

Ombudsman comments on NSW Crime Commission response to the Operation Prospect report

The Acting NSW Ombudsman Professor John McMillan issued the following statement in response to the New South Wales Crime Commission '*Response to Operation Prospect Report*', that the Commission published on 14 March 2017.

'I will comment in full on the Commission's Response in a special report to the Parliament that I will make in accordance with the *Ombudsman Act 1974* after the NSW Government has announced its decision on the appointment of a new Police Commissioner. It is unfortunate that the publication of the Commission's Response at this time intersects with an important appointment decision facing the Government.

A number of unfounded and inflammatory claims in the Commission's Response warrant immediate comment.

The Commission claims that it was denied procedural fairness, the right to cross-examine witnesses and access to unredacted copies of all provisional findings. The Commission does not cite any legal authority to support those claims.

The Ombudsman earlier responded to similar claims in correspondence to the Commission and in detail in the *Operation Prospect* report (see Chapter 2). The Ombudsman's office conducted an extensive procedural fairness process. We released 1,187 pages of provisional analysis to the Commission and invited submissions in reply. The only material not released to the Commission was the provisional findings and material relating to other parties.

The Commission claims that the *Operation Prospect* report was not finalised and published in accordance with the requirements of the Ombudsman Act. The Ombudsman's office has more than 40 years' experience administering the Act. On numerous occasions (including in relation to Prospect) we have sought Senior Counsel's advice to confirm our compliance with those legal requirements. I explained in Progress Reports and correspondence over the past year how the *Operation Prospect* report would be finalised and published.

The Commission claims that it was not responsible for the actions of police who worked on the Mascot Task Force. This was discussed in the *Operation Prospect* report, where the Commission's view was rejected. The report concluded:

The NSWCC's responsibility for the conduct of police officers working under the Mascot reference is founded on a combination of factors. The Mascot investigations were being run by the NSWCC under a reference to the NSWCC. The Mascot investigations used NSWCC resources. Police working on the Mascot Task Force were inducted into the NSWCC and were required to read and comply with NSWCC policies and procedures. NSWPF officers inducted into the NSWCC were subject to the secrecy provisions in the NSWCC Act and are still subject to those today. The Mascot investigations made extensive use of NSWCC informants. The LDs and TIs used by Mascot to inform the investigation were sought under the auspices of the NSWCC. Mascot investigators were required by the NSWPF Internal Affairs Investigation Manual to follow NSWCC policies when using LDs and TIs in the investigation. The investigators sought the advice of NSWCC legal officers in preparing documentation, and NSWCC senior staff approved LD and TI applications. The chapters in this report refer to frequent instances of NSWCC staff participating in Mascot meetings, being part of the flow of correspondence, responding to queries about the Mascot investigations, and scrutinising compliance by Mascot staff with NSWCC policies and procedures in the LD and TI application processes. In those circumstances, systemic failings in Mascot processes are failures for which the NSWCC bears a measure of responsibility. (Ch 4.6.2.2, p 119)

The Commission's claim that it was not responsible for police conduct on the Mascot Task Force is inconsistent with the earlier stance of the Commission. Chapter 18 of the *Operation Prospect* report explains that the Emblems inquiry established by the NSW Police Force (NSWPF) in 2003-04 to investigate Mascot activities was discontinued after the Commission refused to give access to key documents to the NSWPF. The Commissioner of Police, Commissioner Moroney, had pressed the request for access so that the Mascot controversy could be resolved in a 'timely, ethical and transparent manner' (Ch 18.13, p 699).

The Commission's refusal to provide documents to the NSWPF inquiry was explicable only on the basis that the Commission had some responsibility for the Mascot investigations and would not cooperate with a police inquiry of which it was critical. The failure of the Emblems inquiry to resolve the Mascot controversy was a major factor in the decision of the NSW Government nearly a decade later to ask the NSW Ombudsman to conduct an independent inquiry.

It is disturbing that the Commission continues to refuse to acknowledge specifically the errors that occurred in the Mascot investigations and the Commission's responsibility for many of those errors.

There is some acknowledgement by the Commission that errors occurred, though the Response downplays their significance. The Commission states that it is 'sympathetic' that some individuals were subject to electronic surveillance without justification (para 5.4), that errors in warrant applications 'could have been identified by the NSWCC legal staff' (para 6.13) and it acknowledges a "'measure of responsibility" for some of the problems associated with the errant documents' (para 9.7).

The *Operation Prospect* report explains that strict legal requirements were imposed on the use of listening devices and telephone interceptions in order to safeguard personal privacy and to control the use of highly invasive law enforcement methods. Breaches of those requirements could constitute a criminal offence. This was recognised at the time in a Commission manual – ‘*Strict compliance with the Listening Devices Act is essential*’ (Ch 5.5, p 133).

The *Operation Prospect* report also points out that many individuals were deeply upset when they learnt they were wrongly named in a police corruption investigation.

The Commission acknowledges fault in one individual case, referring to an ‘unfortunate confrontation’ between a Commission officer and Police Officer F in November 2001. My finding on that matter was that the Commission officer’s conduct was ‘unreasonable, unjust and oppressive’ (Ch 10.8, p 359)

I recommended that the Commission apologise to Officer F and to fourteen other officers and individuals. The Commission has stated that it will not issue any apology.

The *Operation Prospect* report explains that a large number of people – police officers, journalists, lawyers and members of the public – were unfairly and incorrectly named in listening device and telephone interception warrants and were recorded unnecessarily or without authorisation. One consequence, explained in the report, is that confidential material relating to those activities was improperly accessed and disseminated.

Many complaints, submissions and evidence to the Ombudsman’s office pointed to the emotional and career damage that people claimed to have suffered from this improper conduct. It is clear that emotions still run high, and that many people find it difficult to move on from these events until there is a frank acknowledgment of the mistakes by the Commission and others.

Finally, the Commission’s response takes aim at the Ombudsman and staff by inferring that the Ombudsman lacked the ‘special legal qualifications’ that are normally required for the exercise of coercive investigation powers (Response, para 1.15). I have the legal qualifications to which the Commission refers, as have former Ombudsmen. I have a 45 year legal career as a researcher, practitioner, agency head and tribunal member. The only coercive investigation powers that were exercised during this investigation were to take evidence under oath and to require the production of documents. Those powers are conferred on the Ombudsman by the Ombudsman Act, including powers exercisable under the *Royal Commissions Act 1923*.

These investigation powers have been routinely exercised by Ombudsman officers for over 40 years.

The *Operation Prospect* report provides a professional, detailed and balanced analysis of complex issues that have been a continuing source of controversy in NSW policing and law enforcement investigations. Any disagreement with the findings and recommendations in the report should engage directly with the analysis in the report and not rest on unfounded claims.'