be listed and forwarded with a covering memo to the Manager, Secretariat who will arrange for its destruction pursuant to section 22(2) of the Act. The remaining relevant material will be retained and dealt with in accordance with the Commission's Functional Disposal Schedule.[393]

Operation Prospect is aware of significant quantities of evidence and information that was obtained by the use of LDs by Mascot and other operations. Much of that product was deemed relevant to the matters being investigated and could be retained. However, there was also material that was either clearly irrelevant at the time it came into an investigating officer's possession, or that became irrelevant in the course of investigation. Much of that material should have been but was not destroyed as required by section 22 of the LD Act and the two NSWCC LD Manuals. There were clear breaches of section 22 of the LD Act, but it is not now possible to ascertain the individual case officers who may have been in breach of section 22. Therefore, no individual findings are made in this report with respect to those breaches.

391 *R v Haddad and Treglia* [2000] NSWCCA 351 at [62].
392 *NSWCC Investigation Manual, December 1999,* Chapter 12, p. 6.
393 NSWCC, *Listening Devices Manual, December 1999*, p. 17.

16.8.5 Analysis

The LD Act imposed tight controls on the use of listening devices to listen to or record private conversations. The central objective was to safeguard individual privacy. The controls in the LD Act applied not only to the use of listening devices, but also to the communication and publication of unlawfully recorded conversations, and the retention of recorded conversations. The controls were reinforced by offence provisions in the LD Act.

The analysis in this report points to many instances of disregard if not breach of the provisions of the LD Act. Those instances have not usually resulted in findings that individual officers may have committed an offence, for a range of reasons that are discussed in Chapter 5 and in the relevant chapters. Among them are that some offences in the LD Act required knowledge as an essential element of the offence (for example, section 6); the defence of honest and reasonable mistake may be available to officers who breached a strict liability offence (for example, section 5); or it is not clear from the evidence before Operation Prospect which individual officers had responsibility for particular matters and acted in contravention of the LD Act.

Underlying those points is that officers frequently acted in accordance with established work practices that were faulty. In addition, as noted in this section, unauthorised recordings appear to have been made and then subsequently transcribed and/or communicated because:

- there was no system in place to ensure that the planned deployments of Sea to record people's conversations corresponded with those people being named in the relevant warrants
- insufficient training was provided to police officers and analysts who were working with the LD product
- NSWCC policies did not clearly set out instructions relating to the use or deployment of LDs
- Mascot investigators could not readily access and review LD warrants to ensure that the people who were recorded were named in the warrants.

The training that Mascot officers (both police and civilian staff) were given in relation to the use of LDs and LD product was insufficient. While witnesses seemed to understand that it would be unlawful to deploy Sea to record a person without being named in a warrant, witnesses displayed less knowledge about the restrictions on publishing, communicating or keeping records of unintentional and unauthorised recordings.

The consequences of making an unlawful recording or of communicating, publishing or possessing unauthorised LD were significant. They included unlawful and unfair intrusion into the privacy of conversations, the commission of offences, and the possibility that evidence relied upon in subsequent criminal proceedings may be rendered inadmissible and that prosecutions may fail on that basis. Against that background, it was a serious failing that the NSWCC did not have in place clear, well known and reliable systems to ensure that the LD Act was followed, and an adequate training program and policy framework to ensure that officers understood the requirements of the LD Act. A finding is recorded below against the NSWCC for these systemic failings.

Another matter that requires attention, even though many years have passed since the Mascot investigations, is the obligation in section 22 of the LD Act to destroy LD product that does not relate directly or indirectly to the commission of a prescribed offence. The obligation to take this step reinforces the privacy protection objective of the LD Act. It would be appropriate for the NSWCC to review the Mascot investigation holdings to determine which recordings should be destroyed in accordance with this legislative requirement.

16.8.6 Finding

78. NSW Crime Commission

The NSW Crime Commission did not have in place, during the period of the Mascot investigations from 1999 to the end of 2002, adequate systems to ensure that records of private conversations obtained by the use of listening devices were communicated, published and retained only in accordance with the requirements of the *Listening Devices Act 1984*. The failure of the Commission to have such systems in place was conduct that was unreasonable and otherwise wrong in terms of section 26(1)(b) and (g) of the *Ombudsman Act 1974*.

16.9 Improving governance for current and future task forces

The NSWCC Act and the LD Act that were in force at the time of the Mascot investigations have both been repealed and replaced by other Acts. There is evidence that from an early stage following his commencement at SCIA in about April 2001, Scipione identified problems with the management structure in SCIA and set about improving it. He engaged an external consultant who prepared a detailed report.[394] Since that time the structure of the NSWPF Internal Affairs division has entirely changed. The NSWCC has also undergone a significant change process since the Mascot investigations. Accordingly, it would be of no utility in this report to include recommendations to change the structure, systems and procedures of either organisation.

It would nevertheless be beneficial for both the NSWPF and the NSWCC to review future joint task force investigations in light of the systemic problems identified in this report. There should be no ambiguity or lack of clarity in the arrangements for management and decision-making in joint investigations. The operational focus should not overtake the importance of objectively ensuring that legislative and administrative requirements for the investigation are adequate and being followed. The training needs of officers should also be reviewed to ensure they can perform their duties correctly and in compliance with applicable legal and administrative requirements. This is particularly important when coercive or intrusive powers are being utilised in a joint investigation.

Both the NSWPF[395] and the NSWCC[396] submitted to Operation Prospect that there are existing protocols governing joint task force investigations. It is important that those existing protocols deal effectively with the issues and problems that resulted in the systemic failures outlined in this Chapter.

The NSWPF made the point in its submissions that while current section 58(2) of the *Crime Commission Act 2012* (Crime Commission Act) provides that police officers who are part of a task force will remain under the control and direction of the NSWPF Commissioner, that provision is subject to the directions and guidelines furnished by the Management Committee under section 58(3) of the Crime Commission Act. The NSWPF submitted there may be a benefit in the Management Committee reviewing the current standing directions and guidelines for joint task forces, to ensure they reflect the operational strengths and skill sets of officers belonging to each agency. The review should also assess whether there are clear lines of authority for reviewing complaints, to the extent that the substance of a complaint is relevant to the conduct of an officer of either agency. The NSWPF stated that it fully supports the following recommendation.[397]

16.9.1 Recommendation

24. It is recommended that the NSW Police Force and the NSW Crime Commission jointly review the existing protocols for joint operations between both organisations (task forces) to ensure:

- there are clear and formalised reporting structures, reinforced with a clear line of authority for reporting complaints
- there is clear and unambiguous responsibility allocated for supervision of tasks that require legislative compliance
- appropriate training is provided for new and junior officers.

394 Anderson, J., The improvement process for the Special Crime Unit Including the debrief of Florida Mascot: Business Improvement Final Report, 2003, p. 9.
395 NSWPF, Submission in reply, 20 August 2015, pp. 15-16.
396 NSWCC, Submission in reply, 15 December 2015, p. 5.
397 NSWPF, Submission in reply, 20 August 2015, pp. 15-16.

Chapter 17. Other matters in connection to Mascot

This chapter contains an assortment of issues that supplement the analysis in other chapters. Some of the issues concern the methodology of the Mascot investigations. A few other issues either arose from general complaints or allegations that were made to Operation Prospect, or are matters that should be noted in this report.

The issues discussed in this chapter are:

- the decision to broaden the Mascot reference in November 2000, and the questionable reliability of a document that may have influenced that decision
- the use of integrity tests by Mascot officers, and whether this was an appropriate activity to be undertaken in a reference being conducted by the NSW Crime Commission (NSWCC)
- the inappropriate use of pseudonyms in Mascot operational documents to describe some of the targeted officers
- an incident of misuse of telephone intercept (TI) material by a senior police officer
- the impact of the lengthy covert phase of the Mascot investigations on the standing and career advancement of some of the targeted officers
- the failure of the Commissioner of the Police Integrity Commission (PIC) to place on the record that he had earlier given professional assistance to informant Sea
- a complaint about the misuse of telephone intercept material in Operations Orwell and Jetz
- the assistance given to Sea during and after the Mascot investigations.

17.1 Broadening of the Mascot reference (Mascot II)

Mascot was established on 9 February 1999 when the NSWCC Management Committee (Management Committee) referred certain matters to the NSWCC for investigation in a notice under section 25(1) of the *New South Wales Crime Commission Act 1985* (repealed) (NSWCC Act). Referral of criminal activities to the NSWCC for investigation was a function of the Management Committee under section 25(1)(a) of the NSWCC Act. Another function, under section 25(1)(b), was to review and monitor generally the work of the NSWCC. Section 25(3) of the NSWCC Act provided that the Management Committee may 'by the terms of a reference' impose limitations on an investigation.

On 9 November 2000, the Management Committee extended the Mascot reference using the referral process – creating the reference 'Mascot II'. The Mascot II reference was significantly broader in scope than the original Mascot reference. Although the reference document used the description Mascot II, staff continued to call the investigation Mascot.

17.1.1 Establishment of Mascot II

The Management Committee consisted of the Minister for Police, the Commissioner of Police, the Chairman or another nominated member of the National Crime Authority (or from June 2003 the Chair of the Board of the Australian Crime Commission), and the Commissioner of the NSWCC.[398]

The initial Mascot reference on 9 February 1999 was limited to certain 'persons' and 'their associates', whose names had been provided that day to the Management Committee.[399] The notice referred to the NSWCC for investigation certain criminal activities that those persons and their associates 'may have engaged, may be engaging, or may be about to engage in'.[400] The following offences were specified:

398 *New South Wales Crime Commission Act 1985* (repealed), s. 24.

399 NSWCC, *Section 25(1) Notice – Mascot Reference*, signed by Paul Whelan LLB MP, Presiding Member, New South Wales Crime Commission Management Committee, 9 November 1999.

400 NSWCC, *Section 25(1) Notice – Mascot Reference*, signed by Paul Whelan LLB MP, Presiding Member, New South Wales Crime Commission Management Committee, 9 November 1999.

(a) *serious Drug Offences as defined in section 3 of the Act*

(b) *money laundering within the meaning of section 73 of the Confiscation of Proceeds of Crime Act 1989*

(c) *conspiracy to pervert the course of justice contrary to section 319 of the Crimes Act 1900 and the Common Law.*

The Management Committee received regular progress reports on Mascot operations. Although the reports did not provide details of the number of listening devices (LDs), telephone intercepts (TIs), controlled operations and integrity tests used by Mascot – or the number of individuals named on warrant applications or recorded – they did indicate that Mascot was obtaining electronic evidence to inform its investigation.

On 9 November 2000, a meeting of the Management Committee was given information about relevant criminal activities that were to be the subject of investigation under the reference. The information included a document titled 'Review of Reference Mascot' (Review document) that provided an update on the status of the Mascot investigations. The Review document stated, in part:

> *Informant Sea has now moved to Crime Agencies. There is existing evidence of corruption within that area of the NSW Police Service. Experience has shown that Sea will gain evidence of past and current corruption through tape recorded conversations with police regarding past and current activities. Several proactive strategies have been formulated for this purpose.*
>
> *Ordinary police methods of investigation have not succeeded in this area in the past. The only investigations revealing corruption of this magnitude have involved the Crime Commission and the Police Royal Commission, though in most cases critical information came from the Police Service. It is submitted that the proactive investigation involving the three agencies under Mascot should continue.*[401]

The Review document made two recommendations:

1. *A new Mascot Reference be issued to include the additional offences of a) larceny pursuant to section 117 of the Crimes Act 1900; b) corruption contrary to section 200 of the Police Service Act 1990 (NSW) and c) corruptly receive a benefit contrary to section 249B of the Crimes Act 1900.*
2. *That the new Reference not be limited to the persons named in the original Reference but extend to all police (former & serving) suspected of engaging in the offences the subject of the Reference.*[402]

The Management Committee was also given an unsworn 41-page LD affidavit – LD affidavit 284-290/ 2000, dated 5 October 2000. The affidavit named 112 individuals whose private conversations Mascot sought to listen to or record by LD. The unsworn affidavit was similar in form to many of the LD affidavits sworn over the course of the Mascot investigations. Like those affidavits, it did not outline the reasons that Mascot considered it necessary to record some of those who were named – in this instance, 59 of the 112 people named. The sworn version of affidavit 284-290/2000 is discussed in Chapter 9. It was one of a number of affidavits that included the names of people who had earlier been on an invitee list for the King send-off, but for whom no reason was given to explain why they were named in the affidavit.

The Management Committee extended the Mascot Reference in a notice[403] under section 25(1) of the NSWCC Act on 9 November 2000. It was signed by the Hon Paul Whelan, Minister for Police, as presiding member of the Management Committee. The section 25(1) notice[404] referred matters to the NSWCC for investigation under the name Mascot II. The schedule of offences was the same as in the original Mascot reference, but added two further offences:

401 NSWCC, *Review of Reference Mascot*, undated, pp. 1-2.

402 NSWCC, *Review of Reference Mascot*, undated, p. 2.

403 NSWCC, *Section 25(1) Notice – Mascot II Reference*, signed by Paul Whelan LLB MP, Presiding Member, New South Wales Crime Commission Management Committee, 9 November 2000.

404 NSWCC, *Section 25(1) Notice – Mascot II Reference*, signed by Paul Whelan LLB MP, Presiding Member, New South Wales Crime Commission Management Committee, 9 November 2000, p. 1.

Offences:

...

(d) *larceny contrary to section 117 of the Crimes Act 1900*

(e) *corruption contrary to section 200 of the Police Service Act 1990.* [405]

For reasons unknown, the section 25(1) notice did not include the offence of 'corruptly receive a benefit contrary to section 249B of the Crimes Act', that was listed in recommendation 1 of the Review document.

Recommendation 2 of the Review document was accepted, with the effect that the Mascot II reference significantly broadened the people who the NSWCC could investigate, to include "all police (former & serving) suspected of engaging in the offences the subject of the Reference".[406]

17.1.2 Recollections about the section 25(1) Notice for the Mascot II Reference

Operation Prospect took evidence about why the Mascot II Reference was created. Phillip Bradley, Commissioner of the NSWCC at the time, was unable to recall what led to its expansion to include all police, former and serving – although he did state that Mascot "was unusual so there wouldn't have been another instance of that".[407] He could also not recall why the additional offences of larceny and corruption were added to the reference.[408]

When asked about using a draft Mascot LD affidavit that named people without explanation to expand the Mascot II, Bradley said:

> *If I was aware that the affidavit contained names for which there was no basis for inclusion, either a bumping into reason or criminality, then I would have been concerned about the inclusion as a basis for Mascot references.*[409]

Bradley told Operation Prospect that he relied on Mascot Task Force and other NSWCC staff to check the information in the affidavit that was attached to the Mascot II reference.[410] He also told Operation Prospect that before the public discussion of LD warrant 266/2000 in 2002 – discussed in Chapter 13 – he was not aware that that it was Mascot practice to include names in LD affidavits and warrants without an explanation for their inclusion.

Operation Prospect asked John Giorgiutti, who was the Solicitor and Director to the NSWCC at the relevant time, about the extension of the Mascot reference. He indicated that the Mascot II Reference was created to legitimise the investigation of officers by LD who had not been named in the earlier reference.[411] He said that Bradley sought to expand the reference after becoming aware that Mascot affidavits – particularly the supporting affidavit for LD warrant 266/2000 – referred to people who were not listed on the original Mascot Reference. Giorgiutti told Operation Prospect:

> *Well, I don't know the timing, but that's why I wanted those two references notices, because when I told Phillip that we were working on the Mascot reference that had been issued in whenever it was, January, February, or whatever year it was, and when Phillip heard what they were doing he said, "Shit, we'll have to update the reference if they've got all these other people on it", and it was also clear that they were investigating extra people that might not have been included in the first reference ...*[412]

405 NSWCC, *Section 25(1) Notice – Mascot II Reference*, signed by Paul Whelan LLB MP, Presiding Member, New South Wales Crime Commission Management Committee, 9 November 2000, p. 2.
406 NSWCC, *Review of Reference Mascot*, undated.
407 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2990.
408 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2990.
409 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2993.
410 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2995.
411 Ombudsman Transcript, John Giorgiutti, 11 August 2014, p. 1347.
412 Ombudsman Transcript, John Giorgiutti, 11 August 2014, p. 1346.

Bradley could not recall having such a conversation with Giorgiutti.[413] Giorgiutti went on to say that "at some point the trigger for Mascot II was the fact there were all these names on the warrant".[414] He further stated:

> *What happened was, Phillip was obviously so concerned about what was happening that you can't tell from the notice, but, if you – I remember the extrinsic material basically said that we could investigate any current or former police officer. It was that wide, and I remember saying to him, "Phillip, this is ridiculous. This is the widest reference I've seen in the history of the world. There's a PIC up there. This is too broad," you know, like we're sent to – and he said, "Look, it's fine. There's no time. We'll just do this and it's done," you know, type stuff. It was, it was – but the horse had bolted, you know. So anyway, it was some time before November 2000 because he got the new reference from the managing committee and he did that himself and when I looked at it I said, "This is crazy," you know?*[415]

Peter Ryan, Commissioner of Police at the time, was unable to recollect having any input into the terms of the Mascot II Reference. To the best of his recollection, he was never told which officers were being investigated by Mascot or given information about Mascot's methodology or the progress of investigations it conducted into individual officers.[416]

Operation Prospect asked then Superintendent John Dolan, Commander of the Special Crime Unit, about the expansion of the Mascot Reference.[417] He could not recall any detailed information about why the expansion occurred.

Catherine Burn, Team Leader of Mascot at the time, told Operation Prospect that she was not involved in the higher level decision-making about the expansion of the Reference. Her explanation is accepted.

17.1.3 Analysis

The expansion of the Mascot reference in November 2000 was a significant development. There was an expansion in both the range of people and the range of offences that could be investigated. The expansion was significant also because it was apparent that the primary investigative methodology was electronic surveillance. The expansion was agreed to by a Management Committee that comprised senior law enforcement officers. It is to be assumed that there was an informed deliberation among the members of the Management Committee.

In one respect, however, the process that was followed in expanding the Mascot reference is open to criticism. The unsworn affidavit dated 5 October 2000 that was presented to the Committee – presumably by Bradley – did not explain why more than half of 112 people were named in the affidavit. It is not known what reliance the Management Committee placed on this document, or how its status or contents were explained to the Management Committee. Nevertheless, on such an important issue, it was poor process that a document of questionable reliability could provide an evidentiary basis for expanding the Mascot reference. With the benefit of hindsight, it is also possible to see that if the structural weakness in this document was identified at the time, a more rigorous analysis may have been undertaken of the direction the Mascot investigations were taking.

17.2 Mascot's use of integrity tests

In an integrity test a police officer is given the opportunity to engage in behaviour, whether lawful or unlawful, that "in contravention of the principles of integrity required of a police officer".[418] If the police officer fails the test, the Police Commissioner may consider this result in deciding whether to exercise the power under section 181D of the Police Act to remove a police officer who has lost the Commissioner's confidence.

413 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2996.
414 Ombudsman Transcript, John Giorgiutti, 11 August 2014, p. 1346.
415 Ombudsman Transcript, John Giorgiutti, 11 August 2014, p. 1347.
416 Email from Peter Ryan to Deputy Ombudsman Linda Waugh, NSW Ombudsman – attachment entitled 'Former Commissioner Peter Ryan – Response to Questions', p. 1.
417 Ombudsman Transcript, John Dolan, 31 October 2014, pp. 2600-2601.
418 *Police Act 1990*, s. 207A(2).

At the time of Mascot, integrity tests were primarily done by a specialist NSWPF unit within Special Crime and Internal Affairs (SCIA) called the Integrity Testing Unit (ITU). However, the Mascot team also conducted 10 integrity tests in 2000 and 2001. Sea was involved in executing nine of those tests, five of which targeted more than one officer.

This section examines whether Mascot should have conducted integrity tests while working under a NSWCC reference, and whether those integrity tests complied with the relevant law and NSWPF policy at the time.

17.2.1 Background to NSWPF integrity testing

In 1996, the NSWPF began using targeted integrity testing of police officers as a method of detecting and preventing corruption.[419] The Royal Commission into the New South Wales Police Service commented on this practice in its Interim Report in February 1996:

> *Integrity testing cannot be regarded as a cure for corruption nor is it a reliable indicator of the level of corruption within a police service. It is but one method of detecting and preventing police corruption. To this end, it can only be effective if it is part of a wide-ranging corruption prevention program which focuses on education, training and accountability at all levels. Its use, in targeted situations, and with sufficient safeguards to avoid unfairness and Ridgeway objections, is supported.* [420]

The NSW Government responded to the view of the Royal Commission by introducing a Bill[421] in November 1996 to amend the Police Act. The Hon Paul Whelan, Minister for Police, commented that: "Underpinning the reform process, especially management reform, will be the commissioner's confidence powers and the other immediate measures in the bill before the House."[422] The Bill was passed by Parliament, and the *Police Legislation Further Amendment Act 1996* received assent on 2 December 1996.[423]

The Commissioner's confidence powers, introduced in section 181D of the Police Act, authorised the Commissioner to

> *... remove a police officer from the NSW Police Force if the Commissioner does not have confidence in the police officer's suitability to continue as a police officer, having regard to the police officer's competence, integrity, performance or conduct.*[424]

The Commissioner could remove an officer "in circumstances where there is no proven misbehaviour",[425] but the Commissioner ceases to have confidence in the officer's suitability to continue as a police officer. In deciding on a police officer's suitability, the Commissioner could consider the person's "competence, integrity, performance or conduct".[426]

17.2.2 Legislation and policy governing integrity tests

An allied measure was that Part 10A of the Police Act introduced a legislative framework for integrity testing "to provide a measure of protection for those conducting authorised integrity tests".[427] This was done to cover the circumstance that the person conducting the integrity test may need to engage in unlawful conduct – such as offering a bribe to the police officer being tested.[428]

Section 207A of the Police Act provides:

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419 The Hon Paul Whelan MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 13 November 1996, p. 5912; NSWPF, Complaint number [number] Investigators Report by Detective Inspector Galletta, Strike Force Tumen, 3 July 2003, p. 16.

420 Wood, J, *Royal Commission into the New South Wales Police Service,* Interim Report, February 1996, p. 106.

421 *Police Legislation Further Amendment Bill 1996*.

422 The Hon. Paul Whelan, NSWPD, (Hansard), Legislative Assembly, 19 November 1996, p. 6136.

423 Police Legislation Further Amendment Act 1996.

424 Police Act, s. 181D.

425 Police Legislation Further Amendment Bill 1996, Explanatory Note, p. 4.

426 Police Act, s. 181D(1).

427 The Hon. Paul Whelan MP, NSWPD, (Hansard), Legislative Assembly, 13 November 1996, p. 5912.

428 Police Act, s. 200(2)(a).

> (1) *The Commissioner may conduct, or authorise any police officer or other person to conduct, a program (an* ***integrity testing program****) to test the integrity of any particular officer or class of police officers.*
>
> (2) *An integrity testing program may involve an act or omission (by a person who is participating in the program) that offers a police officer whose integrity is being tested the opportunity to engage in behaviour, whether lawful or unlawful, in contravention of the principles of integrity required of a police officer.*
>
> (3) *Any such act or omission is declared to be lawful, despite any other Act or law to the contrary, but to the extent only to which it occurs in the course of and for the purposes of the integrity testing program.*[429]

Section 207A(4) goes on to list acts or omissions that will not constitute an offence by the person conducting the testing program. These include perverting the course of justice,[430] influencing witnesses and jurors,[431] and aiding and abetting the commission of an offence.[432] A certificate issued by the Commissioner, or a Deputy or Assistant Commissioner authorised by the Commissioner, will provide conclusive evidence for the purpose of legal proceedings, that conduct listed in the certificate was authorised as part of the integrity testing program.[433]

The Commissioner of Police is required to report quarterly to the PIC on all integrity test programs carried out.[434]

Section 2007A did not require that the approval for an integrity test was to be given in writing. The evidence before Operation Prospect indicates that approval for some tests was initially given orally, but most were then confirmed in writing.

The 1997 NSWPF *Integrity Testing Policy and Guidelines*[435] (Integrity Testing Policy), which applied at the time that Mascot conducted integrity tests, listed the goals of integrity testing as being to "test for both corrupt and ethical behaviour, the appropriateness of organisational systems and procedures and as a deterrent to officers who may be exposed to a corruption opportunity".[436] The Policy also outlined that the investigation of corruption must be proactive in nature – supported by a strategic analysis of intelligence – and that integrity testing was introduced to the NSWPF to supplement existing proactive techniques. Integrity testing is described as an integral part of the NSWPF's commitment to identifying and preventing corruption.[437]

The Integrity Testing Policy stated that integrity testing was not intended to identify minor infractions that could be dealt with managerially. The objectives are to measure the presence of corrupt conduct, deter corrupt behaviour, analyse systems, processes and procedures to reduce potential corrupt activity, and show that the NSWPF was actively identifying and preventing serious misconduct and corruption.[438]

An integrity test was defined in the Integrity Testing Policy as the "creation of a situation or condition which is designed to provoke a reaction by the subject of the test".[439] The response of the targeted officer would be observed to see if his or her conduct complied with NSWPF policy and legislative requirements.

An integrity test 'target' could be selected if an officer or specific area of operation had been identified as possibly corrupt or engaged in serious misconduct or criminal activity.[440] A result is to be listed either as a pass, fail or inconclusive. Re-testing could be conducted where additional intelligence supported that it was needed.

Importantly, the integrity test scenario was to imitate "the nature of the allegations" that had been made against the officer being tested.[441] That is, the test should tempt the target with a situation that was similar to the alleged corruption or misconduct that the officer was suspected of, or suspected of having previously engaged in.

429 Police Act, s. 207A.
430 *Crimes Act 1900*, s. 319.
431 Crimes Act, s. 323.
432 Police Act, s. 207A(4)(f).
433 Police Act, s. 207A(6).
434 Police Act, s. 207A(7).
435 NSWPF, *Integrity Testing Unit Policy and Guidelines*, 22 May 1997.
436 NSWPF, *Integrity Testing Unit Policy and Guidelines*, 22 May 1997, p. 1.
437 NSWPF, *Integrity Testing Unit Policy and Guidelines*, 22 May 1997, p. 1.
438 NSWPF, *Integrity Testing Unit Policy and Guidelines*, 22 May 1997, p. 1.
439 NSWPF, *Integrity Testing Unit Policy and Guidelines*, 22 May 1997, p. 2.
440 NSWPF, *Integrity Testing Unit Policy and Guidelines*, 22 May 1997, p. 2.
441 NSWPF, *Integrity Testing Unit Policy and Guidelines*, 22 May 1997, p. 4.

Under the Integrity Testing Policy, the ITU was to conduct all integrity tests.[442] This included creating the scenario, operational planning and various other operational matters – including the use of technical support and the need to debrief as soon as possible after the integrity test. The Integrity Testing Policy concluded that pass or inconclusive results should be referred to the Intelligence and Review unit within SCIA. If the test was failed, it was to be referred to the Investigation Unit within SCIA.

Assistant Commissioner Malcolm Brammer, as the Commander of SCIA, was responsible for the ITU and was delegated to authorise integrity tests under section 207A of the Police Act. All documentation for permission to conduct an integrity test had to be endorsed by him.

The Special Crime Unit (SCU) – to which Mascot officers were attached – was also a unit of SCIA. As outlined in Chapter 4, police attached to the Mascot investigations had been sworn in as staff members of the NSWCC[443] and did their work as staff of the NSWCC, although they retained their rank and seniority as NSWPF officers.[444] They remained "under the control and direction of the Commissioner of Police",[445] although this was subject to any directions and guidelines that the Management Committee provided to the Commissioner of Police.[446] In practice, this meant that SCIA's involvement in Mascot largely related to management rather than operational issues – for example, staffing and resourcing the SCU.

The ITU had also developed its own *Guide to Integrity Testing Operations*[447] that set out steps for preparing LD or TI warrant applications and developing integrity test scenarios. This included deciding whether the ITU needed the support of the NSWPF Special Technical Investigation Branch to install a LD for a test.[448]

17.2.3 Difference between integrity testing and other police operations

Integrity tests differ in purpose and method from standard police criminal investigations. The key purpose of an integrity test is to gather information about whether a police officer will engage in behaviour that contravenes the principles of integrity required of a police officer. Standard criminal investigations seek to gather evidence for a potential prosecution for a criminal offence.

Integrity tests also involve designing and implementing a scenario where an officer is offered the opportunity to behave or act in a manner that may be unlawful – and monitoring their response. Most criminal investigations would not use such a methodology as the admissibility of any evidence obtained in that way could be subject to challenge by the accused person.

Mascot conducted integrity tests that were also authorised as controlled operations under the *Law Enforcement (Controlled Operations) Act 1997* – this is discussed in more detail in Appendix 3 (Volume 1). This Act limits the way a person may be induced to engage in criminal activity during a controlled operation. A controlled operation cannot be authorised if it involves "inducing or encouraging another person to engage in criminal activity or corrupt conduct of a kind that the other person could not reasonably be expected to engage in unless so induced or encouraged".[449]

17.2.4 Integrity tests conducted by Mascot in 2000

When Sea first became an informant for the NSWCC in early 1999, Mascot's investigative strategy was focused on deploying Sea with a LD to gather evidence for criminal investigations. Mascot did not conduct any integrity tests in that first year of operation. Integrity tests were first used to test subject officers in May 2000. By the end of 2000,

442 NSWPF, *Integrity Testing Unit Policy and Guidelines*, 22 May 1997, p. 1.
443 *New South Wales Crime Commission Act 1985* (repealed) (NSWCC Act), s. 32(5).
444 NSWCC Act, s. 32(6).
445 NSWCC Act, s. 27A(2).
446 NSWCC Act, s. 27A(3).
447 NSWPF Integrity Testing Unit, *Guide to Integrity Testing Operations*, undated.
448 NSWPF Integrity Testing Unit, *Guide to Integrity Testing Operations*, undated, p. 14.
449 *Law Enforcement (Controlled Operations) Act 1997*, s. 7(1)(a).

Mascot had conducted seven integrity tests – on 15 and 29 June, 16 August, 1 September, 26 October, and 15 and 21 November 2000.[450]

Of those seven integrity tests:

- Six received either verbal or written authorisation from Brammer before they were conducted. Operation Prospect has been unable to locate any contemporaneous file note of verbal or written authorisation for the integrity test on 15 June 2000. Section 207A(7) requires the NSWPF to give the PIC a report on all integrity testing programs conducted in each quarter, within 14 days of the end of the quarter. Each certificate for these seven integrity tests was issued on 9 April 2001, well outside that timeframe.
- Some tests targeted more than one officer, some tests targeted officers more than once, and eight officers were targeted in total. The integrity test of one person – Officer P – was not recorded in tables created by Mascot referring to the tests done in 2000.[451]
- Mascot records state that seven of the eight officers who were tested received a 'fail' result, six for accepting a bribe.[452]
- Five tests resulted in the prosecution and conviction of at least one of the target officers for offences including receiving a bribe under section 200(1) of the Police Act, and receiving a corrupt commission under section 249B of the *Crimes Act 1900*.[453]
- Three tests (15 and 29 June, and 16 August 2000) also involved a controlled operation that was approved by Bradley, Commissioner of the NSWCC.
- Six tests appear to have been recorded using Sea's body wire under existing LD warrants that were not specific to the purpose of the tests.
- The test conducted on 15 June 2000 was recorded using two LDs installed on premises.[454] This was authorised by warrants that appear to have been sought specifically for the purpose of conducting both the test and an associated controlled operation.[455]

Chapter 8 examines two of the integrity tests that Mascot conducted for Officer P and Officer H.

17.2.5 Unauthorised use of listening devices in two integrity tests

This section examines two integrity tests that Mascot conducted in June and August 2000. There were common themes in both tests: the tests relied on a combined use of LDs and controlled operations; some individuals intentionally recorded by the LDs were not listed on the LD warrants that were in place; the 'unlawful' use of the LDs was saved in both instances by the controlled operation; and the reports that were prepared on the use of the LDs as required by section 19 of the *Listening Devices Act 1974* (LD Act) did not list some people intentionally recorded during both integrity tests.

17.2.5.1 Integrity test in June 2000

In June 2000, Mascot had evidence that two Mascot subject officers had links to drug dealers operating on the Northern Beaches. Both officers were named on a LD warrant granted on 26 June 2000 as people who Sea was likely to record.[456]

450 NSWCC, *Integrity Test Schedule – Mascot Reference*, 6 April 2001; NSWCC Information Report, [Officer P] *and* [Manager of Investigations Internal Affairs] *discussing* [MSO 6] *PCA matter. SOD155*, reporting officer: [name], 16 November 2000; NSWCC Information Report, *Meeting between* [Officer P] *AND* [Manager of Investigations Internal Affairs] *on the 15-11-00 re* [MSO 6] *PCA matter SOD155*, reporting officer: [name], 16 November 2000.

451 NSWCC, *Integrity Tests Schedule – Mascot reference*, undated.

452 NSWCC, *Integrity Tests Schedule – Mascot reference*, undated.

453 NSWPF Complaint number [number] SOD 161 SOD164 SOD171 SOD 189, Finalisation Report by Greg Moore, Team Leader of SCU, 15 April 2003, p. 3.

454 LD warrant 154/2000; LD warrant 155/2000.

455 NSWCC, Authority to conduct a controlled operation, Operation No. CO00/23, 15 June 2000.

456 LD warrant 178/2000.

The day after the warrant was granted, Mascot developed a detailed scenario to test whether both officers would steal money or accept a bribe while undertaking a search of the home of a suspected drug dealer, Mr X. The integrity test program was approved by Brammer on 27 June 2000.[457]

On the same day, a separate application for a controlled operation was prepared by Assistant Director Mark Standen, NSWCC Investigations Manager.[458] The application for the controlled operation covered the same events as the integrity test. It stated that Sea would use legitimate information to apply for a warrant to search the homes of Mr X and two other suspected dealers. The application included two possible addresses for Mr X. The application proposed that Sea be authorised to engage in four types of unlawful activity during the operation – including stealing money and supplying drugs – if one of the subject officers asked him to do this. This would make Sea's participation in the scenario appear more genuine to the subject officers.[459] Bradley approved the controlled operation on 28 June 2000.[460]

Late on the morning of 29 June 2000, Sea was granted a warrant to search one of Mr X's addresses. Sea, the two Mascot subject officers and another police officer then searched the premises. Mr X and a woman were at the residence during this search. Sea used his LD to record the conversation of everyone present during the search. Mr X was arrested and placed in a police vehicle. Sea also recorded some of Mr X's conversation in the vehicle.

Sea's recording of the additional officer and the woman were unintentional, and not in contravention of section 5 of the LD Act. Mascot could not have foreseen that the additional officer would help Sea with the search, or that the woman would be present. However, Mr X's name and addresses were listed in Standen's application for the controlled operation. It was therefore foreseeable that Mr X might be home when his residence was searched and that Sea would record his conversation as part of the Mascot operation. The recording of Mr X cannot be seen as unintentional, it was not authorised by a LD warrant, and was probably in contravention of the LD Act.

The NSWCC reported the names of people recorded on Sea's body worn LD to the Supreme Court and the Attorney General, as required by section 19 of the LD Act. The report did not include the name of the woman who Sea had recorded during the search.[461]

17.2.5.2 Integrity test in August 2000

In August 2000, Mascot arranged an integrity test similar to that in the previous example, and involving one of the Mascot subject officers in that test. Brammer verbally approved the testing program on 16 August 2000. It involved a similar scenario. Sea and the Mascot subject officer would search the home of a different alleged drug dealer (Mr Y), the Mascot subject officer would either be observed stealing money or drugs, or Sea would offer him an opportunity to do so. The conversations would be recorded on Sea's body worn LD that was authorised by a rollover warrant granted on 7 August 2000 that named both of the Mascot subject officers who were targeted in the 29 June 2000 operation.[462] They had both been Mascot investigation targets for some time.

Sea lawfully obtained a search warrant for Mr Y's house at 3.30 pm on 16 August 2000. At 4.11 pm Bradley authorised a controlled operation for the search. Sea conducted the search later that afternoon with the Mascot subject officer and three other officers. The LD warrant that was in place named the two Mascot subject officers, but not the other two officers who participated in the search.

During the search, Sea recorded the conversations of all the officers present, as well as the conversations of two people present at Mr Y's home when the search commenced. Mr Y arrived home while the search was underway and was arrested and taken to the police station. Sea recorded Mr Y's conversation at his residence, in the police vehicle, and at the police station.

457 NSWPF, Operation Plan, Operation no. IT 00/002, Operation Mascot, 27 June 2000.
458 NSWCC, *Application for Authority to Conduct a Controlled Operation*, Operation No. CO 00/29, 28 June 2000.
459 NSWCC, Operational Plan, Operation no. CO 00/29, 27 June 2000.
460 NSWCC, *Authority to Conduct a Controlled Operation*, Operation No. CO 00/29, 28 June 2000.
461 NSWCC, Report in accordance with section 19(1) of the *Listening Devices Act 1984*, LD 178/2000, signed by [Mascot officer], 31 July 2000.
462 LD warrant 219/2000.

Sea's recording of the two other officers who were not Mascot targets, and the two people present in Mr Y's residence when the search commenced, were unintentional and not in contravention of the LD Act. However, it was foreseeable that Mr Y may have been at his home when the search was conducted. Sea's recording of Mr Y was intentional and probably in contravention of the LD Act.

The NSWCC reported the names of people recorded on Sea's body worn LD to the Supreme Court and the Attorney General, as required by section 19 of the LD Act. The report did not include the names of the two police officers involved in the search who were not listed on the LD warrant, or the names of the two people who were present at Mr Y's residence when the search began.

17.2.5.3 Analysis

The operations involving Mr X and Mr Y were successful in obtaining evidence of corrupt behaviour by the Mascot subject officers. One of those officers was convicted of bribery-related offences after taking money during the searches.[463]

Sea's recordings of both Mr X and Mr Y would have been an unlawful contravention of the LD Act, but for the operation of section 18 of the Law Enforcement (Controlled Operations) Act. That section provides that a person who engages in an activity in the course of an authorised controlled operation that would otherwise be unlawful has not committed an offence. The controlled operations that applied in both instances covered the activities of Sea and the Mascot investigators who instructed him.

This was not a satisfactory way of conducting the integrity test. The failure to name Mr X and Mr Y on the LD warrants relevant to the operation points to an inadequate system in place to check the details of LD warrants. Mascot investigators should have undertaken basic checks to identify who was likely to be recorded during the planned operations. The LD warrants were granted before the integrity test program was approved. At that stage, Mascot should have applied for new LD warrants that named Mr X and Mr Y; they were people likely to be recorded during searches undertaken on premises they occupied.

There was also a failure in both cases to prepare a report that complied with section 19 of the LD Act. The reports did not include the names of all people who Sea recorded on his LD during the controlled operations.

17.2.6 Sea swears affidavit containing false information

In August 2000, Sea swore an affidavit as part of a scenario for an integrity test. The affidavit was used to obtain a search warrant from a magistrate. Operation Prospect received and investigated complaints alleging that this affidavit contained information that Sea knew to be false – which is an offence under the *Oaths Act 1900*.[464] One complainant alleged that the warrant would not have been granted if Sea had not included the false evidence.

17.2.6.1 Events leading up to the swearing of the affidavit

On 9 August 2000, Mascot investigators agreed to develop an integrity test program to be executed on 16 August 2000 to test the integrity of some police. At the time, one officer was a known Mascot target and the others were not.[465] The proposed scenario was that Sea and the targeted officers would search two premises. Sea would be carrying cash provided by Mascot officers. During the search Sea would claim to have located that cash. If the targeted officers suggested it, Sea would distribute the cash among the officers and not report the 'find'.

The integrity tests were to be supported by two controlled operations, numbered CO/0034 and CO/0035. The first would enable Sea to include false information in an affidavit supporting a search warrant application, which

463 The relevant offences for the 29 June 2000 operation were 'Member of the Police Service receive bribe', s. 200(1) of the *Police Service Act 1990* and 'Agent receive corrupt commission', s. 249B of the Crimes Act. The relevant offences for the 16 August 2000 operation were 'Member of the Police service receive bribe', s. 200(1) of the Police Service Act, 'Agent receive corrupt commission', s. 249B of the Crimes Act, 'Conspiracy to solicit bribe'.

464 *Oaths Act 1900*, s. 29.

465 NSWPF, Operational Plan, Operation No: IT 00/005*,* 22 August 2000.

would ordinarily be a criminal offence.[466] This controlled operation was ultimately not approved. The second controlled operation was to authorise Sea to steal money or drugs during the execution of the search warrant if the suspect officers requested him to do so.

A Mascot investigator prepared a draft application for both controlled operations on 11 August 2000 and it was sent to Standen for review. [467] An Information Report written at the time indicated that the drafts required amendments.[468]

On 15 August 2000, Standen learned that the controlled operations and integrity tests were to be conducted concurrently – it appears this was not clear in the draft applications.[469] The applications were amended and submitted for approval by Bradley. The applications still contained problems and Bradley did not approve them at this time.[470]

On the morning of 16 August 2000, the documentation for the controlled operations and the integrity tests were still being amended by Mascot staff.[471] At 10:45 am, Sea was briefed and was given information to include in the applications for two search warrants – one was to include information that Sea knew to be false.[472] He was also given instructions about what he could and could not say to avoid entrapment of the suspect officers during the proposed operations. Sea was to be ready to execute both warrants shortly after 3 pm and was to await further instructions from his case officers.[473]

Brammer gave a verbal approval for the integrity tests at some time on 16 August 2000. The signed approval states that it was approved by Brammer "as per verbal instruction from [the Commander of the ITU] on 16/8/00", although the paperwork was completed on 22 August 2000.[474]

At 1:45 pm, Sea informed Detective Sergeant Greg Moore (a Mascot investigator) that an appointment had been made for 3 pm for a magistrate to issue the search warrants. Moore told Sea not to attend this appointment until he received instructions from the principal law enforcement officer named in the controlled operation authority – Tim O'Connor, Assistant Director of the NSWCC.[475]

Between 2:30 pm and 3:30 pm the application for the first controlled operation number CO00/34 was reviewed by Bradley and reworked by several Mascot investigators. Moore contacted Sea and told him not to apply for the search warrants as there were still legal issues to be resolved and authorisation for the controlled operations had not been granted.[476]

At approximately 3:40 pm Sea called Moore to advise that – although he had not had any contact with O'Connor – Sea had attended the appointment with the magistrate and the search warrants had been issued. Sea later told Dolan and Standen that he did this because of concerns that a delay in obtaining the warrants might raise suspicion among the police targets of the integrity test.[477]

After Mascot staff became aware that Sea had obtained the search warrants, controlled operation application number CO00/34 – which was still being considered by Bradley – was withdrawn.[478] This application would have enabled Sea to swear an affidavit for a search warrant containing information he knew to be false. The

466 Law Enforcement (Controlled Operations) Act, ss. 13 and 16.

467 NSWCC internal memorandum from Detective Sergeant Boyd-Skinner to Commander of SCU, 18 August 2000, p. 2.

468 NSWCC Information Report, *Response to Det Sgt Boyd-Skinners Advising Concering* [sic] *Mascot Informant Management re Controlled Operations CC00/34 & CC00/35 and integrity test authorisations scheduled for Wednesday 16-8-00. SOD166,* reporting officer: Szabo, 16 August 2001.

469 NSWCC internal memorandum from Detective Sergeant Boyd-Skinner to Commander of SCU, 18 August 2000, p. 2.

470 NSWCC internal memorandum from Detective Sergeant Boyd-Skinner to Commander of SCU, 18 August 2000, p. 2.

471 NSWCC internal memorandum from Detective Sergeant Boyd-Skinner to Commander of SCU, 18 August 2000, p. 3.

472 NSWCC internal memorandum from Detective Sergeant Boyd-Skinner to Commander of SCU, 18 August 2000, p. 3.

473 NSWCC internal memorandum from Detective Sergeant Boyd-Skinner to Commander of SCU, 18 August 2000, p. 3.

474 NSWPF, Operational Plan, Operation No: IT 00/005*,* 22 August 2000.

475 NSWCC internal memorandum from Detective Sergeant Boyd-Skinner to Commander of SCU, 18 August 2000, pp. 3-4.

476 NSWCC internal memorandum from Detective Sergeant Boyd-Skinner to Commander of SCU, 18 August 2000, p. 4.

477 NSWCC Information Report, *Informant contact on 23 August 2000*, reporting officer: Burn, 5 September 2000 – attached NSWCC, Record of interview between Detective Superintendent Dolan, Assistant Director Investigations Standen and 'Sea', 23 August 2000, p. 1.

478 NSWCC, *Mascot Controlled operations Schedule (CO99/21 to 01/00022),* dated 29 January 2001; NSWCC internal memorandum from Detective Sergeant Boyd-Skinner to Commander of SCU, 18 August 2000, pp. 5-6. While s. 14 of the Law Enforcement (Controlled Operations) Act, can allow unlawful conduct by an officer to be retrospectively authorised by a controlled operation authorisation in certain circumstances, this could not apply here as no authorised controlled operation was in force.

related integrity test strategy was also abandoned. Sea was told not to execute the search warrant that he obtained using this affidavit.

At 4:10 pm O'Connor signed the application for authority to conduct controlled operation number CO00/35.[479] Bradley authorised the controlled operation at 4:11 pm.[480] Sea executed the remaining search warrant at approximately 6 pm, when the controlled operation and integrity test started. The targeted officers failed the integrity test.[481] The activities listed in the controlled operation – stealing money or drugs located on the premises – did not take place.[482]

After the search warrant associated with CO00/35 was executed, Mascot investigators learnt that – in the course of applying for that search warrant – Sea had embellished evidence that was earlier given to him by Mascot personnel.[483] Specifically, Sea told the magistrate that the informant had actually seen the drugs in the premises. That was not told to Sea by Mascot investigators.

17.2.6.2 Mascot's response to Sea's conduct

Mascot considered that in swearing these two affidavits containing false information, Sea had made a false statement to the issuing magistrate. On 23 August 2000, Standen and Dolan spoke with Sea about the matter. A file note of the conversation states that Dolan directed Sea to abide by the directions of his handlers and not to engage in any illegal activity without a specific direction from one of his handlers.[484]

Sea told Operation Prospect in evidence that he recalled this meeting, but the file note of the conversation was inaccurate. He denied that he was counselled as suggested in the file note.[485] Sea felt particularly aggrieved that the file note described his conduct as a reversion to past corrupt practices rather than as a mistake. He stated that this record "looks like it's trying to crucify me, in a way, or cover up for, um, perhaps operational issues that weren't properly handled".[486]

In his evidence to Operation Prospect, Dolan recalled Sea swearing the affidavit containing false information but did not describe Mascot's response to it.[487] Standen's evidence was that he did not recall these events and did not recall counselling Sea, although he stated that he would have done so if he had been the applicant for the authority to conduct a controlled operation.[488] Sea's evidence about the record of conversation has not been put to Standen or Dolan.

Sea's actions in presenting false information in the affidavit before the magistrate were included in the Mascot electronic Schedule of Debrief and numbered 'SOD166'.[489] The entry for SOD166 notes that Sea's conduct could not be fully investigated until Operation Mascot moved into an overt stage, and that "[u]ntil that time there seems some possibility that Sea may have provided false information and would therefore seek indemnity from any prosecution that may arise".[490]

In an induced interview[491] on 13 June 2001, Sea volunteered that his embellishment of the information provided to the magistrate was the only criminal or corruption matter he was involved in while undertaking duties for Operation Mascot.[492] He said in the interview that he was confused about the two operations being conducted on that day, and if he misled the magistrate it was through error rather than deliberate act.

479 NSWCC, *Application for Authority to Conduct a Controlled Operation,* Operation No. CO0035, 16 August 2000.
480 NSWCC, *Authority to Conduct a Controlled Operation,* Operation No. CO0035, 16 August 2000.
481 NSWCC Transcript of LD 219/2000, Tape T99/961, 16 August 2000, pp. 45-51 and 71-72.
482 NSWCC, *Report on conduct of a Controlled Operation,* Operation No. CO0035, 12 October 2000.
483 NSWCC internal memorandum from Detective Sergeant Boyd-Skinner to Commander of SCU, 18 August 2000, p. 6; Ombudsman Transcript, John Dolan, 31 October 2014, p. 2617.
484 NSWCC, Record of interview between Detective Superintendent Dolan, Assistant Director Investigations Standen and 'Sea', 23 August 2000, p. 2.
485 Ombudsman Transcript, [Sea], 23 October 2013, p. 87.
486 Ombudsman Transcript, [Sea], 23 October 2013, p. 87.
487 Ombudsman Transcript, John Dolan, 31 October 2014, pp. 2617-2618.
488 Ombudsman Transcript, Mark Standen, 21 March 2014, pp. 46–50.
489 NSWCC, *Indemnity Schedule*, granted by the NSW Attorney General on 3 August 2001.
490 Indemnity to [Sea] granted under s. 46 of the *Criminal Procedure Act 1986*; NSWCC, *Indemnity Schedule-SOD 166*, granted by the NSW Attorney General on 3 August 2001, p. 77.
491 An induced interview is conducted in circumstances where the interviewee provides evidence under the guarantee that they will be immune from prosecution or any other legal or administrative action which could arise from their evidence.
492 NSWCC, Record of interview with 'Sea', 13 June 2001, pp. 8-10.

Sea was granted an indemnity from prosecution on 29 August 2001.[493] The indemnity included all conduct for which a SOD had been created, and applied to the affidavit Sea had sworn and given to the magistrate. The overt phase of Operation Mascot then started with the PIC Operation Florida public hearings commencing in October 2001.

17.2.6.3 Analysis

At the time Sea swore an affidavit containing false information, approval had not yet been given for the controlled operation CO00/34 that was to allow this conduct. Sea had expected the application for the operation would be approved by that time, but defects in the application caused delays that ultimately meant it was not approved. It appears that Sea acted independently both in swearing the affidavit before receiving confirmation that CO00/34 had been approved, and in embellishing information in another affidavit sworn at the same time. Sea admitted that this was done on his own initiative and despite the directions given by Mascot personnel. The fault therefore lay directly with Sea.

Mascot officers were not aware that Sea was taking this action. In fact, he was given clear and repeated instructions not to apply for the search warrants until he had been contacted by his case officers and the principal law enforcement officer named in the controlled operation authority.

The Mascot response upon learning of Sea's actions appears to have been appropriate. Sea admitted his wrongdoing, he was firmly counselled and his actions were entered on the Schedule of Debrief as a potential criminal breach. It is understandable that Mascot took no immediate enforcement action, given the covert nature of the investigations at that time and the reliance placed on Sea as a valuable human resource. He was later granted an indemnity from prosecution that covered this and other conduct.

17.2.7 Bradley raised concerns about integrity tests and controlled operations

On 24 August 2000, Bradley wrote a memorandum to Standen, Dolan, O'Connor, the NSWCC Investigations Manager and the NSWCC lawyers. It was prompted, in part, by his concern with the way the operation discussed in the previous section (on 16 August 2000) had been conducted. Bradley's memorandum stated:

> *I previously expressed my concern about our involvement in Integrity Tests. I do not think that it is improper for police to conduct Integrity Tests in appropriate circumstances but the Controlled Operations process is different and must be kept separate. In particular, we do not conduct Controlled Operations to enable Integrity Tests to occur. Controlled Operations are for the collection of evidence of crime and corruption and arresting persons involved or frustrating criminal activity and corrupt conduct.*
>
> *Lately there has been a blurring of this distinction. The most recent manifestation of this was a draft Controlled Operation for the purpose of facilitating an Integrity Test. There was specific reference within the Application to offering bribes etc. The Controlled Operation scheme specifically provides that there should be no encouragement, entrapment etc. Such methods may be appropriate in determining the suitability of a person to remain in the Police Service and may give rise to admissions about past conduct. The admissibility of everything which flows from such methods may be questioned in the future.*[494]

Bradley then expressed concern that the ITU did not appreciate the distinction between integrity tests and controlled operations:

493 Indemnity to [Sea] granted under s. 46 of the Criminal Procedure Act; NSWCC, *Indemnity Schedule* – SOD 166, granted by the NSW Attorney General on 3 August 2001.

494 NSWCC internal memorandum from Commissioner Phillip Bradley to Assistant Director Investigations Mark Standen, Detective Superintendent John Dolan, Tim O'Connor, [and others], 24 August 2000, p. 1.

A previous instance of the blurring occurred when the Integrity Testing unit unilaterally placed an officer at Commission premises. This followed a session with the head of the Unit which did not fill me with confidence that they knew what they were doing. I have recently learnt that some advice was provided by the Unit which was wrong and had to be withdrawn.[495]

Bradley indicated that more had to be done to "reinforce the distinction between the role of the Crime Commission and the Police", which were distinct entities by law.[496] He went on:

We are in police corruption matters because it is unavoidable and the success of Gymea[497] *demonstrates the value of the approach. But it is not our primary role as it is for Internal Affairs (and the Police Integrity Commission). The* [NSWCC] *Act makes it clear that we are to be involved in the collection of evidence for criminal briefs. We have never been involved in incitement. We are in Mascot because Sea came to the Crime Commission and is a registered informer and because of the effectiveness of the approach and the crimes involved. Neither agency could do it alone. But Integrity Testing is not part of our function. These operations are approved by the Internal Affairs commander independently of the Crime Commission and for matters which are essentially disciplinary. I think that they should remain with Internal Affairs.*[498]

However, Bradley left open the possibility that integrity tests and NSWCC controlled operations could be conducted collaterally:

When it is proposed to conduct an Integrity Test collaterally with a Controlled Operation it is appropriate to refer to it in the Operation Plan so that the full picture is known but it needs to be very clear that they are for independent though related purposes.[499]

Bradley reiterated these concerns in another memorandum in 2001, noting that "[i]t is no part of the Commission's charter to be testing police for the purpose of determining whether the Commissioner can have confidence in them".[500] That memo is discussed in section 17.2.10.

17.2.8 Integrity testing by Mascot in 2001

Mascot began 2001 with a renewed but short-lived focus on integrity testing. An email from Burn to the Mascot investigations team in February that year stated "the proactive/integrity test phase has commenced". [501] By May 2001, Mascot had conducted three integrity tests and developed internal procedures for integrity testing. No integrity tests were conducted after May, probably due in part to mounting concerns from Bradley about any integrity testing occurring during Mascot operations.

The first Mascot integrity test in 2001 was conducted on 28 January 2001. The officers targeted were Officer B, Mascot Subject Officer 17, and Mascot Subject Officer 1. The test of Officer B is discussed in Chapter 6, including the fact that Officer B appears to have passed the test but Mascot did not record this result or notify the relevant officers within the NSWPF or the PIC.

The second Mascot integrity test, Operation Strandburgh, was conducted on 9 February 2001. The third test was conducted between 7 March and 2 May 2001.

Mascot conducted two other operations in 2001 that were labelled in some Mascot documents as 'integrity tests', in relation to Officer F and Officer L. These were not in fact integrity tests under Part 10A of the Police Act. These operations are discussed in Chapter 10 and Chapter 12.

495 NSWCC internal memorandum from Commissioner Phillip Bradley to Assistant Director Investigations Mark Standen, Commander of SCIA John Dolan, Tim O'Connor, [and others], 24 August 2000, p. 1.
496 NSWCC internal memorandum from Commissioner Phillip Bradley to Assistant Director Investigations Mark Standen, Commander of SCIA John Dolan, Tim O'Connor [and others], 24 August 2000, p. 1.
497 A NSWCC Reference which investigated police corruption and was the precursor to the Mascot Reference.
498 NSWCC internal memorandum from Commissioner Phillip Bradley to Assistant Director Investigations Mark Standen, Commander of SCIA John Dolan, Tim O'Connor, [and others], 24 August 2000, pp. 1-2.
499 NSWCC internal memorandum from Commissioner Phillip Bradley to Assistant Director Investigations Mark Standen, Commander of SCIA John Dolan, Tim O'Connor [and others], 24 August 2000, p. 2.
500 NSWCC internal memorandum from Commissioner Phillip Bradley to Assistant Director Investigations Mark Standen [and others], 9 May 2001.
501 Email from Detective Inspector Catherine Burn, Mascot Reference, NSWCC to Mascot, NSWCC, 13 February 2001.

Features of the three Mascot integrity tests in 2001 include:

- All received prior verbal and/or written authorisation from Assistant Commissioner Brammer.
- One test targeted three officers and the other two tests each targeted one officer. In total, five officers were targeted.
- Two officers received a 'fail' result from Mascot, and one officer received an 'inconclusive' result. No result appears to have been recorded for the other two officers. One of those officers was Officer B who appears to have passed the test, as discussed in Chapter 6. The integrity test of the other officer was assessed by Task Force Volta in 2003, which concluded that 'no adverse finding'[502] should be made.
- One integrity test scenario (of Officer B) involved a controlled operation authorised by Police Commissioner Ryan in September 2000.[503]
- Two tests appear to have been recorded using Sea's body wire, under existing LD warrants that were not specific to the purpose of the tests – but nevertheless named each of the targets recorded.
- The integrity test conducted on 9 February 2001 did not use Sea, but involved the use of two LDs installed at premises; Mascot appears to have sought appropriate warrants for that purpose.[504]

For several months from January 2001, Mascot was assisted by an officer seconded from the ITU.[505] When interviewed by Strike Force Tumen, the ITU officer described her role at Mascot as "to help them develop scenarios and yeah, I suppose to oversight the integrity tests".[506] She liaised with Brammer to have relevant certificates endorsed for integrity tests that were planned and carried out by Mascot staff. She was also recorded as a case officer in at least one Mascot Information Report relating to integrity tests.[507]

In the email Burn sent to the Mascot team in February 2001[508] announcing the integrity testing phase, Burn explained that Dolan had formulated roles and responsibilities for the ITU officer and nominated a Mascot investigator as the Facilitator of the Mascot Integrity Testing Program, as follows:

> [An ITU officer] – *ITU Representative*
>
> - *Report to, and provide advice to the Commander, SCU*
> - *Liaise with and provide advice to the Team Leader, Mascot*
> - *Represent Integrity Testing Unit in specific areas of Mascot operations only*
> - *Ensure all relevant legislation and policy is complied with in aforementioned operations*
> - *In conjunction with facilitator and assigned Mascot personnel, provide advice and design specific integrity tests*
> - *Ensure the application of the principles of risk management in proposed integrity tests, including the appropriate back stopping*
> - *Liaise with external units and personnel as required*
>
> [Mascot investigator] – *Facilitator – Mascot Integrity Test Program*
>
> - *Report to and provide advice to the Team Leader, Mascot.*
> - *Liaise with Integrity Testing Unit Representative as required.*
> - *Coordinate meetings of assigned personnel and facilitate the development of proposed integrity tests.*
> - *Be responsible for the provision of the requirements/resources of the proposed integrity test.*
> - *Be responsible for the development of integrity tests only to the point of execution.*

502 NSWPF, Complaint number [number] SOD68B Investigators report by [Volta investigator], Task Force Volta, 29 April 2003, p. 5.
503 NSWPF, *Authority to Conduct a Controlled Operation*, Operation no. PS/2000/94, 14 September 2000.
504 LD warrants 01/00577-00578.
505 Email from [an ITU officer], NSWPF to Detective Inspector Mark Galletta, NSWPF, 12 November 2002.
506 NSWPF, Record of interview between Detective Inspectors Galletta, Jenkins and [an ITU officer], 12 November 2002, p. 11.
507 See for example: NSWCC Information Report, *Strategy and planning for the* [an officer] *integrity test*, reporting officer: [Mascot investigator], 10 April 2001.
508 Email from Detective Inspector Catherine Burn, Mascot Reference, NSWCC to Mascot, NSWCC, 13 February 2001.

- *Ensure the application of the principles of risk management in proposed integrity tests, including the appropriate back stopping and subterfuge.*[509]

In February and March 2001, Mascot considered proposed targets for the integrity testing program.[510] Minutes of a Mascot team meeting dated 22 February 2001 recorded that the criteria for selecting targets were discussed, as follows:

> *Our integrity testing targets have all been selected based on a combination of allegations made by Sea, complaint history, Royal Commission history, work location and other high risk factors.*[511]

An Information Report of 21 March 2001 compiled by the Facilitator of the Mascot program indicates that separate LD warrants were to be sought for integrity tests involving Sea, because:

> *Not all targets of the program are current Mascot II/Boat targets and not all information contained in the current LD warrants pertain to the contemporary matters.*[512]

On 27 March 2001, the Facilitator also noted:

> [A] *need was identified to create a simple document for investigators to check what area of the investigations have been considered prior to and during the preparation of integrity tests.*[513]

He distributed an *Integrity Test Check List*[514] for Mascot investigators that included questions, such as whether there was a LD warrant in place for the test, whether a controlled operation would be a more suitable investigation method, and reporting to PIC. Another checklist[515] that was used by Mascot focused on 'legislative requirements' for integrity testing.

Mascot also had an *Integrity Test Application Flowchart*[516] which indicated that an operational plan for each integrity test, developed by a case officer, would be quality reviewed by the NSWCC Investigations Manager or Burn, and then given to Brammer for consideration and approval.[517] The flowchart indicated that the officer applying for test approval was to undertake the following steps: complete and submit an Information Report for approval of the integrity test; at the conclusion of the testing submit an Information Report about the conduct of the operation and request Burn to advise Brammer of the result; and then "Obtain Certificate from Commissioner (or delegated officer) for brief of evidence, as per checklist".[518]

On 23 April 2001, Burn met with four Mascot officers to discuss "the unique application of Integrity Testing in the context of Mascot II/Boat investigation".[519] The meeting agreed that "the application of 'Mascot II/Boat' strategies within the legislation are unique, in regard to the use of a registered informant/internal witness and a careful risk assessment be carried out with an objective view to any later tests that may be applied on a criminal or civil basis".[520] One of the Mascot officers was tasked with seeking clarification about some of the issues discussed.[521]

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509 Email from Detective Inspector Catherine Burn, Mascot Reference, NSWCC to Mascot, NSWCC, 13 February 2001.

510 NSWCC Information Report, *List of proposed targets for Mascot integrity testing program*, reporting officer: [Mascot investigator], 20 March 2001; NSWCC Information Report, *Integrity Test Targests* [sic]/*Possible targets arising from MASCOT*, Reporting Officer: Burn, 21 March 2001.

511 NSWCC, *Confidential minutes of Mascot team meeting*, 22 February 2001, p. 1.

512 NSWCC Information Report, *Listening Device warrants in respect to Sea and the conduct of integrity tests*, reporting officer: [Mascot investigator], 21 March 2001.

513 NSWCC Information Report, *Creation of Integrity Test Checklist to assist investigators with preparing tests*, reporting officer: [Mascot investigator], 27 March 2001.

514 NSWCC, *Integrity Test Check List*, undated.

515 NSWCC, *Integrity Test Checklist – Legislative requirements*, undated.

516 NSWCC, *Integrity Test Application Flow Chart*, undated.

517 NSWCC, *Integrity Test Application Flow Chart,* undated.

518 NSWCC, *Integrity Test Application Flow Chart,* undated.

519 NSWCC Information Report, *Outcome of meeting regarding Integrity Testing Part 10A Police Service Act 1990*, reporting officers: [Mascot investigator] and [an ITU officer], 30 April 2001, p. 1.

520 NSWCC Information Report, *Outcome of meeting regarding Integrity Testing Part 10A Police Service Act 1990*, reporting officers: [Mascot investigator] and [an ITU officer], 30 April 2001, p. 2.

521 NSWCC Information Report, *Outcome of meeting regarding Integrity Testing Part 10A Police Service Act 1990*, reporting officers: [Mascot investigator] and [an ITU officer], 30 April 2001, p. 2.

That officer emailed Dolan, Burn and four other Mascot officers on 27 April 2001 stating: "Team, I have spoken with [an officer] from Court/Legal about those issues we have discussed regarding integrity tests. I attempted to cover all aspects without giving too much away".[522] The Mascot officer provided his own observations as a result of that discussion, including that:

- *Part 10A deals with authorised integrity testing programs, with no definitions provided of such words and phrases as integrity testing program, behaviour that is lawful or unlawful, when/at what point integrity is considered "tested", when does an integrity testing program begin/cease etc - thus we define these terms/words/phrases by ordinary definition.*
- *The criminal investigative process is not influenced by an integrity test, nor is the criminal trial process when there is lawfully obtained/gathered evidence.*[523]

Those documents show that Mascot integrity tests were proposed to be carried out by Mascot staff, rather than the ITU. Although Mascot would interact with the ITU in relation to the integrity tests, on some occasions Mascot staff planned and carried out the integrity tests themselves.

In 2000, Mascot expressed concern that the ITU had conducted an integrity test without proper consideration of the risk that the test scenario might pose to the Mascot operation. Mascot also held some concerns about the capability of the ITU during the period March to May 2001. Other documents seen by Operation Prospect also raise concerns about the ITU being involved in Mascot integrity tests.[524]

Conversely, the ITU officer stated when she was interviewed by Task Force Tumen that in 2001 she was raising concerns within Mascot about its approach to some integrity tests. The ITU officer stated that she asked why integrity tests were necessary in some cases:

> *... which I raised on many occasions, that if they've already got information, why the integrity testing. It's like having a second bite of the cherry, so to speak. I, I didn't think, if they had, if they had TI or LD that implicated them in something, then you didn't need to integrity test as well. That was my understanding. And I raised that.* [525]

She agreed with the Tumen investigator's suggestion that she held a concern as to whether Sea's information was sufficient to justify some of the integrity tests, as his information was historical,[526] and the use of an integrity test was "double dipping".[527] She explained: "I think they were using integrity tests as an investigate, you know like a, just another avenue".[528]

522 Email from [a Mascot officer], Mascot Reference, NSWCC to Superintendent John Dolan, Mascot Reference, NSWCC and Detective Inspector Catherine Burn, Mascot Reference, NSWCC [and four other Mascot officers], 27 April 2001, p. 1.

523 Email from [a Mascot officer], Mascot Reference, NSWCC to Superintendent John Dolan, Mascot Reference, NSWCC and Detective Inspector Catherine Burn, Mascot Reference, NSWCC [and four other Mascot officers], 27 April 2001, p. 1.

524 NSWCC internal memorandum from Superintendent John Dolan to unknown party, 30 April 2001; Email from Detective Inspector Catherine Burn, Mascot Reference, NSWCC to Superintendent John Dolan, Mascot Reference, NSWCC, 1 May 2001, p. 1.

525 NSWPF, Transcript of interview between Detective Inspectors Galletta and Jenkins and [an ITU officer], 12 November 2002, pp. 13-14.

526 NSWPF Strike Force Tumen, Transcript of Interview between Detective Inspectors Galletta and Jenkins and [an ITU officer], 12 November 2002, pp. 26-27.

527 NSWPF Strike Force Tumen, Transcript of Interview between Detective Inspectors Galletta and Jenkins and [an ITU officer], 12 November 2002, p. 27.

528 NSWPF Strike Force Tumen, Transcript of Interview between Detective Inspectors Galletta and Jenkins and [an ITU officer], 12 November 2002, p. 27.

17.2.9 Decision-making about integrity testing

It is clear from documents provided to Operation Prospect that senior officers within the NSWCC and PIC knew that Mascot was planning and carrying out integrity tests. These were discussed at meetings of the Operations Coordination Committee (OCC) where representatives from the PIC, NSWCC and NSWPF received regular updates about Mascot.[529] Meeting attendees included Bradley, Standen, Sage (PIC), a PIC solicitor, Dolan and Burn. Documents also indicate that integrity testing matters were regularly discussed and minuted at the Mascot team meetings – which were routinely attended by Bradley, Giorgiutti, Standen, Dolan, Burn and some of the NSWCC analysts.[530]

Although Mascot's integrity test checklist notes that information about the outcomes of integrity tests should be given to Brammer to comply with the quarterly reporting requirements of the legislation, it is not clear what information was given to him – or the extent to which he was briefed about the integrity tests.[531] In two cases examined by Operation Prospect, no evidence could be found of PIC being informed of the integrity tests conducted in relation to Officer P in November 2000 and Officer B in January 2001. This is contrary to section 207A(7) of the Police Act – see Chapters 6 and 8.

The notes of a meeting at the NSWCC on 19 March 2001, which appear to have been written by a PIC investigator, are titled 'Integrity Testing Targets'. Those notes discuss integrity testing strategies and an integrity testing priority list,[532] and refer to Bradley seeking a copy of the priority list.

Documents indicate that Dolan or Burn contacted Brammer to obtain approval for integrity tests conducted by Mascot. Operation Prospect has located Mascot records that show Brammer gave prior verbal or written approval for nine of the 10 tests conducted by Mascot.[533] Other Mascot documentation, including emails and Information Reports, confirm that Mascot staff were involved in preparing integrity tests – which were approved by Brammer but conducted by Mascot staff rather than the ITU. For example, an Information Report of 2 February 2001 refers to verbal approval given by Brammer for the integrity test that began on 28 January 2001. It was related to the disposal of illegally obtained firearms in the Hawkesbury River – see Chapter 6.[534]

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529 NSWCC *Confidential minutes of the OCC meeting*, for the following dates: 25 September 2000, 23 October 2000, 30 October 2000, 11 December 2000, 18 December 2000, and 8 January 2001.

530 NSWCC, *Confidential minutes of Mascot team meeting*, for the following dates: 4 May 2000, 29 May 2000, 26 June 2000, 3 July 2000, 24 July 2000, 14 August 2000, 9 October 2000, 23 October 2000, 6 November 2000, 13 November 2000, 20 November 2000, 27 November 2000, 11 December 2000, 29 January 2001, 5 February 2001, 5 March 2001, 19 March 2001, 2 April 2001, 9 April 2001, 7 May 2001. The Integrity testing activities were also discussed at a range of other meetings within the Mascot tram, although senior NSWCC staff did not routinely attend these meetings: NSWCC/SCU, *Mascot minutes*, for the following dates: 19 July 2000, 31 August 2000, 1 September 2000, 4 September 2000, 26 September 2000, 6 October 2000, 10 October 2000, 24 October 2000, 25 October 2000, 1 November 2000, 8 November 2000, 15 November 2000, 20 December 2000, 23 January 2001, 15 February 2001, 16 February 2001, 19 February 2001, 21 February 2001, 22 February 2001, 2 May 2001; NSWCC/SCU, *Weekly activity report for weeks ending* 17 July 2000 (dated 18 July 2000), *21 August 2000* (dated 21 August), *28 August 2000* (dated 28 August 2000), *16 October 2000* (dated 16 October 2000), *23 October 2000* (23 October 2000), *30 October 2000* (30 October 2000), *6 November 2000* (dated 6 November 2000), *20 November 2000* (dated 20 November 2000), *27 November 2000* (dated 27 November 2000), *2 December 2000* (dated 4 December 2000), *9 December 2000* (dated 11 December 2000), *13 January 2001* (dated 13 January 2001), *20 January 2001* (dated 22 January 2001), *27 January 2001* (dated 27 January 2001), *3 February 2001* (dated 5 February 2001), *10 February 2001* (dated 12 February 2001), *17 February 2001* (dated 17 February 2001), *24 February 2001* (dated 26 February 2001), *3 March 2001* (dated 5 March 2001), *10 March 2001* (dated 10 March 2001), *17 March 2001* (dated 19 March 2001), *24 March 2001* (dated 25 March 2001), *31 March 2001* (dated 2 April 2001*), 7 April 2001* (dated 9 April 2001); NSWCC, *Weekly activity report for weeks ending 4 January 2000* (dated 7 January 2000), *11 January 2000* (undated), *18 January 2000* (undated*), 24 January 2000* (dated 24 January 2000), *7 February 2000* (dated 14 February 2000), *14 February 2000* (dated 14 February 2000), *28 February 2000* (dated 3 March 2000*), 6 March 2000* (dated 8 March 2000*), 13 March 2000* (dated 13 March 2000), *27 March 2000* (dated 30 March 2000*), 3 April 2000* (dated 6 April 2000), *8 May 2000* (dated 8 May 2000), *29 May 2000* (dated 29 May 2000), *19 June 2000* (dated 19 June 2000), *1 July 2000* (dated 3 July 2000); NSWCC, *Meeting with Brammer, Dolan, Sage and Burn – regarding concerns about various issues*, 14 September 2000, p. 1; NSWCC, *Minutes – Team Leader's meeting*, 16 October 2000, p. 1.

531 NSWCC, *Integrity Test Check List*, undated.

532 PIC, *Notes of meeting at NSWCC*, 19 March 2001, p. 20.

533 NSWPF, Operation Plan*,* Operation No: IT 00/002, 27 June 2000; NSWPF, Operation Plan*,* Operation No: IT 00/003, 18 July 2000; NSWPF Operation Plan*,* Operation No: IT 00/004, 28 August 2000; NSWPF Operation Plan, Operation No: IT 00/005, 22 August 2000; NSWPF Operation Plan, Operation No: IT 00/006, 28 August 2000; NSWPF Operation Plan*,* Operation No: IT 00/007, 28 October 2000; NSWPF Operation Plan, Operation No: IT 00/008, 26 October 2000; Email from Assistant Commissioner Malcolm Brammer, NSWPF to Superintendent John Dolan, Mascot Reference, NSWCC, 21 November 2000; NSWCC Information Report, *Operation plan for integrity test IT 01/001 SOD028*, reporting officer: Szabo, 13 February 2001 – attachment: NSWPF Report, Operation Plan*,* Operation No: IT 01/001, 13 February 2001; NSWPF, Operation Plan, Operation No: IT 01/002, 9 April 2001; NSWPF, Operation Plan, Operation No: IT 03/001 [*sic*], 27 February 2001.

534 NSWCC Information Report, *Verbal Authorisation by Brammer to conduct Integrity test IT01/001 and enter Chatswood Crime Manager's office. SOD028*, reporting officer: Szabo, 2 February 2001.

On 18 December 2000, confidential minutes of the OCC meeting – attended by Bradley, Dolan, Burn and Standen as well as two PIC investigators – included Bradley asking about the 'proposed integrity testing program' and Dolan stating there was a team available to put the program into place and that Mascot was still working on a 'top 5 list'.[535]

17.2.10 Bradley's continuing concerns

As noted in section 17.2.7, Bradley wrote a memo on 24 August 2000 that recorded his concerns about Mascot using integrity testing as one of its investigative strategies. His concern is also noted in a later document in April 2001 that discusses Mascot's planned integrity test of a particular officer.

The officer was adversely mentioned in SOD086 in relation to allegations he and another officer had been "involved in shootings/murders in the south region"[536] and had "previously received money from solicitors".[537] A Mascot Information Report noted the officer was also allegedly mentioned "amongst a group of police on the mid north coast allegedly protecting large scale cannabis cultivators".[538] Mascot's planned scenario for the integrity test of this officer was that Sea would play golf with him and would offer him a range of new golf balls – which would be passed off as having been stolen. The exchange would be captured on a body wire LD worn by Sea and by surveillance in the vicinity. If the officer accepted the golf balls, investigators would later search the officer's premises to retrieve the 'stolen' property. The integrity test was ultimately abandoned as intelligence revealed that the target was not a golfer.[539]

Two documents at the time record Bradley's expressed concern at Mascot's role in the planned test. A document containing the notes of a meeting at the NSWCC on 9 April 2001 discussed a report prepared by the Facilitator of the Mascot integrity testing program in which planning for future integrity tests "was continuing".[540] The notes stated:

> *Phillip Bradley queried the basis of the integrity test in this matter and whether* [the officer] *was a Mascot Target. Cath Burn advised he was mentioned in Mascot. A* [Mascot investigator] *advised it was the intention to get Sea to see* [the officer] *was susceptible to dishonest behaviour. There was information he had been stealing money/property and receiving commissions from solicitors. Discussion took place between Mal Brammer, Phillip Bradley, John Gorgetti* [sic]*, and others as to the validity of the integrity test – it needed to test previous similar behaviour. Phillip Bradley advised he was not aware of this approach and in any case it was up to IA people to devise these things according to the legislation and guidelines.*
>
> *Phillip Bradley also advised that using Sea in these types of matters put him at risk, as the heightened activity concerning* [another officer's name] *and Sea meant that Sea could be considered a possible roll-over by some, and be at some risk dealing with others in these types of tests.*[541]

Minutes of the meeting on 9 April 2001 also record that Bradley had said of this planned integrity test "that these matters were not part of Mascot and expressed concern about using Sea in such matters as it may create problems for him". The minutes also record Brammer having "expressed concern about integrity testing scenarios for which there was no historical evidence to suggest that the target was involved in such conduct".[542] On 9 May 2001, Bradley wrote a further email and memo that conveyed to his senior staff his concerns with Mascot's use of integrity tests. He noted that integrity testing was not a NSWCC function. He also expressed a lack of confidence in the ITU and the impact of that unit on NSWCC work. In particular, he noted that if the NSWCC was involved in using contrived scenarios to entrap officers this would tarnish the NSWCC. He stated:

535 NSWCC, *Confidential minutes of the OCC meeting*, 18 December 2000, p. 1.
536 NSWCC Information Report, *Scenarios for possible use in Stromstad strategy*, reporting officer: [a Mascot investigator], 8 March 2001.
537 NSWCC Chronology Listing, Document ID 474, 1 January 1998, p. 2.
538 NSWCC Information Report, *Scenarios for possible use in Stromstad strategy*, reporting officer: [a Mascot investigator], 8 March 2001, p. 1.
539 NSWCC Information Report, *Strategy and planning for the* [officer] *itegirty* [sic] *test,* reporting officer: [an ITU officer], 10 April 2001.
540 PIC, *Notes of meeting at NSWCC*, compiled by [a PIC investigator], 9 April 2001, p. 29.
541 PIC, *Notes of meeting at NSWCC*, compiled by [a PIC investigator], 9 April 2001, p. 29.
542 NSWCC, *Confidential minutes of Mascot team meeting*, 9 April 2001, p. 2.

It is no part of the Commission's charter to be testing police for the purpose of determining whether the Commissioner can have confidence in them.

I have had no confidence in the ability of the ITU since my first meeting with them, and I do not want the Commission to be affected by mismanagement on their part. It is for this reason that I do not want ITU staff working here.

I am uncomfortable with some of the scenarios which have been proposed. In particular, I am concerned about highly contrived scenarios involving invitations to take money or other benefits. While it may be appropriate to conduct passive tests such as leaving money at the scene of a search warrant to see if it booked up or 'whacked' up, it is not, in my view, appropriate for one detective to hand money to another when there is no basis for inferring that the receiving party would be inclined to receive corrupt payments. We should keep in mind that there is enormous pressure on detectives to act unethically or to not report unethical behaviour, and that this environment is the product of historical mismanagement for which the target has little responsibility. There are very few detectives who could say that they have never experienced an instance of misconduct which they have failed to report. I can think of instances of ethical police who have been put in very embarrassing positions by the conduct of their colleagues and they felt that reporting is not an option.

Having said that, I acknowledge that there may be individuals whose antecedents are such that specific targetting can be justified in order to remove them from the Service. There will be cases, as there have been in the past, where IT's can be conducted, collateral to a Crime Commission Controlled Operation. But the IT component is still not a Crime Commission function.

I am very concerned about the impact that ITU may have on the perception of Mascot and the parties involved. There is already a very negative feeling towards SCIA and the SCU in particular, coming from Crime Agencies and others. Some of this is traditional animosity towards IA, some is not. All of it is unjustified. But if an otherwise good officer is entrapped by a contrived scenario, then many police will feel justified in thinking that the SCIA does not act fairly. No matter how much we try to divorce the Crime Commission from these processes, if our registered informer is used, then we will suffer the same criticism.

This should not be taken as indicating dissatisfaction with the part played by SCU personnel in the management of Sea. It has been a difficult task to balance the sometimes competing interests of the operation, the public interest and the welfare of Sea. I think this has been done well over a very long period. However if Sea is to emerge from this with respect from his peers (which is important for the future), we should not be using him to 'unfairly' trap friends and colleagues. [543]

As set out in Chapter 10, Bradley also communicated discomfort with Mascot's use of integrity tests in an email he sent to Standen on 9 May 2001 headed 'Integrity Tests'.[544] The email set out his concerns about a Mascot plan to use an integrity test on Officer F. The email also contained the following comment about integrity tests more generally (shorthand spellings presented as in original text):

I said that I had previously said that I did not want the CC to be involved in ITs as I had no faith in the people conducting them and they were not part of our charter. I had directed that no IT people shd work on the premises. Yet they were continuing to have IT people on the premises and denied it in the case of a woman who U identified recently...

Generally in relation to IT, I mentioned my concerns about fairness in the particular environment of the PS. I mentioned the golf ball matter and the scenario planned for [Officer E] *which I understood was not to proceed...*

543 NSWCC internal memorandum from Commissioner Phillip Bradley to Solicitor to the Commission John Giorgiutti, Assistant Director Investigations Mark Standen and Commander of SCIA Andrew Scipione, NSWPF, 9 May 2001, pp. 1-2.

544 Email from Commissioner Phillip Bradley, NSWCC to Mark Standen, Assistant Director Investigations, NSWCC, 9 May 2001.

> *I sd thatthe* [sic] *relationship with CA was already very bad and it wd be far better if the SC could emerge from Mascot arguing that it had worked on cops who were crooks and did not run around entrapping people esp if this was done to settle old scores. I sd I did not want the name of the CC associated with such conduct and that as the informer was registered here and not with the PS it would be difficult to assert that we were not involved in ITs involving Sea. I said I took the view that the SCU was managing him on our behalf. He shd not be diverted on to work which we did not support and in fact were opposed to. He sd he had already ascertained that Sea was registered with us and not the PS. I sd I did not want to make an issue out of this because he seemed to be well handled by police and MS had regular contact with him...* [545]

17.2.11 Previous investigations into integrity testing by Mascot

It should be noted that Strike Force Tumen considered allegations that Dolan had inappropriately used integrity tests against officers he disliked. Tumen made no adverse finding in relation to Mascot's integrity testing program.[546] Task Force Tumen's final report on this matter concluded that "Superintendent Burn ... states that in regards to integrity tests, many have been described as not actual integrity tests but proactive strategies".[547] The report also indicated that a number of Mascot staff were under the impression that their investigative strategies did involve integrity tests, when no formal integrity test was in place.

17.2.12 Analysis and submissions

The purpose of an integrity test under section 207A of the Police Act is to allow the NSWPF to test if a police officer will act in contravention of the principles of integrity, if given the opportunity. The Commissioner of Police (or a delegate) may authorise a test, and the Commissioner may consider the test result in determining if the Commissioner has confidence in that officer.

A statutory object of the NSWCC at the time of Mascot was to "reduce the incidence of organised and other serious crime".[548] The Mascot references were directed to that statutory object and listed the serious criminal offences involving current and former police officers that would be investigated by the Mascot Task Force. The NSWCC had, and continues to have, powerful investigative tools at its disposal for that purpose, such as controlled operations and LDs.

The NSWCC Act did not include a provision comparable to section 207A of the Police Act that provides a statutory framework for conducting integrity tests. To that extent it was not a function conferred explicitly on the NSWCC. As discussed in Chapter 8 section 8.3.9.1, Bradley noted in a written submission to Operation Prospect that there was no statutory bar against the NSWCC undertaking investigative actions that could alternately be conducted by the NSWPF as an integrity test.[549] While that submission is accepted, it was nevertheless relevant that integrity tests were given an explicit statutory foundation in Part 10A of the Police Act.

The legal essence of the integrity testing scheme is that an officer conducting an integrity test program will not commit an offence by engaging in activities that are otherwise unlawful. From a functional and operational perspective, an equally important feature of the scheme is that Part 10A of the Police Act lays down a framework for approving, managing and reporting the results of an integrity testing program. When the integrity testing scheme was given a statutory foundation in 1996, it was also tied to the new power conferred on the Police Commissioner in section 181D of the Police Act to terminate the service of an officer in whom the Commissioner had lost confidence.

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545 Email from Commissioner Phillip Bradley, NSWCC to Mark Standen, Assistant Director Investigations, NSWCC, 9 May 2001. In Bradley's email, 'IT' refers to Integrity Tests, 'JD' refers to John Dolan, 'AS' refers to Andrew Scipione, 'KB' refers to Catherine Burn, 'CC' refers to Crime Commission, 'PS' refers to Police Service, 'CA' refers to Crime Agencies, 'SC' refers to Special Crimes Unit, and 'MS' refers to Mark Standen.

546 NSWPF, Complaint number [number] Investigators Report by Detective Inspector Galletta, Strike Force Tumen, 3 July 2003, p. 16.

547 NSWPF, Complaint number [number] Investigators Report by Detective Inspector Galletta, Strike Force Tumen, 3 July 2003, p. 16.

548 NSW Crime Commission Act, s. 3A(2).

549 Bradley, P, Submissions in reply, 18 October 2016, pp. 4-5.

An activity that is purposely framed as an integrity test is not an activity that fell within the statutory responsibilities at the time of the NSWCC. Nor did the objectives of integrity testing squarely align with the statutory objects of the NSWCC in investigating serious criminal matters under the Mascot references. This was recognised, in a broad sense, in Bradley's communications at the time to other officers. The Mascot investigations, which were a NSWCC reference, should not therefore have engaged in a planned use of integrity tests as a Mascot investigative strategy. If Mascot identified concerns relating to the integrity of particular officers that made integrity testing an appropriate investigative strategy, these concerns could have been passed to the ITU to consider and test. That was particularly important if the matters were not of the same level of seriousness as the criminal matters the NSWCC had been empowered to investigate under the references issued by the NSWCC Management Committee.

If Mascot was concerned that referring matters to the ITU during Mascot's covert phase could compromise the integrity of Mascot's investigation, the referral could have occurred once Mascot entered an overt phase of investigation. Sea would no longer have been a useful resource for the ITU to use for any further integrity tests after his connection to the Mascot investigations was known. It would still have been open to the ITU to devise other integrity testing scenarios to target particular officers.

Brammer made a lengthy and articulate submission[550] to explain his view that the integrity tests conducted during Mascot were lawfully conducted and properly controlled. He referred in detail to the decision-making process that was followed for the application and approval of each test, and to ITU involvement in the process.[551] He set out the valuable role that integrity testing could play as an anti-corruption measure,[552] and his view that it was an appropriate strategy in the Mascot investigations and in keeping with the spirit of section 207A of the Police Act.[553] He pointed to matters that indicated the NSWCC Commissioner was well aware of and sanctioned the use of integrity testing as part of the investigations, and that the PIC as the oversight agency was also aware and had raised no objections.[554] He noted that integrity tests conducted by Mascot resulted in the prosecution and criminal conviction of a number of officers. In commenting on the concerns that Bradley had expressed, Brammer said that integrity testing was not a NSWCC function and had always remained a NSWPF function. One concession Brammer made in his submission was that:

> *Perhaps with the benefit of hindsight it may have been prudent had those legally qualified in the mix of the NSWCC and the PIC considered and examined the appropriateness of including integrity testing in the investigation methodology adopted by Mascot.*[555]

Burn similarly submitted that the use of integrity testing within Mascot was appropriate. She made the additional point that "it was always envisaged that the investigations conducted pursuant to the References could lead to lesser outcomes for targets than criminal prosecutions".[556] She argued that it was a:

> *... misconception that the Mascot references were solely concerned with the investigation of 'serious criminal matters' as distinct from matters that may merely result in the removal of police officer's due to the loss of the Commissioner's confidence.*[557]

Burn submitted that, at most, any problems to do with the Mascot use of integrity testing were systemic problems and not the result of unreasonable decision making by individual officers.[558]

That summary of submissions, contrasted with the earlier summary of Bradley's concerns, illustrates the quandary at the heart of this issue that was never properly resolved during the Mascot era. On the one hand, integrity testing is well accepted as an effective and valuable mechanism that is available to police for investigating integrity issues that range from corruption at one end of the scale to probity and disciplinary

550 Brammer, M, Submissions in reply, 7 October 2016.
551 Brammer, M, Submissions in reply, 7 October 2016, pp. 11-15.
552 Brammer, M, Submissions in reply, 7 October 2016, pp. 10-11.
553 Brammer, M, Submissions in reply, 7 October 2016. pp. 34-37.
554 Though it is noted that at section 17.2.4 that the PIC may not have received timely notice of integrity tests as required under the Police Act.
555 Brammer, M, Submissions in reply, 7 October 2016, p. 36.
556 Burn, C, Submissions in reply, 25 September 2015, Appendix 4, p. 13.
557 Burn, C, Submissions in reply, 25 September 2015, Appendix 4, p. 12.
558 Burn, C, Submissions in reply, 25 September 2015, Appendix 4, p. 13.

matters at the other end of the scale. The Mascot investigations were undertaken by NSWPF officers and their use of integrity testing was approved in compliance with NSWPF procedures.

On the other hand, the Mascot references were conducted by the NSWCC that had no explicit integrity testing function and no direct responsibility to ensure compliance with NSWPF procedures. The NSWCC also had other investigative powers at its disposal such as controlled operations and listening devices.

The evidence before Operation Prospect suggests that this combination of powers and functions was never clarified so far as integrity testing was concerned. There was a failure to comply rigorously with the reporting and record keeping requirements for integrity testing. The objectives behind individual integrity tests were not always thought through properly before a test was conducted. The outcomes of integrity tests were not properly recorded and factored into subsequent risk assessments of officers who had been tested. The overlap between integrity testing and controlled operations was blurred. The Mascot Task Force appears to have been distracted on occasions from its role of investigating serious criminal conduct into using integrity tests to examine alleged minor infractions.

In the circumstances, the use of integrity testing in Mascot investigations points to a systemic weakness in Mascot processes. There was a responsibility on the NSWCC to resolve in a proper manner the problems of which it was aware concerning the use of integrity testing in the Mascot investigations, which was a NSWCC reference. The NSWCC did not properly address or resolve whether it was appropriate for integrity testing to be used in a NSWCC reference, and whether the Mascot Task Force was adhering strictly to legislative and administrative requirements in conducting those tests.

17.2.13 Findings

79. NSW Crime Commission

The conduct of the NSW Crime Commission, in failing to resolve the problems of which it was aware concerning the appropriateness and use of integrity testing in a NSW Crime Commission reference, was conduct that was otherwise wrong in terms of section 26(1)(g) of the *Ombudsman Act 1974.*

17.3 Use of pseudonyms for Mascot persons of interest

During the course of its investigations, Mascot assigned codenames (pseudonyms) to a number of 'persons of interest' or investigation targets. A Mascot record from September 2001 included a list of 57 then-current or former NSWPF officers and 43 civilians for whom Mascot officers had established pseudonyms.[559] The list was amended many times during the Mascot investigations.[560] Not all targets were given a pseudonym, and the reasons why people were selected is unclear and undocumented.

On 30 December 2012, *The Sunday Telegraph* published a story about the pseudonyms used by Mascot.[561] The article listed several pseudonyms and included comments from a former NSWPF officer that were critical of the Mascot pseudonyms.

Typically, the purpose of using a pseudonym is to improve operational secrecy and reduce the risk that an investigation will be compromised by a person becoming aware that they or an associate is under investigation. The operational value of pseudonyms in Mascot was limited by the fact that the pseudonyms of some people were used in some documents and their actual names were used in others.

559 NSWCC, *Mascot/Boat Pseudonyms*, 11 September 2001.
560 PIC, *Mascot Code Names*, undated.
561 Morri, M. and Fife-Yeomans, J., 'That's Mr Big to you: Tags rile police', *Sunday Telegraph*, 30 December 2012.

Evidence to Operation Prospect from former Mascot officers was that they did not know how the pseudonyms came to be created.[562] Some former Mascot officers could recall particular pseudonyms and/or the people associated with them, but not necessarily why a given pseudonym had been chosen for an identified person.[563]

One former Mascot officer stated that the pseudonyms were regularly used in conversations, both within the NSWCC and in the field, to avoid publicly identifying people of interest to Mascot:

Q: *... did the targets or people of interest have, um, coded names as well?*

A: *Most of them did. Um, most of the ones in the investigations had, yeah, code names and that wasn't so they would use them in public. It was when, um, just out - out in public we wouldn't mention names.*

Q: *So that was my next question. You didn't use those inside the four walls of the Crime Commission?*

A: *We did.*

Q: *You did?*

A: *We got used to it. Like we always called Paddle, Paddle. We always called Sea, Sea. A lot of the targets we'd call - if it was* [person's name]*, he'd have a name. I can't remember what it was but we actually called him by that name. There might have been times when in bigger meetings we actually used names so everyone knew, but within ourselves we just made it practice that if you're talking about a target it was a code name so you wouldn't mess up when you were out in the field.*[564]

One pseudonym appears to have been derived from allegations against the relevant person that were recorded on a LD. The pseudonym is open to the inference, as stated in evidence to Operation Prospect from a former Mascot officer, that "I'd only assume by that nickname he's apparently up to no good".[565] There was no recorded Mascot explanation for the choice of this or other pseudonyms.

It is possible that Mascot officers chose a pseudonym based on their particular knowledge of a person – including their ethnicity, reputation or attributes. However, due to the passage of time and a lack of familiarity with the named people, Operation Prospect cannot confirm if that was the case.

17.3.1 Analysis

As a result of complaints received, Operation Prospect reviewed the Mascot pseudonym list. Although some Mascot pseudonyms do not seem inappropriate when taken at face value, at least two pseudonyms appear to be based on derogatory references to the relevant person's appearance or ethnicity.[566] Another Mascot pseudonym appeared to be connected with allegations of domestic violence. At least one pseudonym was chosen with reference to allegations against that person. A small number of other pseudonyms appear to have been chosen by reference to the person's ethnicity, appearance or reputation – but were not inherently derogatory.

Several Mascot pseudonyms were insufficiently separated from the person's actual name, and could readily have been linked back to the corresponding person without detailed knowledge of Mascot's investigations. Operation Prospect considers that approximately 15 pseudonyms could readily be linked to particular individuals, even by someone with limited knowledge of Mascot's investigations.[567] The connection could be made in some cases by linking the person to a pop cultural reference, by a shortened or modified form of the person's current or former legal name or a logical association between the pseudonym and the person's surname.

562 Ombudsman Transcript, [former Mascot officer], 4 April 2014, p. 177; Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2720.
563 Ombudsman Transcript, [a Mascot analyst], 8 May 2014, p. 56; Ombudsman Transcript, [a Mascot officer], 10 February 2014, pp. 74-75.
564 Ombudsman Transcript, [a Mascot officer], 16 April 2014, p. 50.
565 Ombudsman Transcript, [a Mascot officer], 1 May 2014, p. 164.
566 NSWCC, *Mascot/Boat Pseudonyms*, 11 September 2001.
567 NSWCC, *Mascot/Boat Pseudonyms*, 11 September 2001.

There is neither documentary evidence nor any oral evidence given by witnesses that assists in determining which Mascot staff were responsible for allocating the pseudonyms. It should also be noted that – for the majority of people on the pseudonym list – their accompanying pseudonyms were not inappropriate and attract no criticism in this report.

It would ordinarily be appropriate to record an adverse finding against the NSWCC for the practice adopted in the Mascot Task Force of assigning pseudonyms that had culturally inappropriate references, references to the physical attributes of a person or references to sensitive personal information. Conduct of that kind is unreasonable and improperly discriminatory under section 26(1)(b) of the Ombudsman Act. However, it would be inappropriate in this report to particularise the instances in which that occurred and to invite comment from the NSWCC. For that reason this matter is recorded in this report only as an adverse comment.

17.4 Allegation that SCIA misused telecommunications intercepts

17.4.1 Prohibition on disclosure of telephone intercept information

A complaint allegation considered by Operation Prospect was that John Dolan, the Commander of the SCU, misused information obtained by Mascot from a TI in July 2001.

The *Telecommunications (Interception and Access) Act 1979* (Cth) (TI Act) governs the use of TIs and intercepted information. Relevant sections of the TI Act are set out in Appendix 3 (Volume 1) of this report – including section 6E which defines 'lawfully intercepted information' (LII), and section 6EA which defines 'interception warrant information' (IWI). This is information that has been intercepted by a TI,[568] and any reference to a TI warrant or information that is likely to enable the person who is the subject of a TI warrant to be identified.[569]

Section 63 of the TI Act creates a general prohibition on the communication, use or making of a record of LII and IWI. Under section 105 of the TI Act, a contravention of section 63 of that Act is an indictable offence – punishable on conviction by imprisonment for a period not exceeding two years.

Various permitted dealings with LII or IWI are set out in Part 2-6 of the TI Act. Section 67(1) of the TI Act provides a limited exception to the section 63 prohibition where an officer of an agency makes use of LII or IWI for a permitted purpose. The definition of 'permitted purpose' under section 5 of the TI Act includes:

- investigating a prescribed offence under the TI Act
- relevant proceedings by an agency or eligible authority – defined in section 6L of the TI Act
- investigations by police into alleged misbehaviour or improper conduct or making of decisions or reviews of decisions in relation to the appointment, reappointment, term of appointment, retirement or termination of appointment of an officer or member of staff of the relevant police body.

17.4.2 Events in July 2001

On 12 July 2001, Mascot intercepted a telephone conversation between two officers under a warrant issued under the TI Act. In the course of that conversation, the two officers discussed Dolan's position within the NSWPF and their concerns about SCIA's lack of accountability. The officers agreed to meet to discuss the issue of SCIA's accountability, and one stated that he had heard that Dolan had been told he would be removed from his position at SCIA – with the other agreeing that this was correct.[570] Dolan heard the contents of the intercepted conversation thorough his work as Commander of SCU.[571]

568 *Telecommunications (Interception and Access) Act 1979* (Cth), s. 6E.
569 Telecommunications (Interception and Access) Act, s. 6EA.
570 NSWCC Transcript of TI E01131/00/00, Tape no. [unknown], 16:11 on 12 July 2001, pp. 8-9.
571 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2604.

Later the same day, Dolan contacted Brammer by telephone and reported to Brammer his concerns about the contents of the recorded conversation, in particular that the participants in the conversation had discussed Dolan's future and his impending removal from SCIA.[572] At the time of this conversation, Brammer had already left SCIA – in April 2001 – and was working at NSWPF Education Services before taking up an external secondment.[573]

As a result of the telephone conversation, Brammer prepared a document about Dolan's welfare. It was dated 14 July 2001 and headed 'Issues surrounding John Dolan'.[574] Brammer also sent an email to Burn on 19 July 2001, which contained his 14 July 2001 document.[575] Both of these records detailed the fact and contents of the intercepted conversation.

17.4.3 Evidence of Dolan and Brammer

In his evidence to Operation Prospect, Dolan indicated that in July 2001 he considered Brammer to be a person in whom he could confide and with whom he could discuss things that worried him.[576] Dolan accepted that he disclosed to Brammer some of the product of a TI.[577] Dolan declined to answer further questions to Operation Prospect on the issue, asserting the privilege against self-incrimination.[578] However, he stated that in July 2001 he felt like the intercepted conversation was about his removal from SCIA, and said: "I felt as though my demise was being brought about, yes".[579]

Brammer's evidence was that he prepared the document dated 14 July 2001 because Dolan had raised a number of welfare issues with him and at that point "he [Dolan] was in a distressed situation".[580] Brammer believed that Dolan was at risk psychologically at that time, but would have known that information obtained from TIs could only be used for very particular purposes.

Brammer said that – although he did have a concern that Dolan should not have been communicating the contents of the intercepted communications to him[581] – he prepared the document recording their conversation with the intention of providing the document to the Commissioner.[582] He decided to send it to Burn instead to be recorded with Mascot's investigation papers.[583]

While Brammer understood that the conversation Dolan overheard was apparently an interception, he said he did not know whether it had been intercepted under a warrant.[584]

17.4.4 Analysis and submissions

The information Dolan disclosed to Brammer on 12 July 2001 fell within the definition of LII and IWI. Specifically, it was 'interception warrant information' as defined in section 6EA(b)(ii) of the TI Act: "information that is likely to enable the identification of ... a person specified in an interception warrant as a person using or likely to use the telecommunications service to which the warrant relates".[585] Similarly, it was 'lawfully intercepted information' as defined in section 6E(1) of the Act: "information obtained ... by intercepting ... a communication passing over a telecommunications system".

572 NSWPF Information Report, *Issues surrounding John Dolan,* reporting officer: Brammer, 14 July 2001, p. 1.
573 Ombudsman Transcript, Malcolm Brammer, 28 October 2014, pp. 2516, 2551.
574 NSWPF Information Report, *Issues surrounding John Dolan,* reporting officer: Mal Brammer, 14 July 2001.
575 Email from Commander Malcolm Brammer, NSWPF to Detective Inspector Catherine Burn, Mascot Reference, NSWCC, 19 July 2001.
576 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2663.
577 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2660.
578 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2661.
579 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2663.
580 Ombudsman Transcript, Malcolm Brammer, 28 October 2014, p. 2551.
581 Ombudsman Transcript, Malcolm Brammer, 28 October 2014, p. 2552.
582 Ombudsman Transcript, Malcolm Brammer, 28 October 2014, p. 2551.
583 Ombudsman Transcript, Malcolm Brammer, 28 October 2014, p. 2551.
584 Ombudsman Transcript, Malcolm Brammer, 28 October 2014, p. 2551.
585 Telecommunications (Interception and Access) Act, s. 6EA.

None of the exceptions to the prohibition against dealing in LII or IWI apply to Dolan's communication of this LII and IWI. The information was not communicated to Brammer for any permitted purpose, which could relevantly include Mascot's investigations into possible criminal offences. Brammer was not working in SCIA in July 2001 and had no operational reason to be given that information.

Brammer was aware that the information communicated by Dolan was obtained by a TI (though not necessarily under a warrant). He made a record of that information (which was LII and IWI) in the document dated 14 July 2001. This record and Brammer's email to Burn of 19 July 2001 constituted 'dealings' with LII or IWI for the purposes of the TI Act.[586] The dealings were, however, for a permitted purpose in relation to the NSWPF, and consequently authorised under section 67 of the TI Act. Although Brammer was no longer Dolan's supervising officer in July 2001, he was still a member of the NSWPF. Brammer's communication of LII and IWI on 14 July 2001 relating to the intercepted conversation appears to have been motivated by his concerns for Dolan's health and welfare. The evidence suggests that Brammer did not have any other purpose than to make an internal record of those concerns and to ensure that they were communicated to relevant people in the NSWPF for future reference. While Brammer's evidence did not explain his conduct strictly in line with the provisions of the TI Act, his conduct in passing the information on to Burn could be seen as assisting with any decision within the NSWPF as to whether or not to begin a relevant proceeding (section 5(a)(ii) of the TI Act). A relevant proceeding includes, under section 6L(1)(e) of the TI Act a police disciplinary proceeding, and under section 6L(1)(f) of the TI Act a proceeding "in so far as it relates to alleged misbehaviour, or alleged improper conduct, of an officer of … that State…". Therefore, no adverse finding is made against Brammer in relation to his dealings with the LII and IWI communicated to him by Dolan on 12 July 2001.

Dolan's written submission on this issue to Operation Prospect[587] drew attention to mitigating factors. He explained that the only part of the intercepted information that he communicated to Brammer was malicious gossip about him by two other officers that caused him anxiety and stress. [588] The Mascot work assignment to investigate corruption of fellow officers was unpopular and stressful. Dolan felt that he could turn to Brammer for moral and welfare support.[589] There was no corrupt purpose in his disclosure of intercepted information and he did not disclose any evidence relevant to the Mascot investigation.[590]

17.4.5 Findings

80. Dolan

Dolan's conduct in communicating lawfully intercepted information and interception warrant information to Brammer on 12 July 2001 may be conduct that constitutes an offence in terms of section 122(1)(a) of the *Police Act 1990*. The relevant offence is "No dealing in intercepted information or interception warrant information" in section 63(2)(a) of the *Telecommunications (Interception and Access) Act 1979* (Cth).

17.5 Impact of the delay in Mascot moving to an overt investigation

17.5.1 Promotional opportunities affected by unresolved allegations

As detailed in this report, Mascot accumulated a range of allegations against many NSWPF officers, using information recorded on Sea's LDs. Some allegations were of a relatively minor nature and based on hearsay evidence. Those allegations, along with those that were more serious, were added into Mascot's Schedule of Debrief.

586 Telecommunications (Interception and Access) Act, s. 63.
587 Dolan, J, Submissions in reply, 26 October 2015.
588 Dolan, J, Submissions in reply, 26 October 2015, p. 2.
589 Dolan, J, Submissions in reply, 26 October 2015, p. 3.
590 Dolan, J, Submissions in reply, 26 October 2015, pp. 2-3.

Mascot did not actively investigate a number of the lower level allegations until Sea's role as an informant for the NSWCC was exposed through the Operation Florida public hearings. The operational imperative of keeping Sea's role secret during the covert phase of the investigation caused a delay in the investigation and closure of these allegations – in some cases for a period of two years or more. For some officers, the delay affected their promotional opportunities – as the NSWPF had (and retains) a practice whereby officers who are considered for promotion are subject to a number of probity checks, including checks through Internal Affairs (within SCIA).

When a probity request about an officer being considered for promotion was made through IA, it would seek information from SCU and Mascot to find out if the officer had outstanding allegations of corrupt conduct. IA would be advised if the officer was named on Mascot's Schedule of Debrief and if an allegation of corruption was outstanding and had not been resolved. An officer's promotional opportunities could be delayed or declined as a result of being named in one or more allegations in the Schedule of Debrief.

Mascot's lengthy covert phase delayed the full investigation of many allegations and adversely affected a number of officers' careers in circumstances where the allegations against them were ultimately not sustained. This section examines whether Mascot's handling of many lower level allegations in this way was an appropriate approach. The circumstances of one officer – Officer O – are discussed in greater detail in section 17.5.4, regarding a delay in Officer O's promotion through concern not to avoid exposing Sea.

17.5.2 Mascot's covert investigative phase

During the covert stage of the Mascot investigations – from its inception through to the Operation Florida public hearings in October 2001 – Mascot's investigation strategy was focused on using Sea as an undercover informant to record the conversations of officers suspected of corruption, to gather corroborative evidence of that corruption. During this phase, traditional investigation methods were used by Mascot on a limited basis due to concerns that this could raise suspicions that could affect both the success of the strategy and the safety of Sea.

Burn gave evidence to Operation Prospect that maintaining the covert nature of Mascot's investigations was paramount and that this affected the manner in which allegations were investigated:

Q: *So let me just understand what you're saying, the operational decision was that you targeted people and you used listening devices to gather information first, rather than actually trying to establish whether or not there was any legitimacy to the first, second or third-hand information, whatever it was, that led to the person being a target in the first place?*

A: *Attempted to establish the legitimacy through whatever corroboration we could obtain whilst also maintaining the security of the informant; so there, so there were some things you just couldn't go and do. ... So you couldn't go and get duty books of south region drug office necessarily, you would have to put something in play to have, to get that information, so, so whether or not a person was going to be specifically the person that, that, that the informant was deployed into, there would be as much corroboration that could be done under that basis that you couldn't expose, you couldn't do a lot, you couldn't find out a lot of information.*

Q: *And, so when that was undertaken, would that find its way into the affidavit process?*

A: *It wasn't undertaken until Sea was removed.*

Q: *But anything that was anything that was undertaken or is what you're saying nothing was undertaken?*

A: *Well, it, it, I don't, we didn't have an opportunity. We didn't have time. Whilst ever he was out in the field, that was the focus of the investigation, to capitalise – and then once he was extracted, we were able to then go through what we would say was the more traditional process. It was then we were able to do that, and I can't remember the name of Mascot 2 or Volta or something, was then able to go through, pull up the information and say, "No further action, not sustained", et cetera, but during his deployment, no.* [591]

591 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2712.

Burn provided a further explanation of Mascot's approach:

Q: *There was no focus, I suggest, on seeking or obtaining exculpatory information in relation to the matters raised by Sea?*

A: *Not in a, not in the covert phase… the covert phase was definitely focused on, as you say, capitalising on whatever opportunities, and in, and in many ways so that we could eventually say whether or not the allegation was sustained, so it was either to, either to get information evidence for a Police Integrity Commission hearing or a New South Wales Crime Commission hearing, or charges, and that was, that was, the focus.*

Q: *Yes. There was no interest in exculpatory information, only inculpatory information. That's fair, isn't it?*

A: *Well, when you have an informer---*

Q: *No, is it fair or not? Don't worry about articulating some other analysis. Is that a fair comment or not?*

A: *Yes, it was just focused on proactive work with the informer, whilst, whilst ever we had that ability.*[592]

The applicant for a LD warrant was required to explain why the applicant suspected or believed that the use of a LD was necessary to investigate a prescribed offence or to obtain evidence of the commission of an offence or the identity of the offender.[593] The judicial officer determining the application was required to consider various factors – including 'the extent to which the privacy of any person is likely to be affected'[594] and 'alternative means of obtaining the evidence or information sought to be obtained'.[595] To address the latter issue, many affidavits prepared by Mascot contained a standard statement such as:

> *Alternative investigative methods are not likely to succeed and it is highly unlikely suspected persons would assist or cooperate if directly interviewed about* [Sea's] *allegations. The majority of persons targeted have extensive experience and exposure to police methodology including physical and electronic surveillance. This further limits the capacity of investigators to obtain evidence. Proof of the allegations made by* [Sea] *will depend on covertly obtained corroborative evidence.*[596]

That statement was broadly accurate. To the extent that Mascot required evidence of an admission of guilt of previous criminal conduct, the only means of obtaining that was by use of a covertly recorded admission from the person. A statement from Sea that the person had made such an admission to him would not have the same weight as an electronic recording of that admission. The use of a LD would also allow admissions or confessions to be obtained in a more uninhibited environment. It is also true that many of the people targeted had been trained in police methodology, including physical and electronic surveillance.

On the other hand, the earlier chapters in this report contain examples where basic checks could have eliminated suspicion about a person against whom an allegation had been made. For example, an assessment of Officer L's Duty Book (see Chapter 12) may have ruled him out as a suspect in relation to an allegation he tried to extort money from a criminal. Nevertheless, the standard declarations in Mascot affidavits were generally acceptable and reasonable in the circumstances.

A consequence of that approach, however, was that as Mascot automatically recorded all allegations onto the Schedule of Debrief – regardless of their strength or weakness – many allegations remained unresolved for years. Some allegations had a strong basis and warranted recording and further investigation. Other allegations on the Schedule of Debrief were weak and based solely on second hand and hearsay evidence. In some cases, there was no allegation of wrongdoing but a person was named in the Schedule of Debrief solely because they were present when a corruption incident had allegedly occurred.

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592 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2713.
593 *Listening Devices Act 1984* (NSW) (repealed) (LD Act), s. 16(1)(b).
594 LD Act, s. 16(2)(b).
595 LD Act, s. 16(2)(c).
596 See for example LD affidavits 147-153/2000, p. 44; 01/00183-00190, p. 34.

17.5.3 Mascot's overt investigative phase

The Mascot investigations moved into an overt phase from October 2001, when the PIC began public hearings as part of Operation Florida. From this time, Sea was no longer tasked to record people and other investigation strategies were adopted. This was explained in evidence by Burn:

> *... we were then able to go and fully exhaust the investigations and people who might have been named, but prior to that, there were, there were other potentially investigative investigations, documents, a lot of other information that might have been obtained to say, to indicate whether or not in the language it was sustained or not. So that was, that was not done in the first phase, but it was done in the second phase....*[597]

When questioned about delays in investigating allegations, a former senior Mascot investigator stated to Operation Prospect that "in retrospect [allegations] should have been more thoroughly tested and, um - and really a clear investigative plan, sort of, um, articulated right from the outset".[598]

In mid-2002, the Commissioner of Police – Mr Ken Moroney – authorised the establishment of a new police Task Force, codenamed Volta, to deal with 199 medium to low risk allegations or events on the Schedule of Debrief that had not been finally dealt with by Mascot at that time. Volta started operations in September 2002[599] – see Chapter 3.

Operation Prospect asked Greg Jewiss – a Senior Sergeant with Mascot and later Commander of Volta – if it concerned him at the time that some allegations were unresolved for years and not progressed beyond deploying Sea to record conversations. He replied:

> *I was caught up in the investigative process. I don't know that I put my mind to that consideration. I know there was overt decisions taken by the commander of internal affairs, the police commissioner and others to do what we could to corroborate the allegations at hand, and then that morphed into contemporary corruption that we found at Manly and Northern Beaches, and the rest of the matters were put on hold whilst that segment was pursued, whilst we still had Sea in the workplace.*[600]

Operation Prospect asked Jewiss about the delays in investigating Officer H (see Chapter 8). One of the allegations against Officer H was left on Mascot records from January 2000 to September 2002 without any active investigation. Jewiss agreed that was a considerable delay. He explained that matters could not be investigated more expeditiously due to the sheer volume of allegations on record and the availability of staff. He said this was partly the reason that the Commissioner of Police increased the staffing to Mascot and created Volta to deal with the low and medium risk matters.[601]

Operation Prospect asked a number of former Mascot officers about the apparent weakness of many allegations that remained as black marks against subject officers' names while Mascot was covert, and which were not finalised until Volta. Some answers gave insight into the focus in Mascot on 'intelligence gathering'. A former senior Mascot investigator told Operation Prospect:

> *I think there's inherent risks associated with conducting an overt investigation. We've all read the documents where there was a lot of bush telegraph mentality when people were interviewed and accessed affidavits and compared notes on things and where is this coming from and you know, it can change the culture quite quickly and it could have changed and potentially put the informant at risk if there was a joining the dots between, well, who's spoken about this recently.*[602]

A former Mascot officer at the rank of Sergeant gave evidence to Operation Prospect that discussions of possible corrupt or criminal conduct that were captured on LDs tended to be uncritically accepted as accurate,

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597 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2712.

598 Ombudsman Transcript, [a former Mascot officer], 10 February 2014, p. 144.

599 NSWPF internal memorandum from Commander of Task Force Volta Greg Jewiss to Commander of SCU, 6 November 2003, p. 2; NSWPF, *The improvement process for the Special Crime Unit – Including the debrief of Florida Mascot – Part 1: Operation Mascot – An Investigator's Overview* (Report), [Mascot investigator], August 2003, p. 3.

600 Ombudsman Transcript, Greg Jewiss, 29 July 2014, p. 934.

601 Ombudsman Transcript, Greg Jewiss, 29 July 2014, p. 967.

602 Ombudsman Transcript, [senior Mascot investigator], 23 July 2014, p. 702.

despite the circumstances in which those discussions occurred. He stated that hearsay statements recorded on LDs were often incorporated into Mascot affidavits to justify targeting particular individuals for investigation:

> *As I said there were incidents where after 10 hours on drinking solid there was vast embellishment about, ah, incidents and, um, instances, um, look, no doubt and particularly in regard to contemporary information, some of the – the other information that was able to be corroborated, um, there, ah, his, ah, credibility wasn't in question in some of those instances, but as I said, like some of the other information I would suggest he would – he didn't have direct knowledge of it and may have been relying on information that he had been told by third, fourth or fifth parties and would then be tipped into, um, targeting those people to elicit information and then get evidence.*[603]

Another former Mascot officer at the rank of Senior Constable gave evidence that little consideration appeared to be given to the age and seriousness of allegations made by Sea in deciding which matters should be put on the Schedule of Debrief:

> *Q:* *So what were your day-to-day tasks?*
>
> *A:* *Oh, good question. Well, near the end they gave me a list of, I think it was 300 – was it 300 – there was all these allegations, if you like, that were made by Sea, had to be looked at, analysed to see whether or not it was worth digging. I mean, they were stupid things that were from 20 or 30 years, I don't know how long ago it was, but they seemed like things that he's brought up in these little chats he's had and they've recorded it, and they've typed it all out and made – and they've – they've put it in point form, and they said, "This is your job", Cath gave me this job, "You – you've got to, um, look at each one of these and see if we can go anywhere with it, and then if not, put it in this column here and write, like, analyse it, basically," and that.*[604]

The officer recalled that her assessment of many allegations was that most were for low level matters and the likelihood of being able to prove them was low:

> *A:* *Because, the end of my time in the cops I was a brief handling manager, so I was pulling briefs apart and pulling the police apart at there, so.*
>
> *Q*: *So when you were doing that process, did anything really stand out as, this is really serious and we haven't done anything on it and we really should get on to it?*
>
> *A:* *Nope. I just thought they were all stupid.*
>
> *Q:* *So when you say you felt they were all stupid - - -*
>
> *A:* *Yeah.*
>
> *Q:* *- - - was it because the majority of them were low level - - -*
>
> *A:* *Yeah. But just really old stuff and these – the likelihood of finding anything about this – something – I - I can't even remember what the jobs were, but I do remember that most of them were just really silly things.*
>
> *Q:* *So hearsay and rumour from - - -*
>
> *A:* *Yeah. Or there might have been one or two that we might have got statements about, I can't even – I can't remember.* [605]

603 Statement of Information (Interview), [a former Mascot officer], 11 March 2014, p. 62.
604 Ombudsman Transcript, [a former Mascot officer], 4 April 2014, p. 66.
605 Ombudsman Transcript, [a former Mascot officer], 4 April 2014, p. 71.

The officer expressed her belief that the cultural impetus towards including as many matters as possible was not unique to Mascot, but was motivated by a desire to obtain the best statistical results for Mascot's investigations:

> *Because I just think that with the amount of stuff like those SODs, the pettiness and the silliness of some of those investigations was like they wanted you to find something to pin on them. Like to - not - not illegally but find something you could charge somebody with to make Mascot look better in the end. To say that they had so many charges. There's this real culture in the cops that you got to get so many charges, you know?*[606]

Other witnesses expressed concern and frustration with the focus on allegations of historical matters. A former Mascot officer at the rank of Detective Senior Sergeant gave evidence that many of the allegations on the Schedule of Debrief concerned historical corruption, which would be difficult to investigate and substantiate. He also stated that there was a view among some Mascot officers that instances of minor misconduct reported by Sea that had occurred many years earlier were 'ancient history', particularly if there was little for the NSWPF to gain organisationally by investigating it:

> *I think everyone was committed to the contemporary phase of the job. They could see that there was – there was contemporary corruption and, um, there was business that was serious, you know, there were drug rips in all manner or form. That was, you know, some pretty serious, um, corruption going on. And everyone was committed to exposing that and dealing with that. I think over time, um, it became obvious that these disclosures of Sea, these historical disclosures were exactly what they were. And trying to corroborate them and to actually do something with them in a contemporary context was going to be challenging. And that's – I was given the job of looking at them. And I think people realised that – where was this going to go, and what benefits were to come organisationally of exposing, you know, um, corruption or misconduct. And some of it was just very minor misconduct from 10, 15 years ago. Some of the people that had left the job, they died, they – it was ancient history. That was how it was viewed.*[607]

Another Mascot officer recalled that a number of Mascot officers had concerns about the direction and scope of Mascot's investigations. His view was that investigators:

> *... were unhappy that they were investigating matters that were, in their minds, outdated. Were – were very much, um, historical. And there was an apprehension that it was achieving very little.*[608]

He gave evidence that the volume of historical allegations affected attitudes within the investigation:

> *Look, from my perspective, my recollection, it was generally the case that, um, everybody had had enough of the investigation. They thought most of it was futile, by virtue of the fact that it was so historic. Some of the activity in Manly was contemporary, and I guess, ah – I guess that was probably the highlight of the whole job. Um, there were some that supported the – the – the investigative, um, line, I guess; investigative direction.*[609]

The officer observed that Mascot's Schedule of Debrief did not accurately reflect the nature and number of allegations that were likely to result in prosecutions:

> *... look, as I said, well that was certainly the, um – what was indicated to me* [by John Dolan]*, that it was this huge job that was going to be bigger than the Crime Commission and, um, it was going to be bigger than every – anything else. You know, exposing corruption everywhere, you know, contemporary and – and historic. And it didn't, and it was never going to. It was just, um, you know, you've got a, um – an informant that is not lacking in – that is lacking in credibility. Um, and for the basis of those 200 or 300 SODs, or whatever, the only ones that really manifested in any result was the ones that affected the police at Manly ... The rest of it was just futile.*[610]

Another former Mascot officer at the rank of Sergeant gave evidence that a number of police officers working at Mascot had concerns about the allegations listed on the Schedule of Debrief. His evidence was that many of the allegations were not underpinned by sufficient evidence to support a criminal charge and prosecution.

606 Ombudsman Transcript, [a former Mascot officer], 4 April 2014, p. 252.
607 Statement of Information (Interview), [a Mascot officer], 17 December 2013, pg. 19.
608 Ombudsman Transcript, [a Mascot officer], 10 February 2014, p. 9.
609 Ombudsman Transcript, [a Mascot officer], 10 February 2014, p. 28.
610 Ombudsman Transcript, [a Mascot officer], 10 February 2014, p. 72.

However, he indicated that these concerns were dismissed when he brought them to the attention of more senior Mascot officers:

> *It was – it was far too broad. So* [name]*, as a prosecutor, saw the alarms bells going off on this and sort of said, listen, you know, if we're going to represent this up, we really need to drill down into it. And we really need to be accurate in what we're saying. And so he was initially asked and then he came to me and said, you know, what – what's your thoughts on it? And I started to go through it and I was raising, you know, a huge number of concerns about hearsay evidence, you know, that I believed the number of the schedules of debrief were nothing more than intelligence. Um, they weren't evidence, they were third-hand and fourth-hand hearsay. Um, they were based upon allegations made by convicted armed robbers* [laughs] *and, you know, serious criminals with – who wouldn't have the credibility to be used as a – as a person to base a prosecution on. So common sense-wise I was just going through it, going – well, that's not going to stand up, that's not going to stand up, that's not going to stand up. And trying to get to a point where, you know, I would apply it as if it was me running the – the investigation, what I would be happy to run a prosecution around. And when it come down to that, it was basically such a – a small number I think that was partly why I was ridiculed. Because I had threatened, you know, threatened their ... I suppose this massive investigation which they had represented as something that was just enormous. And then, all of a sudden, I come along and say, hang on a minute, you haven't got 50 police, you're got 12. And you haven't got a hundred charges, you might have 20 or 30. You know, um, say, for instance, it was quite an affront to them because they had – it was affecting their credibility.*[611]

17.5.4 Mascot's handling of the allegation against Officer O

Officer O was the subject of a low level allegation about his conduct in 1988. Mascot first recorded the allegation in the Schedule of Debrief in September 1999. Soon after, Officer O was named in LD affidavits and warrants. No action was taken to investigate the allegation until three years after it was listed in the SOD, during Mascot's overt phase when relevant parties were interviewed.

17.5.4.1 Mascot records an allegation about Officer O

Officer O was mentioned in Mascot's Schedule of Debrief following a lawfully recorded conversation between Sea and Mascot Subject Officer 11 (MSO11) on 1 September 1999. When Sea mentioned Officer O, MSO11 replied:" [whispers] him and [nickname of another officer] ... at Glebe Detectives 11 o'clock at night... [the transcript noted 'sounds of hands brushing'] ... So all of a sudden instead of goin' it went". The transcript noted that MSO11 laughed, and Sea replied: "Had to go three ways instead".[612]

Burn and a junior Mascot officer summarised this conversation in an Information Report dated 3 September 1999:

> [MSO11] *told Sea about how much money they used to make in a week at Newtown Detectives.* [MSO11] *referred to pawn brokers and pub. Sea mentioned* [Officer O] *(*[Officer O's nickname]*).* [MSO11] *said he works at the NCA. Sea asked* [MSO11] *how he got to the NCA.* [MSO11] *then outlined an incident when he walked into Glebe police station about 11 o'clock one night and saw* [Officer O] *and* [another officer] *dividing (gestured money) up from a cigarette job.* [MSO11] *made sure that they divided it three ways instead of just two. (ADD INFO TO SOD, ENQUIRIES TO BE CONDUCTED). [SOD119 Chron 1327 created by Jewiss 7/09/1999]* [613]

The 'cigarette job' mentioned in this report appears to refer to police accepting money in return for taking no action in relation to the sale of illegal or contraband cigarettes.

611 Ombudsman Transcript, [a Mascot officer], 27 August 2013, p. 12.

612 NSWCC Transcript of LD warrant 306/1999, Tape No. T99/216, 1 September 1999, pp. 36-37.

613 NSWCC Information Report, *Contact with Sea on 1/9/99 – LD Re Sea &* [Mascot Subject Officer 11], [Officer E], reporting officer: Burn/[a junior Mascot officer], 3 September 1999, p. 2.

Operation Prospect investigators also found a handwritten summary of the 1 September 1999 conversation. Some writing appears to be Burn's and some is the handwriting of another person, presumably the junior Mascot officer.[614]

This particular allegation was numbered in the Mascot Schedule of Debrief as 'SOD 119'. It was the only time that Officer O was named in any Mascot documents as the subject of an allegation.

17.5.4.2 Mascot's investigation of the allegation about Officer O

This allegation was first mentioned in a Mascot LD affidavit on 17 September 1999. The affidavit included the following paragraph about the 1 September 1999 conversation between MSO11 and Sea:

> *In the course of the conversation referred to in the preceding paragraph,* [MSO11] *spoke* [sic] *an occasion in 1988 when he walked into Glebe Police Station about 11.00pm one night and saw* [Officer O] *("*[Officer O's surname]*") and* [another officer] *dividing up money from what he (*[MSO11]*) called 'a cigarette job'.* [MSO11] *said he insisted they (*[Officer O] *and* [another officer]*) divide up the money ...*[615]

Though mentioned in the affidavit, Officer O was not named as a person to be listened to or recorded in either the affidavit or the associated warrants. This or substantially similar paragraphs were repeated in five further affidavits between October and December 1999.[616] Again, Officer O was not named as a person to be listened to or recorded in the five affidavits or the associated warrants.

Mascot first named Officer O in a LD affidavit and associated warrants as a person to be listened to or recorded on 11 January 2000. This affidavit included a paragraph almost identical to that in the previous affidavits. Officer O was then named as a person who may be recorded in 19 LD affidavits and 57 associated warrants between 11 January and 21 December 2000.[617] The final five of those affidavits did not include Officer O's name or any information about him in the body paragraphs.[618]

Officer O was only ever recorded once by Mascot – on 6 June 2001 – which was six months after his name was removed from any LD warrants. On that occasion Sea recorded a conversation that he had with Officer O, directly before he recorded a conversation with MSO11.[619] The exchange between Sea and Officer O was described as 'general conversation'[620] when summarised in an Information Report on 7 June 2001. The recording was not transcribed. It is likely it was an unintentional recording given its proximity to the recording of the conversation with MSO11 – who was named on the relevant warrant.

On 19 November 2001, soon after Mascot's overt phase started, an email from Burn to Jewiss – which was ultimately directed to Deputy Commissioner of Field Operations, Ken Moroney – stated: "Of the names mentioned on Friday the following people are of interest to Mascot in some way".[621] Officer O's name was included in the list of officers that followed, with the following notations:

> *He is mentioned in only one matter and this came as a result of a conversation Sea had with* [MSO11] *(see below). Sea has not made any allegations about him, nor does he have any information about* [Officer O]*. The allegation has not been corroborated by Mascot.*

The email then stated:

> [Officer O] *excerpt SOD 119 - LD 01/09/1999 -* [MSO11] *outlined to Sea an incident where he walked into Glebe police station about eleven o'clock one night and saw* [Officer O] *and* [another officer] *dividing*

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614 NSWCC Information Report, *Contact with Sea on 1/9/99 – LD Re Sea &* [Mascot Subject Officer 11], [Officer E], reporting officer: Burn/[a junior Mascot officer], 3 September 1999 – attached handwritten notes of meeting headed '1.9.99 [Mascot Subject Officer 11]/Sea 10.50am'.

615 LD affidavit 324-330/1999, p. 18.

616 LD affidavits 346-352/1999, 371-380/1999, 398-407/1999, 427-436/1999, and 447-456/1999.

617 LD affidavits 007-014/2000, 015-021/2000, 036-038/2000, 043-049/2000, 070-076/2000, 091-097/2000, 108-114/2000, 126-132/2000, 147-153/2000, 174-180/2000, 196-202/2000, 215-221/2000, 241-247/2000, 262-268/2000, 284-290/2000, 313-319/2000, 338-344/2000, 362-368/2000, and 391-397/2000.

618 LD affidavits 284-290/2000, 313-319/2000, 338-344/2000, 362-368/2000, and 391-397/2000.

619 NSWCC Information Report, *Informant Contact with Sea 6-6-01. CD/159 Obtained*, reporting officer: [a Mascot officer], 7 June 2001.

620 NSWCC Information Report, *Informant Contact with Sea 6-6-01. CD/159 Obtained*, reporting officer: [a Mascot officer], 7 June 2001, p. 2.

621 Email from Detective Inspector Catherine Burn, Mascot Reference, NSWCC to Sergeant Greg Jewiss, Mascot Reference, NSWCC [and other officers], 19 November 2001, p. 1.

(gestured money) up from a cigarette job. [MSO11] *claims that he made sure that they divided it three ways instead of just two.*[622]

A letter dated 7 January 2002 from Deputy Commissioner Moroney to the Commander of SCIA headed 'Nomination of Officers for Promotion – Unresolved Issues of Integrity', stated that:

> *... each of the officers whose names are listed herein has been recommended for promotion to Commissioned rank ... For reasons outlined, the Commissioner has declined to approve these nominations at this time. His actions are predicated on the basis that issues relevant to the integrity of each of the nominees are unresolved at this time.*[623]

The Deputy Commissioner then sought advice on the progress of the Mascot-Florida investigations. The letter then repeated the information outlined in Burn's email.[624]

On 15 January 2002, Jewiss informed a Mascot meeting – attended by ten other Mascot officers – that seven serving police officers, one of whom was Officer O, had their promotions declined due to mentions relevant to Mascot/Florida investigations. Mascot investigators and NSWCC analysts were then tasked to prepare "risk assessments and SOD checklists relative to the above list of names and future scheduled hearings at the PIC".[625]

On 21 January 2002, a Mascot Intelligence Analyst prepared an overview of the allegation about Officer O. The overview suggests that at this stage Mascot was still delaying interviews of the officers involved pending further investigation.[626] The overview stated in part:

> *Mascot investigations have been unable to corroborate the initial information provided by* [MSO11] *to Sea. The current whereabouts of the officers involved in SOD119 have been established MAIN3406. The information was scant in detail. The possible date range for this offence to have occurred has also hampered investigators and an event subject of the allegation has not been able to be identified.*
>
> ***Future actions and strategies***
>
> *Duty books for* [Officer O]*,* [another officer] *and* [MSO11] *for the period specified by* [MSO11] *will need to be checked. Reviewed product, which has been identified as possibly relevant needs to be transcribed and verified. The listening device product that originally unearthed SOD119, which has been transcribed, requires verification. Approaches to all three Police are not deemed appropriate at this time pending future Mascot /NSWCC /PIC strategies. The SOD possibly dates back some 15 years and the incident has not been identified through NSW Police holdings. Of the three involved officers, only* [MSO11] *is of significant interest to Mascot investigations at this time.*[627]

A Mascot officer signed the following recommendations at the end of the overview:

> *At this point in time, there is no evidence to support a brief of evidence in respect of criminal or departmental action. There is no independent corroboration of the allegation and the incident can not be identified. The matter can not be progressed at this time and no action can be contemplated against* [Officer O] *and* [another officer]*. Further information may be gathered pending future strategies involving* [MSO11].[628]

Officer O and the other officer were interviewed by SCU officers in October 2002 about the allegation. Both denied the incident had happened. MSO11 was interviewed in December 2002 and stated that the allegation was not true.[629]

622 Email from Detective Inspector Catherine Burn, Mascot Reference, NSWCC to Sergeant Greg Jewiss, Mascot Reference, NSWCC [and other officers], 19 November 2001, p. 1.

623 Letter from Deputy Commissioner Field Operations Ken Moroney to Commander of SCIA, 7 January 2002, p. 1.

624 Letter from Deputy Commissioner Field Operations Ken Moroney to Commander of SCIA, 7 January 2002, p. 1.

625 NSWCC, *Minutes of meeting held in the ground floor hearing room on the 15th January, 2002 at 11am*, 15 January 2002.

626 NSWCC internal memorandum from [a NSWCC analyst], 21 January 2002.

627 NSWCC internal memorandum from [a NSWCC analyst], 21 January 2002, p. 3.

628 NSWCC internal memorandum from [a NSWCC analyst], 21 January 2002, p. 4.

629 NSWPF, Complaint number [numbers] SOD089, 105, 106, 107, 108, 109, 110, 111, 112, 118, 119, 120, 79A Finalisation Report by [SCU investigator], SCU, undated, p. 14.

In an undated report (drafted after December 2002) a Detective Senior Constable from the SCU prepared an Investigator's report that finalised the various Mascot matters, including the allegation related to Officer O. He concluded the following:

> ***Findings:***
>
> *There is no evidence to support any claim that may have been made by* [MSO11] *to* [Sea] *on 1 September 1999 to the effect that at some time in the past when at Glebe police station* [MSO11] *shared in the proceeds of a cigarette robbery together with police officers* [officer's name] *and* [Officer O].
>
> ***Recommendation:***
>
> [MSO11]*: no adverse finding matter not sustained.*
>
> [officer's name]*: no adverse finding matter not sustained.*
>
> [Officer O]*: no adverse finding matter not sustained.* [630]

On 15 January 2003, Officer O was included in the 'Op Mascot Adverse Mention List', which listed officers mentioned in the Mascot Schedule of Debrief who were still serving officers at that time. The list bore a footnote stating 'Mentions may be direct or hearsay'.[631] As that shows, by this late stage NSWPF officers were still being named in the adverse mention list solely because of hearsay statements about historical allegations. Mascot had been overt for 13 months, during which time matters of this nature could have been investigated and finalised.

On 14 April 2003, the Mascot Complaints Management Team (CMT) reviewed the SCU investigator's report and supported his recommendations. The CMT recommended no further action be taken due to a lack of sufficient corroborative evidence, and that Officer O should receive a letter stating there would be no adverse finding made against him.[632] There was no mention of Officer O's promotion. The matter was marked as 'matter acquitted'.[633]

In October 2003, Acting Assistant Commissioner J T Carroll, Professional Standards Command, wrote to officers who had been the subject of allegations arising through Mascot, and who had no adverse finding made against them. The letter to Officer O was dated 20 October 2003[634] and provided the following general advice about Mascot's investigation (emphasis in original):

> *Many of the allegations arising during the Mascot/Florida reference stemmed from protected witnesses and involved both direct and indirect allegations of misconduct and corruption. The Mascot/Florida investigations spanned a significant period of time and covered many complex operational and administrative areas. Investigations were regularly prioritised and dealt with in order of seriousness of the allegations presented.*
>
> *Many officers were named as being involved in instances of misconduct and/or corruption. Allegations against some of these officers were substantiated and the outcomes of these findings have varied from successful criminal prosecutions and custodial sentences to departmental counselling.*
>
> ***Other officers named - whether due to circumstantial relationships to events, locations or officers of primary interest - were investigated and found in some instances to have no case to answer in relation to the particular alleged corrupt activity or misconduct.***[635]

The letter explained that Officer O was a named officer in one allegation which was "an allegation of theft from the seized proceeds of a cigarette robbery during your time at Newtown Detectives".[636] The letter said that the

630 NSWPF, Complaint number [numbers] SOD089, 105, 106, 107, 108, 109, 110, 111, 112, 118, 119, 120, 79A Finalisation Report by [SCU investigator], SCU, undated, p. 14

631 NSWCC, *Op Mascot Adverse Mention List*, 15 January 2003.

632 NSWCC, *Minutes of the Mascot Complaint Management Team Meeting*, 14 April 2003, p. 2.

633 NSWCC, *Minutes of the Mascot Complaint Management Team Meeting*, 14 April 2003, p. 2.

634 Letter from Acting Assistant Commissioner John Carroll, NSWPF to [Officer O], NSWPF, 20 October 2003. A handwritten note on a copy of this letter indicates that Officer O was given this letter by hand on 18 November 2003.

635 Letter from Acting Assistant Commissioner John Carroll, NSWPF to [Officer O], NSWPF, 20 October 2003, p. 1.

636 Letter from Acting Assistant Commissioner John Carroll, NSWPF to [Officer O], NSWPF, 20 October 2003, p. 1.

matter had been assessed by the SCU as requiring no further action and there were no adverse findings made against Officer O. It added:

> *All probity checks for promotions pass through Special Crime & Internal Affairs and information within c@ts.i related to matters where a 'No adverse finding' is recorded will not be considered relevant to, nor will it delay, any future promotion clearances.*[637]

17.5.4.3 Evidence of Mascot officers about delays

The evidence given to Operation Prospect shows that Mascot placed a high priority on avoiding the risk of exposing Sea's role as an informant. For this reason, a number of investigative strategies were not pursued during the covert phase of the Mascot investigations.

Operation Prospect asked Burn about strategies Mascot adopted to gather additional evidence to establish the credibility of allegations against Officer O. It was put to Burn that in this matter Mascot may have been able to find information that would have cleared Officer O without risk of exposing the fact that Sea was an informant. Burn replied:

> *... in that very covert phase we were very sensitive to make sure that we tried to do everything so Sea wouldn't be compromised because his life could be at risk. So there were decisions made not to necessarily do overt investigations or interviews of people because if* [Officer O] *had been interviewed I can guarantee his suspicion would have been raised.*[638]

Burn's evidence was that it was an acceptable strategy in the covert stage not to seek any exculpatory material and to name officers as having corrupt allegations against them in affidavits, warrants and other documentation. She stated: "[In] Phase 1[639] yes, because I think the focus was on maintaining Sea's safety".[640] When it was put to her that Sea's safety was given paramount consideration over the reputations and careers of other officers, Burn responded:

> *... that's why it was so secretive, that's why – realistically their names were protected, and part of the strategy was also to determine whether there was enough to prosecute, whether there was enough to expose, or whether there was enough to say there's no further action. So that was ongoing as well.*[641]

Burn was asked if it seemed unfair that officers who were eventually cleared by Volta had their promotions blocked in the meantime. She replied:

> *Yes, that's correct. It's not a good - I don't know. It's just not a good situation and I don't know at what particular point then it could have been done really, rather than taking Sea out of play earlier.*[642]

A senior Mascot investigator said that to interview Officer O in the covert stage would have been undesirable, as "[t]hat might have sent warning signs to people if there was an overt investigation whilst we had our covert phase of the investigation going".[643]

Bradley's evidence suggested that he was not fully informed of details of the Mascot strategies (or may not have recalled the details):

> *My recollection is that I was not aware of a document called SODs one to whatever until quite late in the piece, and my recollection is I was quite surprised that there were so many things in there, but I would have expected that something like this would be done. In other words, all the allegations would be set out, and the people alleged to have been involved nominated, and then some prioritisation given to them.*[644]

637 Letter from Acting Assistant Commissioner John Carroll, NSWPF to [Officer O], NSWPF, 20 October 2003, p. 2.
638 Ombudsman Transcript, Catherine Burn, 19 November 2014, p. 2944.
639 The covert investigation phase.
640 Ombudsman Transcript, Catherine Burn, 19 November 2014, pp. 2944-2945.
641 Ombudsman Transcript, Catherine Burn, 19 November 2014, p. 2945.
642 Ombudsman Transcript, Catherine Burn, 19 November 2014, p. 2945.
643 Ombudsman Transcript, [a senior Mascot investigator], 23 July 2014, p. 702.
644 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2976.

Bradley also referred on several occasions in his evidence to the NSWPF as being an organisation that leaked information. This aligns with Burn's claim that Sea may well have been exposed to risk if named officers were interviewed during Mascot's covert phase.

17.5.5 Analysis

Mascot was a unique investigation. The reliance Mascot placed on intelligence gained through covert recordings by Sea was understandable. Sea had ongoing success in recording multiple officers who appeared to remain unaware of his role as a Mascot informant. The information that he was able to deliver to Mascot provided a valuable and reliable foundation for investigating serious police corruption. It was understandable that keeping Sea covert and safe was an overriding consideration for Mascot. The potential success of the Mascot investigations would also be threatened by revealing their covert status. The decision to move from a covert to an overt phase of investigation was accordingly one that carried risks and required appropriate timing.

The Schedule of Debrief was a natural corollary of the Mascot methodology for recording allegations that came to its notice. As a method of recording and assembling allegations, there was nothing inherently problematic in that approach. As Bradley commented in evidence, "I would have expected that something like this would be done".[645]

The problem was more to do with the reliance placed on matters listed in the Schedule of Debrief. Mascot did not appear to have a plan or structure to assess the reliability of allegations recorded and they were left in active mode on the Schedule of Debrief. The dominant approach to the investigation appeared to emphasise expansion of the list of matters that could be investigated, rather than evaluating the information that was available to close off some more minor historical allegations. This should have been done for allegations that were unreliable, lacked corroboration or were unlikely to be proven.

An allied problem was that Mascot seemed to accept uncritically what Sea or other officers said had occurred. Often their comments were made in social settings after the consumption of large amounts of alcohol. There was considerable gossip among NSWPF officers. Credence was given to unreliable accounts from Sea's cohorts that ought to have been assessed and closed by Mascot during its covert phase. Mascot's handling of the allegations against Mr N and Officer C1 – see Chapter 7 – illustrate this uncritical acceptance of statements in a way that was unfair to the subject officers.

The Schedule of Debrief was far more than a method of recording and assembling allegations. Considerable reliance was placed on the Schedule of Debrief, for example, in selecting people to be named in LD warrants and in influencing promotion decisions within the police force. This is well illustrated by the investigative and personnel decisions taken in relation to Officer O. He was named in SOD119 after being mentioned in a recorded conversation between Sea and MSO11 in a gossip-style allegation about an event more than a decade earlier. Based on the allegation Officer O was subsequently named in 26 LD affidavits and 57 associated warrants. The SOD mention appears to have been a factor counting against him in promotion opportunities during 2002 and 2003.

Ultimately, a decision was made in late 2003 that Officer O had no case to answer and no adverse finding was sustained. The allegation was removed on the basis of interviews with Officer O and MSO11. While those interviews could only occur during Mascot's overt phase, the injury to Officer O's standing and promotional opportunities occurred because of the reliance placed on information that was uncritically accepted and never tested. Mascot should have adjusted the reliance placed on matters listed in the Schedule of Debrief to take account of the fact that other investigation methods could not be used during the covert phase to test the strength or reliability of allegations.

It is surprising that Bradley was not more aware of the way that Mascot investigation strategies were being conducted. He expected that allegations recorded by Mascot would be prioritised for investigation, but did not recall how allegations that were listed would be resolved or finalised during the covert phase. In one instance discussed in Chapter 10, Bradley appreciated that unresolved complaints and allegations were relevant to promotional considerations. In that instance, he provided background information to the National Crime

645 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2976.

Authority (NCA) about unresolved Mascot allegations involving Officer F in July 2001, when Officer F was being considered for a secondment to the NCA.[646] It would be reasonable to extrapolate from that instance that unresolved allegations listed on the Schedule of Debrief may have a similar bearing on the promotional opportunities of officers in the NSWPF. As NSWCC Commissioner, it was within Bradley's responsibilities to ensure that allegations being given broader relevance were investigated within a reasonable time frame.

The final observation to make about the covert phase and the Schedule of Debrief is that the steps taken at the time also need to be seen in context. The scope and scale of the Mascot investigations grew substantially with the unexpected volume of covertly obtained LD product that came into Mascot almost daily between early 1999 and mid-2001. Many former Mascot officers commented in their evidence to Operation Prospect about being challenged if not overwhelmed by the scale and volume of the information they had to deal with. The point was well explained by Burn in her submission to Operation Prospect:

> *When I commenced at SPU (which was later renamed as the Special Crime Unit (SCU)), my role was not to put proper systems and procedures in place. My role was initially to debrief a police informer and to then put strategies in place to corroborate the informer's intelligence. It was my initial belief that we were embarking on a relatively short-term operation but as time passed something remarkable occurred. The operation did not leak, the informer remained covert and the Reference expanded to such an extent that it is now apparent that the systems and procedures that were in place were inadequate to deal with the proliferation of investigations, targets and listening device warrants.*[647]

17.6 Griffin's work with the NSWCC and as Commissioner of the PIC

Terrence (Terry) Griffin was the Commissioner of the PIC from 15 October 2001 to 15 October 2006. His term began when the PIC was starting public hearings in Operation Florida, which used evidence that the NSWCC had provided from the Mascot investigations. Sea was a key witness at the Operation Florida hearings. The Mascot investigations entered their overt phase through exposure in these hearings.

Before becoming PIC Commissioner, Griffin worked as an independent solicitor and did occasional work for the NSWCC. In that capacity, Griffin took Sea's induced statement in December 1998 about alleged corruption spanning his career in the NSWPF. This section examines the nature of Griffin's work with Sea and whether he should have disclosed this previous professional relationship with Sea when he became PIC Commissioner.

17.6.1 Griffin's career history

In evidence to Operation Prospect, Griffin outlined his career history before becoming PIC Commissioner. He was unable to recall specific dates, but advised that he worked in the Attorney General and Crown Solicitor's office, before going to the Special Prosecutors Office as the Principal Legal Officer in charge of prosecutions. He then worked with the Commonwealth Office of the Director of Public Prosecutions (ODPP) as Deputy Director of Public Prosecutions in Sydney.[648] After leaving the ODPP, Griffin was employed by the NSWCC as General Counsel.[649] Griffin told Operation Prospect that he acted as the NSWCC Commissioner for a period, as well as performing the role of counsel assisting in examinations.[650]

By 1998, Griffin was working in private practice in his own firm 'Griffins'.[651]

646 Phillip Bradley, File note, *File Note:* [Officer F], NSWCC, 23-25 July 2001.
647 Submissions in reply, C. Burn, 25 September 2015, Appendix 2, p. 6
648 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 3.
649 Ombudsman Transcript, Terrence Griffin, 3 June 2016, pp. 4-5.
650 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 5.
651 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 4.

17.6.2 Griffin's involvement in taking Sea's induced statement

On 16 December 1998, Sea gave an induced statement to the NSWCC about his knowledge of alleged police corruption – see Chapter 3. Operation Prospect asked Griffin about his involvement in taking the induced statement, and the nature of his working relationship with the NSWCC before his appointment as PIC Commissioner. He was also asked how he was engaged to work for the NSWCC during this period.

Griffin recalled that he had provided assistance to Sea in preparing his statement,[652] though he stated that he would not have given Sea any legal advice about the induced statement.[653] He was unable to recall the nature of the retainer or contact his firm, Griffins, had with the NSWCC.[654] He explained that his law firm was not usually engaged in the typical work of a solicitor's office:

> *You will appreciate that the firm wasn't doing legal work as in representing, advising. Primarily, in fact almost exclusively, we provided advice to government departments, things like that, about fraud control, mismanagement and so on and, yes, normally there would be a piece of paper saying, "Here are our rates."*[655]

17.6.3 Griffin's work with NSWCC informants

17.6.3.1 Sea

Griffin's evidence in relation to his engagement by the NSWCC and his interactions with Sea was unclear. Griffin told Operation Prospect that he did not act for Sea and his evidence suggests that he was engaged by the NSWCC. However, the precise terms of that engagement by the NSWCC were difficult to ascertain:

> *Q:* *Are you able to tell us the first time you acted for* [Sea].
>
> *A:* *If you're talking about dates I have no idea, but I can tell you what I recall of what happened if that's any help.*
>
> *Q:* *Yes*
>
> *A:* *I think Mr Bradley, although it may have been somebody else from the Crime Commission contacted me and said that they had – sorry. Can I explain that I'm making this up, to the extent that I'm putting words around events. I don't know what anybody said to me, I just know what happened and I'm deducing from that that somebody would have said we have a person and we would like you to debrief him or words to that effect. That's what happened. Now, how it was put to me I have no idea but I know that happened because I can picture* [Sea] *sitting in the conference room in Manly and talking to me.*
>
> *Q:* *Would Mr Bradley have phoned you up and said I've got a client for you I want you to act for, or were you actually acting for the Crime Commission?*
>
> *A:* *I know that you're anxious to make a distinction there but I really don't know whether he would have done one or the other. He knew, I believe, that I could do the job he wanted done and he probably would have rung me personally is my guess, but I'm only guessing. In terms of giving evidence, I really don't recall how it happened but I can recall* [Sea] *being in the conference room at Manly and telling me a story which he may or may not have told anyone else, I don't know. It was early in the stages of his involvement as far as I know.*[656]

Later in his evidence Griffin said he was not acting for Sea, but was a solicitor engaged by the NSWCC:

> *Q:* *But just to clarify the actual solicitor-client relationship: was it with* [Sea] *or was it with the Crime Commission, who were you acting for?*

652 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 29.
653 Ombudsman Transcript, Terrence Griffin. 3 June 2016, p. 30.
654 Ombudsman Transcript, Terrence Griffin, 3 June 2016, pp. 17-19.
655 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 18.
656 Ombudsman Transcript, Terrence Griffin, 3 June 2016, pp. 6-7.

A: *Okay. My recollection was that when I spoke to* [Sea]*, to* [Sea] *I said words to the effect of I'm here on behalf of the Crime Commission. So in answer to that question I think that I was working for the Crime Commission as a solicitor, not for him, and I can remember stressing the fact that whilst I wasn't his solicitor, I would abide by normal rules of fairness et cetera in dealing with him as far as I was concerned. So in answer to that, I think my relationship would have been as a person working for the Crime Commission…*[657]

Griffin's evidence was that if Bradley asked him to debrief somebody he would do so. When asked to clarify what he meant by the term 'debrief', Griffin responded:

A: *Well, yeah, take the story that he was telling down and, you know, reduce it into some form that would provide a paper on what he had to say. So what I would have done and again I'm reinventing it in my head but I know I talked to him, I would have put down on paper a form of what he had to say and given it to the Crime Commission. So I believe now, 10 years later and with not great recollection, that I would have been acting on behalf of the Crime Commission and taking the equivalent of a witness statement, if you like.*

Q: *Right*

A: *As an investigator not as a lawyer probably, but I'm very vague on that.*

Q: *So did your role involve advising* [Sea] *as to his rights, his legal rights?*

A: *I would have done that, but I have no recollection of it being put to me as a role. But I would do that as a matter of course I would have thought, as in "you don't have to talk to me if you don't want to" stuff. Is that what you're interested in?*

Q: *I'm just interested in what your recollection is of your relationship with* [Sea] *and the Crime Commission.*

A: *My recollection is not worth anything really because as I've said, I'm reconstructing from a very fleeting – I couldn't remember his name. So I'm reconstructing what I think might have happened from what tiny recollection I have. I have a knowledge of him being – I can remember him sitting in that room and telling me a terrible story and me recording, getting it down in paper. I don't know whether he wrote it down or I wrote it down. And I remember visiting him in Manly Hospital once.*[658]

Griffin further described his work for the NSWCC as follows:

I think you say "as a solicitor", and I'm attempting to say that that's not really what we were doing at all. That wasn't even this work, debriefing [Sea]*, is not solicitor work. It's investigative work I think, and that's how we would have seen it, and yes certainly in relation to that there must have been some arrangement. I have no recollection what it was, but I'm sure it will be recorded somehow in the Crime Commission books.*[659]

Later, he again emphasised that he never really worked as a solicitor in his career:

Q: *Given your professional career as a solicitor, and – wouldn't it be logical that you were there to provide your professional advice to Sea as a solicitor not an investigator?*

A: *Well, no, I don't think so. In the circumstances, and I think I already said my professional career as a solicitor was effectively non-existent. I didn't have clients in the normal sense of the word. We advised people on things that were legally based. Most of my life I've been an investigator in various forms. The work I was doing in the Commonwealth government prosecution section, where I was on my feet doing things ceased, really, when I went to special prosecutor's office, and that's an investigative body. The DPP – I was really an administrator, a legal administrator.*[660]

657 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 7.
658 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 8.
659 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 19.
660 Ombudsman Transcript, Terrence Griffin, 3 June 2016, pp. 21-22.

In a file note dated 6 January 1999, Bradley recorded Sea's initial approach to the Commission and noted that Sea did not completely trust him (Bradley). They discussed who else Sea could talk to at that time and Bradley suggested Griffin as someone who would be "able to explain things" to Sea.[661] Bradley undertook to arrange that Sea and Griffin talk. Bradley further noted a discussion with Griffin in which Griffin advised that Sea had not kept his appointment. The file note later records that Griffin and Giorgiutti met with Sea in Griffin's office and that by 20 December 1998 Griffin had prepared a draft statement. Bradley's file note also notes that on 21 December 1998 Sea had been hospitalised and Griffin visited him at the hospital. [662]

Other documents produced to Operation Prospect also suggest that Griffin had a legal role. Several Mascot Weekly Operational Reports from 2001 refer to Griffin being contacted about 'legal issues'.[663] Confidential minutes of a 20 August 2001 OCC meeting (a meeting regularly attended by senior members of the NSWCC including Bradley and Giorgiutti, PIC officers and members of Mascot) also refer to Griffin as 'Sea's solicitor'.[664]

Bradley was asked by Operation Prospect about Griffin and whether he used Griffin as a solicitor:

Q: Did you on occasion use a Mr Griffin, solicitor?

A: Yes, Terrence Peter Griffin.

Q: Yes, Terrence Griffin. Yes. Would he help out occasionally with issues at the Crime Commission as an independent legal adviser, or what was his?

A: No, he was a colleague of mine at the Commonwealth DPP, and before that in fact. He set up a private practice with another colleague of mine, two other colleagues of mine, and we used that practice to do a few things, including establish a corporation which was for the purpose of doing covert business, which wasn't associated with the Crime Commission, and Griffin acted as Commissioner once or twice when I was away, and the other fellow, whose name just escapes me for the moment, did some financial analysis work for us, but I can't recall ever having used Griffin, instructing Griffin as a solicitor for the Commission.

Q: Alright.

A: It's possible, but I don't think so.[665]

17.6.3.2 Paddle

Evidence before Operation Prospect indicates that Griffin was used by the NSWCC to provide legal assistance to other informants, one of whom was Paddle. Paddle was an informant who was arrested on 4 September 1999 for a breach of bail conditions – see Chapter 14. A NSWCC Information Report of that date indicates that Paddle's handler – Detective Senior Constable Darren Boyd-Skinner – made arrangements for Griffin to telephone the Maroubra Police Station to establish the position of Paddle in regards to the alleged breach of bail.[666]

During his evidence to Operation Prospect, Griffin was asked whether he recalled acting for Paddle. Griffin had no recollection of acting for any informant to the NSWCC. Operation Prospect showed Griffin a fax coversheet and attached file note – dated 6 September 1999[667] and written by 'T.G.' – sent from his firm to the NSWCC about the breach of bail. This did not prompt any recollection by Griffin, though he agreed that the facsimile coversheet contained details of his firm, Griffins. He did not accept that it was necessarily a note of anything he had done:[668]

661 Philip Bradley, File note, *Informant Sea,* NSWCC, 6 January 1999, p. 2.
662 Philip Bradley, File note, *Informant Sea,* NSWCC, 6 January 1999, p. 2.
663 NSWCC/SCU, *Weekly operational report for week ending 18 August 2001*, dated 20 August 2001, p. 1; NSWCC/SCU, *Weekly operational report for week ending 25 August 2001,* dated 27 August 2001, p. 1; NSWCC/SCU, *Weekly operational report for week ending 1 September 2001*, dated 3 September 2001, p. 1.
664 NSWCC, *Confidential Minutes of the OCC meeting*, 20 August 2001.
665 Ombudsman Transcript, Philip Bradley, 14 July 2014, p. 517.
666 NSWCC Information Report, *Contact by Dets BOYD-SKINNER and* [a Mascot officer] *with PADDLE and OAR regarding arrest of PADDLE 11.30am Saturday 4/9/1999*, reporting officer: [a Mascot officer], 7 September 1999, p. 1.
667 Facsimile from Mr Terrence Griffin to Commissioner Phillip Bradley, NSWCC, 6 September 1999 – attachment: File note, *File Note*, Griffins, 6 September, 1999.
668 Ombudsman Transcript, Terrence Griffin, 3 June 2016, pp. 9-13.

Q: *The file note suggests that you had a discussion with Boyd-Skinner in relation to this subject who had just done an ERISP, and you had given that person some advice?*

A: *Yes, and I agree that the file note suggests that.*

Q: *Yes. Okay. And would you agree that the document suggests that you had spoken to this subject, who I tell you is Paddle, on behalf of the Crime Commission because you're reporting back to Bradley.*

A: *I agree that it suggests that, yes. I don't accept that this is a note of anything I've done. Whilst my memory is terrible for putting things into sequence and so on, usually I find that if there's a trigger I can pick up on it.*[669]

Bradley was also asked about the same facsimile and – like Griffin – had no independent recollection of the event or the document. Bradley said it sounded like an instance of Griffin being treated as a trusted solicitor. He accepted that it was an event that could have happened. He might have rung Griffin and said there's an informant who needs a solicitor and told Griffin what the background with Paddle was.[670]

Bradley's interpretation – and he phrased his answer as a reconstruction based on what was shown to him – was as follows:

> *Paddle had a solicitor who was inclined to disclose the relationship; Paddle needed someone who was more attuned to the sensitivity of it; Boyd-Skinner was told, perhaps by me, that Griffin was a person who could be trusted to keep a secret and could go along as Paddle's solicitor and talk to other police without disclosing whatever it was that he didn't want to have disclosed.*[671]

17.6.3.3 Bowand

Evidence before Operation Prospect suggested a proposed involvement of Griffin with another informant to the NSWCC – code named 'Bowand'. NSWCC documents indicate Bowand was advised to contact Terry Griffin in his capacity as a solicitor.

An Informant Contact Report dated 16 January 2001 records the following contact with Bowand:

> *About 3:20pm Bowand contacted me by phone regarding the details of the solicitor. I informed him that the solicitor's name was Griffin and that I would return his call with the details.*
>
> *About 3:30pm I contacted Bowand on…..and provided the details for solicitor, Terry Griffins* [contact details]*. I advised Bowand that unfortunately Mr Griffins* [sic] *would be unable to represent him tomorrow as he (Griffins) will be in hospital. I instructed Bowand to advise the Duty Solicitor of his predicament and seek an adjournment. Bowand stated he would do this. I then advised Bowand to contact Mr Griffins* [sic] *in the near future regarding this matter.*[672]

The Informant Contact Report also records that Bowand was avoiding contact with another solicitor he had previously spoken to, and that that solicitor should not attend court the following day to appear on behalf of Bowand as he was not instructed to do so.

Griffin did not recollect anyone by that name and suggested the document was possibly inaccurate:

Q: *Ok, would you agree that the document suggests that someone at the Crime Commission made a suggestion that this person, Bowand, contact you about representation?*

A: *I think that's a long bow. I think that somebody somewhere has written that down. To suggest that it means what you say is accepting whether it's true on its face, that's a big call, I think.*

Q: *So is your answer you don't accept that the document implies that this person, Bowand, contact a Terry Griffin, solicitor in Manly?*

A: *It certainly doesn't suggest that Bowand contacted me, I think, to be fair …*[673]

669 Ombudsman Transcript, Terrence Griffin 3 June 2016, p. 13.
670 Ombudsman Transcript, Phillip Bradley, 14 July 2014, p. 518.
671 Ombudsman Transcript, Phillip Bradley, 14 July 2014, p. 519.
672 NSWCC, *Informant Contact Advice Report*, Contact by [a Mascot investigator] with informant Bowand, 16 January 2001.
673 Ombudsman Transcript, Terrence Griffin, 3 June 2016, pp. 27–28.

Griffin went on to reiterate that he accepted the document implied that Bowand was advised to contact him, but Griffin doubted the provenance of the document. Operation Prospect does not have any evidence to confirm whether or not Bowand contacted Griffin as suggested.

17.6.4 Conclusions about the role performed by Griffin at the NSWCC

Although Griffin may have performed non-solicitor roles for the NSWCC as he suggested, documents from the NSWCC and the evidence of Bradley suggest that Griffin was engaged by the NSWCC to provide legal advice to informants, including Sea. The suggestion by Griffin that he was engaged as an investigator and not as a solicitor is not supported by the evidence available to Operation Prospect.

17.6.5 Association between Griffin and Bradley

Operation Prospect also examined the relationship between Griffin and Bradley. Griffin gave evidence that he had known Bradley since the 1970s when they worked together in the NSW Attorney General's Department and Deputy Crown Solicitor's office. Griffin told Operation Prospect they shared a friendship for more than 40 years.[674]

A former senior PIC officer gave evidence to Operation Prospect that Bradley had supported Griffin's appointment as PIC Commissioner.[675] Griffin confirmed that support in his evidence about his appointment as PIC Commissioner:

> *I imagine that it came about because Mr Bradley suggested that I was somebody who could do the job. That would be my guess. I was approached. I'm not sure whether – sorry, I'm seeking a name. I think Les Tree …*[676]

Griffin then said:

> *A:* *Somebody rang me up and asked me if I was interested, and assume I said yes because I ended up in the job. I don't know what happened next, but I went – I did meet Mr Tree. I went in and spoke to him. I think I subsequently to talking to him formally applied for the position – a position. I don't think it was advertised although I don't know. I have some sense that Mr Tree said that they had had applicants and they weren't happy, or something like that, so there may have been an advertised position. In any event I didn't respond to it, and it should be clear I didn't respond to a newspaper advertisement or any other sort. I responded to some approach, and I assume it emanated from Mr Bradley because I just assumed it did. There may have been other people in the business that might have been involved.*
>
> *Q:* *Why did you assume it was Mr Bradley?*
>
> *A:* *Because he was a person who knew me and I believe trusted me. He, I think, thought that I managed the Deputy Crown, the DPP office well, and I think he thought I was an honest person. I think that's probably why it was him. There are other people that might have done that too.*[677]

Bradley told Operation Prospect, and Griffin agreed, that he acted as NSWCC Commissioner from time to time before his appointment to the PIC.

674 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 5.
675 Ombudsman Transcript, [former senior PIC officer], [day] August 2014, pp. 1575-1576.
676 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 43.
677 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 44.

17.6.6 Griffin's failure to disclose his relationship with Sea

17.6.6.1 Griffin's continuing contact with Sea

Griffin's recollection is that he did not disclose his previous involvement with Sea once he became the PIC Commissioner.[678] He also acknowledged that he spoke to and met with Sea when he was Commissioner and Sea was giving evidence in the Florida hearings. Griffin denied any conflict of interests in maintaining contact with Sea:

Q: *I know you told us earlier you didn't preside over any of the Florida hearings. Did you still maintain contact with Sea post your appointment as Commissioner?*

A: *Yes, I spoke with him, I think, on occasions in relation to his welfare I believe.*

Q: *Why did you do that?*

A: *Because he had questions about his welfare. I can't- I won't say why not. He would contact me when he had an issue and I would try and help him deal with it. It happened rarely, maybe not at all, but I think it happened while I was Commissioner.*[679]

…

Q: *You see no conflict?*

A: *No, I don't see a conflict. As I said, I didn't speak with Sea, as far as I can recall, about operational matters even after the initial flurry. He would ring on rare occasions when he was desperately trying to get some issues where nobody was listening to him, that's the impression I had. I'm not even sure that he did, but I think he did. And his objections were things like mentioned earlier, the witness protection people wouldn't help him, or something of that nature. And I don't see any difficulty. I don't see any conflict, no.*

Q: *Did you disclose your prior relationship once you became Commissioner of the PIC?*

A: *To who?*

Q: *To the Inspector of the PIC, to Parliamentary Committee? Did you disclose it in the Florida report?*

A: *No, I don't think so, but it was, I would have thought, quite well known. The statement, the fact that you provided – I don't think that wasn't generally known but I don't recall disclosing it either.*

Q: *Do you think that that's something that is essential, to disclose your prior relationship with a witness that you're ultimately going to make assessments of credit on?*

A: *I could see how that could be put. I wasn't, of course, listening to him assessing his evidence except in the final sense, or having anything to do with him except for his welfare. But I could – perhaps with the benefit of hindsight, and it's the first time I've been asked, I can see that that might have been something better formally disclosed, although it wouldn't have changed anything.*[680]

In his evidence, Griffin told Operation Prospect that he believed Sea at the time of debrief, and still did. This indicates that Griffin made an assessment of Sea's credibility based on his relationship and dealings with him. Griffin described Sea as follows:

A: *… Have you met this gentleman? I don't know if you're allowed to say or not in any case, he had thought the whole thing through. He was a very – I think he was probably a really good police person and he'd gone off the rails in his view and I believe that he'd agonised over it and it had really broken him or almost broken him, what had happened. And what he was doing was trying to, I don't know, for his own reasons or other reasons, just stop.*

678 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 82.
679 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 81.
680 Ombudsman Transcript, Terrence Griffin, 3 June 2016, pp. 81-82.

Q: *Why do you say he's a good police person?*

A: *I believe he was –sorry. In terms of him being an investigator and having a hand on a whole lot of important cases and so on, he had – was an experienced police officer might be better. He knew which way up was, he'd done a lot of things I think, some of which we know about, some we may not, that were not right and the sense that he gave me on that first occasion, his subsequent apparent breakdown and the fact that he as far as I know, although I don't know, hasn't recanted any of this, I think he had just had had enough. And he knew what he was doing when he came in, I believe, and I don't know what conversations he'd had with Bradley beforehand but he knew the essence of what he was doing and I think he just wanted to confess, if you like, if that makes it – that sort of thing: he wanted to talk to someone.*

Q: *Ok.*

A: *And for what it's worth, and it's worth nothing, I believed him at the time and still, primarily.*[681]

17.6.6.2 Griffin's role in Operation Florida

Griffin became PIC Commissioner on 15 October 2001. The Operation Florida public hearings commenced around the same time in October 2001. Deputy Commissioner Sage presided over the hearings.

Griffin told Operation Prospect that he did not do anything in Operation Florida.[682] However, he agreed that he presented the report that was tabled in Parliament in 2004.[683] Although he did not recall, he agreed that it was possible that he would have been consulted on the findings.[684] Griffin also attended "major directional type discussions".[685] He accepted that he was the ultimate decision maker as the PIC Commissioner.[686]

Griffin was questioned about whether it was potentially unfair that the affected parties involved in Operation Florida did not know about Griffin's previous relationship with Sea before his appointment as PIC Commissioner. Griffin's view was that disclosing that relationship would not have changed anything. When it was suggested to him in the Operation Prospect hearings by Counsel Assisting that he was privy to certain information about Sea – the main witness in Operation Florida – that may not have been known to other people, Griffin responded:

And the fact that I visited him in the hospital was on the record for welfare purposes. It's alluded to in Bradley's statement. And the only issues – the only things I did have to do with him were in relation to welfare, he was neither a friend or a confidant. All my dealings with him were public to the extent that they were – if you like, the statement was the only thing of substance. Mr Sage was well aware that I had been involved in that process. He was the person doing the hearing. And in terms of hindsight and malice, you could probably make something of it. But in reality I couldn't affect anything that came out of Florida. I don't think I sat on a single – if I did, it would have been the mopping up and the welfare things.[687]

It appears that staff at the PIC were aware that Griffin had acted as an advisor to Sea prior to his appointment as PIC Commissioner. It is not clear if they were aware of contact between Griffin and Sea following his appointment. Sage gave evidence to Operation Prospect about this matter:

A: *I became aware that the counsel that had been engaged to advise Sea was Terry Griffin, prior to his appointment to the PIC. How long he was involved in advising Sea I'm not sure, but for a period of time I became aware Terry Griffin was his lawyer.*

Q: *His lawyer for what, what purposes, as you understood it?*

A: *I don't know whether it was for the purposes of the indemnity or for all matters requiring independent legal advice.*

681 Ombudsman Transcript, Terrence Griffin, 3 June 2016, pp. 32-33.
682 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 51.
683 PIC, *Report to Parliament – Operation Florida*, Volumes 1 and 2, June 2004.
684 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 52.
685 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 52.
686 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 53.
687 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 83.

Q: *Alright so in terms of Mr Griffin's appointment to PIC and the requirement for* [Sea] *to have separate legal advice for the purposes of the indemnity application, how could that, how does that work, or it doesn't or it creates problems?*

A: *Well I can recall that there was a suggestion that after Terry was appointed to the PIC he continued to advise Sea, which I was just amazed that that could even be put forward.*

Q: *Was it done or just put forward as a possible approach?*

A: *Well, it was put forward as a possible approach because of the fact that the Crime Commission/ internal affairs did not want to go outside and expose Sea to anyone else, and Terry was trusted; but that was just a nonsense, it really was and as far as I know Terry didn't advise him after his appointment.*

Q: *Did not?*

A: *That's to my knowledge. Whether he did or not. I don't know.*[688]

17.6.7 Analysis and submissions

The evidence before Operation Prospect confirms that Griffin was engaged by the NSWCC to assist Sea to prepare his induced statement. The evidence also indicates that Griffin was engaged to provide legal assistance to at least one other informant, Paddle. The terms of the engagement are not altogether clear, but it is reasonable to infer that Griffin was engaged in his capacity as a solicitor and not, for example, as an investigator. Bradley's evidence to Prospect was that Griffin was engaged as a solicitor, and this would seem inherently likely given Griffin's professional history and standing as a solicitor and his familiarity with obtaining witness evidence.

In his submission[689], Griffin accepted that he acted as a solicitor engaged by the NSWCC to obtain an induced statement but disputed that he was Sea's solicitor.

The relationship that Griffin established with Sea from at least late 1998 involved a degree of mutual trust and confidence. Griffin himself confirmed that this extended to concern for Sea's welfare while in hospital and in being consulted on matters such as witness protection arrangements.

Griffin's personal contact with Sea continued after he was appointed PIC Commissioner. Griffin believed this was not a secret, though he did not formally disclose it to anyone. There is no suggestion that the NSWCC was aware of any continuing contact between them.

Early in Griffin's term as PIC Commissioner, the Operation Florida inquiry commenced into alleged police corruption in which Sea was a key witness. Griffin should have formally placed on the record within PIC that he had a prior professional relationship with Sea. Griffin should likewise have disclosed the further instances of contact with Sea, which flowed either directly or indirectly from their earlier professional relationship.

The relationship raised a potential conflict of interests and apprehended bias issue that needed to be properly managed within the PIC. Griffin's failure to disclose the relationship posed an integrity risk for the PIC in the Operation Florida investigation.

Griffin's submission stated that there is no evidence that Griffin was directly involved in Operation Florida hearings or that his contact with Sea had any impact on the hearings or the findings of Operation Florida and this is accepted. Griffin was nevertheless consulted on the findings, and was the authorised decision maker in signing off the Operation Florida final report. Those points reinforce the importance of disclosing such a relationship. Griffin accepted in his evidence that, with hindsight, the relationship should have been disclosed but he said that it would not have made any difference to the outcomes of Operation Florida. That may be so, but that is not the test for deciding whether a relationship should be disclosed for conflict of interests and integrity reasons.

688 Ombudsman Transcript, Timothy Sage, 15 August 2014, pp. 1591-1592.
689 Griffin, T, Submission in reply, 2 September 2016.

17.6.8 Findings

81. Griffin

Griffin's conduct as Commissioner of the Police Integrity Commission, in not disclosing internally that he had given professional assistance to Sea prior to Griffin's appointment as Commissioner and that he maintained contact with Sea after his appointment, was conduct that was otherwise wrong in terms of section 26(1)(g) of the *Ombudsman Act 1974*.

17.7 Use of telephone interception by Operations Orwell and Jetz

Operation Prospect considered a complaint from an officer (the complainant) who was the subject of adverse findings by a joint NSWPF and PIC task force into misconduct by police officers in the NSWPF promotions system. PIC had conducted a further review of the matter before it was raised with Operation Prospect.
This section discusses the initial task force investigation, the PIC review of that investigation, and Operation Prospect's consideration of the complaint.

17.7.1 Operations Orwell and Jetz

In January 2001, SCIA started an investigation called 'Operation Orwell' to investigate suspicions that some serving police officers had corruptly manipulated the NSWPF promotions system. SCIA sought PIC's assistance, and a joint investigation started in June 2001. The PIC called its investigation 'Operation Jetz'. The joint investigation is referred to in this report as Orwell/Jetz.

Task Force Orwell/Jetz investigated a range of matters, including police officers sharing confidential information to help themselves or colleagues in promotion interviews.

The PIC held public hearings between August and November 2001, and finalised a public report for Operation Jetz in January 2003.[690] The report found that a number of police officers had obtained information about questions to be asked during promotional interviews within the NSWPF, and shared that information with or improperly disclosed that information to their colleagues. This could give them an unfair advantage over other candidates being interviewed for promotion. The PIC recommended disciplinary action against 12 police officers, including the complainant.[691]

The complainant admitted in evidence to the PIC that (among other things) he obtained information about promotion interview questions, shared that information with a group of colleagues, breached the confidentiality requirements attached to interview questions, knew that this amounted to 'cheating', and did not report his own misconduct or that of others.[692]

17.7.2 Operation Boulder

In 2005, the complainant complained to the PIC that there was misconduct by the NSWPF in applying for TI warrants that were used during Operation Orwell, as well as misuse of information obtained by the TIs.[693] As Task Force Orwell/Jetz was a joint NSWPF/PIC investigation, the PIC appointed an independent person as Assistant Commissioner to conduct an inquiry into the complaints (Mr Morris Ireland QC). The inquiry was called Operation Boulder.[694] In 2006, Operation Boulder found the complaints were not substantiated.[695]

690 PIC, *Report to Parliament – Operation Jetz*, January 2003, p. iii.
691 PIC, *Report to Parliament – Operation Jetz*, January 2003, pp. 31-44.
692 PIC, *Report to Parliament – Operation Jetz*, January 2003, pp. 33-34.
693 Letter from [complainant] to the PIC, 29 April 2005.
694 "Operation Boulder" commenced in January 2006 following the complainant's letter of complaint to the PIC: PIC, *Annual Report 2005-06*, October 2006, p.17.
695 PIC, *Annual Report 2005-06*, October 2006, p. 17.

The offences for which Task Force Orwell/Jetz used TIs were corruption contrary to section 200 of the *Police Act 1990* (which is punishable by a period of imprisonment of up to seven years) and perverting the course of justice contrary to section 319 of the Crimes Act (also punishable by a period of imprisonment of up to seven years if it involved corruption of an officer of the State).[696] Operation Boulder considered that the offences for which the complainant was investigated met the benchmark for investigation by TIs.[697] The relevant provisions of the TI Act are set out in Appendix 3 (Volume 1).

Operation Boulder also concluded that there was no evidence to suggest the deponents and investigators, in preparing the TI affidavits supporting the warrant applications, had: acted in bad faith; deliberately included false, misleading or embellished information in affidavits; or manipulated the issue of the warrants by falsely alleging the involvement of people in criminal offences to obtain information for a disciplinary investigation.[698] Nor did Operation Boulder find evidence that staff of Orwell/Jetz had obtained any unfair advantage towards promotions as a result of their involvement in that operation. Steps had been taken within the NSWPF to dilute or prevent those staff from obtaining any such benefit.[699] Operation Boulder also concluded there was no impropriety by Orwell/Jetz investigators in not interviewing the complainant about criminal matters or allegations that may have related to him.

17.7.3 Review by the PIC Inspector

In March 2011, The Hon P J Moss – Inspector of the Police Integrity Commission – reviewed the matters raised by the complainant. He formed the view that there were no reasonable grounds to suggest that Operation Boulder had not properly considered his complaint, and conveyed this view to the complainant.[700]

17.7.4 Analysis and conclusions

In 2012, the complainant complained to Operation Prospect that:

- He was inappropriately targeted during Task Force Orwell/Jetz, as there were no reasonable grounds for suspecting him of involvement in criminal offences that would justify obtaining TI and LD warrants.
- The affidavits used in applications for these warrants must have included false and/or misleading information.
- The warrants were improperly and/or unlawfully issued as the matters under investigation in Orwell/Jetz concerned police misconduct rather than criminal allegations.
- No criminal allegations were ever raised with him by investigators.
- He was denied procedural fairness.

Operation Prospect has considered a range of material to assess this complaint – including the Operation Orwell investigator's report, the final reports of Operation Jetz and Operation Boulder, correspondence between the complainant and the PIC Inspector, a number of the affidavits deposed to by SCIA investigators in support of TI warrants used by Operation Orwell, and materials supporting the contents of those affidavits.

In summary, Operation Prospect considers that the complainant's complaints were dealt with appropriately by Operation Boulder. There was sufficient evidence for Operation Boulder's conclusions, and they appear sound to Operation Prospect.

696 PIC, *Operation Boulder – Result of Inquiries Arising from Investigation of Complaint by* [complainant], 1 August 2006, p. 2.
697 PIC, *Operation Boulder – Result of Inquiries Arising from Investigation of Complaint by* [complainant], 1 August 2006, pp. 2-3.
698 PIC, *Operation Boulder – Result of Inquiries Arising from Investigation of Complaint by* [complainant], 1 August 2006.
699 PIC, *Operation Boulder – Result of Inquiries Arising from Investigation of Complaint by* [complainant], 1 August 2006, p. 31.
700 Letter from the Hon P.J. Moss, Inspector of the Police Integrity Commission to [complainant], 16 March 2011.

The initial complaint forming the basis of Operation Orwell was sufficiently serious to constitute the offence of corruption contrary to section 200 of the Police Act. The documentation reviewed by Operation Prospect includes evidence and admissions from the complainant that he was involved in the conduct under investigation. This includes evidence that he obtained information relating to promotion interview questions, that he failed to conduct himself with an acceptable standard of behaviour, that he was in breach of the NSWPF Code of Conduct and Ethics, that he acted dishonestly and failed to report the misconduct of others, that he and another subject officer discussed interview questions for a number of Sergeant and Inspector positions after obtaining information from various NSWPF officers, and that he passed information from a subject officer to other officers. There is also TI evidence that the complainant and another subject officer expected to benefit from having provided this assistance to the recipients of that information if they were successful in obtaining promotions.

The offence under section 200 of the Police Act attracted a maximum sentence of seven years' imprisonment, and was a class 2 offence as defined in section 5D of the TI Act at the relevant time. It could properly be the basis for seeking a warrant under the TI Act. The investigation of the offence therefore provides reasonable grounds for suspecting the complainant of involvement in criminal offences that would justify obtaining TI and LD warrants.

Operation Prospect has formed the view that there was no unlawful conduct by Operation Orwell investigators in connection with seeking TI warrants. Although the TI warrants considered by Operation Prospect did not relate to the complainant's telephone services, the TI warrants appear to have been relied upon to lawfully intercept telecommunications to which the complainant was a party. The affidavits sworn in support of the TI warrant applications did not provide evidence that Orwell investigators had breached the TI Act or attempted to pervert the course of justice – as asserted by the complainant.

The complainant also asserted that he was denied procedural fairness by Orwell/Jetz. It appears this claim was based on his belief that the TI warrants were obtained on the basis of false or misleading information. There is no evidence to support that belief.

The complainant did not provide any fresh evidence to Operation Prospect in support of his allegations. No further action by Operation Prospect is warranted in relation to his complaints. They were properly investigated by Operation Boulder and found to be not substantiated.

17.8 What happened to Sea?

When the PIC Florida hearings began in October 2001, the covert phase of the Mascot investigations was essentially over and Sea's role was exposed. At this stage, Sea was moved to a new location under arrangements involving the NSWPF Internal Witness Support Group. Sea was involved in checking LD and TI transcripts for Mascot during this time. Ultimately, Sea entered the witness protection program.

One of the complaints considered by Operation Prospect alleged that Sea was paid an ex gratia payment to ensure that he would not make a complaint alleging misconduct by SCIA staff.

This section of the report considers what happened to Sea after his work for Mascot was completed, and whether the payments made to him by the NSWCC and NSWPF – during Mascot and after Mascot was completed – were appropriate.

17.8.1 Sea's safe house

When Sea first became an informant for the NSWCC, the NSWCC took responsibility for his protection at Sea's request.[701] Towards the end of Mascot's covert investigation phase, Sea and his family required a higher level of protection as Sea was soon to be exposed as an informant through his appearance at the PIC's Operation Florida hearings.

Mascot therefore arranged for Sea and his family to be relocated to a 'safe house' where their security would be more closely monitored with assistance from SCIA's Strategic Assessments and Security Centre (SASC). By September 2001 specialist staff from the NSWPF Witness Protection Unit were brought on board to help manage Sea's protection.[702]

Mascot, the NSWPF and the PIC were involved in arranging security measures – including alarms and lighting – to be installed at the safe house.[703] Covert LDs and cameras were also installed both inside and outside the house as a security measure. Once the family was living at the safe house, Mascot officers carried out surveillance of the house from a nearby caravan.[704]

Mascot did not obtain any warrants for the use of the LDs at the safe house, nor did they inform Sea that the devices had been installed.[705] Dolan explained to a Mascot meeting on 28 September 2001 that the LDs had been installed at the safe house as a "duress facility only".[706] The minutes of that meeting also note "there is no intention to obtain warrants for the listening devices".[707] This course of action was not unlawful at the time, as the LD Act did not prohibit the installation of a LD – only the use of a device. The LD Act also allowed for a LD to be used without a warrant in an emergency situation "to obtain evidence or information in connection with an imminent threat of serious violence to persons ... if it is necessary to use the device immediately to obtain that evidence or information". [708]

Although the installation of the LDs was not unlawful, one witness told Operation Prospect that these devices would not normally be installed in the way they were installed at the safe house for Sea and his family.[709] A concern was also expressed at the time that if Sea became aware of the covert placement of LDs and cameras in the safe house this could undermine the rapport Mascot had built with him.[710]

A complaint was made to Operation Prospect that on one occasion Mascot officers in the surveillance post near the safe house activated one of the LDs and listened to a private conversation between Sea and another officer. The complainant alleged that he had a private conversation with Sea at the safe house and – after the conversation – went to the caravan and found that the officers tasked with surveillance of the safe house appeared to be aware of details of this private conversation and commented to him about it.[711]

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701 NSWCC, *Confidential minutes of OCC meeting*, 19 November 2001, p. 1.
702 NSWCC, *Confidential minutes of OCC meeting*, 19 November 2001, p. 1.
703 NSWCC Information Report, *Erection of fence at 'Billabong',* reporting officer: [NSWPF Witness Security officer], 2 October 2001, p. 2; Operation Mascot – Witness Sea – Proposed S.O.P's for Billabong Response, undated.
704 NSWCC/SCU, *Security Assessment*, [safe house location] – *Billabong*, unknown author, undated, p. vii.
705 NSWCC Information Report, *Erection of fence at 'Billabong',* reporting officer: [NSWPF Witness Security officer], 2 October 2001, p. 2.
706 NSWCC, *Minutes of Level 6 Meeting*, 28/09/2001, 28 September 2001.
707 NSWCC, *Minutes of Level 6 Meeting*, 28/09/2001, 28 September 2001.
708 LD Act, s. 5(2)(c)(i).
709 Ombudsman Transcript, [name], 4 March 2015, pp. 44-46.
710 NSWCC Information Report, *Topic: Fence activities*, reporting officer: [name], 2 October 2001, p. 2.
711 NSWCC Information Report, *Erection of fence at 'Billabong',* reporting officer: [NSWPF Witness Security officer], 2 October 2001, p. 2.

Operation Prospect has not located any Mascot documents (such as transcripts or summaries of conversations) that indicate Mascot listened to private conversations of people who went to the safe house, either inside it or in external areas such as the garden. However, Operation Prospect was given an unsigned and undated document called 'Operation Termoli – issues raised by the SASC Observation Field Team', which indicates that the SASC staffed the on-site observation post at Sea's safe house.[712] This is also supported in two available Duty Books for the relevant period.[713] That document notes that the PIC played a role in the security measures, and also that Sea was unaware of any audio surveillance of the exterior parts of the residence.[714]

The two Duty Books make no mention of LDs being activated at the safe house.[715] The SCU weekly meetings for August and September 2001 also discussed 'Electronic monitoring of Sea' as a critical outcome,[716] and the minutes of the SCU meeting on 6 October 2001 then noted that "Sea relocated – Electronic monitoring of Sea ceased". None of the minutes provide further detail about how this electronic monitoring was carried out.

The evidence before Operation Prospect is that the LDs were installed at the safe house as a safety feature. If Mascot had sought warrants for these LDs, questions about the lawful activation of the LDs would not arise (although each warrant would operate only for a limited time). However, there is insufficient evidence to support the allegation that the LDs were activated at any time – either for monitoring or recording conversations. No adverse comment or finding is therefore warranted.

17.8.2 Sea lodges a Hurt on Duty claim

On 23 May 2001, Sea put in a claim for Hurt on Duty (HOD) benefits.[717] He had previously made a HOD benefits claim in March 1999, which appears to have lapsed after repeated requests from the assessing officers for further information met with no response.[718] The 2001 HOD benefits claim was ultimately declined in April 2003.[719] On 22 May 2002, Sea applied to be discharged from the NSWPF on medical grounds.[720] In a report dated 17 October 2002 – made in support of Sea's HOD claim – his treating psychiatrist recommended he be discharged from the NSWPF on medical grounds. [721] This ultimately happened on 24 September 2003.[722]

17.8.3 Payments made to Sea

A complaint received by Operation Prospect was that Sea was given an ex gratia payment to ensure that he made no complaints about his treatment by Mascot. Operation Prospect reviewed receipts of payments made to Sea, a deed of release signed by the NSWCC and Sea's former partner, memos about payments for sustenance and other documents – as well as questioning Sea directly on these issues.

712 NSWCC, *OP Termoli – issues raised by the SASC Observation Field Team*, unsigned, undated.

713 NSWPF, Duty Book D041614, [officer], pp. 96-100, 21 August 2001–12 September 2001; NSWPF, Duty Book D042319, [officer], pp. 125-127, 9 August 2001– 20 August 2001; NSWPF, Duty Book D044901, [name], pp. 1-7, 21 August 2001-12 September 2001.

714 NSWCC, *OP Termoli – issues raised by the SASC Observation Field Team*, unsigned, undated.

715 NSWPF, Duty Book D041614, [name], pp. 96-100, 21 August 20001–12 September 2001; NSWPF, Duty Book D042319, [name], pp. 125-127, 9 August 2001 – 20 August 2001; NSWPF, Duty Book D044901, [name], pp. 1-7, 21 August 2001–12 September 2001.

716 NSWCC/SCU, *Weekly operational report for week ending 4 August 2001*, dated 6 August 2001; *week ending 11 August 2001*, dated 13 August 2001; *week ending 18 August 2001*, dated 20 August 2001; *week ending 25 August 2001*, dated 27August 2001; *week ending 1 September 2001*, dated 3 September 2001; *week ending 8 September 2001*, dated 10 September 2001; *week ending 15 September 2001*, dated 17 September 2001; *week ending 22 September 2001*, dated 24 September 2001; *week ending 29 September 2001*, dated 30 September 2001.

717 NSWPF internal memorandum from [NSWPF Workplace Compliance claims manager] to Commissioner's Delegate, 23 May 2001.

718 NSWPF internal memorandum from [NSWPF Workplace Compliance claims manager] to Commissioner's Delegate, 13 March 2001, signed 2 April 2003.

719 NSWPF internal memorandum from [NSWPF Workplace Compliance claims manager] to Commissioner's Delegate, 13 March 2001, signed 2 April 2003.

720 NSWPF, Application for Medical Discharge, submitted by [Sea], dated 22 May 2002.

721 Letter from [forensic psychiatrist] to Inspector [name], NSWPF, 17 October 2002.

722 NSWPF, PODS person profile for [Sea], accessed by NSW Ombudsman on 31 October 2014.

Sea gave evidence to Operation Prospect about various payments made to him during Mascot. He said he was given small amounts of cash for specific expenses, such as plumbing work or medical appointments, and that these payments partially compensated him for losing paid work and overtime in the course of his normal duties.[723] Numerous Information Reports and Contact Advice Reports compiled by Mascot investigators detail these payments and attach receipts received from Sea for these expenses.

The NSWCC also agreed to help Sea and his family with some relocation costs after the covert phase of Mascot was completed, including agents' and auctioneers fees' and stamp duty on a house in a new location. The NSWCC and Sea agreed that Sea would pay these expenses himself and, once all expenses were finalised, the NSWCC would pay that amount to Sea. To help Sea with the deposit for the new house – when Sea's old house had not yet been sold – the NSWCC also gave him an 'advance' [724] payment. Sea agreed to repay the NSWCC any difference between this advance amount and the total of his relocation expenses once they had been finalised.

During the covert phase of Mascot, the NSWCC made regular payments to Sea's then wife of $700 per week for 'loss of income' and a further $100 per week as a subsidy for fuel costs. These payments stopped on 30 September 2002. The asserted bases for terminating these payments were that Sea's wife was expected to obtain employment in October 2002, and that the Australian Tax Office (ATO) was 'seeking tax in connection with the payments'.[725]

In place of the weekly payments and after the family's relocation, Sea's wife was paid a one-off sum of $41,600. It appears this payment was made partly as compensation – as she could no longer work in her profession given the required change of identity.[726] The payment served to cover the costs of retraining to find other work.[727] On 9 October 2003, Sea's wife signed a Deed of Release which released the NSWCC, PIC and NSWPF from all financial liability to her – other than the usual liability of the NSWPF to a witness under the witness protection program.[728]

A representative of the ATO also reviewed Sea's family's accounts before Sea and his family were taken into witness protection. Although this review by the ATO was principally concerned with identifying corrupt payments or monies stolen during search warrants, it did provide a form of oversight of the family's income.[729] The review determined that additional amounts of income tax were owed to the ATO. The records before Operation Prospect indicate that the NSWCC ultimately paid these amounts to the ATO,[730] with contributions made by the NSWPF and PIC in accordance with the Mascot MOU.[731] These records also indicate that these payments were offset against other amounts paid or owed to Sea by the NSWCC, such as Sea's relocation costs.

Although Sea admitted to engaging in criminal and corrupt conduct throughout his career, he was ultimately not charged with any offences as a result of Operations Mascot and Florida. On 29 August 2001, he was granted an indemnity by the Attorney General.[732] The indemnity applied to all of Sea's acts and omissions outlined in an attached schedule. This was essentially a table of the matters on Mascot's Schedule of Debrief concerning corruption, criminal activity and/or misconduct that Sea stated he had either been involved in or known about.[733]

723 Ombudsman Transcript, [Sea], 21 August 2013, pp. 92-94.

724 NSWCC Information Report, *Payment of outstanding tax bill for NSWCC informant Sea*, reporting officer: [name], 18 March 2003.

725 NSWCC internal memorandum from Assistant Director Investigations Mark Standen to Mascot Reference OCC, NSWCC, 25 August 2003, p. 3.

726 NSWCC internal memorandum from Assistant Director Investigations Mark Standen to Mascot Reference OCC, NSWCC, 25 August 2003, p. 3.

727 Ombudsman Transcript, [Sea], 21 August 2013, p. 96; Deed of Release [Sea's wife], 9 October 2003.

728 Ombudsman Transcript, [Sea], 21 August 2013, p. 96; Deed of Release [Sea's wife], 9 October 2003.

729 Ombudsman Transcript, [Sea], 21 August 2013, pp. 94-95; NSWCC Information Report, *Payment of outstanding tax bill for NSWCC informant Sea*, reporting officer: Moore, 18 March 2003.

730 NSWCC Information Report, *Payment of outstanding tax bill for NSWCC informant Sea*, reporting officer: [name], 18 March 2003; NSWCC Information Report, *Payment of additional outstanding tax bill for NSWCC informant Sea*, reporting officer: [name], undated.

731 NSWCC Information Report, *Memorandum of Understanding – NSW Police, PIC, NSWCC re Mascot*, reporting officer: Burn, 13 June 2000 – attachment: Memorandum of Understanding between the Commissioners of the New South Wales Police Service, the Police Integrity Commission and the New South Wales Crime Commission, *Regarding a joint pursuit of allegations of corruption*, undated.

732 Attorney General (NSW), *Indemnity under Criminal Procedure Act 1986 s46*, 29 August 2001.

733 Attorney General (NSW), *Indemnity under Criminal Procedure Act 1986 s46*, 29 August 2001.

17.8.4 Compliance with NSWCC Informant Management Plan policy

A complaint was received by Operation Prospect alleging that Sea was not managed in accordance with the NSWPF informant and undercover officer policies. As previously detailed in this report, Sea was registered as a NSWCC informant and therefore managed under the NSWCC Informant Management Plan.[734]

A review of that policy and evidence surrounding the handling of Sea indicates that it was largely adhered to. The policy allows for a 'variation of these procedures due to exceptional circumstances' if approved by the Director of Investigations.[735] During the period Sea was performing covert duties for Mascot, the Director of Investigations was Mark Standen. It is clear from all the evidence that Standen was actively involved in managing Sea. Sea gave evidence that – as well as having regular contact with his handlers – he also spoke with Standen and Burn.[736] He stated that he was told initially he would be required to perform his undercover role for about six months, but felt that he had no choice and could not opt out because "I was there to do a job and I was going to do it".[737]

17.8.5 Analysis

There is no evidence that Sea was paid any additional amounts or given an ex-gratia cash payment to ensure he made no complaint about any misconduct of SCIA officers. His evidence to Operation Prospect indicated on the whole that he was reasonably satisfied with his treatment by SCIA. Sea made no complaints of misconduct, and the evidence before Operation Prospect provides no evidence of payments other than those listed earlier.

734 NSWCC *Informant Management Plan*, undated.
735 NSWCC *Informant Management Plan*, undated, p. 6.
736 Ombudsman Transcript, [Sea], 21 August 2013, p. 79.
737 Ombudsman Transcript, [Sea], 21 August 2013, pp.101, 103.

Chapter 18. NSWCC Interactions with Strike Force Emblems

18.1 Chapter overview

The central issue dealt with in this chapter is whether the NSWCC should have made documents available to Strike Force Emblems of the NSWPF in 2003-2004. Emblems was established in July 2003, following complaints to the NSWPF after the publication of LD warrant 266/2000 – discussed in Chapter 13. The complaints were made by some of the people named in the warrant and by the Police Association, of NSW (Police Association).

The complainants had limited options for making a complaint. The Mascot warrant applications were prepared by serving NSW police officers who at the time were sworn in as members of the NSWCC, under section 27A of the NSWCC Act.[738] In essence, a complaint about the preparation of LD warrant 266/2000 by Mascot officers was a complaint about the conduct of the NSWCC and its staff. The PIC and the Ombudsman could both receive and investigate complaints about the NSWPF, but had no jurisdiction over the NSWCC. There was no other agency or parliamentary committee that had a specific function to investigate allegations of misconduct or criminal conduct against NSWCC staff, police officers or otherwise. The limited oversight mechanism in the NSWCC Act was the Management Committee of the NSWCC – the functions of this committee are explained in Chapter 3 of this report.

The NSWPF responded to the complaints about Mascot and LD warrant 266/2000 by establishing an investigative strike force, called Strike Force Emblems. The main limitation in this approach was that the NSWPF (and Emblems) did not have the power to require the NSWCC to provide information or documents to it. NSWPF officers who were Mascot Task Force members could also not provide information to the NSWPF without the NSWCC's authorisation. This meant that Emblems was unable to conduct a comprehensive investigation when the NSWCC refused to give access to certain key documents – including the affidavit supporting LD warrant 266/2000.

In doing this, the NSWCC relied on a secrecy provision in the NSWCC Act. Under section 29, it was an offence for a current or former staff member of the Commission (including a current or former member of a police task force assisting the Commission) to divulge or communicate to any person any information acquired in the course of exercising functions under the NSWCC Act, other than for the purposes of the Act or in discharging functions under it. Section 27 of the Act provided that the Management Committee could give a binding direction to the NSWCC about the exercise of its functions. This was taken to mean that the Management Committee could authorise the Commission to divulge or communicate information to another person or agency. Under the NSWCC Act, the NSWCC was defined to consist of the Commissioner (and any Assistant Commissioners appointed although there were none appointed during the relevant periods). The authorisation made by the Management Committee was therefore made to the Commissioner alone which was Phillip Bradley at the relevant time.[739]

For practical purposes, the Management Committee could authorise the Commissioner to provide information about Mascot and LD warrant 266/2000 to Emblems and the NSWPF. The Committee in fact gave that approval, but the Commissioner declined to provide the documents that Emblems wanted to access.

738 *New South Wales Crime Commission Act 1985* (repealed). s. 27A.
739 New South Wales Crime Commission Act, s. 5.

This chapter examines the establishment of Emblems, how it conducted its investigation, and the discussions between the NSWCC, the NSWPF and the Management Committee about providing NSWCC information to Emblems. The chapter concludes with a finding against the then Commissioner of the NSWCC for declining to provide key documents to Emblems and the NSWPF.

This chapter also considers complaints received by Operation Prospect about a statement made by NSWPF Commissioner Andrew Scipione to the media in 2012 that he had not read the Strike Force Emblems report.

18.2 PIC Inspector reviews the warrant (April 2002)

In response to complaints about the preparation of LD warrant 266/2000, the Minister of Police – the Hon Michael Costa MP – wrote to the Inspector of the PIC, the Hon Mervyn Finlay QC, on 15 April 2002 asking him to review the appropriateness of Mascot seeking that warrant. The Hon Mervyn Finlay's report was delivered to the Minister on 29 April 2002.

The Hon Mervyn Finlay's report is considered in detail in Chapter 13, but – in summary – it concluded that:

- LD warrant 266/2000 was justifiably sought.
- The seeking of LD warrant 266/2000 complied with the LD Act, except that two names included on the warrant were not mentioned in the affidavit supporting the warrant application.
- The Hon Mervyn Finlay had "no reason not to accept" the NSWCC's advice that the material obtained by the warrant was used appropriately.[740]

The report did not bring an end to complaints and concerns about LD warrant 266/2000. The NSWPF received further complaints about the conduct of Mascot and SCIA officers during the following 12 months.

18.3 Complaints to the NSWCC from officers named in the warrants

On 21 May 2002, solicitors acting on behalf of a number of NSWPF officers who were named on the warrant wrote to John Giorgiutti, Solicitor to the NSWCC, advising that their clients did not accept "that all things to do with the warrant were in order".[741] They advised that Senior Counsel had been briefed to prepare advice on several aspects of the warrant. To properly brief Senior Counsel, the solicitors asked for a copy of the supporting affidavit to warrant 266/2000 and any other material that was placed before the Supreme Court Justice in the warrant application.[742] Giorgiutti denied this request in writing on 24 May 2002.[743]

This was the first of many requests to the NSWCC for documents from people seeking answers to complaints about the warrant.

On 13 June 2002, a different solicitor wrote to both the PIC and the NSWCC asking why his clients were named on the warrant. The NSWCC replied that the warrant was applied for in connection with the NSWCC Mascot references that now formed part of the PIC's Operation Florida,[744] but did not provide any further information to the solicitor. The PIC responded to the solicitor saying that the NSWCC was the only agency that could answer their request. This was because the warrant was taken out by the NSWCC and it held all the relevant documentation.[745]

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740 Inspector of the Police Integrity Commission, *Operation Florida Re: Listening Device Warrant – Report by Inspector of Preliminary Investigation*, 29 April 2002, p. 18.

741 Facsimile from [a law firm] to NSW Crime Commission, 21 May 2002.

742 Facsimile from [a law firm] to NSW Crime Commission, 21 May 2002.

743 Letter from John Giorgiutti, Solicitor to the Commission, NSWCC to [a law firm], 24 May 2002, p. 1.

744 Letter from John Giorgiutti, Solicitor to the Commission, NSWCC to [a law firm], 20 June 2002, p. 1.

745 Letter from Assistant Commissioner Tim Sage, PIC to [a law firm], 21 June 2002; Letter from Assistant Commissioner Tim Sage, PIC to [a law firm], 17 July 2002; Letter from Assistant Commissioner Tim Sage, PIC to [a law firm], 19 July 2002; Letter from [a law firm] to Commissioner Phillip Bradley, NSWCC, 23 July 2002.

The same solicitor wrote to the NSWCC again on 23 July 2002 seeking the material in support of the warrant. The solicitor also raised the issue that Police Commissioner Peter Ryan had stated on *60 Minutes* that the people listed on the warrant were to attend a function – and advised that their clients denied ever attending that function.[746]

The NSWCC wrote to the PIC on 2 August 2002[747] criticising its initial response to the solicitor which stated that "relevance or otherwise to any criminal offence involving your clients can only be known and answered by the Crime Commission".[748] After receiving several further letters from the solicitor asking for a response, the NSWCC replied on 3 September 2002 – indicating it would not enter into further correspondence on the matter, but noting that the PIC's Annual Report referred to the inquiry conducted by the Inspector of the PIC.[749]

The NSWCC later wrote again to the solicitor and advised that:

> *The applicant (who is a police officer) was obliged to include the names of all of the persons whose conversations were likely to be listened to. That is the law. The inclusion of a name on the Warrant does not mean that the person is involved in, or even suspected of being involved in, wrong doing. A number of independent people have looked at this and agree that it was not only proper, but obligatory to include all of the names.*[750]

18.4 Task Force Volta established (September 2002)

On 12 August 2002, the NSWCC informed the NSWCC Management Committee that a team of 20 investigators would finalise the Mascot investigations. This team became known as Task Force Volta.[751] The Commissioner of Police at the time – Mr Ken Moroney – authorised Volta to start in September 2002.[752]

On 28 February 2003, the NSWCC's progress report to the Management Committee stated: "There are no active operations being conducted under this Reference [Mascot]. Investigators are systematically disseminating information to NSW Police (SCIA) Task Force Volta, which is working to finalising all outstanding matters".[753] On 28 April 2003, the NSWCC advised the Management Committee that it had disseminated all relevant information to Volta.[754]

18.5 Police Association seeks an investigation into Mascot

In March 2003, the Police Association asked the NSWPF for the applications associated with LD warrant 266/2000. Around this time, Moroney sought legal advice as to whether the NSWPF could lawfully review LD applications and supporting material – and was advised that there was nothing in the LD Act that would prevent the affidavits and applications being given to the NSWPF. However, those documents were in the possession and control of the NSWCC – who would not pass them on to the NSWPF to then give to the Police Association. The legal advice was therefore that the Commissioner of Police would be unable to provide the documents to the Police Association.[755]

On 29 April 2003, the Police Association wrote to Moroney detailing the outcome of an earlier meeting of representatives of the State Crime Command Branch and Commissioned Officers Sub Branch of the Police Association. The Police Association raised seven issues that it wanted addressed. These issues were:

746 Letter from [a law firm] to Commissioner Phillip Bradley, NSWCC, 23 July 2002, p. 3.
747 Letter from Commissioner Phillip Bradley, NSWCC, to Assistant Commissioner Tim Sage, PIC, 2 August 2002, p. 1.
748 Letter from Assistant Commissioner Tim Sage, PIC to [a law firm], 19 July 2002, p. 1
749 Letter from John Giorgiutti, Solicitor to the Commission, NSWCC to [a law firm], 3 September 2002, p. 1.
750 Letter from Commissioner Phillip Bradley, NSWCC to [a law firm], 16 October 2002, p. 1.
751 NSWCC, *Progress Report to Management Committee – Mascot II*, August 2002.
752 NSWPF internal memorandum from Greg Jewiss, Commander, Task Force Volta, 6 November 2003; NSWPF internal memorandum from Detective Inspector Paul Pisanos, *Operation Mascot – 'An Investigator's Overview'*, 25 August 2003.
753 NSWCC, *Progress Report to Management Committee Mascot II*, 26 February 2003.
754 NSWCC, *Progress Report to Management Committee Mascot II*, 28 April 2003.
755 [Lawyer] and [lawyer], *'Florida' Listening Device Act Warrants: Joint Advice*, to NSW Commissioner of Police, 28 March 2003.

- The strategic operational validity in seeking a LD warrant that covered over 100 people, the majority of whom were members of the Police Association.
- The failure by the NSWPF to process and deal with complaints relating to Commanders Brammer, Dolan and Burn in a timely manner.
- The failure of the NSWPF to resolve in a timely manner complaints arising out of the Mascot/Florida investigations.
- The failure of the NSWPF to debrief officers – this issue related to members who were not adversely involved in the investigation but were named on the warrant.
- Unacceptable operational risk taking – this issue related to members who may have been exposed to risk during the investigation phase, particularly at Manly Police Station.
- Complaints from investigators attached to SCIA – this issue related to human resource issues affecting SCIA investigators. The Police Association noted that the investigators had been investigated by Strike Force Tumen, but no report had been made public and no formal debriefing had been given to the affected staff. The Association asked for the recommendations of the Tumen report to be made public.
- The breakdown of relations between the NSWCC and the NSWPF.[756]

The issues raised in the Police Association's letter were treated by the NSWPF as complaints for investigation. Moroney referred them to the Deputy Commissioner (Operations), noting that it would be inappropriate for SCIA to investigate them.[757] Moroney advised that – if an investigation was warranted into any of the matters raised by the Association – it may be appropriate that a small Task Force be constituted for that purpose.[758]

The complaints were registered on the police complaint system known as c@ts.i on 16 May 2003.[759] In a memo dated 23 May 2003, the Professional Standards Manager (PSM) recommended that the matter be assessed as a Category 1 complaint – this was a complaint that usually involved allegations of serious criminal or corrupt behaviour and had to be referred to the PIC in accordance with the Police Act. The memo advised that the PSM had discussed the matter with the Deputy Commissioner (Operations), and they agreed that a team of senior and appropriately skilled officers should be appointed to investigate the complaints.[760]

Despite this recommendation, the complaints were later declined by the Complaint Management Team that considered them and marked as 'No Action Required' in c@ts.i. The reasons given were the PIC's involvement, the scope of the Mascot investigations (which would itself take some time to investigate), the PIC Inspector's conclusion that the warrant had been justifiably sought, and the fact that the NSWPF was in the process of conducting an extensive debrief with a large number of officers about being named on the warrant.[761]

On 3 June 2003, the PSM wrote to the Police Association advising that all matters were declined. The Police Association then gave the NSWPF further information, apparently including the fact that it had previously met with Moroney who had given an undertaking to investigate the complaints.[762] As a result, the matter was allocated to Assistant Commissioner Garry Dobson for resolution. [763] The PSM notified the Police Association of this decision in a letter dated 23 June 2003. This investigation became known as Strike Force Emblems.

756 Letter from Peter Remfrey, Secretary of the Police Association of New South Wales to Commissioner Ken Moroney, NSWPF, 29 April 2003.
757 Letter from Commissioner Ken Moroney, NSWPF to Commander of SCIA, NSWPF, 8 May 2003.
758 Letter from Commissioner Ken Moroney, NSWPF to Deputy Commissioner Operations, NSWPF, 8 May 2003, pp. 1-2.
759 Complaint ID [number], 16 May 2003.
760 NSWPF internal memorandum from the Professional Standards Manager to [all of Complaint Management Team, NSWPF], 23 May 2003, p. 2.
761 NSWPF, Complaint number [number] (c@ts.i screen print), Complaint Details, accessed on 18 June 2003.
762 NSWPF, Complaint number [number] (c@ts.i screen print), undated.
763 NSWPF, Complaint number [number] (c@ts.i screen print), undated.

18.6 Start of Emblems (July 2003)

On 23 June 2003, it seems that Moroney's Staff Officer advised the NSWCC Commissioner Bradley that Dobson had been appointed to investigate allegations relating to LD warrant 266/2000. Bradley replied by fax on 25 June 2003 advising that he did not see any difficulties in Dobson interviewing police involved in Mascot, provided he was aware of the NSWCC secrecy provisions. Bradley also stated that he had been told by a 'confidential source' that there was an allegation "circulating within the State Crime Command that the Crime Commission is in some way impeding that investigation".[764] He wrote: "I want to ensure that there is no scope of any assertion that this Commission is impeding the investigation. If there is any such impediment perceived by Mr Dobson, I should be informed immediately".[765]

Dobson was to be assisted in the investigation by Detective Inspector Galletta. He had been heavily involved in previous investigations of complaints about SCIA and Mascot, and was one of the officers who signed off on the final reports for both Sibutu and Tumen.[766]

On 30 June 2003, Dobson and Galletta presented a progress report to the Executive Complaints Management Team (ECMT), which was the NSWPF complaints management team that was monitoring the Emblems investigation. The report outlined activities that Emblems had undertaken so far and identified future activities.[767]

Subsequent correspondence indicates that Emblems formally started on 3 July 2003, with Galletta appointed as the officer in charge of the investigation.[768]

On 4 July 2003, Dobson wrote to Bradley introducing himself and advising that Emblems had been established to investigate complaints related to "the integrity, accuracy and authenticity of the data relied upon to issue the subject warrant". Dobson requested access to the Mascot terms of reference, the minutes of Mascot meetings, the transcript of the original debrief of Sea, the Schedule of Debrief, and the applications for LDs, telephone interception (TI), controlled operations and integrity tests, and search warrants pertaining to Mascot including rollover warrants and all relevant affidavits and source material.[769] This potentially required a large proportion of Mascot's investigative material to be given to Emblems. Dobson also sought a meeting with Bradley to be briefed on the structure of the NSWCC, the relationship between the NSWPF and NSWCC consistent with an existing MOU, and the role of the NSWCC in decision-making processes relating to investigation directions, strategies and target selection.[770]

Operation Prospect has seen a draft facsimile dated 7 July 2003 from Bradley to Dobson that asked for a copy of Dobson's terms of reference. The fax indicated that it would be unlikely the NSWCC Management Committee would wish Emblems to have all information held by the NSWCC in relation to Mascot. Although it cannot be determined if the fax was sent, a handwritten note on the copy held by Operation Prospect records that a meeting had been organised for 24 July 2003 between Bradley, Giorgiutti and Dobson.[771]

Galletta drafted a letter on 21 July 2003, apparently to be handed to Bradley at the 24 July meeting. The letter requested that the NSWCC provide additional material, namely the minutes relating to the Operations Coordination Committee (OCC) established for Mascot/Florida and records in relation to Operation Boat – this was a subsidiary investigation of Mascot that used Sea to investigate allegations that officers had fabricated evidence.[772]

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764 Facsimile from Commissioner Phillip Bradley, NSWCC to [name], Staff Officer to the Commissioner of Police, NSWPF, 25 June 2003.
765 Facsimile from Commissioner Phillip Bradley, NSWCC to [name], Staff Officer to the Commissioner of Police, NSWPF, 25 June 2003.
766 See the Glossary for an explanation of these investigations.
767 Assistant Commissioner Dobson, G, *1st Progress Report*, NSWPF, 30 June 2003, pp. 1-4.
768 Letter from Detective Inspector Mark Galletta, NSWPF Strike Force Emblems to Peter Remfrey, Secretary, Police Association of New South Wales, 18 May 2004.
769 Letter from Assistant Commissioner Garry Dobson, NSWPF to Commissioner Phillip Bradley, NSWCC, 4 July 2003, p. 1.
770 Letter from Assistant Commissioner Garry Dobson, NSWPF to Commissioner Phillip Bradley, NSWCC, 4 July 2003, pp. 1-2.
771 'Draft' Facsimile from Commissioner Phillip Bradley, NSWCC to Assistant Commissioner Garry Dobson, NSWPF, 7 July 2003 (no transmission evidence).
772 Letter from Detective Inspector Mark Galletta, NSWPF to Commissioner Phillip Bradley, NSWCC, 21 July 2003, p. 1 (to be handed over in meeting of 24 July 2003).

Bradley recorded a file note for the 24 July meeting between himself, Giorgiutti, Dobson and Galletta. It stated that:

- Emblems had a team of eight investigators working on the matter. They hoped to complete their investigation within 12 months.
- The main issue was whether there was sufficient information to justify the inclusion of names on a warrant. However, the NSWCC did not want to "water down the position that allows people to go behind warrant to look at affidavit [sic]. The complainants agree with this".
- The NSWCC would assemble material relating to each name along with associated source material such as Sea's records of interview, to "enable them [Emblems] to be satisfied that names should be included as targets". The NSWCC would provide further material to support the basis for inclusion of people who "are not targets but are persons likely to be spoken to in presence of LD" – described as the 'Blackburn principle'.
- In the meantime, the NSWCC would assemble material such as the Mascot terms of reference.[773]

A NSWPF file note records similar details, although indicates that more material was to be provided than referred to in Bradley's file note. According to the NSWPF note, Bradley had said that – if Emblems still wanted the affidavit after reviewing other documentation – he would consider such a request.[774]

On 29 July 2003, journalist Neil Mercer published an article in the *Sydney Morning Herald*. The second page of that article was titled: 'Thieves beware: the untouchables could take your home'. Although much of that article is not relevant to Operation Prospect, it referred to a complaint "about a listening device warrant obtained by the commission in September 2000, which named more than 100 police, many of them detectives with unblemished records". The article went on to state that Moroney had set up a task force to investigate the obtaining of the warrant. It further stated: "the *Herald* has been told that commission boss Phil Bradley is prepared to hand over all relevant documents".[775]

18.7 NSWCC Management Committee authorises access being given

A memo dated 30 July 2003 from Bradley to the Management Committee advised that Dobson had sought access to a range of material, including all LD and TI applications.[776] Bradley noted that it was unclear if the NSWCC would be able to provide the investigation with TI material, given the legislative limitations on disseminating such material. Bradley further noted that:

> *So far as access to LD applications is concerned, access should be refused as the Commission cannot be seen to be waiving the long-standing law enforcement position that there is no basis upon which any person can go behind the grant of a warrant. This principle has been supported by the courts. We are hopeful that dissemination of all of the other material gathered under the investigation will be sufficient to satisfy Mr Dobson that there was a proper basis for inclusion of all of the names contained in the warrant.*[777]

Bradley's memo suggested that the Management Committee grant approval under section 7 of the NSWCC Act to give Dobson access to "information and evidence relevant to Listening Device Warrant No 266 of 2000 held by the NSW Crime Commission as a result of its investigation under Reference codenamed Mascot, which can be lawfully disseminated, other than applications that ground any listening device warrants".[778] Section 7 allows the NSWCC to disseminate intelligence to, or cooperate and consult with other bodies, with the approval of the Management Committee. The Management Committee then passed the following resolution:

773 Phillip Bradley, File note, *File Note JMG and PAB,* NSWCC, 24 July 2003.
774 Unknown author, Investigators note, *Meeting with Commissioner Bradley NSWCC*, NSWPF, 25 July 2003.
775 Mercer, Neil, 'Petty thieves beware: the secret police could seize your home', *The Sydney Morning Herald*, 29 July 2003, p. 2.
776 NSWCC internal memorandum from Commissioner Phillip Bradley to Management Committee, 30 July 2003.
777 NSWCC internal memorandum from Commissioner Phillip Bradley to Management Committee, 30 July 2003.
778 NSWCC internal memorandum from Commissioner Phillip Bradley to Management Committee, 30 July 2003.

The Management Committee approves access being given to Assistant Commissioner Garry Dobson to information and evidence being given relevant to Listening Device Warrant No 266 of 2000 held by the NSW Crime Commission as a result of its investigation under reference codenamed Mascot, which can be lawfully disseminated, other than applications that ground any listening device warrants. Where Mr Dobson identifies such information and evidence which he requires to be disseminated to himself for the purpose of his investigation, the Management Committee approves of such dissemination by the Commission.[779]

Bradley told Operation Prospect:

My initial position was that we would cooperate and provide them with the documents sans affidavits because I just wanted to hold the position about looking at affidavits, and I would have said to them, in fact the documents support this somewhere, that if they weren't satisfied based on the information provided, they could come back and ask about the affidavits.[780]

Bradley did recall there was a period when Emblems could not access NSWCC documents until Volta was finalised.[781] However, he later conceded that he could not remember if that was put forward as a "sort of holding position, or what".[782]

18.8 Correspondence between NSWCC and NSWPF about access to documents

On 5 August 2003, Giorgiutti wrote to Dobson referring to his request for information dated 4 July 2003, the meeting on 24 July 2003, and a telephone conversation Giorgiutti had with Galletta on 31 July 2003. Giorgiutti advised that:

- The Management Committee had passed a resolution that access could be granted, in terms identical to those outlined in Bradley's memo to the Management Committee of 30 July 2003.
- A 'large volume' of material sought by Emblems was with Volta, and Giorgiutti would arrange to have it brought to the NSWCC so it could be given to Emblems.
- The NSWCC requested a copy of the Emblems terms of reference so that "the Commission can determine what is able to be lawfully disseminated", given the secrecy provision in section 29 of the NSWCC Act.
- As the material might disclose confidential information that may be relevant to ongoing investigations, the NSWCC asked to be told who, other than Dobson and Galletta, were undertaking the investigation.[783]

Galletta replied on the same day advising that the terms of reference were "to investigate allegations concerning impropriety of listening device warrants in relation to operation Mascot". He said that specific complaints had been made against former senior officers of SCIA about management and human resource issues. Galletta then outlined four issues of complaint raised by the Police Association:

1. *The strategic operational validity in the seeking a listening device warrant containing one hundred and fourteen names (number 266 of 2000).*
2. *Unacceptable operational risk taking in relation to the deployment of M5* [Sea].
3. *Complaints from investigators attached to the Special Crime and Internal Affairs concerning management and human resource issues.*
4. *Breakdown of relations between the NSW Crime Commission and the NSW Police caused by Operation Mascot and the existence of Listening Device warrant 266 of 2000.*[784]

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779 Letter from Commissioner Ken Moroney, NSWPF to Commissioner Phillip Bradley, NSWCC, 5 January 2004, pp. 1-2.
780 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 3072.
781 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 3072.
782 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 3072.
783 Letter from John Giorgiutti, Solicitor to the Commission, NSWCC to Assistant Commissioner Garry Dobson, NSWPF, 5 August 2003, pp. 1-2.
784 Letter from Detective Inspector Mark Galletta, NSWPF to John Giorgiutti, Solicitor to the Commission, NSWCC, 5 August 2003.

Galletta said he envisaged that these four issues would form the basis of interviews with SCIA staff. Access to TI material could be considered separately after analysis of other material to be provided by the NSWCC. He reiterated his request for the material sought in the 4 July 2003 letter, none of which had yet been provided.[785]

On 12 August 2003, Giorgiutti wrote to Dobson advising that a copy of the terms of reference for Mascot and Mascot II were available, along with some of the folders containing material relating to the Schedule of Debrief. A room was being made available at the NSWCC to enable Emblems investigators to review the material. He confirmed that Volta had a large volume of material which he had arranged to be brought to the NSWCC for Emblems to review. Giorgiutti advised that the NSWPF should have its own copy of 'Joint Management Team minutes', as those meetings were attended by representatives of the NSWCC, NSWPF and PIC.

For the TI material, Giorgiutti stated:

> *As I have previously indicated some of the material to which you seek access contains information in connection with and as a result of telephone intercepts. That information cannot be disseminated to you unless it relates, or appears to relate to the commission of relevant offences or acts or omissions by officers of the NSW Police that may give rise to disciplinary proceedings against that officer.*
>
> *Based on the information provided by you at the meeting of 24 July 2003 and on the face of your letter dated 5 August 2003 there appears to be no basis upon which my Commissioner could make a determination to disseminate telephone interception information to you.*
>
> *It would not be lawful for 'this issue will be addressed on a merit basis after analysis of disseminated material from your organisation' as suggested by Detective Inspector Mark Galletta.*
>
> *So that my Commissioner can make a determination as to dissemination of the intercepted material would you kindly provide all the documents that ground the complaints together with all documents that relate to any determinations made by NSW Police in relation to the complaints.*[786]

18.9 Legal advice obtained on providing access to NSWCC documents

On 5 September 2003, Emblems investigators arranged a meeting with Bradley and Giorgiutti to take place on 9 September 2003 and to be facilitated by Mr Ian Temby QC.

On 8 September 2003, a senior solicitor from the Legal Services Branch of the NSWPF wrote to Giorgiutti acknowledging the issues with the NSWCC providing TI material. The letter stated that the NSWPF considered the other material requested by Emblems could be provided by the NSWCC under section 7 of the NSWCC Act. This would be consistent with the secrecy provision in section 29 of the NSWCC Act as Emblems would be using the material for the exercise of functions under Part 8A of the Police Act.[787]

The 9 September 2003 meeting was attended by Temby, Giorgiutti, Bradley, Dobson, Galletta and other NSWPF representatives.[788] It appears that a further meeting took place on 10 September 2003 between Temby and the NSWCC.[789]

Temby was asked to provide advice to both agencies in response to specific questions they jointly posed. One question was whether and how section 29 enabled Mascot staff to answer questions from Emblems investigators. Another was how the NSWCC could provide warrant applications to the NSWPF.

785 Letter from Detective Inspector Mark Galletta, NSWPF to John Giorgiutti, Solicitor to the Commission, NSWCC, 5 August 2003, p. 2.
786 Letter from John Giorgiutti, Solicitor to the Commission, NSWCC to Assistant Commissioner Garry Dobson, NSWPF, 12 August 2003, p. 2.
787 Facsimile from [Senior Solicitor and Manager], Special Projects to John Giorgiutti, Solicitor to the Commission, NSWCC, 8 September 2003.
788 NSWPF, Complaint number [numbers], Complaint number [numbers], Complaint number [numbers], Complaint number [numbers], Complaint number [numbers], Complaint number [numbers], Investigators report by Detective Inspector M Galletta, Strike Force Emblems, 22 March 2004, p. 14.
789 NSWPF, Complaint number [numbers], Investigators report by Detective Inspector M Galletta, Strike Force Emblems, 22 March 2004, p. 14.

Temby advised that the Management Committee could approve the dissemination of information held by the NSWCC, as requested by Emblems. However, it was still a matter for the NSWCC to determine if it would do so, and – as 'the Commission' comprised only the Commissioner – the decision was Bradley's alone. On the question of whether and how the NSWCC could provide warrant applications to Emblems, Temby advised that the NSWCC – with the approval of the Management Committee under section 7 of the NSWCC Act – could disseminate the material on the basis that it was to remain confidential.[790] Temby's written advice on 11 September 2003 concluded:

> *It has been made clear to me that the Crime Commission is reluctant to make the warrant applications available. It says there is no real need for that to happen, especially as neither the Commission nor its Management Committee has been made privy to the complaints. I anticipate that if the Committee is to grant the necessary approval, and the Commission is to exercise its discretion in favour of provision, it may be necessary for NSW Police to demonstrate that there are complaints requiring statutory investigation - which is a different thing from saying that the complaints are well founded. That could be done by providing the Commission with details of the substance of a number of complaints, but not the names of complainants.*
>
> *The Police Commissioner wants to have the conduct of certain of his officers investigated. In the view of investigators that can be done in a fully effective fashion if but only if the warrant applications are made available to them. It would seem appropriate that the Crime Commission, in the spirit of comity, make them available, in the manner I have outlined, subject to the approval of its Management Committee.*[791]

Despite this advice, the NSWCC did not provide Emblems with the warrant applications. A file note prepared by Bradley records details of a meeting with the Minister for Police on 16 September 2003, which states:[792]

- In his (Bradley's) view, Emblems was established by the NSWPF without consultation with the NSWCC and Bradley was only asked subsequently whether he would cooperate.
- He (Bradley) had written to the Commissioner of Police about a rumour that he (Bradley) was obstructing the investigation, but had restated his assurance that he would cooperate – this assurance was then published by the journalist Neil Mercer.
- He (Bradley) was concerned that there was unwillingness by the complainants to accept the advice about the effect of the LD Act, and further complaints were arising as a consequence of Emblems.
- The issues Emblems were investigating were "more in the nature of a dispute than a complaint" and there had been no attempt to mediate.
- When Steve Barrett, another journalist, received a letter indicating he was not suspected of an offence, he published that letter.[793]

18.10 Emblems continues to seek documents from the NSWCC

On 17 September 2003, Galletta faxed a letter to Giorgiutti with a cover sheet headed 'Material availability'. The letter noted that Giorgiutti had stated at the meeting on 9 September 2003 that there were six folders of material available to be viewed. Galletta noted that he had made contact with another NSWCC staff member to arrange a time and place to view those folders, but had not heard back. Galletta requested advice about the earliest time this material could be made available.[794]

On 19 September 2003, a senior solicitor from the Legal Services Branch of the NSWPF again wrote to Giorgiutti advising that he had now had the opportunity to consider the Temby advice of 11 September 2003. He suggested that legal officers from both agencies should meet to work out a procedure for allowing Emblems access to the information it required. He also sought access to the six folders of material.[795]

790 Ian Temby QC, Proposed Dissemination of Information by NSWCC to Strike Force Emblems: Advice, 11 September 2003.
791 Ian Temby QC, Proposed Dissemination of Information by NSWCC to Strike Force Emblems: Advice, 11 September 2003.
792 Phillip Bradley, File note, *Meeting with Minister for Police re: Task Force 'Emblems'*, NSWCC, 16 September 2003.
793 Phillip Bradley, File note, *Meeting with Minister for Police re: Task Force 'Emblems'*, NSWCC, 16 September 2003.
794 Facsimile from Detective Inspector Mark Galletta, NSWPF to John Giorgiutti, Solicitor to the Commission, NSWCC, 17 September 2003.
795 Facsimile from [Senior Solicitor and Manager], Special Projects Section to John Giorgiutti, Solicitor to the Commission, NSWCC, 19 September 2003.

On 27 September 2003, the same NSWPF senior solicitor sent a fax to Giorgiutti indicating he was about to go on leave – and asking for a response to his previous letter and two telephone messages of 25 and 26 September 2003. He gave details of another solicitor to contact in his absence.[796]

On 7 October 2003 Bradley, Moroney, the Staff Officer to the Commissioner of Police, and Les Tree (Director General of the Ministry for Police) met about Emblems. A file note of the meeting – on NSWCC letterhead and headed 'Task Force Emblem' [sic]– recorded that it was unlikely Emblems would complete its investigation within the next three months and that:

- there was a 'problem with documents'
- there was discussion of the Temby advice
- documents were still with Volta
- there had already been one leak to the media.

The file note also stated that Bradley had indicated that the end result was unlikely to "satisfy anyone" – the issue revolved around an affidavit so conciliation may be an option and the Police Association should possibly be involved – and Moroney would speak to the Police Association after a briefing from Dobson.[797]

18.11 Media article and preliminary Emblems report (October 2003)

Galletta completed a preliminary report of Emblems on 16 October 2003, in which he identified the following as a major issue:

> *Information at hand manifests an overwhelming inference that would indicate prima facie criminal allegations surrounding the affidavit and the inappropriate operational practices displayed by the SCIA investigators & M5 which impact on the accuracy and the authenticity of the affidavits.*[798]

The preliminary report concluded:

> *... there is overwhelming information to support prima facie criminal allegations in that the subject affidavit may contain false information and there has been an abuse of due process.*[799]

It is not clear exactly what information Galletta accessed to form this view as the NSWPF had not been given access to the supporting affidavit for LD warrant 266/2000.

On 20 October 2003, Barrett wrote an article that appeared in *The Australian*. It opened with the following paragraphs:

> *The NSW Crime Commission has refused to co-operate with a special police strike force investigating complaints about an extensive police bugging operation.*
>
> *The Australian has been told the crime commission has declined to give crucial documents to Strike Force Emblems, the investigation team set up in July this year.*
>
> *As a result, the work of the eight-member strike force has stalled because the documents at the heart of the investigation – affidavits that convinced a judge to allow the bugging to take place – have not been handed over.*[800]

The article went on to state that the NSWCC would not comment, but that the Police Minister stated that he had been told that the NSWCC "was cooperating".

796 Facsimile from [Senior Solicitor and Manager], Special Projects Section to John Giorgiutti, Solicitor to the Commission, NSWCC, 27 September 2003.
797 Unknown author, File note, *File note Task Force Emblem*, NSWCC, 8 October 2003.
798 NSWPF, Preliminary Report for Strike Force Emblems, Executive Summary, Detective Inspector M. Galletta, Strike Force Emblems, 16 October 2003, p. 1.
799 NSWPF, Preliminary Report for Strike Force Emblems, Executive Summary, Detective Inspector M. Galletta, Strike Force Emblems, 16 October 2003, p. 2.
800 Barrett, Steve, 'Crime body hampers police bugging inquiry', *The Australian*, 20 October 2003.

Operation Prospect reviewed the NSWPF e@gle.i[801] holdings for Emblems. They contained an Investigators Note filed electronically on 20 October 2003 attaching Barrett's article. The note stated that an Emblems investigator had been contacted by Barrett on 19 October 2003, as he:

> *... wished to inform SF Emblems (as per continued agreement) that an article would be published in his paper on Monday the 20th of October 203* [sic]*. ... He briefly indicated it would be about NSWCC's opposition to supplying SF with relevant documents.*

The Investigators Note continued:

> *From the early stages of this investigation Mr Barrett had informally agreed not to publish any articles that may hamper the negotiation process between SF and the NSWCC for the production of documents. Because of this agreement, he is and was aware, that documents have not been produced by the CC to date. Mr. Barrett has respected this agreement up until now however, he stated his commitment to his employer now takes precedence.*
>
> *See attached article from 'The Australian' dated Monday the 20/10/2003.*[802]

A status report to Moroney from the ECMT [803] dated 21 October 2003 stated that Dobson and Galletta had informed the ECMT that the investigation had progressed, but they could not proceed further without the cooperation of the NSWCC.[804]

On 22 October 2003, Bradley wrote to Moroney noting that – after Bradley had written to the NSWPF indicating he would cooperate with Emblems – his undertaking was later reported by Mercer in the *Sydney Morning Herald*.[805] Bradley stated that the NSWCC had cooperated but progress had been slow due to the work done by Volta, legal restrictions, and because the NSWCC had not had access to the terms of the complaints that Emblems was investigating. Bradley stated:

> *Co-operation does not mean that the commission will hand over all documents regardless of the provisions of the Crime Commission Act, the Telecommunications (Interception) Act, the interests of the PIC, public interest immunity and legal convention.*[806]

In the letter, Bradley reiterated his concerns about the sensitive nature of documents and the "continued leaking of information". He noted that he had received questions from journalists about the specifics of the Mascot investigations as had the Police Minister, and that an article had appeared the day before in *The Australian*. Bradley stated:

> *Apparently Mr Barrett and others are being kept well informed of the status of the Emblems investigation. The recurring issue of my co-operation, or lack of it, is again specifically raised.*
>
> *…*
>
> *I am not confident that the Commission can disseminate information without it falling into the hands of those who are talking to journalists.*
>
> *The irony of this is that those seeking access to the information are apparently accusing the Commission of preventing access on the basis of the secrecy provisions. Yet I cannot get access to complaints in order to make up my mind whether the information can be properly handed over. It is also ironic that the complaints apparently assert or imply that officers within Mascot abused their position in order to settle old scores or at least prejudice the position of antagonists. There is now an inference available that the Emblems exercise is retaliatory.*
>
> *…*

801 The NSWPF investigations database.
802 NSWPF, Investigators Note, Article published in *The Australian* by Barrett (extracted from Emblems brief), 20 October 2003.
803 The complaints management team that was monitoring the Emblems investigation.
804 NSWPF internal memorandum from Executive Complaint Management Team to Commissioner, 'Strike Force Emblems - Status Report', 21 October 2003.
805 Mercer, Neil. 'Petty thieves beware: the secret police could seize your home', *Sydney Morning Herald, 29* July 2003, p. 4.
806 Letter from Commissioner Phillip Bradley, NSWCC to Commissioner Ken Moroney, NSWPF, 22 October 2003.

> *Since we last spoke, I have even less confidence that this matter can be handled appropriately or that confidentiality will be preserved. You indicated that you would investigate other options. I would be interested to know whether you have found any*.[807]

On 20 November 2003, the NSWPF wrote to Giorgiutti requesting access to the Mascot source material now that Volta had finished with it.[808]

18.12 Alternative resolution options discussed

File notes that Bradley prepared about two telephone conversations he had on 1 December 2003 refer to discussions between the Commissioners of the NSWPF and the NSWCC about options for resolving the complaints that were before Emblems.

The first conversation Bradley had was with Officer F, whose investigation by Mascot is examined in Chapter 10. Officer F expressed concern to Bradley that Emblems had been "stonewalled". [809] Bradley advised of a number of problems – including that Emblems was behaving "as though they were doing the bidding of the aggrieved parties",[810] Bradley's statements had been leaked to the media, and the NSWCC had not been given copies of the complaints Emblems had received. The file note includes discussion of Officer F's concern that he was targeted by Mascot.

Bradley noted that he told Officer F he had met Moroney and been advised that Emblems was disbanded. The NSWCC and NSWPF were "[l]ooking for alternative such as conciliation ... or another independent"[811] to address the issues. Officer F told Bradley he had received a letter from the NSWPF saying he (Officer F) had done nothing wrong and would not be interviewed. Bradley advised that he was not a party to that. Officer F said he could not understand how Mascot could have launched an investigation into him that included (according to Giorgiutti) Officer F's house, car, telephone and surveillance – and yet he was never interviewed by Mascot about the allegations.[812]

The second relevant telephone conversation Bradley had on 1 December was with Moroney. He advised Bradley that he had received the volumes of material from Emblems and that his recollection was that once Volta had finished it could pass on material to Emblems. Bradley noted that he advised Moroney of his recollection from the "CEO's meeting", [813] that Emblems was to be disbanded, alternatives ways of settling the dispute would be considered, and Emblems would refer their brief to the ODPP. Bradley said there were problems with providing information to Emblems that related to TI material, public interest immunity, PIC and affidavit material. Bradley noted that Moroney asked him if the NSWCC was refusing to provide the information on that basis. Bradley recorded that he replied: "that is my informal position based on my attitude to Emblems and the fact that they did not seem disinterested as an IA inquiry should be".[814]

Moroney's evidence to Operation Prospect was that in his telephone call with Bradley on 1 December 2003 he took Bradley to be refusing to provide the material to the NSWPF. Moroney agreed with the proposition that before that point he had felt there was a subtle failure by the NSWCC to provide the material as opposed to an actual refusal, but on this date he considered it was an actual refusal to provide the material.[815]

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807 Letter from Commissioner Phillip Bradley, NSWCC to Commissioner Ken Moroney, NSWPF, 22 October 2003.
808 Facsimile from [Senior Solicitor and Manager], Special Projects Section to John Giorgiutti, Solicitor to the Commission, NSWCC, 20 November 2003.
809 Phillip Bradley, File note (unsigned), NSWCC, 1 December 2003, p. 1.
810 Phillip Bradley, File note (unsigned), NSWCC, 1 December 2003, p. 1.
811 Phillip Bradley, File note (unsigned), NSWCC, 1 December 2003, p. 1.
812 Phillip Bradley, File note (unsigned), NSWCC, 1 December 2003, p. 1.
813 Phillip Bradley, File note (unsigned), NSWCC, 1 December 2003, p. 2.
814 Phillip Bradley, File note (unsigned), NSWCC, 1 December 2003, p. 2.
815 Ombudsman Transcript, Ken Moroney, 21 October 2014, pp. 2404-2405.

18.13 Initial discussions about referring Emblems conclusions to the DPP

On 23 December 2003, Giorgiutti replied to the NSWPF's letter of 20 November 2003 that had requested access to the Mascot source material. Giorgiutti wrote that the NSWCC had been "surprised" to receive that letter, given the discussions between Bradley and Moroney during which they had expressed shared concerns about Emblems. Giorgiutti referred to Moroney's advice that Emblems had reported there was an "overwhelming prima facie case for prosecution", that he was directing Emblems to refer the brief of evidence in support of the prima facie case to the DPP, and that Emblems was to be disbanded.[816]

An internal memo by Dobson dated 23 December 2003, and endorsed by the Chair of the ECMT on 24 December 2003, detailed ongoing issues in attempting to address the complaints:

> *The principal aim of Strike Force Emblems has been to find a means to resolve the dispute arising from the complaints made relating to Warrant 266/2000. To date that has been impossible due to a lack of information to form a conclusive view. Indeed it is arguable that inferences can be drawn from the available data that may indicate impropriety on the part of person or persons involved in the conduct of Operation Mascot. The provision of quality information may dispel that inference.*[817]

Dobson noted that – although the NSWCC had provided a number of Schedules of Debrief with specific allegations – it had still not provided the supporting material for the warrant, despite several formal requests. To resolve the matter, Dobson suggested that information could be provided about people who were named on the warrant but for whom there was no justification in the supporting affidavit, no mention in the Schedule of Debrief, no CIS[818] and no other material to indicate why they were named.

Dobson's memo also included an assessment of the information held by Emblems. As to whether there was sufficient information to provide to the DPP to consider criminal proceedings, Dobson commented:

> *It is the view of Emblems investigators that there is nothing more than an inference at this point in time and on the basis of existing evidence to suggest that corrupt conduct has occurred. This is insufficient to warrant consideration of proceedings against any officer.*[819]

Dobson recommended that Moroney write to Bradley seeking the release of information and further authorisation for Volta to release information.[820]

On 5 January 2004, Moroney wrote to Bradley expressing his understanding of their mutual desire to resolve these matters in a "timely, ethical and transparent manner". Moroney outlined the reasons that Emblems was established on 3 July 2003 and noted that it had had limited access to information since that date. He indicated that it was his intention that Emblems be given access to information including material from Volta, but for that to occur the NSWCC needed to disseminate that material in line with the resolution of the Management Committee under section 7 of the NSWCC Act on 30 July 2003.

Moroney's letter also noted that at the meeting on 9 September 2003 – attended by Bradley, Deputy Commissioner Madden, Temby and others – there was agreement that such dissemination would be forthcoming. Moroney advised that Emblems had analysed the information they had been given and identified that 60 individuals named on LD warrant 266/2000 could be justified. This assessment was based on a range of criteria including recorded criminal convictions before the date of the warrant, detailed disclosure in the Schedule of Debrief or in interviews with Sea, the person named being attached to the Manly Local Area Command at the time or being involved in the PIC enquiry.

816 Letter from John Giorgiutti, Solicitor to the Commission, NSWCC to [Senior Solicitor and Manager], Special Projects, NSWPF, 23 December 2003, p. 1.
817 NSWPF internal memorandum from Assistant Commissioner Garry Dobson to Chair, Executive Complaints Management Team and Commissioner Ken Moroney, 23 December 2003.
818 Complaint Information System – the precursor to c@ts.i.
819 NSWPF internal memorandum from Assistant Commissioner Garry Dobson to Chair, Executive Complaints Management Team and Commissioner Ken Moroney, 23 December 2003, p. 1.
820 NSWPF internal memorandum from Assistant Commissioner Garry Dobson to Chair, Executive Complaints Management Team and Commissioner Ken Moroney, 23 December 2003.

Moroney's letter noted there were a further 54 individuals – listed in a schedule attached to the letter – for whom Emblems investigators could not identify any reasonable evidence to justify their inclusion on the warrant. Of those, 40 individuals were not mentioned in the Schedule of Debrief, and 28 of those 40 had also not been mentioned in any interview with Sea. The letter sought Bradley's "urgent support and assistance" in providing Emblems with an explanation or information that may assist them to determine the justification for those individuals being included. He expressed his belief that if that was done, the outstanding issues in the complaints might be resolved. Also, "without the latter information it is not possible to engage the complainants in any meaningful resolution of their complaints".[821]

Finally, Moroney also raised his and Bradley's earlier discussions with the Director General of the Ministry for Police about the "prospect of an Independent Person reviewing the subject material". The current PIC Inspector was mentioned at the time as an option. Moroney noted that the Director General was to pursue that option, but nothing further had been heard.

On the same day (5 January 2004), Moroney wrote to the NSWPF Deputy Commissioner (Operations) advising of his letter to Bradley. Moroney expressed his concern at "what appears to be a leaking of information to the media",[822] noting that it would be unacceptable if the leak had come from serving police officers. He suggested that Dobson should meet with Bradley to discuss this if they had not already done so.

Moroney then quoted from the preliminary report that Galletta had submitted on 21 October 2003. That report said there was sufficient information to support prima facie criminal allegations "in that the subject affidavit may contain false information and that there has been an abuse of due process".[823] Moroney advised that – on the basis of Galletta's experience, opinions and analysis – there should be consultation with the Director, Legal Services to refer the matter to the ODPP.[824]

On 15 January 2004, Bradley responded to Moroney's letter. Bradley noted that "When the matter was last discussed at the CEO's meeting, it was agreed that, given the Strike Force had advised you in writing that there is an overwhelming *prima facie* case for prosecution, the brief would be referred to the DPP".[825] Bradley reiterated that Moroney had indicated previously that Emblems was to be disbanded. Bradley suggested that if that course of action was to be abandoned, "I think we should put that before the next CEO's meeting"[826] and that Moroney's letter be circulated before the meeting.

Bradley further stated that his recollection of the meeting of 24 July 2003 differed from that of Dobson's, noting that it has "always been the case that the inclusion of the names on the warrant need not flow from the SOD's but in some cases are a requirement of the statute". Bradley acknowledged that there had been earlier discussions about an independent person reviewing the material, but also noted that he had not been advised if that had been advanced. He signed off: "For reasons which I have previously mentioned, I am less sanguine about the prospects of satisfying the complainants".[827]

When Galletta was interviewed by Operation Prospect, he stated that by late February 2004 Emblems became aware that Bradley:

> *… had less confidence in us to do it, ah, doing a ... prudent investigation and perceived it to be a retaliatory investigation ... and soon as those comments were made in the letter, that's when the shutters came down about - from everybody. Everyone just pulled it down and it was, you know, all the strategies ... all the things that we investigate and planned that we wanted to do didn't go anywhere. No further headway were* [sic] *made, you know, we - I think we were closed down on official on the 18th of February, which, you know, was within three weeks of these letters from Bradley to Moroney.*[828]

821 Letter from Commissioner Ken Moroney, NSWPF to Commissioner Phillip Bradley, NSWCC, 5 January 2004, pp. 2-3.
822 Letter from Commissioner Ken Moroney, NSWPF to Deputy Commissioner, Operations, NSWPF, 5 January 2004, pp. 1-2.
823 Letter from Commissioner Ken Moroney, NSWPF to Deputy Commissioner, Operations, NSWPF, 5 January 2004, pp. 1-2.
824 Letter from Commissioner Ken Moroney, NSWPF to Deputy Commissioner, Operations, NSWPF, 5 January 2004, pp. 1-2.
825 Letter from Commissioner Phillip Bradley, NSWCC to Commissioner Ken Moroney, NSWPF, 15 January 2004, p. 1.
826 Letter from Commissioner Phillip Bradley, NSWCC to Commissioner Ken Moroney, NSWPF, 15 January 2004, p. 1.
827 Letter from Commissioner Phillip Bradley, NSWCC to Commissioner Ken Moroney, NSWPF, 15 January 2004, p. 1.
828 Ombudsman Transcript, Mark Galletta, 18 July 2013, pp. 36-37.

18.14 Bradley's evidence about releasing documents to Emblems

Bradley was asked by Operation Prospect what he perceived to be the issues with disseminating the material, given that he could do so relying on the resolution of the Management Committee. He stated:

> *Well, we couldn't disseminate against a blanket request, 'Give us everything you've got on Mascot.' If there was a basis for it and they said what they were interested in, then we could easily identify the material that they needed.*[829]

Bradley confirmed that he could have released the affidavits if he had so wished and that the decision would be his alone. He confirmed that he did not require further approval.[830] However, he had decided that the affidavits ought not be provided, and he wanted Emblems to tell him what its terms of reference were, and:

> *... what it is you seek, I'll provide to you the material that supports the inclusion of the names in the warrant. I won't, at this stage, provide you with the affidavit itself. I'm holding the line on that, but if the information we provide to you is insufficient for your purposes, you can come back.*[831]

Bradley expressed his view that Emblems was "conducting a campaign against individuals and the Crime Commission, which I didn't want to happen".[832] He stated:

> *Galletta and others were very outspoken about the Crime Commission and the fact that we weren't cooperating ... I didn't regard them as a legitimate professional investigation. I looked at it as a - it's probably putting it too high, but a form of retaliation for the perceived inappropriateness of elements of Mascot ...*[833]

Bradley stated that he formed this view because of the large number of resources diverted to the Emblems investigation, and because his communications with the Chief of Staff of the Commissioner of Police and others were published in newspapers:[834]

> *... even today, you know, it's been described as the New South Wales Watergate, which it clearly isn't, all of which I found to be a bit disturbing, and I didn't want to be a part of it, and I wasn't going to allow them to traduce the Crime Commission through such methods. Now, that might be an overreaction, and I've said to you before that if I'd given them what they wanted and they'd written their report and we'd torn it to pieces, it would be all over 14 years ago or something, at least 10 years ago anyway, and all of this wouldn't have been necessary. But certainly I was resistant to cooperating with them at a point after a little while, and they were for their part behaving unprofessionally in my view.*[835]

Bradley stated in evidence that he thought the complainants had a genuine grievance and, to the extent they could be placated, he would have assisted. However, he thought the Emblems investigation was overkill and when Moroney told him he had been advised there was a prima facie case for a brief of evidence, his reaction was: " 'Well, tell them to put up or shut up,' and they wanted to refer it to the DPP, and I said, 'Good. Let's do that' ".[836]

829 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 3077.
830 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 3080.
831 Ombudsman Transcript, Phillip Bradley, 24 November 2014, pp. 3080-3081.
832 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 3076.
833 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 3075.
834 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 3075.
835 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 3075.
836 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 3076.

18.15 Referral of Emblems to the Director of Public Prosecutions to consider sufficiency of evidence

On 4 February 2004, Galletta made a file note on e@gle.i indicating that he had discussed with Dobson referring Emblems to the DPP, after having been told about the conversations between Moroney and Bradley:

> *S/F Emblems believe there is insufficient evidence to refer to the DPP to the following reasons:*
>
> 1. *The most significant proof of the offences pertains to the affidavit. Emblems have not viewed that document. The affidavit has not been analysed to establish if any falsity does exist.*
> 2. *The deponents* [name and name] *cannot be interviewed as NSWCC has not allowed these officers to be interviewed due to the secrecy provisions that bind them under S29.*
> 3. *The interviews obtained from the current-serving complainants at this time have been conducted as Departmental interviews and would not be admissible in evidence at court. (Due to no jurat). However, an adoption statement containing the required jurat can rectify this. All interviews obtained by investigators have been with limited information because of the secrecy provisions surrounding NSWCC documentation and investigators [sic] non-possession of the subject affidavits and source material.*
> 4. *As indicated, strike force investigators have not established any direct evidence of criminal offences committed by any person.*

Galletta then noted that the matter had been handed to NSWPF Legal Services for assessment.[837]

The Ministry for Police (through the Director General, Les Tree) had been briefed on the complaints and progress of Emblems since about September 2003. This included discussion of how to respond to media enquiries and questions on notice in Parliament. Discussions between Tree, Moroney and Bradley about an independent arbitrator were a recurring theme. In late February 2004, Moroney emailed Tree seeking "the availability of an external source to review the documentation held by the NSWCC under the Mascot/Florida reference", with the hopes of "one last chance of resolving this issue from the amicable perspective of the complainant officers".[838]

Tree responded that he did not think the matter could be resolved by the new Inspector of the PIC looking at the matter, given that the report by the previous PIC Inspector did not satisfy the aggrieved parties. Tree stated: "On balance I think it best if nothing more is done outside the internal processes".[839] This email chain was forwarded by Tree to Bradley, who forwarded the matter to Giorgiutti noting that the Commissioner of Police had advised Tree that he will refer the matter to the Ombudsman.[840]

On 25 February 2004, Dobson wrote to Bradley outlining the history of the complaints assigned to Emblems and informing him that a further matter had now been allocated for investigation. It was that members of the SCU induced a NSWCC informant to breach his bail conditions. Dobson sought access to material relating to that allegation, which he understood had already been given to a detective in the ITU. Dobson also noted that Emblems wished to interview the informant, involved officers and witnesses and he sought authority from the NSWCC to do so.[841] Bradley referred the letter to Giorgiutti who was on leave until 8 March 2004.[842]

837 Mark Galletta, File note, *Submission to Legal Services for Referral to the DPP*, NSWPF, 6 February 2004.
838 Email from Commissioner Ken Moroney, NSWPF to Director-General Les Tree, Ministry of Police, 22 February 2004.
839 Email from Director-General Les Tree, Ministry of Police to Commissioner Ken Moroney, NSWPF, 24 February 2004.
840 Email from Director-General Les Tree, Ministry of Police to Phillip Bradley, NSWCC, 24 February 2004.
841 Facsimile from Assistant Commissioner Garry Dobson, NSWPF to Commissioner Phillip Bradley, NSWCC, 25 February 2004.
842 Facsimile from [name], Administration Manager, NSWCC to Assistant Commissioner Garry Dobson, NSWPF, 26 February 2004.

By this stage, the following Questions on Notice about Emblems had been posed to the Minister for Police in the NSW Parliament:

> *(1) What is the status of the investigation as at 25 February 2004?*
>
> *(2) How many investigators have worked on this Strikeforce and over what period?*
>
> *(3) What is the cost of the investigation to date?*
>
> *(4) Have investigators on Strikeforce Emblems been denied access to affidavits underpinning listening device warrants which are alleged to have been improperly obtained?*
>
> *(5) As Minister and a member of the NSW Crime Commission Management Committee, will you intervene to ensure that Strikeforce Emblems is given full access to all documentation they require including affidavits used to secure listening device warrants?*
>
> *(6) How many individual listening device warrants is Strikeforce Emblems investigating?*
>
> *(7) In the last two years, what other Strikeforces have investigated alleged misuse of listening device warrants and were they given access to the affidavits that underpin the warrants?*
>
> *(8) What were the findings of the Strikeforces in (7) above?* [843]

On 27 February 2004, Bradley sent an internal email to Giorgiutti, Standen and NSWCC Assistant Director Tim O'Connor with the subject line 'Emblems'. He indicated that he had received a fax from the Ministry for Police which set out the Questions on Notice in Parliament. He noted that the timing was "interesting":

> *No sooner are we notified of the fact that the COP has shut down this aspect of the inquiry, than the same issues get raised in parliament. in* [sic] *my view this is further evidence that the Emblems people are not conducting an independant* [sic] *internal investigation but are running a campaign on behalf of the complainants and cannot be trusted with the type of info which was collected in Mascot. I have put this view to KM*[844] *on many occasions following media reports of discussions which i* [sic] *had thought were confidential.*
>
> *We have not seen the briefing wherein they allegedly asserted that there was a prima facie criminal brief nor was the brief referred to the DPP as decided at the meeting with the Minister. THat* [sic] *was the same meeting at which we were informed that Emblems had been shut down and returned to their respective patrols. I undestand* [sic] *that they are also making submissions about the cc and amending our Act to remove the secrecy restrictions on the police. I wonder which part of their brief this comes from.*[845]

On 8 March 2004, the NSWPF Director of Legal Services wrote to Dobson about "legal advice regarding Strike Force Emblems investigation". He referred to the attached papers (the preliminary Emblems report) and stated:

> *Before being able to properly advise, I must be supplied with an appropriate, full brief of evidence, including statements.*
>
> *After an initial examination of the attached papers, I have formed a preliminary view (without examining any brief of evidence) that there is difficulty in proceeding without a detailed examination of the affidavits and supporting source materials.*[846]

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843 NSW Legislative Assembly Questions and Answers Paper No 57, *1522: Peter Debnam MP to Minister for Police*, 26 February 2004, p. 2166.

844 Taken to be a reference to Ken Moroney, Commissioner of Police.

845 Email from Commissioner Phillip Bradley, NSWCC to John Giorgiutti, Solicitor to the Commission, NSWCC, Mark Standen, Assistant Director Investigations, NSWCC, Tim O'Connor, Assistant Director Investigations, NSWCC and [name], Administration Manager, NSWCC, 27 February 2004.

846 NSWPF internal memorandum from Michael Holmes, Director, Legal Services to Commander Garry Dobson, 8 March 2004.

18.16 Emblems discontinued (March/May 2004)

On 19 March 2004, Bradley sent a memo to the Management Committee advising that the NSWCC had been told by the head of SCIA that Emblems had been discontinued. Bradley stated: "One of the central difficulties with this matter was the inability of the Task Force to gain access to the material grounding Listening Device warrants". He noted that this was the subject of an earlier resolution by the Management Committee. He also noted that there were a number of "related actions" by people named in the warrants under the *Freedom of Information Act 1982 (Cth)* and in the Industrial Relations Commission.[847]

On 11 May 2004, the PSM told the Deputy Commissioner (Operations), Commissioner Moroney and the Ministry of Police that Emblems had been finalised and the investigation staff returned to their individual commands. He noted that the Deputy Commissioner (Operations), Dobson and Galletta had met with representatives of the Police Association on 6 May 2004 to brief them on the investigation outcomes in the final report of Emblems. He also advised that complainants would be individually spoken to over the coming two months. The Deputy Commissioner (Operations) made a notation on the PSM's briefing memo: "This report contains significant information on complainants and methodologies. It should be treated with strict confidentiality at all times. Protection of IPCs must be guaranteed" (IPC refers to internal police complainants).

Despite the relative lack of information available – and without having seen the affidavits sworn in the course of obtaining Mascot warrants 95/2000 and 266/2000 – the Emblems report concluded that:

- Criminal conduct may have occurred in relation to the supporting affidavits for LD warrants 95/2000 and 266/2000, which would have been due at least in part to the alleged inappropriate operational practices at SCIA and Mascot.[848]
- SCIA and Mascot had relied extensively on electronic surveillance rather than traditional forms of investigation, which had "a catastrophic impact on internal investigations and on the NSW Police Force".[849]
- Serious questions existed about the legality of the warrants, the corresponding affidavits and the deployment and operational activities of Sea (with the proviso that this finding was based on the limited material reviewed and was reached in the absence of any form of rebuttal).[850]
- The NSWCC's role in Mascot meant that culpability should not be borne solely by the NSWPF.[851]

The Emblems report made six recommendations, some of which required legislative amendment or actions by agencies other than the NSWPF.

An internal review of the Emblems report observed that inferences of corrupt conduct had been drawn without accessing the key documents that could confirm or refute those inferences, and the report's findings were based on conjecture rather than evidence.[852] The information available to Operation Prospect indicates that the Emblems recommendations were not generally supported in 2004 and were not implemented.[853]

Commissioner Moroney made a notation on the final report indicating that the issues considered may also be relevant to the Management Committee. Tree, on behalf of the Ministry of Police, made a notation: "Given the complaint investigation has been finalised. No further action is required".[854]

847 NSWCC internal memorandum from Commissioner Phillip Bradley to Management Committee, 19 March 2004.
848 NSWPF, Complaint number [numbers], Investigators report by Detective Inspector M Galletta, Strike Force Emblems, 22 March 2004, p. 27.
849 NSWPF, Complaint number [numbers], Investigators report by Detective Inspector M Galletta, Strike Force Emblems, 22 March 2004, p. 28.
850 NSWPF, Complaint number [numbers], Investigators report by Detective Inspector M Galletta, Strike Force Emblems, 22 March 2004, p. 36.
851 NSWPF, Complaint number [numbers], Investigators report by Detective Inspector M Galletta, Strike Force Emblems, 22 March 2004, p. 36.
852 NSWPF internal memorandum from Assistant Commissioner Carroll to The Professional Standards Manager, 28 June 2004, p. 2.
853 NSWPF internal memorandum from Assistant Commissioner Carroll to The Professional Standards Manager, 28 June 2004; Inspector of the Police Integrity Commission, *Review and Report to the Minister of Police – Strike Force Emblems*, November 2012.
854 NSWPF internal memorandum from the Professional Standards Manager to Deputy Commissioner (Operations), Commissioner Ken Moroney, NSWPF, Ministry of Police and Minister of Police, 11 May 2004.

Emblems was discussed at the Management Committee meeting on 8 July 2004. Moroney advised that the NSWPF was in the process of debriefing each of the complainants and having them sign release forms so that the report could be made available to the Management Committee. Moroney advised that, although the report came to a number of conclusions, the lack of access to documents meant the NSWPF was unable to pursue the enquiry further. The Police Minister asked that the report be tabled at the next Management Committee meeting for discussion and a decision made about whether any action would be taken.[855] The minutes of the 8 July 2004 Management Committee meeting state that Moroney would table the Emblems report at the following meeting.

On 9 July 2004, the office of the Minister for Police faxed Bradley a draft letter – which had been prepared for Moroney's signature – to be sent to affected officers.[856] It read as follows:

' '

Dear

Re: Investigation of complaint concerning inclusion of
your name on Listening Device Warrant 226 [sic] *of 2000*

I am writing in response to your complaint pertaining to the subject matter and to acknowledge the concerns which you expressed.

I established Strike Force Emblems on 3 July 2003 under the leadership of Commander Garry Dobson, Detective Inspector Mark Galletta and a number of other senior detectives.

The decision to form the Strike Force was taken as a direct result of a number of complaints made with respect to the circumstances surrounding the issue of Listening Device Warrant number 266 of 2000 which contained the names of one hundred and fourteen (114) people. However, it has always been my desire to resolve this issue in a timely, ethical and transparent manner.

May I assure you that the Strike Force has exhaustively examined information available to it in the best endeavour to achieve a proper outcome. Notwithstanding its best efforts in relation to the issues relating to you, the Strike Force has been unable to determine in a conclusive manner the circumstances that lead [sic] *to the inclusion of your name on the particular Listening Device Warrant.*

As a result, I have decided on the information before me, to wind up the work of the Strike Force. May I say in recognising the impact that this decision may have on those persons named in the warrant, I have requested Commander Dobson and Detective Inspector Galletta to invite you to meet with them to discuss the circumstances of the investigation which they have undertaken.

I trust that this action may ultimately assist to resolve the matters of concern to you as soon as possible.

Yours faithfully

[blank space for signature]

K E Moroney APM
Commissioner of Police [857]

Operation Prospect has not been able to establish if this letter was finalised, if it was sent to anyone, and what input Bradley may have had to the letter or the process.

855 NSWCC, *Confidential Minutes of the One Hundred and Seventy Sixth Meeting of the Management Committee of the New South Wales Crime Commission*, 8 July 2004, p. 2.
856 Facsimile from [staff member], Office of the Minister for Police to Commissioner Phillip Bradley, NSWCC, 9 July 2004.
857 Facsimile from [name], Office of the Minister for Police to Commissioner Phillip Bradley, NSWCC, 9 July 2004.

Moroney did not table the Emblems report at the following Management Committee meeting on 26 July 2004,[858] but did so at the meeting on 26 August 2004 – along with a suggestion that it be discussed at the next meeting after members had read it.[859] Moroney advised that he would like Dobson to speak to the meeting about the report, and that the Police Association had asked for a copy. Bradley indicated that he did not want to commit to a discussion with Dobson at that stage and that the Emblems investigation was "conducted in a way which concerned him and that there were many leaks to the press during its course". Bradley undertook to provide advice about the report.[860]

Minutes of the Management Committee meeting of 27 September 2004 show that there was a "lengthy discussion about the Emblems report".[861] Bradley indicated that he had read the report and prepared a report of his own perception of events. He said he did not think the Management Committee should be addressed by the authors of the report, given the lack of precedent for such an event and because he had concerns about the investigation itself.

According to the minutes, Moroney said that he was required to take some action as the report indicated that some form of corrupt conduct had occurred. Moroney thought that Dobson and Galletta should be inducted as members of staff of the NSWCC, sworn to secrecy, and shown the contents of the affidavit. Bradley stated that he would not be prepared to do that – given the leaks that had occurred during the life of Emblems, and the pressure that would be brought to bear on Galletta and Dobson to disclose what they had read. Bradley made it clear that he was not accusing either of them of specifically leaking information, but they had produced a report which in his view was not balanced.[862]

After discussions, the Management Committee resolved that the matter be referred to the DPP by Moroney for advice on sufficiency of evidence.[863]

Bradley told Operation Prospect that he thought ultimately the matter was not referred to the DPP. This was because at its core Emblems was:

> *... overstating their position, they didn't have evidence to support criminal conduct from whatever source, including leaked affidavits … it would be objectively considered by the DPP and be knocked out for insufficiency, and ... Well, they ultimately withdrew from that position because they just didn't have any feathers to fly with in my view.*[864]

He rejected the suggestion that he was trying to manipulate Emblems into sending documents to the DPP which he knew were incomplete, which would lead the DPP to say there was insufficient evidence to proceed.[865]

858 NSWCC, *Confidential Minutes of the One Hundred and Seventy Seventh Meeting of the Management Committee of the New South Wales Crime Commission*, 26 July 2004.
859 NSWCC, *Confidential Minutes of the One Hundred and Seventy Eighth Meeting of the Management Committee of the New South Wales Crime Commission*, 26 August 2004.
860 NSWCC, *Confidential Minutes of the One Hundred and Seventy Eighth Meeting of the Management Committee of the New South Wales Crime Commission*, 26 August 2004, p. 6.
861 NSWCC, *Confidential Minutes of the One Hundred and Seventy Ninth Meeting of the Management Committee of the New South Wales Crime Commission*, 27 September 2004, p. 5.
862 NSWCC, *Confidential Minutes of the One Hundred and Seventy Eighth Meeting of the Management Committee of the New South Wales Crime Commission*, 26 August 2004.
863 NSWCC, *Confidential Minutes of the One Hundred and Seventy Ninth Meeting of the Management Committee of the New South Wales Crime Commission*, 27 September 2004, p. 6.
864 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 3081.
865 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 3082.

18.17 Bradley's submission to the Management Committee

On 28 September 2004, Bradley created a long file note recording the reasons behind his submission to the Management Committee the previous day.[866] His file note is consistent with the minutes of the Management Committee meeting regarding his concerns about leaking and that the report was unbalanced. Bradley's general view was that the investigation was a "campaign, rather than an impartial investigation by disinterested professionals".[867] He also noted his concern that the report "distorted the facts, was selective about things that it had included, and things that it had excluded. On this basis it betrayed a biased position".[868]

Bradley further recorded that he felt previous communications from Emblems to complainants were distorted, and reflected poorly on the NSWCC. He also noted that the Emblems report omitted any reference to the legal position under the LD Act, including the position taken by the PIC Inspector and the Crown Solicitor about naming people in warrants. Bradley recorded that, during the meeting, the Ministry for Police suggested referring the matter to the DPP – as originally proposed by the NSWPF – but Moroney told the meeting that the authors had now retreated from that position,[869] which Bradley found "worrying".

An attachment to Bradley's file note detailed the history of the NSWCC's responses to the Emblems investigation, specifically citing correspondence and discussions at the meeting on 9 September 2004. The attachment concluded:

> *I have concerns about Strike Force Emblems. I understand that those concerns are shared by the Commissioner of Police. Those concerns may be summarised as an apprehension that the operations of that Task Force are more in the nature of a campaign (partly conducted in the media) on behalf of complainants who are colleagues, rather than an objective investigation by disinterested professionals. Because of those concerns, I cannot provide highly confidential information to that Task Force.*[870]

Moroney gave evidence to Operation Prospect about his views on Dobson and Galletta and their integrity. He stated:

> *I felt that there was an impasse that could be overcome by having Dobson and Galletta come to the management committee and talk about the issue, and I was hoping that, from memory now, that their investigations to date, the difficulties that they were encountering, would have been able to engender in that management committee some feeling that the matter needed to progress to a degree of finality, but could only ever get to that point if there was openness to all of the documents that was* [sic] *being sought – that we were being sought. I reflect there on a comment of Mr Bradley's about leaks from the task force. That's something, knowing those two men in particular, that I would have absolutely rejected. I had every faith in Dobson and Galletta to conduct it in a very fair and impartial way, and I don't doubt that comments in the media were certainly emanating.*[871]

866 Phillip Bradley, File note, *Emblems*, NSWCC, 28 September 2004.
867 Phillip Bradley, File note, *Emblems*, NSWCC, 28 September 2004, p. 1.
868 Phillip Bradley, File note, *Emblems*, NSWCC, 28 September 2004, p. 1.
869 Phillip Bradley, File note, *Emblems*, NSWCC, 28 September 2004. p. 2.
870 Phillip Bradley, File note, *Emblems*, NSWCC, 28 September 2004 – attachment 'Strike Force Emblems', p. 13.
871 Ombudsman Transcript, Ken Moroney, 21 October 2014, p. 2412.

18.18 Further meetings of the Management Committee about Emblems

The Management Committee met again on 13 December 2004. The minutes record a discussion of making amendments to the LD Act. The Emblems report and complainants were not discussed at the meeting.[872]

Emblems was discussed at the 14 February 2005 Management Committee meeting, attended by the relatively new Minister for Police – the Hon Carl Scully. Moroney gave the historical background to Mascot/Florida/Emblems, and advised the Committee that the remaining issue for Emblems investigators was that they had not been given the contents of the supporting affidavit for LD warrant 266/2000. Moroney advised the Committee that investigators had indicated that there was a case for prosecution and had been advised to refer the matter to the DPP.

Bradley advised the Management Committee that the warrant included many names, including those of police who were not suspected of wrongdoing – as the LD Act required that anyone whose conversations were likely to be recorded must be named on the warrant. The Committee agreed that the LD Act needed to be amended to remove the requirement for all people to be named in the warrant. The minutes noted that the matter was now with the DPP for consideration.[873]

18.19 NSWPF seeks advice from Office of the Director of Public Prosecutions

On 31 December 2004, the Manager of the NSWPF Operational Legal Advice Unit, Legal Services wrote to the DPP seeking advice as to the "sufficiency of evidence to justify the commencement of any criminal proceedings against any person for any offence, in the absence of the affidavit". It is unclear what material was given to the DPP, but it appears that at the very least LD warrants 95/2000 and 266/2000 were provided.[874]

The DPP replied on 22 February 2005: "On the material provided there is insufficient evidence to lay charges against any person".[875] The Manager of the Operational Legal Advice Unit passed that advice on to Galletta on 3 March 2005, noting also that the DPP's view was consistent with advice previously provided by Legal Services. He concluded: "I cannot see any further viable avenue for investigation of this matter".[876]

18.20 Reflections on Emblems by Bradley and Moroney

Operation Prospect asked Moroney to state in broad terms his contact with Bradley about the documents that needed to be released so that Emblems could be completed. He said:

> *The issue had boiled up to a point where what was initially, I thought, a grievance and could have and should have been handled in those initial informative days, I think still to this day could have been resolved and resolved quickly, that it was allowed to fester only engendered in the minds of those who felt aggrieved that they were not being told the truth and the very nature of the police profession is that they, I think, saw conspiracies at every turn in the road.*[877]

872 NSWCC, *Confidential Minutes of the One Hundred and Eighty First Meeting of the Management Committee of the New South Wales Crime Commission*, 13 December 2004.
873 NSWCC, *Confidential New South Wales Crime Commission 182nd Management Committee Meeting*, 14 February 2005, p. 8.
874 Letter from Acting Inspector Col Kennedy, NSWPF to Managing Lawyer, [name], DPP, 31 December 2004, p. 2.
875 Letter from [name], Managing Lawyer, DPP to Acting Inspector Col Kennedy, NSWPF, 22 February 2005, p. 1.
876 NSWPF, internal memorandum from Inspector Col Kennedy to Detective Inspector Mark Galletta, 3 March 2005.
877 Ombudsman Transcript, Ken Moroney, 21 October 2014, p. 2398.

Moroney said that he felt the complaints raised by the Police Association "needed to be aired formally by way of an investigation", but that he felt he was "being pushed back". He continued:

> *There was nothing said to me. There was no rejection of what I was seeking formally, or in writing, or verbally, but intuitively and instinctively I felt that there was a push back, that if we don't talk about this issue it will simply go away.*[878]

Moroney said this feeling was not prompted by any particular person, but he:

> *... had this instinctive feeling that we had best leave the matter where it sits, that an investigation along the lines that I was seeking was not warranted. What I was concerned was that 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.*[879]

Bradley's evidence to Operation Prospect was that the 'whole saga' had arisen because of the publication of the warrant. He stated that he had sympathy for the complainants, adding:

> *But the real issue here is - the real issue for me was whether an important investigation was - and an important investigative opportunity presented by Sea, was diverted in favour of a person or - or personal agenda of individuals and if that happened then the victims of that diversion appear to have either become aware of the inappropriate activity or got information by an unorthodox means, and that that's really the substance of the matter from a Crime Commission point of view. Thereafter there was an investigation which I labelled a campaign, perhaps unjustifiably, but that was my impression, and that's why ultimately I didn't cooperate with the people charged with conducting that investigation for the reasons that I've gone through.*[880]

18.21 Analysis and submissions – interaction between NSWCC and Emblems

18.21.1 Framing the issues to be resolved

The NSWPF decided to establish Emblems to investigate and report on complaints that had been received about LD warrant 266/2000. The NSWPF requested the NSWCC to provide documents to Emblems for this investigation. It would have been clear to all involved that Emblems could not do a full investigation without access to key documents, such as the supporting affidavit for the warrant.

The choice facing the NSWCC was not straightforward. A range of matters needed to be considered, some pulling in opposite directions. There were five main matters that should have been given some weight by the NSWCC in deciding on its response:

- There was simmering controversy about the Mascot investigations after the publication of LD warrant 266/2000 on 12 April 2002. As discussed in Chapter 13, the steps taken in that month to quell the controversy were unsuccessful. The Minister for Police had asked the PIC Inspector to prepare a report on issues relating to the warrant, but the Inspector's report was immediately questioned by the Police Association – that called for an independent review of the matters in dispute. Both the Association and the people that were named in the warrant continued to agitate for a more comprehensive investigation. This led to Strike Force Emblems being established in July 2003.

878 Ombudsman Transcript, Ken Moroney, 21 October 2014, p. 2399.
879 Ombudsman Transcript, Ken Moroney, 21 October 2014, p. 2399.
880 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 3085.

- There was no independent agency with a statutory jurisdiction to investigate the substance of the complaints that had been made about the NSWCC's conduct of the Mascot investigations and LD warrant 266/2000. If an investigation was to be established, some other investigation option needed to be considered. Emblems was one such option, but there may have been others to be considered.
- It would not be an easy task to investigate the matters in dispute to the satisfaction of the complainants. The decision to grant LD warrant 266/2000 was made by a Judge of the Supreme Court, and it was not open to a non-judicial body to go behind or question the decision to grant the warrant. There were also legal constraints on the information that could be given to the Emblems investigation because of the secrecy provisions in telecommunications legislation and the NSWCC Act.
- There were risks to be considered in divulging information about the nature of the NSWCC and Mascot investigations, the investigation methodologies that were adopted, and the identities of people involved in the investigations. The investigation of some allegations was still ongoing. Disclosure posed an operational risk of compromising the investigations, revealing methodologies, and exposing informants, undercover agents and officers who had 'rolled over' and agreed to give evidence against others.
- Disclosure could also potentially defame or tarnish people who were listed in the documents as investigation targets – people against whom untested allegations had been made – or people who were NSWCC and Mascot staff who may be unfairly pilloried for the work they had done. The NSWCC therefore needed complete confidence that any information it divulged to Emblems or others would be properly used, would not be disseminated (or leaked), and would not compromise the NSWCC's work.

18.21.2 Approach taken by the NSWCC Commissioner

Bradley agreed at an early stage (in a fax on 25 June 2003) that Dobson could interview police involved in Mascot, and asked to be informed immediately of any perception that the NSWCC was impeding the investigation. A number of documents record the steps being taken at an early stage by the NSWCC to prepare material for inspection by Emblems' officers – such as Bradley's file note on 24 July, his memo to the Management Committee on 30 July, and Giorgiutti's letter to Dobson on 5 August. The upshot of those discussions is that the NSWPF was advised on 5 August 2003 that a 'large volume' of material (later identified as six volumes) was to be made available to Emblems by the NSWCC.

However, that never occurred. Initially, the discussion appears to have become stuck on whether LD and TI warrant applications could be made available. Legal advice on that issue was provided by Temby on 11 September 2003. At around the same time, Bradley became concerned that information about the Emblems investigation was being given to journalists, that Emblems was not approaching matters in an objective and unbiased fashion, and that Emblems investigators had not given the NSWCC the text of the complaints they were investigating. There was a reasonable basis for Bradley's concerns – as shown by the matters discussed in section 16.12 (relating to a media article and preliminary Emblems report) and section 16.15 (summarising Bradley's evidence to Operation Prospect). It is clear that – by 1 December 2003 – an impasse had occurred, when Bradley recorded in a file note that he had advised Moroney that "my informal position based on my attitude to Emblems" is that he was refusing to provide information to the NSWPF.

There was an attempt by Moroney to resolve the impasse in a letter to Bradley on 5 January 2004. This letter noted that Emblems had identified prima facie problems with the list of names in the LD warrant, Emblems could not properly complete its investigation without access to NSWCC documents, both the Management Committee and the Temby advice agreed that access could be granted, and one option to resolve the impasse was to appoint an independent person to review the warrant material. Bradley's response on 15 January 2004 canvassed once again some of the obstacles to providing access. Resolution of the issues was further impeded over the next two months by discussion of whether the preliminary Emblems findings should be referred to the DPP, and by Questions on Notice in Parliament.

Emblems was discontinued shortly after in March 2004. Its report concluded that criminal conduct may have occurred in relation to the supporting affidavits for two LD warrants, and that other serious legal questions about the Mascot investigations were unresolved. The Emblems report was subsequently discussed at three meetings of the Management Committee on 8 July 2004, 27 September 2004 and 14 February 2005. Suggestions made by Moroney – for Dobson and Galletta either to address the Management Committee, or to be sworn in as NSWCC officers so they could be shown the documents – were not agreed to by Bradley. Two factors that were prominent in his response were his concern that Emblems was a source of leaks and that it had taken an unbalanced approach.

18.21.3 Assessment and comment

It is clear that Bradley approached the complaints and requests by Emblems in a serious and considered manner and in good faith. He engaged repeatedly with senior police officials, consulted with the Management Committee, and explained his views in a reasoned manner in emails and memos. He emphasised those matters in a written submission to Operation Prospect – in which he explained (by reference to documents) his “cooperative intent”, “balanced and proper approach”, “fair and appropriate attempts to balance” competing considerations, and that he was “constructive and fair regarding the underlying grievances”.[881]

The outcome, nonetheless, is that no agreement was reached between Bradley and Moroney about providing key documents to Emblems. Emblems could not do a comprehensive investigation and follow through on its preliminary view that there were names on LD warrant 266/2000 for which there was no apparent justification. Emblems then delivered a report that was not well regarded, even within the NSWPF (see Chapter 1). 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.

Bradley had an understandable concern about leaks and Emblems objectivity. However, the weight given to those considerations and other practical obstacles to providing document access meant that a stalemate was reached by the end of 2003 and was not bridged.

It is important to note that the confidential documents provided to Emblems were not leaked. This includes the Schedule of Debrief that contained a multiplicity of allegations – some proven, some tested, and some untested and unproven. Reasons given by the NSWCC for not releasing the supporting affidavits and other warrant material (preserving confidentiality, containing defamation risks, and not revealing methodologies) could equally have applied to the Schedule of Debrief. There is also no evidence that the Emblems lead investigators, Galletta and Dobson, leaked any documents. They were understandably within the zone of suspicion – after it was clear that at least one complainant was being given updates about how Emblems was progressing, and information published in *The Australian* referred to the fractured relations between Emblems and the NSWCC. It is possible that the media articles were not based on leaked information but on journalistic ‘guesswork’ after speaking to complainants and Emblems. It is not uncommon that investigations into controversial incidents attract public comments that are conjecture and assertion.

It was apparent, and again understandable, that Bradley held strong beliefs about the objectivity and motivations behind Emblems. He told Operation Prospect that he perceived Emblems as a campaign against individuals in the NSWCC, and concluded it was a form of retaliation for the perceived inappropriateness of elements of Mascot. He was not going to allow Emblems to “traduce the Crime Commission” through its investigation.

881 Bradley, P, Submission in reply, 8 February 2016, pp. 17-19.

That concern needed to be weighed against other considerations – two in particular – that were given insufficient weight by Bradley. One was that Bradley knew by that stage that questions had legitimately been raised about why some names were on LD warrant 266/2000. As discussed in Chapter 13, he initially expressed the view that some people were named merely as "innocent bystanders", but shortly after expressed a more nuanced rationale based on the requirements of the LD Act in his letter to the PIC Inspector on 19 April 2002 – see section 13.6.2. Emblems had also indicated to the NSWCC that it could not work out why as many as 54 individuals were named on the warrant. Indeed, Moroney's letter to Bradley on 5 January 2004 asked for Bradley's "urgent support and assistance" to provide Emblems with an explanation for those 54 names so that a "meaningful resolution" of the complaints could be achieved.

Another consideration given insufficient weight by Bradley was that other options could be explored for allowing document access or inspection. One option that he rejected was a meeting with Dobson and Galletta. Another suggestion that was left hanging (not solely by Bradley) was the appointment of an independent person to review the material. Moroney had continued to stress this option with the hope of "one last chance of resolving this issue" for the complainants, while Bradley had earlier signalled his view that he was "less sanguine about the prospects of satisfying the complainants". The same divergence of approach was given by both officers in their evidence to Operation Prospect. Moroney, referring to the complainants, "felt that for their sake more than anything else, the matter needed to be aired publicly, and then independently reported". Bradley, on the other hand, acknowledged sympathy for the complainants – but focused on his dissatisfaction with the Emblems investigation as "why ultimately I didn't cooperate with the people charged with conducting that investigation".

Taking all those matters into account, the view reached in this report is that Bradley – as the NSWCC Commissioner who had sole capacity to release NSWCC documents to enable an independent review of Mascot-related complaints – gave insufficient weight to the importance of facilitating that review by one means or another. Too much weight was given to the NSWCC's dissatisfaction with the investigation option first chosen by the NSWPF, namely Strike Force Emblems.

18.21.4 Current oversight arrangements for the NSWCC

It is appropriate to note that the oversight arrangements for the NSWCC have changed since the time of the Mascot investigations. The current legislation gives the Management Committee a greater capacity to direct the NSWCC. Section 57 of the Crime Commission Act provides that the Management Committee may give directions and furnish guidelines to the NSWCC with respect to the exercise of its functions, and the NSWCC must comply with those directions or guidelines.[882]

The creation of the Inspector of the Crime Commission may also now address some of the difficulties that were experienced by Emblems, whereby neither the NSWPF nor any oversight organisation had sufficient jurisdiction to closely review the work of the NSWCC and its task forces. Under section 62 of the Crime Commission Act, the Inspector's functions are:

> *(a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and*
>
> *(b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and*
>
> *(c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and*
>
> *(d) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.*

882 New South Wales Crime Commission Act, s. 57.

The Inspector may exercise those functions on his or her own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Parliamentary Joint Committee or a government agency or member of a government agency. Importantly, the Inspector has powers to investigate the conduct of NSWCC officers and is entitled to full access to NSWCC records. He or she may also:

- require NSWCC officers to supply information, answer questions or produce documents or other things
- investigate complaints and refer relevant matters to other public authorities for consideration of action
- recommend disciplinary action or criminal prosecution against NSWCC officers.[883]

In 2017 the LECC Act will commence, and under that Act the functions of the Inspector of the Crime Commission will transfer to the LECC.[884]

18.22 Findings

82. Bradley

Bradley's conduct in hindering the investigation and resolution of the complaints the NSW Police Force had received about LD warrant 266/2000 and the Mascot investigations was conduct that was unreasonable under section 26(1)(b) of the *Ombudsman Act 1974*, for the reasons discussed in section 16.22.3.

18.23 Whether the Police Commissioner had read the Emblems report in May 2012

In May 2012, Police Commissioner Scipione told Channel 7 during a press conference that he had not seen the Emblems report:

> *Look, I haven't seen the report. Um. I too am bound by secrecy provisions. I have not seen the Emblems report and certainly I haven't seen the affidavit nor the warrant so at this stage I'm not in a position to give you any idea as what's in there because I simply haven't seen it ... The secrecy provisions that apply to the Crime Commission equally apply to me.*[885]

Scipione then gave his interpretation of the LD legislation at the time of Mascot and how so many people could have been named on a warrant, specifically LD warrant 266/2000.

Channel 7 used excerpts of Scipione's comment in a news report on 9 September 2012 and again on 6 October 2012.[886]

Operation Prospect received and investigated complaints alleging that Scipione's statement to Channel 7 was false. The complaints alleged that it was unlikely Scipione had not read the Emblems report – given his role as Deputy Commissioner at the time the report was finalised and the report's subject matter.

Operation Prospect asked the then Director of the Office of the (NSWPF) Commissioner about her understanding of whether Scipione had read the Emblems report at the time he made his statement to Channel 7. The Director had prepared a briefing note on 16 June 2011 in response to a request from the Minister of Police about the outcomes of Strike Force Emblems. Her briefing note is substantially the same as a briefing note prepared by Assistant Commissioner Paul Carey for the Police Commissioner (date unknown)[887] – the Director may have based her briefing note on the information in Carey's report. A handwritten note on

883 New South Wales Crime Commission Act, s. 63.
884 *Law Enforcement Conduct Commission Act 2016*, Schedule 6.
885 Seven Network, Interview with Mike Gallacher and Andrew Scipione about Strike Force Emblems Report.
886 Email from Zdenka Vaughan, NSWPF to Commissioner Andrew Scipione, NSWPF, 9 September 2012; Department of Premier and Cabinet, Email from Media Monitoring Unit to Commissioner Andrew Scipione, NSWPF and others, 6 October 2012.
887 NSWPF, Assistant Commissioner Paul Carey, Briefing Note D/2011/102401, date unknown.

the briefing note by the Director stated: "Discussed with [Commissioner of Police] – This office does not currently have access to the Crime Commission Minutes of 2004. Perhaps the CEO of Ministry can assist in this regard?"[888] The Director's evidence was that Scipione had not read the Emblems report at that time, but he had agreed that the Minister should receive a copy if the Minister wanted it.[889] Her recollection was that Scipione may have read the Emblems report only after a Budget Estimates committee hearing in September or October 2012.[890] She was quite certain that Scipione had not read the Emblems report at the time of his statement to Channel 7.[891]

In evidence to Operation Prospect, Scipione stated that – although he was Deputy Commissioner at the time that Emblems was finalised – he was excused from the Complaints Management Team that dealt with Emblems. This was partly because Mascot had considered whether Scipione had leaked information about Mascot – an allegation that was unsubstantiated (see Chapter 10). Scipione also told Operation Prospect that he read the Emblems report well after it was written. He believed this may have been around September 2012, after the matter had been referred to the Inspector of the PIC, or around the time of the Budget Estimates Committee.[892] He could not provide a precise date, but the timeframe was consistent with that provided by the Director and was after the press conference in May 2012.

18.23.1 Analysis and conclusions

The complaints to Operation Prospect about Scipione's statement to Channel 7 were speculative. The complainants did not provide any evidence to support their contentions, other than the fact that Emblems was a report commissioned by the NSWPF.

There is no evidence before Operation Prospect that suggests that Scipione had read the Emblems report at the time of his press statement to Channel 7. There also does not appear to be anything to suggest that he would have a motive to make a false statement to the media at that time.

888 NSWPF, Briefing Note, Director of the Office of the Commissioner, 16 June 2011.
889 Ombudsman Transcript, Director of the Office of the Commissioner, 22 July 2014, p. 40.
890 Ombudsman Transcript, Director of the Office of the Commissioner, 22 July 2014, p. 39.
891 Ombudsman Transcript, Director of the Office of the Commissioner, 22 July 2014, p. 73.
892 Ombudsman Transcript, Andrew Scipione, 31 July 2014, pp. 1012, 1028-1030, 1048.

Chapter 19. Improving the warrant authorisation processes

19.1 Chapter overview

The laws governing the issuing of LD and TI warrants impose strict controls that are intended to prevent the misuse of these kinds of covert surveillance technologies. LD and TI warrants are writs issued by courts that give law enforcement officers the authority to covertly record conversations or listen in on telephone calls – but only ever in relation to very serious crimes and generally only in circumstances specified by the warrant. There are some exceptions, such as when surveillance authorised by a court leads to "the unintentional hearing of a private conversation".[893] Otherwise, using such devices without a warrant may be illegal and any evidence gathered inadmissible.

The warrant application and authorisation processes in place at the time of the Mascot investigations are set out in the LD Act and the *Telecommunications (Interception) Act 1979* (TI Act). These are largely the same as the procedures set out in the principal laws that regulate the use of such technologies now – the *Surveillance Devices Act 2007* (SD Act) and current version of the TI Act, which was renamed the *Telecommunications (Interception and Access) Act 1979* in 2006. Then, as now, the procedural safeguards are regarded as the cornerstone of those laws.

Despite the controls and governance applying to the warrant application and authorisation processes, Operation Prospect has identified numerous deficiencies associated with the LD and TI warrants issued during the Mascot investigations. All of these were NSW Crime Commission (NSWCC) warrants – that is, none was taken out in the name of the NSW Police Force (NSWPF) or the Police Integrity Commission (PIC). Some of the questions and concerns raised included:

- why individuals were named in warrants without apparent reason or with insufficient evidence in the supporting affidavits to justify their inclusion
- why many warrants did not clearly distinguish individuals who were the subject of investigation from those who were also named because they might be recorded as a result of the surveillance
- how approvals were obtained to repeatedly 'roll over' LD and TI warrants despite preceding warrants having failed to produce any evidence to justify the continued targeting of those individuals
- the practice of listing large numbers of individuals in LD warrants without reasons in the supporting affidavits to explain how they might reasonably be expected to be recorded within the 21 day period authorised by the warrant
- the targeting of individuals on the basis of weak, inaccurate or uncorroborated information and the failure to include potential exculpatory information in applications for LD or TI warrants.

This chapter examines the warrant application and authorisation processes that govern the use of covert surveillance technologies (meaning those used under surveillance device and telecommunications intercept warrants) in NSW, and the adequacy of legislative controls and safeguards to prevent these processes from being misused. At the heart of these laws is an attempt to establish controls and safeguards that permit the use of highly intrusive surveillance technologies to investigate certain serious crimes, while protecting the privacy of affected individuals from unwarranted intrusion. This is true for both the laws in place at the time of the Mascot investigations and those that govern the use of such technologies now.

893 *Listening Devices Act 1984* (repealed) (LD Act), s. 5(2)(d); *Surveillance Devices Act 2007* ("SD Act"), s. 7(2)(c).

The apparent failure of these laws to protect important rights and interests of many people affected by the Mascot investigations raises questions such as:

- Were warrants issued on the basis of affidavits that contained false, misleading or uncorroborated information?
- Were weaknesses or vulnerabilities inherent in the warrant authorisation processes to blame for the kinds of deficiencies noted throughout this report, and have those weaknesses since been addressed by reforms implemented since Mascot?

This chapter seeks to address these questions. Information in the supporting affidavits for some of the Mascot warrants was false, misleading or omitted important facts. It is clear from a close examination of the Mascot warrants that many of the obvious flaws in the supporting affidavits could have been identified before the warrants were granted, but the safeguards in the warrant authorisation processes repeatedly failed.

This chapter also considers whether the legislative and procedural safeguards created since the Mascot investigations could prevent similar problems from happening again today. The chapter considers the Attorney General's role in the monitoring and oversight of current warrant application and authorisation processes, and the Attorney General's powers to intervene where appropriate. There is also now the Ombudsman's role in inspecting and reporting on the adequacy of record-keeping by law enforcement agencies after their use of covert surveillance.

Despite these reforms, it appears that the procedural weaknesses exposed by the warrants issued for the Mascot investigations are still present in existing warrant authorisation processes as they apply to NSW law enforcement agencies. This chapter recommends measures to address these weaknesses.

19.2 Background – privacy and laws for covert surveillance technologies in NSW

Covert surveillance technologies have long been recognised as an invaluable tool in the investigation and prosecution of organised crime and other serious and systemic offences. The Royal Commission into the New South Wales Police Service found that electronic surveillance "was the single most important factor in achieving a breakthrough in its investigations"[894] and recommended that law enforcement agencies be "equipped with adequate resources and electronic surveillance capacity, to fulfil their charters to best advantage and to keep ahead of the increasing sophistication of criminals". [895]

19.2.1 Introduction of listening and surveillance device laws

Although covert surveillance technologies are highly effective and widely used, the law recognises that they are also highly intrusive and must be subject to strict controls. This was emphasised by the Attorney General in his second reading speech when introducing the Listening Devices Bill in 1984, which extended the use of LDs to investigate certain serious offences while tightening controls over how they were to be used:

> *This bill will establish safeguards against the unjustified invasion of privacy that can be occasioned by the use of electronic surveillance. In so doing, it seeks to protect one of the most important aspects of individual freedom – the right of people to enjoy their private lives free from interference by the State or by others. The protection of individual privacy is clearly established as a legitimate matter for the concern of government.* [896]

After explaining that laws originally designed to protect citizens from eavesdropping had been rendered "utterly inadequate" by the rapid development of electronic surveillance technology, the Attorney General then argued that governments have a duty to control and regulate how such intrusive devices are used:

894 Wood, J, *Royal Commission into the New South Wales Police Service, Volume 2 (Report)*, May 1997, p. 413.
895 Wood, J, *Royal Commission into the New South Wales Police Service, Volume 2 (Report)*, May 1997, p. 414.
896 The Hon David Paul Landa, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 17 May 1984, pp. 1092-1093.

Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate and more obnoxious to a truly free society.

... If the fact is accepted that this technology is capable of being used to achieve intrusions upon privacy that are not justified by the fundamental concepts of a free society, it becomes the proper role and duty of Government to place wise and effective limits on its use. Unless we are willing to watch privacy disappear, and with it one of the most important manifestations of individual liberty, the use of listening devices must be controlled by being limited to circumstances where it is justified. This bill is motivated by a desire to achieve that result.[897]

In 2007, the SD Act replaced the LD Act and extended the warrant application and authorisation processes used for listening devices to other covert surveillance technologies – such as data surveillance devices, optical surveillance devices and tracking devices. The SD Act also extended the maximum period a warrant may be in force from 21 days to 90 days.

The SD Act incorporated and extended a number of LD Act safeguards. These included requirements that the Attorney General monitor the use of LD warrants and report annually on the use of listening devices,[898] and a requirement that warrants "must not be issued" unless the Attorney General has been given "an opportunity to be heard in relation to the granting of the warrant".[899]

At the other end of the process, the SD Act also introduced new monitoring and oversight provisions. Agencies were required to keep more detailed records of how warrants were used and to open their records to regular inspections by the Ombudsman who "must, from time to time, inspect the records of each law enforcement agency" to determine the extent of the agencies' compliance with the Act.[900]

Other safeguards were also considered. During the debate on the Surveillance Devices Bill 2007 (SD Bill), a cross-bench member urged the NSW Government to consider a Council for Civil Liberties proposal to further strengthen oversight of the provisions by appointing:

... an experienced barrister to defend the interests of potential targets whenever covert surveillance is used. This person should have powers to make submissions to the issuing authorities, to question applicants for warrants and witnesses, and to report to Parliament. [901]

Another member noted that a similar model was already in place in Queensland, where a Public Interest Monitor directly oversights the authorisation process and can make submissions on warrant applications as part of measures to ensure that those named in warrants are targeted appropriately.[902]

The Attorney General responded by noting that the bill establishes:

... a thorough monitoring and oversight regime, including requirements that the chief law enforcement officer discontinue a device and revoke the warrant if the device is in use but is no longer necessary; that reports are provided to the Attorney General and to the issuing judge on the execution of the warrant; that the Attorney General provide an annual report to Parliament; that the chief officers of a law enforcement agency keep records; and that the Ombudsman inspect the records of a law enforcement agency and report to Parliament. The bill also provides that the Ombudsman may enter at any reasonable time the premises of the law enforcement agency for that particular purpose.[903]

These safeguards are discussed further at 19.5.1.

Concerns were also raised by the Leader of the Opposition in the Legislative Council. He told Parliament that he had copies of two warrants issued in connection with the Strike Force Emblems and Operation Florida

897 The Hon David Paul Landa, NSWPD, (Hansard), Legislative Assembly, 17 May 1984, pp. 1092-1093.
898 Listening Devices Act, s. 23; Surveillance Devices Act, s. 45.
899 Listening Devices Act, s. 17(2)(b); Surveillance Devices Act, s. 51(2)(b).
900 Surveillance Devices Act, s. 48(1).
901 Ms Lee Rhiannon, NSWPD, (Hansard), Legislative Council, 14 November 2007, p. 4046.
902 Ms Lee Rhiannon, NSWPD, (Hansard), Legislative Council, 14 November 2007, p. 4046.
903 The Hon John Hatzistergos, NSWPD, (Hansard), Legislative Council, 14 November 2007, p. 4047.

investigations – one issued in April 2000 (that appears to be Mascot LD warrant 95/2000), and another that was issued on 14 September 2000 (Mascot LD warrant 266/2000). Details of both warrants are discussed in Chapters 9 and 13. He argued that these warrants had highlighted weaknesses in the legislative safeguards that needed to be addressed in the SD Bill.

In relation to the April warrant, the member explained that it included more than 100 names and that – although some of those named had subsequently been charged with serious offences – many others had gone on to have very successful careers. He said the naming of so many individuals “appears to be nothing more than a driftnet, a huge catch-all net”.[904]

He then pointed to similarities between the April warrant and the LD warrant issued on 14 September 2000, noting that the latter “included the names of the same 100 people who were mentioned in the original warrant”. He said the original warrant appeared to have been repeatedly ‘rolled over’ after the expiration of each 21-day period, raising questions about “the ease with which warrants can be obtained, rolled over and continued in perpetuity”.[905]

In committee, an Opposition amendment to limit the maximum duration of a warrant to 21 days was rejected. However, amendments to clause 33(1) and (2) requiring emergency authorisations to be notified to an eligible Judge for approval within two business days (rather than five) were accepted.[906]

19.2.2 Introduction of telecommunications interception laws

19.2.2.1 Extending controls over TI powers to State law enforcement agencies

The Commonwealth TI Act came into operation in 1979 and specified the circumstances in which it was lawful for interception of, or access to, certain telecommunications to take place. The TI Act also included provisions to protect the privacy of individuals who use the Australian telecommunications system. In 1987, the TI Act was amended to enable State police forces to obtain warrants to intercept telecommunications. Further amendments in 2006 changed the title of the Act to the *Telecommunications (Interception and Access) Act 1979* and included provisions allowing access to stored communications – such as email, voice mail and SMS – held by telecommunications carriers.

An interception warrant can only be issued to a criminal law enforcement agency that has been declared by the Commonwealth Attorney General to be an “eligible authority”.[907] Before such a declaration can be made, there must be State legislation to complement the TI Act. Section 35 of the TI Act sets out what must be in place before the Attorney General may declare that an agency is an “eligible authority” under the Commonwealth Act. Section 35(1)(h) of the TI Act requires the State (in this case NSW) to make satisfactory provision:

> *(h) requiring regular inspections of the eligible authority’s records, for the purpose of ascertaining the extent of compliance by the officers of the eligible authority with the requirements referred to in paragraphs (a), (f) and (g) of this subsection, to be made by an authority of that State that is independent of the eligible authority and on which sufficient powers have been conferred to enable the independent authority to make a proper inspection of those records for that purpose.*

The *Telecommunications (Interception) (New South Wales) Act 1987* (TI (NSW) Act) was enacted to complement and meet the requirements of the Commonwealth statute (the TI Act as it was then) and extended phone tapping powers to the NSWPF and the State Drug Crime Commission – which later became the NSWCC.

As part of the State laws needed to give effect to these changes, the TI (NSW) Act also imposed obligations on the chief officers of State law enforcement agencies – including the Commissioner of Police and the Commissioner of the Crime Commission – to keep certain records connected with TI warrants, applications for

904 The Hon Michael Gallacher, NSWPD, (Hansard), Legislative Council, 14 November 2007, p. 4041.
905 The Hon Michael Gallacher, NSWPD, (Hansard), Legislative Council, 14 November 2007, p. 4041.
906 Committee discussion of *Surveillance Devices Bill 2007*, NSWPD, (Hansard), Legislative Council, 14 November 2007, pp. 4050-4053.
907 *Telecommunications (Interception and Access) Act 1979* (Cth) (TI Act), Division 2.

TI warrants, and uses and disclosures of intercepted information.[908] The TI (NSW) Act also conferred powers on the Ombudsman to inspect those records and report on compliance with the TI (NSW) Act. These mirrored the provisions that applied to the Commonwealth Ombudsman under the TI Act.[909] These requirements were in place at the time of the Mascot investigations and remain in force today under the *Telecommunications (Interception and Access) (New South Wales) Act 1987*.

The NSW Government argued that these safeguards represented the best balance that could be achieved between the interests of privacy and effective law enforcement,[910] and that State law enforcement agencies must be able to intercept telecommunications to fight organised crime:

> *In these times criminals have available to them the full range of technological equipment to flout the law. The New South Wales Government will not allow its enforcement agencies to be hampered in their pursuit of criminals by the lack of access to such technology. The ability to intercept telecommunications was seen by Mr Justice Stewart*[911] *to be fundamental to the criminal enforcement processes. The New South Wales Government strongly agrees with that view ...*[912]

19.2.2.2 Concerns about the TI Act (Cth)

When the Commonwealth Government presented its first TI Bill in 1979, it proposed that the Australian Security Intelligence Organisation (ASIO) should be the only agency with powers to intercept telecommunications. A second Bill – which was subsequently enacted – extended the powers to Customs officers, allowed TIs to be used in investigations of drug crime, and permitted certain TI information to be communicated to State and Territory police forces.[913]

Much of the debate about the Commonwealth's TI Bills focused on:

- the potential for ASIO and Customs to misuse TIs to obtain ancillary information about other suspected offences – even though that TI product would not be admissible as evidence
- disquiet about the scope for telephones to be tapped in situations that might now be recognised as 'noble cause' corruption"[914]
- concerns that the use of TIs "is likely to get out of hand" if the powers were extended to agencies other than ASIO or used to detect minor drug offences, and the scope for "widescale interference with private telephone communications"[915]
- the removal from Ministerial control of warrants issued to ASIO under urgent circumstances – which the Opposition described as "intolerable"[916]
- the need to guarantee the integrity of the legislative controls over TIs.[917]

Concerns about the potential extent of electronic surveillance included fears about the intrusive reach of listening devices, leading another Senator to comment that:

908 *Telecommunications (Interception and Access) (New South Wales) Act 1987* (TI (NSW) Act), Part 2.
909 The Hon Terry Sheahan, NSWPD, (Hansard), Legislative Assembly, 12 November 1987, pp. 15923-15924.
910 The Hon J. R. Hallam, NSWPD, (Hansard), Legislative Council, 24 November 1987, p. 17105.
911 In 1985, Mr Justice Stewart had been appointed to lead a Royal Commission – referred to as the Stewart Royal Commission – into allegedly unlawful telephone interceptions by New South Wales police officers over the preceding two decades. Mr Justice Stewart's report on the results of that Commission's inquiries was handed down on 30 April 1986.
912 The Hon Terry Sheahan, NSWPD, (Hansard), Legislative Assembly, 12 November 1987, p. 15924.
913 Senator John Carrick, Commonwealth Senate (Hansard), 30 May 1979, pp. 2336-2337.
914 Senator Chris Puplick, Commonwealth Senate, (Hansard), 22 August 1979, p. 135
915 Senator John Button, Commonwealth Senate, (Hansard), 22 August 1979, pp. 132-133.
916 Senator Gareth Evans, Commonwealth Senate, (Hansard), 22 August 1979, p. 144.
917 Senator Arthur Gietzelt, Commonwealth Senate, (Hansard), 22 August 1979, p. 140.

> *If we are to believe what we read about listening devices, it is possible – I am not saying that it happens – that conversations in our homes, in our offices, in the Parliament, in the Cabinet room, in a trade union meeting place, in a student organisation and in political parties could be overheard. Listening devices are such that now there is absolutely no control possible for the exercise of any reasonable protection over the rights of people.*[918]

It was also suggested during this debate that the relevant evidence supporting a suspicion about the need to intercept someone's telecommunications should be set out clearly in an affidavit, and that a judge issuing a warrant ought to indicate both the basis on which that warrant was granted and the time that warrant would be in force.[919] The basis for those proposed amendments was to ensure that all the relevant evidence was put before a judge determining whether or not to grant the interception warrant.[920]

In response to the Royal Commission of Inquiry into Alleged Telephone Interceptions (the 'Age Tapes' Royal Commission), which examined allegedly unlawful interceptions of telephone services by police in NSW over many years,[921] the Commonwealth Government amended the TI Act in 1987 to enable State police forces to obtain warrants to intercept telecommunications.[922] Under the amended TI Act, the interceptions were to be done by a specialised division within the Australian Federal Police (AFP) under warrants granted to the various agencies.[923]

The 1987 amendments were part of a suite of Bills (including proceeds of crime legislation) directed at increasing the powers of law enforcement agencies to investigate and take action against organised crime, particularly narcotics trafficking.[924] Debate on the 1987 amendments included discussion about:

- balancing the expansion of TI capabilities against protecting civil liberties[925]
- claims that the new laws did not go far enough to allow the rapid implementation of interceptions[926]
- whether and how TI product should be admissible as evidence – and whether decisions about admitting unlawfully-obtained TI product should be left to the courts[927]
- preventing State police forces from unlawfully intercepting telecommunications on the grounds that this information was necessary for particular investigations but not lawfully available to them.[928]

19.2.2.3 Concerns about the TI (NSW) Act

When the TI (NSW) Act was introduced in 1987 to complement and meet the requirements of the Commonwealth TI Act, the Opposition supported the reforms. It considered that the inspection and reporting provisions in the Act created important safeguards against the misuse of telecommunications interceptions.[929] Nonetheless, the Opposition warned that there was a need to preserve both individual privacy and public confidence that telephone communications would not be intercepted without good cause:

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918 Senator Arthur Gietzelt, Commonwealth Senate, (Hansard), 22 August 1979, p. 140.

919 Mr Clyde Holding MHR, Commonwealth House of Representatives (Hansard), 17 October 1979, p. 2138.

920 Mr Clyde Holding MHR, Commonwealth House of Representatives (Hansard), 17 October 1979, p. 2138.

921 The Royal Commission of Inquiry into Alleged Telephone Interceptions was established in 1985, following the issue of Letters Patent by the Governor-General and the Governors of New South Wales and Victoria and the appointment of Mr Justice Stewart as Commissioner. As noted at paragraph 2.2 of volume one of the report of that Royal Commission, one of the Commission's tasks was to identify whether there was "in the possession of any person, any information or material arising out of or relating to the unlawful interception in New South Wales of telephone conversations on or before 28 March 1985 and whether that information or material discloses the commission of criminal offences or the possible commission of criminal offences".

922 TI Act, s. 39; *Telecommunications (Interception) Amendment Act 1987* (Cth), s. 21.

923 TI Act, ss. 32-33; Telecommunications (Interception) Amendment Act, s. 21.

924 Senator Richard Alston, Commonwealth Senate, (Hansard), 4 June 1987, p. 3548.

925 Senator Barney Cooney, Commonwealth Senate, (Hansard), 4 June 1987, p. 3550.

926 Senator Richard Alston, Commonwealth Senate, (Hansard), 4 June 1987, pp. 3548-3549.

927 Senator Richard Alston, Commonwealth Senate, (Hansard), 4 June 1987, pp. 3549, 3587, 3590-3591; Senator Peter Durack, Commonwealth Senate, (Hansard), 4 June 1987, p. 3576; Senator Gareth Evans, Commonwealth Senate, (Hansard), 4 June 1987, pp. 3587-3588, 3591.

928 Mr Lionel Bowen MHR, Commonwealth House of Representatives, (Hansard), 2 June 1987, p. 3793; Stewart, D, *Report of the Royal Commission of Inquiry into Alleged Telephone Interceptions, Volume One (Report)*, 30 April 1986, p. 297.

929 The Hon. John Dowd, NSWPD, (Hansard), Legislative Assembly, 19 November 1987, p. 16554.

> *Obviously many honourable members on the Government side would share the Opposition's concern about the real privacy problems inherent in this sort of legislation. It is not just a matter of interception: the fear of interception also detracts from the humanity of us all. Many people would worry about their telephones being tapped, some with good reason, some without.*[930]

One cross-bench member of Parliament opposed conferring powers on State law enforcement bodies to obtain warrants to intercept telecommunications. Referring to Justice Donald Stewart's findings in the Royal Commission of Inquiry into Alleged Telephone Interceptions that police in NSW had been illegally intercepting telephone calls for almost 20 years, the member said:

> *I very much regret that we are rapidly moving towards a society in which the privacy of the individual is unimportant when it comes to dealing with crime and security.*[931]

19.3 LD and TI warrants issued during the Mascot investigations

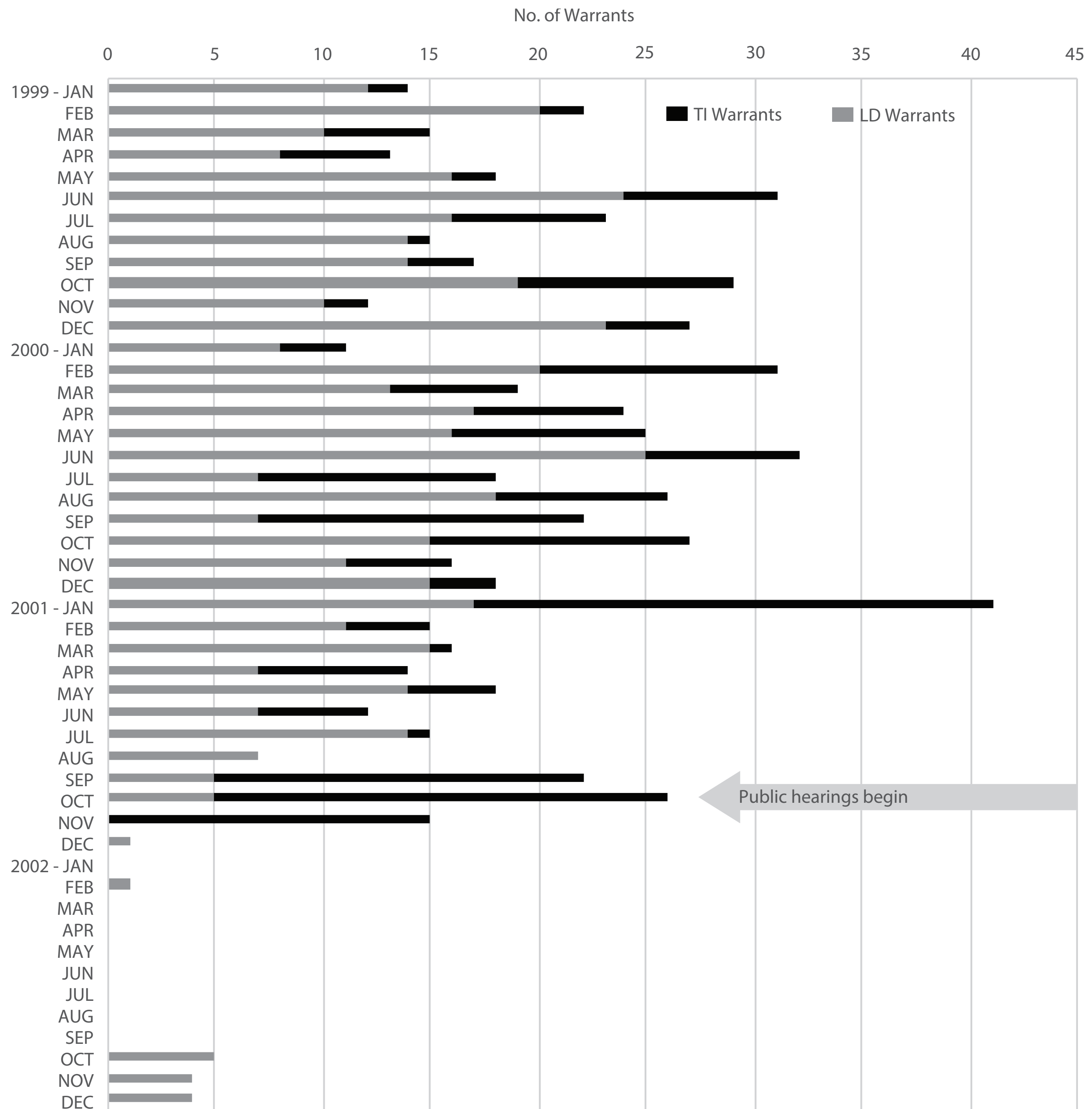
The Mascot investigations relied heavily on covert technologies – in attempting to gather evidence to corroborate the allegations Sea had made about police corruption, and during the investigation of suspected contemporaneous criminality and corrupt conduct by police officers (later highlighted by the PIC in its Operation Florida[932] reports). Over the course of the investigations, 475 LD warrants were issued to Mascot. These warrants were supported by 107 affidavits and named 295 people who were to be listened to or recorded. Of the 475 LD warrants, 273 were for LDs placed in premises, 177 were for body-worn devices and 25 were for LDs in vehicles.

In addition, 246 TI warrants were issued to Mascot over the course of its investigations. These warrants were supported by 111 TI affidavits and named 95 people who were to have their telephone communications intercepted.

Figure 4 shows how many LD and TI warrants were issued to Mascot each month over the course of the Mascot investigations. It shows that LDs were used continually from the beginning of the Mascot investigation in January 1999 until October 2001. TI warrants were also used throughout that period, but mostly in the latter stages of the investigations.

930 The Hon John Dowd, NSWPD, (Hansard), Legislative Assembly, 19 November 1987, p. 16554.
931 Mr. George Petersen, NSWPD, (Hansard), Legislative Assembly, 19 November 1987, p. 16555.
932 Police Integrity Commission, *Report to Parliament – Operation Florida,* Volumes 1 and II, June 2004.

Figure 4: LD and TI warrants issued to Mascot each month, January 1999 to December 2002



Source: Data from documentary evidence provided to Operation Prospect

Notes: The covert stage of Mascot ended on 8 October 2001 when PIC held its first day of public hearings in Operation Florida. During 2002 Mascot resources were mostly directed to assisting PIC and preparing briefs for criminal prosecution. The small number of LD warrants taken out at the end of 2002 related to an investigation into police involvement in the distribution and use of prohibited drugs. This investigation involved informant Salmon (not Sea).

Figure 4 shows that Mascot made frequent use of LD warrants, especially early in its investigations. Of the 475 LD warrants issued to Mascot, 186 were issued in 1999 and 172 in 2000 – including 25 in June 2000. LD warrants continued to be issued in 2001 but fell sharply after the start of the PIC's public hearings for Operation Florida on 8 October 2001. The fact that LD warrants were only able to be issued for a maximum of 21 days goes some way to explaining the volume of LD warrants.

By comparison, the numbers of TI warrants issued was relatively modest in the early stages of the Mascot investigations. There were 50 TI warrants issued to Mascot in 1999, compared with 97 in 2000 and 99 in 2001. There were sharp rises in the use of TI warrants in January 2001, when 24 were issued and around the time of the PIC's public hearings, when 53 were issued in September to November 2001.

19.4 Issues identified in relation to the Mascot warrants

Operation Prospect identified numerous instances of individuals engaging in wrong conduct, or failing to adhere to the legislative and procedural requirements that were established to ensure that covert surveillance technologies were authorised on the basis of accurate and complete information. The following sections highlight some of the significant defects in the warrant application and authorisation processes used by Mascot.

This section presents a general and statistical analysis that overlaps in part with the more particular analysis in some other chapters.

19.4.1 Naming individuals without reasons or sufficient evidence

A concern raised repeatedly in complaints to Operation Prospect and in public discussions about the Mascot investigations was that people were named in LD and TI warrants without apparent reason or without clear reasons in the supporting affidavits to justify their inclusion. This concern related particularly to two warrants that have been in the public domain for a number of years – LD warrants 95/2000 and 266/2000, the details of which are discussed in Chapters 9 and 13.

Operation Prospect has identified numerous other examples of LD warrants in which people were named without information in the supporting affidavit to explain why Mascot sought to listen to or record them. For example:

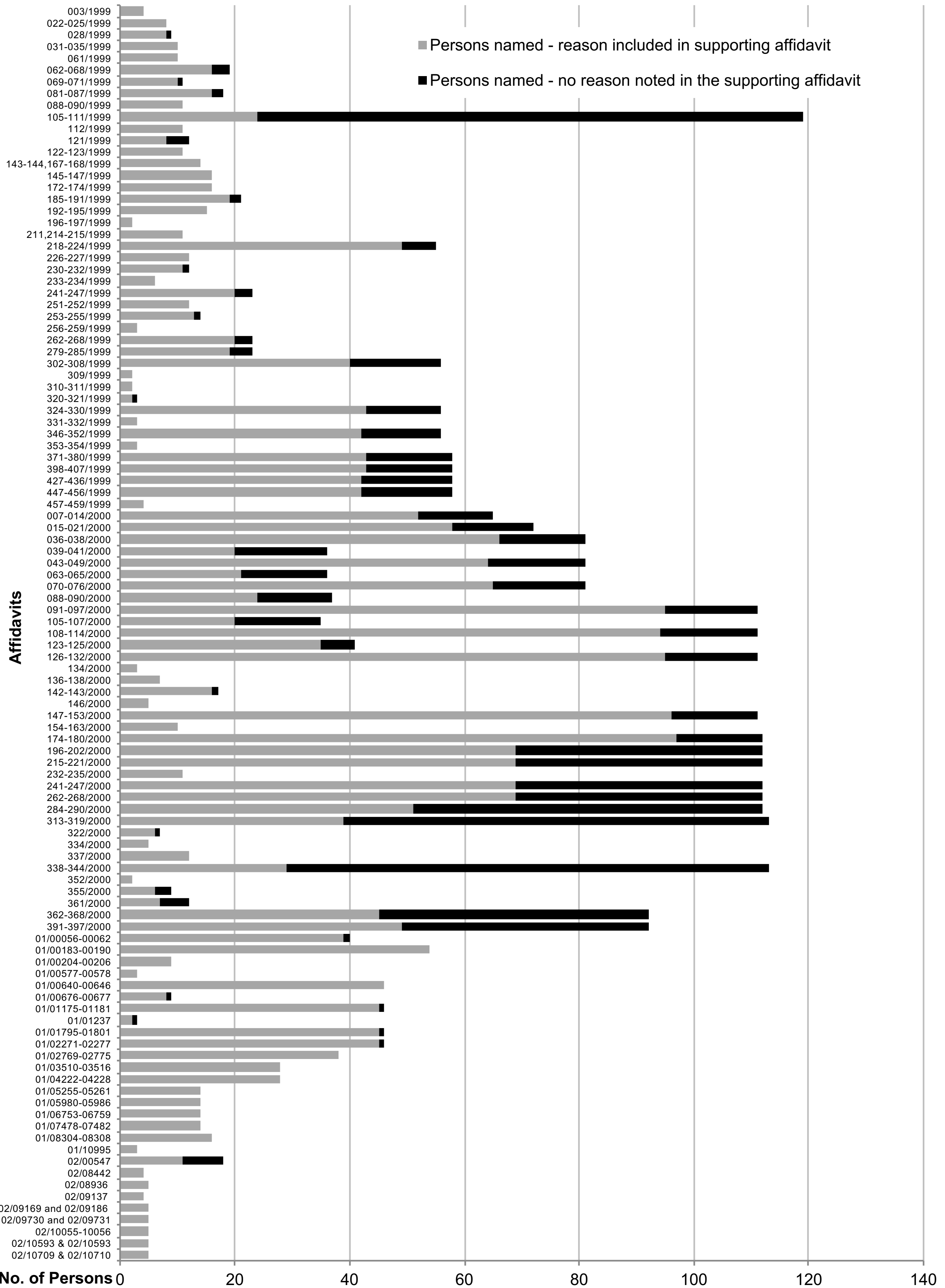
- The affidavit supporting LD warrant 109/1999 (discussed in Chapter 7) did not explain why Mascot might record or listen to the private conversations of 95 of the 119 people named in the warrant. Even in relation to the 24 people named where at least some explanation was provided, it was unclear whether all were suspected of engaging in or having knowledge of the criminal offences that Mascot was investigating.
- Many of the affidavits described in Chapter 9, which listed people who were expected to be invited to the King send-off – including the affidavits supporting LD warrants 95/2000 and 266/2000 – failed to explain why Mascot proposed to listen to or record many of those named. It appears that a particular paragraph explaining that certain people were expected to be invited to the function was omitted from one affidavit. This affidavit was then rolled over or copied multiple times with the same error.

Operation Prospect analysed the 107 Mascot LD affidavits sworn between January 1999 and December 2002 to identify how many people were named in each affidavit and whether the ‘facts and grounds’ paragraphs included reasons for naming all the people on that affidavit. Figure 5 summarises the findings from this analysis in relation to each LD affidavit, and distinguishes the number of people named on the affidavit where there was some text in the ‘facts and grounds’ paragraphs to explain why their name had been included, from those who were named without any text to explain their inclusion.

Over the course of the Mascot investigations, 51 (48%) of Mascot’s 107 LD affidavits had reasons noted in the ‘facts and grounds’ paragraphs for every person named in that affidavit, whereas 56 (52%) had reasons noted for only some of the people named. In some cases, half or more of the people on an affidavit were named without any supporting text noting why they had been included. As Figure 5 shows, this issue was particularly evident in LD affidavit 105-111/1999 – the supporting affidavit for LD warrant 109/1999 (noted above). However, this deficiency was also apparent in relation to most of the affidavits that named large numbers of people, whereas those that named 20 or fewer people in the affidavit were much less likely to lack this information.

In relation to LD warrant 95/2000 (noted above), the supporting affidavit – LD affidavit 091-097/2000 – had reasons to explain the inclusion of 95 of the 111 people named. After the King send-off the paragraph explaining that they were expected to attend was removed from the next rollover affidavit, yet the names of invitees were not also removed even though there was now no explanation for their inclusion. They continued to be named in subsequent rollover affidavits, despite no further reasons being provided for their inclusion. This accounts for why the supporting affidavit for LD warrant 266/2000 – LD affidavit 262-268/2000 – had reasons for including just 69 of the 112 people named on that warrant.

Figure 5: Analysis of whether reasons were given for including names in Mascot LD affidavits



Source: Based on Operation Prospect's analysis of all names listed in 107 Mascot listening device affidavits sworn between January 1999 and December 2002.

19.4.2 Failing to distinguish subjects of investigation from others named

Although 51 (48%) of Mascot's 107 LD affidavits had text in the 'facts and grounds' paragraphs of affidavits covering all the people listed, it was not always clear whether particular individuals were suspected of involvement in or had knowledge of criminal or corrupt conduct.

As discussed in Chapter 9, a notable example of warrants that failed to distinguish between individuals who were to be the subject of investigation and those named because they were likely to be incidentally recorded, were the LD warrants that listed people invited to the King send-off. In LD affidavit 091-097/2000 – the first to describe Mascot's strategy to record attendees of the King send-off – 46 of 113 people were named without any clear indication as to whether they were each suspected of being involved in or having knowledge of corrupt or criminal conduct, or whether they were likely to speak with Sea while he was using a listening device and be incidentally recorded.

By contrast, that same affidavit named a group of nine officers who worked in the Manly Detectives unit – noting the reason they were named in the affidavit was because Sea was likely to come into contact with them while wearing his body-worn LD, not because they were suspected of involvement in corrupt conduct.

As LD affidavit 091-097/2000 was copied in subsequent affidavits addressing the King send-off strategy, the subsequent affidavits also lacked information about whether many of the people named were suspected of wrongdoing. A number of unrelated Mascot LD affidavits also had this deficiency.

19.4.3 Rolling over successive warrants without investigative outcomes

Operation Prospect found numerous instances of Mascot investigators 'rolling over' LD warrants for significant periods of time, even though the use of the LD continually failed to produce any investigative outcome. For example, in Mascot's investigation of Officer P (discussed in Chapter 8), Mascot repeatedly named her in affidavits – but the purpose of naming her was never made explicit. Other Mascot documents indicate that confidential information was being leaked from the Internal Affairs investigation in which she was an investigator, and she was therefore potentially the subject of some suspicion.

Although Officer P remained under investigation and was named in affidavits and warrants for 18 months on the same basis, the investigation produced no evidence to corroborate suspicion that she might have been involved in leaking confidential information. Even after Officer P was the subject of integrity testing and apparently passed that test, Mascot did not record this information or convey it to others as required by the integrity testing policy. This exculpatory information was also not noted in subsequent LD affidavits.

Another example – detailed in Chapter 10 – relates to Officer F, who was suspected by Mascot of possible involvement in taking money stolen from an Armaguard vehicle. Officer F was named in 13 affidavits on the basis of this suspicion over eight months in 2001, despite no evidence corroborating the suspicion coming to light.

19.4.4 Naming individuals who would not be recorded

A number of Mascot affidavits named people as those Mascot proposed to listen to or record by using Sea's body worn LD in circumstances where it was impossible that all those people would be recorded in the 21 day period that the LD warrant was to be in force. In some cases, the number of people listed was many more than Sea could possibly have come into contact with during the period. In other cases, the affidavits included the names of people in remote locations. As Sea had not been tasked to approach them or visit those locations, he was highly unlikely to come into contact with them.

Chapter 7 and Chapter 8 consider the affidavit supporting LD warrant 109/1999. That warrant, and the supporting affidavit, named 119 people. It is not clear from the affidavit or any other Mascot documentation how Sea might come into contact with these 119 people in the 21-day period for which the warrant was in force.

Chapter 16 includes the evidence of NSWCC Assistant Director, Standen, when he identified this issue in some Mascot LD affidavits. Standen spoke of an instance where one of the officers that Mascot proposed to name on a LD affidavit lived "in the bush" when there was "no reasonable likelihood, ah, in the next 21 days that Sea is going to be having a conversation with this person...".[933]

Table 6 is drawn from the individual matters discussed in Chapters 6, 7, 8, 9, 10 and 12. It compares the number of LD affidavits and warrants each person was named in, to the number of actual recordings made as a result of the surveillance activities authorised by those warrants. Of interest is how often the warrants granted for each person named led to that individual being recorded. If, as the applications were required to demonstrate, Mascot needed authority to conduct specified surveillance activities within the 21 days that each warrant was in place, then many of the warrants should have resulted in that person being recorded.

Table 6: Case summary analysis: Number of times person named on LD warrants vs. actual recordings

Person	Chapter	No. of affidavits named in	No. of warrants named in	No. of times recorded on LD
Officer A	6	36	253	2
Officer B	6	47	168	4
Mr N	7	37	95	0
Officer C1	7	22	63	1
Officer J	7	1	3	0
Mr F	7	27	90	0
Officer P	8	29	81	1
Officer E	8	22	66	5
Mr J	9	12	36	1
Officer X	9	14	42	0
Officer T	9	12	35	1
Mr K	9	14	42	0
Mr DD	9	24	45	0
Officer F	10	27	77	9
Officer L	12	1	1	1
Officer G	12	5	15	0
Officer G	13	5	15	0

Source: Operation Prospect data holdings, compiled 23 November 2016.

Note: Only affidavits where the person is named in the list of persons to be recorded was included in this count. It excluded instances where the person may only be named in the 'facts and grounds' section or had allegations against them included elsewhere in other affidavits. The number of times a person was recorded on a LD excluded any time a person was recorded but was not named on the list of persons to be recorded on the corresponding affidavit.

* In a report to Mascot there was one reference to Mr DD being recorded by a LD by Sea, but there was no transcript of that recording.

Table 6 shows a marked disparity between the high numbers of warrants for each person named, and the low numbers of LD recordings resulting from surveillance activities authorised by the warrants. The figures highlight the disconnect between Mascot's applications for warrants to authorise specified surveillance activities, and the apparent failure to task Sea to engage or interact with a number of the people who were named in the warrants. The size of the disparity suggests that some names were placed or left on warrants even though there was no planned strategy to deploy Sea to speak with them within the 21-day period that the warrant was active.

933 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 12.

A number of individuals were named in dozens of affidavits and many more warrants but, despite warrants being in place over extended periods, they were seldom recorded. For example, Mr N (discussed in Chapter 7) was named in 36 affidavits that led to 95 LD warrants being granted – including 75 LD warrants to enable Mascot to investigate an historical allegation against Mr N. However, he was never recorded.

19.4.5 Weak or inaccurate information or failing to note all relevant information

Throughout this report there are numerous examples of Mascot LD and TI warrants that were granted on the basis of weak, inaccurate or uncorroborated information. There are also many examples of warrants issued on the basis of affidavits that failed to note all relevant information – including material that, if included, might have led to the application being refused.

Chapter 7 considers Mascot's failed attempts to investigate an historical allegation against Mr N, a former Detective Chief Inspector – on the basis of a passing comment by Mascot Subject Officer 7 (MSO7) about him "sharing dollars with" Mr N when they had worked together as police officers in 1969. This vague reference in a covert recording about the possible receipt of corrupt payments 30 years earlier was set out in an application for a LD warrant to listen to or record Mr N (and MSO7). This paragraph was rolled over into a further 24 affidavits. In total, the 25 affidavits supported the issuing of 75 LD warrants. Even if any of these warrants had led to Mr N being recorded, it is questionable what reliable evidence could have been obtained to properly investigate such vague and poorly corroborated information. Also, none of the LD affidavits that named Mr N directly addressed the requirements of section 16(1) of the LD Act – that the applicant had reasonable grounds to suspect or believe that a LD was necessary to investigate a prescribed offence.

The investigation of Officer F provides another example of Mascot framing affidavits in a manner that tended to highlight suspicions rather than objectively summarising the available evidence. He was suspected of having possibly received money stolen from an Armaguard vehicle – see Chapter 10. A recording of comments that Mascot Subject Officer 11 (MSO11) made about Officer F was subsequently reflected in an affidavit as: "[MSO11] referred to [Officer F] and the Orange Armaguard robbery".[934] The associated Information Report also noted that Officer F was among the "names mentioned".[935] The affidavit could be read as implying that MSO11 had connected Officer F to the Armaguard robbery. A more complete account should also have noted that – even though Officer F had worked with some officers who may have been involved – there was no evidence connecting Officer F to the robbery. This inaccurate presentation was rolled over into multiple LD affidavits and also appeared in a TI affidavit. The inclusion of inaccurate information in a TI affidavit also resulted in the telephone of Officer F's former family home being tapped.

Some of the weaknesses in Mascot's LD affidavits were as a result of Mascot's failure to document and pass on crucial information. Chapter 6 details Mascot's investigation of an allegation that Officer B had agreed to assist in the disposal of illegal firearms. Officer B was the subject of a NSWPF integrity test in relation to this matter, which it appears he passed. The results of the integrity test were not disclosed in subsequent affidavits and reports relating to Officer B – even though Mascot investigators continued to swear LD affidavits and TI affidavits that referred to Officer B's suspected involvement in the weapons disposal allegation. Had this information been noted in the warrant applications, it should have prompted questions about why further warrants were needed and enabled the investigation of Officer B to be concluded much earlier.

934 NSWCC Information Report, *Contact with Sea on 10/8/99 – LD review re* [name] / [MSO11], reporting officer: Burn, 10 August 1999, p. 2.
935 NSWCC Information Report, *Contact with Sea on 10/8/99 – LD review re* [name] / [MSO11], reporting officer: Burn, 10 August 1999, p. 4.

19.5 Legislative safeguards in force during Mascot investigations

19.5.1 *Listening Devices Act 1984*

19.5.1.1 Overview

When the LD Act was introduced in 1984, the Attorney General emphasised that it would "establish safeguards against the unjustified invasion of privacy that can be occasioned by the use of electronic surveillance".[936] The cornerstone of the LD Act was the warrant authorisation process, which was the basis of the safeguards in the legislation. As set out in Chapter 5 of this report, the LD Act made it an offence to use a LD to record a private conversation – unless the use and recording came within an exception listed in section 5(2) of the LD Act:[937]

> *(a) the use of a listening device pursuant to a warrant granted under Part IV,*
>
> *(b) the use of a listening device pursuant to an authority granted by or under the Telecommunications (Interception) Act 1979 of the Commonwealth or any other law of the Commonwealth,*
>
> *(c) the use of a listening device to obtain evidence or information in connection with –*
>
> *(i) an imminent threat of serious violence to persons or of substantial damage to property, or*
>
> *(ii) a serious narcotics offence,*
>
> *if it is necessary to use the device immediately to obtain that evidence or information, or*
>
> *(d) the unintentional hearing of a private conversation by means of a listening device.* [938]

A further exception was added to section 5(2) of the LD Act in 1989 to allow:

> *(e) the use of a listening device to record a refusal to consent to the recording of an interview by a member of the police force in connection with the commission of an offence by a person suspected of having committed the offence.*[939]

A "private conversation" is defined in the Act as:

> *... any words spoken by one person to another person or to other persons in circumstances that may reasonably be taken to indicate that any of those persons desires the words to be listened to only:*
>
> *(a) by themselves, or*
>
> *(b) by themselves and by some other person who has the consent, express or implied, of all of those persons to do so.*

Of the exceptions listed in section 5(2), the primary exception applicable during the Mascot investigations was the use of a LD pursuant to a warrant. To obtain a warrant, a person was required to apply to an independent and impartial judicial officer – an eligible Judge of the Supreme Court – to obtain a warrant authorising the use of a LD for 21 days. New warrant applications that were essentially the same or very similar to a previously authorised warrant application were colloquially known as 'rollover warrants'. Although a rollover warrant may be the same or very similar to a previous warrant, it had to be applied for in the same manner.

An additional legislative safeguard was the involvement of the Attorney General in being notified in advance of a proposed warrant application. This advance notice requirement in section 17 of the LD Act is explained at 19.5.1.2 below.

936 The Hon. David Paul Landa, NSWPD, (Hansard), Legislative Assembly, 17 May 1984, p. 1092.
937 LD Act, s. 5.
938 LD Act, s. 5(2).
939 *Statute Law (Miscellaneous Provisions) Act (No 3) 1989*, s. 3 and Schedule 1.

The reference in section 5(2)(d) to “the unintentional hearing of a private conversation” by means of a LD is another exception that was significant in the context of the Mascot investigations. Many of the preceding chapters consider circumstances where conversations were unexpectedly heard and subsequently used.

In addition to making it an offence to use a listening device in breach of section 5 of the LD Act, the LD Act also prohibited the communication, publication or possession of any material obtained in contravention of the LD Act.[940] Conversations that were unlawfully obtained were inadmissible in civil or criminal proceedings, except in limited circumstances.[941] Private conversations that inadvertently or unexpectedly came to the knowledge of a person as a result of the use of a LD were admissible in evidence, unless the evidence related to an offence for which a warrant could not be granted under the LD Act, or if the application upon which the warrant was granted was not – in the opinion of the court – made in good faith.[942]

The LD Act required that a person to whom a warrant was granted must, after the LD has been used, provide a report to the judicial officer and Attorney General detailing how it was used. The requirement for applicants to prepare these post-authorisation reports under section 19 of the LD Act has been incorporated into the SD Act under section 44. As discussed in section 19.15, these reports have the potential to improve the scrutiny of how warrants were used.

19.5.1.2 Warrant authorisation process

The warrant authorisation process was set out in section 16 of the LD Act – see Appendix 3 (Volume 1) of this report. The key elements of the process were that a warrant could be granted by a judicial officer upon receiving an application that the applicant suspected or believed that a prescribed offence had or was likely to be committed and that the use of a LD was necessary to obtain evidence in the investigation of the offence being committed.[943]

The prescribed offences for which a LD warrant could be obtained were offences punishable on indictment and other offences prescribed under Part 4 of the LD Act.[944]

The LD Act did not specify the form that an application for a warrant had to take. In practice, warrant applications were made in writing and supported by affidavits that addressed the matters the judicial officer was required to consider in deciding whether to grant a warrant and how to frame the warrant – for example, whether to impose conditions. The form of the warrant under section 16 was specified in Schedule 2 of the LD Act.

A judicial officer could grant a warrant to authorise the use of a LD if satisfied there were reasonable grounds for the applicant’s suspicion or belief that a LD was necessary to investigate a prescribed offence.[945] Section 16(2) of the LD Act specified five matters the judicial officer was to have regard to:

> *(a) the nature of the prescribed offence in respect of which the warrant is sought,*
>
> *(b) the extent to which the privacy of any person is likely to be affected,*
>
> *(c) alternative means of obtaining the evidence or information sought to be obtained,*
>
> *(d) the evidentiary value of any evidence sought to be obtained, and*
>
> *(e) any previous warrant sought or granted under* [the LD Act] *in connection with the same prescribed offence.*

940 LD Act, ss. 6-8, 10.
941 LD Act, s. 13.
942 LD Act, s. 14.
943 LD Act, s. 16.
944 LD Act, s. 15.
945 LD Act, s. 16(1).

The LD Act also provided in section 16(4) that a warrant granted under the Act was to specify the following information:[946]

- the prescribed offence being investigated by the use of the LD
- where practicable, the name of any person whose private conversation may be recorded or listened to by the use of the LD pursuant to the warrant
- the period the warrant was to be in force
- the name of any person who could use the LD under the warrant
- where practicable, the premises on which the LD was to be installed or the place it was to be used
- any conditions subject to which premises may be entered or how the LD could be used
- the time within which an authorised person was to report to the Court and the Attorney General about the use of the warrant as required by section 19 of the LD Act.

To understand what information applicants had to include in the application for a LD warrant, the requirements listed in section 16(2) should be read in conjunction with section 16(4). That is, in addition to applicants having to provide enough information to satisfy judicial officers that the requirements listed in section 16(2) had been addressed, applicants also had to specify practical information such as how long the warrant would be needed, who would use the LD and where it would be installed or used. In granting a LD warrant the judicial officer would have regard to the information provided by the applicant to specify what, if any, conditions should be imposed regarding the use of a LD.

The applicant was also required to issue a notice to the Attorney General under section 17 of the LD Act – an advance notice that the application was to be made. Much of the information that had to be provided to the Attorney General in the section 17 advance notice report, was the same as the information required by the judicial officer under section 16. Both the Attorney General and the judicial officer had to be provided with details of the prescribed offence, the name of any person to be recorded or listened to, where the listening device would be installed or used, any alternative means of obtaining the information sought, how long the warrant would be needed, who would be authorised to use the LD, and details of any previous warrant sought or granted in connection with the same offence.[947]

However, there were also a few notable differences in the two sets of information requirements. For example, the advance notice under section 17 was required to include:

> *(b) where practicable, the type of listening device intended to be used*
>
> ...
>
> *(c) whether any attempt has been made to obtain by alternative means the evidence or information sought and, if so, the result of any such attempt.*[948]

Neither point was specified by either section 16(2) or section 16(4) as information required by the judicial officer. In practice, these points were usually addressed in Mascot affidavits. However, the information that was provided about previous attempts to obtain evidence by alternative means was usually generic, often incomplete and, in at least some cases, inaccurate.

Significantly, there was no specific requirement in section 17 for the advance notice to the Attorney General to include information about:

- the extent to which the privacy of any person is likely to be affected, and
- the evidentiary value of any evidence sought to be obtained.

946 LD Act, s. 16(4).
947 LD Act, s. 17(a), (c), (d), and (f)-(i).
948 LD Act, s. 17.

These are two of the five matters the judicial officer was to have regard to in determining whether or not a LD warrant should be granted. Again, the Mascot affidavits usually addressed these points but the information provided was also often flawed or incomplete.

In principle, the information provided to the Attorney General under section 17 was important because a warrant could not be granted unless the judicial officer was satisfied that the notice to the Attorney General had been served and "the Attorney General has had an opportunity to be heard in relation to the granting of the warrant".[949] The purpose of the advance notice provision was to "ensure effective representation of the public interest in requiring responsibility in the use of listening devices".[950] Despite the requirement that the Attorney General be given "an opportunity to be heard" in relation to warrant applications, there were no provisions in the LD Act to indicate how this function was to be exercised in practice. By contrast, the LD Act contained specific provisions relating to the Attorney General's other functions – including those relating to preparing annual reports to Parliament (section 23) and the need for the Attorney General to provide written consent to any prosecutions instituted under the LD Act (section 28).

19.5.1.3 Advance notice reports issued by the Mascot investigators

Operation Prospect considered the section 17 notifications in relation to the warrants sought under the Mascot references. The Attorney General did not seek to make submissions in relation to any of them.

In practice, all warrant applications that are notified to the Attorney General under the advance notice provisions are reviewed by the Solicitor General or, if the Solicitor General is unavailable, by the Crown Advocate or Crown Solicitor.[951] It is clear that these reports did not provide an effective safeguard for identifying deficiencies in the Mascot affidavits. Nor did the advance notice reports prompt the Attorney General to seek to be heard on any application that appeared deficient.

A key impediment was the lack of specific provisions about how the advance notice reports may be used. Although the Attorney General was required to be given an opportunity to be heard before a warrant was granted, the LD Act provided no guidance on how this should be done, what factors should prompt the Attorney General to intervene or how the Attorney General may be 'heard'. The Attorney General had no powers to appear at the hearing of an application or to cross-examine an applicant about the contents of an application. Although the advance notice provisions have been incorporated into the SD Act, these impediments remain.

All the Mascot investigators' advance notice reports to the Attorney General were made and answered by facsimile. The shortest response time to a notification was four minutes, the longest was 17 hours and 4 minutes. The average response time was one hour and 24 minutes. From this, it can be concluded that the advance notification requirement did not adversely affect the time taken for the warrant authorisation process to be completed.

19.5.1.4 Post-authorisation section 19 reports

After the LD warrant expired, section 19 of the LD Act stated that the judicial officer who granted the warrant and the Attorney General must both be given a written report on how the warrant was used. This report was to include advice about whether the listening device was actually used, the names of anyone recorded or listened to, the period of use, where the device was installed, the "particulars of the general use made or to be made of any evidence or information obtained by the use of the device",[952] and any previous use of a LD in connection with the relevant offence. These post-authorisation reports were intended to promote "efficient monitoring of the use that is made of listening devices".[953]

949 LD Act, s. 17(2).
950 The Hon David Paul Landa, NSWPD, (Hansard), Legislative Assembly, 17 May 1984, p. 1095.
951 Attorney General and Department of Justice (NSW), *Report by the Attorney General of New South Wales pursuant to section 45 of the Surveillance Devices Act 2007 for the period ended 30 June 2013*, 21 March 2014, p. 4.
952 LD Act, s. 19(1)(b)(iv).
953 The Hon David Paul Landa, NSWPD, (Hansard), Legislative Assembly, 17 May 1984, p. 1095.

19.5.1.5 Post-authorisation reports issued by the Mascot investigators

Operation Prospect examined the section 19 post-authorisation reports given to the judicial officers and the Attorney General for all the warrants issued under the Mascot references. Mascot completed a section 19 report for every warrant it had been authorised to use. In reviewing these reports, Operation Prospect found no instances of the Attorney General writing back to any of the warrant holders to seek clarification about or comment on any information in the section 19 reports. For all the Mascot warrants, the only correspondence from the Attorney General in response to a section 19 report were form letters to the warrant holders in which the Attorney General noted receipt of the reports. For the Mascot references, no questions were raised as to whether the LDs were being used appropriately.

The LD scheme should assist the people responsible for checking the section 19 reports to compare the information in those reports with the advance notice reports, the affidavits and the warrants – including details of how many of the people named in the warrant were actually recorded, information about people who were recorded despite them not having been named and what, if any, useful evidence was obtained as a result of the warrant. The fact that a person was recorded but not named in a warrant does not, of itself, signify that the device has been misused. People may be incidentally or inadvertently recorded or listened to if they came into the vicinity of a LD. However, any patterns – such as a person being noted in the section 19 report without being named in the associated affidavit or warrant – should, at the very least, prompt further questions about the circumstances of the repeated recordings.

An example of the deficiency of the safeguard established under section 19 of the LD Act is the matter of Officer M, whose case is discussed in Chapter 11. Officer M was repeatedly recorded but not named in any LD warrants. Some of the recordings might have been incidental. However, others were transcribed and summarised in Information Reports – and included recordings of conversations where it was clear that Sea and Officer M were the only people present, Officer M was unaware he was being recorded and he had not given express consent. Officer M was subsequently named in six Mascot section 19 reports that noted nine of the 10 occasions that Officer M was recorded. The only occasion not noted in a related section 19 report was the first recording on 25 October 2000.[954] Although it appears Sea and the officers who deployed him to speak to Officer M while wearing a LD believed a valid warrant was in place to allow Officer M to be recorded, the fact that Officer M was repeatedly named in a series of section 19 reports as having been recorded could have prompted questions about why none of the associated warrants had named him as a person to be listened to or recorded.

The LD Act did not specify what cross-checking the Attorney General or the judicial officer was expected to do after receiving a section 19 report. Greater clarity in the legislation about what they were expected to do with the reports may have improved the effectiveness of this accountability measure. Under the Mascot investigations, it appears that the main action taken after the reports were given to the Attorney General was that the Solicitor General noting their receipt.

Even if the Act had specified what the Attorney General or the judicial officer were expected to do after receiving a post-authorisation report, deficiencies in the reports could also have constrained their ability to use them to monitor the effectiveness of the warrants. Many of the post-authorisation reports examined by Operation Prospect contained only very generic statements about how the recorded information would be used. The general nature of some of the information included in the reports would have made it difficult to undertake a meaningful analysis of the way the LDs were used or to assess – at a systemic level – whether their use was appropriate and justified.

954 NSWCC, Report in accordance with section 19(1) of the Listening Devices Act 1984, LD 342/2000, signed by [a NSWCC officer], 17 December 2000; NSWCC, Report in accordance with section 19(1) of the Listening Devices Act 1984, LD 366/2000, signed by [a NSWCC officer], 10 January 2001; NSWCC, Report in accordance with section 19(1) of the Listening Devices Act 1984, LD 01/00188, signed by [a NSWCC officer], 20 February 2001; NSWCC, Report in accordance with section 19(1) of the Listening Devices Act 1984, LD 01/02275, signed by [a NSWCC officer], 16 May 2001; NSWCC, Report in accordance with section 19(1) of the Listening Devices Act 1984, LD 01/02773, signed by [a NSWCC officer], 6 June 2001; NSWCC, Report in accordance with section 19(1) of the Listening Devices Act 1984, LD 01/03514, signed by [a NSWCC officer], 2 July 2001.

These defects in the LD Act's post-authorisation reporting safeguards were subsequently incorporated into the SD Act. A summary of the current post-authorisation reporting provisions at section 19.15.1.1. shows that the procedural weaknesses exposed by the Mascot investigations are still evident, highlighting the need for legislative changes to address ongoing concerns about the effectiveness of post-authorisation reports.

19.5.1.6 Other legislative provisions protecting privacy and the public interest

In addition to prohibiting unauthorised recordings of private conversations, section 13(1) of the LD Act provided that unlawfully recorded or obtained recordings could not be used in court proceedings. There were certain exceptions to this prohibition. For example, evidence relating to a private conversation may be admissible if all the principal parties consented to their conversation being recorded.[955]

One important exception was section 13(2)(d). It gave courts a general discretion to admit unlawfully obtained evidence in relation to certain serious offences – namely, "an offence punishable by imprisonment for life or for 20 years or more" or "a serious narcotics offence". In deciding how to use this discretion, section 13(3) of the LD Act required courts to:

> *(a) be guided by the public interest, including where relevant the public interest in:*
>
> > *(i) upholding the law,*
> >
> > *(ii) protecting people from illegal or unfair treatment, and*
> >
> > *(iii) punishing those guilty of offences, and*
>
> *(b) have regard to all relevant matters, including:*
>
> > *(i) the seriousness of the offence in relation to which the evidence is sought to be admitted, and*
> >
> > *(ii) the nature of the contravention of section 5 concerned* [the prohibition on using listening devices, except in specified circumstances].

The principles in section 13 related to the particular circumstances in which unlawfully obtained evidence might be admitted into legal proceedings. At the same time, they provided important guidance on the application of broader public interest principles that underpin the Act. In particular, section 13(2)(d) and (3) reinforced prohibitions elsewhere in the Act that barred the use of LD technologies except in relation to certain serious offences. It is also clear that there must be no departure from these principles, other than in a very limited range of exceptional circumstances.[956]

Similarly, the advance notice provisions under section 17 of the LD Act were specifically included to address important public interest principles – and have been reflected in section 51(2) of the SD Act. These advance notice provisions remain an important avenue for ensuring that the public interest is represented in judicial decisions on whether SD warrants should be granted.

In relation to the Mascot investigations, the apparent failure of these broad public interest principles to inform and influence the way that LD warrants were used, suggests that clearer guidance is needed on how these kinds of public interest principles should be applied. There is a recommendation aimed at addressing this issue at 19.13.1.

19.5.2 *Telecommunications (Interception) Act 1979* (Cth)

Initially, ASIO was to be the only agency with powers to intercept telecommunications under the TI Act. However, a second Bill for the TI Act was introduced later in 1979 – granting expanded powers of interception and enabling Customs officers to obtain interception warrants to combat drug crime.[957] In 1987, the TI Act was amended to enable State police forces to obtain warrants to intercept telecommunications.

955 LD Act, s. 13(2)(a).
956 LD Act, Parts 2 and 4.
957 Senator John Carrick, Commonwealth Senate, (Hansard), 30 May 1979, p. 2336.

19.5.2.1 Legislative safeguards in the TI Act at the time of the Mascot investigations

The TI Act has always included provisions making it an offence for a person to intercept communications passing over a telecommunications system – or to authorise, suffer, permit or otherwise enable another person to do so.[958] This restriction does not apply under certain specific circumstances, including where those interceptions occur pursuant to a warrant granted under the TI Act. Warrants to intercept telecommunications could be issued by nominated Federal Court judges, although some could also be issued by nominated Administrative Appeals Tribunal (AAT) members.[959]

Between 1999 and 2004, the TI Act identified two groups of offences – “class 1 offences” and “class 2 offences” – which could justify seeking and granting a warrant to intercept telecommunications.

Class 1 offences were objectively more serious – and included murder and kidnapping (and any equivalent offences), narcotics offences and the offences of aiding or abetting, being knowingly concerning in or party to, or conspiring to commit any of those offences.[960] Later amendments to the TI Act expanded the definition of class 1 offences to include offences involving terrorism or acts of terrorism, including financing terrorism.[961]

Class 2 offences during this period included:

- Offences punishable by imprisonment for a period of seven years or more, where the conduct involved in the offence would involve or require:
  - loss of life or serious personal injury (or a serious risk of either)
  - serious damage to property in circumstances where this would endanger a person’s safety
  - trafficking in prescribed substances
  - serious fraud
  - serious loss to the revenue of the Commonwealth, a State or the Australian Capital Territory
  - bribery or corruption of (or by) an officer of the Commonwealth, an officer of a State or an officer of the Australian Capital Territory.
- Organised criminal offences meeting certain specified criteria, and offences punishable by imprisonment for a period of seven years or more, if those offences:
  - involved multiple offenders and substantial planning and organisation
  - involved (or ordinarily involved) the use of sophisticated methods and techniques
  - were committed (or were ordinarily committed) in conjunction with other offences of a like kind
  - involved any kind of particular specified conduct – which included theft, tax evasion, extortion and sexual offences against children.[962]
- Money laundering offences.
- Cybercrime offences – including offences involving access to security information held on government information systems and computers.
- Aiding or abetting, being knowingly concerning in or party to, or conspiring to commit, an offence which was a class 2 offence.[963]

958 TI Act, s. 7(1).
959 TI Act, ss. 6D and 6DA.
960 TI Act, s. 5(1).
961 TI Act, s. 5(1).
962 This is an abridged version of s. 5D(3) of the TI Act in force between December 1998 and April 2004. In broad terms, these criteria are directed at allowing the use of TIs for investigating organised crime.
963 TI Act, s. 5D.

When the first Mascot reference was granted, warrants could only be sought and issued to permit the interception of particular telecommunications services. In 2000, the TI Act was amended to allow law enforcement agencies to apply for warrants authorising the interception of any telecommunications service that a specific person was using or likely to use.[964] These types of warrants (referred to as "named person warrants") could be sought and issued for investigations into both class 1 and class 2 offences.

19.5.2.2 Warrant authorisation process

Under the TI Act at the time of Operation Mascot, warrants could be issued to specified law enforcement agencies – which included the NSWPF and the NSWCC – to assist with the investigation by that agency of class 1[965] or class 2 offences.[966] The judge or AAT member considering the application was required to consider:

- the extent to which investigative methods other than intercepting telecommunications were available to or had been used by the investigating agency
- how much of the information that was expected to be gathered through the use of TIs was likely to assist with the agency's investigation of the relevant offence(s)
- how much the investigation would be prejudiced by using those other methods, either because of delay in obtaining this information or for some other reason.[967]

It was also necessary for an applicant to show that the proposed interception could provide otherwise unobtainable evidence. If a warrant was sought to investigate class 1 offences, the judicial officer had to be satisfied that some or all of the information sought to be gained by the TI could not be appropriately obtained by other methods.[968] For applications for warrants connected with investigating class 2 offences, the judicial officer also had to consider:

- the likely interference with any person's privacy that would result from granting the interception[969]
- the gravity of the conduct constituting the offence or offences being investigated[970]
- how much the use of interceptions would assist in connection with the investigation of the relevant class 2 offence(s).[971]

If an agency applied for a named person warrant, the judicial officer considering the application also had to be satisfied that there were reasonable grounds for suspecting that the person was using, or likely to use, more than one telecommunications service.[972] The information before Operation Prospect indicates that no "named person warrants" were sought or granted in the course of Mascot's investigations.

The TI Act also included specific instructions and limitations about when warrants would come into force, how the authority conferred by a warrant could be exercised, and how such warrants could be revoked.[973] The TI Act prohibited the use or communication of information obtained by interceptions – and certain information about warrants and warrant applications – except for specific purposes.[974]

964 TI Act, ss. 45A and 46A.
965 TI Act, s. 45.
966 TI Act, s. 46.
967 TI Act, ss. 45(e), 46(2)(c), (d) and (f).
968 TI Act, s. 45(e).
969 TI Act, s. 46(2)(a).
970 TI Act, s. 46(2)(b).
971 TI Act, s. 46(2)(e).
972 TI Act, ss. 45A(c) and 46A(c).
973 TI Act, Part VI, Division 4.
974 TI Act, Part VII.

19.5.2.3 Legislative provisions protecting privacy and public interest

Under the TI Act at the time of Operation Mascot, a judicial officer who received a warrant application in connection with the investigation of class 2 offences was required to consider the potential impact on the privacy of a person likely to use any of the telecommunications services that would be intercepted.[975] With the exception of certain narcotics offences, the offences listed in the Mascot and Mascot II references[976] were all class 2 offences.

The TI Act incorporated several provisions designed to prevent excessive or unnecessary telecommunications interceptions. Regardless of the nature of the offences under investigation, the applicant for a warrant needed to demonstrate a reasonable basis for suspecting that a particular person would be using the service proposed to be intercepted, or that a specific named person would likely be using multiple services. The TI Act also prescribed that applications for TI warrants had to contain information about:

- the number of previous applications, if any, for warrants that the agency had made and which related to each service or person to whom that warrant related
- the number of warrants, if any, previously issued on such applications
- particulars of the use made by the agency of information obtained by interceptions under such warrants[977]
- in the case of a named person warrant, the name or names by which that person was known and details sufficient to identify the telecommunications services which that person was using or likely to use, to the extent that the agency was aware of them.[978]

Even after a TI warrant had been issued for the Mascot investigations, procedural steps had to be taken before the warrant could enter into force[979] – and only specifically approved officers of the agency could lawfully exercise the authority granted by the warrant.[980] The TI Act also included a requirement that the chief officer of an agency – for Mascot, the NSWCC Commissioner – must take steps to have a warrant revoked if they were satisfied that "the grounds on which the warrant was issued have ceased to exist".[981]

The TI Act imposed strict controls over how intercepted information and information about TI warrants could lawfully be used, communicated or recorded.[982] Information intercepted under the authority of a TI warrant could be given in evidence in certain proceedings, including criminal prosecutions for both class 1 and class 2 offences.[983] Such information could also be used for defined "permitted purposes", which varied depending on the agency to which the warrant was issued.[984] Depending on the specific nature of the information obtained by a TI, it could also be given to another agency if that information was relevant to the receiving agency's functions.[985] The TI Act allowed a person to communicate intercepted information to the Commonwealth Attorney General, the Commonwealth Director of Public Prosecutions, the Commissioner of Police or the Chairman of the National Crime Authority if the person reasonably believed that information had been obtained, used, dealt with or communicated unlawfully.[986]

975 TI Act, s. 46(2)(a).
976 NSWCC, *Notice under section 25(1) of the New South Wales Crime Commission Act 1985 – Mascot Reference*, 9 February 1999; NSWCC, *Notice under section 25(1) of the New South Wales Crime Commission Act 1985 – Mascot II Reference*, 9 November 2000.
977 TI Act, s. 42(4).
978 TI Act, s. 42(4A).
979 TI Act, s. 54.
980 TI Act, s. 55.
981 TI Act, s. 57.
982 TI Act, Part VII.
983 TI Act, ss. 5(1), 5B, 74.
984 TI Act, s. 67.
985 TI Act, s. 68.
986 TI Act, s. 71.

19.6 Current laws for using covert surveillance technologies

This section considers the legislation that currently governs the use of covert surveillance technologies (meaning those used under LD and TI warrants) in NSW, and the extent to which the controls and safeguards enacted since the Mascot investigations are likely to address the systemic weaknesses and vulnerabilities exposed by the Mascot warrants.

19.6.1 *Surveillance Devices Act 2007*

19.6.1.1 Overview

Under the SD Act – which replaced the LD Act in 2007 – the warrant authorisation process remains the primary means of mitigating against the risk that surveillance devices (SDs) might be used to intrude into people's privacy without justification.

Notable differences between the warrant authorisation process under the SD Act and those in place at the time of the Mascot investigations include the following:

- An SD warrant can authorise the use of a range of SDs – data surveillance devices, listening devices, optical surveillance devices and tracking devices.[987]
- An application for an SD warrant is determined by an eligible judge of the Supreme Court or – for applications for tracking devices only – an eligible Magistrate.[988] These are referred to in this chapter as the judicial officer.
- An SD warrant may authorise the use of devices for a period of 90 days, rather than 21 days.
- An SD warrant does not need to specify the names of people who may be recorded by the SD, whereas under the LD Act the warrant listed who was authorised to be listened to or recorded.[989]

Although the SD warrant authorisation process focuses on mitigating the risk of unjustified surveillance at an individual level, the SD Act contains a range of accountability measures aimed at ensuring the use of SDs is appropriate at a systemic level. The SD Act requires the warrant holder to report to the judicial officer and Attorney General about the way the LDs were used,[990] and the Attorney General must publish an annual report on the number of warrants sought and granted each year.[991]

The reporting requirements that existed under the LD Act remain, with the significant addition in the SD Act of an inspection and monitoring role for the Ombudsman's office.[992] These accountability measures are intended to ensure that agencies comply with the legislative requirements and to provide Parliament and the public with some level of assurance that SDs are being used appropriately and the policy objectives of the legislation are being met.

The SD Act prohibits – except as authorised by the Act – the use and maintenance of LDs,[993] optical surveillance devices,[994] tracking devices,[995] and data surveillance devices.[996] However, there are exceptions to this for each type of device. For example, a LD may be used under a warrant – in accordance with the TI Act or another Commonwealth law – in relation to the unintentional hearing of a private conversation in the following circumstances:

- for recording a refusal to consent to the recording of an interview by the NSWPF in connection with the commission of an offence

987 SD Act, s. 4(1).
988 SD Act, ss. 5, 16(2).
989 SD Act, s. 20.
990 SD Act, s. 44.
991 SD Act, s. 45.
992 SD Act, s. 48.
993 SD Act, s. 7.
994 SD Act, s. 8.
995 SD Act, s. 9.
996 SD Act, s. 10.

- when used to locate and retrieve the device
- when integrated into a Taser issued to a police officer
- when used with a body worn video recorder by a police officer.[997]

Section 7(3) of the SD Act sets out an exception to the prohibition on recording a private conversation to which the person is a party if:

> *(a) all of the principal parties to the conversation consent, expressly or impliedly, to the listening device being so used, or*
>
> *(b) a principal party to the conversation consents to the listening device being so used and the recording of the conversation:*
>
> *(i) is reasonably necessary for the protection of the lawful interests of that principal party, or*
>
> *(ii) is not made for the purpose of communicating or publishing the conversation, or a report of the conversation, to persons who are not parties to the conversation.*[998]

Section 7(4) also provides that the prohibition does not apply to the use of a LD to record, monitor or listen to a private conversation if:

> *(a) a party to the private conversation is a participant in an authorised operation and, in the case of a participant who is a law enforcement officer, is using an assumed name or assumed identity, and*
>
> *(b) the person using the listening device is that participant or another participant in that authorised operation.*[999]

A significant difference between the warrants is that the LD Act made it a requirement that the warrant stipulated who could be listened to or recorded under the warrant, but the SD Act does not.[1000] There is also no specific requirement under the SD Act that the warrant application names those who are proposed to be recorded.[1001] It would, however, usually be the case that those to be recorded should be included in the supporting affidavit which sets out the grounds on which the warrant is sought – particularly as one of the matters the judicial officer must consider in determining a warrant application is the "extent to which the privacy of any person is likely to be affected".[1002]

The SD Act includes that same advance notice provision as the LD Act requiring the applicant to advise the Attorney General "where practicable, the name of any person whose private conversation or activity is intended to be recorded or listened to by the use of the surveillance device".[1003]

19.6.1.2 Warrant authorisation process

The SD Act has retained the warrant authorisation framework that was the central protection in the LD Act against the unjustified invasion of privacy.

Under section 17 of the SD Act, a law enforcement officer (or another person on their behalf) may apply for an SD warrant if the law enforcement officer on reasonable grounds suspects or believes that:

> *(a) a relevant offence has been, is being, is about to be or is likely to be committed, and*
>
> *(b) an investigation into that offence is being, will be or is likely to be conducted in this jurisdiction or in this jurisdiction and in one or more participating jurisdictions, and*

997 SD Act, s. 7(2).
998 SD Act, s. 7(3).
999 SD Act, s. 7(4).
1000 SD Act, s. 20.
1001 SD Act, s. 17.
1002 SD Act, s. 19(2)(b).
1003 SD Act, s. 51(1)(c).

> (c) *the use of a surveillance device is necessary for the purpose of an investigation into that offence to enable evidence to be obtained of the commission of that offence or the identity or location of the offender.*[1004]

An applicant must set out his or her suspicion or belief about the commission of a relevant offence and the investigation into that offence, and why a SD is needed for the investigation.[1005] This must be supported by an affidavit setting out the grounds on which the warrant is sought.[1006]

The grounds for a SD warrant to be granted are similar to those under the LD Act. The judicial officer may issue a SD warrant if they are satisfied "that there are reasonable grounds for the suspicion or belief founding the application for the warrant".[1007] In determining whether a warrant should be issued, section 19(2) requires the judicial officer to consider:

> (a) *the nature and gravity of the alleged offence in respect of which the warrant is sought, and*
>
> (b) *the extent to which the privacy of any person is likely to be affected, and*
>
> (c) *the existence of any alternative means of obtaining the evidence or information sought to be obtained and the extent to which those means may assist or prejudice the investigation, and*
>
> (d) *the extent to which the information sought to be obtained would assist the investigation, and*
>
> (e) *the evidentiary value of any information sought to be obtained, and*
>
> (f) *any previous warrant sought or issued ... in connection with the same offence.*[1008]

These factors are substantially the same as the factors that were to be considered by an eligible Judge under the LD Act.[1009]

An affidavit in support of a SD application should address the matters a judicial officer must consider under section 19 of the SD Act. This includes establishing that the suspicion or belief informing the application is reasonable, as well as addressing each of the elements that the judicial officer must consider under section 19(2). There are no specific requirements in the legislation about how information in the application or affidavit must be presented.

A judicial officer may reject an application that is unclear, or may require further information from the applicant before deciding whether to issue a warrant. The SD Act does not require the number of applications that were withdrawn or refused to be reported publicly, although this information is collated by the Ombudsman as part of the inspection functions under the SD Act.[1010] This data is presented and further discussed in section 19.7.1.

19.6.1.3 Accountability within the authorisation process

Although the central safeguard of the SD scheme is the fact that warrants are authorised by independent judicial officers, the SD Act gives the Attorney General a role in supporting issuing authorities to consider public interest issues. The approach in NSW can be contrasted with schemes in Queensland and Victoria, where Public Interest Monitors have been established to help issuing authorities to test the sufficiency of information supporting applications for SDs.

1004 SD Act, s. 17(1).

1005 SD Act, s. 17(1). This provision requires information to be provided to satisfy a judicial officer about the need for a warrant, and is substantially the same as section 16(1) of the LD Act.

1006 SD Act, s. 17(3)(b). There are some limited circumstances in which a warrant application may be made before an affidavit is prepared or sworn or an application may be made remotely: SD Act, ss. 17(4), 18.

1007 SD Act, s. 19(1)(a). In the case of unsworn applications, the judicial officer must also be satisfied that it was impracticable for the application to be sworn, and for remote applications, that it was impracticable to make the application in person and the need for the surveillance device to be used immediately: SD Act, s. 19(1)(b)-(c).

1008 SD Act, s. 19(2).

1009 The requirement under s. 19(2)(d) of the SD Act that the judicial officer consider the investigative value of the information sought was not reflected in any equivalent provision under s. 16(2) of the LD Act.

1010 SD Act, s. 45(1)(b1)-(b3).

The SD Act requires the applicant for a SD warrant to provide advance notice of the application to the Attorney General.[1011] The LD Act included substantially the same provision under section 17 when it was in force.[1012] However, neither the now repealed LD Act nor the current SD Act specifies a procedure for the Attorney General's involvement at this stage of the application process. As noted earlier, the Attorney General at the time did not seek to be heard or make representations on any Mascot warrant application.

Before a warrant is issued, the judicial officer must be satisfied that the Attorney General has been notified of the application and has had an opportunity to be heard in relation to the granting of the warrant.[1013] This advance notice is required to contain:

- the relevant offence for which the warrant is sought
- the type of SD intended to be used
- the name of any person intended to be recorded or listened to
- the premises or vehicle in which the SD is to be installed or the place at which it is intended to be used
- whether any attempt has been made to obtain the information or evidence sought by alternative means, and the results of any such attempt
- what alternative means of obtaining the evidence exist
- the period of intended use
- the name of the law enforcement officer primarily responsible for executing the warrant
- details of any previous warrant sought or issued in connection with the same relevant offence.[1014]

The legislation does not require the applicant to provide a copy of any supporting affidavit to the Attorney General. In principle, limiting the information that must be provided to the Attorney General to an abridged version of the application has the potential to hamper the Attorney General's ability to take action in an appropriate case to make a submission to the judicial officer about any potential defect or concern in a supporting affidavit. However, in practice agencies generally provide the Attorney General with details of the evidence informing the application, and some agencies – such as the NSWPF – include all the information from the affidavit in the notice.[1015] However, the Ombudsman has observed through the compliance and monitoring functions under the SD Act that the notice does not include a detailed assessment of the way the SD may have an impact on the privacy of anyone. At best, the notice might include a general statement to the effect that the privacy of any person will be affected only to the extent it is necessary to do so to conduct the investigation.

The Solicitor General reviews all applications that have been notified to the Attorney General. The Solicitor General will liaise with the applicant about any issues of concern that are identified. The Solicitor General then "advises the Court that the Attorney General does not wish to be heard, or makes any necessary submissions in relation to the application, as appropriate".[1016] If the Solicitor General is unavailable, this review is done by the Crown Advocate or Crown Solicitor.[1017]

The advance notice provision has drawn some criticism. In its 2001 interim report on SDs the NSW Law Reform Commission (NSWLRC) noted that the advance notice provision "has little effect as an accountability measure" and in practice only slowed down the application process.[1018] However – as shown in data outlined in section 19.5.1.3 – there is little evidence that the advance notice requirements caused any delay or had any detrimental effect on the Mascot investigation.

1011 SD Act, s. 51(1).
1012 LD Act, s. 17.
1013 SD Act, s. 51(2).
1014 SD Act, s. 51(1).
1015 This observation is drawn from the NSW Ombudsman's performance of its compliance and monitoring functions under s. 48 of the SD Act.
1016 Attorney General and Department of Justice (NSW), *Report by the Attorney General of New South Wales pursuant to section 45 of the Surveillance Devices Act 2007 for the period ended 30 June 2013*, 21 March 2014, p. 3.
1017 Attorney General and Department of Justice (NSW), *Report by the Attorney General of New South Wales pursuant to section 45 of the Surveillance Devices Act 2007 for the period ended 30 June 2013*, 21 March 2014, p. 4.
1018 New South Wales Law Reform Commission (NSWLRC), Report 98, *Surveillance: An Interim Report*, February 2001, p. 319.

19.6.1.4 Giving reasons for decisions

In 2014, staff from Operation Prospect inspected the files of a number of LD warrants held by the Supreme Court registry to obtain copies of original signed warrants or affidavits not located on NSWCC files, and to note if the judicial officers who had authorised the warrants had recorded any notes or other records on their decision to authorise. None of the applications that were accessed included any notes or notations on the application or reasons for the decision to approve.

In early 2015, Chief Justice Bathurst and Chief Judge Hoeben of the NSW Supreme Court introduced a procedure whereby judges of the Common Law Division of the Court are required to write reasons for granting a warrant for covert surveillance technologies.[1019] These reasons are entered in the judge's benchbook or set out in a separate document which is placed with a copy of the warrant in a sealed envelope and can only be opened by order of the Judge of the Court. The amount of detail included in the recorded reasons is a matter for each individual judge, and in many cases the reasons may simply note that the requirements of section 19 of the SD Act have been met "in respect of each person to whom the warrant is directed".[1020]

The procedure requiring judicial officers to record their reasons and to standardise how this information is recorded are welcome developments and should provide some reassurance about the integrity of the warrant authorisation process. Over time, the reasons may provide further insight into the granting of SDs in court proceedings where evidence obtained by covert surveillance is challenged because of concerns about the lawfulness of the use of an SD. However, the new procedure can only be seen as a first step in strengthening the judicial oversight of the authorisation process. It goes no further than requiring judicial officers to note the outcome of their reasoning – such as whether they are satisfied "that there are reasonable grounds for the suspicion or belief founding the application for the warrant". [1021]

19.6.1.5 Post-authorisation reports under the Surveillance Devices Act 2007

Section 44 of the SD Act requires the warrant holder to report to the judicial officer and the Attorney General about the use of SDs authorised by a warrant. The content required in this post-authorisation report is substantially the same as was required under section 19 of the LD Act.

The extent to which the judicial officer and the Attorney General monitor that the SDs have been used in a manner that complies with the warrant remains unclear. None of the annual reports issued by the Attorney General under the SD Act have detailed the way the post authorisation reports have been assessed.

The Ombudsman has a role under the SD Act to inspect the records of agencies that use SDs to determine their compliance with the Act.[1022] In the course of this work, the Ombudsman has not encountered any instances since the start of the Act in which the records indicate that the Attorney General or the judicial officer sought clarification from, or made comments back to, the warrant holder about the post authorisation reports.

The legislation does not contain any details about the kinds of cross-checking the Attorney General or judicial officer are expected to do when assessing the content of the post-authorisation reports. It appears – based on information from the Ombudsman's monitoring and compliance functions – that they only note receipt of the report.

1019 Letter from Justice C Hoeben, Chief Judge at Common Law, Supreme Court of NSW to Prof. John McMillan, Acting Ombudsman, Ombudsman NSW, 20 October 2016.

1020 Letter from Justice C Hoeben, Chief Judge at Common Law, Supreme Court of NSW to Prof. John McMillan, Acting Ombudsman, Ombudsman NSW, 20 October 2016 – enclosure entitled 'Email from Justice C Hoeben, Chief Judge at Common Law, Supreme Court of NSW to [members and officers of the Supreme Court of NSW], 13 February 2015'.

1021 Letter from Justice C Hoeben, Chief Judge at Common Law, Supreme Court of NSW to Prof. John McMillan, Acting Ombudsman, Ombudsman NSW, 20 October 2016 – enclosure entitled 'Email from Justice C Hoeben, Chief Judge at Common Law, Supreme Court of NSW to [members and officers of the Supreme Court of NSW], 13 February 2015'.

1022 SD Act, Part 5, Division 3.

19.6.1.6 Inspection and monitoring of compliance with the SD Act 2007

The most significant addition to the accountability measures under the SD Act was the introduction in 2007 of the Ombudsman's inspection and monitoring role to assess and report on the way law enforcement agencies comply with the legislation. [1023] This level of independent scrutiny did not exist under the LD Act.

The Ombudsman's role is to inspect the records of the NSWPF, NSWCC, PIC and Independent Commission Against Corruption (ICAC) to assess their compliance with the record-keeping requirements in the SD Act, while at the same time considering other aspects of compliance that can be determined from those records and from questions asked of relevant officers.[1024] Although there is little to indicate what checks the Attorney General or judicial officers do on receiving the post authorisation reports (see 19.6.1.5), the Ombudsman's inspections include checking for consistency across all the documentation an agency holds relating to each SD warrant – including the post-authorisation report. These functions did not exist under the LD Act. The current scheme therefore has improved checks on whether SDs are used in compliance with the legislation.

The Ombudsman's post-authorisation records inspections include checking:

- that the application contained all the details specified by section 20 – 'Contents of SD warrants' – including the name of the applicant, the nature and duration of the warrant, the kind of SD to be used, and any conditions relating to the premises or vehicle entered or the SD used
- if any extension or variation to the warrant complied with section 22
- if the revocation of a warrant complied with section 23
- that the appropriate law enforcement officer notified the chief officer immediately if they were satisfied the use of the warrant was no longer necessary, and that the chief officer took steps to discontinue the use of the device or devices as soon as practicable
- if a warrant was revoked, that the use of the SD was discontinued immediately
- that the section 51 notice contained the required information and had been given to the Attorney General before the warrant was issued, and that the Attorney General had an opportunity to be heard on the application
- that the report under section 44 was given to the eligible Judge and the Attorney General within the time specified in the warrant
- that the report complied with the requirements of section 41
- that the application for continued use of an authorised SD in an emergency situation complied with sections 31-32
- if a SD was used without a warrant – that an application for approval was made within two business days to an eligible Judge and that such approval complied with section 33
- that the register of warrants and emergency applications contained the information required by section 47
- that any directions under section 52 were complied with. [1025]

The Ombudsman also checks the accuracy of information in the post-authorisation reports by conducting 'field inspections' throughout metropolitan and regional areas. This allows the information in the report to be checked against the physical records of the way the SD was used, such as files containing the transcripts and recordings made by the SD. The Ombudsman can then confirm if the reports accurately reflect all the people recorded or listened to, and how the recorded information was communicated or used. Although each SD warrant file is checked, only limited field inspections can be done each year. It should be noted that the inspection regime does not include examining or considering any aspect of the application and authorisation process – for example, the adequacy of information in an application or the reasons for granting a warrant.

1023 This inspection function will be transferred to the Inspector of the Law Enforcement Conduct Commission on the date of proclamation of the *Law Enforcement Conduct Commission Act 2016*.

1024 For example, see NSW Ombudsman, *Report under section 49(1) of the Surveillance Devices Act 2007 for the period ending 30 June 2015*, April 2016.

1025 NSW Ombudsman, *Report under section 49(1) of the Surveillance Devices Act 2007 for the period ending 30 June 2015*, April 2016, p. 2.

The recently enacted *Law Enforcement Conduct Commission Act 2016* (LECC Act) provides that the inspection, monitoring and reporting role currently done by the Ombudsman under the SD Act will be done by the Inspector of the Law Enforcement Conduct Commission (LECC) from January 2017.[1026]

19.6.1.7 Legislative provisions protecting privacy and the public interest

While the Ombudsman's monitoring of agency compliance with post-authorisation record-keeping requirements provides some measure of transparency – particularly in checking that agencies adhere to any conditions that courts include in a warrant – the principal protections of privacy and the public interest are incorporated into the initial stages of the warrant application and authorisation process.

For example, before issuing a warrant authorising the use of an SD the judicial officer must first consider factors including "the nature and gravity of the alleged offence", "the extent to which the privacy of any person is likely to be affected", and the necessity of using such intrusive surveillance technologies to investigate the alleged offences.[1027] These and other such provisions recognise that there is a public interest in authorising controlled uses of highly intrusive covert surveillance technologies to investigate crime – but only in relation to certain serious offences and only in ways that do not unnecessarily interfere with the privacy of any person recorded.

The ability of judicial officers to protect the public interest – and prevent any unnecessary intrusions on the privacy of individuals – when determining SD warrant applications depends heavily on the quality and completeness of the information provided by deponents in their applications. As noted throughout this report, the warrants issued for the Mascot investigations were often issued on the basis of affidavits that contained false, misleading or uncorroborated information.

19.6.2 *Telecommunications (Interception and Access) Act 1979* (Cth)

19.6.2.1 Overview

The TI Act currently allows nominated law enforcement agencies – the NSWCC, the NSWPF, the PIC and the ICAC – to obtain warrants authorising the interception of communications, as well as accessing and using stored communications (such as SMS messages and emails)[1028] and telecommunications data.[1029] These changes reflect developments in telecommunications technology since the Mascot investigation concluded.

The TI (NSW) Act imposes similar record-keeping and document provision obligations on the NSWCC, the NSWPF and the PIC to those which applied during the Mascot investigation.[1030] There is also an inspection and reporting regime to ensure that the records kept by law enforcement agencies comply with the requirements of the TI (NSW) Act. This function, currently performed by the Ombudsman, will be transferred to the Inspector of the LECC in accordance with Schedule 6 of the LECC Act 2016.

19.6.2.2 Warrant authorisation process

The application process for warrants authorising the interception of telecommunications is substantially the same now as it was under the TI Act during Operation Mascot.[1031] Applications for TI warrants are supported by affidavits, which must contain certain information.[1032] Under the TI Act, the definitions of class 1 and class 2 offences have been replaced by the overarching concept of "serious offences". This definition includes offences that would have been class 1 and class 2 offences under the TI Act at the time of Mascot.[1033]

1026 *Law Enforcement Conduct Commission Act 2016*, Schedule 6.
1027 SD Act, s. 19(2).
1028 TI Act, Parts 3-3 and 3-4.
1029 TI Act, Part 4-1.
1030 TI (NSW) Act, Part 2.
1031 TI Act, Part 2-5, Division 3. Although warrants can now be granted following telephone applications, section 51 of the TI Act requires an agency to provide an affidavit setting out the information provided in that telephone application to the issuing judge or AAT member before the end of the following day. The issuing judge or AAT member may revoke the interception warrants granted following a telephone application if this requirement is not satisfied.
1032 TI Act, s. 42.
1033 TI Act, s. 5D.

A stored communications warrant can be sought for less serious matters than required for a TI warrant. As defined by the TI Act, "serious contraventions" can be grounds for an application for a stored communications warrant and can include "serious offences", as well as offences punishable by imprisonment for a maximum period of at least three years or by fines or pecuniary penalties above a certain amount.[1034] For law enforcement agencies in New South Wales, the application process for warrants authorising access to stored communications is similar to the process for seeking a TI warrant.[1035] Other than the distinction between serious offences and serious contraventions, the TI Act requires the issuing judicial officer to consider the same matters about applications for both TI warrants and stored communications warrants.[1036]

Access to telecommunications data is governed by Chapter 4 of the TI Act, and operates differently from the processes for obtaining TI warrants or stored communications warrants. Access to telecommunications data is authorised by nominated officers (in the case of law enforcement agencies such as the NSWPF and NSWCC) who hold or are acting in a position that has been designated as an "authorised officer" under the TI Act.[1037] Access can be authorised for existing information or documents[1038] or for prospective information or documents.[1039] Access to existing information or documents must not be authorised unless the "authorised officer" is satisfied that it is reasonably necessary for enforcing the criminal law[1040] or laws imposing pecuniary penalties,[1041] for protecting the public revenue,[1042] or to locate missing persons.[1043] Access to prospective information operates similarly to authorisation by a warrant, albeit without application to a court.[1044] Such access can only be authorised for up to 45 days, and only in connection with the investigation of a "serious offence" or a criminal offence punishable by a maximum of at least three years' imprisonment.[1045] An authorised officer of an enforcement agency cannot authorise access to telecommunications data if this would disclose information relating to a journalist or their employer if one purpose of making that authorisation would be to identify another person believed to be a source of information – unless a relevant "journalist information warrant" has been issued.[1046]

19.6.2.3 Legislative provisions protecting privacy and the public interest

The TI Act contains the same provisions designed to protect privacy and the public interest as the TI Act did at the time of the Mascot investigation. Affidavits sworn in support of applications for TI warrants must include the same information about previous related applications, warrants previously issued from those applications, and particulars of how information obtained under those warrants had been used.[1047] The same additional requirements apply for named person warrants.[1048] When a judicial officer is deciding whether to grant a TI or stored communications warrant, they must consider how much the privacy of any person would be likely to be interfered with by allowing communications to be intercepted or accessed under that warrant.[1049]

1034 TI Act, s. 5E.

1035 TI Act, ss. 39-44 and 110-115. Additional provisions apply to applications for interception warrants made in Victoria and Queensland, to enable the Public Interest Monitors in those states to discharge their functions in respect of applications for such warrants. However, there are no equivalent provisions for applications for stored communications warrants.

1036 TI Act, ss. 46 and 116.

1037 TI Act, ss. 5 and 5AB.

1038 TI Act, ss. 178, 178A and 179.

1039 TI Act, s. 180.

1040 TI Act, s. 178(3).

1041 TI Act, s. 179(3).

1042 TI Act, s. 179(3).

1043 TI Act, s. 178A(3).

1044 TI Act, s. 180.

1045 TI Act, s. 180.

1046 TI Act, s. 180H.

1047 TI Act, s. 42(4).

1048 TI Act, s. 42(4A).

1049 TI Act, ss. 46(2)(a), 46A(2)(a), 116(2)(a).

Before authorising access to telecommunications data, an "authorised officer" must consider the potential impact on privacy and be satisfied – on reasonable grounds – that any interference with the privacy of any person that may result from the disclosure or use is justifiable and proportionate, based on the following matters:

- the gravity of any conduct in relation to which the authorisation is sought – including the seriousness of any offence, pecuniary penalty or protection of the public revenue in relation to which the authorisation is sought and whether the authorisation is sought to find a missing person
- the likely relevance and usefulness of the information or documents
- the reason the disclosure or use concerned is proposed to be authorised.[1050]

To prevent law enforcement agencies from accessing telecommunications data to identify journalists' sources, the TI Act restricts lawful access to this data in the absence of a "journalist information warrant". This restriction recognises the importance of enabling people to provide information to journalists on a confidential basis. The processes for applying for and issuing a journalist information warrant vary depending on the agency seeking that information. However, in each case, an external authority is responsible for considering the application.[1051] When deciding whether to grant a journalist information warrant to an enforcement agency such as the NSWPF, the external authority must consider whether the warrant is reasonably necessary for the purpose for which it has been sought – for example, the enforcement of the criminal law – and whether the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the journalist's source.[1052]

TI warrants now enter into force when they are issued.[1053] However, the same restrictions on exercising the authority conferred by a warrant still apply to warrants issued under the TI Act.[1054] Likewise, the chief officer of an agency must take steps to have a warrant revoked if satisfied that "the grounds on which the warrant was issued have ceased to exist".[1055] Stored communications warrants only authorise access to the communications listed in the warrant, and this access is subject to any conditions or restrictions listed in the warrant.[1056] These warrants only remain in force for five days after being issued or until the warrants are executed.[1057] Authorisations to access prospective telecommunications data may be revoked if the disclosure of the telecommunications data is no longer required,[1058] and lapse at the time specified in the authorisation – which cannot be longer than 45 days after the date of that authorisation[1059] – or when any applicable journalist information warrant expires or is revoked.[1060] The net effect of these provisions is to prevent unnecessary interception or access of telecommunications, and to require agencies not to continue to intercept or access such information beyond a certain time limit without further authorisation or if it is no longer necessary to do so.

The TI Act includes the same general prohibitions on dealing with, using, communicating or making a record of intercepted information which applied at the time of the Mascot investigation.[1061] The list of offences for which a TI warrant may be sought has been expanded, but the restrictions on the use of information obtained have not been relaxed. The TI Act permits substantially the same dealings with intercepted information, although lawfully intercepted information may be communicated to a larger number of agencies.[1062] The current version of the TI Act includes a small number of additional permitted dealings compared to the TI Act between 1998 and 2003, most of which relate to "network protection duties". These are directed towards ensuring the proper operation, use, protection and maintenance of computer networks that hold records obtained by intercepting telecommunications.[1063] Separate but similar restrictions apply to dealing with information obtained under a stored communications warrant[1064] and to telecommunications data accessed under Chapter 4 of the TI Act.[1065]

1050 TI Act, s. 180F.
1051 TI Act, Part 4-1, Division 4C.
1052 TI Act, s. 180T.
1053 TI Act, s. 54.
1054 TI Act, s. 55.
1055 TI Act, s. 57.
1056 TI Act, s. 117.
1057 TI Act, s. 119.
1058 TI Act, s. 180(7).
1059 TI Act, s. 180(6)(b)(i).
1060 TI Act, s. 180(6)(b)(ii), and (7)(b).
1061 TI Act, s. 63.
1062 TI Act, s. 68.
1063 TI Act, ss. 63C, 63D, 63E, 68A and 79A.
1064 TI Act, Part 3-4, Division 2.
1065 TI Act, Part 4-1, Division 6.

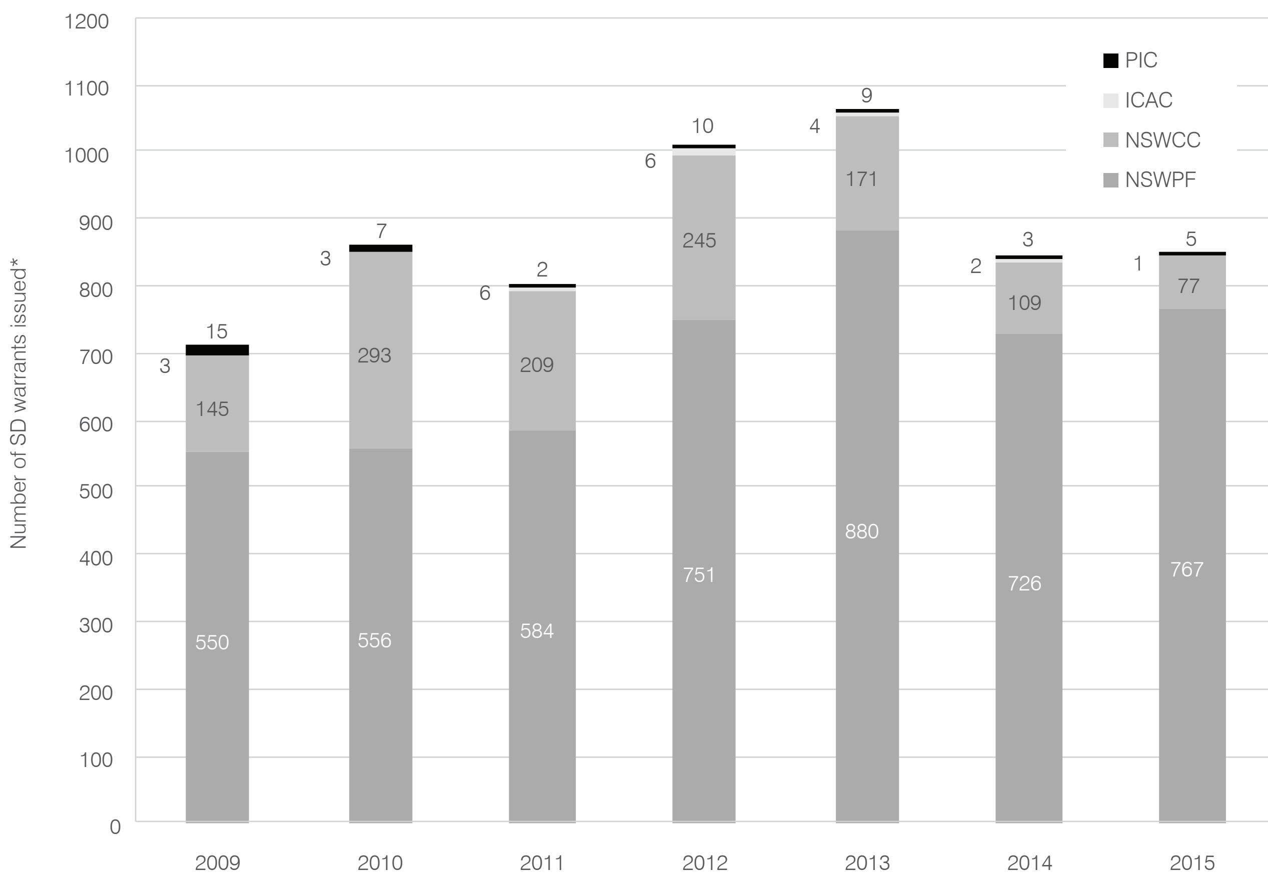
19.7 Current uses of covert surveillance technologies in NSW

The remainder of this chapter considers whether, and to what extent, the legislative changes introduced by the SD Act and the TI Act might have improved the warrant authorisation processes, and whether further amendments are needed to strengthen the accountability and controls around these processes. The discussion about the current provisions begins with information about the current uses of SD and TI warrants in NSW.

19.7.1 Data on SD warrants rejected and granted

The number of SDs sought annually fluctuates according to the nature of particular investigative operations in any given year. However, an examination of the number of SD warrants issued between 2009 and 2015 suggests that the NSWPF and the NSWCC continue to make frequent use of SDs – see Figure 6.

Figure 6: Number of surveillance device warrants issued to NSW agencies, 2009 to 2015



* Including 13 emergency authorisations issued during this period, consisting of seven issued to the NSWPF and six to the NSWCC.

Source: Compiled from published NSW Ombudsman reports from 2009 to 2015 under Section 49(1) of the SD Act.

Figure 6 shows that the NSWPF is by far the highest user of SDs among NSW agencies, having had a total of 4,814 SD warrants (including emergency authorisations) granted to its investigators between 2009 and 2015 – an average of almost 690 warrants a year. The NSWCC is the next highest user, with 1,249 SD warrants issued in the same period – an average of 180 warrants a year, although far fewer in recent years. By comparison, the ICAC and PIC are relatively minor users of SD technologies.

The high volume of SD warrants granted each year places great pressure on the relatively small number of judicial officers who may determine applications. The SD Act provides for an SD warrant to be issued only by an eligible Judge of the Supreme Court, and warrants relating to tracking devices only to be issued by eligible Magistrates. There are no provisions, as there were under the LD Act, for other judicial officers such as judges of the District Court to exercise these functions.

One possible indicator of whether the existing warrant application and authorisation processes are successful in identifying deficiencies in SD warrant applications is how often applications are declined by a judicial officer. Table 7 shows how many SD warrant applications were declined between 2009 and 2015.

Table 7: Number of SD warrant applications by NSW agencies refused, 2009 to 2015

	2009	2010	2011	2012	2013	2014	2015
NSWPF	0	0	0	2	0	10	10
NSWCC	0	1	0	0	0	7	1
ICAC	0	0	0	0	0	0	0
PIC	0	0	0	0	0	0	0
Total refusals	**0**	**1**	**0**	**2**	**0**	**17**	**11**
Total granted*	**713**	**859**	**801**	**1,012**	**1,064**	**840**	**850**

*Total for all NSW agencies – see Figure 6. Source: Ombudsman Inspection data – September 2016.

Until recently, it was rare for warrant applications under the SD Act to be refused. These figures are consistent with anecdotal information, such as comments made by former Supreme Court judges who were responsible for determining applications for SD warrants. Some have said that it was extremely uncommon for judges to reject applications.[1066]

In 2012, a total of 1,012 SD warrants were granted to NSW agencies and just two were refused. The following year 1,064 were granted and none refused. However, Table 7 shows a marked change in 2014 when 17 SD warrant applications by NSW agencies were refused (seven of these on the same day), and in 2015 when 11 were refused – although the volume of warrant applications remained high.

One possible explanation for this sharp increase in refusals is that changes in NSWPF and NSWCC practices and procedures might have caused higher numbers of faulty applications to be submitted – thereby increasing the pool of matters that are then likely to be rejected. Although this explanation is plausible, there is no available evidence of changed law enforcement agency practices to support this argument.

Another possible explanation might be that changes in the types of matters being investigated caused the increase. For example, there are anecdotal reports that the number of historical child sexual assault investigations in NSW have risen since the Royal Commission into Institutional Responses to Child Sexual Abuse began in January 2013. Child sexual assault offences are undoubtedly serious enough to justify the granting of an SD warrant. However, the factors a judicial officer must have regard to when deciding whether a warrant should be granted include the extent to which the information sought to be obtained would assist the investigation,[1067] and the evidentiary value of any information sought.[1068] The length of time since the alleged offences and issues associated with the young age of the victims when the incidents were said to have occurred can therefore mitigate against warrants being granted. However, judicial officers often simply note "not satisfied on the evidence" as the reason for refusing an application, making it difficult to know how influential these factors might have been.

1066 The Hon Bruce James, Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission, General Meeting with the Commissioner of the Police Integrity Commission, 21 May 2012, p. 13; The Hon David Levine, Legislative Council Select Committee on the Conduct and Progress of the Ombudsman's inquiry 'Operation Prospect' (Select Committee), 30 January 2015, p. 42.

1067 SD Act, s. 19(2)(d).

1068 SD Act, s. 19(2)(e).

Although changes in the characteristics of matters being investigated might account for a few of the additional SD warrant refusals, a more probable explanation is that closer judicial scrutiny of SD warrant applications has led to higher numbers of warrants being refused. Factors likely to have prompted increased care in assessing applications include rising public interest in Operation Prospect in late 2013 and early 2014,[1069] and a high profile parliamentary inquiry into Operation Prospect later that year.[1070] Both factors were noted by Chief Judge Hoeben of the NSW Supreme Court in his email to judges of the Common Law Division of the Court in early 2015, when he recommended a new procedure for recording written reasons for granting SD warrants. His Honour's email acknowledged growing parliamentary and media interest in a number of surveillance warrants issued by Judges of this Court between 1998 and 2002, and that "[q]uestions have been asked in Parliament and by the press as to how some of these Warrants came to be issued".[1071]

One consequence of this increased interest was to spotlight the adequacy of the warrant application and authorisation processes in place at the time of the Mascot investigations, and whether the processes put in place since then would lead to an improved approach. An issue that the Select Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect' explored in some detail was:

> *... to understand the oversight role played by judges and whether it is effective in detecting flawed material to prevent the unwarranted intrusion into people's privacy.*[1072]

The Select Committee's subsequent report observed that the ability of judicial officers to properly assess warrant applications was heavily dependent on the "accuracy and quality of information within applications and affidavits". The committee also had concerns about the adequacy of the warrant authorisation process and whether it enabled judges to scrutinise applications to the extent necessary.[1073] These issues were considered again during a further inquiry by the committee into the progress of Operation Prospect in mid-2015.

The noticeable rise in warrant applications being refused began in February 2014, when four NSWPF warrant applications and five NSWCC applications were refused. However, the higher numbers of applications being refused continued in 2015 and is still evident today. A recent check of Ombudsman records relating to SD warrant applications shows that, as at 14 November 2016, a total of 12 SD warrant applications have been refused by judicial officers so far this year.[1074]

19.7.2 Data on TI warrants granted and rejected

As is the case for SD warrants, the number of TI warrants sought each year fluctuates according to the nature of particular investigative operations in any given year. As the data in Figure 7 shows, TI powers continue to be used on a regular basis by NSW law enforcement agencies.

1069 Sheehan, Paul, 'Self-inflicted damage set to be coming for NSW Police', *Sydney Morning Herald*, 23 January 2014.

1070 The Legislative Council Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect" was established by a resolution of the Legislative Council dated 12 November 2014.

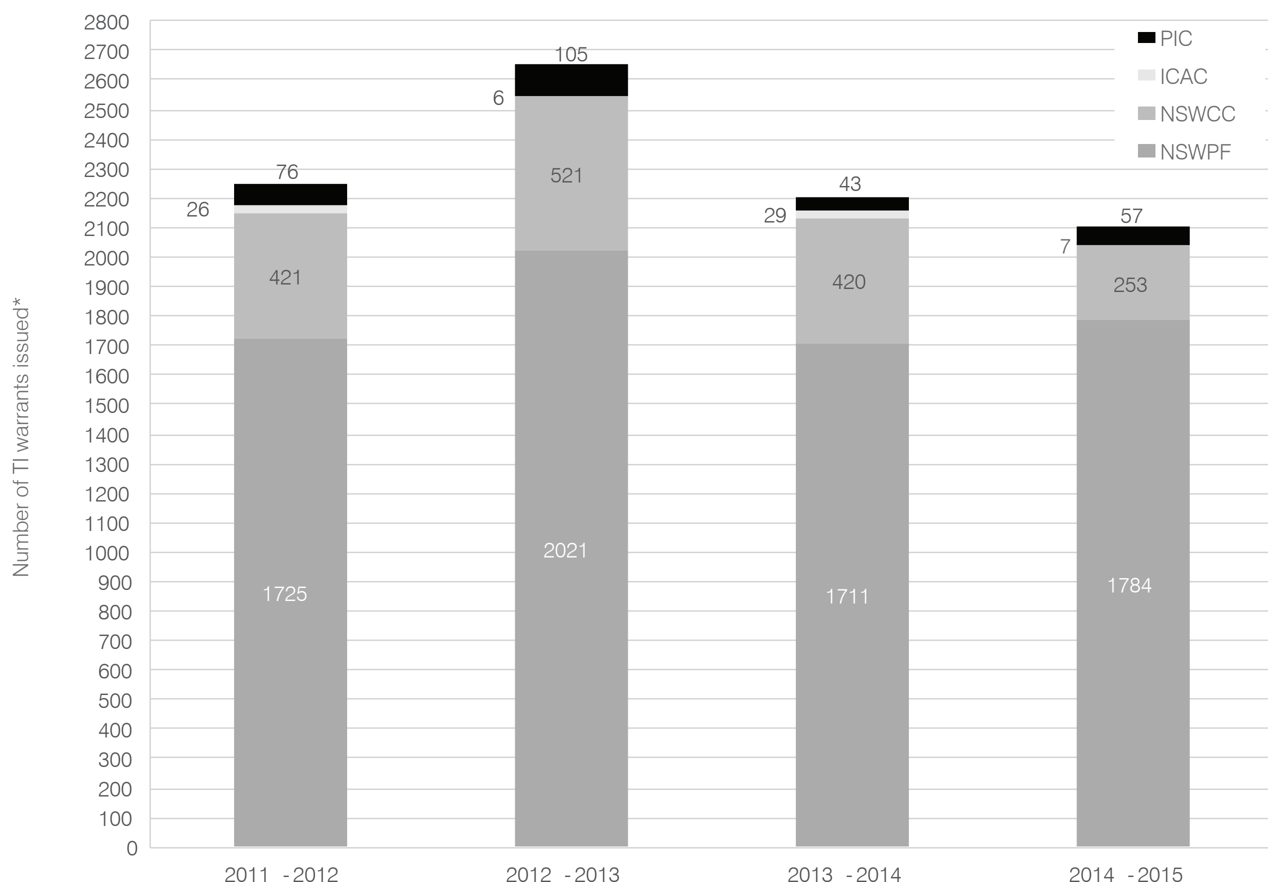
1071 Letter from Justice C Hoeben, Chief Judge at Common Law, Supreme Court of NSW to Prof. John McMillan, Acting Ombudsman, Ombudsman NSW, 20 October 2016 – enclosure entitled 'Email from Justice C Hoeben, Chief Judge at Common Law, Supreme Court of NSW to [members and officers of the Supreme Court of NSW], 13 February 2015'.

1072 Select Committee, The conduct and progress of the Ombudsman's inquiry "Operation Prospect", February 2015, p. 49.

1073 Select Committee, The conduct and progress of the Ombudsman's inquiry "Operation Prospect", February 2015, p. 51.

1074 Figures provided by the NSW Ombudsman's Secure Monitoring Unit, 14 November 2016.

Figure 7: Total TI warrants issued to NSW agencies – 2011-12 to 2014-15



* Includes applications for new warrants and renewal of existing warrants.

Source: Data from Attorney General's Department, *Telecommunications (Interception and Access) Act 1979: Annual Report 2014-2015*, 2015 p. 6 and Attorney General's Department, *Telecommunications (Interception and Access) Act 1979: Annual Report 2012-2013*, 2013, p. 12.

Figure 7 shows that the NSWPF is by far the highest user of TIs, having had a total of 7,241 TI warrants issued to its investigators in the four years from 2011-12 to 2014-15. The NSWCC is also a relatively frequent user of TIs, with 1,615 TI warrants issued in the same period.

The Ombudsman's office checked published data relating to TI warrant applications to see how often applications from NSW agencies were declined by judicial officers. Table 8 shows the number of TI warrant applications that were refused.

Table 8: Number of TI warrant applications by NSW agencies refused 2011-12 to 2014-15

	2011-12	2012-13	2013-14	2014-15
NSWPF	4	7	5	2
NSWCC	2	1	0	0
ICAC	0	0	0	0
PIC	0	0	0	0
TOTAL	**6**	**8**	**5**	**2**
Total granted*	**2,248**	**2,653**	**2,203**	**2,101**

*Total for all NSW agencies – see Figure 7
Source: Attorney General's Department, *Telecommunications (Interception and Access) Act 1979 Annual Report* for the years ending 30 June 2006 – 2015.

As the data in Table 8 shows, TI warrant applications by NSW law enforcement agencies are rarely rejected by judicial officers. In 2011-12, NSW agencies were granted a combined total of 2,248 TI warrants and just six applications were refused. The figures were similar in 2012-13 (2,653 granted, eight refused), 2013-14 (2,203 granted, five refused) and 2014-15 (2,101 granted, two refused).

Whatever factors led to the recent rise in SD warrant applications being refused, it is apparent that those factors did not also lead to an increase in TI warrant applications being rejected. It is notable that NSW judicial officers are responsible for SD warrant authorisations and there was considerable parliamentary and public commentary as a result of the Mascot investigations – whereas Federal Court judges and nominated AAT members are responsible for issuing TI warrants and were not subjected to the same kinds of comments and criticisms.

19.7.3 Comparing NSW with other jurisdictions

The published data shows that NSW law enforcement agencies were granted 850 SD warrants in 2015 and 2,101 TI warrants in 2014-15. To put these figures in context, there is a need to compare NSW's uses of covert surveillance technologies to uses in other jurisdictions.

In relation to TI warrants (where reliable comparative figures are readily available), there were 4,676 TI warrants issued to State and Commonwealth law enforcement agencies across Australia in 2014-15.[1075] This means the 2,101 TI warrants issued to NSW agencies during this period constituted 45% of all TI warrants issued in Australia. This is more than five times the number issued to Queensland agencies (370 TI warrants in 2014-15) and more than ten times the number issued to Victorian agencies (205 in 2014-15). The only comparable users of TI warrants are Commonwealth agencies – the AFP, the Australian Crime Commission (ACC) and the Australian Commission for Law Enforcement Integrity – which were granted a combined total of 1,415 TI warrants.[1076]

Most TI warrants in NSW are granted to the NSWPF,[1077] which makes greater use of telecommunications intercepts than any other agency in Australia. In 2014-15 the NSWPF was issued 1,784 TI warrants, more warrants than the combined total of the next three highest agencies – the AFP (1,095 TI warrants), the Western Australia Police (371 TI warrants) and the ACC (316 TI warrants).[1078]

At the time of writing, gaps in the way that other jurisdictions report on their uses of SD warrants make it difficult to compare those uses with NSW. However, as an example of the comparative volume of applications across jurisdictions, 861 SD warrant applications were made in NSW in 2015 (including 11 that were refused). At the Commonwealth level, 876 SD applications were made in 2014-15,[1079] and fewer than 100 applications were made in that year in each of Queensland, South Australia, the Australian Capital Territory (ACT) and Western Australia.[1080]

Two jurisdictions, Queensland and Victoria, have Public Interest Monitors that assess and report on SD warrant applications submitted by law enforcement agencies in those states. The most recent annual report for Queensland's Public Interest Monitor showed that in 2014-15 Queensland law enforcement agencies applied for and were granted 60 SD warrants that authorised the use of 315 devices.[1081] Victoria's Public Interest Monitor has responsibility for assessing applications for SD warrants and a range of other covert powers, including TI

1075 Attorney General's Department (Cth), *Telecommunications (Interception and Access) Act 1979: Annual Report 2014-2015*, 2 December 2015, Table 4, pp. 6-7. Figure includes applications for warrants and renewal applications.

1076 Attorney General's Department (Cth), *Telecommunications (Interception and Access) Act 1979: Annual Report 2014-2015*, 2 December 2015, Table 4, pp. 6-7.

1077 In 2014-15, the NSWPF was issued 86.6% (1,532) of all TI warrants issued in NSW.

1078 Attorney General's Department (Cth), *Telecommunications (Interception and Access) Act 1979: Annual Report 2014-2015,* 2 December 2015, Table 4, pp. 6-7.

1079 Attorney General's Department (Cth), *Surveillance Devices Act 2004 - Annual Report 2014-15*, 2 December 2015, p. 11.

1080 For example, in 2014-15 there were 60 in Queensland, 72 in the ACT, 54 in South Australia and 84 in Western Australia. See Queensland Public Interest Monitor *17th Annual Report – Public Interest Monitor, Reporting Period 1 July 2014 – 30 June 2015,* 31 October 2015, pp. 4-5; AFP, *ACT Policing – Surveillance Devices – Annual Report 2014-2015*, 2 October 2015, p. 12; South Australia Police, *2015 State Attorney General Report – Listening and Surveillance Devices Act 1972*, 27 October 2015, p. 3; Western Australia Police, *Surveillance Devices Act 1998 – WAPOL Annual Report – 2014/2015*, 17 August 2015, p. 3.

1081 Queensland Public Interest Monitor, *17th Annual Report – Public Interest Monitor, Reporting Period 1 July 2014 – 30 June 2015,* 31 October 2015.

warrant applications. The monitor's most recent annual report states that in 2015-16 law enforcement agencies in Victoria made 269 'relevant applications'; 13 were withdrawn and three were refused.[1082] As the monitor provides no breakdown of what the applications were for, it is unclear how many were for SD warrants, TI warrants and other covert powers.[1083] However, assuming the number of TI warrant applications in 2015-16 was similar to the 205 TI warrants granted in the previous year,[1084] then it is likely that Victoria's law enforcement agencies were granted no more than 60 or 70 SD warrants in 2015-16.

Despite the marked differences in the way that each state monitors and reports authorisations to use SDs, the powers are similar across the three jurisdictions. Remarkably, the available data indicates that the 850 SD warrants granted to NSW agencies in 2015 is about 14 times the number issued to agencies in Queensland, and probably about 12 to 14 times the number issued in Victoria.

19.7.4 Factors driving the rising use of covert surveillance technologies

The use of covert surveillance technologies by law enforcement agencies has grown rapidly in recent decades. The development of sophisticated new surveillance technologies, new laws allowing additional agencies to use these devices, and extending the use of this option to an ever wider range of serious offences have all contributed to marked changes in the way that covert surveillance is now used. When the Royal Commission on Intelligence and Security was established in 1974, ASIO was the principal user of TIs and they were primarily directed at investigating national security issues.[1085] The technology for intercepting and recording telephone conversations at that time was much more labour-intensive, often requiring agents to physically tap into telephone lines and monitor conversations from a nearby listening post. One estimate of the number of TI warrants issued annually at that time comes from a former Attorney General who gave evidence to a Senate inquiry that a total of 107 telephone taps had been authorised in one year in the mid-1970s.[1086]

Over time these powers were extended to Customs and other agencies, including State law enforcement bodies, and to deal with additional offences. Meanwhile, technological innovations have made TIs and other covert SDs a more cost-effective investigative tool.

Changes in criminal activity can also drive changes in law and practice. A case in point is child pornography offences. These are predominantly executed through communications devices such as phones and computers. TIs are therefore essential for the successful investigation and prosecution of these crimes. Also, as criminals turn to encrypted technologies to circumvent the ability of law enforcement agencies to intercept their communications, SDs have become increasingly important in investigating certain types of crime.

19.8 Protecting privacy and the public interest before granting a warrant

NSW law enforcement agencies have actively embraced the use of covert surveillance technologies as an investigative tool. However, the concerns documented throughout this report demonstrate that the legislative framework for regulating the appropriate use of these devices at the time of the Mascot investigations was not adequate. This section considers current concerns and whether the changes introduced by the SD Act and the TI Act in recent years might be any more effective at addressing the weaknesses in warrant authorisation processes.

1082 Victorian Public Interest Monitor, *Annual Report 2015-2016,* 25 July 2016, p. 6.

1083 Under s. 4 of the *Public Interest Monitor Act 2011* (Vic), a "relevant application" is defined as including applications for a coercive powers order; a surveillance device warrant; a retrieval warrant; an assistance order; an approval of an emergency authorisation; a telecommunications interception warrant; a covert search warrant; a preventative detention order; a prohibited contact order; and an extension, variation, renewal or revocation of any such order, warrant or approval.

1084 Attorney General's Department (Cth), *Telecommunications (Interception and Access) Act 1979: Annual Report 2014-2015,* 2 December 2015, Table 4, pp. 6-7.

1085 The Royal Commission on Intelligence and Security, led by Justice Robert Hope, was established on 21 August 1974.

1086 Senator John Button, Commonwealth Senate, (Hansard), 22 August 1979, p. 132.

19.8.1 Opportunities to intervene before a warrant is granted

In light of the high volumes of TI and SD warrants now issued to law enforcement agencies in NSW each year, it is important to consider the adequacy of procedural safeguards incorporated in the warrant application and authorisation processes. This will shed light on whether further measures are needed to strengthen the accountability and controls on how these powers are used.

Under the SD Act, the primary measures for ensuring that individuals are protected from unnecessary incursions on their privacy, and that the SD Act powers are used in the public interest, are:

- The SD warrant must be issued by a Judge of the Supreme Court, and the judge must be satisfied that the warrant is necessary after considering the factors listed in section 19 of the SD Act.
- A warrant must not be issued unless the judge is satisfied that advance notice of the application has been given to the Attorney General, and the Attorney General has had an opportunity to be heard in relation to the granting of the warrant.[1087]

Similarly, the primary safeguards in the TI Act for ensuring TI warrant powers are used appropriately and in the public interest are:

- The TI warrant must be issued by a Federal Court judge or nominated AAT member, and that the judge or member must be satisfied that the warrant is necessary after having regard to the factors in section 46 of the TI Act.

The list of factors in section 46 of the TI Act that the judicial officer must consider in determining whether it would be in the public interest to grant a TI warrant, are similar to those listed in section 19 of the SD Act. Both require that, before granting a warrant application, the judicial officer must have regard to:

- the nature and gravity of the alleged offence[1088]
- the extent to which the privacy of individuals is likely to be affected[1089]
- the necessity of using covert surveillance and the availability of other investigative strategies,[1090] and
- the evidentiary value of any information sought.[1091]

There is no equivalent in the TI Act to the advance notice provisions in the SD Act that give the Attorney General an opportunity to be heard in relation to the granting of SD warrants. In this regard, NSW differs from Victoria where a Public Interest Monitor is expected to provide additional scrutiny over the TI warrant application and authorisation processes. The TI Act makes provision for this Public Interest Monitor scheme, which is discussed further, below.

Other safeguards in both the SD Act and TI Act include record keeping, reporting and inspection provisions. Although important, these do not affect the warrant authorisation process – but occur at the 'back end' of the process after a warrant has been issued. They therefore do not address many of the risks identified in Operation Prospect's analysis of the Mascot investigation's use of LDs and TIs. These risks occurred at the 'front end' of the process for authorising warrants.

1087 SD Act, s.51(2).
1088 SD Act, s.19(2)(a); TI Act, s. 46(2)(b).
1089 SD Act, s.19(2)(b); TI Act, s. 46(2)(a).
1090 SD Act, s.19(2)(c) and (d); TI Act, s. 46(2)(c)and(d).
1091 SD Act, s.19(2)(e); TI Act, s. 46(2)(e).

19.8.2 Weaknesses in the current warrant authorisation processes

Both the SD Act and TI Act place significant reliance on the judicial officer's capacity to identify false or misleading information by finding internal flaws and inconsistencies in the affidavit presented in support of an application. The inherent difficulties associated with identifying such flaws in sometimes lengthy and complex applications are compounded by the very high volumes of SD and TI warrant applications that judicial officers must consider. This greatly increases the pressure on the small number of judicial officers who are expected to perform this vital role.

Some former judges of the Supreme Court have acknowledged that there are significant constraints on the capacity of judicial officers to test the sufficiency of evidence in applications for LDs. For example, in evidence given by Bruce James QC – Commissioner of the PIC – to the Committee on the Office of the Ombudsman and the PIC on 21 May 2012, he observed that warrant applications are typically heard "on the papers", with no opportunity for the deponents who prepare the affidavits to be cross-examined about the evidence presented.

> *CHAIR: In relation to an affidavit which is confidential, what transparency and accountability is there for the veracity of affidavits that have been sworn before Supreme Court Judges?*
>
> *Mr JAMES: I used to be a Supreme Court Judge. If one is an authorised Judge, and I think all Judges in the Common Law Division are, you are presented with the affidavits – and I am confident that my practice is no different from the practice adopted by other Judges, at least at that time – it was that simply on the papers, without ever seeing your deponents, on the face of the evidence you made a decision whether to grant the warrant. I have to say it is a fact that almost all applications are granted.* [1092]

Although judges could require deponents to attend to be examined on the contents of a sworn affidavit, Mr James thought it unlikely that this would greatly strengthen the integrity of the process.

> *CHAIR: Is there any testing of an affidavit that can ever be undertaken?*
>
> *Mr JAMES: I think a Judge could require a deponent of the affidavit to attend before the Judge. The Judge would be unlikely to have any information outside the affidavit with which to confront the deponent so that getting the deponent in and speaking to the deponent might not achieve very much.* [1093]

Also, if the application contains false or misleading information, there are few practical opportunities for that information to be examined and tested after the affidavit has been accepted as part of the warrant authorisation process:

> *CHAIR: So the basis of all authorisations for listening devices is through this process. I am interested in the integrity of this process. If false information was put before a Supreme Court Judge, I am assuming that it would be difficult for a Judge not to accept a sworn affidavit?*
>
> *Mr JAMES: Yes.*
>
> *CHAIR: Then that affidavit becomes secret so it is never seen to be tested or if a crime was committed by someone swearing a false affidavit, is there any possibility of ever detecting that crime or making a person accountable for it?*
>
> *Mr JAMES: I think it is unlikely to be detected. The Listening Devices Act has been replaced by the Surveillance Devices Act, but there is no difference in principle with regard to the matters that we are talking about. I suppose there is the possibility that if a warrant is granted and evidence is obtained through the use of the device and there is subsequently a trial, there is the possibility of evidence of events emerging at the trial which would show that some of the contents of the affidavit are not true.*
>
> *CHAIR: But the affidavit is not available at the trial, is it?*
>
> *Mr JAMES: No, the affidavit is not available at the trial.*

1092 The Hon Bruce James, Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission, General Meeting with the Commissioner of the Police Integrity Commission, 21 May 2012, p. 13.

1093 The Hon Bruce James, Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission, General Meeting with the Commissioner of the Police Integrity Commission, 21 May 2012, p. 13.

CHAIR: So it cannot be tested there either, can it?

Mr JAMES: I think what you say is at least generally correct ... [1094]

Mr James also stated that almost all applications are granted.[1095] In evidence given by the Hon David Levine – Inspector of the PIC – to the Committee on the Ombudsman, the PIC and the Crime Commission on 22 February 2013, he said that when judges are confronted with high numbers of warrant applications to assess, one approach was to scan for internal inconsistencies:

I, like any other judge, developed an idiosyncratic methodology for reading this material, which at times would come in inundating waves one after the other. I do not want to diminish the process, but I said, "I am going to look to see if there is someone named in this warrant who is named as 'M. Mouse' or 'D. Duck'" – I did that.[1096]

Levine stated that judges primarily rely "on the integrity of the officers from the respective bodies who are entitled to approach a judge or a magistrate".[1097]

19.8.3 Mitigating against the vulnerabilities exposed by the Mascot warrants

The weaknesses identified by Operation Prospect in its analysis of Mascot's use of LDs and TIs largely centre on vulnerabilities in the procedures for authorising warrants. However, the safeguards introduced by the SD Act and TI Act since Mascot – such as stricter record-keeping requirements and new post-authorisation reporting and inspection provisions – principally focus on strengthening the integrity of the 'back end' warrant processes. These are retrospective safeguards, in that they do not come into effect at the time that a warrant is being sought or determined, so have no impact on whether a warrant may be granted or refused.

Although important, these measures cannot address the kinds of 'front end' procedural vulnerabilities exposed by the Mascot warrants such as:

- the naming of individuals without sufficient evidence in the supporting affidavits to justify their inclusion
- the failure to clearly distinguish individuals who are the subject of investigation from those who are not
- the practice of repeatedly 'rolling over' warrants for extended periods
- the failure to outline an investigative strategy to justify the naming of large numbers of individuals in some SD warrants
- the targeting of individuals on the basis of weak, inaccurate or uncorroborated information, and
- the failure to note all relevant facts in the SD or TI warrant applications, including exculpatory information.

All of these concerns can only be addressed by strengthening the scrutiny of warrant applications before the warrant is granted.

While the systemic gaps are now obvious, there are at least two significant structural impediments to strengthening the integrity of the SD and TI warrant authorisation processes in NSW:

- that relatively small numbers of judicial officers are routinely required – in addition to their other court duties – to assess what Levine referred to as "inundating waves" of warrant applications, some of which are complex and lengthy
- the inherent need for secrecy in assessing warrant applications means that the contents of supporting affidavits can rarely, if ever, be tested in open court.

1094 The Hon Bruce James, Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission, General Meeting with the Commissioner of the Police Integrity Commission, 21 May 2012, p. 13.

1095 The Hon Bruce James, Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission, General Meeting with the Commissioner of the Police Integrity Commission, 21 May 2012, p. 13.

1096 The Hon David Levine, Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission, Thirteenth General Meeting with the Inspector of the Police Integrity Commission, 22 February 2013, p. 6.

1097 The Hon David Levine, Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission, Thirteenth General Meeting with the Inspector of the Police Integrity Commission, 22 February 2013, p. 6.

As discussed below at 19.9.1, one option for trying to address the structural concerns about the high volume of applications might be to increase the number of judicial officers who are authorised to assess and approve warrant applications. However, it is important to recognise that there are also benefits associated with restricting warrant authorisation processes to a small pool of independent experts who are familiar with the complex legislative and procedural requirements. In the case of SD warrant approvals, the reason this responsibility was given to Supreme Court Judges in the first place was in recognition that independent review by a senior judicial officer is central to protecting the human rights and civil liberties of affected individuals.[1098] Also, although it might also be possible to reduce the complexity of applications, this must be done in a way that does not undermine the integrity of the process.

In tackling the other main structural impediment, it is not possible to open the processes for authorising covert surveillance to affected individuals without making covert investigations overt. This would seriously compromise the ability of law enforcement agencies to investigate certain serious crimes and would not be in the public interest.

The need for warrant applications to be heard in closed court places an added duty on deponents to provide accurate and fair information – and on judicial officers to ensure that deponents comply with all relevant requirements. As the Select Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect' observed:

> *... applications for listening device warrants are ... usually considered in a closed hearing in a judge's chambers with only the judge, the law enforcement agency and its lawyers present. Because there is no other party present to contradict the material put by the agency, this places an obligation on the agency to be frank with the judge and include material that both assists their case (inculpatory material) and detracts from their case (exculpatory material).*[1099]

The Select Committee argued that – because our court system usually relies on adversarial proceedings in which judges assess the relative merits of the arguments put by two or more parties before them in open court – the courts are "not well suited to dealing with closed hearings with only one party present so that there is no one testing the evidence or merits of the application being made".[1100]

Any steps aimed at addressing this weakness must also include measures that emphasise the duty of all parties to ensure the integrity of the system. This includes reinforcing the responsibility of investigators and deponents to present a fair and complete summary of the evidence relating to whether an SD or TI warrant is necessary and should be granted. It is also important to look at ways of supporting and improving the independent scrutiny provided by judicial officers.

19.9 Options for strengthening the warrant authorisation safeguards

As judicial authorisation is paramount to ensuring the integrity and effectiveness of the warrant issuing process, one option for dealing with NSW's high numbers of applications might be to expand the number of judicial officers who may assess applications and make determinations. However, as discussed below, there are constraints in how this might be done.

1098 The Hon David Paul Landa, NSWPD, (Hansard), Legislative Assembly, 17 May 1984, p. 1095.
1099 Select Committee, *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"*, 25 February 2015, p. 43.
1100 Select Committee, *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"*, 25 February 2015, p. 46.

In looking for other effective SD and TI warrant authorisation safeguards that have the potential to remedy the kinds of serious and systemic deficiencies associated with the Mascot warrants, Operation Prospect identified two main options. These are to:

- expand and clarify the Attorney General's functions for being heard in relation to the granting of a warrant.
- establish an independent Public Interest Monitor – similar to the schemes for supporting warrant authorisation processes for covert surveillance technologies in Queensland and Victoria.

Those options have the potential to strengthen the protection of individual privacy and other public interest factors by ensuring that these interests routinely inform day-to-day decisions on whether warrants should be granted. Discussion then turns to what other measures could improve accountability within the warrant authorisation process (section 19.11), and options for improving accountability after warrants for covert surveillance technologies are authorised (section 19.15).

19.9.1 Increase the number of authorities to grant SD warrants

The high volumes of often complex and lengthy SD warrant applications in NSW places an enormous load on the judicial officers who must determine these applications, often during short breaks from other court duties. As at 8 April 2016, there were 43 eligible judges declared under the SD Act.[1101] All of these judges also exercised functions as eligible judges under other statutes.

Although judges of the NSW Supreme Court must be adept at managing demanding workloads, analysing complex matters and digesting large volumes of information, a question arises as to the degree of scrutiny that can be given to so many individual warrant applications. Applications are determined by duty judges, often during lunch breaks or after hours. Ordinarily, duty judges are met by large numbers of applications from various agencies seeking warrants and orders available under a range of statutes. [1102] In 2016, the average number of applications for warrants (of all kinds) coming before the Common Law Division Duty Judge was between five and six per weekday. Although urgent applications for SDs over weekends are less frequent, there are still often one to two applications per weekend.[1103]

Currently the SD Act provides for SD warrants to be issued by eligible Judges of the Supreme Court, and warrants relating to tracking devices to be issued by eligible Magistrates. There are no provisions, as there were under the LD Act, for other judicial officers – such as judges of the District Court – to exercise the functions of eligible judges or eligible magistrates.

The Attorney General's most recent tabled reports under the SD Act indicate that tracking devices typically account for 20% or less of the devices authorised by warrants each year. [1104] The Ombudsman's compliance and monitoring work shows that, in practice, all applications for SDs – including those that are for tracking devices only – are determined by eligible Judges of the Supreme Court. Since the start of the SD Act, no applications have ever been made to eligible Magistrates.

The reason for allowing eligible Magistrates to authorise applications for tracking devices was to expand the pool of decision makers and, particularly in regional areas, speed up the decision making process. In practice, applications made by the NSWPF are made centrally through the Covert Applications Unit within the Police

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1101 Supreme Court of New South Wales, *Contacting an Eligible Judicial Officer*, http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_contactus/judicialcontacts/eligible_judicial_officers.aspx, accessed 27 November 2016.

1102 The Hon David Levine, Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission, Thirteenth General Meeting with the Inspector of the Police Integrity Commission, 22 February 2013, p. 6.

1103 Letter from Justice C Hoeben, Chief Judge at Common Law, Supreme Court of NSW to Prof. John McMillan, Acting Ombudsman, Ombudsman NSW, 20 October 2016.

1104 For example, in the year ending 30 June 2013, tracking device warrants represented approximately 18% of all devices authorised by warrant (1,554 of a total 8,824 devices), in the year ending 30 June 2014, approximately 19% of devices authorised by warrant were tracking devices only (1,742 of 9,680 devices) and in the year ending 30 June 2015, approximately 20% of devices authorised by warrant were tracking devices only (1,504 of 7,369 devices). See: Attorney General and Department of Justice (NSW), *Report by the Attorney General of New South Wales pursuant to section 45 of the Surveillance Devices Act 2007 for the period ended 30 June 2013*, 21 March 2014, p. 4; Attorney General and Department of Justice (NSW), *Report by the Attorney General of New South Wales pursuant to section 45 of the Surveillance Devices Act 2007 for the period ended 30 June 2014*, 11 November 2014, p. 4; Attorney General and Department of Justice (NSW), *Report by the Attorney General of New South Wales pursuant to section 45 of the Surveillance Devices Act 2007 for the period ended 30 June 2015*, 17 November 2015, p. 4.

Prosecutions Command. As that unit has practices in place for making appointments with eligible Judges, applications are usually made to eligible Judges rather than Magistrates. The Ombudsman's compliance and monitoring work under the SD Act also shows that very few operations use tracking devices only.

One option for relieving the time pressure on issuing authorities who are required to hear a large volume of applications is to consider extending the power to authorise warrants to a broader group. However, it is questionable whether altering the legislation to allow for a broader group to determine SD applications would result in any changes to the practice for authorising warrants, as the existing mechanism for relieving pressure on eligible Judges by allowing eligible Magistrates to determine some applications is not used in practice.

The requirement that warrants are determined by Supreme Court Judges is based on the view that judges are independent and impartial and are skilled in quickly appraising the available evidence.[1105] Judges may also give the public

> *... confidence that in the process of investigation the civil rights of citizens and others will not be abused; that 'the rule of law' will be respected.*[1106]

These views led the NSWLRC to recommend that the power to grant SD warrants should be given to judges of the Supreme and District Courts.[1107] In its 2005 report on laws to regulate highly intrusive surveillance powers, the NSWLRC concluded that extending the power beyond Judges of the Supreme Court was justified because the volume of applications for SD warrants may impose too great a strain on them.[1108] The NSWLRC also considered that in regional areas it may be impractical to bring applications before the Supreme Court.[1109]

In light of the views considered by the NSWLRC, it would be reasonable that any further expansion of the group of experts who may authorise SD warrants be limited to those with considerable judicial experience and/or expertise in administrative law. Limiting such decisions to judicial officers is sound, particularly because of:

- the array of competing public interest considerations that must be assessed
- the serious intrusion into privacy that surveillance devices represent, and
- the fact that warrant applications must be heard in private, usually in the absence of any opposing voice.

As the most serious and systemic problems exposed by Operation Prospect relate to concerns about how SDs were used, the focus of this section is on whether it is practicable to expand the pool of judicial officers who may assess and grant (or refuse) SD warrant applications. However, it is also important to note that there are also acute pressures on the small number of 'nominated AAT members' in NSW who must deal with similarly high volumes of TI warrants.

The data shows that AAT members in NSW are already handling significantly higher volumes of warrant applications than members elsewhere. Across Australia there are just 29 nominated AAT members who have authority to issue TI warrants.[1110] It is unclear how many of these members are based in NSW. However, of the 3,223 TI warrants issued by AAT members across Australia in 2014-15, just over half – 1,648 warrants – were issued to NSW agencies.[1111] The high numbers of TI warrants issued to NSW agencies, as well as any TI warrants issued to Commonwealth law enforcement officers who are based in NSW, indicates that the challenges associated with small numbers of judicial officers having to deal with high volumes of applications, is just as much of a concern for AAT members.

1105 Barker, Michael, 'On being a Chapter III Judge' (2010) 35 *UWA Law Review* 1, 3.
1106 Barker, Michael, 'On being a Chapter III Judge' (2010) 35 *UWA Law Review* 1, 3.
1107 NSWLRC, Report 98, *Surveillance: An Interim Report*, February 2001, pp. 217-218.
1108 NSWLRC, Report 108, *Surveillance: Final Report*, May 2005, pp. 75-76.
1109 NSWLRC, Report 108, *Surveillance: Final Report*, May 2005, pp. 75-76.
1110 Attorney General's Department, *Telecommunications (Interception and Access) Act 1979: Annual Report 2014-2015,* 2015, p.4.
1111 Attorney General's Department, *Telecommunications (Interception and Access) Act 1979: Annual Report 2014-2015,* 2015, p.5.

If the NSW Parliament does consider other options for expanding the range of officers authorised to determine warrant applications, it is crucial that any additional decision-makers are independent from the Executive (especially law enforcement agencies), have a widely recognised public reputation for integrity, and have extensive experience in analysing complex legal issues. These attributes are essential for ensuring that the public can have confidence in the way such intrusive powers are used.

19.9.2 Expand and clarify the Attorney General's existing functions

In view of the practical constraints on expanding the pool of expert decision-makers who may authorise intrusive covert surveillance warrants, other options for tackling the systemic concerns exposed by the Mascot warrants must also be considered. There is an urgent need for more innovative ways to strengthen the scrutiny of warrant applications.

One such solution is already incorporated in the SD Act. The SD Act requires the applicant for an SD warrant to provide advance notice of the application to the Attorney General.[1112] The LD Act included substantially the same provision when it was in force, under section 17 of that Act.[1113]

The purpose of these advance notice provisions is to "ensure effective representation of the public interest in requiring responsibility in the use of listening devices".[1114] Although the debate preceding the introduction of the LD Act outlined the Attorney General's role in the application process as representing the public interest and ensuring that LDs are used responsibly,[1115] any description of the Attorney General's functions in this regard is notably absent from the SD Act – as it was under the LD Act.

In practice, the absence of specific provisions setting out what the Attorney General is expected to assess and when it might be appropriate for the Attorney General to be given "an opportunity to be heard in relation to the granting of the warrant" – as required by section 51(2) – has tended to undermine the usefulness of these advance notice provisions as a mechanism for identifying and raising issues that should be considered by judicial officers before granting applications.

Also, one of the fundamental public interest considerations relevant to the use of SDs is protecting the privacy of affected individuals – not just the person targeted, but also others who are likely to be recorded or listened to. Another public interest consideration is assessing whether the likely evidentiary value of any evidence sought is sufficient to justify such intrusions. Although the factors under section 19(2) of the SD Act that a judicial officer must consider before granting an SD warrant includes "the extent to which the privacy of any individual is likely to be affected" and "the evidentiary value of any information sought to be obtained", neither are on the long list of particulars that section 51(1) requires applicants to include in their advice to the Attorney General.[1116] As previously discussed in section 19.5.1.2, these omissions have the potential to undermine the ability of the Attorney General to help judicial officers make appropriate decisions about these central public interest issues. These gaps in the advance notice provisions must be addressed as part of any scheme to strengthen the scrutiny of warrant authorisations.

Since the start of the SD Act, there have been more than 6,700 applications for SD warrants. The Ombudsman has assessed the relevant documentation for all these warrants. This includes documentation relating to section 44 of the SD Act – which requires the person who sought the warrant to report back to the judicial officer and Attorney General about the way the SD was used. That assessment shows that the Attorney General has never made a submission about an application, or appeared at any hearing since the Act came into operation.

This raises a question about the utility of the advance notice provisions and how effective they are in ensuring the public interest is effectively represented. There is a real risk that the advance notice provision is merely an exercise in filling forms – rather than providing meaningful scrutiny of public interest concerns. It is notable that

1112 SD Act, s. 51(1).
1113 LD Act, s. 17.
1114 The Hon David Paul Landa, NSWPD, (Hansard), Legislative Assembly, 17 May 1984, p. 1095.
1115 The Hon David Paul Landa, NSWPD, (Hansard), Legislative Assembly, 17 May 1984, p. 1095.
1116 SD Act, s. 51(2).

Mr Bruce James, a former Supreme Court judge who was involved in authorising warrants under the LD Act, commented to the Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission that he did not think there was any close scrutiny of applications in the Solicitor General's office – the office that, in practice, undertakes the Attorney General's reviews of all applications for warrants for covert surveillance technologies.[1117]

The following sections examine whether the Attorney General should continue to check applications before warrants are authorised, or whether it would be preferable for the NSW Government to establish a Public Interest Monitor to strengthen the scrutiny of warrant applications and supporting affidavits. That analysis concludes that NSW would benefit from establishing a Public Interest Monitor, with functions similar to the Queensland and Victorian Public Interest Monitors' responsibilities with respect to testing the validity of SD and TI warrant applications.

Irrespective of whether the Attorney General or a newly established Public Interest Monitor is ultimately given responsibility for this safeguard, the following changes are needed to ensure that the policy objectives of the advance notice provisions are met:

- The functions of the person responsible for this safeguard – whether that be the Attorney General or the Public Interest Monitor – must be clearly set out in the legislation.
- The array of information that the applicant must provide in the advance notice report should be the same as that which must be provided to the judicial officer.

In addition to improving the quality of advice contained in the advance notice reports, consideration must also be given to expanding the powers of whoever is given responsibility for assessing and responding to the reports. These issues are discussed below.

19.9.3 Establish a Public Interest Monitor

It is possible to address the structural problems that stem from the need for secrecy in covert warrant authorisation processes by establishing a position that has specific responsibility for assessing and testing the validity of warrant applications, with a view to ensuring that the public interest is routinely considered as part of the authorisation processes. In its proposal that the NSW Government establish an Office of Independent Counsel, the Select Committee said the purpose of such a position would be:

> *... to ensure that independent legal representatives are available to act as a contradictor in proceedings for listening device and telephone intercept warrants. These counsel would, without being connected to or acting on behalf of persons to be subject to the warrants, be able to test the evidence and assertions of law enforcement agencies that seek the warrants before judicial officers.*[1118]

The model for such a position is already in place in Queensland and Victoria, where the legislative schemes regulating SDs and TIs require a Public Interest Monitor to represent the public interest in proceedings to determine whether a warrant should be issued.

In principle, the Public Interest Monitor fulfils the same policy objectives as the Attorney General's involvement in considering applications for covert surveillance technologies before a warrant is authorised – discussed above in 19.9.2. However, the legislation in Queensland and Victoria provides much greater clarity about the functions of the Public Interest Monitor and their involvement in the warrants authorisation processes.

1117 The Hon Bruce James, Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission, General Meeting with the Commissioner of the Police Integrity Commission, 21 May 2012, p. 15.

1118 Select Committee, *The conduct and progress of the Ombudsman's Inquiry "Operation Prospect"*, 25 February 2015, p. 46, [3.97].

19.9.3.1 What is a public interest monitor?

The Public Interest Monitor was established in Queensland under the *Crime and Misconduct Act 2001* (Qld) – now the *Crime and Corruption Act 2001* (Qld) – and the *Police Powers and Responsibilities Act 2000* (Qld). In 2009 the monitor was also given a role in relation to TI's under the *Telecommunications Interception Act 2009 (Qld)*.

Victoria's Public Interest Monitor was established under the *Public Interest Monitor Act 2011* (Vic), and exercises its functions under the *Surveillance Devices Act 1999* (Vic), *Major Crime (Investigative Powers) Act 2004* (Vic), the *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) and the *Terrorism (Community Protection) Act 2003* (Vic).

Under these statutes, the Public Interest Monitors routinely assess all applications for, and the use of, a range of warrants and orders relating to covert law enforcement activities – such as SD warrants, retrieval warrants, covert search warrants, TI warrants and preventative detention orders. In both Queensland and Victoria, Public Interest Monitors have a role before and at hearings of applications for warrants and orders such as SD warrants.

Although the legislation regulating SD and TI warrant approval processes in NSW does not have a monitor like those in Queensland and Victoria, the role is analogous to the functions required of the criminal intelligence monitor in relation to the *Crimes (Criminal Organisations Control) Act 2012*. Under that Act, the criminal intelligence monitor is responsible for monitoring applications about criminal intelligence, declaring criminal organisations and control orders for members of declared criminal organisations. The monitor is to "test, and make submissions to the court, about the appropriateness and validity of each monitored application".[1119] However, at the time of writing, the NSW Government had yet to appoint its first criminal intelligence monitor.

19.9.3.2 Functions of Queensland's Public Interest Monitor

In Queensland, the Public Interest Monitor is responsible for inspecting and monitoring compliance by police and law enforcement officers with the legislation governing applications for covert search warrants, SD warrants and retrieval warrants.[1120] The Public Interest Monitor's functions are generally described as 'front end' or 'back end' monitoring.[1121]

At the front end, the Queensland Public Interest Monitor is tasked with appearing at any hearing of applications for covert search, SD and retrieval warrants to test the validity of the application and to:

> *(i) present questions for the applicant to answer and examine or cross-examine any witness*
>
> *(ii) make submissions on the appropriateness of granting the application.*[1122]

In assessing whether it is in the public interest for an SD warrant to be issued, the judicial officer must consider any submissions by the Public Interest Monitor (among other matters).[1123]

The Public Interest Monitor is also entitled to appear at the hearing of applications for warrants sought by relevant Queensland law enforcement agencies – namely the police service and the Crime and Corruption Commission – under Part 2-5 of the TI Act. The Public Interest Monitor may report to the Minister about non-compliance by relevant agencies with that Act or the *Telecommunications Interception Act 2009* (Qld). The Public Interest Monitor in Queensland also has a role in monitoring the application and use of preventative detention orders under the *Terrorism (Preventative Detention) Act 2005* (Qld) and control orders under the Commonwealth Criminal Code.

1119 *Crimes (Criminal Organisations Control) Act 2012*, s. 28D(c).
1120 *Police Powers and Responsibilities Act 2000* (Qld), s. 742(2).
1121 Forrest, Colin, 'Privacy issues and the role of the Public Interest Monitor', *Proctor*, November 2008, p. 29.
1122 *Police Powers and Responsibilities Act 2000* (Qld), s. 742(2)(c).
1123 *Police Powers and Responsibilities Act 2000* (Qld), s. 330(2)(f).

At the back end of the process after warrants are issued, the Queensland Public Interest Monitor is responsible for monitoring compliance by police with the conditions of the warrant and with legislative provisions, and must report publicly about its activities. The Public Interest Monitor is also required to report to the police commissioner or chief executive officer of a law enforcement officer about any identified non-compliance with the legislation.[1124] This is similar to the inspection role currently performed by the NSW Ombudsman, which will be performed by the Inspector of the LECC from 2017.[1125] The Public Interest Monitor gathers a range of statistical information about the applications and warrants it monitors, including information about the use and effectiveness of SD and other warrants.

In Queensland, the people appointed to the Public Interest Monitor and deputy Public Interest Monitor roles are usually barristers who discharge their duties on a part-time, fee-for-service basis while maintaining their existing chambers and offices. They:

> *... must eschew practice in criminal law for the term of our appointment because of interest that would arise if the Public Interest Monitor was taking briefs or acting in criminal defence or prosecution whilst at the same time being privy to highly sensitive police intelligence about criminal activity.*[1126]

The previous Queensland Public Interest Monitor held the view that appointment of legal practitioners to the role on a part-time basis was ideal as it fostered "healthy independence" in the office and allowed for a "diversity of views" to be brought to the role.[1127]

19.9.3.3 Functions of Victoria's Public Interest Monitor

Victoria's legislation gives its Public Interest Monitor similar front end functions to the scheme in Queensland:

> ***14. A Public Interest Monitor has the following functions –***
>
> *(a) to appear at any hearing of a relevant application to test the content and sufficiency of the information relied on and the circumstances of the application, and*
>
> *(b) for the purpose of testing the content and sufficiency of the information relied on and the circumstances of the application –*
>
> - *to ask questions of any person giving information in relation to the application, and*
> - *to make submissions as to the appropriateness of granting the application, and*
>
> *(c) any other functions conferred on a Public Interest Monitor under any Act or law.*[1128]

These functions are mirrored in relevant legislation – such as the *Surveillance Devices Act 1999* (Vic) and the *Major Crime (Investigative Powers) Act 2004* (Vic).[1129] Under the *Telecommunications (Interception) (State Provisions) Act 1988* (Vic), the Victorian Public Interest Monitor exercises these functions in relation to warrants under the TI Act. Victoria's Public Interest Monitor is also responsible for reporting annually on the performance of the Public Interest Monitor's functions. The Public Interest Monitor has a similar role under the *Terrorism (Community Protection) Act 2003* (Vic) in relation to covert search warrants, preventative detention orders and prohibited contact orders.

The accountability requirements imposed on the Victorian Public Interest Monitor in relation to its work before warrants are issued are more detailed than in Queensland. For example, the Public Interest Monitor is required to report each year on the total number of relevant applications in which the Public Interest Monitor appeared at a hearing, the number of orders or warrants made, and the number of applications that were refused or withdrawn.

1124 *Police Powers and Responsibilities Act 2000* (Qld), s. 742(2)(g).
1125 *Law Enforcement Conduct Commission Act 2016*, Schedule 6.
1126 Forrest, Colin, 'Privacy issues and the role of the Public Interest Monitor', *Proctor*, November 2008, p. 30.
1127 Forrest, Colin, 'Privacy issues and the role of the Public Interest Monitor', Proctor, November 2008, p. 30.
1128 *Public Interest Monitor Act 2011* (Vic).
1129 *Surveillance Devices Act 1999* (Vic), Part 4, Division 1AA; *Major Crimes (Investigative Powers) Act 2004* (Vic), Part 1A.

19.9.3.4 Role of the Public Interest Monitor in the application process

Since their inception, Public Interest Monitors in Australian jurisdictions have received generally positive assessments. In evidence given to the Senate Legal and Constitutional Affairs References Committee in July 2014, Mr Philip Kellow – the Registrar of the AAT – commented on AAT members' views of the Public Interest Monitor schemes operating in Queensland and Victoria:

> *I think in broad terms they feel it has improved the quality of the requests* [for TI warrants] *and the supporting material and that, on occasions, when the monitor has taken a fairly active role in helping test some of the assertions and the need for the warrant or its breadth, the members have appreciated that assistance.*[1130]

The Registrar indicated that the involvement of the Public Interest Monitor generally improved the warrant application process, and commented that members who had been dealing with the Queensland Public Interest Monitor had indicated that:

> *The requests by the law enforcement agencies have been much more realistic and less ambit, knowing they are going to be tested. So, in a way, it has provided a bit more of a framework for them to think seriously about how long they actually need to have the warrant in place, what the breadth of it should be and so on.*[1131]

These comments differ from the reservations expressed by the NSWLRC in 2001. At that point, before the SD Act had started, the NSWLRC commented that a Public Interest Monitor would not improve the level of scrutiny that the appropriate issuing authorities would ordinarily give.[1132] However, as discussed in section 19.9.1, former judicial officers have commented publicly that the volume of applications and the difficulty in assessing inaccuracies in the information provided in supporting affidavits creates vulnerabilities in the warrant authorisation process. It would therefore be prudent for the NSW Government to consider the additional support and safeguards that a Public Interest Monitor could add to the warrant authorisation process.

In its 2015 inquiry into the legislative framework for the protection of privacy in Australia, the Australian Law Reform Commission (ALRC) concluded that there was "merit in having the public interest represented before the warrant is issued", and that a Public Interest Monitor ensures a greater degree of accountability and enhances the integrity and independence of the warrant-issuing process.[1133] The ALRC recommended further consideration should be given to introducing a Public Interest Monitor to oversight the telecommunications process at the Commonwealth level.

Involving a Public Interest Monitor in the application process provides an effective way of testing the competing values of addressing serious crime and protecting the right to privacy in each use of these intrusive covert investigative tools. Given the high volume of applications for SD and TI warrants in NSW, supplementing judicial review with additional checks of warrant applications would be a positive step forward.

19.9.4 Preferred model for NSW

19.9.4.1 Need for a Public Interest Monitor in NSW

As NSW law enforcement agencies are granted many more SD and TI warrants than anywhere else in Australia, it is imperative that NSW has an effective regime in place for checking that adequate safeguards are in place. Having considered the depth and breadth of procedural weaknesses exposed by the Mascot warrants – including vulnerabilities that are still a feature of current approval procedures – it is the view of Operation Prospect that NSW should establish a Public Interest Monitor scheme that has specific responsibility for supporting judicial scrutiny of warrant applications. This would be an additional and effective safeguard

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1130 Senate (Cth), Legal and Constitutional Affairs References Committee, *Comprehensive Review of the Telecommunications (Interception and Access) Act 1979*, Official Committee Hansard, 29 July 2014, p. 8.

1131 Senate (Cth), Legal and Constitutional Affairs References Committee, *Comprehensive Review of the Telecommunications (Interception and Access) Act 1979*, Official Committee Hansard, 29 July 2014, p. 9.

1132 NSWLRC, Report 98, *Surveillance: An Interim Report*, February 2001, pp. 279-280.

1133 Australian Law Reform Commission, Report 108, *For Your Information: Australian Privacy Law and Practice*, August 2008, Volume 3, p. 2510.

aimed at protecting the privacy of individuals and other vital public interest issues while covert surveillance technologies are used.

Alternatively, there might be merit in expanding and clarifying the Attorney General's functions to give the Attorney General an opportunity to be heard in relation to more warrant applications. However, this safeguard has been in place since 1984 and appears to have done little to ensure the integrity of SD warrant applications. Also, it does not extend to checking the quality of TI warrant approvals.

Without systemic reforms, the weaknesses evident in NSW's current safeguards are likely to persist – particularly in view of the very high volumes of applications that are lodged each day. Although the focus of the additional independent assistance provided by a Public Interest Monitor would be to check that individual warrants are justified, effective checks could also inform and enhance ongoing improvements to agency practices.

In creating a Public Interest Monitor framework that best suits the needs of NSW, it is important to be mindful of two current features of NSW's warrants processes. First, the numbers of SD and TI warrant applications in NSW far exceeds those in other states. Second, NSW already has effective processes in place for checking the integrity of post-authorisation processes.

Because of these factors, Operation Prospect is of the view that a Public Interest Monitor framework in NSW should focus solely on strengthening and improving 'front end' warrant applications and approval processes. The function should not extend to 'back end' checks of record keeping, reporting and inspection provisions after a warrant has been issued. In part, this is necessary to help keep the monitor's workload at a more manageable level in such a high volume environment. For example, whereas Victoria's Public Interest Monitor appeared before the hearings for almost all of the 269 'relevant applications' submitted by Victorian agencies in 2015-16, most of which were for SD and TI warrants, even a well-resourced NSW Public Interest Monitor would be unlikely to be able to appear at the approximately 3,000 SD and TI warrant applications that are heard in NSW each year.[1134] However, focusing any additional integrity checks on 'front end' processes also recognises that all of the serious concerns arising from the Mascot warrants were related to the need for closer checks before warrants are issued.

19.9.4.2 Defining the function of NSW's proposed Public Interest Monitor

There are several features that underpin the Public Interest Monitor frameworks in Queensland and Victoria that should be considered when adapting those schemes to NSW. The Public Interest Monitors in Queensland and Victoria both:

- Receive advance notice reports in relation to all warrant applications within their jurisdiction, similar to the advance notice requirements in section 51 of the SD Act. The information provided to the Public Interest Monitor is the same as the information that must be provided to judicial officers, and includes the supporting affidavits.
- Have formal powers to appear before proceedings. Both exercise this power in relation to almost all applications received.
- May cross-examine applicants about the contents of applications. Although they rarely exercise this power, both state in their respective annual reports that the right to cross-examine applicants is an essential feature of any Public Interest Monitor scheme.
- Emphasise that their most important work is done through asking questions of, and providing feedback to, agencies before the warrant applications are formally submitted. Both have established cooperative arrangements with the law enforcement agencies in their states to support this aspect of their functions.
- Issues that are not resolved through informal discussion and feedback to the agency at the draft stage, are often addressed in this way.

1134 The principal monitor and two deputy monitors appeared before proceedings relating to 251 applications in 2015-16. Victorian Public Interest Monitor *Annual Report 2015-2016,* 25 July 2016. p. 6.

In addition to incorporating most or all of these features into a Public Interest Monitor framework for NSW, one crucial jurisdictional question that the NSW Government must address is whether the scheme should apply to all warrant applications under the SD Act and TI Act, or only to warrants under the SD Act. Adding checks of TI warrant applications to the Public Interest Monitor's responsibilities would more than triple an already formidable caseload. However, NSW law enforcement agencies are annually issued with at least 14 times the number of TI warrants that are issued to agencies in Queensland and Victoria. This indicates that the need for a Public Interest Monitor scheme to support the small number of judicial officers responsible for assessing TI warrants is even greater in NSW than in those states. Without a Public Interest Monitor testing the sufficiency of information in supporting affidavits for TI warrants, crucial procedural weaknesses will persist.

In creating a Public Interest Monitor for NSW, any amendments to the laws relating to SD and TI warrant application and authorisation processes must:

- emphasise that judicial scrutiny of warrant applications remains the paramount safeguard in ensuring the lawful and fair use of SDs and TIs in NSW, and that the purpose of an independent Public Interest Monitor is to complement and enhance this scrutiny
- clearly set out the Public Interest Monitor's role in ensuring that warrant applications have regard to the public interest, and include specific provisions on how these functions will be performed
- ensure the Public Interest Monitor has the discretion to appear at any hearing of a relevant application to test the content and sufficiency of the information relied on and the circumstances of the application, and has sufficient powers to question any person about the application and make submissions before a warrant is granted
- clarify the respective duties of all parties involved in preparing, assessing and granting warrant applications – including a duty on applicants to fully disclose all matters of which they are aware that are adverse to the application and the penalties for knowingly or recklessly failing to disclose such information.

For any such scheme to be effective it must also be appropriately resourced. There would be little point in establishing an independent Public Interest Monitor to provide judicial officers with much-needed support, but then fail to provide the necessary resources to perform these functions.

There must also be measures to improve the information provided in annual or six-monthly reports about this activity. Currently, the Attorney General's annual reports to Parliament about his responsibilities under the SD Act shed no light on the Attorney General's involvement in warrant applications. By contrast, the public reports produced by Queensland's and Victoria's Public Interest Monitors provide much greater insights into the application process.

In Victoria, the Public Interest Monitor's annual reports include information about hearings involving the monitor, the number of applications refused and, significantly, applications withdrawn before hearing after discussions between the Public Interest Monitor and the applicant.[1135] In Queensland, the Public Interest Monitor's annual reports include details about the reasons applications were refused – for example, whether the refusals were based on concerns about the privacy of third parties or material in support of the application. This kind of detail is critical to providing greater transparency in the application process and the role of the Public Interest Monitor.

1135 *Public Interest Monitor Act 2011* (Vic), s. 19(3)(a).

19.9.5 Recommendations

25. It is recommended under section 26(2)(b) that the Attorney General propose, for the consideration of the Parliament, a scheme for a Public Interest Monitor in NSW – with functions similar to the Queensland and Victorian Public Interest Monitors for applications for SD and TI warrants.

26. It is recommended under section 26(2)(b) that the Attorney General propose, for the consideration of the Parliament, amendments to the *Surveillance Devices Act 2007* and the *Telecommunications (Interception) (New South Wales) Act 1987* to clarify the Public Interest Monitor's functions in the application process – similar to the way that the functions are explained in the legislation establishing Public Interest Monitors in Queensland and Victoria. These functions should include:

- requirements relating to the provision of advance notice reports
- powers to appear at any hearing of a relevant application and, for the purpose of testing the content and sufficiency of the information relied on and the circumstances of the application:
  - to ask questions of any person giving information in relation to the application, and
  - make submissions as to the appropriateness of granting the application
- provisions to support the appropriate exchange of information between the Public Interest Monitor and applicants before applications are submitted.

27. It is recommended under section 26(2)(b) that the Attorney General propose, for the consideration of the Parliament, amendments to the *Surveillance Devices Act 2007* and the *Telecommunications (Interception) (New South Wales) Act 1987* requiring applicants to provide the Public Interest Monitor with same information as that provided to the judicial officer in the warrant application.

28. It is recommended under section 26(2)(b) that the Attorney General propose, for the consideration of the Parliament, an amendment to the *Surveillance Devices Act 2007* to distinguish the Attorney General's ongoing responsibility for ensuring the effectiveness of systems established under the Surveillance Devices Act from the Public Interest Monitor's specific functions in the application process.

29. It is recommended under section 26(2)(b) that the Attorney General propose, for the consideration of the Parliament, an amendment to the advance notice provision in the *Surveillance Devices Act 2007* to require that the Public Interest Monitor be given the same information that must also be given to the eligible Judge or eligible Magistrate – including a copy of the warrant application and a full copy of any supporting affidavit.

30. It is recommended under section 26(2)(b) that any legislation establishing a Public Interest Monitor require the monitor to prepare an annual report, and for the report to include the following information in addition to current reporting requirements:

- information about hearings in which the Public Interest Monitor intervened to raise issues or question applicants or witnesses
- the number of applications in which the Public Interest Monitor made submissions to the eligible Judge or eligible Magistrate
- the number of applications withdrawn before hearing
- the number of applications refused and information about why they were refused.

19.10 Additional legislative changes to improve warrant authorisations

Establishing a Public Interest Monitor to strengthen the scrutiny of warrant applications would be an important reform. However, without additional measures to also improve the quality and reliability of the information provided in warrant applications, no amount of added scrutiny can successfully remedy the kinds of serious and systemic deficiencies that were evident in so many of the Mascot warrants.

The central aim is to ensure that warrant applications are of a consistently high standard. This depends on the law enforcement agencies that prepare these applications instituting the procedures needed to ensure full compliance with the legislative requirements. The agencies must also make appropriate adjustments in response to issues raised by judicial officers, Public Interest Monitors and others at various stages of the warrants processes – including post-authorisation reports by the Ombudsman's compliance and monitoring officers. Chapter 16 highlights some of the historical issues identified by Operation Prospect's review that could only have been properly addressed at an organisational level – such as the need to properly induct and instruct staff who are responsible for preparing and submitting applications, supervisory and training issues, and the adequacy of quality checks before submitting applications.

Other legislative amendments also have the potential to greatly improve the quality and consistency of information provided as part of the warrant application process. This section of the report briefly addresses three proposals and how they could improve the information available to Public Interest Monitors and judicial officers to enable them to perform their functions effectively. The first proposal relates to information about the individuals named in the affidavits. The second is that applicants are required to fully disclose all relevant information, including information that might be adverse to the application being granted. The third is to insert a privacy focused 'objects' clause into the SD Act to strengthen privacy protections for affected individuals.

19.10.1 Distinguish the 'targets' of covert surveillance from others named in the warrant

A key concern identified by Operation Prospect was the failure of many of the Mascot affidavits to clearly distinguish the people who were named in the warrant because they were suspected of having information about a relevant offence – that is, the 'targets' of the investigation – from those named because they might be incidentally recorded as a result of the surveillance activity.

As discussed in sections 19.4.1 and 19.4.2 and illustrated in Figure 5, half (52%) of Mascot's 107 LD affidavits included names of people to be listened to or recorded, but failed to include text in the 'facts and grounds' paragraphs of affidavits to explain why they had been named. In some cases, half or more of the people on an affidavit were named without any reason noted. Even when a reason was noted, it did not always clarify if the person was suspected of involvement in or having knowledge of criminal or corrupt conduct.

Neither the LD Act nor the current SD Act explicitly requires the application or affidavit to separately identify the intended targets of the LD from others who are not suspects – but are likely to be recorded because of their proximity to the SD. Operation Prospect accepts that it may not always be possible for law enforcement officers to know every person who may be recorded by an SD, and this is recognised in the SD Act which provides that warrants may be issued to record people whose identity is unknown.[1136] However, it is reasonable to expect that each investigation would have a strategy about how an SD is proposed to be used. Sections 17 and 19 of the SD Act effectively require the investigation strategy to be described in the affidavit. It should therefore be possible to identify, even if only by description rather than by name, the people the SD is intended to record and if they are likely to know or provide information about a relevant offence.

1136 SD Act, s. 21(1)(c).

Under both the previous and current schemes, the judicial officer must consider the extent to which the privacy of any person is likely to be affected by the authorisation of a warrant.[1137] However, the judicial officer is limited by the information in the affidavit supporting the application. In proceedings held in May 2012 before the Committee on the Ombudsman, the PIC and the NSWCC, the then PIC Commissioner Mr Bruce James made the following observations:

CHAIR: *The warrant can include the innocent third party?*

Mr JAMES: *It can. A listening device warrant can involve some invasion of the privacy of an innocent third party.*

CHAIR: *That is why I am eager to understand the veracity of the affidavits sworn. I am not comfortable with the checks and safeguards in place given such a broad application. These warrants can be issued against anyone.*

Mr JAMES: *I accept that there is a problem. In my own experience as a Judge, I recall refusing to issue a warrant where I thought its use would invade a communication or a possible communication between the suspected person and a legal adviser. Of course, that is a fairly clear case and there would be client legal privilege. But, short of a case like that, I think there is a genuine problem.*[1138]

A requirement that investigation targets are identified separately to other people who are not suspects or who are not expected to have knowledge of the criminal offences under investigation may make it clearer for both applicants and judicial officers to assess how the SD may affect the privacy of each person who may be recorded. The ability of judicial officers to impose appropriate conditions on the use of SDs operates as a potential safeguard against unjustified intrusion into the privacy of people – for example, family members of targets or others who may be incidentally recorded. A requirement that targets are identified separately in supporting affidavits to others likely to be recorded can help a judicial officer to decide whether to impose conditions on the warrant to protect the privacy of such people.

One way to ensure that all targets and others are properly explained in the facts and grounds of a supporting affidavit would be for the affidavit to contain a table that lists all named people, identifies whether they are a target or not, and identifies which paragraph in the facts and grounds of the affidavit explains why the applicant intends to record them. If such an approach been used in Mascot, many of the deficiencies in relation to affidavits prepared for that investigation could have been identified and rectified before the warrant was granted. This would have prevented the problem of people being named in warrants without any explanation in the facts and grounds paragraphs, and is likely to have remedied the problem of insufficient explanations about why people were listed as people to be recorded in Mascot affidavits. Distinguishing these two categories of individuals who may be recorded also helps the judicial officer to set any particular conditions under section 20(1)(xi) in granting a warrant.

19.10.1.1 Recommendation

31. It is recommended under section 26(2)(b) that the Attorney General propose, for the consideration of the Parliament, an amendment to the *Surveillance Devices Act 2007* to require an affidavit in support of an application for a surveillance device warrant to identify targets of the use of a surveillance device separately from those who are likely to be incidentally recorded.

1137 SD Act, s. 19(2)(b).

1138 The Hon Bruce James, Parliamentary Joint Committee on the Office of the Ombudsman and the Police Integrity Commission, General Meeting with the Commissioner of the Police Integrity Commission, 21 May 2012, pp. 14-15.

19.10.2 Require full disclosure of information adverse to warrant applications and make it an offence to fail to do so

Operation Prospect observed that, in a number of LD warrant applications, information in the supporting affidavit emphasised inculpatory evidence while failing to mention or have sufficient regard to exculpatory evidence about those people who the applicant sought to record or listen to with the SD. In some cases, exculpatory information obtained through surveillance authorised by a previous warrant or an integrity test was not noted.

This is an issue that should be addressed by agency policies and procedures providing clear guidance about the need to present all relevant information in an application – and allow the judicial officer to make an informed decision about whether the use of an SD is a justified investigative strategy for the relevant offence. However, consideration could also be given to making provision in the legislation that would mitigate against the failure to include all such information in an application.

Both Queensland and Victoria have provisions in their legislation that require applications for SDs to make full disclosure of all matters both favourable and adverse to issuing a warrant. In Queensland this is simply stated as a requirement of the application.[1139] The Victorian legislation requires the applicant for an SD warrant to fully disclose all matters which they are aware are adverse to an application.[1140] That disclosure must be made to a Public Interest Monitor who may appear at the hearing of the application, and may cross-examine parties and make submissions about whether it is appropriate to issue the warrant. As a further safeguard against the failure to include full information in applications, the Victorian legislation makes it an offence for an applicant to knowingly or recklessly fail to provide full disclosure to the Public Interest Monitor.[1141] Similar provisions requiring full disclosure to the Public Interest Monitor exist under both Victorian and Queensland TI legislation.[1142] At the time of writing, no prosecutions have been made under these provisions of the Victorian legislation.

There are no similar requirements for SD warrants in NSW to contain full disclosure of all relevant matters, including any matter the applicant is aware of that may be adverse to the application. There are also no such provisions for applications for TI warrants.

Regardless of whether NSW ultimately adopts a Public Interest Monitor to help test an application before it is determined, including a legislative provision requiring an applicant to make full disclosure may help to mitigate against the risk that applications might disproportionately emphasise matters favourable to issuing an SD. Including a provision requiring full disclosure in applications for TI warrants is desirable for the same reasons.

This report has also highlighted many examples of cases where deponents have sworn affidavits that have contained inaccurate information, often without first checking its accuracy. This was particularly evident in relation to rollover affidavits.

Operation Prospect has accepted that a significant systemic issue within the Mascot investigation was the practice of deponents swearing LD and TI affidavits without checking the accuracy of the information in them. Systemic failures within the Mascot investigations that allowed this practice to continue are set out in Chapter 16 – and specific examples are highlighted in most other chapters in this report. Because the failure to check the accuracy of all information in LD affidavits was an accepted practice, Operation Prospect has not made individual findings against each deponent of a rollover affidavit. However, such a practice is unacceptable and should not be allowed to continue in future affidavits supporting applications for covert surveillance technologies.

1139 *Police Powers and Responsibilities Act 2000* (Qld), s. 328(4); *Crime and Corruption Act 2001* (Qld), s. 121(4)(b).
1140 *Surveillance Devices Act 1999* (Vic), s. 12C(1).
1141 Surveillance Devices Act (Vic), s. 12C(2).
1142 *Telecommunications (Interception) (State Provisions) Act 1988* (Vic), s. 4B; *Telecommunications Interception Act 2009* (Qld), s. 8.

Although law enforcement officers ought to know that by swearing affidavits they are attesting to the accuracy of the contents, this did not prevent examples of inaccurate information being presented in many Mascot LD affidavits. Greater attention to the deponent's responsibility to present accurate, fair and complete information in affidavits supporting applications for covert surveillance technologies would enhance the integrity of the warrant authorisation process. Offence provisions – such as those in Victoria that make it an offence for a deponent to knowingly or recklessly fail to provide full disclosure to the Public Interest Monitor [1143] would put beyond doubt the duty of a deponent to ensure the information in affidavits they swear is accurate, fair and complete.

19.10.2.1 Recommendations

32. It is recommended under section 26(2)(b) that the Attorney General propose, for the consideration of the Parliament, an amendment to the *Surveillance Devices Act 2007* and the *Telecommunications (Interception and Access) (New South Wales) Act 1987* to include a provision requiring an applicant to fully disclose all matters that they are aware are adverse to an application.

33. It is recommended under section 26(2)(b) that Attorney General propose, for the consideration of the Parliament, an amendment to the *Surveillance Devices Act 2007* and the *Telecommunications (Interception and Access) (New South Wales) Act 1987* to make it an offence for an applicant to knowingly or recklessly fail to fully disclose all matters that they are aware are adverse to an application.

19.10.3 Include a privacy-focused objects clause in the SD Act

The need to protect privacy is reflected in both the SD Act and TI Act as one of the main criteria that a judicial officer must consider in determining an application for an SD warrant. Under section 19(2)(b) of the SD Act, the judicial officer must consider "the extent to which the privacy of any person is likely to be affected". Section 46(2)(a) of the TI Act requires that a judicial officer must have regard to "how much the privacy of any person or persons would be likely to be interfered with" as a result of the surveillance activities. Given this, an affidavit should set out the particular factors that render the potential invasion of a person's privacy necessary to assist the judicial officer in deciding whether a warrant to use a device should be granted.

The analysis of Mascot LD affidavits in this report shows that the relevant parts of affidavits that addressed the potential privacy impacts of the use of LDs usually consisted of a generic statement to the effect that the privacy of any person would only be affected as necessary to gain evidence or information relating to an indictable offence.

The compliance and monitoring work of the Ombudsman under the SD Act suggests that it remains common practice for law enforcement agencies to use a form paragraph of this nature when addressing the potential privacy impact of the SD that is sought. The utility of such generic statements in informing a judicial officer's decision to authorise a warrant is questionable. It is difficult to see how this could be remedied by legislative amendment. It is a matter that can only be addressed through internal agency practices and strengthening the warrants authorisation process – and by enabling the Public Interest Monitor to cross-examine applicants on this aspect of an application.

The authorisation of SDs straddles a tension between individuals' right to privacy and the important public interest served by using available technologies to investigate and prosecute serious crimes. Although this tension is sometimes seen as requiring judicial officers to "balance" individual rights against societal goals of crime prevention in deciding whether to grant applications, this balance metaphor has increasingly come to be seen as problematic. The NSWLRC concluded that a balancing approach was "inherently flawed"[1144] because it tends towards utilitarianism and favours the expansion of criminal investigation powers.

Making privacy the paramount consideration by entrenching this value in an 'objects' clause may be the most appropriate way to limit the expansion of criminal investigative powers at the expense of other competing values.

1143 Surveillance Devices Act (Vic), s. 12C(2).
1144 NSWLRC, Report 98, *Surveillance: An Interim Report*, February 2001, pp. 37-39.

Inserting a privacy-focused objects clause into the SD Act may strengthen the protection of privacy by guiding the interpretation and application of the obligations under the Act. Agencies could be required to demonstrate how they have met the privacy objective – both at the application stage and in any subsequent check of the way the SD has been used. An objects clause may result in more meaningful consideration of the impact of SDs on the privacy of individuals than is afforded under the current scheme.

In 2013, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) held an *Inquiry into Potential Reforms to Australia's National Security Legislation*. In relation to the TI Act, the PJCIS recommended including an objects clause that emphasised the protection of privacy as one of the objectives of that legislation.[1145] The PJCIS indicated that this proposal for a privacy object clause "drew broad support from privacy advocates, private submitters, law enforcement and investigative agencies alike".[1146]

19.10.3.1 Recommendation

34. It is recommended under section 26(2)(b) that the Attorney General propose, for the consideration of the Parliament, an amendment to the *Surveillance Devices Act 2007* to include a privacy-focused objects clause.

19.11 Improving accountability after SD warrants are granted

This section considers the accountability measures that take effect after SD warrants are issued, and whether these provide a comprehensive check against the risks that SDs may be used unjustifiably. Accountability measures that are in place in other jurisdictions are also considered.

The reason for focusing on improving the accountability of SD warrants is because TI reporting processes are already more detailed than for SDs. As noted in sections 19.2.2.1 and 19.16.1, the TI legislation contains more stringent reporting and record-keeping requirements than the SD Act – particularly for reporting on the effectiveness of warrants and recording specific particulars of how TI product has been used or communicated.[1147]

19.11.1 Reports on the results of surveillance

Under the legislative framework authorising the use of SDs, the applicant is required to report to the judicial officer and the Attorney General about the results of the surveillance undertaken.[1148] These post-authorisation reports under the SD Act are substantially the same as those that Mascot was required to provide under the now repealed LD Act.[1149]

19.11.1.1 Post-authorisation reports under the LD Act

At the time of the Mascot investigations, section 19 of the LD Act required that a written post-authorisation report be provided to the judicial officer who granted the warrant and to the Attorney General. The SD Act reports are substantially the same as the reports that were required under the LD Act.

1145 Parliamentary Joint Committee on Intelligence and Security (Commonwealth), *Inquiry into the potential reforms of Australia's National Security Legislation*, May 2013, p. 14.
1146 Parliamentary Joint Committee on Intelligence and Security (Commonwealth), *Inquiry into the potential reforms of Australia's National Security Legislation*, May 2013, p. 11.
1147 *TI (NSW) Act 1987*, Parts 2 and 3.
1148 SD Act, s. 44.
1149 LD Act, s. 19.

Operation Prospect examined the post-authorisation reports for the warrants issued under the Mascot references and found that Mascot provided a section 19 report to the Attorney General and the judicial officers for every warrant it was authorised to use. However, there was nothing in the documentation we examined to indicate that the post-authorisation reports were being used to support the monitoring of the LD warrants granted to Mascot investigators.

Had effective arrangements been in place, the information provided in these reports could have been checked against key information in the advance notice report (under section 17 of the LD Act), in the affidavit and in the warrant itself. In relation to the Mascot warrants, proper scrutiny at this point could have exposed a number of serious deficiencies such as individuals repeatedly being recorded without being named in the affidavit or warrant. It should at least have prompted the person preparing the post-authorisation report to question why certain individuals were repeatedly recorded, in circumstances where it was clear from the associated transcriptions and Information Reports that they were being targeted, and yet no warrant was in place to authorise the recordings.

Those responsible for preparing and checking the post-authorisation reports should have compared the information in those reports with the advance notice reports, the affidavits and the warrants. This would have enabled patterns in the post-authorisation reports – such as a person being recorded without being named in the documentation – to be identified and should, at the very least, have precipitated further questions about the circumstances of the repeated recordings and how those recordings are expected to be used.

It must be noted that the LD Act did not specify what cross-checking the Attorney General or the judicial officer were expected to do after receiving the post-authorisation report. Greater clarity in the legislation about these responsibilities of the Attorney General and the judicial officer could also have improved the effectiveness of this accountability measure.

Another weakness was the very generic information in most reports about how the information recorded by the LD would be used. The level of generality of the information in the Mascot post-authorisation reports, such as broad statements about how the recorded information would be used, undermined the potential for any meaningful analysis of the way devices were used or any systemic assessments of whether the uses of the devices was appropriate and justified.

The weaknesses in the LD Act that undermined the effectiveness of post-authorisation reports as a safeguard during Mascot are evident in the SD Act today. Amendments are needed to ensure this safeguard serves a practical purpose. The requirements for post-authorisation reports should be retained, the reports should be provided to the judicial officer and the Public Interest Monitor (rather than the Attorney General), and the Act should specify what steps the Public Interest Monitor and judicial officer should take after receiving a report. The information that warrant holders are required to provide should also include details that enable effective cross-checking against the related advance notice reports, the affidavits and the warrants.

19.11.1.2 Unauthorised recordings not detected in reports

Not all unauthorised recordings will be able to be detected from analysing the reports required under the legislation. For example, Chapter 8 detailed the unauthorised recording of Mr H by LDs used by Mascot. Mr H was recorded at least 18 times in a 12-month period without being named on any warrant. His name also does not appear on any section 19 reports. This unauthorised use of LDs was identified by analysing a range of material, including Information Reports and Mascot meeting minutes.

Even with a well-used reporting framework, it will always be important for law enforcement agencies to ensure that all uses of covert surveillance technologies are properly supervised and that everyone involved in the process understands their duty to check the lawfulness of investigative strategies and ensure that – each time a person is recorded – that recording is lawful and justified by an appropriate authority.

One of the principles that should underpin any amendments to the current law is that all parties involved in preparing, assessing and granting warrant applications have a duty to provide an accurate and balanced summary of all relevant facts that might affect the judicial officer's decision on whether or not to grant the warrant. This duty is reflected in the discussion in section 19.12.1 which concludes with a recommendation that an applicant is required to fully disclose all matters that they are aware of that are adverse to the application, and that it should be an offence to knowingly or recklessly fail to disclose such information. This principle is no less important in relation to post-authorisation reports.

19.11.1.3 Post-authorisation reports and the Public Interest Monitor

Post-authorisation reports provide some insight into the investigative utility of SDs as they outline the way the information that has been recorded has been or will be used. For example, the reports record arrests and prosecutions[1150] as well as the previous uses of SDs in connection with the same offences.[1151] This kind of information may assist in evaluating public interest issues and assessing whether the use of an SD is appropriate in ongoing investigations.

Post-authorisation reports may also help the Public Interest Monitor to:

- make representations in other cases to a judicial officer about whether it is appropriate to authorise the use of a particular SD
- form a view about public interest issues arising from particular applications – particularly if the application is a rollover application or targets people who have previously been the target of SD warrants.

In this way, the Public Interest Monitor may be able to use the post-authorisation report to assess applications for SD warrants – eliciting further relevant information to help the judicial officer to consider the warrant application in the 'front end' of the authorisation process.

By contrast, the work the Ombudsman does with the post-authorisation reports is focused on back end monitoring, ensuring the accuracy of the records as required by law and using this information to improve the record keeping practices of agencies that use SDs.

19.11.1.4 Recommendations

35. It is recommended under section 26(2)(b) that the Attorney General propose, for the consideration of the Parliament, an amendment to section 44 of the *Surveillance Devices Act 2007* to require an applicant to provide a report about the use of a surveillance device to the Public Interest Monitor.

36. It is recommended under section 26(2)(b) that the Attorney General propose, for the consideration of the Parliament, an amendment to the *Surveillance Devices Act 2007* to detail what type of assessment the judicial officer and Public Interest Monitor are expected to undertake after receiving a post-authorisation report issued under section 44 of the *Surveillance Devices Act 2007*.

19.11.2 Greater detail in the Attorney General's annual reports

The Attorney General is required to report each year on the number of warrant applications sought and warrants issued for SDs and emergency authorisations of SDs.[1152] For warrants issued and executed wholly within NSW, only these overall figures are required to be reported publicly. The Attorney General does have a general discretion to report publicly about "any other information relating to the use of surveillance devices and the administration of the SD Act".[1153] However, the reports rarely contain any information beyond what is explicitly required.

1150 SD Act, s. 44(1)(f).
1151 SD Act, s. 44(1)(g).
1152 SD Act, s. 45.
1153 SD Act, s. 45(1)(c).

For applications and warrants made or issued in NSW but executed in participating jurisdictions,[1154] the SD Act requires the Attorney General to report the following additional information:

- the number of remote applications made by law enforcement officers
- the number of refusals by judicial officers to issue warrants and the reasons for refusal
- the number of applications for extensions of warrants that were granted or refused, and why they were granted or refused
- the number of arrests based on information obtained by the use of SDs
- the number of prosecutions based on information obtained by the use of SDs, and the number of those prosecutions in which a person was found guilty.[1155]

The reporting requirements for warrants issued and executed wholly within NSW depart from the model laws for Commonwealth and State agencies developed to foster mutual recognition of laws for cross-border investigations.[1156] It is unclear why the reporting requirements for applications and warrants issued and executed within NSW should be less rigorous than those executed in participating jurisdictions. The reporting of this kind of additional information about all applications and warrants would give a clearer picture of the way the system regulating SDs works, and the utility of SDs for investigating and prosecuting crime in NSW. Greater transparency affords better accountability – and may foster a more informed discourse about whether the objectives of the SD legislation are being met.

In its work on surveillance, the NSWLRC recommended that a much greater range of information should be included in the Attorney General's reports than is currently required. This would "facilitate an assessment of the level of compliance with the surveillance legislation and give an indication of whether the legislation is operating efficiently and effectively".[1157] That information included:

- the total number of applications for warrants – including the number of radio, telephone, facsimile or other electronic applications, which organisations made the requests, and the number of applications that were granted, refused or withdrawn
- the number of applications for retrospective warrants, who made them, and the number of them that were granted, refused or withdrawn
- the number and type of offences for which warrants were issued, and the number of warrants issued for each type of offence
- the number of each type of SD used
- the average period of time each warrant was in force
- the number of renewal applications received, granted, refused or withdrawn
- the number of warrants authorising the installation of devices in premises, an indication of the type of premises where devices were installed, and the number of warrants authorising surveillance of a particular individual
- the number of warrant applications requesting entry to premises and the number of warrants granted, refused or withdrawn
- the number of warrants issued specifying conditions or restrictions and the type of conditions or restrictions applied
- the number of devices not removed after the completion of surveillance and the reasons why the devices were not removed

1154 A participating jurisdiction is a jurisdiction with a corresponding surveillance devices law, as prescribed by the legislation: SD Act, s. 4. Pursuant to reg 3 of the Surveillance Devices Regulation 2014, the Northern Territory, Queensland, Victoria and Tasmania are participating jurisdictions with corresponding laws governing the use of surveillance devices.

1155 SD Act s. 45(1)(b1)-(b5).

1156 The model laws were developed by the Joint Working Group on National Investigation Powers of the Standing Committee of Attorneys General and Australasian Police Ministers in 2003.

1157 NSWLRC, *Report 98*, *Surveillance: An Interim Report*, February 2001, p. 343.

- the general use to which information obtained by using SDs has been put – including the number of arrests, prosecutions and convictions in which the information was used
- the annual cost of the covert use of SDs by the different law enforcement agencies.[1158]

It is also worth noting that the TI legislation contains more stringent reporting and record-keeping requirements than the SD Act, particularly for reporting on the effectiveness of warrants and recording specific particulars of how TI product has been used or communicated.[1159] Public reports issued by the Commonwealth Attorney General must contain information about the number of arrests, prosecutions and convictions made on the basis of lawfully intercepted information, the categories of offence in which lawfully intercepted information was used in evidence, the duration of warrants issued, and the costs associated with executing warrants issued under the TI Act.[1160]

The reports issued by the NSW Ombudsman under section 49 of the SD Act contain extensive information about SD warrants and the way SDs are used in NSW. However, the Ombudsman's resources do not permit a report on all of the matters recommended by the NSWLRC.

Another matter that is currently not reported is the issuing of directions to inform the subject of surveillance that they have been listened to or recorded. A judicial officer may direct a warrant holder to inform the subject of surveillance about the warrant and the use of the device if the judicial officer is satisfied that the use of the SD was "not justified and was an unnecessary interference with the privacy of the person recorded".[1161]

The capacity for a judicial officer to make such an order is an important safeguard against misuse of SDs authorised by warrant. The number of times that such directions are made should be publicly reported. This information sheds important light on the effectiveness of the SD scheme, and the way that potential abuses of that scheme are checked.

Public reporting about applying for and granting warrants and the way SDs are used is important to ensuring the system for regulating the use of SDs is working appropriately. However, more accurate and complete information must be reported to achieve this end. Increasing transparency in relation to the way SDs are used would provide greater accountability and inform public debate about the effectiveness of the SD scheme.

19.11.2.1 Recommendations

37. It is recommended under section 26(2)(b) that the Attorney General propose, for the consideration of the Parliament, an amendment to section 45 of the *Surveillance Devices Act 2007* to require that the information to be reported in section 45(1)(b1)-(b5) is reported in relation to all warrants sought and issued, including those executed within NSW.

38. It is recommended under section 26(2)(b) that the Attorney General propose, for the consideration of the Parliament, an amendment to section 45 of the *Surveillance Devices Act 2007* to require the report to include the number of times a judicial officer issues a direction under section 52 of the *Surveillance Devices Act 2007* requiring a warrant holder to advise people recorded about the use of a surveillance device.

1158 NSWLRC, *Report 98, Surveillance: An Interim Report*, February 2001, p. 343.
1159 TI (NSW) Act, Parts 2 and 3.
1160 TI Act, Part 2-8, Division 2.
1161 SD Act, s. 52. The same provision existed at s. 20 of the LD Act.

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