

NOTE TO THE READERS:

Many of the findings in this report that are made against individual officers relate to their conduct as the first officer to swear an affidavit that contained inaccurate content. As discussed in the report, these errors were not intentional or deliberate, but stemmed from defective work practices in the New South Wales Crime Commission and the Mascot Task Force. A finding is nevertheless made against some named officers because of the special responsibility on the deponent of an affidavit to ensure the accuracy and reliability of information to which they are attesting.

Some other individual findings against named officers should also be understood in context as the product of defective work practices. The explanations for individual findings are given throughout the report.

Operation Prospect

Volume 1

Chapters 1-5

Introduction and background

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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December 2016

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Foreword

Operation Prospect has been a complex and at times controversial investigation. It is the largest single investigation undertaken by an Ombudsman in Australia.

Over the four years of investigation to compile this report of over 850 pages, the NSW Ombudsman has assembled over one million pages of source documents, conducted 107 hearings and 67 interviews with 131 witnesses, provided 1,425 pages of provisional findings to 38 affected parties, arranged 103 days of document inspection for 27 of the 38 parties, considered 61 submissions from the parties comprising 1,626 pages of submissions, and handled more than 330 complaints, enquiries and public interest disclosures regarding the matters under investigation.

There has been regular correspondence between the Ombudsman and legal representatives of the parties, at times dealing with threatened litigation. The Ombudsman participated in two Legislative Council committee inquiries into the progress and conduct of Operation Prospect. There was a change of Ombudsman during the investigation. The direct cost of the investigation is \$9.64M (a high sum, but less than the \$50M or more for some royal commissions and similar external inquiries).

Throughout the investigation four questions were frequently asked. Why is the investigation important? Why is it taking so long? Why was it conducted in secret? Will this report be the end of it? This Foreword addresses those questions, and ends with three take-away messages.

Why is Operation Prospect important?

Chapters 6 to 18 of this report largely deal with events occurring in 1999-2003. Chapters 20 to 22 deal with events occurring in 2010-12. Though separated by several years, the events in each period were linked to common disputes.

The passing of the years neither resolved nor submerged the core issues in dispute. If anything, the disputes were enlarging and becoming unshakable. Media reports claimed the disputes were having a corrosive effect on internal harmony in the senior levels of the NSW Police Force. Inquiries – both internal and external – had been held intermittently into some of the disputed events. Assertions about the integrity of those inquiries became absorbed into the larger dispute. Thousands of confidential internal documents were leaked and publicly disseminated. Fresh allegations arose from those documents that could not be addressed publicly without revealing other confidential information.

The NSW Government decided that a thorough independent investigation was needed. The NSW Premier announced in October 2012 that the Ombudsman would be asked to conduct that investigation. Legislative changes were made to enable a complete investigation. After establishing a special investigation team and facilities, and obtaining and analysing source documents, the Ombudsman commenced private hearings in March 2013.

That short history distils the central objective of Operation Prospect: to examine, evaluate and report publicly on disputed events between 1999 to 2012 that make up this controversy. The story – the truth, if that is possible – has to be placed on the public record.

Many of the events that are examined in exhaustive detail in this report are now part of history. Many of the flaws in policing systems and methods that are exposed in this report have either been acknowledged or overtaken by legislative and administrative reforms. Some of the players have moved on, or rightly insist that their mistakes occurred many years ago in a more junior phase of their career.

Those are telling points, but they have not removed the need for a thorough and complete investigation and public reporting of the kind that Operation Prospect has undertaken. Government and many in the community want that to occur. Many people directly involved in these disputes – as investigators, administrators and investigated persons – have equally insisted that the fog has to clear. It will be difficult also for the NSW Police Force (NSWPF) and the NSW Crime Commission (NSWCC) to put the controversy to one side until it is properly explained.

While the analysis in this report is tied to the events under investigation, the report also attempts to stand back from the historical detail to see if there are lessons of broader or enduring relevance to be learnt. These are spelt out in individual chapters, particularly in chapters 16 and 19 which address systemic weaknesses and reform options.

Why did Operation Prospect take so long?

It hardly needs saying that no member of the Ombudsman's Operation Prospect team wanted this investigation to last four years. We were acutely aware of the strong desire in many quarters for a final investigation report to be published as quickly as possible. Hardly a week went by when this issue was not raised squarely with us, sometimes by acerbic criticism. The contents of this report will illustrate why it was such a long and complex investigation.

The allegations, tensions and grievances that are examined in this report were embedded deeply in the recent history and culture of the NSWPF and the NSWCC. Many parties say they carry career and personal scars from the events that are discussed. Some people claim they were wrongly targeted for investigation by the Mascot Task Force, others claim their professionalism as investigators on that Task Force has been unfairly maligned. The conflict spilt over into unauthorised disclosures and fresh allegations that surfaced in 2010 and 2012, and that drew more people into the dispute. Many in government, the media and the community, who were not directly involved in these events, simply want objective clarity about the issues in contention.

Those pressures and expectations meant that a thorough and balanced investigation was required. As noted above, that investigation has involved a formidable exercise in document collection and analysis and has spanned a large number of hearings, interviews, submissions and correspondence with parties.

A couple of examples illustrate the complexity of the task of unravelling the issues. It was not uncommon that a person who was targeted for investigation by the Mascot Task Force would be named on multiple listening device and telephone interception warrants. Some warrants named more than 100 people, and some people were named on close to 100 warrants. The Operation Prospect team had to build an individual history of the investigation of each person, by tracing the investigation from beginning to end. How many warrants was the person named in? Why were they first named in a warrant? What reason was given in the application and affidavit for the first warrant? Did that reason align with the information held at that time by the Mascot Task Force? Was the same or a different reason given for naming the person in subsequent applications and affidavits? Were there intervening developments (such as exculpatory revelations) that should have been mentioned in subsequent affidavits? When did the investigation of the person conclude? Was the outcome justifiable? Could the investigation have been concluded earlier? Was the person's career unfairly and adversely affected by the investigation?

Each one of those questions could require extensive document analysis that stretched back into meeting records, information reports, transcripts, court documents, briefing notes and emails. Before Operation Prospect could decide that an aspect of a person's investigation was flawed, former Mascot and NSWCC staff had to be given the opportunity to make a submission. There could be multiple officers – the deponent of an affidavit, an in-house lawyer who helped draft the affidavit, the authors of information reports from which material was drawn for an affidavit, and the supervisors, team leaders and agency executive managers who directed or sanctioned a line of investigation.

Most of those parties accepted the opportunity to inspect relevant documents prior to making a submission. The documents would have to be individually prepared for each inspection, often by detailed redaction of words or sentences that would identify other persons mentioned in the investigation who should not be identified for privacy or procedural fairness reasons. Questions were constantly raised by the parties and their lawyers during document inspection and submission preparation, about the documents or passages they had or had not been shown.

A second (and shorter) example of the complexity of the Operation Prospect investigation has to do with clarifying who was involved in and responsible for particular Mascot investigation decisions and actions. Numerous NSWCC and Mascot officers were directly or indirectly involved at each stage of an investigation. Participation could vary from day-to-day or throughout the day. In the evidence given to Operation Prospect, there was frequent and sharp disagreement and some blame shifting between officers as to who knew about or sanctioned a particular investigation strategy or action.

In addition to talking to each of the parties, Operation Prospect would have to delve deeply into the records to see who was at a particular meeting, what was recorded in the minutes of the meeting, whether an issue was discussed contemporaneously in other documents such as information reports or emails, who received an email or memo, whether any party noted the matter in their police notebook or diary, and whether other office records (such as leave and telephone records) revealed a person's location or movements at a particular time.

Other developments have added to the complexity of the Operation Prospect investigation. There were two Parliamentary inquiries into the conduct of Operation Prospect. Those inquiries, as well as adding to the timeline, drew further public attention to the Mascot controversy and underscored the need for a thorough and complete analysis in the final Operation Prospect report. The departure of the former Ombudsman in 2015 at the completion of a fifteen year term, and my appointment as Acting Ombudsman to head the investigation, prompted many parties and their lawyers to raise further questions about the conduct of the investigation that had to be addressed and explained in correspondence with the parties and in a progress report to the Parliament.

Understandably, the parties and their lawyers have insisted throughout that procedural fairness must be observed before any adverse findings are reached. While parties would frequently urge the need for a timely conclusion of Operation Prospect's work, as frequently they raised questions or made demands that would take extra time to deal with. Operation Prospect is a case study in the complex challenges that arise in meeting the requirements of procedural fairness in an investigation that is conducted in private and by inquisitorial method.

Why was Operation Prospect conducted in secret?

There is both a legal and a practical answer to that question.

The *Ombudsman Act 1974* requires that all Ombudsman inquiries be conducted in private. This is a well-settled feature of the Ombudsman method, internationally as well as locally. Private inquiry is inherently part of the inquisitorial style of an Ombudsman investigation. This provides assurance to the parties that they can assist the Ombudsman in a less formal and less adversarial setting. It enables the Ombudsman to refine (and enlarge) the scope of an investigation as it proceeds, in response to issues raised by the parties and the information being analysed. Large and complex investigations can be more comprehensive and efficient if done privately and by inquisitorial method.

The practical reason why Operation Prospect was a private investigation is that a great deal of the material that was analysed and examined with witnesses was inherently confidential and sensitive, for law enforcement and privacy reasons. A central focus of Operation Prospect was Mascot's deployment of three informants, one of whom was a serving police officer who covertly recorded a large number of his conversations with colleagues. The immense volume of information gathered by Mascot was laden with allegations or gossip about individual officers. Many of those allegations were never corroborated, and the identity of those who were mentioned should remain private.

The criticism that was sometimes directed at Operation Prospect for conducting a secret inquiry mistook an essential feature of an Ombudsman investigation. It may result – as this investigation has – in a public report. This report of over 1,000 pages provides a maximum level of public transparency on matters that would otherwise remain secret. Investigating in private combined with reporting in public enables the right balance to be struck between privacy and transparency. This is well illustrated throughout this report in the decisions made to name some people and anonymise others.

Will this report finalise the issues?

Many have asked: 'What next?' Does this report finalise the issues and draw a curtain across the disputed past?

It is unavoidable that some further examination of issues will be required and that contentions may be raised. Recommendations in this report require consideration and action, as will some adverse findings in the report against agencies and individuals. People may dispute findings made against them or resist any action to address an adverse finding. It is equally possible that fresh complaints and claims will be made once the full story in this report is revealed and understood.

Those processes are unavoidable and are a regular consequence of a commission of inquiry report. It is nonetheless to be hoped that there will be a preparedness in all quarters to accept this report as a thorough and definitive examination of a troubled era. A further investigation of this scale is not required.

An insight repeated throughout this report is that many former NSWCC and NSWPF officers whose actions are criticised did not intentionally or knowingly act improperly. They frankly acknowledge they would have acted differently if they had then the understanding that has since come from this painstaking and granular analysis of their actions at the time. Unravelling the story has been a central objective of Operation Prospect.

Take-away messages

Three themes permeate much of the analysis in this report.

Firstly, law enforcement investigations into police corruption and criminality were undertaken by Mascot using listening devices and telephone interceptions. Legislation permitted those highly invasive methods to be used, but only in strict compliance with rigorous procedures that were set out in legislation. Among the procedures was judicial and tribunal authorisation of listening device and telephone interception warrants, based on sworn affidavits that set out the grounds for the warrants to be granted.

There is no alternative other than strict and faithful compliance with those legislative requirements, particularly in swearing that the contents of an affidavit are true and correct. Public confidence in the integrity of coercive and intrusive law enforcement action depends on being able to trust that sworn documents that underpin that action are what they purport to be – a reliable record of facts and information.

That explains why a strict approach is taken in this report in holding to account those who attested to documents that were not carefully prepared. It may seem harsh to shine the spotlight more on the deponents than on colleagues who contributed to the unsatisfactory outcome. That is true, but there is a heavy responsibility on the deponents of legal documents to take reasonable steps to ensure the accuracy of the facts and statements in those documents. The smooth administration of the law and justice system depends on that principle.

Secondly, when the events of one age are investigated in another age, two questions will be prominent. What rules applied at the time? What does the documentary record of the time tell us about how well those rules were understood and observed?

Operation Prospect has placed great store on the explanations, views and reflections of the parties as presented in their oral evidence and written submissions. Ultimately, however, we are drawn back necessarily to the rules and documents of the time. What do they tell us? Do they reveal improper actions? Does the law require the impropriety to be addressed?

The clear lesson is that care must be taken by those who are recording why coercive or contentious action was being taken. The record may gather dust over the years. Equally, it may have unexpected importance many years later as a definitive record of whether an action was justifiable at the time.

The third take-away message also has to do with government record keeping. People can become deeply upset, even outraged, when they later learn they were mentioned in a bad light in a government document. At the heart of this investigation is the fact that scores of police officers and some journalists were mentioned in affidavits and warrants that authorised the covert use of listening devices and telephone interception to investigate corruption and other offences.

More people were named in those documents than seems appropriate, since many of them were never individually targeted or suspected of wrongdoing. A common justification that has since been given for including their names was that this was an unavoidable step in casting the net wide before zeroing in on the real offenders. Merely being named, it has been said, was an unobtrusive step in a law enforcement investigation.

The records of the Mascot investigation do not draw that distinction either clearly or at all in relation to some individuals who were named. The legislation that authorised listening devices and telephone interception was clear that privacy protection was a paramount objective and that a convincing explanation was needed to use those intrusive techniques. Unsurprisingly, many of those who have since learnt they were named in warrants have expressed deep upset and have campaigned to learn more and to seek redress.

Those three messages should be cautionary reminders to all who work in government.

Acknowledgements

A large number of people have assisted the Operation Prospect investigation – complainants and witnesses, their legal representatives, agency officers who made documents available and assisted with enquiries, and NSW Ombudsman staff who provided corporate assistance and collegial support.

I pay special thanks to the members of the Operation Prospect team. This investigation was longer and more tiring than anyone expected and the team members gave their utmost commitment throughout. Many worked long hours at nights and weekends to ensure that hearings and document inspection could proceed efficiently, and that the queries of parties, journalists and others were efficiently and helpfully addressed. The mental toil of examining such an extensive range of source documents and detailed submissions was unrelenting and arduous.

There are two people I will single out for special acknowledgement. The first is my predecessor, Mr Bruce Barbour, who led this investigation for the first thirty months. It was Bruce's wish to finalise the investigation during his term, but after fifteen years as NSW Ombudsman he felt that it was time to move on. Bruce's career as Ombudsman was marked by national and international recognition for his achievements. His commitment to the Operation Prospect investigation was unswerving.

Also deserving of special acknowledgement is Ms Linda Waugh, Deputy Ombudsman. Linda led the Operation Prospect team throughout. She brought to this task considerable expertise in Ombudsman and anti-corruption investigations. I am deeply indebted to Linda for her management ability, commitment, perceptiveness, professionalism and integrity in conducting Operation Prospect.

Bruce, Linda and the Operation Prospect team exemplified the principle that when an Ombudsman office decides to investigate a complex matter it will strive to do so knowledgeably, thoroughly, fairly and professionally. The Mascot era and ramifications had reached a point that nothing less was appropriate. I trust that others will accept that the Operation Prospect investigation and report have met that expectation.



Professor John McMillan AO

Acting NSW Ombudsman

December 2016

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About this report

This is a report of the NSW Ombudsman investigation known as 'Operation Prospect'.

Operation Prospect is a comprehensive investigation of allegations and complaints about the conduct of officers of the NSW Police Force (NSWPF), the NSW Crime Commission (NSWCC) and the Police Integrity Commission (PIC). The complaints and allegations relate to certain investigations conducted by those bodies, separately and jointly, between 1999 and 2002. The Ombudsman's investigation also examined the unauthorised release of confidential NSWPF and NSWCC records relating to those matters.

Operation Prospect is the largest single investigation undertaken by an Ombudsman Office in Australia. It started in 2012, under former NSW Ombudsman Mr Bruce Barbour and continued through until the end of 2016 under the Acting Ombudsman, Professor John McMillan AO, after his appointment in August 2015.

This report was prepared by Professor McMillan, in his capacity as Acting Ombudsman. It represents his views, opinions and findings in relation to the matters investigated, which he reached after considering the evidence, submissions and information assembled during the course of Operation Prospect.

The report is divided into six volumes and contains 22 chapters. This section lists the volumes and briefly summarises the content of each chapter to help the reader to find the more detailed information in the main report. When accessed online, this section contains hyperlinks that can be used to navigate to each chapter.

Findings and recommendations about particular matters investigated are stated throughout the report. Each finding is preceded by a discussion of the information and evidence that the Ombudsman considered in reaching it. The reason for each recommendation is explained, and linked to one or more findings. For ease of reference, the report includes a table of findings and a table of recommendations. They are located immediately after this section.

Volume 1: Introduction and background

Chapter 1. Background and scope of Operation Prospect

Chapter 1 explains the background and key events leading to the establishment of Operation Prospect – including the specific NSWPF, NSWCC and PIC investigations that were the source of the allegations and complaints that the Ombudsman investigated. It also details the funding the NSW Government provided to the Ombudsman to conduct Operation Prospect.

The final section of chapter 1 provides notes to assist the reader. It explains how people, organisations, legislation and policies are referred to in the report, and how figures about the use of affidavits, warrants, and recordings from listening devices (LDs) were derived.

Chapter 2. Operation Prospect – Approach and methodology

Chapter 2 provides an overview of the Ombudsman's jurisdiction to conduct Operation Prospect. It sets out the Ombudsman's powers to obtain information and conduct inquiries, to make this report to Parliament, and to refer information to the Director of Public Prosecutions (DPP).

It describes the stages in Operation Prospect, explains how the Ombudsman conducted the investigation, and provides statistics about the volume of evidence and information collected. It also discusses the arrangements to ensure procedural fairness and confidentiality and to provide legal advice and personal support for people involved as witnesses or subjects in the Ombudsman's investigation.

The chapter includes information about reforms that have already addressed some of the systemic weaknesses and problems identified by Operation Prospect, and signals recommendations made in later chapters of the report.

The final section briefly addresses some of the legal issues raised by parties during the investigation – such as the application of natural justice principles to Operation Prospect. It explains how the term ‘findings’ is used in this report, and defines the terms used to express the findings.

Chapter 3. Mascot investigations and Operation Florida

Chapter 3 considers key events leading up to the start of the NSWCC’s Mascot investigation in February 1999. Those events followed on from the Royal Commission into the NSW Police Service, and include the establishment of the PIC and the creation of certain units within the NSWPF to investigate police conduct. The chapter also introduces an informant known as ‘Sea’, who gave the NSWCC information about police corruption that was critical to the Mascot investigation.

The chapter summarises the outcomes of the Mascot investigation, and explains how these informed the PIC’s Operation Florida – which included public hearings and culminated in a report to Parliament. The Mascot investigation and Operation Florida resulted in prosecutions, resignations and dismissals.

The chapter also considers the work of the NSWPF’s Task Force Volta, which was set up to finalise many of the outstanding medium to low risk allegations compiled or investigated by Mascot.

Chapter 4. Mascot structure, governance and personnel

Chapter 4 explains the structure of the Mascot Task Force – which included police and NSWCC staff. It discusses how the Mascot Task Force operated and the circumstances in which operational and management decisions were made.

It identifies the senior managers responsible for the direction, oversight and control of the Mascot investigation. It also identifies those NSWPF personnel who were subject to NSWCC direction, but were nevertheless responsible for Mascot at an operational level – and who managed and supervised Mascot investigators.

Chapter 5. Mascot methodology

Chapter 5 describes the Mascot Task Force’s investigative methodology. It explains the different approaches in the covert and overt phases of the Mascot investigation, how the informant Sea was deployed, and how it was decided which police officers would be investigated and over what period. It discusses Mascot’s extensive use of LDs – and to a lesser extent telephone intercepts (TIs) – to gather evidence of police corruption.

In NSW it is an offence to listen to a private conversation using an LD or TI, unless permitted to do so by a legal exception. This is an important legal safeguard to protect people’s privacy. One of the relevant legal exceptions, however, is if a warrant is granted by an eligible judge or member of the Administrative Appeals Tribunal. This chapter explains the legislative framework for obtaining warrants and for dealing with information obtained lawfully using LDs and TIs.

This chapter also describes the Mascot Task Force’s procedures for applying for warrants and discusses common features of the warrant applications and affidavits prepared for the Mascot investigation.

Volume 2: Mascot investigations – 1999

Chapter 6. Investigation of Officers A and B

Chapter 6 considers Mascot's investigation of two police officers – Officer A and Officer B. Both were named on warrants granted on 8 February 1999, which authorised the use of LDs to record or listen to the private conversations of 18 people.

Officers A and B continued to be named in Mascot affidavits and warrants until 2002. The allegations against both officers were eventually found to be unsubstantiated – but not until 2003 (for Officer A) and 2004 (for Officer B).

This chapter identifies some of the problematic work practices evident in Mascot's approach to investigating Officers A and B. These were systemic defects that pervaded the entire Mascot investigation.

The Ombudsman makes findings in this chapter about the conduct of the NSWPF, the NSWCC and certain named public officials.

Chapter 7. Investigation of Messers F and N, and Officers C1 and J

Chapter 7 discusses the Mascot investigations of a number of current and former police officers – Mr F, Mr N, and Officers C1 and J. Subsequent NSWCC and NSWPF actions concerning those four people are also discussed.

The first LD warrant in which some of them were named was granted on 12 March 1999. The warrant named 119 people whose private conversations could be recorded or listened to over 21 days. They were then regularly named in later Mascot applications, affidavits and warrants.

The chapter discusses weaknesses in the document preparation processes in the early stages of the Mascot investigations and finds that Mascot investigators did not have sufficient regard for the legal requirements when applying for warrants. A significant deficiency was not explaining why certain people were named in the application or why it was considered necessary to listen to or record their private conversations. Those problems increased as the Mascot investigation expanded. The chapter also makes observations about a lack of rigour in the Mascot Task Force's assessment of allegations and in evaluating appropriate investigation strategies.

The Ombudsman makes findings in this chapter against certain named public officials involved in the investigations of Mr F, Mr N, and Officers C1 and J. The Ombudsman also makes findings against the NSWPF and NSWCC, and recommends that those agencies issue written apologies for certain conduct.

Chapter 8. Investigation of Officers P, H and E

Chapter 8 analyses the Mascot Task Force investigations of Officer P, Officer H and Officer E. Issues similar to those in Chapter 7 are explored – such as a lack of administrative rigour in preparing documents, not having sufficient regard for the legal requirements when applying for LD warrants, and inadequately assessing allegations and evaluating appropriate investigation strategies.

A prominent theme in this chapter is the lack of appropriate controls when using intrusive investigation techniques within Mascot investigations. Those techniques included planned 'integrity tests' to see whether the targeted officer would behave in a way that contravenes the principles of integrity required of a police officer. The integrity tests examined in this chapter were undertaken by Mascot without sufficient regard for the relevant legal and administrative requirements and without properly recording and communicating the outcomes. The analysis also shows the intentional use of an LD to record a person's private conversations without ensuring they were named in a supporting affidavit or warrant.

The chapter also identifies that some of the police conduct that Mascot was investigating may not have been within the scope of the Mascot references to the NSWCC – as it concerned the breach of police regulations or the Code of Conduct, rather than a serious criminal offence.

The Ombudsman makes findings in this chapter against certain named public officials involved in the investigations of Officer P and Officer E. The Ombudsman also makes findings about the conduct of the NSWCC in relation to the investigations of Officer P, Officer H and Officer E and recommends that the agency issue written apologies in response to some of those findings.

Volume 3: Mascot investigations – 2000 to 2002

Chapter 9. King send-off strategy and the associated warrants

Chapter 9 discusses the Mascot investigation strategy surrounding a function to celebrate the retirement of a police officer called King. The function was organised by Sea and another police officer. Most of the people invited were current and former police officers. The chapter includes a discussion of the specific circumstances of five people who were listed on an LD warrant along with other invitees – Mr J, Officer T, Mr P, Mr K and Mr DD.

The Mascot Task Force saw the King send-off as an opportunity for Sea to record the conversations of attendees who might reminisce and possibly corroborate some of Sea's allegations. In anticipation of the event, Mascot investigators set about obtaining warrants to authorise Sea to use a body worn LD at the function.

This chapter examines the processes and reasoning that led to all but one of the people included on the list of invitees being named in the original LD warrant. Those people continued to be named in 'rollover' warrants covering a period of several months when the function was postponed, and then again for several months after it was actually held. This was problematic – given that a central objective of the Listening Devices Act was to regulate the exercise of intrusive state powers and to safeguard personal privacy as far as possible when LDs were being used.

The Ombudsman makes findings in this chapter against certain named public officials involved in preparing affidavits associated with the King send-off strategy. The Ombudsman also makes findings about the conduct of the NSWCC and recommends that the agency issue written apologies in response to those findings.

Chapter 10. Investigation of Officer F

Chapter 10 deals with the Mascot Task Force's investigation of a senior police officer, Officer F. The investigation took place over a period of 15 months from October 2000 to December 2001 during which Officer F was named in 77 LD warrants and three TI warrants.

No findings of misconduct or criminality were reached against Officer F as a result of the Mascot investigations. The allegations against him were based on weak and uncorroborated information, and were inaccurately recorded in Mascot Information Reports and in the supporting affidavits for warrants. A senior officer who played a role in the investigation of Officer F had a perceived conflict of interest that was not properly managed. The chapter also critically examines a directed interview of Officer F that was conducted in a confrontational and accusatory manner that was inappropriate and oppressive.

The Ombudsman makes findings in this chapter against certain named public officials involved in the Mascot investigation of Officer F. The Ombudsman also makes findings about the conduct of the NSWCC in relation to its lack of appropriate systems to properly evaluate the strategies being used by Mascot to investigate Officer F and recommends that it issue a written apology to him.

Chapter 11. Unauthorised recordings and incorrectly naming a person as an investigation subject

Chapter 11 considers two issues that arose in the Mascot investigations in late 2000. These issues were raised in four complaints to Operation Prospect.

The first issue is the unauthorised recording of the private conversations of Officer M, Ms E and Officer Q. These three people were not named in any Mascot warrants, but Sea used an LD to record his conversations with them. As this chapter explains, Mascot officers were not aware that the recordings were unlawful – mainly because they did not routinely check whether Sea’s recordings were authorised by a warrant, or cross-check the recordings with source documents when summarising them or preparing transcripts.

The second issue is the naming of an incorrect person (Bourke) in LD affidavits and warrants, because of a misspelling of the intended person’s name (Burke). This mix-up led to Bourke – a police officer – being incorrectly listed as a person likely to be recorded by Sea in 69 warrants and 23 supporting affidavits. In fact, none of Bourke’s private conversations were recorded and none of his telecommunications were intercepted. Nor was there any adverse information that would make him a legitimate investigation target.

These systemic failures in Mascot processes are criticised in this chapter, but no adverse finding is made against any individual. The Ombudsman recommends that the NSWCC apologise to Officers M and Q and Ms E for the unauthorised recording of their private conversations, and destroy all records relating to those recordings. The Ombudsman also recommends that the NSWCC apologise to Bourke for incorrectly naming him in affidavits and warrants.

Chapter 12. Investigation of Officers L and G

Chapter 12 examines the Mascot investigations of Officer L and Officer G. Both cases raise questions about actual or perceived conflict of interests in the Mascot investigations. Some of the evidence in this chapter about Officers L and G comes from an inquiry by Strike Force Tumen.

Although Officer L was a member of the Mascot Task Force, it was considered appropriate for other Mascot members to investigate an allegation of corrupt conduct about him. An alternative was to refer the matter to PIC for independent investigation.

The allegation against Officer L was misrepresented in Mascot documents, and may have been treated more seriously than was appropriate because he was a Mascot staff member. The investigation relied on using LD recordings and an integrity testing strategy as key investigative tools, before less intrusive options were considered. The allegations against Officer L were not substantiated. However, the defects in the investigation of Officer L became a source of considerable grievance to him and some of his colleagues – who then accessed internal Mascot information to discover why Officer L was targeted.

Officer G was not a member of the Mascot Task Force, and it was alleged that he may have been unlawfully targeted by Mascot for personal reasons. Officer G was identified as a target for possible integrity testing in November 2001, for reasons that were not made clear at the time. The allegation against Officer G was not substantiated, but it would seem that Mascot’s investigation delayed his promotional progress.

The Ombudsman makes findings in this chapter against certain named public officials involved in the Mascot investigations of Officer L and Officer G.

Chapter 13. LD warrant 266/2000 becomes public

Chapter 13 explains how a Mascot LD warrant granted on 14 September 2000 (LD 266/2000) became public on 12 April 2002. The controversy about LD 266/2000 has persisted to the present, and was instrumental in the establishment of Operation Prospect.

LD 266/2000 named 114 people whose private conversations could be recorded or listened to via an LD worn by Sea. The warrant stated that it was issued for the purposes of investigating offences including money laundering, corruption, corruptly receiving a benefit, conspiracy to pervert the course of justice, and tampering with evidence.

This chapter considers the media interest in the warrant, the concerns expressed by some of those named in it, and the steps taken by the NSWPF and NSWCC to explain the content of both the warrant and the supporting affidavit. The chapter also examines public statements made by the Police Commissioner and others, and a review of the warrant by the PIC Inspector.

Adverse comments are made in this chapter about the failure of some senior officers – after LD 266/2000 became public – to better understand and address concerns being raised both privately and publicly about the intrusive nature of the Mascot investigation. The failure of senior officers to grasp that opportunity to deal with a brewing controversy contributed to the unresolved grievances that gave rise to Operation Prospect. However, no adverse finding is made against any individual officer.

The Ombudsman recommends that the NSWCC destroy the listening device recordings obtained under LD warrant 266/2000 that do not relate – directly or indirectly – to the commission of a prescribed offence.

Volume 4: Mascot management of informants Paddle and Salmon

Chapter 14. Deployment and management of informant Paddle

Chapter 14 examines Mascot's deployment of an informant known as 'Paddle'. Mascot investigators approached Paddle in 1999, to enlist his cooperation in investigating Sea's allegation that police verballed Paddle and two others in relation to an attempted armed robbery.

This chapter focuses on five aspects of Mascot's management of Paddle. These are:

- instructing Paddle to meet with Mr A – a former police officer involved in Paddle's arrest – in breach of Paddle's bail conditions
- relocating Paddle several times – in further breach of his bail conditions – so that Paddle could avoid police officers seeking him in connection with his contact with Mr A
- advising Paddle to conceal his work as an informant from the court during proceedings to deal with Paddle's bail breaches
- failing to respond appropriately to formal complaints about Paddle's deployment received from Mr A's solicitors and others
- failing to disclose relevant matters to the Director of Public Prosecutions (DPP) when advising on a proposed DPP decision to discontinue proceedings against Paddle.

The Ombudsman makes findings in this chapter about the conduct of the NSWCC – and recommends that the agency apologise to Mr A for deploying Paddle to meet him in breach of Paddle's bail conditions and for failing to investigate allegations about that matter.

The Ombudsman makes findings on the NSWPF's handling of Mr A's complaint about the deployment of Paddle and recommends that the agency apologise for failing to deal with it in a timely manner.

The Ombudsman makes findings in this chapter against certain named public officials involved in managing Paddle's deployment. The Ombudsman also makes findings against certain named public officials and the NSWCC in relation to the failure to ensure the DPP was properly informed of Paddle's admission of guilt.

The Ombudsman recommends that the DPP Prosecution Policy and Guidelines should be clarified to address matters discussed in this chapter.

This chapter also considers an allegation that Mascot failed to properly investigate a homicide in which Paddle was involved, and concludes that the matter was properly investigated.

Chapter 15. Deployment and management of informant Salmon

Chapter 15 considers Operation Wattles, which was conducted by the NSWCC under the Mascot references. The chapter examines the circumstances surrounding the deployment of an informant known as 'Salmon' to record the conversations of two serving police officers and their associates.

Most of the warrants for Salmon's body worn LDs did not correctly describe the circumstances in which they were intended to be used. As a result, Salmon recorded some conversations unlawfully. Those recordings were used as evidence in PIC hearings and successful criminal prosecutions. Although it is accepted that these errors occurred in good faith, it is questioned whether the evidence obtained by Salmon was in fact admissible.

The Ombudsman makes an adverse finding against a police officer who played a central role in Operation Wattles, and a further finding against the NSWCC about its processes for obtaining warrants.

Volume 5: Systemic and other issues

Chapter 16. Systemic failures in Mascot processes and practices

Chapter 16 further examines some of the deficiencies discussed in earlier chapters, and considers the underlying systems and procedures in the Mascot Task Force that contributed to the deficiencies. The chapter starts by examining criticisms made to Operation Prospect about the cultural and human resource setting in the NSWCC and the Mascot Task Force, and about the lack of induction and specialist training for Mascot officers.

The chapter considers in detail the NSWCC's processes for drafting and approving affidavits – including decisions about who should be named, what information should be included, and checks to ensure that information in affidavits is accurate and reliable. The chapter also discusses weaknesses in NSWCC arrangements at the time for managing informants and transcribing and destroying 'LD product', and for ensuring that legislative requirements were observed.

The Ombudsman makes findings against certain named officials in this chapter for their conduct in relation to the supervision and review of affidavit preparation in the NSWCC.

The Ombudsman also makes findings against the NSWCC for a range of systemic failures and deficient work practices in Mascot processes in relation to:

- training about preparing affidavits
- reliance by investigators on secondary and non-evidentiary material in affidavits
- the lack of warrant cross checking processes in the deployment of informant Sea
- management of LD product.

At the end of the chapter, the Ombudsman recommends that the NSWPF and the NSWCC review the current protocols for joint operations.

Chapter 17. Other matters in connection to Mascot

Chapter 17 discusses some issues that emerged through the Operation Prospect investigation that have not been explored in detail in the earlier chapters. These include:

- the basis for the NSWCC Management Committee's decision to broaden the Mascot references
- whether it was appropriate for the NSWCC to conduct integrity tests under the Mascot references
- the choice and use of pseudonyms for Mascot persons of interest
- whether lawfully intercepted information was communicated unlawfully
- the delay in starting the overt phase of the Mascot investigation, and how unresolved allegations against certain officers affected their career progression
- the PIC Commissioner's role in Operation Florida, and his earlier professional relationship with Sea
- alleged misconduct in Operations Orwell and Jetz, and a complaint about the outcome of Operation Boulder.

The Ombudsman makes findings against certain named public officials in this chapter as well as a number of findings about the conduct of the NSWCC.

The final section of this chapter discusses what happened to Sea when Mascot became an overt investigation.

Chapter 18. NSWCC interactions with Strike Force Emblems

Chapter 18 discusses the work of Strike Force Emblems, established in July 2003 to investigate complaints made to the NSWPF after LD warrant 266/2000 became public – see Chapter 13.

The particular focus of this chapter is the difficulties that Emblems faced in investigating the conduct of the NSWCC and its staff – including NSWPF members of the Mascot Task Force.

The chapter explains how Emblems conducted its investigation, and the discussions between the NSWCC, the NSWPF and the NSWCC Management Committee about providing NSWCC information to Emblems. The NSWCC was reluctant for legal, operational and reputational reasons to make information available to Emblems.

The Ombudsman makes a finding in this chapter against the former Commissioner of the NSWCC for his role in the NSWCC declining to provide key documents to Emblems and the NSWPF. There were complications in doing so, but these could have been overcome had more weight been given to the importance of facilitating a review of the controversial and unsettled issues that were being raised since the public dissemination of LD warrant 266/2000.

This chapter also examines an allegation that the Commissioner of Police incorrectly stated in a media interview in 2012 that he had not read the Strike Force Emblems report. The Ombudsman makes no adverse finding in respect of that allegation.

Chapter 19. Improving warrant authorisation processes

Chapter 19 examines the NSW legal framework that permits the use of LDs and TIs to investigate certain serious crimes, while protecting the privacy of affected individuals from unwarranted intrusion. The chapter contains a detailed analysis of the Mascot affidavits and warrants, and discusses some of the significant features and common deficiencies of those documents. It also contains statistics about the use of covert surveillance technologies by NSW law enforcement agencies over the period 2009 to 2015, and compares that with the use of those devices in other Australian jurisdictions.

As the Operation Prospect investigation has shown, the legal controls and safeguards in the warrant authorisation process were not adequate to prevent many of the problems identified with the warrants the NSWCC obtained in the Mascot investigations. Although there has since been some reform, procedural weaknesses are still present today.

In this chapter, the Ombudsman recommends measures to improve the warrant authorisation processes in NSW, to give greater assurance that law enforcement agencies use surveillance technologies appropriately.

Volume 6: Access to and disclosure of confidential records

Chapter 20. Access to and disclosure of confidential records – legal and policy considerations

Chapter 20 examines the legal requirements and policy considerations that protect confidential law enforcement records. The chapter sets out relevant laws and policies that apply to NSWPF and NSWCC staff who have access to confidential information in the course of their duties. It discusses the NSWPF rules and policies for avoiding and managing conflicts of interests. The final section of the chapter explains the elements of the common law offence of misconduct in public office.

The legislative and policy framework for controlling the use and dissemination of confidential law enforcement information provides a background for Chapters 21 and 22. Those chapters respectively analyse what happened in 2010 and 2012 when confidential NSWPF and NSWCC records about the Mascot investigations and related NSWPF internal investigations were improperly accessed, and subsequently disseminated to – and read by – people without proper authority to see them.

Chapter 21. Internal access to and circulation of confidential records – events in 2010

Chapter 21 considers the actions of a number of NSWPF officers in 2010 – after the publication of a newspaper article that referred to ‘an unlawful operation’ in 2000 by the NSWPF Special Crime and Internal Affairs Command and the Crime Commission. The article noted that 114 detectives, including a current NSWPF Deputy Commissioner, ‘were bugged’. Steps were initiated by another NSWPF Deputy Commissioner to seek a correction or retraction of the statement that the operation was ‘unlawful’. Email discussion then occurred within the senior ranks of the NSWPF as to how, if at all, the NSWPF should comment or respond to the media article.

This chapter examines the circumstances in which the Deputy Commissioner named in the article sought and was given access to certain confidential records about a number of investigations discussed in this report. The chapter considers whether proper procedures were followed to obtain access, and if the access request was legitimately related to the proper discharge of the Deputy Commissioner’s functions. It also analyses the actions of the police officers who responded when asked to provide or facilitate that access.

The Ombudsman makes both adverse comments and findings against named officials in this chapter.

Chapter 22. Public dissemination of confidential records – events in 2012

Chapter 22 details Operation Prospect’s investigation into how restricted and confidential NSWPF and NSWCC documents were accessed internally and publicly disseminated without authorisation during 2012.

Operation Prospect has identified over 120 confidential NSWPF and NSWCC documents that were disseminated without authorisation to journalists, serving and former NSWPF officers, and a member of parliament. The access and unauthorised release of so many confidential documents was a serious breach of the security systems intended to protect confidential information in those agencies.

The Ombudsman makes formal findings against certain named officials in this chapter.

Table of findings

Volume 1: Introduction and background

Nil.

Volume 2: Mascot investigations – 1999

1. Kaizik..... 189

Kaizik's conduct as the deponent of LD affidavit 062-068/1999 sworn on 5 February 1999, in support of an application for a LD warrant to listen to or record Officer A's private conversations, was unreasonable conduct in terms of section 122(d)(i) of the *Police Act 1990*. As discussed in sections 6.2.4.1 and 6.2.4.2, the affidavit did not accurately record the allegations against Officer A and omitted information that could potentially be exculpatory.

2. Szabo..... 189

Szabo's conduct as the deponent of four affidavits sworn between 9 July 2001 and 11 February 2002 (LD affidavits 01/05980-05986, 01/06753-06759, 01/0748-07482 and 02/00547) that included allegations against Officer A, was unreasonable conduct in terms of section 122(d)(i) of the *Police Act 1990*. As discussed in sections 6.2.3.2 and 6.2.4.3, Szabo was directly aware from meetings with Sea in June and August 2001 that a paragraph in the affidavits describing the allegations against Officer A was incorrect.

3. NSW Crime Commission..... 189

The NSW Crime Commission was responsible for the unreasonable conduct of the members of the Mascot Task Force in naming Officer A in 51 LD affidavits and one TI affidavit between 5 February 1999 and 11 February 2002, based on ambiguous comments that fell short of clear allegations of corruption or misconduct. As discussed in sections 6.2.4.2 and 6.2.4.3, information about Officer A was inaccurately presented in all the affidavits, the paragraphs naming Officer A were copied into multiple affidavits without proper checking and review, and he was named unnecessarily in some affidavits.

The NSW Crime Commission was responsible for the Mascot and Mascot II references and for the supervision of members of the Mascot Task Force. The actions taken by the Mascot Task Force with respect to Officer A indicate a lack of administrative rigour at the time in NSW Crime Commission document preparation processes. This was contrary to NSW Crime Commission policies, practices and procedures that should have been followed in the conduct of the Mascot references and in the preparation of affidavits and warrant applications. The conduct of the NSW Crime Commission in carrying out functions related to the administration of the *Listening Devices Act 1984* was unreasonable and otherwise wrong within the meaning of section 26(1)(b) and (g) of the *Ombudsman Act 1974*.

The general deficiencies that have been described in relation to the investigation of Officer A arose partly from the failure of the NSW Crime Commission, during the period January 1999 to January 2002, to ensure that affidavits were properly prepared and that the NSW Crime Commission's own policies, practices and procedures in relation to the obtaining of listening device warrants were properly implemented.

The NSW Crime Commission failed to ensure that staff under its control properly complied with the *Listening Devices Act 1984* and the *New South Wales Crime Commission Act 1985* – and with NSW Crime Commission policies and procedures relating to those Acts – in preparing 52 affidavits that contained inaccurate and incomplete information about allegations that Sea had made about Officer A.

4. Trayhurn 219

Trayhurn's conduct in preparing a memorandum dated 14 November 2000 to the NSW Crime Commission solicitor, that contained an inaccurate summary of a conversation recorded on 31 October 2000, was conduct that arose wholly or in part from a mistake of fact in terms of section 122(1)(d)(iv) of the *Police Act 1990*. The memorandum exaggerated Officer B's knowledge of and involvement in the disposal of unlawfully obtained firearms. Trayhurn knew and intended that the memorandum would be used in affidavits supporting applications for LD and TI warrants to investigate Officer B.

5. Moore 219

Moore's conduct as the deponent of TI affidavit 122-125/1999 sworn on 30 April 1999, in support of an application for a warrant to intercept Officer B's telephone service, was conduct that arose wholly or in part from a mistake of fact in terms of section 122(1)(d)(iv) of the *Police Act 1990*. As discussed in section 6.3.3, the affidavit wrongly stated that Officer B had knowingly completed a police report that falsely named himself as the driver of a vehicle driven by another officer that was involved in an accident.

6. Szabo 219

Szabo's conduct as the deponent of LD affidavit 338-334/2000 sworn on 16 November 2000, in support of an application for seven LD warrants to listen to or record Officer B's private conversations, was conduct that arose wholly or in part from a mistake of fact in terms of section 122(1)(d)(iv) of the *Police Act 1990*. As discussed in section 6.3.4.4, the affidavit apparently relied on a memorandum dated 14 November 2000, prepared by Trayhurn, that inaccurately summarised a conversation recorded on 31 October 2000.

7. Szabo 219

Szabo's conduct as the deponent of LD affidavit 362-368/2000 sworn on 7 December 2000, in support of an application for a LD warrant to listen to or record Officer B's private conversations, was conduct that was unreasonable and arose wholly or in part from a mistake of fact in terms of section 122(1)(d)(i) and (iv) of the *Police Act 1990*. As discussed in section 6.3.2.3, the affidavit incorrectly stated that a recorded conversation between Sea and Officer B corroborated an allegation that Officer B had verbaled a suspect.

8. Kaizik 220

Kaizik's conduct as the deponent of LD affidavit 062-068/1999 sworn on 5 February 1999, in support of an application for a LD warrant to listen to or record Officer B's private conversations, was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. The affidavit did not accurately record information about Officer B in relation to two allegations concerning the completion of a false police report – as discussed in section 6.3.3 and the disposal of firearms, as discussed in section 6.3.4.

9. Kaizik 220

Kaizik's conduct as the deponent of LD affidavit 324-330/2000 sworn on 17 September 1999, in support of an application for a LD warrant to listen to or record Officer B's private conversations, was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. The affidavit inaccurately represented a claim by Sea that Paddle had been verbaled by Officer B as an allegation that was a substantiated fact – as discussed in section 6.3.2.3.

10. Grainger 210

Grainger's conduct in preparing a report dated 12 May 2004 with a finding that an allegation of verballing against Officer B was sustained was conduct that was unreasonable in terms of section 122(1)(d)(i)(iv) of the *Police Act 1990*. The finding was not reasonably supported by the evidence available to Grainger – as discussed in section 6.3.11.2.

11. NSW Police Force220

The NSW Police Force is responsible for:

- the inappropriate recommendation, made in a risk assessment in November 2002, that alternative duties be considered for Officer B as allegations against him had not been fully resolved – as discussed in section 6.3.10.
- the extended delay in Officer B being confirmed in a new position at the rank of Inspector, caused by unnecessary delays in resolving the allegation that he had verbally Paddle – as discussed in sections 6.3.11.2 and 6.3.12.

The recommendation and the delay were caused by the actions of NSW Police Force officers. The conduct of the NSW Police Force was unreasonable and based wholly or partly on a mistake of fact, in terms of section 26(1)(b) and (e) of the *Ombudsman Act 1974*.

12. NSW Crime Commission220

The NSW Crime Commission is responsible for the actions of members of the Mascot Task Force in continuing to investigate, after December 1999, the allegation that Officer B had verbally Paddle. As discussed in section 6.3.2.4, Paddle's admission on 7 December 1999 that he was involved in the armed robbery in 1994 provided a basis to conclude the investigation of this allegation against Officer B. The NSW Crime Commission was responsible for the Mascot and Mascot II references and for the supervision of members of the Mascot Task Force. The conduct of the NSW Crime Commission in failing to ensure that the investigation of this allegation was appropriately conducted and finalised was unreasonable and otherwise wrong in terms of section 26(1)(b) and (g) of the *Ombudsman Act 1974*.

13. Kaizik234

Kaizik's conduct as the deponent of two affidavits that referred to Mr N was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*.

LD affidavit 069-071/1999 sworn on 5 February 1999 named Mr N for the first time as a person whose private conversations Mascot sought to listen to or record, although Mr N was not named in the associated warrant. As discussed in section 7.3.7.1 the affidavit did not explain why the investigation of a prescribed offence would be assisted by listening to or recording Mr N's private conversations, and the information provided in the affidavit about Mr N fell short of an allegation of criminal conduct.

LD affidavit 371-380/1999 sworn on 29 October 1999 named Mr N in support of an application for two LD warrants that authorised his private conversations to be listened to or recorded. The affidavit did not provide any information to explain why Mascot sought to listen to or record Mr N's private conversations.

14. NSW Crime Commission234

The NSW Crime Commission was responsible for the actions of members of the Mascot Task Force in undertaking an investigation of Mr N and naming him in 95 LD warrants, 41 LD affidavits and two TI affidavits. The NSW Crime Commission was responsible for the Mascot and Mascot II references and for supervising members of the Mascot Task Force. There were multiple failings in Mascot's investigation of Mr N, as outlined in section 7.3.7.1. 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 of the NSW Crime Commission was unreasonable and otherwise wrong in terms of section 26(1)(b) and (g) of the *Ombudsman Act 1974*.

15. NSW Police Force235

The conduct of the NSW Police Force in providing Mr N with an inadequate response on 10 April 2003, concerning his enquiry about the investigation of his conduct as a police officer, was conduct of a kind for which adequate reasons should have been but were not given – in terms of section 26(1)(f) of the *Ombudsman Act 1974*.

16. Kaizik240

Kaizik's conduct as the deponent of LD affidavit 105-111/1999 – sworn on 12 March 1999 in support of an application for a warrant to listen to or record Officer C1's private conversations – was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in section 7.4.8, the affidavit did not provide any information to explain why Mascot sought to listen to or record Officer C1's private conversations.

17. NSW Crime Commission241

The NSW Crime Commission was responsible for the actions of members of the Mascot Task Force in undertaking an investigation of Officer C1 and naming him in 63 LD warrants, 29 LD affidavits and four TI affidavits. The NSW Crime Commission was responsible for the Mascot and Mascot II references and for supervising members of the Mascot Task Force. There were multiple failings in Mascot's investigation of Officer C1, as outlined in section 7.4.8. 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 of the NSW Crime Commission was unreasonable and otherwise wrong in terms of section 26(1)(b) and (g) of the *Ombudsman Act 1974*.

18. Kaizik242

Kaizik's conduct as the deponent of LD affidavit 105-111/1999 – sworn on 12 March 1999 in support of an application for a warrant to listen to or record Officer J's private conversations – was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in section 7.5.2, the affidavit did not provide any information to explain why Mascot sought to listen to or record Officer J's private conversations.

19. Szabo247

Szabo's conduct as the deponent of LD affidavit 218-224/1999 – sworn on 4 June 1999 in support of an application for a warrant to listen to or record Mr F's private conversations – was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in section 7.6.3 the affidavit did not accurately or fairly represent the information that Mascot held about a conversation between Sea and Mascot Subject Officer 11 on 27 May 1999 that referred to Mr F.

20. Moore247

Moore's conduct as the deponent of LD affidavit 284-290/2000 – sworn on 5 October 2000 in support of an application for a warrant to listen to or record Mr F's private conversations – was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in section 7.6.3 the affidavit did not provide any information to explain why Mascot sought to listen to or record Mr F's private conversations.

21. NSW Crime Commission247

The NSW Crime Commission was responsible for the actions of members of the Mascot Task Force in naming Mr F in 90 LD warrants and 30 supporting LD affidavits. As outlined in section 7.6.3, some of those affidavits did not accurately or fairly represent the information Mascot held about Mr F, and some other affidavits did not explain why Mascot sought authority to use a LD to listen to or record his private conversations. The NSW Crime Commission was responsible for the Mascot and Mascot II references and for supervising members of the Mascot Task Force. The matters referred to collectively indicate a lack of administrative rigour in NSW Crime Commission document preparation processes. This was contrary to NSW Crime Commission policies, practices and procedures that should have been followed in conducting the Mascot references and preparing affidavits and warrant applications. 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*.

22. Kaizik267

Kaizik’s conduct as the deponent of LD affidavit 105-111/1999 sworn on 12 March 1999 – in support of an application for a LD warrant to listen to or record Officer P’s private conversations – was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in sections 8.2.3 and 8.2.10.2, the affidavit did not include other important information that would have affected the strength of the information presented in the affidavit about Officer P.

23. Moore267

Moore’s conduct as the deponent of TI affidavit 099-104/2000 sworn on 28 September 2000 and TI affidavit 132-135/2000 sworn on 26 October 2000 – in support of applications for TI warrants applying to Officer P’s home and mobile telephones – was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in sections 8.2.6 and 8.2.10.4, the affidavits overstated the strength of the information available to support an allegation that Officer P had or would engage in corrupt conduct.

24. Burn267

Burn’s conduct as the leader of the team that investigated Officer P through the use of LDs, TIs and an integrity test was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in section 8.2.10, the investigation relied on weak information (including hearsay information) that was not properly tested or assessed in the context of other available information, and there was a failure to explain adequately the connection between the information available and the use of intrusive investigation techniques to investigate an allegation against Officer P. Burn was aware of or approved many of the steps that were taken in the investigation of Officer P, and was in a position to exercise better control over the investigation.

25. Bradley267

Bradley’s conduct in approving the applications for six TI warrants in September and October 2000, based on the TI supporting affidavits sworn by Moore, was unreasonable conduct in terms of section 26(1)(b) of the *Ombudsman Act 1974*. As discussed in sections 8.2.6 and 8.2.10.4, the affidavits did not contain information sufficient to demonstrate that the gravity of Officer P’s alleged conduct justified the invasion of her privacy through the use of a TI, or that Officer P could be reasonably suspected of being involved in the relevant offence of bribery or corruption.

26. NSW Crime Commission.....268

The NSW Crime Commission was responsible for the actions of members of the Mascot Task Force in naming Officer P in 81 LD warrants (29 of which named her as a person to be recorded or listened to), 48 LD affidavits, 12 TI affidavits and four TI warrants. As discussed in section 8.2.10, Officer P was investigated through the use of LDs, TIs and an integrity test. The decisions to use those intrusive techniques relied on weak information (including hearsay information) that was not properly tested or assessed in the context of other available information, and there was a failure to explain adequately the connection between the information available and the use of those techniques to support an investigation of an allegation against Officer P.

The NSW Crime Commission was responsible for the Mascot and Mascot II references and for the supervision of members of the Mascot Task Force. The actions taken by the Mascot Task Force with respect to Officer P indicate a lack of administrative rigour at the time in NSW Crime Commission document preparation processes. This was contrary to NSW Crime Commission policies, practices and procedures that should have been followed in the conduct of the Mascot references and in the preparation of affidavits and warrant applications.

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*.

27. NSW Crime Commission.....290

The NSW Crime Commission was responsible for the actions of members of the Mascot Task Force in implementing an investigation strategy in relation to Officer H that had multiple failings. As discussed in section 8.3.9, these included non-compliance with the legal and administrative requirements for conducting integrity tests, recording Officer H's private conversations in contravention of the *Listening Devices Act 1984*, naming Officer H in LD and TI affidavits without proper justification, and including inaccurate information about Officer H in LD and TI affidavits.

The NSW Crime Commission was responsible for the Mascot and Mascot II references and for the supervision of members of the Mascot Task Force. The actions taken by the Mascot Task Force with respect to Officer H indicate a lack of administrative rigour at the time in NSW Crime Commission document preparation processes and in investigation planning procedures. This was contrary to NSW Crime Commission policies, practices and procedures that should have been followed in the conduct of the Mascot references and in the preparation of affidavits and warrant applications.

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*.

28. Moore296

Moore's conduct as the deponent of LD affidavit 01/00183-00190 sworn on 22 January 2001, in support of an application for a LD warrant to listen to or record Officer E's private conversations, was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in section 8.4.4 the affidavit did not accurately and fairly represent information about Officer E in relation to an allegation concerning the fabrication of evidence against police suspects.

29. NSW Crime Commission.....296

The NSW Crime Commission was responsible for the actions of members of the Mascot Task Force in naming Officer E in 67 LD and TI warrants and 23 supporting LD and TI affidavits. As outlined in section 8.4.4 some affidavits did not accurately or fairly represent the information Mascot held about Officer E, and some affidavits did not explain why Mascot sought authority to use a LD to listen to or record his private conversations. The NSW Crime Commission was responsible for the Mascot and Mascot II references and for the supervision of members of the Mascot Task Force. The actions taken by the Mascot Task Force with respect to Officer E indicate a lack of administrative rigour at the time in NSW Crime Commission document preparation processes. This was contrary to NSW Crime Commission policies, practices and procedures that should have been followed in the conduct of the Mascot references and in the preparation of affidavits and warrant applications. 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*.

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30. Jewiss..... 315

As discussed in section 9.8, the conduct of Jewiss, Kaizik and Moore – as the deponents of LD affidavits that inappropriately named, without proper explanation, 30 people who were on a list of invitees to the King send-off – was conduct that was engaged in accordance with an established practice that was unreasonable in terms of section 122(1)(e) of the *Police Act 1990*.

31. Kaizik..... 315

As discussed in section 9.8, the conduct of Jewiss, Kaizik and Moore – as the deponents of LD affidavits that inappropriately named, without proper explanation, 30 people who were on a list of invitees to the King send-off – was conduct that was engaged in accordance with an established practice that was unreasonable in terms of section 122(1)(e) of the *Police Act 1990*.

32. Moore 315

As discussed in section 9.8, the conduct of Jewiss, Kaizik and Moore – as the deponents of LD affidavits that inappropriately named, without proper explanation, 30 people who were on a list of invitees to the King send-off – was conduct that was engaged in accordance with an established practice that was unreasonable in terms of section 122(1)(e) of the *Police Act 1990*.

33. NSW Crime Commission..... 316

The NSW Crime Commission is responsible for the actions of members of the Mascot Task Force in the preparation and adoption of warrants and supporting affidavits that inappropriately named, without proper explanation, 30 people who were on a list of invitees to the King send-off. As discussed in section 9.8, this occurred in relation to multiple warrants and affidavits that were adopted in the period 4 April to 21 December 2000. The example is given in section 9.4 of three people – Mr J, Officer T and Officer X – who were named even though there was no evidence in Mascot records to suggest that any of them had been involved in corrupt or criminal conduct, or specific evidence to suggest that any of them had knowledge of it.

The NSW Crime Commission was responsible for the Mascot and Mascot II references and for supervising members of the Mascot Task Force. The actions taken by the Mascot Task Force as examined in this chapter indicate a lack of administrative rigour at the time in NSW Crime Commission document preparation processes. This was contrary to NSW Crime Commission policies, practices and procedures that should have been followed in the conduct of the Mascot references and in preparing affidavits and warrant applications.

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*.

34. Burn358

Burn's conduct in jointly implementing the investigation strategy to investigate Officer F was conduct that arose in part from a mistake of fact in terms of section 122(1)(d)(iv) of the *Police Act 1990*, and was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in sections 10.2.8, 10.3.4, 10.5.3 and 10.6.6, some of the investigative strategies relating to Officer F in which Burn played an active role were based on allegations or statements that were either inaccurate or misrepresented. These allegations or statements were not justified by the material known to Mascot if a more objective evaluation or reappraisal had been undertaken of the direction of the investigation and the resort to covert and invasive investigation methods. Burn was in a position to require that a thorough assessment of that kind should have been undertaken.

35. Dolan359

Dolan's conduct in jointly implementing the investigation strategy to investigate Officer F was conduct that arose in part from a mistake of fact in terms of section 122(1)(d)(iv) of the *Police Act 1990*, and was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in sections 10.2.8, 10.3.4, 10.5.3 and 10.6.6, some of the investigative strategies relating to Officer F that were known to or approved by Dolan and others were based on allegations or statements that were either inaccurate or carried little force, or were not justified by the material known to Mascot if a more thorough assessment and evaluation had been undertaken.

Dolan's conduct in failing to remove himself from the investigation of Officer F due to a perceived conflict of interest was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in section 10.4.2, Dolan was aware that there was a perceived conflict of interests and his failure to remove himself from the investigation was a breach of the internal policies and guidelines applying to NSW Police Force officers.

36. Griffin.....359

As discussed in section 10.6.6, Griffin's conduct in allowing the interview of Officer F at the Police Integrity Commission on 14 December 2001 to take place in the manner it did – and allowing it to continue after the Police Integrity Commission investigator raised his concern about the conduct of the interview by a Police Integrity Commission investigator – was unreasonable conduct in terms of section 26(1)(b) of the *Ombudsman Act 1974*.

37. Henry359

Henry's conduct in preparing an Information Report on 29 November 1999 that misrepresented a comment by Officer F that was made in a recorded conversation was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in section 10.2.4, Officer F's comment was represented in a way that implied he agreed with a remark that everyone was involved in corruption at some stage. This representation of Officer F's comment was relied upon in subsequent Mascot documents and investigative strategies involving Officer F.

38. Moore359

Moore's conduct as the deponent of LD affidavit 01/00183-0190 sworn on 22 January 2001, in support of an application to listen to or record Officer F's private conversations, was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in section 10.2.7, the affidavit misrepresented a comment that was made by Officer F in a recorded conversation, in a way that implied Officer F agreed with a remark that everyone was involved in corruption at some stage.

39. Moore359

Moore's conduct as the deponent of TI affidavit 01/403-406 sworn on 29 June 2001, in support of a TI warrant on Officer F's mobile and home telephone services, was conduct that arose in part from a mistake of fact in terms of section 122(1)(d)(iv) of the *Police Act 1990*. As discussed in section 10.5.3.1 the affidavit incorrectly stated that Officer F resided at the residential address of his former wife, and consequently supported a TI warrant applying to the home telephone service at that address.

40. Giorgiutti359

Giorgiutti's conduct in questioning Officer F on 14 December 2001 was conduct that was unreasonable, unjust and oppressive in terms of section 26(1)(b) of the *Ombudsman Act 1974*. As discussed in section 10.6.6, the confrontational and accusatory manner in which Giorgiutti questioned Officer F was inappropriate, unfair, ill-founded and not supported by the information available to Mascot.

41. NSW Crime Commission366

Throughout the Mascot investigations from 1999 to 2002, the NSW Crime Commission did not sufficiently evaluate with a critical eye the alleged bases for targeting Officer F. Although those failures can be seen as partially mitigated by what seems to have been a possible exaggeration of the strength of the evidence about Officer F by Dolan and/or Burn, the NSW Crime Commission has an overarching responsibility to ensure its powers and staff are used to investigate matters within its mandate.

The prolonged investigation of Officer F based on relatively weak allegations was wrong under section 26(1)(g) of the *Ombudsman Act 1974*.

42. Bradley415

Bradley's conduct in approving an internal investigation by Mascot officers into the allegations against Officer L was conduct that was otherwise wrong in terms of section 26(1)(g) of the *Ombudsman Act 1974*. As discussed in section 12.2.12.4, Bradley should have referred the allegation for investigation by the Police Integrity Commission.

43. Seary415

Seary's conduct as the deponent of LD affidavit 01/10995 was unreasonable and unjust in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in sections 12.2.5 and 12.2.12.2, the affidavit contained inaccurate, misleading information about allegations relating to Officer L and did not include relevant exculpatory information.

44. Seary415

Seary's conduct as the deponent of LD affidavit 01/10995 containing false and misleading information was conduct that may fit within the terms of section 122(1)(a) of the *Police Act 1990* – namely, "conduct of a police officer that constitutes an offence". The relevant offence is swearing falsely in affidavits in section 29 of the *Oaths Act 1900*. As discussed in section 12.2.12.2, Seary would have been aware that some of the information in the affidavit was false.

45. NSW Crime Commission415

The conduct of the NSW Crime Commission in conducting an internal investigation of allegations against Officer L was unreasonable and otherwise wrong in terms of section 26(1)(b) and (g) of the *Ombudsman Act 1974*. As discussed in sections 12.2.12.1 and 12.2.12.4, the investigation strategy was hastily and poorly devised, it did not take adequate account of the potential adverse career and emotional impact on Officer L, and the matter should instead have been referred for investigation by the Police Integrity Commission.

46. Kaizik 425

Kaizik's conduct as the deponent of LD affidavits 279-285/1999 sworn on 5 August 1999 was unreasonable conduct under section 122(1)(d)(i) of the *Police Act 1990*. As discussed in section 12.3.5, the affidavits did not accurately represent the text of an allegation that had been made against Officer G.

47. NSW Crime Commission 425

The NSW Crime Commission is responsible for the actions of members of the Mascot Task Force in preparing affidavits (referred to in section 12.3.5) that did not accurately represent the text of an allegation that had been made against Officer G. The NSW Crime Commission was responsible for the Mascot and Mascot II references, and for supervising members of the Mascot Task Force in the investigation of Officer G. The conduct of the NSW Crime Commission in failing to ensure that affidavit content was accurate was unreasonable and otherwise wrong under section 26(1)(b) and (g) of the *Ombudsman Act 1974*.

Volume 4: Mascot management of informants Paddle and Salmon**48. Boyd-Skinner 478**

Boyd-Skinner's conduct in relation to the deployments of Paddle on 5 and 24 May 1999 was unlawful conduct in terms of section 122(1)(c) of the *Police Act 1990*. Boyd-Skinner had primary responsibility for planning and executing the deployment of a NSW Crime Commission informant in a manner that constituted a breach of the informant's bail condition on two occasions.

49. Burn 478

Burn's conduct in relation to the deployments of Paddle on 5 and 24 May 1999 was unlawful conduct as described in section 122(1)(c) of the *Police Act 1990*. As discussed in section 14.5.7.4, Burn was the team leader with management and supervisory responsibilities for planning and executing the deployment of a NSW Crime Commission informant in a manner that constituted a breach of the informant's bail condition on two occasions.

50. NSW Crime Commission 478

The NSW Crime Commission is responsible for the actions of members of the Mascot Task Force in deploying Paddle on two occasions to speak to Mr A on 5 and 24 May 1999. This was in breach of a bail condition that was designed to prevent Paddle speaking to a person, such as Mr A, who may be a Crown witness in Paddle's scheduled trial on a serious offence.

Paddle was registered as a NSW Crime Commission Informant in April 1999, with the knowledge of at least two senior officers – Bradley and Standen. NSW Crime Commission Informant Management Guidelines that were in place at the time were breached by the actions of members of the Mascot Task Force. The NSW Crime Commission was responsible for the Mascot reference and for supervising members of the Mascot Task Force. To that extent, the NSW Crime Commission failed to implement its own policies, practices and procedures in conducting the Mascot reference and managing the informant Paddle.

The conduct of the NSW Crime Commission in the deployments of Paddle as a NSW Crime Commission informant in breach of his bail condition on two occasions was unreasonable and otherwise wrong in terms of section 26(1)(b) and (g) of the *Ombudsman Act 1974*.

51. Boyd-Skinner489

Boyd-Skinner’s conduct in the relocation of Paddle may be conduct of a police officer that constitutes an offence in terms of section 122(1)(a) of the *Police Act 1990*. The relevant offence is the “General offence of perverting the course of justice” in section 319 of the *Crimes Act 1900*. That offence is defined in section 312 of the *Crimes Act 1900* as referring to “obstructing, preventing, perverting or defeating the course of justice or the administration of the law”. As discussed in section 14.6.6, Boyd-Skinner was aware that NSW Police Force officers were searching for Paddle to arrest him for breaching his bail conditions on two occasions in May 1999 by approaching Mr A. Boyd-Skinner actively facilitated Paddle’s relocation to avoid apprehension.

52. Haywood489

Haywood’s conduct in the relocation of Paddle may be conduct of a police officer that constitutes an offence in terms of section 122(1)(a) of the *Police Act 1990*. The relevant offence is the “General offence of perverting the course of justice” in section 319 of the *Crimes Act 1900*, as further defined in section 312 of the *Crimes Act 1900*. As discussed in section 14.6.6, Haywood was aware that NSW Police Force officers were searching for Paddle to arrest him for breaching his bail conditions on two occasions in May 1999 by approaching Mr A. Haywood advised Paddle to give false instructions to his solicitor for the purposes of a submission to the court.

53. NSW Crime Commission489

The NSW Crime Commission is responsible for the actions of members of the Mascot Task Force in relocating Paddle to covert accommodation to avoid his apprehension by NSW Police Force officers for having breached his bail conditions on two occasions by speaking to Mr A on 5 and 24 May 1999. The relocation of Paddle was also in breach of his bail conditions and may have constituted an offence by Mascot officers.

Paddle was registered as a NSW Crime Commission Informant in April 1999 with the knowledge of at least two senior officers – Bradley and Standen. The NSW Crime Commission was responsible for the Mascot reference and for supervising members of the Mascot Task Force. To that extent, the NSW Crime Commission failed to implement its own policies, practices and procedures in conducting the Mascot reference and managing the informant Paddle.

The conduct of the NSW Crime Commission in the deployment of Paddle as a NSW Crime Commission informant in breach of his bail conditions was unreasonable and otherwise wrong in terms of section 26(1)(b) and (g) of the *Ombudsman Act 1974*.

54. Boyd-Skinner504

Boyd-Skinner’s conduct in persuading or causing Paddle to give false evidence under oath to the Coffs Harbour District Court on 23 September 1999 may be conduct of a police officer that constitutes an offence in terms of section 122(1)(a) of the *Police Act 1990*. The relevant offences are “Influencing witnesses and jurors” in section 323 of the *Crimes Act 1900* and “Subornation of perjury” in section 333 of the *Crimes Act 1900*. As discussed in sections 14.8.4.1 and 14.8.5, Boyd-Skinner played an influential role in persuading or causing Paddle to give evidence to the Court that Boyd-Skinner knew to be false and misleading evidence.

55. Haywood504

Haywood’s conduct in persuading or causing Paddle to give false evidence under oath to the Coffs Harbour District Court on 23 September 1999 may be conduct of a police officer that constitutes an offence in terms of section 122(1)(a) of the *Police Act 1990*. The relevant offences are “Influencing witnesses and jurors” in section 323 of the *Crimes Act 1900* and “Subornation of perjury” in section 333 of the *Crimes Act 1900*. As discussed in sections 14.8.4.3 and 14.8.5, Haywood advised Paddle at a meeting on 17 September 1999 to give evidence to the Court that Haywood knew to be false and misleading evidence.

56. Cramsie 504

Cramsie's conduct in persuading or causing Paddle to give false evidence under oath to the Coffs Harbour District Court on 23 September 1999 may be conduct of a police officer that constitutes an offence in terms of section 122(1)(a) of the *Police Act 1990*. The relevant offences are "Influencing witnesses and jurors" in section 323 of the *Crimes Act 1900* and "Subornation of perjury" in section 333 of the *Crimes Act 1900*. As discussed in sections 14.8.4.2 and 14.8.5, Cramsie advised Paddle at a meeting on 17 September 1999 to give evidence to the Court that Cramsie knew to be false and misleading evidence.

57. NSW Crime Commission 504

The NSW Crime Commission is responsible for the actions of members of the Mascot Task Force in persuading or causing Paddle to give false evidence under oath to the Coffs Harbour District Court on 23 September 1999. Paddle was registered as a NSW Crime Commission Informant in April 1999, with the knowledge of at least two senior officers – Bradley and Standen. NSW Crime Commission Informant Management Guidelines that were in place at the time were breached by the actions of members of the Mascot Task Force in persuading or causing Paddle to give false evidence to the Court. The NSW Crime Commission was responsible for the Mascot reference and for supervising members of the Mascot Task Force. To that extent, the NSW Crime Commission failed to implement its own policies, practices and procedures in conducting the Mascot reference and managing the informant Paddle. The conduct of the NSWCC was unreasonable and otherwise wrong in terms of section 26(1)(b) and (g) of the *Ombudsman Act 1974*.

58. Dolan 515

Dolan's conduct in determining that the complaint by Mascot Subject Officer 4 (made during his interview on 11 June 1999) required no initiation or investigation was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in section 14.9.12.1, the complaint made a serious allegation against NSW Police Force officers that should have been recorded and assessed at Dolan's initiation in his role as Superintendent of the Special Crime Unit.

59. Burn 515

Burn's conduct in preparing two memoranda on 22 March 2002 and 23 May 2002 that contained misleading or inaccurate information was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in section 14.9.12.3, the purpose of those memoranda was to advise senior officers about the nature and status of serious allegations that had been made against NSW Police Force officers. It was important that accurate advice was prepared, or that appropriate reservations or qualifications were made about the reliability of the analysis and advice in the memoranda.

60. NSW Police Force 516

The conduct of the NSW Police Force in failing to deal with Mr A's complaint (made on 27 September 1999) in a timely and appropriate manner is conduct that is 'otherwise wrong' in terms of section 26(1)(g) of the *Ombudsman Act 1974*, for the reasons discussed in section 14.9.12.1.

61. NSW Crime Commission 516

The conduct of the NSW Crime Commission in failing to deal with the allegations about Paddle's deployments that were brought to its attention is conduct that is 'otherwise wrong' in terms of section 26(1)(g) of the *Ombudsman Act 1974*, for the reasons discussed in section 14.9.12.2.

62. Bradley 541

As discussed in sections 14.10.12.1 and 14.10.12.2, Bradley's conduct in failing to ensure that the Director of Public Prosecutions was informed of Paddle's admissions in the 7 December 1999 interview was unreasonable conduct in terms of section 26(1)(b) of the *Ombudsman Act 1974*.

63. Brammer..... 541

As discussed in sections 14.10.12.1 and 14.10.12.2, Brammer's conduct in failing to ensure that the Director of Public Prosecutions was informed of Paddle's admissions in the 7 December 1999 interview was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*.

64. Dolan 541

As discussed in sections 14.10.12.1 and 14.10.12.2, Dolan's conduct in failing to ensure that the Director of Public Prosecutions was informed of Paddle's admissions in the 7 December 1999 interview was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*.

65. Burn 542

As discussed in sections 14.10.12.1 and 14.10.12.2, Burn's conduct in failing to ensure that the Director of Public Prosecutions was informed of Paddle's admissions in the 7 December 1999 interview was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*.

66. NSW Crime Commission 542

As discussed in sections 14.10.12.1 and 14.10.12.2, the conduct of the NSW Crime Commission in failing to ensure that the Director of Public Prosecutions was informed of Paddle's admissions in the 7 December 1999 interview was unreasonable conduct in terms of section 26(1)(b) of the *Ombudsman Act 1974*.

67. Trayhurn 573

As discussed in section 15.7.1, Trayhurn's conduct in causing a LD to be used to record Mr V's private conversations on 27 November 2002 and 3 December 2002 may be conduct that constitutes an offence in terms of section 122(1)(a) of the *Police Act 1990*. The relevant offence is 'Prohibition on use of listening devices' in section 5 of the *Listening Devices Act 1984*.

68. NSW Crime Commission 573

The NSW Crime Commission is responsible for the actions of Operation Wattles investigators in using a LD authorised by a NSW Crime Commission warrant to record the private conversations of Mr V on two occasions – on 27 November 2002 and 3 December 2002. As discussed in sections 15.7.1 and 15.7.4, the use of the LDs on those days was in contravention of section 5 of the LD Act and of instructions given in the NSW Crime Commission *Listening Devices Manual*. The NSW Crime Commission was responsible for the Mascot and Mascot II references. Operation Wattles was set up to finalise Mascot-related allegations and relied on NSW Crime Commission resources. Salmon was registered as a NSW Crime Commission informant and the applications for the LDs were prepared and made within the NSW Crime Commission. The NSW Crime Commission was responsible for ensuring that the use of LDs in Operation Wattles was done in accordance with the requirements of the LD Act and the *Listening Devices Manual*. 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*.

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69. NSW Crime Commission 585

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.

70. NSW Crime Commission 589

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.

71. Bradley 618

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 618

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 618

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*.

74. Owen 619

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 619

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*.

76. NSW Crime Commission.....623

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*.

77. NSW Crime Commission.....625

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*.

78. NSW Crime Commission.....630

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*.

79. NSW Crime Commission.....655

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*.

80. Dolan659

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).

81. Griffin.....680

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*.

82. Bradley713

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.

Volume 6: Access to and disclosure of confidential records

83. Kaldas..... 820

Kaldas's conduct in requesting or receiving NSW Police Force information on three occasions – in an email to Carey on 29 September 2010, in a request to Galletta on 1 October 2010, and in receipt of a briefing note prepared by Ms D on 5 October 2010 – was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As a Deputy Commissioner of Police, Kaldas should have recognised that his request and the receipt of information in the manner that occurred did not comply with the requirements of the NSW Police Force Code of Conduct and Conflict of Interests Policy.

84. Carey 820

Carey's conduct in response to a request for information in an email from Kaldas on 29 September 2010 was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As an Assistant Commissioner of Police and Commander of Professional Standards, Carey should have recognised that Kaldas's request raised a conflict of interests issue that Carey failed to address. Carey's conduct in facilitating other NSW Police Force staff to respond to Kaldas's request, and not raising the request with the Commissioner of Police, did not comply with the requirements of the NSW Police Force Conflict of Interests Policy.

85. Walton..... 820

Walton's conduct in responding on two occasions to requests for information that Kaldas made to Carey on 29 September 2010 and to Walton on 1 October 2010 was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As the Acting Commander of Professional Standards, Walton should have recognised that Kaldas's requests raised a conflict of interests issue that Walton failed to address. Walton's conduct in facilitating other NSW Police Force staff to respond to Kaldas's request on 1 October 2010 (when Walton was acting in Carey's role), and not raising the request with the Commissioner of Police, did not comply with the requirements of the NSW Police Force Conflict of Interests Policy.

86. Kaldas..... 873

Kaldas's conduct in failing to record and report the confidential NSW Crime Commission and NSW Police Force documents that he received anonymously in August to September 2012 was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in sections 22.5.4 and 22.11.2.3, as a Deputy Commissioner of Police he should have reacted in a more formal and considered manner to having received confidential law enforcement information that had quite clearly been disseminated in an unauthorised manner.

87. Kaldas..... 873

Kaldas's evidence to Operation Prospect concerning his contact with Giorgiutti may, as discussed in section 22.4.3, be conduct that constitutes an offence in terms of section 122(1)(a) of the *Police Act 1990*. The relevant offence is "False and misleading testimony" in section 21(1) of the *Royal Commissions Act 1923*.

88. Giorgiutti 873

Giorgiutti's conduct in providing the supporting affidavits for TI warrants 403-406/2000 and LD warrant 266/2000 to Kaldas was conduct that was unreasonable in terms of section 26(1)(b) of the *Ombudsman Act 1974*. As discussed in section 22.11.3.3, Giorgiutti was a senior NSW Crime Commission officer who was entrusted with those confidential documents for a work-related purpose, he had no authority to release the documents to Kaldas and he should not have done so.

89. Giorgiutti 873

Giorgiutti's conduct in providing the supporting affidavit for TI warrants 403-406/2000 to Kaldas may, as discussed in section 22.7.2, be conduct that is contrary to law in terms of section 26(1)(a) of the *Ombudsman Act 1974*. The conduct may have contravened the requirements of section 63(2)(a) of the *Telecommunications (Interception and Access) Act 1979*.

90. Giorgiutti 874

Giorgiutti's conduct in providing the supporting affidavits for LD warrant 266/2000 and TI warrants 403-406/2000 to Kaldas may, as discussed in section 22.7.2, be conduct that is contrary to law in terms of section 26(1)(a) of the *Ombudsman Act 1974*. The conduct may have contravened the requirements of section 29 of the *New South Wales Crime Commission Act 1985*.¹ It is noted that proceedings for a contravention of section 29 are now statute barred, as the conduct occurred more than six months previously.²

91. Giorgiutti 874

Giorgiutti's conduct in retaining a NSW Crime Commission laptop after he ceased employment with the Commission may be conduct that was contrary to law in terms of section 26(1)(a) of the *Ombudsman Act 1974*. The relevant offence is "Larceny by persons in Public Service" in section 159 of the *Crimes Act 1900*. As discussed in section 22.3.3, the laptop was the property of the NSW Crime Commission and it does not appear that Giorgiutti had any legal claim to possession of the laptop after he ceased employment with the NSW Crime Commission.

92. Galletta 874

Galletta's conduct in failing to secure nine e@gle.i CDs that he obtained from the NSW Police Force on 5 June 2012 was unreasonable conduct in terms of section 122(1)(d)(i) of the *Police Act 1990*. As discussed in section 22.6.8, the reasonable inference from the evidence available to Operation Prospect is that Galletta's failure to secure the CDs resulted in confidential NSW Crime Commission and NSW Police Force information stored on those CDs being disseminated to at least two other parties. Further, Galletta was unable to account for the whereabouts of one of the CDs, as discussed in section 22.6.4.

93. Galletta

Galletta's conduct in failing to produce the CDs to the Ombudsman's office in response to a 'Notice of Requirement to give a Statement of Information and/or Produce Documents, Mark Galletta, 12 December 2012' may be conduct of a police officer that constitutes an offence in terms of section 122(1)(a) of the *Police Act 1990*. The relevant offence is a failure to comply with a lawful requirement of the Ombudsman, under section 37(1)(b) of the *Ombudsman Act 1974*.

¹ The *New South Wales Crime Commission Act 1985* was repealed on 4 October 2012. However, s. 29 of this Act was in force throughout the period during which Giorgiutti provided these documents to Kaldas.

² NSWCC Act, s. 29(2) and *Criminal Procedure Act 1986*, s. 6(1)(c).

Table of recommendations

Volume 1: Introduction and background

Nil.

Volume 2: Mascot investigations – 1999

1. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Crime Commission give Mr N a written apology for naming him in multiple LD and TI affidavits and LD warrants without:
 - first undertaking a proper and rigorous analysis to justify that course of action
 - properly explaining in the affidavits either why Mr N was being named or why it was considered necessary to listen to or record his private conversations. 235
2. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Police Force give Mr N a written apology for inadequately responding to his query in the NSW Police Force letter of 10 April 2003. 235
3. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Crime Commission give Officer C1 a written apology for naming him in multiple LD and TI affidavits and LD warrants without:
 - first undertaking a proper and rigorous analysis to justify that course of action
 - properly explaining in the affidavits either why Officer C1 was being named or why it was considered necessary to listen to or record his private conversations. 241
4. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Crime Commission give Mr F a written apology for naming him in multiple LD affidavits and LD warrants:
 - in a way that did not accurately and fairly represent (in some affidavits) the information that the NSW Crime Commission held at the time about Mr F
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6. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Crime Commission provide Officer H with a written apology for repeatedly recording his conversations without appropriate authorisation. ... 290
7. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Crime Commission destroy all recordings (and associated transcripts) of the unlawfully recorded conversations between Sea and Officer H. 290

Volume 3: Mascot investigations – 2000 to 2002

8. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Crime Commission separately provide to Mr J, Officer T and Officer X a written apology for the fact that they were inappropriately named in warrants and affidavits in the period 4 April to 16 November 2000 (as to Mr J and Officer T) and to 21 December 2000 (as to Officer X). 316
9. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Crime Commission give Officer F a written apology for:
 - naming him in multiple LD affidavits and LD warrants in a way that did not accurately and fairly represent (in some affidavits) the information that the NSW Crime Commission held about him at the time
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10. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Crime Commission provide a written apology to Officer M for the repeated unlawful recording of his private conversations in contravention of section 5 of the *Listening Devices Act 1984*. 370
11. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Crime Commission destroy all recordings (and associated transcripts) it holds of the private conversations between Officer M and Sea. 370
12. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Crime Commission provide a written apology to Ms E for the repeated unlawful recording of her private conversations in contravention of section 5 of the *Listening Devices Act 1984*. 375
13. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Crime Commission destroy all recordings (and associated transcripts) it holds of the private conversations between Sea and Ms E. 375
14. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Crime Commission provide a written apology to Officer Q for unlawfully recording his private conversations in contravention of section 5 of the *Listening Devices Act 1984*. 379
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16. It is recommended under section 26(2) of the *Ombudsman Act 1974*, that the NSW Crime Commission provide a written apology to Bourke for incorrectly naming him as a person to be listened to or recorded in 23 listening device affidavits and 69 listening device warrants, and in the ‘facts and grounds’ paragraphs of five other affidavits..... 386
17. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Crime Commission provide Officer L with a written apology for the distress and injury caused by the unsatisfactory manner in which an investigation was undertaken into allegations against him. 415
18. It is recommended under section 26(2) of the *Ombudsman Act 1974*, the NSW Crime Commission provide Officer G with a written apology for inaccurate information about him being included in affidavits..... 425
19. It is recommended under section 26(2) of the *Ombudsman Act 1974* that following the advice of the Inspector of the Police Integrity Commission, the NSW Crime Commission destroy the listening device recordings (and associated transcripts) obtained under LD warrant 266/2000 that do not relate directly or indirectly to the commission of a prescribed offence. 454

Volume 4: Mascot management of informants Paddle and Salmon

20. It is recommended under section 26(2)(b) of the *Ombudsman Act 1974* that the NSW Crime Commission provide a written apology to Mr A.
- for the deployments of Paddle on two occasions to speak to Mr A, in breach of a bail condition that was designed to ensure Paddle did not approach a potential Crown witness such as Mr A
 - for arranging for Paddle to record his conversation with Mr A with a concealed LD. 478
21. It is recommended under section 26(2)(b) of the *Ombudsman Act 1974* that the NSW Police Force provide a written apology to Mr A for failing to progress his complaint in a timely manner. 516
22. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the NSW Crime Commission provide a written apology to Mr A for the NSW Crime Commission's failure to investigate allegations – that were received by or known to officers who were working under the NSW Crime Commission's supervision – about the actions of a registered NSW Crime Commission informant (Paddle) in speaking to Mr A contrary to Paddle's bail conditions. 516
23. It is recommended under section 26(2) of the *Ombudsman Act 1974* that the Director of Public Prosecutions give consideration to amending the 'Prosecution Policy and Guidelines' to clarify the authority to offer an inducement to an informant in an investigation under a NSW Crime Commission reference about a matter that is the subject of DPP proceedings. 542

Volume 5: Systemic and other issues

24. It is recommended under section 26(2)(b) 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. 631
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. 765
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. 756

- 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.765
- 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.765
- 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. 765
- 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. 765
- 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.....767
- 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.....769
- 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.....769
- 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.770
- 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.....772
- 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*.....772

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- 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. 774
- 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. 774

Volume 6: Access to and disclosure of confidential records

Nil.

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

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 <i>Law Enforcement (Controlled Operations) Act 1997</i> 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: <ul style="list-style-type: none"> • 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.
Gynea reference	In 1996 the Gynea 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 Gynea 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 <i>Criminal Procedure Act 1986</i> , 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 <i>Police Act 1990</i> 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, deter 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 Box investigator had disseminated confidential police information to a convicted criminal in the course of Task Force Box. 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 1. Background and scope of Operation Prospect

This chapter sets out the background and key events leading to the establishment of Operation Prospect, as well as its scope and the allegations and issues that have been investigated. The final section provides some notes – about, for example, style issues and figures used – to help with reading the report.

1.1 Introduction and background

1.1.1 Mascot references

The name ‘Operation Prospect’ applies to a major investigation undertaken by the NSW Ombudsman between 2012 and 2016. The investigation has examined allegations and complaints either about, or connected to, two references that were made to the New South Wales Crime Commission (NSWCC) in February 1999 (Mascot) and November 2000 (Mascot II).¹ These references to the NSWCC were made by the NSWCC Management Committee. This report uses the name ‘Mascot’ to describe all the investigations conducted under these references.

The Mascot references were covertly investigated by the NSWCC from 1999-2001, with the assistance of officers from the New South Wales Police Force (NSWPF) who were sworn into the NSWCC. The references sprung from allegations of serious police corruption that were initially made in December 1998 by a police officer – codenamed ‘Sea’ and ‘M5’² – who became an informant for the NSWCC. He is referred to in this report as Sea. While the Mascot investigations were underway, they expanded to consider other allegations of more contemporary police corruption. Mascot remained a covert investigation until October 2001.

In June 2000, a memorandum of understanding (MOU) relating to the Mascot investigations was signed by the Commissioners of the NSWCC, NSWPF and Police Integrity Commission (PIC). The parties agreed to jointly pursue the allegations of corruption against current and former NSW police who had been identified in Sea’s initial disclosures and subsequently. The participation of the PIC in the expanded investigation enabled it to conduct private and public hearings, drawing from the substantial body of evidence gathered by Mascot. These hearings were held by the PIC between October 2001 and late 2002, under the auspices of ‘Operation Florida’. In June 2004, the PIC presented a two-volume report to Parliament on Operation Florida³ – and a number of police officers were prosecuted on corruption-related offences.

Complaints about the Mascot investigations began to surface in 2002. This resulted in the NSWPF establishing Strike Force Emblems and in the former PIC Inspector reviewing one of the Mascot warrants. Over the years, further complaints arose, and calls were made for the Strike Force Emblems report to be publicly released. There was a mistaken belief that the Emblems report contained evidence of criminal conduct and that the failure to release it was a cover-up of some sort by either the NSWPF or the NSW Government. By 2011, the NSW Government – which had called for the public release of the recommendations of the Emblems report while in Opposition – now found itself in a difficult position. Having reviewed the contents of the Emblems report, it was evident to the Minister for Police, the Hon Michael Gallacher MP, that there were significant legal and other obstacles to releasing the Emblems recommendations. In May 2012 the Minister referred the question of whether the Emblems report should be released to the PIC Inspector.

¹ The references were made under s. 25 of the *New South Wales Crime Commission Act 1985* (NSWCC Act). One of the principal functions of the NSWCC Management Committee is to refer (by written notice) matters relating to relevant criminal activities to the NSWCC for investigation.

² The NSWCC used the codename ‘Sea’ and *Police Integrity Commission* (PIC) used the codename ‘M5’.

³ PIC, *Report to Parliament – Operation Florida*, Volume 1 and 2, June 2004.

The PIC Inspector had also received new complaints about the Mascot investigations and, in the second half of 2012, about the unauthorised release of confidential NSWPF and NSWCC records concerning Mascot and police internal investigations into related matters. These events highlighted that the allegations about the Mascot investigations had never been fully investigated, and that it was beyond the scope of the PIC Inspector's remit to review the Emblems report.

By August 2012, the NSWPF had also received complaints about the Mascot investigations and the unlawful dissemination of NSWPF and NSWCC confidential records. The NSWPF established Strike Force Jooriland to investigate these matters. This was despite the fact that the NSWPF would be hampered by the secrecy provisions in the NSWCC Act, just as Strike Force Emblems was. The Ombudsman's office had also started receiving complaints and submissions about these matters, but did not have jurisdiction to investigate the conduct of the NSWCC and Mascot-related matters.

In October 2012, the NSW Government announced that the Ombudsman would undertake an independent investigation into these matters⁴ and that legislative changes would be made to facilitate the investigation.

The matters investigated by the Ombudsman's office in Operation Prospect had been partly investigated by other bodies, but not necessarily to finality or to the satisfaction of interested parties. The scope and direction of the various inquiries has expanded and become more contested over time.

The following sections provide a brief introduction to key events that preceded the commencement and establishment of Operation Prospect.

1.1.2 Listening device warrant 266/2000

A key document that is referred to frequently in this report is a listening device (LD) warrant that was issued to Mascot investigators by Justice Virginia Bell (then of the Supreme Court of NSW) under section 16 of the *Listening Devices Act 1984* (LD Act) on 14 September 2000 (LD warrant 266/2000). A number of the matters investigated by Operation Prospect are directly or indirectly related to this warrant, the supporting affidavit for the warrant, and Mascot investigations that were either based on this warrant or on warrants of a similar nature.

In early 2002, reports emerged in the media suggesting that there were doubts about the legality of a handful of warrants for LDs or telephone intercepts (TIs) in relation to Mascot and Florida. Subsequent articles referred to LD warrant 266/2000 and the fact that a copy of it had entered public circulation. The probable explanation is that the warrant was inadvertently served in a prosecution brief that arose from the Mascot investigations and a recipient distributed the warrant. It was described in the media articles as a Mascot LD warrant that named 114 people – including serving and former police officers, a barrister and a journalist. A number of people named in the warrant then complained through one or other official channels.⁵

On 15 April 2002, the Minister for Police (the Hon Michael Costa) issued a press release stating he had had a briefing with NSWPF Commissioner Peter Ryan and NSWCC Commissioner Philip Bradley earlier that day about LD warrant 266/2000. The Minister announced that he would refer⁶ the matter to the PIC Inspector, the Hon Mervyn Finlay QC, to confirm – in relation to LD warrant 266/2000 – if:

- *The warrant was justifiably sought;*
- *The seeking of the warrant complied with the relevant legislation; and*
- *The material obtained by the warrant was used appropriately.*⁷

4 AAP, 'Ombudsman to probe strike force claims', *Daily Telegraph*, 7 October 2012.

5 Mercer, Neil and Kennedy, Les. 'Now Ryan's new "white knights" face their own investigation', *Sydney Morning Herald*, 11 February 2002; Lawrence, Kara and Wockner, Cindy. 'Just before you go Mr Ryan, a little word in your ear', *Daily Telegraph*, 13 April 2002; Murphy, Damien. 'Costa calls for answers on secret police tapes', *Sydney Morning Herald*, 15 April 2002; Cornford, Philip. 'Police taped each other', *Newcastle Herald*, 23 April 2002; Mitchell, Alex and Sutton, Candace. 'Police union looks at tapes warrant', *The Sun Herald*, 28 April 2002.

6 The Minister's request was made under s. 89 of the PIC Act

7 The Hon Michael Costa MP, Minister for Police, Media Release, 'Listening Devices Warrant', 15 April 2002.

On 29 April 2002, the PIC Inspector reported to the Minister on his investigation. The PIC Inspector concluded that the warrant was justifiably sought and complied with the legislation in all material aspects. He noted one irregularity – the affidavit omitted two names – but described this as minor and of no substantial consequence. He also accepted the advice of the NSWCC that the material obtained by the warrant was used only for the purpose of preparing for “PIC hearings, criminal prosecution briefs, and in furtherance of this investigation”.⁸ His report did not identify any matters for further investigation.

The PIC Inspector’s report was not published – but copies were given⁹ to Costa, Bradley, Mr Les Tree (the Director General of the Ministry for Police), Mr Terrence Griffin (the Commissioner of the PIC), and Mr Ken Moroney (the Acting Commissioner of Police).¹⁰

1.1.3 Internal police investigations and Strike Force Emblems

The covert stage of the Mascot investigations was undertaken by the NSWCC between 1999 and 2001 – with the assistance of officers drawn from the Special Crime and Internal Affairs Command (SCIA) of the NSWPF. While Mascot was underway, the NSWPF conducted a number of internal police investigations into complaints it had received (mostly from police officers) about the activities of SCIA. The internal investigations (not related to Mascot investigations) included Operation Banks in 1999, Strike Force Sibutu in 2001, and Strike Force Tumen in 2002 (see Glossary). The work of Sibutu and Tumen was included in the matters referred to the Ombudsman by the PIC Inspector in 2012.

Following on from those internal police investigations, Strike Force Emblems was set up in July 2003 to investigate a range of matters relating to the investigations conducted under the NSWCC Mascot and Mascot II references. These included allegations of impropriety connected to LD warrant 266/2000. When it delivered its final report in March 2004,¹¹ 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 – on the basis of a secrecy provision in the NSWCC Act.¹² Among the documents not viewed was the affidavit in support of LD warrant 266/2000. For the same reason, Strike Force Emblems was unable to interview some relevant witnesses – including the deponent of that warrant and others who had worked on Mascot investigations.

The Emblems report was however strongly critical of the warrant, supporting affidavit and other Mascot processes. Although its findings and comments were prefaced by acknowledging the limited material available to the Strike Force, the report:

- listed the names of some people who should not have been included in the LD warrant
- expressed the view that an abuse of process had occurred and possible criminal offences were committed in preparing the supporting affidavit
- commented that prosecutions may be tainted by Mascot improprieties
- named some Mascot police officers who it said had engaged in inappropriate practices and displayed personal agendas
- stated there were some doubts over the operational activities of Sea and the legality of Sea’s deployment
- noted that the failure of the NSWCC to provide critical material to the Strike Force heightened suspicion of impropriety about the LD warrants
- made recommendations for further action to be taken.¹³

8 Inspector of the PIC, *Operation Florida – RE: Listening Device Warrant, Report by Inspector of Preliminary Investigation*, 29 April 2002, p. 18.

9 Under s. 56(4)(c) of the PIC Act.

10 Inspector of the PIC, *Operation Florida – RE: Listening Device Warrant, Report by Inspector of Preliminary Investigation*, 29 April 2002, p. 19.

11 NSWPF, Complaint number [numbers], Investigators report by Detective Inspector M Galletta, Strike Force Emblems, 22 March 2004.

12 Section 29(2) of the NSWCC Act made it an offence for the Commissioner or staff to disclose official information “except for the purposes of this Act or otherwise in connection with the exercise of the person’s functions under this Act”.

13 NSWPF, Complaint number [numbers], Investigators report by Detective Inspector M Galletta, Strike Force Emblems 22 March 2004.

As a result of discussions at the NSWCC Management Committee – at that time made up of the Minister for Police, the NSWCC Commissioner, the Commissioner of Police, the chair of the board of the Australian Crime Commission and the Commissioner of the Australian Federal Police – the Commissioner of Police directed that Strike Force Emblems send a submission to the Director Legal Services NSWPF to assess whether there was sufficient evidence to refer to the Office of the Director of Public Prosecutions (ODPP). The Strike Force Emblems lead investigator noted in a submission made on 6 February 2004 that:

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 & Name] cannot be interviewed as NSWCC has not allowed these officers to be interviewed due to the secrecy provision that bind them under s 29.*
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 nonpossession of the subject affidavit and source material.*
4. *As indicated, strike force investigators have not established any direct evidence of criminal offences committed by any person.*

Submission handed to [Personnel Assistant to the Director Legal Services]...¹⁴

On 8 March 2004, the Director Legal Services NSWPF responded that he could not provide advice in the absence of a detailed examination of the affidavits and supporting source materials. He declined to provide any advice without being 'supplied with an appropriate, full brief of evidence, including statements'.¹⁵

On 28 June 2004, the Assistant Commissioner of the Professional Standards Command (PSC) prepared a memorandum on his review of the Strike Force Emblems Report findings and recommendations. He concluded:

... the comments of the investigator are extremely subjective, as he has drawn an inference of corrupt conduct without addressing key source documents that would confirm or refute those inferences. The findings are based on conjecture and not based on empirical evidence.¹⁶

The Assistant Commissioner also recommended that the Deputy Commissioner should consider the "investigator's findings, circumstances of the investigation and the PSC recommendations with a view to making a finding of 'not sustained' or 'unable to be determined'".¹⁷

On 31 December 2004, the NSWPF Legal Services branch – at the request of the Commissioner of Police, Mr Ken Moroney – wrote to the ODPP requesting advice about applications for LD warrants in relation to Operation Mascot, including LD Warrants 95 and 266 of 2000.¹⁸ The specific advice sought concerned the sufficiency of evidence to justify the start of any criminal proceedings against any person for any offence, in the absence of the affidavits supporting the warrant applications. Advice was also sought on any alternative means by which criminal offences may be proved, or any mechanisms available through which investigators could obtain the affidavits.

On 22 February 2005, the ODPP replied to the NSWPF advising that there was insufficient evidence to lay charges against anyone on the basis of the material available from Emblems.¹⁹ No other advice was provided. The Manager of the Operational Legal Advice Unit within the NSWPF Legal Services Branch sent the advice from the ODPP to the Emblems lead investigator, stating the advice was consistent with internal legal advice.

¹⁴ NSWPF, Galletta, Mark, E@gle.i log entry *Submission to Legal Services for referral to the DPP*, 6 February 2004.

¹⁵ NSWPF, internal memorandum from Director Legal Services, [name] to Commander [name], 8 March 2004, p.1.

¹⁶ NSWPF, internal memorandum from A/Assistant Commissioner [name], to Detective Inspector [name] 28 June 2004, p. 2.

¹⁷ NSWPF, internal memorandum from A/Assistant Commissioner [name], to Detective Inspector [name] 28 June 2004, p. 2.

¹⁸ Letter from A/Inspector [name], NSWPF to Managing Lawyer, Office of the Director of Public Prosecutions, 31 December 2004.

¹⁹ Letter from [name], Solicitor, Office of the Director of Public Prosecutions to A/Inspector [name], NSWPF, 22 February 2005.

Consequently, there did not appear to be any further viable avenue for investigation, given that Emblems was unable to access the NSWCC affidavits and other documentation.²⁰

The rejection of the Emblems Report did little to quieten debate about Mascot and related events. Much of this occurred out of the public eye. There was constant rumbling about what had occurred and the career damage that many officers had suffered as a result. Those unresolved allegations and complaints may have been a contributing factor in the subsequent unauthorised release and improper dissemination of official NSWPF and NSWCC records. This steadily developed as a major and related issue that needed to be properly investigated.

1.1.4 Referral of the Emblems Report to the Inspector of the PIC in 2012

In May 2012, the Police Association passed a motion at its biennial conference to make representations to the Premier and the Minister for Police to honour previous commitments made by the Government while in Opposition to publicly release the recommendations of the Emblems report.²¹

On 11 May 2012, the Minister for Police (the Hon Michael Gallagher) wrote to the PIC Inspector (the Hon David Levine AO) under section 217 of the *Police Act 1990* (Police Act) asking him to review the Emblems report and provide a report to the Minister. The Minister noted:

By way of background, I advise that while in Opposition, I stated that I would make public the recommendations of Strike Force Emblems.

Since becoming Minister for Police I have reviewed those recommendations and I am of the view that they cannot be released in their current form. Firstly, I am not confident that these recommendations have been concluded. Secondly I am conscious of the need to ensure that no one person is denied natural justice.²²

The Minister's letter asked the PIC Inspector to conduct a review as follows:

I request that you undertake a review of this matter with an emphasis upon reviewing the recommendations to ensure that they have firstly, been properly dealt with, secondly their release would be in the public interest, thirdly whether their release would prejudice any legal action or investigation by the Police Integrity Commission or your office and fourthly, their release will not unreasonably reflect upon any individuals without them being afforded natural justice.²³

The Premier (as the Minister responsible for the PIC) wrote to the PIC Inspector on 25 May 2012 seeking advice as to "whether the Emblems Report could be publicly released in its entirety". The letter noted:

The NSW Government is committed to openness and transparency but we understand the necessity of balancing public interest against procedural fairness and the importance of not prejudicing any potential legal action or investigation.²⁴

Before reporting to the Minister for Police, the PIC Inspector referred the Emblems report and associated matters to the NSW Ombudsman on 11 October 2012. The following month, on 23 November 2012, the PIC Inspector gave the Minister for Police a report on his review of the Emblems report – with copies to the Commissioner for Police and the Ombudsman. The report advised that, for a number of reasons, it would not be in the public interest to release either the Emblems report or the PIC Inspector's report. This was because:

- the reasoning in the Emblems report was deficient in some areas and did not deal properly with the allegations under investigation
- both reports contained confidential information

²⁰ NSWPF, internal memorandum from Inspector [name], to Detective Inspector Mark Galletta, 3 March 2005.

²¹ Email from Peter Remfrey, Police Association of New South Wales to Deputy Commissioner Catherine Burn, NSWPF, 29 May 2012.

²² Letter from the Hon Michael Gallacher MLC, Minister for Police and Emergency Services to the Hon David Levine, Inspector of the PIC, 11 May 2012.

²³ Letter from the Hon Michael Gallacher MLC, Minister for Police and Emergency Services to the Hon David Levine, Inspector of the PIC, 11 May 2012.

²⁴ Letter from the Hon Barry O'Farrell, Premier of New South Wales to the Hon David Levine, Inspector of the PIC, 25 May 2012.

- releasing the reports would prejudice the Ombudsman's Operation Prospect investigation
- the reputation of individuals could be adversely affected without them being afforded natural justice.²⁵

The PIC Inspector acknowledged the scale of investigation that would be required in Operation Prospect to ensure all matters were properly investigated and brought to finality.²⁶

1.1.5 Unauthorised release of reports and other documents

It was clear from some newspaper articles in 2012 that confidential NSWCC documents (including warrants) and confidential NSWPF documents (from Strike Forces Sibutu, Tumen and Emblems) were circulating publicly.²⁷ The newspaper articles gave rise to allegations of unlawful dissemination of confidential documents and of criminal and wrong conduct by police officers in connection with Mascot.

Another incident in August 2012 confirmed the unauthorised release of Mascot documents. On 31 August 2012, a police officer who was formerly attached to the Emblems investigation received an anonymous package of documents containing:

- a fourteen page memorandum by Catherine Burn dated 13 April 2002 about LD warrant 266/2000. The annexure to that memorandum referred to the people named on the warrant. At the time of writing the memorandum, Burn was a Detective Chief Inspector, and Commander of the Special Crime Unit within SCIA.
- a letter from Burn to the Hon Mervyn Finlay, the PIC Inspector, dated 22 April 2002 about LD warrant 266/2000
- a NSWCC File Note re LD 266/2000
- a NSWCC LD Affidavit 262-268 of 2000 dated 14 September 2000.

The officer immediately contacted the lead investigator of Emblems, who took possession of the documents and reported the anonymous delivery to the Deputy Commissioner Specialist Operations. The Deputy Commissioner secured the documents and later referred them to the PIC Inspector.

1.1.6 Establishment of Strike Force Jooriland

In September 2012, the NSWPF established Strike Force Jooriland within the PSC to investigate the following allegations in a number of complaints received by the NSWPF:

- That, during or before 2012, a person/s unknown supplied to journalist Neil Mercer and others an affidavit or affidavits related to Mascot contrary to section 29(2) of the NSWCC Act.
- That, during or before 2012, a person/s unknown supplied to journalist Neil Mercer and others documents related to NSWPF investigation Emblems contrary to clause 75 of the Police Regulation 2008.
- That, during and/or subsequent to 1999, a person/s attached to SCIA knowingly swore an affidavit or affidavits containing false or partly false information contrary to section 319 of the *Crimes Act 1900*.
- That, during and/or subsequent to 1999, a person/s attached to SCIA unlawfully monitored and/or recorded conversations in the office of now former Deputy Commissioner Kaldas contrary to sections 5 and 10 of the LD Act.

25 The Hon David Levine, Inspector of the Police Integrity Commission, *Review and Report to the Minister of Police, "Strike Force Emblems"*, November 2012, p. 20; Letter from the Hon David Levine, Inspector of the Police Integrity Commission, to the Hon Michael Gallacher MLC, Minister for Police and Emergency Services, 23 November 2012.

26 Letter from the Hon David Levine, Inspector of the Police Integrity Commission, to the Hon Michael Gallacher MLC, Minister for Police and Emergency Services, 23 November 2012.

27 See for example, Barrett, Steve, 'Wired: my conversations were bugged', *Sydney Morning Herald*, 20 May 2012; Mercer, Neil, 'Bugging bombshell as secret files revealed', *Sydney Morning Herald*, 9 September 2012; Mercer, Neil, 'Some burning questions for the deputy', *Sydney Morning Herald*, 9 September 2012; Bashan, Yoni, 'Confidential police papers leak examined in internal inquiry', *Sunday Telegraph*, 16 September 2012.

- That, during and/or subsequent to 1999, a person/s attached to SCIA unlawfully monitored and/or recorded conversations on the mobile telecommunications service of Kaldas contrary to sections 7(1) and 105 of the *Telecommunications (Interception and Access) Act 1979* (Cth) (TI Act).
- That, during and/or subsequent to 1999, a person/s attached to SCIA unlawfully monitored and/or recorded conversations on the former home telecommunications service of Kaldas contrary to sections 7(1) and 105 of the TI Act.
- That, during and/or subsequent to 1999, a person/s took detrimental action against Kaldas substantially in reprisal for him making protected allegations contrary to section 206(2) of the Police Act.
- That, during and/or subsequent to 1999, a person/s attached to SCIA failed to comply with section 7 of the Police Act in respect to the investigation of Kaldas and others.²⁸

The PSC did not complete the Jooriland investigation as it was taken over by Operation Prospect in October 2012.

1.2 Start and scope of Operation Prospect

1.2.1 Commencement of Operation Prospect

On 7 October 2012, the Premier, the Hon Barry O'Farrell, issued a media release stating that the office of the NSW Ombudsman would undertake "an independent investigation of Strike Force Emblems and any relevant matters leading up to it".²⁹ The Premier commented that the Ombudsman was the "appropriate independent body to comprehensively review" the complaints and submissions made to the Ombudsman and the PIC Inspector about Emblems.

The Ombudsman responded with a media statement the following day, 8 October 2012, confirming the investigation and adding:

*This will be a significant, complex and extensive investigation, and will involve both historical and contemporary matters. We will be provided with additional funding to establish a highly experienced and specialised team to conduct this investigation.*³⁰

The PIC Inspector wrote to the Ombudsman on 11 October 2012 making a referral of matters to the Ombudsman under section 90(1)(f) of the *Police Integrity Commission Act 1996* (PIC Act).³¹ The referral was in general terms and was described by the Ombudsman in a reply letter as "allegations concerning a broad range of conduct connected to Operations Florida, Mascot and Emblems and Strike Forces Sibuto [sic] and Tumin, [sic] and associated matters".³²

As noted previously, the PIC Inspector also gave the Minister of Police a report on 23 November 2012 advising that the Emblems report should not be published because of its deficiencies. This was to protect individuals who had not been afforded natural justice, and protect the privacy of individuals named in LD warrant 266/2000, the accompanying affidavit and other material. The PIC Inspector's report observed:

*This is an instance where it fairly can be argued that the steps taken to refer the matter to the Ombudsman are not to avoid public scrutiny by some form of public inquiry. That is, the purpose is not to conceal but rather to protect relevant individuals unless and until there is a good reason for their deserved protection and privacy to be foregone.*³³

²⁸ NSWPF, *Strike Force Jooriland: Terms of Reference* from Commander [name] to Detective Inspector [name], 8 October 2012, pp. 1-2.

²⁹ The Hon Barry O'Farrell MP, Premier of NSW, Media Release, 'Strike Force Emblems', 7 October 2012.

³⁰ Mr Bruce Barbour, Ombudsman, Media Statement, 8 October 2012.

³¹ Letter from the Hon David Levine, Inspector of the PIC to Mr Bruce Barbour, Ombudsman, NSW Ombudsman, 11 October 2012.

³² Letter from Mr Bruce Barbour, Ombudsman, NSW Ombudsman, 15 October 2012, to the Hon David Levine, Inspector of the PIC, 11 October 2012.

³³ Inspector of the PIC, *Review and Report to the Minister for Police: "Strike Force Emblems,"* November 2012, p. 18.

On the question of whether misconduct or criminal conduct had occurred, the PIC Inspector stated:

I do not and have not considered a part of my task in responding to the Minister's letter to determine whether there has been misconduct, whether that misconduct is criminal, whether any such criminal misconduct has been founded in improper motives, what those improper motives might have been or why they might have been enlivened.

Investigation of such open ended matters (at present) is best left to the Ombudsman.³⁴

The PIC Inspector's report referred to the longstanding and contested allegations that had sprung from the Mascot investigations, to the agitation and campaigns that had been waged internally and publicly in the intervening years, to the impact of these developments on the morale and reputation of the police force, and to the fact that the disquiet had not been resolved by earlier inquiries.

1.2.2 Scope of Operation Prospect

The scope of Operation Prospect has consequently been framed by:

- the referral by the PIC Inspector which was described as "allegations concerning a broad range of conduct connected to Operations Florida, Mascot and Emblems and Strike Forces Sibuto [sic] and Tumin, [sic] and associated matters".
- complaints independently made to the Ombudsman under section 12 of the *Ombudsman Act 1974* (The Ombudsman Act), Part 8A of the *Police Act* and the *Public Interest Disclosure Act 1994* (PID Act) about Mascot and related investigations. Some of those complaints were made in response to a public call for information by the Ombudsman in 2013.
- a decision by the Ombudsman on 18 October 2012, under section 156(1) of the *Police Act*, to take over all complaints that were then under investigation by NSWPF Strike Force Jooriland about "the conduct of officers of the NSWPF in relation to the Operations Mascot, Florida and Emblems and associated matters".
- own motion matters under section 13(1) of the Ombudsman Act or under section 159 of the *Police Act*.

The referral from the PIC Inspector and Strike Force Jooriland included complaints and allegations both about the conduct of investigations under the Mascot and Mascot II references, and about the improper dissemination of confidential information from the computer systems and/or physical files of the NSWCC, the NSWPF and the PIC. The Ombudsman has also directly received complaints under both of these categories.

The Ombudsman formally commenced Operation Prospect on 15 October 2012 by notifying the Commissioner of the NSWCC of a decision under section 13 of the Ombudsman Act to conduct an investigation into the actions and inactions of NSWCC officers in relation to a number of specific matters. These included:

- Strike Force Emblems, Operations Florida, Boat, Mascot and Banks
- Strike Forces Volta and Ivory
- dealings with and disclosures of confidential information about those investigations.

The Commissioner of the NSWCC was also informed of the Ombudsman's decision under section 19 of the Ombudsman Act to conduct an inquiry into those matters and was given a summons to produce documents relating to them.

On 18 October 2012, the Ombudsman notified the Commissioner of Police of his decision under section 19 of the Ombudsman Act to hold an inquiry and to take over the complaints before Strike Force Jooriland. The Ombudsman also issued a summons to the Commissioner of Police on that date to produce documents relating to the same Operations and Strike Forces named in the letter to the NSWCC Commissioner – as well as Strike Forces Emblems, Sibutu and Tumen. The Ombudsman issued a summons to PIC on 31 January 2013 to produce records relating to investigations or joint investigation Operations Florida, Jetz and Ivory.

³⁴ Inspector of the PIC, *Review and Report to the Minister for Police: "Strike Force Emblems"*, November 2012, p. 19.

1.2.3 Allegations and issues investigated by Operation Prospect

The breadth of the Operation Prospect investigation has broadly remained the same from the outset, with allegations falling within one of the following lines of inquiry:

- the use of false and misleading information in warrant applications and supporting affidavits under the LD Act and the TI Act
- improper targeting or investigation of individuals
- mishandling of informants/undercover operatives
- unlawful and/or improper dissemination of material from hardcopy files and/or the computer systems of the NSWPF, the NSWCC and/or the PIC
- improper interference
- the provision of misinformation and/or making false statements
- other wrong conduct – that is, systemic issues and any conduct connected with matters that were under investigation and did not fall within the above lines of inquiry.

'Other wrong conduct' includes issues and allegations in connection with:

- systemic issues or failures in the management of Mascot investigations
- the broadening of the Mascot reference
- the use of integrity testing within Mascot investigations
- Mascot's investigation into the homicide of a security guard
- the use of inappropriate pseudonyms by Mascot
- whether Sea was 'paid out' not to complain about Mascot and whether Sea ever swore a false affidavit
- the decision by the NSWCC to not provide Emblems with the records and information required for the Emblems investigation.

All these matters are dealt with in this report.

1.2.4 Operation Prospect funding

Most of the NSW Ombudsman's revenue comes from the NSW Government in the form of a consolidated fund appropriation, with a small amount generated through workshops and publications, and grant funding. This revenue must cover the cost of all Ombudsman activities and investigations, and does not provide a contingency for large and complex investigations such as Operation Prospect. The NSW Ombudsman was therefore given supplementary funding from the NSW Government to conduct the investigation. This funding was for:

- establishment costs – including building a secure and restricted area to house staff, exhibits, files and records, as well as equipment and systems (hardware and software) and associated ongoing maintenance costs
- staff recruitment and ongoing salary costs
- fees for hearing room hire
- legal fees for engaging Counsel Assisting and external legal advice
- costs for producing and printing the report
- other costs – such as providing ongoing counselling services to affected parties, staff and witness travel and expenses, and document scanning and management.

The actual cost of Operation Prospect up to December 2016 was \$9.639 million – as shown in Table 1 below.

Table 1: Cost of Operation Prospect

Financial year	Expenses costs \$'000
Oct 2012–June 2013	1,193
2013–2014	2,171
2014–2015	3,046
2015–2016	2,144
June 2016–Dec 2016*	1,085
Total	9,639

*The figures for November and December 2016 are projected estimates.

Source: Provided by the Assistant Ombudsman (Corporate), 5 November 2016.

The Ombudsman will seek funding to cover the costs of winding up activities that may continue into 2017–2018.

1.3 Notes for reading this report

This report refers to a great many people, in relation to various conduct occurring over a long period of time. It was considered appropriate in some instances to name people, and in others to refer to a person by a pseudonym or their title or role.

This report also refers to legislation which has changed over the relevant times. This section explains how those issues are addressed throughout this report.

1.3.1 Anonymisation of particular names

The people referred to in this report include:

- staff working for Mascot
- staff working for the NSWCC, the NSWPF and the PIC
- informants and undercover operatives assisting the NSWCC
- police officers who were the subject of Mascot investigations (who are anonymised in this report by the description 'Mascot Subject Officer' or 'MSO')
- people (other than police officers) alleged to have committed offences that were under investigation by Mascot or that involved an association with a Mascot Subject Officer
- complainants to the Ombudsman
- journalists who wrote about Mascot.

Many people in this report have been anonymised. The key reasons are:

- to protect the identity of those named in Mascot documentation as being involved in corrupt or criminal conduct, particularly if an allegation was found to be unsubstantiated
- the person's involvement in events being described was incidental or minor
- the person was a junior Mascot staff member who has not been found to have engaged in any conduct that is the subject of adverse comment or a formal finding
- the identity of the person is immaterial to the event or incident being described or set out
- the person is a NSWCC informant
- the person is a complainant and it is not in the public interest to reveal their identity.

The names of individuals and agencies who are the subject of adverse comment or formal findings appear in this report. Other individuals are identified either because of relevance to the events or incidents being described or because they have previously been identified publicly in association with the matters under investigation. That has meant that most of the senior officials who played a role at one stage or another in the Mascot investigations and in subsequent reviews are named in the report.

Another convention adopted throughout the report also requires explanation. Many of the LD and TI affidavits discussed in this report contained inaccurate or misleading information. The deponent of an affidavit swears to their belief that the contents of the affidavit are a true and correct record. Indeed, it is an offence under section 29 of the *Oaths Act 1900* to wilfully swear a false affidavit. There is a distinct responsibility on the deponent of an affidavit to take reasonable steps to ensure the accuracy of all facts and statements in the affidavit. The integrity of public administration and the justice system depends on this responsibility being respected.

Consequently, this report generally names the officer who first swore an affidavit that included inaccurate or misleading information in circumstances where reasonable diligence by the officer may have led to the affidavit being framed differently. For the same reason a deponent is named if the affidavit omits important exculpatory information that was reasonably available to the officer. The finding that is ordinarily made in these circumstances is that the named officer engaged in conduct that was unreasonable in terms of section 122(1)(d)(i) of the Police Act.

Many of the defective affidavits that are discussed in this report were 'rollover' affidavits that substantially copied or cut and pasted from earlier affidavits. This was an accepted Mascot practice that was generally undertaken without an officer checking the source information. The deponent of a rollover affidavit bears the same responsibility to ensure that its contents are accurate, balanced and reliable. However, it is accepted that this defect was attributable more to systemic failures in NSWCC and Mascot processes rather than to any delinquent conduct by the officers involved. In particular, the affidavit errors were not intentional or deliberate. Consequently, the deponents of rollover affidavits are not named in the report. Instead, a finding is generally made in those circumstances that there was unreasonable conduct by the NSWCC in failing to ensure greater rigour in document preparation processes.

1.3.2 Use of family names instead of full titles

After the first mention of a person's full name (including their title or rank), the report generally refers to them by their family name only. This was done in the interests of brevity. No discourtesy is intended.

1.3.3 Use of 'sic' when reproducing errors in documents

The quotations from Mascot transcriptions and documents reproduce typographical and grammatical errors in these documents. In a few instances where it may not be clear if the error was in the original or the reproduction, [sic] is used to indicate the error was in the original.

1.3.4 References to the NSWPF

The NSW Police Force was known as the NSW Police Service until 2002. It then became known as NSW Police after an amendment to the *Police Service Act 1990*, which was renamed the *Police Act 1990*.³⁵ A further change occurred in 2006, when the NSW Police became known as the NSW Police Force.³⁶ These changes occurred during the time of the events under investigation by Operation Prospect. For consistency and ease of reading, the terms 'NSW Police Force' or 'NSWPF' and 'Police Act' are used throughout this report, regardless of the date of the events being discussed.

All references to police officers in this report are to officers of the NSWPF, unless otherwise indicated. Where an officer's rank has been included in the text, it refers to the officer's rank at the time of the conduct being discussed.

³⁵ *Police Service Amendment (NSW Police) Act 2002* No. 51.

³⁶ *Police Amendment (Miscellaneous) Act 2006* No. 94.

1.3.5 References to the NSW Crime Commission

The NSWCC became known as the Crime Commission in 2012, following the replacement of the *New South Wales Crime Commission Act 1985* with the *Crime Commission Act 2012*. The organisation is referred to throughout this report as the NSW Crime Commission or NSWCC.

1.3.6 References to Mascot

Throughout the report there are references to 'the Mascot investigations', 'the Mascot investigation' or 'Mascot'. These terms are used interchangeably but all refer to the NSWCC investigations conducted under the NSWCC references Mascot and Mascot II. The Mascot investigations are also sometimes referred to as 'Operation Boat' or 'Boat' which was the operation name given to the majority of NSWCC investigations conducted under the Mascot references.

1.3.7 References to the Ombudsman and Operation Prospect

This report discusses information and evidence that the Ombudsman and staff, or counsel assisting the Ombudsman, received from various sources during Operation Prospect. For brevity, this is referred to in the report as information or evidence given to or received by Operation Prospect.

1.3.8 References to legislation and policy

Many of the events detailed in this report are historical, and some legislation and policies in place at the time an event happened have since been amended or repealed. All references in the report to legislation or policies are to the versions current at the time the events happened – unless stated otherwise.

For example, the relevant Commonwealth legislation governing the use of TIs at the time of the Mascot investigations was the *Telecommunications (Interception) Act 1979* (Cth). It has undergone numerous amendments since the time of the Mascot investigations, including being renamed as the *Telecommunications (Interception and Access) Act 1979*. Throughout this report the legislation is referred to by its current title, and the abbreviation 'TI Act' is used.

1.3.9 Figures on affidavits, warrants and recordings

Many chapters in this report detail how many times a person was named in a Mascot LD or TI affidavit or warrant, and how many times the person was recorded by a LD.

The NSWCC provided Operation Prospect with the LD and TI affidavits and warrants issued to Mascot, along with supporting documentation. An important source of information was the reports that warrant applicants (NSWCC staff) were required to prepare under section 19 of the LD Act, providing particulars of persons whose private conversations were recorded by LDs pursuant to the warrants.

This information has been used to count how many times people were named in affidavits and warrants. However, the information about how many times a person was recorded is limited by the nature of the information in the section 19 reports. A section 19 report is only required to note if a person was recorded by a LD issued under a particular LD warrant, but not how many times that person was recorded by LD. Given a LD warrant was usually in force for 21 days, it is possible that some people were recorded more than once under a LD warrant. To ensure greater accuracy in the LD tallies, a range of additional documents were searched to ascertain how many times people were recorded under a LD warrant. The additional documents included NSWCC Information Reports, records of Mascot meetings and other meetings where a Mascot investigative strategy was discussed, and transcripts of recordings.

The legislation governing the use of TIs did not require records to be kept about how many times a person's conversations were intercepted. Consequently in this report, the numbers presented for TIs are in terms of the number of warrants.

Chapter 2. Operation Prospect – approach and methodology

This chapter provides an overview of the Ombudsman's jurisdiction to conduct Operation Prospect. It outlines the stages of Operation Prospect, the work done in each stage, and the processes and practices that were put in place for the investigation. Information and figures are given on matters such as the number of hearings and interviews and the scale and type of documents assembled. There is further discussion of the Ombudsman's jurisdiction and legislative changes in Appendices 1 and 2.

2.1 Ombudsman jurisdiction and powers to conduct Operation Prospect

2.1.1 Jurisdiction under the Ombudsman Act and Police Act

When the NSW Government announced that the NSW Ombudsman would conduct Operation Prospect, the Government undertook to make the necessary legislative changes to ensure a thorough and complete investigation. Before these legislative amendments, the following limitations applied to the Ombudsman's jurisdiction:

- The NSW Ombudsman could investigate matters referred by the PIC Inspector about the conduct of the PIC Commissioner or a PIC officer. However, the Ombudsman could not compel the PIC Commissioner or a PIC officer to give evidence or information to the Ombudsman. The PIC's cooperation in any investigation was at its discretion.
- The NSW Ombudsman could not investigate matters referred by the PIC Inspector relating to executive officers and members of the NSWCC.
- Section 80 of the Crime Commission Act - and its forerunner, section 29 of the NSW Crime Commission Act - precluded NSWCC members, staff and seconded police officers from disclosing NSWCC related information, and provided that they were only compellable witnesses in very limited circumstances.

Legislative changes were required to address these limitations, and to strengthen the confidentiality and integrity arrangements for the Ombudsman to conduct an investigation of this type.

The NSW Parliament made amendments to the Ombudsman Act and other relevant legislation to overcome these limitations. The amendments are detailed in Appendix 1.

The Operation Prospect investigation was principally conducted under the Ombudsman Act, the Police Act and the *Royal Commissions Act 1923*. The PIC Act and the PID Act were also relevant.

The following sections summarise the breadth of the Ombudsman's jurisdiction following the legislative amendments, and the Ombudsman's investigation and reporting powers. Appendix 2 gives further information on those topics.

2.1.2 Investigation of the conduct of current and former public authorities and police officers

The Ombudsman's authority and jurisdiction to undertake Operation Prospect comes from both the Ombudsman Act and the Police Act.

The Ombudsman Act authorises the Ombudsman to investigate a complaint, or to conduct an own motion investigation, into the conduct of a public authority.³⁷ The term 'public authority' is defined in section 5(1) of the Act to include the three agencies that were centrally involved in this investigation – the NSWCC, the NSWPF and the PIC. The term also extends to individuals, specifically any person employed in:

- a Public Service agency
- the service of the Crown or any statutory body representing the Crown.³⁸

That extended definition meant that many individuals who were officers of the NSWPF and the NSWCC during Mascot were separately treated as public authorities for the Operation Prospect investigation. The Ombudsman may also investigate the conduct of a former public authority – that is, the conduct of a person that occurred at a time when the person worked for a NSW public service agency.

The 'conduct' that may be investigated is defined broadly in the Ombudsman Act to mean any action or inaction, or alleged action or inaction, "relating to a matter of administration".³⁹ The term 'administration' bears its ordinary meaning.⁴⁰ The purpose of an investigation is to examine whether the conduct was:

- contrary to law, unreasonable, unjust, oppressive or improperly discriminatory
- based on an improper motive, irrelevant consideration, or a mistake of law or fact
- otherwise wrong.⁴¹

An investigation may also examine whether conduct was in accordance with a law or an established practice – but the law or practice was unreasonable, unjust, oppressive or improperly discriminatory – or whether reasons should have been but were not given for the conduct. The term 'maladministration' is often used as a collective description of those grounds of investigation.

A special limitation applies to the Ombudsman's jurisdiction to investigate the conduct of the Commissioner or Assistant Commissioner of the NSWCC, or a member of the NSWCC Management Committee under the Crime Commission Act. The conduct can only be investigated if it relates to a matter referred to the Ombudsman by the NSWCC Inspector under the Crime Commission Act or by the PIC Inspector under the PIC Act.⁴² In Operation Prospect, a referral under section 90(1)(f) of the PIC Act⁴³ was made by the PIC Inspector on 11 October 2012. The referral was in general and broad terms and activated this aspect of the Operation Prospect investigation.

The Ombudsman's jurisdiction to investigate the conduct of a police officer exercising police functions with respect to crime and the preservation of the peace is found in Part 8A of the Police Act. The grounds of investigation include similar grounds to the maladministration grounds in the Ombudsman Act – namely conduct of a police officer that is unreasonable, unjust, oppressive, improperly discriminatory in its effect, based on improper motives, irrelevant considerations, a mistake of law or fact, or conduct that is in accordance with a law or established practice that was unreasonable, unjust, oppressive or improperly discriminatory in its effect.⁴⁴

37 Ombudsman Act, ss. 12, 13.

38 Ombudsman Act, s. 5(1).

39 Ombudsman Act, s. 5(1).

40 Except in relation to estate or trust administration: Ombudsman Act, s. 5(1), definition of 'administration'. This restriction is not relevant to Operation Prospect.

41 Ombudsman Act, s. 26.

42 PIC Act, s. 125(1).

43 Letter from the Hon David Levine, Inspector of the PIC to Ombudsman Bruce Barbour, NSW Ombudsman, 11 October 2012.

44 Police Act, s. 122(1).

Two differences between the grounds for investigation in the Ombudsman Act and the Police Act are that:

- The Police Act contains three additional grounds – that the conduct of a police officer constitutes an offence, corrupt conduct or unlawful conduct that is not otherwise an offence or corrupt conduct.⁴⁵ There is discussion of the term ‘unlawful conduct’ in section 2.5.5. There is overlap between these grounds and the phrase ‘contrary to law’ that is a ground for investigation in the Ombudsman Act.⁴⁶
- The Police Act does not specify two of the grounds in the Ombudsman Act – ‘conduct for which reasons should be but are not given’ and conduct that is ‘otherwise wrong’.⁴⁷ Again, there is overlap between those grounds and grounds that are specified in the Police Act, such as ‘unreasonable’ and ‘mistake of law or fact’.

An investigation of the conduct of a police officer by the Ombudsman is done under the investigation provisions of the Ombudsman Act.⁴⁸ The Ombudsman can investigate conduct that occurred at the time a person was a police officer, even though the person has since left the NSWPF.⁴⁹ Operation Prospect has therefore examined the conduct of a number of police officers involved in the Mascot investigations who have since left the NSWPF.

Under both the Ombudsman Act and the Police Act, the Ombudsman has an ‘own motion’ power to investigate the conduct of a police officer⁵⁰ or a public authority.⁵¹ This enables the Ombudsman to initiate an investigation in the absence of a complaint.

There are some express limitations on the Ombudsman’s jurisdiction. The Ombudsman cannot investigate the conduct of a court or a member of a court.⁵² As a result, Operation Prospect could not investigate the decisions of judicial officers to grant listening device LD warrants under the LD Act,⁵³ or require anyone associated with a court to give evidence about the granting of a warrant. A similar limitation applies to the decisions of Federal Court Judges and members of the Administrative Appeals Tribunal (AAT) to grant TI warrants under the TI Act.⁵⁴ The jurisdiction of the NSW Ombudsman does not extend to the conduct of federal courts and tribunals.

Two other relevant limitations on the Ombudsman’s jurisdiction are that the Ombudsman cannot investigate the conduct of a public authority acting as a legal adviser to or legal representative of a public authority, or the conduct of the Director of Public Prosecutions (DPP) relating to commencing, carrying on or terminating proceedings before a court.⁵⁵

2.1.3 Ombudsman’s investigation and inquiry powers

For an investigation, the Ombudsman may – in writing – require any public authority to:

- give the Ombudsman a statement of information
- produce to the Ombudsman any document or thing
- give the Ombudsman a copy of any document.⁵⁶

The majority of witnesses in Operation Prospect gave a statement of information by attending an interview that was recorded and then transcribed.

As part of an investigation, the Ombudsman may ‘make or hold inquiries’.⁵⁷ For an inquiry, the Ombudsman has the same powers, authorities, protections and immunities conferred on a commissioner by the Royal

45 Police Act, ss. 122(1)(a), (b), (c).

46 Ombudsman Act, s. 26(1)(a).

47 Ombudsman Act, s. 26(1)(f), (g).

48 Police Act, s. 156.

49 Police Act, s. 123.

50 Police Act, s. 159.

51 Ombudsman Act, s. 13(1).

52 Ombudsman Act, Schedule 1, item 2.

53 LD Act, s. 3A.

54 TI Act, ss. 6D (Judges), 6DA (nominated AAT members).

55 Ombudsman Act, Schedule 1, items 6, 7.

56 Ombudsman Act, s.18.

57 Ombudsman Act, s.19(1).

Commissions Act, Part 2, Division 1. This includes the power to summons 'any person' (including, but not limited to, a 'public authority') to attend to give evidence and/or produce documents or things.

The exercise of inquiry powers was a major feature of Operation Prospect. When the investigation formally started on 15 October 2012, the Ombudsman decided as part of the investigation to conduct an inquiry into all matters that fell within the scope of Operation Prospect.

An Ombudsman investigation, including any inquiry or hearing, must be conducted 'in the absence of the public'.⁵⁸ By implication, there are certain things the Ombudsman cannot do for the purposes of an investigation. One is to conduct public hearings. Nor is the Ombudsman authorised to conduct a controlled operation, obtain a warrant to intercept a person's telephone, or obtain a warrant to use a surveillance device (SD).

2.1.4 Ombudsman's reporting powers

There are separate reporting provisions in the Ombudsman Act and the Police Act. This report has been prepared as a single report under the reporting provisions of both Acts.

Under the Ombudsman Act, the Ombudsman has to prepare a report on an investigation if the Ombudsman finds that the conduct of a public authority has contravened one of the 'maladministration' grounds referred to in section 2.1.2.⁵⁹ In addition to including the Ombudsman's findings, the report may recommend that certain action be taken – for example, a written apology be given to a person adversely affected by the conduct.

The Operation Prospect report is being published and distributed in accordance with the following reporting provisions in the Ombudsman Act:

- The Act requires a copy of the report to be provided to the responsible Minister and to the head of the public authority whose conduct is the subject of the report.⁶⁰ A copy of this report has therefore been provided to the NSWCC and the NSWPF. The NSWCC and NSWPF will be required to notify the Ombudsman of any action they take in response to this report.⁶¹
- If the public authority against whom an adverse finding is made was an individual Public Service employee, the report is also to be provided to the Department of Premier and Cabinet.⁶² This has been done as there are a number of such findings in this report.
- The Ombudsman may provide a copy of the report to any such individual who is deemed to be a public authority for the purposes of the investigation.⁶³ Again, that has been done in light of some of the findings in this report.
- The Ombudsman may provide a copy of the report to any person who made a complaint that gave rise to the investigation.⁶⁴ The Ombudsman is also required to report to a complainant 'on the results of the investigation',⁶⁵ including any comments that the Ombudsman thinks fit to make.⁶⁶ This report has been sent to a number of complainants. In many cases, the letter to the complainant explained how their complaint was resolved – as that may not always be apparent from the text of this report because the identity of many people has been anonymised or issues raised in a complaint are not dealt with in the report.

58 Ombudsman Act s. 17.

59 Ombudsman Act s. 26.

60 Ombudsman Act, ss. 26(3)(a), (b).

61 Ombudsman Act, s. 26(5).

62 Ombudsman Act, s. 26(3)(c).

63 Ombudsman Act, s. 26(4)(b).

64 Ombudsman Act, s. 26(4)(a).

65 Ombudsman Act, s. 29(1)(b).

66 Ombudsman Act, s. 29(1)(c).

- The Ombudsman may also, at any time, make a 'special report' to each House of the Parliament 'on any matter arising in connection with the discharge of the Ombudsman's functions', and may recommend 'that the report be made public forthwith'.⁶⁷ This report is also being made under that 'special report' power. It was sent to the public authorities and complainants immediately after it was provided to the Parliament.

The reporting provisions in the Police Act are similar to those in the Ombudsman Act, but with some differences. The relevant Police Act provisions for this report are as follows:

- If the Ombudsman decides to investigate a complaint about a police officer under Part 8A of the Police Act, the Ombudsman must prepare a report on the investigation and may include in the report 'such comments and recommendations as the Ombudsman considers appropriate'.⁶⁸
- A copy of the report must be provided to the complainant, the Minister for Police and the Commissioner of Police.⁶⁹ A copy of this report has been given to those parties.
- The Commissioner of Police is required to provide a copy of the report to the police officer whose conduct was the subject of the complaint.⁷⁰ That requirement has been drawn to the Commissioner's attention. However, in light of the fact that this report may be published by the Parliament, the Ombudsman has separately given a copy of the report to each such police officer. The Ombudsman also wrote to all those officers shortly before the report was to be published to inform them that the report was to be tabled.
- The Commissioner is to notify the Ombudsman as soon as practicable after receiving a report of action that has or will be taken as a result of the report.⁷¹ This requirement will cease to operate between the Commissioner and the Ombudsman after the start of the Law Enforcement Conduct Commission (LECC) in 2017. The report from the Commissioner will after that be given to the LECC.⁷²
- The Ombudsman may make a 'special report' to each House of the Parliament on an investigation of a complaint to which Part 8A of the Police Act applies, and may recommend that the report 'be made public as soon as practicable'.⁷³ As noted before, this report is being presented to the Presiding Officer of each House jointly under the Ombudsman Act and the Police Act.

The Minister administering the Ombudsman Act (the Premier) was informed in advance, as required under section 25(2)(a) of the Ombudsman Act, that it was the Acting Ombudsman's intention to present this report to the Presiding Officer of each House of Parliament with a recommendation that the report be made public forthwith.⁷⁴

Some of the terms used in the Ombudsman Act and the Police Act are discussed separately in section 2.4.

67 Ombudsman Act, s. 31.

68 Police Act, ss. 157(1), (2).

69 Police Act, s. 157(3).

70 Police Act, s. 157(4).

71 Police Act, s. 158(1).

72 *Law Enforcement Conduct Commission Act 2016*, s. 146.

73 Police Act, s. 161.

74 Letter from Acting Ombudsman, NSW Ombudsman to the Hon Mike Baird MP, Premier of New South Wales, 20 December 2016.

2.1.5 Referral to the Director of Public Prosecutions

The Ombudsman Act provides that the Ombudsman may, at any time, furnish information obtained in the discharge of functions under the Ombudsman Act or other Act to the Director of Public Prosecutions (ODPP).⁷⁵ So far as Operation Prospect is concerned, the referral power is to be read in context with the Ombudsman's power to find that the conduct of a public authority was contrary to law,⁷⁶ or that the conduct of a police officer constituted an offence or corrupt conduct.⁷⁷ A number of findings of that kind are made in this report.

Four points should be made about this referral power. The first is that a finding that conduct was contrary to law or an offence will not necessarily result in the matter being referred to the ODPP. Operation Prospect is an administrative inquiry, and the Ombudsman is neither bound by the rules of evidence nor required to apply the criminal standard of proof ("beyond reasonable doubt"). Evidence on which the Ombudsman has relied in reaching a finding may not be admissible in court proceedings. An example is that the joint effect of sections 18, 21 and 36 of the Ombudsman Act is that a person may be required to give a statement that tends to incriminate the person, but the statement may then be inadmissible in any proceedings against the person. Another circumstance in which a referral may not be made is that the offence referred to in an Ombudsman finding is statute barred (the statutory limitation period for strictly summary offences is six months).⁷⁸ Other Acts, such as the LD Act, prescribe a limitation period of up to two years for the commencement of summary proceedings.

It is important nevertheless to stress that Operation Prospect has paid close regard to the strength of the evidence to support a finding of conduct contrary to law or an offence, even if the finding may not result in a referral to the ODPP. In particular, Operation Prospect has taken heed of the time-honoured principle referred to as the rule in *Briginshaw v Briginshaw*:

*... reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony or indirect inferences.*⁷⁹

The second point about the referral power is that a referral is made within the framework of the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales*. Guideline 4 provides that a decision by the ODPP to prosecute is based on the following considerations:

The general public interest is the paramount criterion. The question whether or not the public interest requires that a matter be prosecuted is resolved by determining:

- (1) *whether or not the admissible evidence available is capable of establishing each element of the offence;*
- (2) *whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law; and if not*
- (3) *whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.*⁸⁰

The Ombudsman's role is limited to the first of those three considerations, which is referred to as "the prima facie case test" as it is the role of the ODPP as the prosecutorial agency to apply the Director's guidelines when considering whether or not to prosecute. That is, the issue facing the Ombudsman, in respect of any finding of contrary to law or an offence, is whether there is sufficient admissible evidence to satisfy the prima facie test.

⁷⁵ Ombudsman Act ss. 31AB. See also s. 34(1)(b6), which provides an exception to the prohibition on the Ombudsman disclosing information for the purpose of any proceedings resulting from an investigation related to a matter referenced by the PIC Inspector or NSWCC Inspector.

⁷⁶ Ombudsman Act, s. 26(1)(a).

⁷⁷ Police Act, ss. 122(1)(a), (b)

⁷⁸ *Criminal Procedure Act 1986*, s. 179(1).

⁷⁹ *Briginshaw v Briginshaw* (1938) 60 CLR 336, p. 362 per Dixon J.

⁸⁰ Office of the Director Public Prosecutions, *Prosecution Guidelines*, 1 June 2007, p. 8.

If so, a referral will be made. It is not within the Ombudsman's function to decline to make a referral based on the second and third considerations in the DPP Prosecution Guidelines. It is for the DPP to consider those matters in deciding whether to prosecute. Guideline 4 elaborates the matters that the DPP may consider in deciding if it would be contrary to the public interest to prosecute a person (for example, the triviality of a matter, that a prosecution would be counter-productive, the staleness of the alleged offence, the degree of culpability of the alleged offender, that a prosecution would be unduly harsh or oppressive, or the cooperation of the alleged offender).

The submissions to Operation Prospect from parties against whom referable findings could be made were often directed to those public interest considerations. It is understandable that parties wished to draw those to the Ombudsman's attention, and an attempt has been made to acknowledge them in this report. However, no weight could be given to them in deciding whether the prima facie test was met, and that a finding of contrary to law or an offence should be referred to the DPP under the Ombudsman Act and the Prosecution Guidelines.

Third, as a matter of fairness this report does not disclose whether a referral has been made under sections 31AB and 34(1)(b6) of the Ombudsman Act, nor will the Ombudsman be making any public statement on this. The decision to prosecute is a matter for the DPP, having regard to the matters investigated by Operation Prospect and any submissions the parties choose to make to the DPP. It is appropriate to protect the identity of individuals while those matters are under consideration by the DPP.

Finally, a memorandum of understanding (MOU) has been reached between the Ombudsman and the DPP to regulate the referral of any matters: "Arrangement for Referral by NSW Ombudsman to Office of Director of Public Prosecutions (NSW) of *Operation Prospect* Matters", dated 6 May 2015. The MOU deals with the procedure for referral, the furnishing of evidence, the decision whether to prosecute, the issue of court attendance notices and guilty pleas.

2.2 Stages of Operation Prospect

Operation Prospect commenced in October 2012 and concludes with the publication of this report in December 2016. It was conducted in stages – because of the age, nature and complexity of the issues to be examined and the number of individuals and agencies involved. A concern that was frequently raised was the duration of the investigation. The discussion of this issue in correspondence and public commentary has not always reflected an understanding of the demands imposed by a complex and resource-intensive inquiry of this kind, and the time taken to conduct a demanding procedural fairness process in a private inquiry setting. Other events that will be mentioned in the following discussion also had a bearing on Operation Prospect timeframes.

2.2.1 Stage 1: Establishment (October 2012 to April 2013)

The Ombudsman's office did not have the budget or resources required for an investigation of this scale and type when the inquiry was initially announced. The first step was a submission to the NSW Government for funding to establish a secure physical location for the investigation, to recruit staff, purchase equipment and set up the electronic and record systems necessary for the investigation. On 19 October 2012, the Ombudsman wrote to the Director General of the Department of Premier and Cabinet stating:

*I have initially costed the inquiry until the end of the 2013-2014 financial year. I am not in a position to confirm that it will be finished by then, but will advise the government as soon as I am able to do so.*⁸¹

On 26 November 2012, the Department of Premier and Cabinet committed initial funding until the end of that financial year, and proposed quarterly financial reporting during this period. The Department also advised that any funding request for subsequent years should form part of the Ombudsman's annual budget planning process.⁸²

81 Letter from Ombudsman Bruce Barbour, NSW Ombudsman, to Director General Chris Eccles, Department of Premier and Cabinet, 19 October 2012.

82 Letter from Director General Chris Eccles, Department of Premier and Cabinet, to Ombudsman Bruce Barbour, NSW Ombudsman, 26 November 2012.

The Ombudsman issued initial summonses to the NSWCC (15 October 2012) and the NSWPF (18 October 2012), requiring them to produce a wide range of documents and information. On 31 January 2013, the Ombudsman issued the PIC with an initial summons to produce documents and information.

At the start, seven complaints were referred to Operation Prospect by the PIC Inspector and the NSWPF.⁸³

Between October 2012 and April 2013, the NSWCC, NSWPF and the PIC responded to the summonses from the Ombudsman by making 44 productions of material⁸⁴ – 1,394 boxes of documents and files⁸⁵ and 41 bundles of information.⁸⁶ These were as follows:

- NSWPF – 24 productions, made up of 712 boxes and seven bundles of information.
- NSWCC – 12 productions, made up of 682 boxes and 29 bundles of information.
- PIC made eight productions of eight electronic bundles of information (52.968GB).⁸⁷

The PIC Inspector, after completing his inquiries as to whether the Strike Force Emblems report should be made public, also provided all the relevant records in his possession. This amounted to 312 boxes and one bundle of information. In addition, there were a further four individuals or other agencies that provided six productions to Operation Prospect. This totalled eight bundles of information.

From the outset, a significant part of the investigative work in Operation Prospect involved analysing and examining an estimated one million records relating to the Mascot investigations. It was not feasible to conduct the Prospect investigation by reviewing the physical records one by one. It was also evident that a number of the physical files were disorganised, mislabelled or contained documents unrelated to the title of the file – rendering the use of file titles and title indexing as an aid for locating records of little assistance. It was therefore necessary to convert all the physical records into electronic format and identify an application with a cataloguing system within which the electronic records could be stored, analysed and organised – and which could support a sophisticated interrogation of the materials.

In January 2013, an external document scanning company started the work of converting the physical records into electronic records. A large section of the Operation Prospect work area was converted into an IT unit to house the necessary servers and IT network and the 12 staff required to do the work. Over 400,000 images were scanned in during this period.⁸⁸ The document scanning and conversion process was completed by 15 February 2013. After that, all electronic records were imported into an intelligence data management application (the Prospect database) which had been purchased in December 2012 and subsequently customised and tested in the intervening period.

83 One complaint was sent directly to the NSW Ombudsman; however there is evidence available to Operation Prospect that this complaint was first received by the PIC Inspector.

84 Each time a tranche of documents or records was provided to the Ombudsman it was counted as a 'production'.

85 Some boxes contained audio and video tapes from surveillance and covert activities.

86 A bundle of information may be a small (5) or large (50) bundle of documents or a folder of information and records. This could also include bundles provided electronically. The size of a bundle provided electronically varied significantly – a bundle could comprise one document (e.g. an email) or multiple documents comprising thousands of pages.

87 The majority of the PIC productions were provided electronically, and could, for example, include audio files, documents and emails. The size of these bundles were often significantly larger than bundles provided physically to Operation Prospect. While the PIC provided fewer productions and bundles than the NSWPF and NSWCC, solely reporting on these figures does not adequately convey the sheer volume of information that the PIC provided to Operation Prospect. Consequently, we have included the corresponding size of the electronic files per PIC production to demonstrate the scope of what it produced.

88 Approximately 473,050 images were scanned.

Between October 2012 and early January 2013, Operation Prospect was staffed by one full-time staff member (a Senior Investigator, Intelligence/Forensics), the Deputy Ombudsman for the Police and Compliance Branch (PCB), part-time assistance from the PCB Principal Legal Officer and the Ombudsman's Legal Counsel, and a small number of staff from other parts of the office. During this period, staff skills, experience and expertise for the investigation were determined and role descriptions were prepared for every position within the Operation Prospect team. Recruitment was done through a combination of measures – external advertisements, targeted recruitment, and direct approaches to individuals with particular expertise in investigations and inquisitorial proceedings. Between January and April 2013, a number of staff were recruited to the Operation Prospect team including a director of operations, two chief investigators, three investigators, a paralegal, and three administration officers. The director and investigations staff all had criminal investigation backgrounds with experience in Australian and overseas law enforcement bodies.

A telephone hotline and dedicated email address for the operation were established, and the first fact sheet was published providing general information about Operation Prospect and the Ombudsman's jurisdiction and work processes.

In Stage 1, 30 complaints were received and assessed, and two hearings and five interviews were conducted.

By the end of April 2013, Operation Prospect was fully staffed, the special purpose area had been secured and fitted out, the new information technology equipment and software were purchased, and training was being delivered to the newly appointed staff on the use of the Operation Prospect database. The Operation Prospect area in the Ombudsman's office was accessible only to Operation Prospect staff and all records and information holdings were securely held within the Operation Prospect working area or within a secure file storage room. All electronic records and Operation Prospect computer systems were stored on a secure server only accessible by Operation Prospect staff and the IT administrator.

2.2.2 Stage 2: Document analysis, examination and compilation (May to December 2013)

The examination of records effectively began in May 2013 when Operation Prospect was fully resourced and staff had completed comprehensive training in using the Operation Prospect database. Although a significant number of records had been produced in Stage 1, the productions of records continued throughout 2013. Between May and December 2013, there was a further 27 productions of records from the NSWPF, the PIC and the NSWCC, which was made up of 84 boxes⁸⁹ of records and 29 bundles⁹⁰ of information. The majority of these were in response to the original summonses issued in 2012. In addition, 15 individuals and other agencies provided 20 productions comprising 26 bundles of information to Operation Prospect in this time.

On 6 May 2013, the Ombudsman publicly advertised – on the Ombudsman's website and in three newspapers – a call for information to encourage people to come forward with submissions or complaints relevant to Operation Prospect.⁹¹ After this, 35 people contacted Operation Prospect on 40 occasions and a further 36 complaints were received. Between May and December 2013, Operation Prospect received approximately 68 complaints.

The Ombudsman made arrangements to provide free and independent counselling services (described in section 2.4.7) for individuals involved in Operation Prospect. This service started on 1 June 2013, has remained in place throughout the inquiry, and will continue after the report is published.

⁸⁹ NSWPF provided 84 boxes.

⁹⁰ NSWPF provided 21 bundles, NSWCC provided five bundles and the PIC provided three bundles (10.386GB).

⁹¹ NSW Ombudsman, *Call for information: Operation Prospect – Investigations into allegations concerning officers of the NSW Police Force, NSW Crime Commission and Police Integrity Commission*, 6 May 2013.

During Stage 2, the focus of Operation Prospect's eight investigators was to:

- develop a comprehensive understanding of the details of, and interplay between, Mascot, Mascot II, Florida, Banks, Emblems, Sibutu and Tumen and the various associated investigations, task forces and strike forces – for example, Boat, Volta and Naman
- identify the internal structures, policies, procedures and practices of each agency and investigation or strike force, and identify the roles, responsibilities and decision-making authority of the individuals involved in the various matters across a six-year timeframe
- determine the scope of each investigation/strike force that related to the various allegations within the scope of Operation Prospect
- determine what facts could be established in relation to each line of inquiry under each allegation
- identify the information gaps in each line of inquiry and conduct further searches and reviews to remedy those gaps, as well as deciding which individuals may be able to assist with these gaps
- categorise each reviewed document and electronically link it to relevant allegations and individuals within the Prospect database.

The most complex and resource intensive part of the investigative work in 2013 was to compile the chronologies and facts relating to each allegation of false and misleading information in a warrant application, and each allegation of improper targeting or investigation of a particular individual.

The allegations of false and misleading information in Mascot warrant applications required the examination of the 218 affidavits and 721 warrants within the Operation Prospect database. For many of these, it was necessary to examine each paragraph of each affidavit that was the subject of an allegation and trace that information back to its source. Every affidavit had to be scrutinised in some way despite many of them being 'rollover' warrants containing similar information. This was because the information about events or people was sometimes updated or amended slightly, requiring Operation Prospect investigators to search for the source material that led to this change. During the life of the Mascot investigations, the paragraphs in many affidavits grew in length as further evidence was gathered to support the deponents' assertions that the prescribed offences listed in the warrants either had been, were about to be or were likely to be committed.

This task involved reviewing over 488 pages of transcript of debrief with the informant Sea (see Chapter 3) and searching the Operation Prospect database for any document that could be relevant. Searching for the source of each update or amendment often required checking relevant minutes, Information Reports, contact advice reports, emails, surveillance reports, LD and TI transcripts and audio and other documentation.

As many of the records produced were in a seemingly random order and without a set naming convention, Operation Prospect investigators often had to search the Operation Prospect database using key word searches. As the database held an estimated one million or more documents, these searches frequently returned thousands of hits. Each hit could be a single document or an entire file up to 500 pages long. The investigator then had to read each document to see if it was relevant to the allegation that false and misleading information was contained in a supporting affidavit. This involved examining the 15 Mascot investigations tape logs books that contained 1,444 entries from hundreds of LD tape recordings made by Sea, electronic recordings of police interviews, microcassette and video tape recordings.

Several thousand hours of recordings and tens of thousands of pages of transcripts were apparently used by Mascot investigations staff as evidence and information to support references made in paragraphs in affidavits. Operation Prospect investigators have listened to many of these tape recordings to verify the accuracy of transcripts prepared as part of the Mascot investigations, and the accuracy of the references in affidavit paragraphs. The time required to do each task varied, with some recordings extending over nine hours while others were less than an hour.

If the information was only on an audio cassette tape (with no corresponding transcript), the tape was digitised to a CD so that an investigator could listen to it. On many occasions, investigators listened to the recording for which a transcript existed – as the audio was the primary source material and may not have been accurately transcribed. The investigators found that transcripts were occasionally incorrect or incomplete. Operation Prospect assessed, where possible, if this was due to genuine error or another reason.

Each allegation of improper targeting of an individual also involved a series of detailed investigative steps to find out if the person was initially justifiably targeted, and then whether the continued investigation of that person was justified. In each case, the investigator had to first identify all warrants naming the person and then cross-check each to the associated affidavit to establish if the affidavit explained why the person was named in the warrants. The next step required searching across all holdings to find out if the person was specifically targeted by the Mascot investigations and to identify all records about a targeting decision or activity. It was common for each person targeted to be named in a thousand or more documents. For each allegation, the investigator had to:

- identify records to find out the period for which a person was targeted
- clarify the initial allegation or intelligence, its age and seriousness, and whether it matched the information in each affidavit
- search for and identify any corroborative evidence that may have existed at the time that would reasonably support a suspicion that a crime associated with a person had in fact been committed, or that the person had knowledge of a crime
- examine all documents relating to the person – such as schedules, information reports, briefs, surveillance logs and reports, LD recordings and transcripts, emails, minutes and internal reports
- search for and identify any exculpatory evidence found during the Mascot investigations that ought to have been referred to in any affidavit seeking authority to record conversations of certain people
- analyse the previous complaint histories of individuals, as held by the Mascot investigations, to determine if appropriate or inappropriate weight had been given to those histories
- examine the policies and procedures in place at the relevant time to see if they had been followed in a particular investigation
- decide if the method of targeting an individual officer was appropriate in the circumstances, and if the continued targeting was justified.

These tasks involved identifying and considering a large volume of documents and a significant range of evidence collected by the Mascot and associated investigations over a number of years. The investigators also needed to find out if that material was held by Mascot at the relevant time – that is, when a target's name was added to an affidavit or operational strategy.

In the second half of 2013, the first summaries and collations of facts for each line of inquiry and allegation were assembled by investigation staff. The Ombudsman, together with external Senior Counsel Assisting, reviewed that material to determine what further investigative activities were required. After this review, further analysis of records was required to complete the documentary review and compilation of chronologies and facts in connection with a number of allegations and issues. It was also clear that considerable time was required to plan for hearings to be held in 2014 and to compile each hearing brief – due to the complexity and breadth of matters that needed to be canvassed.

The main focus in 2013 was documentary and evidentiary review and analysis, establishing background and contextual information, and assembling facts and chronologies for each matter under investigation. A small number of interviews and hearings were also held to assist the document/evidence analysis work. Between May and December 2013, 15 interviews and four hearings were conducted.

2.2.3 Stage 3: Hearings and interviews (2014)

In 2014, the main investigative activities were preparing for and holding interviews and hearings. In total, 73 private hearings and 39 interviews were conducted. These hearings and interviews generally focused on establishing facts about individual allegations. They also elicited important contextual information on the Mascot investigations' management and decision-making processes and how staff were inducted and trained to perform their duties at the NSWCC.

Between January and June 2014, 19 private hearings and 30 interviews were conducted. The main witnesses were the more junior Mascot investigators – along with analysts and legal advisors – who gave evidence about the day-to-day operation of the Mascot investigations and their knowledge of and/or involvement in particular cases.

In the latter half of 2014, the focus shifted to more senior officers and managers responsible for the Mascot investigations and the officers who were deponents on a large number of key affidavits. A smaller number of hearings were also conducted with individuals in connection with the dissemination of confidential records relating to the Mascot, Emblems, Sibutu and Tumen investigations. During this period, 54 private hearings and nine interviews were conducted.

There was further production of records in Stage 3 – in response both to the original summonses of 2012 and new summonses and production notices. There were 61 productions⁹² of records in 2014, made up of four boxes and 63 bundles of information⁹³ provided by the NSWPF, NSWCC and PIC. An additional 79 productions comprising 100 bundles of information were also provided by 58 individuals and other agencies during this stage. In 2014, a further 82 complaints were received and assessed. Initial early drafting on background issues for the report also started during this period.

2.2.4 Stage 4: Submissions and procedural fairness (2015)

Between January and March 2015, a further nine private hearings and six interviews were conducted. However, the focus in the first half of 2015 was drafting and finalising submissions (Prospect submissions) to be sent to affected parties – see section 2.4.8. During 2015, six Prospect submissions were prepared with a total of 784 pages. The largest submission had 439 pages. Each submission covered a different aspect of the investigation and presented a preliminary statement of facts and provisional findings, recommendations and comments that were being considered by the Ombudsman. The purpose of providing submissions was to allow affected parties to make submissions in reply, which the Ombudsman would consider in determining the facts and whether to make a finding or an adverse comment in the final report. By 30 June 2015, all submissions prepared in the first half of 2015 had been distributed to 32 affected parties. The first was sent on 1 April 2015 and the last on 29 June 2015. In the second half of 2015, further submissions were sent to two other affected parties.

All affected parties were able to come to the Ombudsman's office to inspect the records and documents referred to in their particular submissions, along with extracts of witness evidence quoted in those submissions. For each affected party, Operation Prospect legal and administration staff compiled all the records listed in their particular submission with a full index in hard copy. Redactions had to be made in many documents to remove confidential or private material that was either not relevant to the inspection or was inappropriate to be disclosed to the affected party. If a person or an agency received more than one submission, a compilation of records with an index was prepared for each separate submission. In 2015, 65 document inspections were conducted by various affected parties across 59 non-consecutive days – totalling 353 hours.

One submission in reply from an affected party was received in the first half of 2015 and was 31 pages long. Between July and December 2015, Operation Prospect received a further 34 submissions in reply – a total of 1,008 pages. Each submission was considered by the Acting Ombudsman.

⁹² NSWPF provided 29 productions, NSWCC provided 23 productions, and the PIC provided nine productions.

⁹³ NSWPF provided 30 bundles, NSWCC provided 24 bundles, and the PIC provided nine bundles (18MB).

In 2015, the NSWPF and NSWCC provided a further 17 productions,⁹⁴ comprising 33 bundles of records.⁹⁵ An additional 16 productions comprising 16 bundles of information were also provided by 14 individuals and other agencies during this stage. A further 103 complaints were received and assessed. Report drafting also continued for aspects of the investigation relating to background, chronologies and factual matters unrelated to the issues being considered in the submissions.

In 2015, the Ombudsman and Deputy Ombudsman were summonsed before two Parliamentary Inquiries – both examining certain aspects of Operation Prospect.⁹⁶ In early 2015, Operation Prospect staff stopped their investigative work to prepare material for the first Inquiry – including preparing a detailed submission on the scope, work and progress of Operation Prospect that the Ombudsman considered appropriate for publication. The Ombudsman made a public interest immunity claim for all the operational information and details not included in this submission.⁹⁷ The second Inquiry in June 2015 also required responses from Operation Prospect, but had a less disruptive impact on the work of operational staff.

A further relevant event in 2015 was the departure of the then Ombudsman, Mr Bruce Barbour – at the end of his third term of appointment on 30 June 2015, after 15 years as NSW Ombudsman. Professor John McMillan AO was appointed Acting Ombudsman on 1 August 2015 for a two year term and assumed responsibility for Operation Prospect. The immediate challenges facing the Acting Ombudsman were to get abreast of the significant amount of material gathered by Operation Prospect, consider the submissions in reply from affected parties (being received mostly in the second half of 2015), and address correspondence from a number of affected parties about the future conduct of Operation Prospect.

On 4 November 2015, the Acting Ombudsman provided a Progress Report on Operation Prospect to the Parliament.⁹⁸ In addition to summarising the work undertaken and underway, the Progress Report discussed issues raised by affected parties in correspondence to the Acting Ombudsman. The information in the report included:

- the scope of Operation Prospect
- the legal basis for the investigation, with particular reference to relevant provisions of the Ombudsman Act and the Police Act defining the jurisdiction and powers of the Ombudsman
- implications for the investigation flowing from the change in Ombudsman
- the procedure followed in notifying parties who were the subject of investigation
- how Operation Prospect was to be finalised and reported
- the steps being taken to accord procedural fairness to affected parties
- the decision not to allow cross-examination of parties.⁹⁹

2.2.5 Stage 5: Hearings, procedural fairness and report writing (2016)

On 3 March 2016, the Acting Ombudsman appeared before the Parliamentary Committee on the Office of the Ombudsman, the PIC and the NSWCC. He provided an update on the status of Operation Prospect and undertook to provide a further progress report in June 2016. A second Progress Report to Parliament was made on 15 June 2016. It advised on the status of the investigation and summarised the work that had been done.¹⁰⁰

94 NSWPF provided eight productions and NSWCC provided nine productions.

95 NSWPF provided eight bundles and NSWCC provided 25 bundles.

96 NSW Parliament, NSW Legislative Council, Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", *Inquiry into the Conduct and Progress of the Ombudsman's inquiry "Operation Prospect": Terms of reference*, 2014; NSW Parliament, NSW Legislative Council, General Purpose Standing Committee No. 4, *Inquiry into the progress of the Ombudsman's investigation "Operation Prospect": Terms of reference*, 2015.

97 Letter from Ombudsman Bruce Barbour, NSW Ombudsman to the Hon Robert Borsak, MLC, 28 January 2015.

98 McMillan, J, *Operation Prospect – Progress Report by the Acting NSW Ombudsman*, 4 November 2015.

99 McMillan, J, *Operation Prospect – Progress Report by the Acting NSW Ombudsman*, 4 November 2015, pp. 1-15.

100 McMillan, J, *Operation Prospect – Second progress report by the Acting NSW Ombudsman*, 15 June 2016.

The priorities during 2016 were to complete the procedural fairness stage of Operation Prospect and prepare the final report. Further investigations and follow-up were undertaken as a result of matters that arose either during the procedural fairness process or from the reconsideration of evidence and other information. There were four significant matters that became the subject of further hearings. As a result, a further 19 hearings and two interviews were held. In 2016, a total of 28 submissions were prepared and sent to 17 affected parties in June and August 2016 with an invitation to respond.

Submissions in reply continued to be received from affected parties until 26 October 2016. Extensions were granted to 27 parties who were unable to provide their submissions in reply by the original due dates. In total, 26 submissions in reply were received from affected parties in 2016 totalling 587 pages – some parties made multiple submissions. Each submission needed to be reviewed and considered by the Acting Ombudsman to finalise this report.

In 2016, the NSWPF and the NSWCC provided a further eight productions,¹⁰¹ comprising 11 bundles of information.¹⁰² An additional nine productions comprising nine bundles of information were also provided by five individuals and a number of agencies during this stage.

In 2016, 47 document inspections were conducted by affected parties across 44 non-consecutive days or 274 hours.

2.3 Figures on complaints and investigative activities

2.3.1 Complaints received and assessed

More than 330 complaints and enquiries were made or referred to Operation Prospect over the course of the investigation. The last complaint was received in November 2016.¹⁰³ Some of the complaints concerned matters within the scope of Operation Prospect and were incorporated into the investigation. Complaints that were outside the scope of Operation Prospect were referred elsewhere. Approximately 265 complaints and inquiries were referred to the Ombudsman's Police and Compliance Branch or to another agency, or were declined under the provisions of the Ombudsman Act.

2.3.2 Records produced

Throughout Operation Prospect, an estimated one million or more records (document pages) were produced in response to notices to produce and summonses under sections 18 and 19 of the Ombudsman Act. The exact number of individual records produced cannot be calculated. This is mainly because a significant number of files were scanned as a single image (which could, for example, contain 100 different records), and because the Operation Prospect database also holds records and documents created by Operation Prospect staff and documents about non-operational work – such as correspondence with suppliers and providers, induction and training material for Operation Prospect staff, and internal guidelines, policies and procedures.

101 NSWPF provided seven productions and NSWCC provided one production.

102 NSWPF provided 10 bundles and NSWCC provided one bundle.

103 This is correct as of 21 November 2016. Operation Prospect did not assess any complaints after this time.

The records and documentary evidence produced to the Ombudsman took a wide variety of forms – including correspondence and internal memoranda, police Duty Books, diaries, email records, records of meetings (held by Mascot, between agencies, and within the NSWPF), Information Reports, statements of debrief, full briefs of evidence, records of interview, LD recordings, transcripts of LD and TI recordings, investigation plans, court notices, tapes of Electronic Recording of Interviews with Suspected Persons (ERISP), records of investigations, applications for LDs and TIs, affidavits, warrants, notices required to be provided under the LD Act and TI Act, and internal and public reports completed by other bodies that related to Operation Prospect issues. Audio cassettes, video surveillance tapes and photographs were also in some file boxes.

Over the course of Operation Prospect, approximately 290 productions of records and material were made. These productions comprised 1,794 boxes of records and material, and 340 bundles of information. Table 2 shows the total productions by year.

Table 2: Productions of records to Operation Prospect by year

Year	No. of individual productions	No. of boxes	No. of bundles
2012	28	1,458	32
2013	71	332	76
2014	140	4	163
2015	33	0	49
2016	17	0	20
Total	289	1,794	340

Source: NSW Ombudsman dataset, compiled 29 November 2016. A count was conducted per year of each box and bundle provided to the NSW Ombudsman by every individual and agency that submitted a production to Operation Prospect.

Note: Caution must be exercised when interpreting the number of boxes and bundles provided to Operation Prospect. A box could be small or large, and the volume and nature of content inside each box varied. A bundle could comprise one document (e.g. an email) or multiple documents comprising thousands of pages.

The productions came mostly from the three agencies central to this investigation – the PIC, the NSWPF and the NSWCC.

2.3.2.1 PIC

The PIC produced the majority of its records by the end of February 2013. The PIC had maintained organised records in electronic form, so it was relatively straightforward for the agency to meet the requirements of production. In total, the PIC made 20 separate productions of material to the Ombudsman over the course of Operation Prospect. Nine of these bundles were solely electronic bundles, with a total 63.372GB of electronic data provided. The remaining 11 bundles were of smaller amounts (one to 10 records, diaries and notebooks.)

2.3.2.2 NSWPF

The NSWPF assembled a small team of officers to search for and collate the records that were held in different physical locations and across different electronic media and systems. In view of the issues with locating and transporting records – particularly in physical form – it was agreed that there would be a staged delivery of records. Delivery or production of material in response to the original summons of October 2012 resulted in many small deliveries between October 2012 and 27 February 2014. Production notices were also issued during the course of Operation Prospect. In total, the NSWPF made 89 separate productions of material amounting to 798 boxes of records and 76 bundles of information (see Table 3).

Table 3: NSWPF productions by boxes and bundles by stage – 2012 to 2016

Date	No. of boxes	No. of bundles or records folders	No. of productions
Oct 2012 to April 2013	712	7	24
May to Dec 2013	84	21	21
2014	2	30	28
2015	0	8	7
2016	0	10	7
Total	798	76	89

Source: NSW Ombudsman dataset, compiled 29 November 2016. A count was conducted per year of each box and bundle provided by the NSWPF to get the total for each stage.

There were a number of police officers who assisted with productions requirements for the NSWPF and their assistance is appreciated. Particular thanks are extended to Detective Chief Superintendent Greg Rolph, Sergeant John Gench and a small team from the Professional Standards Command who had primary responsibility for responding to and managing many of the production requirements on behalf of the NSWPF.

2.3.2.3 NSWCC

After the initial summons to the NSWCC in October 2012, the Commissioner of the NSWCC advised the Ombudsman that the material to be located was being identified through searches of key terms (such as 'Mascot') in file titles and descriptions of operation files, and that searches would also need to be done for administrative and other files. The Commissioner advised that an extension was required and that "[f]ull compliance may be difficult or impossible to achieve at all".¹⁰⁴ On 1 November 2012, Ombudsman staff met with NSWCC staff to discuss production and the Commissioner advised that the majority of NSWCC records were in physical form.¹⁰⁵

On 6 November 2012, the NSWCC produced an electronic copy of the NSWCC Mascot computer directories and advised that it had recalled physical records from the Government Records Repository.¹⁰⁶ The NSWCC proposed that Ombudsman staff attend the NSWCC offices to inspect the documents once obtained to determine which were relevant to Operation Prospect. The NSWCC suggested it would then scan the records – which would be costly and time consuming – before providing those records to the Ombudsman.¹⁰⁷ On 7 November 2012, the Ombudsman wrote to the Commissioner advising that the records should be produced in accordance with the original summons.¹⁰⁸ The NSWCC subsequently produced physical files to the Ombudsman, which were then scanned in by Operation Prospect and an electronic copy of these records given back to the NSWCC.

On 18 February 2013, the Ombudsman wrote to the Commissioner of the NSWCC advising that some records had not yet been produced.¹⁰⁹ On 5 March 2013, the NSWCC advised that some records were missing as the record management practices at the NSWCC at the time of the Mascot investigations were "less than ideal".¹¹⁰ In May 2013, the NSWCC advised that its 'Mascot Chronology system'¹¹¹ – an important source of information for Operation Prospect – had been successfully recovered.¹¹² This was then provided to the Ombudsman in June 2013, along with further material the NSWCC had located.¹¹³

¹⁰⁴ Letter from Assistant Commissioner Peter Singleton, NSWCC to Ombudsman Bruce Barbour, NSW Ombudsman, 31 October 2012, p. 4.

¹⁰⁵ Operation Prospect, NSW Ombudsman, *Minutes 1 November 2012 4:00pm-5:00pm NSW Crime Commission office*, 1 November 2012.

¹⁰⁶ Letter from Assistant Commissioner Peter Singleton, NSWCC to Deputy Ombudsman Linda Waugh, NSW Ombudsman, 6 November 2012.

¹⁰⁷ Letter from Assistant Commissioner Peter Singleton, NSWCC to Deputy Ombudsman Linda Waugh, NSW Ombudsman, 6 November 2012.

¹⁰⁸ Letter from Ombudsman Bruce Barbour, NSW Ombudsman to Commissioner Peter Hastings QC, NSWCC, 7 November 2012.

¹⁰⁹ Letter from Ombudsman Bruce Barbour, NSW Ombudsman to Commissioner Peter Hastings QC, NSWCC, 18 February 2013.

¹¹⁰ Letter from [Name], NSWCC to [name], NSW Ombudsman, 5 March 2013, p. 1.

¹¹¹ The Mascot Chronology was an electronic database maintained by the NSWCC to record Mascot investigative activities.

¹¹² Email from [name], NSWCC to [name], NSW Ombudsman, 29 May 2013.

¹¹³ Letter from [name], NSWCC to [name], NSW Ombudsman, 4 June 2013.

On 29 October 2013, a further notice to produce was issued to the NSWCC Commissioner identifying a range of specific records and documents that had not been produced in response to the first broad summons in October 2012.¹¹⁴ Operation Prospect also sought the Mascot email records. The NSWCC advised on 20 November 2013 that – because the system it used for emails between 1998 and 2003 was rudimentary compared to modern systems – it was likely that only partial records could be retrieved and that the process would take some time.¹¹⁵

On 12 February 2014, the Deputy Ombudsman wrote to the NSWCC Commissioner advising that a range of material had still not been produced as required by the original summons of October 2012. The outstanding materials included transcripts, minutes, staff diaries, email records, and archived personal computer drives.¹¹⁶ In June 2014, a further notice to produce was issued to the NSWCC seeking records such as email records, as well as some records not previously required.¹¹⁷ On 30 June 2014, Operation Prospect staff met with NSWCC staff to discuss productions and timeframes. Further records were produced during July 2014, but did not include email records.¹¹⁸ On 18 July 2014, the NSWCC Commissioner acknowledged that a number of items had not been produced and that older material (including emails) needed to be reformatted and reviewed.¹¹⁹

On 5 August 2014, correspondence was received from the NSWCC that outlined difficulties in the recovery of emails from the older email system and noted that emails may have been stored on media that was subsequently destroyed (and not migrated to newer systems).¹²⁰ The NSWCC also advised that it could not produce personal computer drives.¹²¹ NSWCC and Operation Prospect staff met to discuss the difficulties and an IT solution was found to deal with the technical issues.¹²² The Ombudsman's IT staff drafted a conversion code to help the NSWCC with the extraction and production of emails,¹²³ and gave it to the NSWCC in August 2014.

On 10 September 2014, the NSWCC was advised that Operation Prospect hearings had been suspended because records were outstanding – including the majority of email records (a small number had been produced by this stage) – and that production of these records was now urgent.¹²⁴ Some records were subsequently produced but were incomplete. On 25 September 2014, the NSWCC was contacted again about some outstanding items and was given a priority order to produce them.¹²⁵ Throughout September and October 2014, the NSWCC produced records including emails. However, the majority of email accounts and records could not be located. The NSWCC advised that it was likely that during 1998–2003 the staff electronic mailboxes were not stored centrally on servers but on local computers managed by individual staff members.¹²⁶ On 11 November 2014, the NSWCC confirmed that it had exhausted all searches for email accounts and had produced all that could be located.¹²⁷

The NSWCC continued to produce records throughout the duration of Operation Prospect. This was evidently resource intensive and time-consuming because of the NSWCC computer and records management systems that were in place during 1999–2003. The NSWCC took considerable time to comply with the notices to produce, particularly the earlier and larger notices. The staggered production of NSWCC information meant that, in some cases, aspects of certain investigations had to be revisited whenever relevant new information was produced. As shown in Table 4, the NSWCC made 48 separate productions comprising 684 boxes of records and 84 bundles of information.

114 Letter from Deputy Ombudsman Linda Waugh, NSW Ombudsman to Commissioner Peter Hastings QC, NSWCC, 29 October 2013 – enclosure entitled 'Notice of requirement to produce documents and other things'.

115 Email from [name], NSW Ombudsman to [name], NSW Ombudsman, *File note: Conversation with [name] (NSWCC)*, 20 November 2013.

116 Letter from Deputy Ombudsman Linda Waugh, NSW Ombudsman to Commissioner Peter Hastings QC, NSWCC, 12 February 2014 – enclosure entitled 'Schedule of outstanding material required under notice dated 15 October 2012'.

117 Letter from Deputy Ombudsman Linda Waugh, NSW Ombudsman to Commissioner Peter Hastings QC, NSWCC, 20 June 2014 – enclosure entitled 'Notice of requirement to produce documents and give a statement of information'.

118 Letter from Commissioner Peter Hastings QC, NSWCC to Deputy Ombudsman Linda Waugh, NSW Ombudsman, 4 July 2014; Letter from Commissioner Peter Hastings QC, NSWCC to Deputy Ombudsman Linda Waugh, NSW Ombudsman, 8 July 2014; Letter from Commissioner Peter Hastings QC, NSWCC to Ombudsman Bruce Barbour, NSW Ombudsman, 11 July 2014.

119 Letter from Commissioner Peter Hastings QC, NSWCC, to Deputy Ombudsman Linda Waugh, NSW Ombudsman, 18 July 2014.

120 Letter from [Commissioner Solicitor], NSWCC to Deputy Ombudsman Linda Waugh, NSW Ombudsman, 5 August 2014, pp. 2–5.

121 Letter from [Commissioner Solicitor], NSWCC to Deputy Ombudsman Linda Waugh, NSW Ombudsman, 5 August 2014, p. 4.

122 [Name], *File note, File note*, NSW Ombudsman, 6 August 2014.

123 Email from Deputy Ombudsman Linda Waugh, NSW Ombudsman to Commissioner Peter Hastings QC, NSWCC, 14 August 2014.

124 Email from Deputy Ombudsman Linda Waugh, NSW Ombudsman to Assistant Commissioner Peter Singleton, NSWCC, and [name], NSWCC, 10 September 2014.

125 Email from Deputy Ombudsman Linda Waugh, NSW Ombudsman to Commissioner Peter Hastings QC, NSWCC, 25 September 2014.

126 Letter from Commissioner Peter Hastings QC, NSWCC to Deputy Ombudsman Linda Waugh, NSW Ombudsman, 10 October 2014.

127 Email from Commissioner Peter Hastings QC, NSWCC to Deputy Ombudsman Linda Waugh, NSW Ombudsman, 11 November 2014.

Table 4: NSWCC productions by boxes and bundles by stage – 2012 to 2016

Date	No. of boxes	No. of bundles or records folders	No. of productions
Oct 2012 to April 2013	682	29	12
May to Dec 2013	0	5	3
2014	2	24	23
2015	0	25	9
2016	0	1	1
Total	684	84	48

Source: NSW Ombudsman dataset, compiled 29 November 2016. A count was conducted per year of each box and bundle provided by the NSWCC to get the total for each year.

2.3.2.4 Information that could not be produced

The records or material that the NSWCC was unable to produce included the following:

- Most of the email records of the Mascot investigations staff (both police and NSWCC staff) – in particular, no email records or accounts could be located for:
 - the NSWCC legal officer who applied for nearly all Mascot LD warrants
 - a NSWCC analyst who worked on Mascot
 - John Giorgiutti, Director and Solicitor to the NSWCC
 - Superintendent John Dolan, Commander Special Crime Unit
 - Assistant Commissioner Malcolm Brammer, Commander Special Crime and Internal Affairs (SCIA)
 - three other Mascot investigators.

Only partial email records could be located for other Mascot investigators and NSWCC staff – including Commissioner Phillip Bradley, NSWCC, Assistant Director Mark Standen, NSWCC, Superintendent Catherine Burn, Team Leader Mascot, Sergeant Greg Jewiss, Senior Mascot Intelligence Analyst, Detective Senior Constable Darren Boyd-Skinner, and Detective Sergeant Damian Henry, Senior Mascot Investigator, and a number of others.¹²⁸

- The version(s) of the Investigation Manual in use at the time of the Mascot investigations. The NSWCC explained that there was no system for archiving an earlier version of the manual each time it was updated.¹²⁹
- Certain other internal guidelines in place in 1999-2002, notably:
 - the general induction paper for task force members
 - the Staff Handbook.¹³⁰
- Some records relating to the management of the informant Sea, including contact advice reports and the Emergency Action Plan. The NSWCC suggested these would be held by the NSWPF.¹³¹ However, checks confirmed that the NSWPF held no such records.
- Information held on personal computer drives during Mascot, as the NSWCC had no system for saving or backing up such records.

¹²⁸ These titles and ranks refer to positions held at the time of the Mascot investigations.

¹²⁹ Email from [name], NSWCC to Deputy Ombudsman Linda Waugh, NSW Ombudsman, 14 July 2016.

¹³⁰ Letter from Commissioner Peter Hastings QC, NSWCC to Deputy Ombudsman Linda Waugh, NSW Ombudsman, 4 July 2014.

¹³¹ Email from Commissioner Peter Hastings QC, NSWCC to Deputy Ombudsman Linda Waugh, NSW Ombudsman, 29 October 2014.

In addition some police records could not be produced or were incomplete:

- Some police Duty Books and diaries that the NSWPF and individual police officers were unable to locate.
- Some NSWPF records that were incomplete or that lacked relevant signatures. For example, neither the NSWPF nor the NSWCC could locate a signed record of the Commissioner or Deputy Commissioner authorising Emblems, or a copy of the Emblems final report with all annexures attached.

2.3.3 Interviews and private hearings

During Operation Prospect:

- 131 witnesses appeared at a hearing or participated in an interview
- 107 hearings and 67 interviews were conducted
- 89 non-consecutive days were spent holding hearings or interviews.

The first hearing was held on 4 March 2013 and the last on 3 June 2016. The first interview was held on 9 November 2012 and the last on 15 April 2016.

2.3.4 Submissions and affected parties

In 2015 and 2016, Operation Prospect sent submissions to 38 affected parties for comment and response. There were 16 separate submissions sent to the parties comprising 1,425 pages. The shortest Operation Prospect submission was three pages and the longest was 439 pages.

In total, 27 affected parties were granted an extension of time to prepare a submission in reply. A total of 35 affected parties provided 61 submissions in reply comprising 1,626 pages. The Acting Ombudsman has separately considered each submission in reply in preparing this report.

2.3.5 Document inspections

The affected parties were given the opportunity while preparing their submissions in reply to attend the Ombudsman's office to inspect the physical records of all documents referred to in their particular Operation Prospect submissions. For each inspection, Operation Prospect staff compiled a chronological index of the documents available for inspection. The number of records for some inspections was small and could be compiled and indexed in a matter of hours. Others were large and took a number of days and involved multiple staff. Although resource-intensive, document inspection was a vital element of the procedural fairness process.

Twenty-seven of the 38 affected parties elected to do document inspections and 11 did not. An estimated 112 document inspections occurred, spanning 103 days and totalling approximately 627 hours. The shortest document inspection period was one hour and the longest by one party was 133 hours over 20 days.

The first document inspection occurred on 15 April 2015 and the last on 13 October 2016. As discussed in section 2.4.8, the procedural fairness process took longer than expected and the document inspection period spanned approximately 18 months.

2.3.6 Affidavits, warrants and associated records

The following affidavits, warrants and associated records were produced to Operation Prospect:

- 107 affidavits sworn in support of applications for 475 LD warrants. The LD affidavits comprised more than 3,900 pages. The shortest supporting affidavit was six pages long¹³² and the longest was 82 pages.¹³³ The average number of pages for each LD supporting affidavit was 37 pages.
- 111 affidavits sworn in support of applications for 246 TI warrants. The TI affidavits comprised more than 2,300 pages. The shortest TI affidavit was nine pages¹³⁴ and the longest was 40 pages.¹³⁵ The average number of pages for each TI supporting affidavit was 21 pages.
- 15 Mascot investigations tape logs comprising 1,144 entries from LD recordings.
- The original 498 page debrief with informant Sea, and 10 page induced statement
- Thousands of hours of audio recordings kept by the NSWCC and tens of thousands of pages of associated transcripts.

2.3.7 Operation Prospect staffing levels

Table 5 shows the average number of staff per year in the Operation Prospect team. The composition of the team varied from one stage of the investigation to another. For example, in Stages 1 to 3, most staff were investigators – whereas more lawyers and writers joined the team during the hearings and report writing stage. Generally, the team always included investigators, lawyers, administrative staff and writers.

Table 5: Average number of Operation Prospect staff per financial year

Year	Number (Full-Time equivalent)
2012-13	5.25
2013-14	10
2014-15	9.58
2015-16	12.87
2016-17	12.23

Source: NSW Ombudsman administrative data source, compiled 22 November 2016.

2.3.8 Resource allocation decisions between different allegations

A topic of public comment during Operation Prospect was the investigative resources devoted to particular issues. This section explains the approach adopted by Operation Prospect.

The scope of Operation Prospect and the range of individual allegations that were investigated stemmed from various sources – as explained in Chapter 1 (section 1.2). Some matters arose from complaints and public interest disclosures, some were referred by the PIC Inspector, the Ombudsman took over responsibility for aspects of an internal police investigation called Strike Force Jooriland, and other matters were investigated under the Ombudsman's own motion powers. These matters can be grouped under the following broad lines of inquiry:

- matters relating directly to the conduct of particular Mascot investigations
- matters relating to the unlawful or improper dissemination of documents relating to the Mascot, Emblems, Sibutu and Tumen investigations
- matters connected to the Mascot, Emblems, Sibutu or Tumen investigations that did not fall within the first two categories.

¹³² LD affidavit 02/08442.

¹³³ LD affidavit 262-268/2000.

¹³⁴ TI affidavit 093/1999.

¹³⁵ TI affidavit 174/2001.

In November 2014, after Operation Prospect had conducted nearly 12 months of private hearings, the Legislative Council of the NSW Parliament established a Select Committee to inquire into the conduct and progress of Operation Prospect.¹³⁶ The Chair and Deputy Chair of the Select Committee commented publicly at that time that they believed Operation Prospect was inappropriately directing investigative resources to investigating the unlawful or improper dissemination of documents.¹³⁷ In a media interview, the Chair of the newly established Select Committee observed:

... when a little over two years ago when we were approached by the government to support them in giving extra powers to the Ombudsman to fix all of this and to conduct hearings, we were told that we could get an answer within six months,¹³⁸ we were told that it would be looking at the areas of Operation Mascot, of Florida and Emblems and now we find that we're over two years down the track, we are being told sorry, I am being told – and I believe other members of Parliament have also been approached – that the Ombudsman has effectively moved off on a flight of fancy. And what he's trying to do now is to go after the people that have apparently – and I don't know where the documents came from – leaked documents from the failed inquiry of Emblems.¹³⁹

In an earlier interview, the Deputy Chair of the Select Committee was asked how Operation Prospect had become “some sort of quasi investigation into the releasing of documents”¹⁴⁰ when it should instead be focusing on “the heart of the matter ... the way that people were treated between 1999 and 2001”.¹⁴¹

... that is the very issue that this Parliamentary inquiry ... need to look at. How does an investigation that should be looking at potentially illegal secret warrants and what is – what went so horribly wrong between our crime agencies and the Supreme Court. How does it turn into an investigation into who told the public small amounts of information about this scandal?¹⁴²

However – after taking evidence during public hearings – the Select Committee concluded:

The committee is of the view that the Ombudsman is conducting a proper, thorough and hopefully conclusive investigation into a matter that is both incredibly important and incredibly complex. To this end, the committee acknowledges the hard work and dedication of the Ombudsman, his deputy and his staff.

The committee is satisfied with the explanation provided by the Ombudsman regarding his intention to properly investigate the propriety of listening device warrants obtained as part of the Mascot/Florida investigation and that his inquiry is not merely a witch-hunt to track down the person or persons who brought this matter to light.¹⁴³

The following information on the resources allocated to investigating the allegations of improper or unlawful dissemination of records are relevant to this issue:

- In 2013, one Operation Prospect investigator worked part-time for only part of the year on this line of inquiry. The main investigation priority at that time was the analysis and review of records and evidence relating to the Mascot investigations.
- In 2014, work on this line of inquiry started in March – after which one investigator worked full time on the matter for parts of that year, with part-time assistance from a junior staff member.

It is estimated that between 10 - 20% of time in interviews and private hearings was devoted to examining the allegations of improper and unlawful dissemination of official records (the broad estimate is because some hearings and interviews canvassed a mix of issues). Only one of the 16 Operation Prospect submissions prepared for affected parties related to this line of inquiry.

¹³⁶ NSW Parliament, Legislative Council, *Legislative Council Minutes No. 17 – Wednesday 12 November 2014*, 12 November 2014, pp. 277–279.

¹³⁷ Radio 2GB, Interview between Ray Hadley and the Hon David Borsak, MLC, 14 November 2014.

¹³⁸ It should be noted the Ombudsman has never advised or indicated that Operation Prospect could be completed within six months.

¹³⁹ Radio 2GB, Interview between Ray Hadley and the Hon David Borsak, MLC, 14 November 2014.

¹⁴⁰ Radio 2GB, Interview between Ray Hadley and David Shoebridge, MLC, 12 November 2014.

¹⁴¹ Radio 2GB, Interview between Ray Hadley and David Shoebridge, MLC, 12 November 2014.

¹⁴² Radio 2GB, Interview between Ray Hadley and David Shoebridge, MLC, 12 November 2014.

¹⁴³ NSW Parliament, Legislative Council, Select Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect', *The conduct and progress of the Ombudsman's inquiry 'Operation Prospect'*, February 2015, pp. 108-109.

2.4 Operation Prospect processes

This section explains the processes adopted by Operation Prospect in obtaining witness evidence, particularly in private hearings.

2.4.1 Deciding who should be examined in private hearings

Operation Prospect placed strong reliance on interviews and hearings to obtain direct evidence or commentary on the matters under investigation. The emphasis on obtaining direct evidence meant that not all individuals who may have had knowledge of Mascot operations were called to an interview or a hearing. For example, those named in LD warrants or who were recorded by LDs or TIs may have had no relevant knowledge of the decisions that led to them being named or recorded. For the same reason, it was not thought necessary or appropriate to elicit hearsay evidence from third parties about conversations involving police officers and journalists.

Operation Prospect closely considered all complaints and submissions, including those made to previous inquiries about Mascot. Many complainants were not called to give evidence in a private hearing as it was deemed unnecessary or inappropriate to make them repeat matters they had already addressed in writing or in an interview.

Some aspects of the Operation Prospect investigation were primarily done by reviewing documentation. It was unnecessary to elicit oral evidence on every matter. However, everyone who was likely to be the subject of adverse comment or findings was given the opportunity to make written submissions about the evidence considered and the provisional findings made about their actions. This is detailed further in section 2.4.8.

2.4.2 Reliance on documentary and oral evidence

The main focus of Operation Prospect has been on allegations about conduct that occurred between 1999 and 2002. At the start of Operation Prospect, many matters were already more than a decade old. Not surprisingly, the level of detail that witnesses could recall was affected by the passage of time. The lack of detailed recall is mentioned frequently in the chapters in this report.

This was another reason why the document review and analysis stage of Operation Prospect in 2013 was critically important – to identify, collate and compile a documentary history in preparation for the main hearings in 2014. This approach also reduced the duration of attendance of each witness and, for the most part, avoided witnesses being recalled.

This report is based on the documentary and oral evidence and the submissions. The oral evidence taken during Operation Prospect hearings was both an essential and necessary part of this investigation. Nevertheless, the report places great reliance on the contemporaneous documentary evidence in reaching findings and conclusions – particularly in relation to older matters on which witness memory has deteriorated over time.

2.4.3 Secrecy provisions and section 19A directions

Section 17 of the Ombudsman Act requires that an investigation by the Ombudsman “shall be made in the absence of the public”. The corollary of that requirement is two-fold – that oral evidence must be taken in a private interview or hearing, and that an obligation of confidentiality must apply to witnesses and the evidence they give.

The summons to each witness, under section 19 of the Ombudsman Act, to attend a hearing stipulated that the witness must not disclose any information about the summons or the requirement to give evidence. The notices issued to public authorities under section 18 of the Act to provide statements of information imposed the same confidentiality requirement.

Section 19C(1) of the Ombudsman Act makes it an offence for a person to whom a summons or a notice has been issued to contravene any non-disclosure requirement to the prejudice of the investigation. Similarly, section 19B(1) makes it an offence for a person to publish any evidence given before an Ombudsman inquiry or the contents of a document produced at the inquiry – except as permitted by the Ombudsman or the regulations.

Section 19A authorises the Ombudsman to issue directions that prohibit or restrict the publication of:

- evidence given before an inquiry
- the contents of any document, or a description of anything produced to the Ombudsman
- any information that might enable a person who has given or may be about to give evidence before an inquiry to be identified or located
- the fact that any person has given or may be about to give evidence before an inquiry.

The Ombudsman must not give a direction under section 19A(1) unless satisfied that it is in the public interest to do so.¹⁴⁴ A similar requirement to section 19A is to be found in section 112 of the *Independent Commission Against Corruption Act 1988* (ICAC Act) and section 52 of the PIC Act.

During Operation Prospect, the Ombudsman issued section 19A(1) directions to all witnesses required to give evidence at private hearings and to all parties who received written submissions from Operation Prospect during the procedural fairness process. Those directions served multiple purposes, including:

- safeguarding the integrity of the investigation by keeping confidential the evidence that was obtained and the avenues and methods of investigation
- preventing collusion and discussion among witnesses
- protecting the identity (and therefore the safety, health and welfare) of witnesses, who may have given confidential and sensitive information to the inquiry
- protecting the identity of people who were referred to in evidence or in submissions
- precluding the disclosure of provisional facts, findings and recommendations that may be altered after the procedural fairness process.

The non-disclosure directions remain in force after the publication of this report – to the extent that they were issued to parties who are anonymised in this report or they apply to evidence (or the fact of giving evidence) that is not revealed in this report.

The Ombudsman may vary a direction under section 19A(1) in response to a request or application to enable the person to speak with a medical practitioner, psychiatrist, psychologist, spouse or family member about certain matters. All such requests were granted during Operation Prospect. The most frequent reason for a variation to be sought was to speak with a spouse or family member.

In September 2015, the Acting Ombudsman issued a variation applying to every witness who had not already made an application to permit them to speak with a medical practitioner, psychiatrist or psychologist.

2.4.4 Alleged breaches of section 19A directions

Operation Prospect received two allegations between October and November 2014 that a witness at a private hearing had breached a section 19A direction. There was a further alleged breach by another witness in February 2015. In the second half of 2016, it appeared that a number of other potential breaches may have occurred.

The first allegation was initially pursued, with a summons issued to the witness allegedly in breach of the direction. The witness submitted a medical certificate in support of a claim not to be able to attend a further hearing for medical reasons. The Presiding Officer at the hearing accepted the claim and the medical certificate, and the proposed hearing was delayed for an unspecified period.

¹⁴⁴ Ombudsman Act, s. 19A(2).

Further action to examine the first two allegations was suspended when the Ombudsman dedicated the resources of the office to participating in the inquiry into the progress of Operation Prospect by a Select Committee in November 2014, and to completing the Operation Prospect hearings scheduled for 2014.

In early 2015, the statutory timeframe for referring any breach of section 19A to the DPP had expired for the first two allegations. Similarly, the statutory timeframe for referring any breach of the third allegation expired in mid-2015, after priority being given to providing assistance to Counsel Assisting. A similar outcome applied to the allegations that emerged in the second half of 2016, as a result of priority being given to completing the procedural fairness stage and finalising this report. Another consideration, in one or more of the cases, was that potential evidentiary and other issues could have delayed the investigation of the alleged breach beyond the statutory timeframe for referral action to be taken.

2.4.5 Issuing a notice of investigation to a public authority or police officer

Operation Prospect was an investigation conducted under section 13 of the Ombudsman Act. This provides that the Ombudsman may investigate the 'conduct of a public authority' if it appears to the Ombudsman that the conduct may constitute maladministration of a kind referred to in section 26 of the Act. A similar provision in section 122 of the Police Act applies to police conduct that the Ombudsman may investigate.

At the time of deciding to investigate the conduct of a public authority or police conduct, the Ombudsman is required by section 16 of the Act to give notice of that decision to any person who has complained about the conduct (the complainant), to the head of the public authority and, if practicable, to the person or agency the subject of the investigation. As noted in section 2.1.2, an individual may fall within the definition of 'public authority' under section 5 of the Act and receive a notice of investigation under section 16. The Act does not prescribe when or how the notice of investigation is to be given.

At the start of Operation Prospect, written notices under section 16 were issued to the NSWPF and the NSWCC – and the PIC was given a summons to produce documents. The Ombudsman made public announcements about the commencement of investigations that broadly described the types of matters that would be investigated.

Notices under section 16 were not given at this initial stage to any individuals. There was no clear evidentiary basis to do so and no decision had yet been made by the Ombudsman to make the conduct of any individual the subject of investigation. Complainants to Operation Prospect were advised if their allegations were accepted by Operation Prospect for investigation. Public announcements were also made that Operation Prospect was investigating matters relating to the NSWCC, the NSWPF, and the PIC.

Similarly, a decision by the Ombudsman to require a person to provide a statement of information under section 18 of the Ombudsman Act – or to give evidence at a private hearing under section 19 – did not carry any implication that the person's conduct was a subject of investigation.

The decision to investigate police conduct or the conduct of an individual can be based on an analysis of the information and oral evidence that is gathered both from that person and from others, and on the submissions of Counsel Assisting. The full list of authorities and individuals to be made a subject of investigation had not been decided when Operation Prospect started. As Operation Prospect was a broad and multifaceted investigation into the actions of multiple public authorities and a wide range of conduct, the scope of the investigation – and the decisions about who would be the subjects of investigation – had to be clarified during the course of investigation.

In most cases, the decision to issue a section 16 notice to an individual was made at the time that the Ombudsman determined that it was necessary to ask the person to respond to provisional findings, comments or recommendations in the Operation Prospect submissions. A section 16 notice was issued at the same time as the person was invited to respond to the submission. In a few instances, a section 16 notice was issued at an earlier stage when a decision was made that the individual's conduct or police conduct would be a subject of investigation. This occurred if the Ombudsman was satisfied without written submissions from Counsel Assisting that a strong evidentiary basis existed to suggest that a person may have engaged in conduct of the type described in section 26 of the Ombudsman Act or section 122 of the Police Act. The head of the relevant

public authority was advised when a notice of investigation was given to a person in relation to their conduct while working at that agency.

Some parties expressed concern at receiving a section 16 notice at the same time as receiving the Operation Prospect submission containing provisional statements and findings – rather than at an earlier time when they were called as a witness. Some individuals complained that they were led to believe from discussion with Operation Prospect staff or Counsel Assisting that they were being called as a witness, not as a person against whom adverse findings may be made. A few individuals asked for an undertaking during their interview or hearing that they were not a subject of investigation. On each occasion, the person was advised that their conduct was not the subject of investigation if a section 16 notice had not been issued to them. However, witnesses were also advised that the Ombudsman could decide at a later stage to make their conduct a subject of investigation and, if so, they would then receive notice of that decision in accordance with section 16. The Ombudsman's office has acted throughout to mitigate any actual or perceived prejudice to a person as a consequence of receiving a notice under section 16 during the course of the investigation. The summons requiring a person to attend a hearing briefly explained the scope of Operation Prospect and particularised the conduct and allegations that may be examined in the hearing. Each summons included a page of information about the availability of legal assistance through the Legal Representation Office (LRO) for those receiving the summons. Similar advice was generally given to those required to attend an interview.

Some parties have claimed that they may have acted differently if they had received a notice of investigation under section 16 at an earlier stage. For example, some parties stated they may have prepared differently for a hearing or obtained legal representation at an earlier stage. In the majority of cases, witnesses within this category were legally represented at all hearings or interviews. It is important also to note that a witness who is a public authority is unlikely to have been disadvantaged by not being accompanied by a legal representative who could advise the person to object on a ground of privilege to answering a question or providing information or documents. The effect of section 21 of the Ombudsman Act is that a witness who falls within the definition of a public authority cannot claim grounds of privilege that may operate in another forum – such as a public interest immunity claim or the privilege against self-incrimination. A public authority can only decline to answer a question or produce a document if a valid claim of Cabinet confidentiality is made out (section 22). This was explained in a document attached to the summonses, titled 'Advice to Legal Representatives in Inquiries pursuant to the provisions of section 19 of the Ombudsman Act 1974'.

Some witnesses were given documents to review before their examination. Whether this occurred was not based on the person having received a notice under section 16 but on other considerations.

2.4.6 Provision of legal representation services

All witnesses in Operation Prospect were entitled to access no-cost legal representation and legal advice through the Legal Representation Office (LRO). This office was established by the NSW Government to provide independent legal advice and representation to people who are required to give statements, documents or evidence to the PIC, the Independent Commission Against Corruption (ICAC) and other Royal and Special Commissions of Inquiry. Some witnesses used this legal service, others chose their own counsel and some were unrepresented.¹⁴⁵

2.4.7 Provision of welfare services

Confidential and comprehensive welfare services were provided to Operation Prospect witnesses under an agreement between the Ombudsman's office and Davidson Trahaire Corpsych (DTC). Those services were also available to the family members of witnesses. The DTC counsellors are trained to refer clients to other services, including medical practitioners, as necessary.

¹⁴⁵ One complainant gave evidence at a public hearing on 29 January 2015 for the *Select Committee on the conduct and progress of the Ombudsman's Inquiry 'Operation Prospect'* that the LRO had declined to provide him with financial assistance on the basis he was not a current or former police officer. This office is not directly aware of any refusals of assistance by the LRO.

The counselling service was completely confidential. The arrangement with DTC was structured so that the Ombudsman's office was not advised of – and could not request information about – the identity of people who sought counselling. The counselling services were provided independently of the proceedings of Operation Prospect. As noted in section 2.4.3, the non-disclosure directions to witnesses under section 19A of the Ombudsman Act were varied in all cases to allow people to consult with, for example, a mental health professional or a family member. These arrangements are not routinely provided to parties required to participate in other inquiries – for example, before the ICAC or PIC. The Ombudsman made these arrangements in response to the concern expressed by many people about the ongoing distress resulting from the unresolved matters being investigated by Operation Prospect.

2.4.8 Affording natural justice/procedural fairness to parties

Section 24 of the Ombudsman Act requires that natural justice (also called procedural fairness) be observed by the Ombudsman in two ways:

- a public authority given a notice under section 16 of the Ombudsman Act must be given an opportunity to make a submission on the matters under investigation
- before a report is made that contains adverse comment about any person, that person must be given an opportunity to make submissions on the substance of the grounds of the adverse comment.

The common law supplements those provisions in a number of ways that are relevant to this investigation. An example is the requirement that a person be told of adverse information before the decision maker that is credible, relevant and significant to the decision to be made, and be given a reasonable opportunity to respond.¹⁴⁶

In the first half of 2015, the Ombudsman wrote to everyone about whom an adverse comment or finding had been proposed by that time. They were each given an opportunity to make a submission in reply to the provisional statement, including the opportunity to inspect documents referred to in the submissions given to them. In the latter half of 2015, a further two parties were sent Operation Prospect submissions with an invitation to make a submission in reply.

The analysis by Operation Prospect of the submissions made by affected parties – together with the receipt of fresh information and the further analysis of existing evidence – identified issues that were not fully addressed in the earlier Operation Prospect submissions. This resulted in additional hearings, as explained in section 2.2.5. The analysis of evidence and identification and clarification of issues also resulted in additional provisional adverse comments and findings. As a result, a further 10 submissions were provided to affected parties in 2016 to enable them to make a submission in reply. In total, Operation Prospect sent submissions to 38 different parties. Two parties also received correspondence advising that additional records would be referenced in the final public report and were invited to inspect the documents and make submissions on the content of those records.

The Operation Prospect procedural fairness process extended into October 2016 – much longer than initially anticipated. The factors contributing to this extension were that document inspections by parties took longer than expected, some key witnesses provided supplementary submissions over some months, and some witnesses were granted an extension to provide their submissions as they had reasonable and significant grounds that prevented them from responding earlier.

2.4.9 Changes to agency procedure and practice

The Operation Prospect investigation was primarily concerned with conduct that occurred between 1999 and 2002. It is evident that during this period there were systemic failures and weaknesses within the NSWCC that are discussed in Chapter 16. Similarly, there were weaknesses at the time in the relationship between the NSWCC and the NSWPF as well as in NSWPF practices and procedures – including in SCIA. Significant change and reform has, understandably, taken place in the intervening years in both organisations.

¹⁴⁶ *Kioa v West* (1985) 159 CLR 550, p. 629.

A fundamental weakness in the era of the Mascot investigations was that no independent agency was able to conduct an investigation when complaints started to emerge in 2002 (see section 2.1.1). No oversight agency at that time – for example, the PIC, the Ombudsman or the ICAC – had jurisdiction to investigate the complaint issues that were being raised. There was some response at the time by the NSWCC, the PIC Inspector and the NSW Government, but this response was ineffective to quell the rising controversy – as discussed in Chapters 9 and 13.

This deficiency in the oversight and accountability framework applying to the work of the NSWCC has since been addressed. Noteworthy reforms include:

- The PIC's jurisdiction was expanded in 2008 to include the detection, investigation and prevention of misconduct of officers of the NSWCC.¹⁴⁷ Further amendments in 2012 clarified the PIC's powers to investigate the conduct of NSWCC officers.¹⁴⁸
- The Crime Commission Act replaced the NSWCC Act. The new Act implemented the NSW Government's response to the findings and recommendations of the Special Commission of Inquiry into the New South Wales Crime Commission, led by Mr David Patten.¹⁴⁹ One key accountability reform was the establishment of an independent NSWCC Inspector, whose principal functions involve auditing NSWCC operations, dealing with complaints of abuse of power, misconduct, impropriety or maladministration by NSWCC officers and assessing the effectiveness and appropriateness of NSWCC procedures relating to the legality or propriety of its activities.¹⁵⁰ Another reform was to give the Parliamentary Joint Committee constituted under Part 4A of the Ombudsman Act, responsibility for monitoring and reviewing the exercise of functions by the NSWCC, its Management Committee and the NSWCC Inspector.¹⁵¹

After the *Law Enforcement Conduct Commission Act 2016* (LECC Act) comes into operation, the role of the NSWCC Inspector and the PIC's role in overseeing the NSWCC and its officers will be transferred to the new Law Enforcement Conduct Commission (LECC). The LECC's jurisdiction will include the oversight and investigation of allegations of serious misconduct¹⁵² and maladministration by NSWCC officers or the NSWCC itself.¹⁵³ The Parliamentary Joint Committee will retain a role in relation to the NSWCC and its Management Committee, and will also monitor and review the exercise of functions by the LECC and the LECC Inspector.¹⁵⁴

Important changes have also occurred in NSWCC management and operational practices and procedures. It is beyond the scope of Operation Prospect to analyse current NSWCC policies, practices and procedures. This report therefore does not include any recommendations directed to current matters. It is for the NSWCC and its Management Committee to examine whether the past internal systemic failures and procedural deficiencies that are identified in this report have been adequately remedied.

For the same reasons, this report does not include any analysis of current NSWPF procedures and practices or recommendations for reform. SCIA has undergone significant internal review and change since the Mascot investigations. It is for the NSWPF and its current management to ensure that the procedural and other problems identified in this report have since been remedied.

The only recommendation in Chapter 16 of this report addressed to both the NSWCC and NSWPF concerns the operation of joint task forces. The report recommends that both agencies ensure there is a clear reporting structure and appropriate supervisory arrangements for joint task forces.

147 *Police Integrity Commission Amendment (Crime Commission) Act 2008* inserted ss. 5B and 13B into the PIC Act.

148 *Police Integrity Commission Amendment Act 2012*, s. 4. See also ss. 3, 13 of the same Act.

149 Patten, D., *Report of the Special Commission of Inquiry into the New South Wales Crime Commission*, 30 November 2011, pp. 12, 118-120. This Special Commission followed the conviction of Mark Standen, Assistant Director of the NSWCC, for serious importation and drug supply charges and conspiring to pervert the course of justice.

150 Crime Commission Act, ss. 62(1)(a) to (d).

151 Crime Commission Act, Part 5.

152 LECC Act, s. 10.

153 LECC Act ss. 11(1), 11(2).

154 LECC Act, s. 131(a). For further detail regarding these major reforms of the accountability mechanisms relevant to the NSW Crime Commission, see Appendix 3.7.2.

In two other areas, this report makes recommendations for change to practices or processes that are largely the same as in the Mascot investigations era. The first is in the warrant authorisation process in NSW. Although there has been legislative change, the procedures and controls in the authorisation process for LD and TI warrant applications in NSW are much the same as in 1999 and 2000. It was beyond the scope of Operation Prospect to examine whether the problems identified in the Mascot investigations no longer occur. The most that can be said is that the processes for assessing and authorising warrants retain the same vulnerability and risk exposure, and that shortcomings in warrant and affidavit preparation may not easily be detected. For those reasons, Chapter 19 makes recommendations for improving the current system for warrant authorisations. A draft of the chapter and recommendations were given to the Chief Justice of NSW for comment.

Another area where this report recommends change is to the DPP Prosecution Guidelines – about the authority to offer an inducement to an informant in an investigation under a NSWCC reference – discussed in Chapter 14. The guidelines on that topic remain the same as they were during the Mascot investigations. The discussion of this issue in Chapter 14 was given to the DPP for comment.

2.4.10 Recommendations for apologies

In a number of places in this report, a recommendation is made that either the NSWCC or the NSWPF provide a written apology to an individual for actions taken by the agency or its staff during the Mascot investigations. The identity of the individuals to whom an apology should be made is anonymised in this report. The agencies have been advised of their identities and the individuals have been advised of the recommendations. It remains the decision of the agency whether to accept an Ombudsman recommendation.

2.5 Selected legal issues

A feature of Operation Prospect is that many of the affected parties were legally represented. There has been regular correspondence with the parties on legal issues to do with the scope and conduct of the investigation.

Some issues that were frequently raised by the parties are addressed earlier in this chapter – for example, the legal basis for this investigation, the Ombudsman's reporting powers, and the procedure for issuing a notice of investigation to a public authority or a police officer under section 16 of the Ombudsman Act. Some other issues were addressed in the Acting Ombudsman's Progress Report to the Parliament in November 2015 – for example, the implications flowing from the change in Ombudsman in 2015, and whether the Acting Ombudsman can rely upon oral testimony given at a hearing at which the former Ombudsman presided. It is not necessary to repeat what was said in the Progress Report about those matters.

This section will briefly address some other legal issues that parties have frequently raised. They are: the application of natural justice principles to Operation Prospect; not allowing cross-examination of witnesses; the Ombudsman's power to make 'findings' in a report; and the meaning of some of the grounds in the Ombudsman Act and the Police Act on which a finding can be made ('unreasonable conduct', 'otherwise wrong' and 'unlawful conduct').

2.5.1 Application of natural justice principles to Operation Prospect

It was noted earlier in this chapter (section 2.4.8) that both the Ombudsman Act and the common law require that natural justice be observed by the Ombudsman in conducting and reporting on this investigation. This chapter (and the Progress Report) have explained the numerous steps that have been taken to ensure that natural justice is observed to the fullest extent practicable. They include: conducting interviews and hearings with parties; providing parties with a provisional statement of adverse findings and recommendations and allowing a submission in reply; facilitating document inspection after service of the provisional statements; granting extensions of time for document inspection and submissions in reply; and replying orally and in writing to individual inquiries, including by providing further particulars of adverse findings.

Some parties have continued to insist that natural justice requires that additional steps be taken. The most common suggestions have been that parties should be given broader access to the evidence or submissions of other parties, that a draft copy of the final report should be made available for comment, and that cross-examination of other parties should be permitted. Broadly speaking, those assertions rely on a misconception as to the requirements of natural justice in an investigation of this kind. This will be explained by reference to settled principle.

Investigations such as Operation Prospect are administrative, not judicial. The investigations are inquisitorial in nature, in which the role of the investigator (the Ombudsman) is to ascertain the truth of a matter that is under examination, by following the leads presented by the unfolding evidence.¹⁵⁵ As the investigation proceeds:

*... hypotheses are formed and subjected to continuous assessment ... suspicions and inferences are tested and refined. Some are confirmed, others are not. Hypotheses are likewise re-evaluated and re-shaped as the process continues. A series of possibilities may be considered and discarded during the course of a particular inquiry.*¹⁵⁶

Investigations are not adversarial legal proceedings in which “the State and elements of the executive are pitted against persons summoned for examination or the interests that those persons represent”.¹⁵⁷ The purpose of an investigation, and the procedure followed in it, bear no relation to an adversarial judicial proceeding that is conducted to resolve a dispute defined by opposing parties.¹⁵⁸

In the course of an investigation, the Ombudsman is undoubtedly required to accord natural justice.¹⁵⁹ However, the content of that obligation is not immutably fixed.¹⁶⁰ When natural justice is required in the exercise of a statutory function, its content is shaped by the legislative framework giving rise to that function.¹⁶¹ This means that the content of procedural fairness in an investigation is not what would be required in judicial proceedings.¹⁶² Importantly, whether the obligation to accord natural justice has been satisfied is a matter to be assessed primarily at the conclusion of the investigation and presentation of a final report.¹⁶³ Only at that stage can be assessed whether a party has had a fair opportunity to make submissions on matters that are adverse to their interests.

In the present context, the ‘hearing rule’ component of natural justice requires that a person against whom adverse comment may be given, or an adverse finding may be made, is advised of the nature of the comment or finding and given a reasonable opportunity to respond.¹⁶⁴ More specifically, these persons should be told of the nature and purpose of the investigation, the issues to be considered, and the nature and content of the information that might be taken into account in the course of coming to a conclusion that may be adverse to them.¹⁶⁵ They are also to be given an opportunity to respond.¹⁶⁶ However, informing a person of the nature and content of material that may be taken into account does not mean that they are entitled to access and inspect all the material that has been gathered in the investigation and that may be referred to.¹⁶⁷

155 *R v Independent Broad-based Anti-corruption Commissioner* (2016) 256 CLR 459 at [74].

156 *Duncan v Ipp* [2013] NSWCA 189 at [217]. The peculiar nature of investigative proceedings, and the way they differ from judicial proceedings, has been noted in many cases, including *Glynn v Independent Commission Against Corruption* (1990) 20 ALD 214, *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 at [690] and *McMillan v Director-General of Communities NSW* [2009] NSWSC 1236 at [210].

157 *Duncan v Ipp* [2013] NSWCA 189 at [217].

158 *Duncan v Independent Commission Against Corruption* [2016] NSWCA 143 at [690].

159 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [99]-[104], [126], [179]-[181]; *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29 at [75]; *Obeid v Ipp* [2016] NSWSC 1376 at [83].

160 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at [156].

161 *NCSC v News Corp Ltd* (1984) 156 CLR 296, p. 326; *Duncan v ICAC* [2016] NSWCA 143 at [688].

162 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [24]; *McCloy v Latham* [2015] NSWSC 1879 at [114]; *New South Wales v Canellis* (1994) 181 CLR 309, pp. 329-330.

163 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, p. 578; *Brettingham-Moore v St Leonards Corporation* (1969) 121 CLR 509, p. 521; *Minister for Local Government v South Sydney City Council* [2002] NSWCA 288 at [28]; *Botany Bay Council v New South Wales* [2016] NSWCA 243 at [79].

164 *Glynn v Independent Commission Against Corruption* (1990) 20 ALD 214; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, pp. 590-591 (cited with approval *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [32]); *Obeid v Ipp* [2016] NSWSC 1376 at [96].

165 *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29 at [83], *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, pp. 590-591.

166 *Glynn v Independent Commission Against Corruption* (1990) 20 ALD 214.

167 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [27]-[29].

Nor are they entitled to access all of the 'adverse' material submitted by other persons; such a practice has been described as "unworkable, because it would lead to an infinite regression of counter-disputation".¹⁶⁸ Finally, there is no obligation for a decision maker to provide a preview of his or her proposed findings or conclusions,¹⁶⁹ provisional views,¹⁷⁰ or mental processes.¹⁷¹

The particular nature of Operation Prospect, which was required to be carried out in private and involved large quantities of sensitive and confidential material, reinforced the need to restrict access to material considered by the Ombudsman in the course of the investigation. To honour the requirement that natural justice be accorded to each interested person, it was necessary to quarantine provisional conclusions and findings pertaining to each person from other interested persons until each had been given a chance to respond. To have done otherwise, and enable parties to comment on the provisional conclusions and findings relating to other parties, would be to defeat the purpose of the procedural fairness process. It would entail disclosure of adverse comments about parties before they had an opportunity to submit that the adverse comments should not be sustained.¹⁷²

2.5.2 Cross-examination

Some parties formally requested the opportunity to cross-examine the witnesses who provided evidence at hearings convened by Operation Prospect. These requests were made at the commencement of Operation Prospect, and were repeated throughout – with the implication that hearings should be reconvened and witnesses recalled.

The Ombudsman determined at the outset that cross-examination would not be permitted. There has been no departure from that ruling during Operation Prospect. The practice adopted instead was that Counsel Assisting was appointed and led the examination of witnesses. Individuals who were called as witnesses were advised they could apply to be legally represented during their examination, and many were in fact represented.

In the absence of any legislative provision to the contrary, the 'hearing rule' component of procedural fairness does not require that there be a right to cross-examine witnesses appearing before an investigative hearing.¹⁷³ As the High Court noted in another investigative context, providing interested people with a right to cross-examine witnesses would make the investigation "so protracted as to render it practically futile".¹⁷⁴ That observation captures the impracticability of permitting cross-examination in Operation Prospect, given the size and complexity of the investigation, the fact that it was required by the Ombudsman Act to be held in the absence of the public, and that the investigation relied heavily on document analysis. The investigation involved 131 witnesses appearing in 104 hearings and examinations. It was neither necessary nor appropriate to permit cross-examination by all or any of those parties.

2.5.3 Ombudsman findings

The Ombudsman Act and the Police Act contain a number of differently worded provisions to regulate how the Ombudsman is to report the results of an investigation. Operation Prospect has received submissions that seek to differentiate between those provisions and to imply limitations on the Ombudsman's reporting powers.

In essence there were two propositions in the submissions: that a report under section 26 of the Ombudsman Act can contain 'findings', but not a report under section 157 of the Police Act; and that a report to Parliament under either section 31 of the Ombudsman Act or section 161 of the Police Act cannot contain findings.

168 *Minister for Local Government v South Sydney City Council* [2002] NSWCA 288 at [267].

169 *Lawrie v Lawler* [2016] NTCA 03 at [192]; *Victims Compensation Fund Corporation v Nguyen* (2001) 52 NSWLR 213, p. 220.

170 *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; 241 CLR 594 at [9].

171 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, pp. 590-591; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [32].

172 In a very small number of cases where the same provisional finding applied to conduct in which two parties participated, both parties were informed that it applied jointly. In the case of Bradley he was given a copy of all provisional findings against the NSWCC, as he was the Commissioner of the NSWCC at the time the conduct occurred.

173 *NCSC v News Corp Ltd* (1984) 156 CLR 296, pp. 313-314; *Kingham v Cole* [2002] FCA 45; *Bundagen Co-operative v Battle* [2010] NSWSC 160 at [25]; *De Luca v Warringah Shire Council* [2011] NSWSC 1280.

174 *NCSC v News Corp Ltd* (1984) 156 CLR 296, p. 314 (in the context of a private investigation conducted by the NCSC).

The term 'finding' is a popular term that describes the results of an inquiry or investigation. It is a familiar term in legal reasoning, but is used more broadly. The term is used frequently in this report to conclude Operation Prospect's analysis of the evidence, information and submissions on particular points. Nothing more is meant by the term 'finding' other than that it is an apt expression for the conclusions reached in this report.

Section 26(1) of the Ombudsman Act explicitly sanctions that usage. The section provides that "Where, in an investigation ... the Ombudsman *finds* that the conduct the subject of the investigation" contravenes one of the grounds in section 26, "the Ombudsman is to make a report accordingly, giving his or her reasons" (emphasis added). Section 26(2) provides that the Ombudsman's report "may recommend" that remedial action be taken by the public authority, for example, that a decision be reconsidered, reasons be given or that compensation be paid. (Examples of the grounds for an investigation, discussed below, are unreasonableness, irrelevant considerations, contrary to law, otherwise wrong, and failure to give reasons.)

The Police Act uses different wording, spread over two sections. Section 122 lists the grounds that can be the subject of an investigation under the Act into "a complaint that alleges or indicates" a breach of one of those grounds (the grounds are similar to those in the Ombudsman Act). (similar to those in the Ombudsman Act). Section 157(1) and (2) provide that: "At the conclusion of an investigation ... the Ombudsman must prepare a report on the investigation" and the report "may include such comments and recommendations as the Ombudsman considers appropriate". By implication, the Ombudsman is to express a view on whether the matter alleged in a complaint is substantiated.

The different language in the Ombudsman Act and Police Act provisions is best explained by the different structure of the complaint investigation and reporting provisions in both Acts. In substantive terms the Acts are similar: both list the grounds on which the Ombudsman can undertake an investigation, both require the Ombudsman to prepare a report on the results of the investigation, and both authorise the Ombudsman to make recommendations for remedial action. It is hard to see why anything should turn on the use of the common language term 'finding' to express the results of an investigation under either Act. Indeed, substitute terms are used in other Ombudsman Act provisions to explain the action the Ombudsman can take following an investigation: for example, section 29 provides that the Ombudsman must provide "the results of the investigation" to a complainant, and may include "such comments" as the Ombudsman thinks fit. Section 31B(2)(d) uses the inclusive phrase "the findings, recommendations or other decisions of the Ombudsman" in defining the role of the Parliamentary Joint Committee on the Ombudsman.

Both Acts also provide, in identical language, that "The Ombudsman may, at any time, make a special report to the Presiding Officer of each House of the Parliament on any matter arising" in connection with the discharge or exercise of the Ombudsman's functions.¹⁷⁵ Neither Act spells out the content of the report that the Ombudsman can make to the Parliament, other than that it can be a report "on any matter" relating to the discharge or exercise of the Ombudsman's functions. By implication, the report to the Parliament could be the same report that the Ombudsman has prepared under section 26 of the Ombudsman Act or section 157 of the Police Act. There is no apparent reason to read down the broad language that authorises the Ombudsman to report to the Parliament. Indeed, it is consistent with the role of the Ombudsman under those Acts that the broad meaning should be retained. In particular, there is no reason to preclude the Ombudsman from using the term 'finding' to express the results of an Ombudsman investigation in a report to the Parliament.

A final matter to note is that there is case law on the use of the term 'finding' in administrative investigations. However, the issue in contention was the nature of the finding that an administrative investigative agency could make, rather than its use of the term 'finding' to conclude its investigation. In *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman*,¹⁷⁶ the Federal Court held that the Commonwealth Ombudsman could not express a 'finding' of criminal guilt or disciplinary breach, as opposed to expressing an 'opinion' being the term used in the legislation. Similarly, in *Balog v Independent Commission Against Corruption*,¹⁷⁷ the High Court held that ICAC was not authorised under its statute to include in a report a finding that a person may be guilty of a criminal offence or corrupt conduct.

¹⁷⁵ Ombudsman Act, s. 31(1), Police Act, s. 161(1): the Ombudsman Act uses the phrase "discharge" of functions, while the Police Act uses the phrase "exercise of functions".

¹⁷⁶ (1995) 134 ALD 238.

¹⁷⁷ (1990) 169 CLR 625. The ICAC Act was amended following this decision to remove this limitation on ICAC's reporting powers.

The basis of the ruling in both cases was not the use of the word ‘finding’ per se, but that a non-judicial body should not reach a finding of criminal guilt. The High Court has subsequently departed from that rationale, in *Australian Communication and Media Authority v Today FM (Sydney)*, emphasising that the scope of the reporting powers of an agency will depend on the words of the statute under which it acts. Importantly, the Court held that “it is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action”.¹⁷⁸ Applying that principle, the Court held that ACMA could reach a finding that Today FM had breached a condition of its licence by using the licence in the commission of an offence.

The Police Act confers an express power on the Ombudsman to conduct an investigation into whether police conduct constituted an offence or corrupt conduct. The Ombudsman Act confers an express power to investigate whether the conduct of a public authority was contrary to law. This report, accordingly, contains findings that rely on those powers. It is accepted nevertheless that an Ombudsman investigation does not apply the criminal standard of proof (‘beyond reasonable doubt’) and that the Ombudsman may rely on evidence that would not be admissible in a criminal prosecution (see section 2.1.5). With that in mind the findings in this report are expressed in a qualified manner, namely, that the conduct in question ‘may’ constitute an offence.

2.5.4 Conduct that is unreasonable, unjust, oppressive or ... otherwise wrong

The culmination of an Ombudsman investigation may be the preparation of a report under the Ombudsman Act or the Police Act. As explained earlier in section 2.1.2, the focus of the Operation Prospect investigation is upon whether the conduct of a public authority or a police officer has contravened one of the grounds of investigation specified in either section 26 of the Ombudsman Act or section 122 of the Police Act. The collective description of those grounds is ‘maladministration’ or ‘wrong conduct’. As that collective description suggests, there is considerable overlap between many of the grounds.

Some of the grounds are self-explanatory and require no elaboration – for example, that conduct was based on an irrelevant consideration or a mistake of law or fact. To the extent that findings in this report are based on those grounds, the nature and relevance of the ground will be clear from the discussion. The same can be said of another ground in the Ombudsman Act on which a finding is based in this report – that reasons should have been but were not given for particular conduct. Some other grounds in the Ombudsman Act and Police Act are not applied in this report and do not need elaboration (namely, conduct that was improperly discriminatory, or based on improper motives).

Other grounds on which findings in this report are based should be explained. The first is that conduct was ‘unreasonable’.¹⁷⁹ As used in the Ombudsman Act that term bears its popular or dictionary meaning.¹⁸⁰ Accordingly, the issue is whether, viewed objectively, particular conduct was not based on reason or good sense, or displayed poor judgement in the circumstances. This is to be contrasted with the doctrine of unreasonableness that can be a ground for judicial review of administrative action, which is generally thought to be a narrower and more demanding ground.¹⁸¹

This broad concept of unreasonableness in the Ombudsman Act and the Police Act has been applied in a few situations in this report. One is where a supporting affidavit for a LD or TI warrant included inaccurate information about a person, with the apparent result of strengthening the case for the warrant to be granted. It is self-evidently unreasonable, in a document sworn in support of an application to a judicial officer for authorisation to use an intrusive investigation technique, to include inaccurate information that could have been readily checked by appropriate diligence. For similar reasons the finding of unreasonableness is applied in this

¹⁷⁸ *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 at [33].

¹⁷⁹ Ombudsman Act, s. 26(1)(b).

¹⁸⁰ See *Re Hospital Benefit Fund of Western Australia Inc* (1992) 28 ALD 25 at 84, on the broad meaning of statutory unreasonableness.

¹⁸¹ For example, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332.

report in situations where exculpatory information was not included in an affidavit or internal report; adverse information was exaggerated, overstated or misrepresented; a briefing document to senior officers contained misleading and inaccurate information; a person was inappropriately named in an affidavit without a supporting explanation or evidence; or the reasoning to support a decision to integrity test an officer was deficient.

Findings of unreasonableness are also recorded against the NSWCC and the NSWPF, and individually against senior officers, for the way in which their supervisory, guidance and managerial functions were discharged. The common situation, once again, was that a decision was inappropriately made to investigate the conduct of a police officer using intrusive investigation techniques or an integrity test. Some investigation strategies were based on weak or unreliable information that was not properly tested or assessed, or the use of alternative investigation methods was not properly considered. A finding made frequently against the NSWCC is that it failed to ensure its own policies, practices and procedures were carefully followed by the Mascot Task Force in the conduct of investigations.

There are other individual situations in which the ground of unreasonableness is applied in this report, particularly in relation to senior officers. They include failing to deal properly with a perceived conflict of interest, failing to report the unexpected receipt of confidential official information that was apparently disseminated in an unauthorised manner, and failing to secure confidential information to avoid its unauthorised dissemination.

The Ombudsman Act, but not the Police Act, includes the ground that conduct was 'otherwise wrong'.¹⁸² The implicit purpose of that ground is to supplement the individual and more specific grounds in section 26, by enabling the Ombudsman to examine whether the conduct of a public authority complied with standards of good administration. That is a broad concept that defies precise definition, or a static meaning. In part, it is left to the Ombudsman to elaborate on the standards of administration that should be expected of a public authority, having regard to the nature of the decision being made, the impact of the decision on individual interests, and contemporary expectations of government conduct.

In this report, findings of 'otherwise wrong' conduct are recorded against the NSWCC and individually against senior officers. The findings against the NSWCC are in conjunction with findings of 'unreasonable' conduct. Both are made on the same basis, that the NSWCC failed to ensure its own policies, practices and procedures were carefully followed by the Mascot Task Force in the conduct of investigations. That constitutes a failure by the NSWCC at the time to implement standards of good administration. The 'otherwise wrong' findings against individual officers also relate to their failure to ensure that standards of good administration were properly observed in conducting integrity tests, maintaining oversight of affidavit preparation, and discharging official functions.

In one instance a finding is made that the conduct of an officer was 'unjust' and 'oppressive'.¹⁸³ The conduct in question was the confrontational and accusatory questioning of another officer, in circumstances that were inappropriate, unfair and ill-founded (see Chapter 10). The rationale for describing that conduct as unjust and oppressive is self-evident and does not require further elaboration.

2.5.5 Unlawful conduct/contrary to law

The Police Act provides that the Ombudsman may examine whether "conduct of a police officer ... constitutes an offence ... constitutes corrupt conduct [or] constitutes unlawful conduct (not being an offence or corrupt conduct)".¹⁸⁴ The Ombudsman Act provides that the Ombudsman may examine whether conduct of a public authority was "contrary to law".¹⁸⁵

The first point to note is that the Ombudsman Act does not distinguish in the same way as the Police Act between an offence, corrupt conduct and unlawful conduct. That distinction is drawn in the Police Act because of other features of the police oversight framework, that includes the role of the Police Integrity Commission and the definition of corrupt conduct in the ICAC Act. It is not necessary to pursue those features in this report, other than to note that for Ombudsman Act purposes, criminality and corruption fall within the concept of 'contrary to law'.

¹⁸² Ombudsman Act, s. 26(1)(g).

¹⁸³ Ombudsman Act, s. 26(1)(b).

¹⁸⁴ Police Act, s.122(1)(a)(b) and (c).

¹⁸⁵ Ombudsman Act, s. 26(1)(a).

There is no finding in this report of corrupt conduct. That matter can accordingly be put to one side. There are findings that an offence may have been committed by a police officer or by an individual who was a public authority. In each instance the particular offence is referred to. They include contraventions of offence provisions in the Ombudsman Act, Royal Commissions Act, NSW Crime Commission Act, LD Act, TI Act, *Crimes Act 1900*, and *Oaths Act 1900*. Nothing more need be said about those findings at this stage, as the elements of the offence provision, and how the offence may apply to the conduct investigated, is explained at the appropriate point.

There are also findings against police officers for 'unlawful conduct' that did not constitute an offence. The question therefore arising is what is meant by 'unlawful' (and, by implication, what is meant by the similar term 'contrary to law' in the Ombudsman Act). Nothing directly turns on classifying conduct as unlawful rather than, say, unreasonable, or based on a mistake of law or fact. In formal terms the result is the same. The Ombudsman's report containing the finding is formally reported through the reporting procedures in the Police Act: see section 2.1.4. (A different result may follow if the conduct is classified as corrupt or an offence.) The term 'unlawful' may nevertheless be perceived as carrying a greater sting than a term such as unreasonable or mistake of fact. For that reason – if no other – it is important to explain how the term 'unlawful' is applied in this report.

Despite their 'deceptive air of simplicity'¹⁸⁶ and the frequency with which they appear in legislation, terms such as 'unlawful' and 'contrary to law' do not have a fixed meaning.¹⁸⁷ Those terms are to be interpreted having regard to the particular legislative context in which they appear.¹⁸⁸ The relevant context for present purposes is that 'unlawful' in section 122 of the Police Act is to be taken as a term that is broader in meaning than the more specific terms 'offence' and 'corrupt conduct'.¹⁸⁹ Equally, the term 'unlawful conduct' in the Police Act is not synonymous with the narrower term 'illegal conduct' that is used in other legal contexts.¹⁹⁰

Examples of conduct that could appropriately fall within the broader concept of unlawful conduct include contravening a legal rule or direction that should be observed by an official, failing to comply with a mandatory statutory requirement (that is not punishable as an offence), failing to implement or act in accordance with the order or direction of a court, contravening a common law requirement for lawful decision making (for example, the obligation to observe natural justice), or committing a civil wrong (for example, the tort of misfeasance in public office, or a trademark infringement).¹⁹¹

There are no findings of that kind made in this report. The only point to be drawn from those examples is that they illustrate how the concept of unlawful conduct can have a broad meaning as used in the Police Act. This is confirmed by the fact that unlawful conduct is a ground of investigation along with other broad terms such as unreasonable, unjust and mistake of fact.

Findings of unlawful conduct are made in this report against officers who facilitated a deployment that required a registered police informant to breach a bail condition. While it is not an offence for a person to breach a bail condition, it is conduct in breach of a court order that can result in the person being brought before a court. It can therefore be said that an officer who facilitated or encouraged a breach of bail has engaged in unlawful conduct.

186 *Hancock v Birsa* [1972] WAR 177, p. 178, referring to the phrase 'lawful excuse', cited in *Wilson v McDonald* [2009] WASCA 39 at [29].

187 Similar issues arise in a common law context in considering claims in tort involving the element of 'unlawful means' or 'unlawful interference': see *OBG Limited v Allan* [2007] UKHL 21, *Hardie Finance Corporation Pty Ltd v Ahern [No 3]* [2010] WASC 403, and *Dresna Pty Ltd v Misu Nominees Pty Ltd* [2004] FCAFC 169.

188 *Crafter v Kelly* [1941] SASR 237 at 243, cited in *Taikato v The Queen* (1996) 186 CLR 454, p. 460; *Simon v Condran* [2013] NSWCA 388 at [32].

189 Adopting the presumption that every word in a legislative provision should be given meaning, or work to do: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, p. 382.

190 For example, for example *Pemble v The Queen* (1971) 124 CLR 107, p. 122, *Burns v The Queen* (2012) 246 CLR 334 and *Regina v Dalton* [2005] NSWSC 137 at [36].

191 For example, *New South Wales v McMaster* [2015] NSWCA 228 at [200]-[209], treating 'unlawful conduct' as conduct amounting to a civil wrong; and *Violi v Berrivale Orchards Limited* [2000] FCA 797 at [28], treating 'lawful interests' as being distinguishable from 'legal interests', and embracing interests that are 'legitimate' or 'not unlawful'.

Chapter 3. Mascot investigations and Operation Florida

This chapter considers the events that led up to the Mascot investigations starting in February 1999. The events discussed followed on from the work of the Royal Commission into the NSW Police Service, and extend to the role played by three agencies after information about police corruption was given to the NSWCC by an informant known as 'Sea'. The three agencies were the NSWCC, the PIC, and the NSWPF.

The chapter summarises the outcomes of the Mascot investigations, and how these informed the PIC's Operation Florida investigation and public hearings, and resulted in the PIC's report to Parliament of the same name. The work of Mascot and Florida resulted in prosecutions, decisions about police misconduct, resignations and dismissals.

This chapter also considers the work of Task Force Volta, which was established in 2002 to finalise many of the medium to low risk allegations that had been assembled or investigated by Mascot – but had not been finalised by that time.

3.1 Background and context

3.1.1 Report of the Royal Commission into the NSW Police Service

The Royal Commission into the New South Wales Police Service (the Royal Commission) 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 NSWPF.¹⁹² The Royal Commission's investigation included public hearings, the exercise of powers to compel attendance of witnesses and the production of documents, electronic surveillance, and the use of police informants and undercover operatives. In November 1995, the Royal Commission offered a conditional amnesty to officers who volunteered information about police corruption or misconduct.

The Royal Commission published two interim reports in February and November 1996. Its final six volume report, with extensive findings on police corruption and recommendations for reform, was published in May 1997.

The first interim report concluded that the framework for investigating complaints of serious misconduct and corruption within the NSWPF was inadequate, and that systemic or entrenched corruption had provisionally been shown to exist. The report recommended that a permanent Commission be established to investigate serious police misconduct. This recommendation was implemented in 1996 when the PIC was established.

The second interim report confirmed that systemic corruption existed. The recommended changes included new disciplinary and management arrangements to deal with misconduct by police officers, and the introduction of targeted integrity testing and random drug and alcohol testing.¹⁹³

¹⁹² Wood, J. *Royal Commission into the New South Wales Police Service*, Volume 1 (Report), May 1997, p. 1. The terms of reference were extended, first, in 1994 to the adequacy of police investigation of paedophiles and pederasts by the Police Service, and again in 1996 to include matters relating to the legislation prohibiting and penalising paedophilia, pederasty and related crimes of sexual abuse.

¹⁹³ Wood, J. *Royal Commission into the New South Wales Police Service*, Volume 1 (Report), May 1997, p. 4.

The final report in 1997 observed:

Despite regular inquiries and efforts at reform the Service has rarely been free of corruption.

*What is of concern arising out of the present inquiry is the manner in which corruption has expanded from those forms commonly seen in connection with regulatory forms of policing, to the active involvement of police in planning and implementing criminal activity, sometimes in partnership with known criminals and on other occasions, in competition with them.*¹⁹⁴

The Royal Commission recommended significant reforms to deal with endemic corruption. These included changes to the structure of the police service, to training and recruitment, the handling of police complaints, the police discipline system, the integrity of criminal investigations by police, and the way police officers performed their roles. These recommendations resulted in amendments to the Police Act and a major restructure of the NSWPF.

3.1.2 Establishment of the PIC

The PIC was established in 1996 after the Royal Commission's first interim report. The Hon Judge Paul Urquhart QC was appointed as the first PIC Commissioner on 11 July 1996. A number of staff from the Royal Commission were moved to the PIC, as well as many of the Royal Commission's records.

The PIC is independent and separate from the NSWPF. The principal functions of the PIC – set out in the PIC Act – are to detect, investigate and prevent police corruption and other serious officer misconduct.¹⁹⁵ The PIC also assists the NSWPF and the NSWCC in detecting, investigating and preventing corruption and serious misconduct. In 2017, the PIC will cease to exist and its functions will be transferred to a new police oversight body in NSW called the Law Enforcement Conduct Commission (LECC).

3.1.3 Establishment of the Special Crime and Internal Affairs and Special Crime Unit within the NSWPF

The NSWCC started operating in 1986, with the object of reducing the incidence of illegal drug trafficking and organised and other crime.¹⁹⁶ At the time of the Mascot investigations, the NSWCC's principal functions included:

- investigating relevant criminal activity referred to it by the NSWCC Management Committee
- assembling admissible evidence for the prosecution of relevant offences and providing it to the DPP
- reviewing police inquiries in relation to criminal activity (upon such an inquiry being referred for review to the NSWCC)
- making reports relating to illegal drug trafficking and organised and other crime
- disseminating investigatory, technological and analytical expertise as the NSWCC saw fit.¹⁹⁷

On 12 September 1996, the NSWCC Management Committee – acting under section 25(1) of the NSWCC Act¹⁹⁸ – established a new reference for the NSWCC called Gymea.¹⁹⁹ The Gymea reference was to investigate members of a criminal network known as the East Coast Criminal Milieu.²⁰⁰ The reference was initially staffed solely by non-police staff of the NSWCC.²⁰¹ In February 1997, NSWCC Commissioner Phillip Bradley wrote to Superintendent Malcolm Brammer – the Commander of Internal Affairs in the NSWPF – seeking to establish

¹⁹⁴ Wood, J. *Royal Commission into the New South Wales Police Service*, Volume 1 (Report), May 1997, p. 153.

¹⁹⁵ PIC Act, s. 3(a). The term 'serious officer misconduct' is not defined in the PIC Act.

¹⁹⁶ NSWCC Act, s. 3A.

¹⁹⁷ NSWCC Act, s. 6.

¹⁹⁸ The NSWCC Act has since been repealed and replaced with the Crime Commission Act.

¹⁹⁹ NSWCC, NSWPF and AFP, *Gymea Task Force Review*, 31 May 2001.

²⁰⁰ The East Coast Criminal Milieu was "a group involved in widespread criminal activity along Australia's eastern seaboard. ... involved in drug importation, manufacture and distribution; armed robbery; theft; fraud; gaming; and associated money laundering"; NSWCC, *Gymea/Yard-Acid Summary*, undated, p. 1.

²⁰¹ Email from Christopher Leeds, NSWPF, to unknown recipient, undated.

a police task force within the Internal Affairs Command under the Gymea reference.²⁰² This task force, which was set up under section 27A of the NSWCC Act, used police officers from Internal Affairs to help the Gymea investigation, which had developed concerns that police had been involved in 'green-lighting' the criminal conduct of some organised crime networks. The task force, also called Gymea, was based in NSWCC premises²⁰³ and sat within a division of the Internal Affairs Command called the Special Projects Unit²⁰⁴ (which was established in 1997).²⁰⁵

The role of the Internal Affairs Command was to investigate complaints about the conduct of police officers, and to maintain and manage the NSWPF complaints information system. The role of the Special Projects Unit was to investigate organised crime groups that may have been helped by corrupt police – using the coercive powers of the NSWCC and its expertise in intelligence gathering, financial analysis, and use of electronic investigative technologies. The police officers who worked on the Gymea Task Force had limited contact with other police.²⁰⁶

In 1999, the Commissioner of the NSWPF instigated a restructure of the Internal Affairs Command. Special Crime and Internal Affairs (SCIA) replaced the Internal Affairs Command, and the Special Crime Unit (SCU) within SCIA replaced the Special Projects Unit.²⁰⁷

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 units²⁰⁸ – the Investigations Unit (known colloquially as Internal Affairs), the Integrity Testing Unit,²⁰⁹ the SCU, the Strategic Assessment and Security Centre,²¹⁰ and the System and Process Inspection Unit.²¹¹ This structure was current in 2001 but evolved over the following year to adapt to changing needs and priorities. Figure 1 depicts the structure of IA/SCIA as reported in 2002.

Brammer was appointed as the Commander of SCIA and reported directly to the Commissioner of Police.²¹² Brammer advised Operation Prospect that he appointed John Dolan to be the Commander of SCU reporting directly to himself, and Detective Inspector Catherine Burn as a Team Leader within SCU – with Dolan being responsible for identifying additional SCU staff.²¹³

The existence and staffing of SCU was formalised by the Commissioner of Police on 23 December 1999.²¹⁴ Its role was to:

- identify, investigate and prosecute high risk people or organisations involved in organised crime
- identify, investigate and prosecute corrupt police associated with such people and organisations
- identify and deal with contemporary police corruption, conduct and criminality through external environmental scanning, risk analysis and historical assessment.²¹⁵

202 Letter from Commissioner Philip Bradley, NSWCC to Commander M Brammer, Internal Affairs, NSWPF, 11 February 1997.

203 NSWPF internal memorandum from Commissioner Peter Ryan to Deputy Commissioner Specialist Operations, Deputy Commissioner Field Operations, Executive Director Human Resource Services, Commander Crime Agencies and Commander Internal Affairs and Special Crime, 23 December 1999, p. 3.

204 Email from Christopher Leeds, NSWPF, to unknown recipient, undated.

205 NSWPF internal memorandum from Detective Superintendent Mark Wright, 18 November 2003.

206 NSWPF internal memorandum from Commissioner Peter Ryan, 'Gymea Reference', 18 March 1997.

207 NSWPF internal memorandum from Commissioner Peter Ryan to Deputy Commissioner Specialist Operations, Deputy Commissioner Field Operations, Executive Director Human Resource Services, Commander Crime Agencies and Commander Internal Affairs and Special Crime, 23 December 1999, pp. 1-2; NSWPF internal memorandum from Detective Superintendent Mark Wright, 18 November 2003.

208 NSWPF, *SCIA Administrative Induction Package, Part 1*, 15 March 2001, pp. 10-12.

209 Integrity testing is a tool used by the NSWPF under s. 207A of the *Police Act 1990*. It is designed to establish whether particular officers whose integrity is being tested will act in contravention of the principles of integrity required of a police officer.

210 The Strategic Assessments and Security Centre undertook a range of intelligence based work, such as compiling profiles of people of interest to investigations, and risk assessments of police officers.

211 The System and Process Inspection Unit undertook auditing of NSWPF processes and systems.

212 NSWPF internal memorandum from Commissioner Peter Ryan to Deputy Commissioner Specialist Operations, Deputy Commissioner Field Operations, Executive Director Human Resource Services, Commander Crime Agencies and Commander Internal Affairs and Special Crime, 23 December 1999, p. 3.

213 Letter from Malcolm Brammer to Linda Waugh, Deputy Ombudsman (Police and Compliance), NSW Ombudsman, 17 December 2012 – enclosure entitled 'Addendum 1 – Background to Mascot Investigation'.

214 NSWPF internal memorandum from Commissioner Peter Ryan to Deputy Commissioner Specialist Operations, Deputy Commissioner Field Operations, Executive Director Human Resource Services, Commander Crime Agencies and Commander Internal Affairs and Special Crime, 23 December 1999, p. 2.

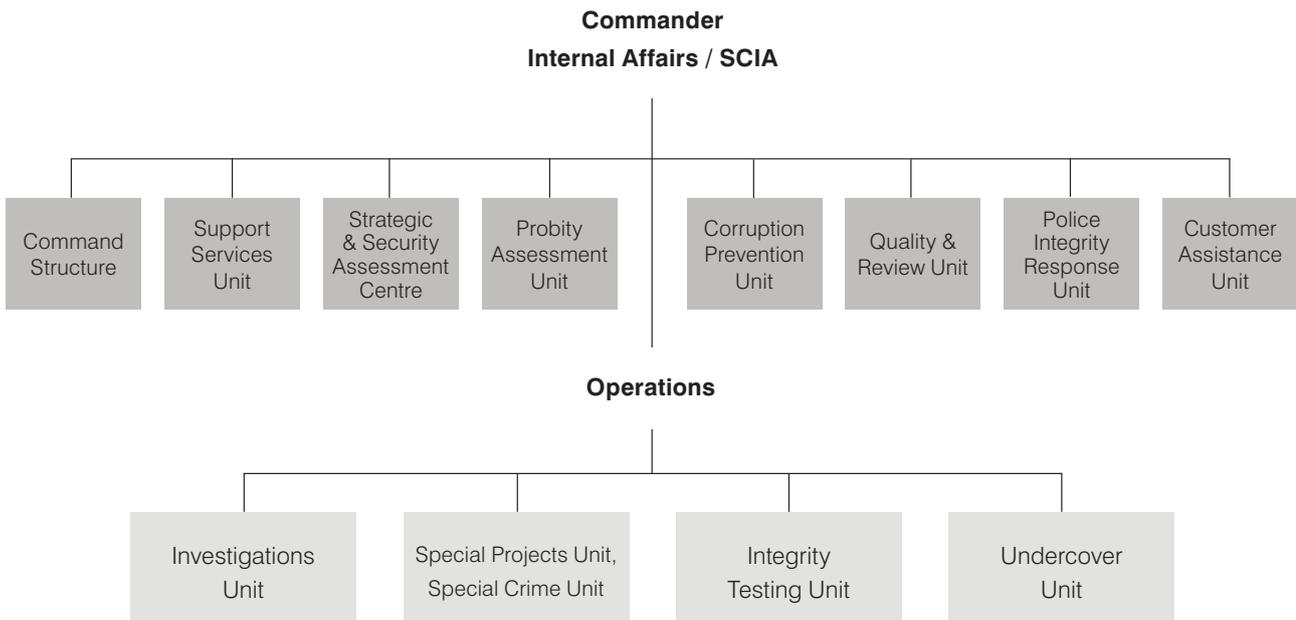
215 NSWPF internal memorandum by unknown author, *Establishment of Special Crime Unit, Internal Affairs*, undated, p. 1.

The SCU was to be made up of 41 police positions and a handful of unsworn staff to do administrative tasks and to analyse and process electronic intelligence gathered by the unit – such as listening device (LD) recordings.²¹⁶ SCU was unique in that it worked in partnership with the NSWCC to help investigate organised crime that had been ‘green-lighted’ by law enforcement officers.²¹⁷ The secrecy provisions applying to the NSWCC also applied to SCU officers, and work done by the SCU on NSWCC references was conducted within the legislative and policy framework of the NSWCC – rather than the NSWPF (see Chapter 4). By contrast, other SCIA units (such as the Investigations Unit and Integrity Testing Unit) worked solely within the NSWPF legislative and policy framework.

The SCU’s work overlapped to some extent with that of SCIA’s Investigations Unit and another unit in NSWPF called Crime Agencies. The Investigations Unit investigated police corruption and misconduct matters. Crime Agencies investigated organised crime and supported the work of the NSWCC and the National Crime Authority (later the Australian Crime Commission). However – given SCU’s independence from other police investigative work – it had the capacity to investigate matters at the intersection of organised crime and police misconduct. For example, a number of the matters investigated by SCU involved alleged corruption by officers who had worked in Crime Agencies. SCU staff members were advised in their Induction Package that “the type of investigations being conducted require the upmost [sic] professionalism, proactivity, patience, persistence, perseverance, security and inherent risk management in dealing with internal and external vulnerability’s [sic]”.²¹⁸

The structure of the Internal Affairs Command (later SCIA) was as follows:

Figure 1: Structure of Internal Affairs / SCIA



Source: Complaint number [number] Investigation Plan by [name], Principal Investigation Manager, Strike Force Tumen, 5 April 2002 – attachment ‘internal Affairs Command Structure’.

216 Attachment A to NSWPF internal memorandum from Commissioner Peter Ryan to Deputy Commissioner Specialist Operations, Deputy Commissioner Field Operations, Executive Director Human Resource Services, Commander Crime Agencies and Commander Internal Affairs and Special Crime, 23 December 1999.

217 NSWPF internal memorandum from Detective Superintendent Mark Wright, 18 November 2003, p. 1.

218 NSWPF, *Special Crime Unit – Special Crime and Internal Affairs Command – Induction Package*, April 2002, p. 9.

3.2 Establishment of the Mascot investigations

3.2.1 A police officer becomes a key informant to the NSWCC (1998)

On 16 December 1998, a serving NSW police officer approached the NSWCC and disclosed his knowledge of, and involvement in, organised crime and police corruption spanning over 15 years. The officer disclosed that he and other officers had engaged in the fabrication of evidence, 'loading' of witnesses, theft of money from suspects and assaults on suspects. The NSWCC gave the officer the codename 'Sea', which is used in this report.

In his evidence to Operation Prospect, Sea said that when he chose to approach the NSWCC he was unsure if he was under investigation. Sea indicated that he went to the NSWCC to unburden himself because he had been a detective for a long time and had been "working in a lot of serious areas and seen a lot of things and done a lot of things"²¹⁹ – including noble cause corruption,²²⁰ accepting money, planting evidence and verbals.²²¹

On 19 December 1998, Sea provided a 10-page 'induced statement' to the NSWCC. That term is defined in the *Prosecution Guidelines* as follows:

*An induced statement is one taken from a person on the basis that the information in the statement will not be used against the person making the statement. It is a statement from a person who is prepared to supply information relevant to the investigation of criminal activity which may tend to incriminate him or her in criminal activity and who is not otherwise prepared to supply the information.*²²²

Sea told Operation Prospect that he was initially interviewed by the NSWCC Commissioner, Bradley.²²³

Sea's induced statement was prepared in consultation with a solicitor, Terrence Griffin (who became PIC Commissioner in 2001).²²⁴ The statement gave a broad overview of Sea's history as a police officer and his involvement in and knowledge of various instances of police corruption. The introduction to Sea's statement said:

From the earliest days as a detective it was clear to me that I was expected to assist enquiries to the extent that police notebooks and statements were to support each other.

*Over the years I have been involved in numerous matters where the evidence against defendants has been tampered with, or created and unlawful or improper conduct by police has been covered up.*²²⁵

Sea then detailed the number of specific incidents he was directly involved in, and added:

I am able to give direct evidence of many officers being involved in similar things to the things I have mentioned above and a number of other activities of significance.

I want to record that when I became a detective I entered an [sic] pre-existing system or culture in which my superiors and peers carried out their duties in a way that had no regard for the procedures in place and ignored the law whenever it was seen as an impediment to the course of action they had chosen to take. The types of things I have mentioned above were frequent occurrences and the law and police procedures were broken almost as a matter of course. I and all new detectives were expected to fit into the existing culture. There was no room for argument or dissent - basically you were either with the other detectives or against them. In general terms nearly, everyone of the detectives I have worked with over the years, has either been a part of that culture or has known about it and accepted it as a fact.

219 Ombudsman Transcript, Sea, 21 August 2013, p. 12.

220 Corruption which uses unethical or illegal means to obtain a desired result which the individual considers to be for the greater good.

221 Ombudsman Transcript, Sea, 21 August 2013, p. 12.

222 Office of the Director of Public Prosecutions, *Prosecution Guidelines*, 1 June 2007, p. 24.

223 Ombudsman Transcript, Sea, 21 August 2013, p. 5.

224 Ombudsman Transcript, Sea, 21 August 2013, pp. 15-16.

225 NSWCC, *Induced statement of Sea*, undated, p. 2.

*I able [sic] to remember a number of specific matters which involved wrongful activity on the part of police. In these and other case [sic] I believe I will be able to provide details of wrongdoing after I have had a chance to refresh my memory from various records and documents.*²²⁶

The statement then addressed particular people and events from 1983 to December 1998.

On the same day, Sea was admitted to a hospital psychiatric unit and remained there for 11 days to be treated for depression.²²⁷ On his release from hospital, he remained an outpatient.

In January 1999, while off duty on sick leave, Sea participated in several days of interviews with two police officers attached to SCU – Burn and Detective Senior Sergeant Damian Henry. The first interview occurred on 7 January 1999.

Burn and Henry conducted further interviews with Sea on 8, 9, 10 and 11 January 1999. The disclosures that Sea made during these interviews implicated former and serving police officers and civilians in misconduct, criminal activity and corruption. Sea alleged that this conduct mainly occurred while he was stationed in the following areas of the NSWPF – the Criminal Investigations Branch, the Armed Hold Up Unit, Task Force Magnum, and the Major Crime Squad North Drug Unit.

3.2.2 Schedule of Debrief

Burn prepared a handwritten schedule of the material that Sea conveyed in his initial debrief about police corruption.²²⁸ This handwritten document was appended to an Information Report that Burn compiled, dated 13 January 1999, in which she recorded the following:

Title: Schedule of Debrief with SEA, 91 matters outlined.

*During a debriefing with Sea between 7/1/99 and 11/1/99 a schedule of events was maintained of information provided by Sea which relates to criminal activity and corruption between 1983 and the [sic] 1998. There are ninety one matters contained in this schedule in which several police are named as being involved in corruption and criminal activity. Schedule attached.*²²⁹

The handwritten schedule listed each allegation made by Sea during the 7-11 January 1999 debrief interviews. The schedule was divided into columns with the headings Offence, Date, Location of Sea, Incident, Police Involved, Corroboration Opportunity, Status, and Money. Each allegation was allocated a number and information was recorded under these headings.

The police officers who were identified in the schedule included officers who Sea alleged had been involved in corrupt incidents, as well as officers who may have been involved or who had some other relationship with the events described.²³⁰ The schedule did not distinguish between those different categories of officer. In her evidence to Operation Prospect, Burn said that the column 'Police Involved' listed the officers Sea mentioned in relation to each of the incidents he raised – whatever their capacity.²³¹

Burn agreed that the format of the schedule document she prepared could give the mistaken impression that officers who may have been involved were identified as in fact being involved, but said: "the names that were, that were jotted down during the debrief or when the document was created were names that the informer mentioned and were related to the instance that he was talking about".²³² In response to a question as to whether innocent officers could be placed under a cloud of suspicion simply because they happened

²²⁶ NSWCC, *Induced statement of Sea*, undated, pp. 2-3.

²²⁷ Ombudsman Transcript, Sea, 21 August 2013, pp. 6, 9, 15, 45; NSWPF internal memorandum from [Sea], 5 March 1999.

²²⁸ Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2675; NSWCC Information Report, *Schedule of Debrief with SEA, 91 matters outlined*, reporting officer: Burn, 13 January 1999 – attachment 'handwritten schedule of events'.

²²⁹ NSWCC Information Report, *Schedule of Debrief with SEA, 91 matters outlined*, reporting officer: Burn, 13 January 1999 – attachment 'handwritten schedule of events'.

²³⁰ Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2675.

²³¹ Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2675.

²³² Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2676.

to work at a particular unit where other corrupt police officers had carried out certain activities, Burn replied, “Unfortunately that’s the reality of what happens”.²³³

Burn’s handwritten schedule was then converted into an electronic document, referred to throughout this report as the ‘Schedule of Debrief’. The Schedule of Debrief guided the Mascot lines of inquiry and investigation. The conversion of the handwritten document into the electronic version was led by Senior Constable Gregory Jewiss, who was inducted into the NSWCC on 14 January 1999.²³⁴ He also had the responsibility for adding further matters to the Schedule of Debrief that were not listed in the original handwritten schedule. He identified these by reading transcripts, interviews and the initial debrief with Sea.²³⁵

The Schedule of Debrief became a ‘living’ document that was added to and updated regularly throughout Mascot.²³⁶ There was no version control and limited control over who could change or modify the schedule. As a result, there is no information or records about who accessed and modified the schedule over long periods – and inaccuracies or errors could occur without detection. Jewiss told Operation Prospect that at times he found inaccuracies in the detail of the electronic document.²³⁷

Mascot printed and kept copies of the Schedule of Debrief to show what the Schedule contained at various points in time. However, there were relatively few such copies. The way the document was maintained means that it is not possible to track all changes to the Schedule as they were made, but only to see snapshots of the Schedule captured in the printed copies.

During the Mascot investigations, the number of matters in the Schedule of Debrief increased from the 91 matters outlined in Burn’s original handwritten schedule to 231 matters. The 140 entries added after 13 January 1999 came from a number of sources, including disclosures made by Sea in subsequent interviews or debriefs and material obtained by Mascot investigators by other methods.

3.2.3 Mascot references

Under legislation operating at the time of Mascot – which continues operating until a new Law Enforcement Conduct Commission commences in early 2017²³⁸ – complaints and allegations about the misconduct of police officers were usually dealt with under Part 8A of the Police Act. Under Part 8A, the NSWPF has the primary responsibility for investigating and resolving all complaints. All complaints are registered on the NSWPF complaints information system, and serious complaints about police are notified to the NSW Ombudsman so that the Ombudsman can oversight or monitor the way the complaint is investigated by the NSWPF.²³⁹ The Ombudsman is required to keep the police complaints system under scrutiny,²⁴⁰ and may also investigate complaints about police under the Ombudsman Act.²⁴¹ The PIC examines complaints that are registered on the complaints system to identify matters involving serious officer misconduct in order to prevent, detect, investigate and oversee or manage the detection or investigation of officer misconduct.²⁴² At the relevant time,²⁴³ the PIC’s work included undertaking serious, complex investigations and conducting private and/or public hearings.²⁴⁴

²³³ Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2682.

²³⁴ NSWPF Duty Book, D36051, G. Jewiss, IA SASC, 14 January 1999, p. 41.

²³⁵ Ombudsman Transcript, Gregory Jewiss, 29 July 2014, p. 902.

²³⁶ Gregory Jewiss, 29 July 2014, p. 911; the document NSWCC, *Schedule of Debrief Operation Boat*, author: G. Jewiss as at 11 July 2003 is an example of the Schedule of Debrief as it was on 11 July 2003.

²³⁷ Ombudsman Transcript, Gregory Jewiss, 29 July 2014, p. 911.

²³⁸ As noted in Chapter 2, in 2017, the functions of the PIC and the functions of the Ombudsman with regard to police complaints and the police complaints system will be undertaken by the Law Enforcement Conduct Commission. See the *Law Enforcement Conduct Commission Act 2016*.

²³⁹ Police Act, s. 121.

²⁴⁰ Police Act, s. 160.

²⁴¹ Police Act, s. 156.

²⁴² PIC Act, ss. 13(1) and 13(2).

²⁴³ This work will also be undertaken by the Law Enforcement Conduct Commission from 2017.

²⁴⁴ PIC Act, s. 33.

Sea's allegations were not treated as complaints of police misconduct to be investigated under Part 8A of the Police Act. Instead, it was decided that the allegations would be investigated essentially by a police task force under a reference to the NSWCC.

The following section explains how the reference occurred. The role of police task forces is discussed further in Chapter 4.

3.2.3.1 NSWCC references

During the Mascot investigations, the NSWCC was regulated by the NSWCC Act – which has since been repealed.²⁴⁵ The NSWCC Act established the NSW Crime Commission Management Committee (Management Committee). The members of the Management Committee in 1999 were the Minister for Police and Emergency Services, the Commissioner of Police, the Chairman or another member of the National Crime Authority, and the Commissioner of the NSWCC.²⁴⁶

The principal functions of the Management Committee were defined in section 25(1) of the NSWCC Act as:

- to refer by written notice to the NSWCC for investigation, matters relating to relevant criminal activities
- to refer by written notice to the NSWCC for review, police inquiries into matters relating to any criminal activities
- to arrange for police task forces to assist the NSWCC to carry out investigations into relevant criminal activities
- to review and monitor the work of the NSWCC
- to approve information sharing and cooperation between the NSWCC and other bodies.

The Management Committee could refer a matter to the NSWCC only if satisfied that ordinary police methods of investigation were “unlikely to be effective”.²⁴⁷ The Management Committee could, in the terms of reference for an investigation or review, impose limits on the way it was to be carried out.²⁴⁸ The notice referring a matter to the NSWCC for investigation could describe the matter to be investigated by reference to information given to a Management Committee meeting,²⁴⁹ but had to “describe the general nature of the circumstances or allegations constituting the relevant criminal activity” to be investigated and “set out the general purpose of the investigation”.²⁵⁰ In deciding whether to refer a matter to the NSWCC, the Committee was to “give high priority to matters relating to illegal drug trafficking, as far as practicable”.²⁵¹ The reference of a matter to the NSWCC could be made after a written request from the NSWCC to the Management Committee.²⁵²

3.2.3.2 Original Mascot reference (February 1999)

On 9 February 1999, an urgent meeting of the Management Committee was held at which the first Mascot reference was made to the NSWCC. This meeting was attended by Bradley, Police Commissioner Peter Ryan, and the Minister for Police the Hon Paul Whelan MP.²⁵³ Until that time, the investigation of the allegations Sea had made in the previous two months had fallen under the existing NSWCC Gynea reference. Bradley advised the Management Committee meeting that a new reference was needed to permit a TI strategy to be used to investigate an aspect of the matters that Sea had disclosed in his debrief in January 1999.

The minutes of the Management Committee meeting record Bradley informing the meeting that the NSWCC would not give the Commissioner of Police a written complaint based on Sea's disclosures. This meant the

245 The NSWCC is established now by the Crime Commission Act.

246 NSWCC Act, s. 24.

247 NSWCC Act, s. 25(2).

248 NSWCC Act, s. 25(3).

249 NSWCC Act, s. 25(4)(a).

250 NSWCC Act, s. 24(b) and (c).

251 NSWCC Act, s. 25(6).

252 NSWCC Act, s. 26.

253 NSWCC, *Minutes of the one hundred and twenty ninth meeting of the Management Committee of the New South Wales Crime Commission*, 9 February 1999, p. 1.

Commissioner of Police was not required to formally advise the PIC of the allegations. Bradley said that Urquhart, the PIC Commissioner, had agreed to this course of action. Bradley said he would brief Urquhart the following day and that – although he was generally aware of the matter – PIC staff were not. The minutes record that Urquhart had advised Bradley that it would not be necessary to inform the Ombudsman of the information that Bradley had provided.²⁵⁴ Bradley also noted however, that the Ombudsman would need to be informed once a controlled operation was commenced.²⁵⁵

The minutes record that Bradley then read from a document on NSWCC letterhead titled 'Proposed Reference – Mascot', which summarised some details about Sea's information and named 18 other police officers who were allegedly involved in systematic crime and corruption. The Proposed Reference recorded that "Sea is being fully debriefed to get accurate details of the above matters with a view to obtaining witness statements"²⁵⁶ and that the plan was to use part of the GyMEA investigation team to pursue these matters. It also noted that Sea would:

*... meet and converse with suspects with a view to gathering evidence against them through electronic surveillance. It is hoped that criminal briefs of evidence can be established in relation to some of the persons referred to and that disciplinary action can also be taken.*²⁵⁷

The Proposed Reference further noted:

*The Commissioner of the Police Integrity Commission has been informed about the matter in general terms and will be informed in more detail soon. He has been told that the [Police] Commissioner has not received a written complaint and agrees that there is no obligation for him to report to the Police Integrity Commission or the Ombudsman.*²⁵⁸

This was followed by a statement that it was:

*... absolutely paramount that this matter be treated as highly confidential. Only a limited number of persons within the Crime Commission and Internal Affairs are aware of the matter. The IA officers are bound by the Commission's secrecy provisions.*²⁵⁹

Attached to the Proposed Reference document was an untitled eight-page document that set out a list of Suspects, Offences and Facts.²⁶⁰ The minutes record Bradley as having summarised the attachment at the meeting. The attachment listed 19 names under the heading 'Suspects', including Sea. The 'Facts' section of the document set out specific instances of witnessed or stated acts of corruption that occurred between 1983 and February 1999. This information appears to have been extracted from an affidavit used to support a LD application sworn by Senior Constable Troy Kaizik on 5 February 1999.²⁶¹ The Minister signed both the Proposed Reference and the attachment.²⁶²

In relation to the untitled eight page document – that set out a list of suspects, offences and supporting facts and was attached to the Proposed Reference for Mascot on 9 February 1999²⁶³ – Bradley told Operation Prospect that someone else would have prepared the factual material for the Reference. He would have settled it by adding or taking out any material as he thought necessary.²⁶⁴

254 NSWCC, *Minutes of the one hundred and twenty ninth meeting of the Management Committee of the New South Wales Crime Commission*, 9 February 1999, p. 1.

255 This notification is a requirement under the *Law Enforcement (Controlled Operations) Act 1997* in connection to the Ombudsman's monitoring and inspection functions under that Act.

256 NSWCC, *Proposed Reference – Mascot*, Phillip Bradley, Commissioner, 9 February 1999, p. 1.

257 NSWCC, *Proposed Reference – Mascot*, Phillip Bradley, Commissioner, 9 February 1999, p. 1.

258 NSWCC, *Proposed Reference – Mascot*, Phillip Bradley, Commissioner, 9 February 1999, p. 2.

259 NSWCC, *Proposed Reference – Mascot*, Phillip Bradley, Commissioner, 9 February 1999, p. 2.

260 NSWCC, *Proposed Reference – Mascot*, Phillip Bradley, Commissioner, 9 February 1999 – attachment 'List of suspects, offences and relevant facts'.

261 LD affidavit 069-071/1999.

262 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2987.

263 NSWCC, *Proposed Reference – Mascot*, Phillip Bradley, Commissioner, 9 February 1999 – attachment 'List of suspects, offences and relevant facts'.

264 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2986.

The Minister then signed a Section 25(1) Notice, referring the Mascot reference to the NSWCC.²⁶⁵ The Notice stated that the Management Committee was satisfied that it was in the public interest that the NSWCC investigate criminal activities about which it had been advised, that this fell within its functions, and that “ordinary police methods of investigation into the matters are unlikely to be effective”.²⁶⁶ This statement – and a reference in the Proposed Reference document to electronic surveillance – points to the approach that Mascot would adopt in applying for LD warrants and adopting a covert strategy that would not be known to the police officers who were being investigated. This is further discussed in Chapter 5.

The Section 25(1) Notice specified the name of the reference as ‘Mascot’ and listed the following offences in a Schedule:

Offences:

- (a) *serious Drug Offences as defined in section 3 of the [NSWCC] 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.*²⁶⁷

The course of action adopted was to make a reference to the NSWCC based on Sea’s disclosures, rather than opting for a complaint investigation. This meant that the issues being investigated would not be tracked in the police complaints database, oversight of the investigation would be by the NSWCC Management Committee, and a strong focus could be given to intelligence gathering.

3.2.3.3 Expansion of Mascot – the Mascot II reference (November 2000)

On 9 November 2000, a further reference was issued by the NSWCC Management Committee – known as ‘Mascot II’. It was significantly broader than the original Mascot Reference. Minister for Police Whelan was again the presiding member of the Management Committee.

The Management Committee was shown a 47 page document made up of three parts. These were:

- a document called ‘Review of Reference Mascot’ (the Review document)
- a copy of the Memorandum of Understanding between the Commissioners of the NSWCC, the PIC and the NSWPF – that had been signed in June 2000 to jointly pursue allegations of corruption against current and former police officers
- a copy of an unsworn affidavit dated 5 October 2000.

After referring to the earlier Mascot reference, the Review document stated:

*Since the Reference was issued the Commission in conjunction with the Special Crime and Internal Affairs Branch of the New South Wales Police Service has conducted an indepth [sic] investigation utilising proactive work by informant Sea supplemented by electronic surveillance and other informers. That investigation has largely corroborated the information provided by Sea concerning past police misconduct and corruption. It has also uncovered further incidents of similar police behaviour. Substantial current police corruption has also been identified.*²⁶⁸

²⁶⁵ NSWCC, *Section 25(1) Notice - Mascot Reference*, signed by Paul Whelan LLB MP, Presiding Member, New South Wales Crime Commission Management Committee, 9 February 1999.

²⁶⁶ NSWCC, *Section 25(1) Notice - Mascot Reference*, signed by Paul Whelan LLB MP, Presiding Member, New South Wales Crime Commission Management Committee, 9 February 1999, p. 1.

²⁶⁷ NSWCC, *Section 25(1) Notice - Mascot Reference*, signed by Paul Whelan LLB MP, Presiding Member, New South Wales Crime Commission Management Committee, 9 February 1999, p. 2.

²⁶⁸ 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, attachment entitled – ‘Review of Reference Mascot’, p. 1.

The Review document referred to controlled operations and integrity tests that had led to evidence being obtained of current instances of serious corruption that were “more fully set out in the annexed draft affidavit”.²⁶⁹ This draft affidavit was identical to an affidavit sworn by Sergeant Greg Moore, a senior Mascot investigator, on 5 October 2000. It was sworn in support of an application for seven LD warrants – three body devices to be worn by Sea and four devices to be installed at his residential property.²⁷⁰ Paragraph 3(c) of the affidavit listed 112 individuals whose private conversations may be listened to or recorded. The Review document outlined particular recent significant corruption instances, and added:

*The investigation so far has disclosed that corrupt activity by police appears to be widespread and extends into the higher ranks of local area commands. Police officers have offered an informant a standing corrupt arrangement to ‘greenlight’ his activities. Another informer has reported multiple instances of bribery and corruption.*²⁷¹

The Review document described other proactive strategies being formulated to deal with existing evidence of corruption in the Crime Agencies unit of the NSWPF. It noted that ordinary methods of police investigation had not succeeded in this area in the past, and made the following recommendations to the Management Committee:

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.*²⁷²

Operation Prospect asked Bradley about the selection of the material that was presented to the Management Committee on 9 November 2000. In relation to the draft affidavit²⁷³ that was attached to the Review document,²⁷⁴ Bradley was unable to explain whose idea or decision it was that the affidavit should be included in the information given to the Management Committee in considering the Mascot II Reference.²⁷⁵

The Section 25(1) Notice²⁷⁶ referred matters to the NSWCC for investigation under the name Mascot II. The schedule of offences was identical to the original Mascot reference, but added two further offences:

Offences:

...

- (d) *larceny contrary to section 117 of the Crimes Act 1900*
- (e) *corruption contrary to section 200 of the Police Service Act 1990.*²⁷⁷

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.

The issues surrounding the documents that were used to support the expansion of the Mascot reference to Mascot II are discussed further in Chapter 17.

269 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, attachment entitled – ‘Review of Reference Mascot’, p. 1.

270 LD affidavit 284-290/2000.

271 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, attachment entitled – ‘Review of Reference Mascot’, p. 1.

272 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, attachment entitled – ‘Review of Reference Mascot’, p. 2.

273 The draft was identical to LD affidavit 284-290/2000.

274 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, attachment entitled – ‘Review of Reference Mascot’.

275 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2990.

276 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.

277 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.

3.2.3.4 Relationship between Mascot and the SCU

The SCU conducted a range of task forces that were formed under section 27A of the NSWCC Act and under various NSWCC references. Mascot was only one of those task forces. Others are mentioned in the chapters that follow – including Operation Storm, which was formed under the Oberon and Oberon II references (see Chapter 14). SCU also ran some task forces that were independent of a NSWCC reference, and were therefore staffed by police officers, and not NSWCC staff – for example, Task Force Volta.²⁷⁸

Although many Mascot officers worked solely on the Mascot reference, given its extremely covert nature, some investigators worked on multiple references and sometimes provided concurrent assistance to more than one reference concurrently. Some ‘persons of interest’ to the Mascot investigations also informed the investigative strategies for other operations – see, for example, Chapter 15.

3.3 PIC Involvement in Mascot investigations

The PIC had limited involvement in the initial stages of the Mascot investigations. A ‘Memorandum of Understanding Informant “[Sea]”’ (MOU) was signed by Urquhart on 29 July 1999 and Bradley on 3 August 1999.²⁷⁹ The MOU was framed on the assumption that the NSWCC would continue to manage Sea and investigate his disclosures as part of the Mascot reference. It noted that:

- the investigation was covert and disclosing the details could put the safety of Sea and the success of the investigation at risk
- the NSWCC Commissioner would, when he considered it appropriate to do so, provide further information to the Commissioner and Assistant Commissioner of the PIC – they would not divulge that information to other PIC officers or people without the approval of the NSWCC Commissioner
- the PIC would not take any action in relation to information divulged to it ‘unless the NSWCC has been advised of the proposal to take such action in advance and has approved of the proposed course of action’.²⁸⁰

The MOU also envisaged that ‘It is likely that a new Memorandum of Understanding will need to be entered into between the NSWCC and the PIC as regards any use of the informant and any information provided by the NSWCC or the informant’.²⁸¹

After the adoption of that MOU, the NSWCC kept the PIC informed of the progress of the Mascot investigations during meetings of what was called the Operations Coordination Committee (OCC). The PIC was represented at OCC meetings held on 8 and 29 January 2000,²⁸² and at regular OCC meetings that started in the latter half of 2000.

In June 2000, a new MOU was signed by the Commissioners of the NSWCC, the NSWPF and the PIC.²⁸³ It was headed, ‘regarding a joint pursuit of allegations of police corruption’. The MOU outlined the intention to expand the Mascot investigations, and for the PIC to join the investigation with the option of conducting public or private hearings and using other investigative strategies – a course adopted by the PIC for Operation Florida. The MOU specified that the NSWPF, with a possible contribution from PIC, would provide electronic surveillance (except TI surveillance, which would be done by NSWCC monitors), physical surveillance, field investigators, and recruitment and management of informers. The MOU also outlined that the PIC would be kept informed of the progress of the Mascot investigations during meetings of the OCC. These meetings would be attended by agency representatives who would be authorised by their agencies to reach agreement on issues.

278 NSWPF internal memorandum from Greg Jewiss, Commander, Task Force Volta, 6 November 2003, p. 2.

279 Memorandum of Understanding Informant “[Sea]” between PIC and NSWCC, July/August 1999.

280 Memorandum of Understanding Informant “[Sea]” between PIC and NSWCC, July/August 1999.

281 Memorandum of Understanding Informant “[Sea]” between PIC and NSWCC, July/August 1999, p. 2.

282 NSWCC, *Confidential Minutes of the Operational Co-ordination Committee*, 8 January 2000; NSWCC, *Confidential Minutes of the Operational Co-ordination Committee*, 29 January 2000.

283 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.

On 30 June 2000, the PIC attended the first formal OCC briefing on Mascot²⁸⁴ – followed by another on 31 August 2000.²⁸⁵ It appears that significant background and details about the Mascot investigations were revealed and discussed at those meetings.

The evidence provided to Operation Prospect indicates that the PIC had little, if any, involvement in the Mascot investigations before signing the MOU in June 2000. Significant details of the investigations were then given to the PIC.²⁸⁶ The reason for the PIC's involvement from that date was to conduct public hearings and expose what Mascot had found – see section 3.4.2. This was because it was only the PIC that had the power to conduct public hearings. The MOU stated:

*The Parties recognise that the examination of some suspects in public will be important in informing the public of the nature and extent of corruption in the NSWPol.*²⁸⁷

The PIC did not have the role or the statutory authority to review, oversight or otherwise scrutinise NSWCC investigations.²⁸⁸ At this time, no agency or parliamentary committee had an external oversight role for NSWCC operations and decision-making. This theme is developed in other chapters in this report, which note this gap in the accountability framework when allegations arose of misconduct and criminal conduct by Mascot investigators and managers.

Operation Prospect received evidence about the PIC's early involvement in Mascot from Timothy Sage, who was the Assistant Commissioner of the PIC from 1996 to 2004.²⁸⁹ Sage confirmed that the PIC was not involved in the early Mascot investigations. By the time Sage knew about the investigation, Urquhart had agreed to Bradley's request that the NSWCC run the investigation – on the basis that Sea would not cooperate with anyone else. Sage also understood Bradley to have stated that the matter would not be handed over to the PIC, which to Sage meant that the PIC had no early role in Mascot.²⁹⁰ He was not able to recall whether he advised Urquhart to sign the 1999 MOU, but confirmed that he had expressed concern to him about how Mascot was intended to proceed.²⁹¹ Sage said there was no discussion with the PIC about who would be targeted for investigation, he was never told who the NSWCC was going to target or given a list of events that were going to be investigated,²⁹² and decisions on who to investigate were made by the NSWCC.²⁹³

Operation Prospect also received evidence from Tom McGrath, whose role was described as 'Investigations, Special Advisor to PIC'. He recalled that the PIC's role in Mascot was limited to receiving information from NSWCC operatives and processing it to a point where it could be used at a PIC hearing. This occurred after June 2001 as part of Operation Florida. McGrath did not have a decision-making role in the strategies Mascot was using – such as deploying informants to speak to people while fitted with LDs. McGrath said he liaised regularly with Burn during the Florida investigation, but had no operational role in Mascot.²⁹⁴

At a meeting on 14 November 2001 – attended by representatives of the PIC, the NSWPF, the NSWCC and the NSW Ombudsman – to discuss the management of outstanding matters from Mascot and Operation Florida, the issue of Mascot/Florida allegations becoming a Part 8A complaint under the Police Act was discussed.

284 NSWCC, *Briefing – Mascot Reference*, 30 June 2000.

285 NSWCC, *Briefing – Mascot Reference*, 31 August 2000.

286 NSWCC, *Briefing – Mascot Reference*, 30 June 2000 and 31 August 2000.

287 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, p. 1.

288 The fact that some NSWCC staff were also police officers did not enliven PIC's jurisdiction, which involved investigating police misconduct.

289 Ombudsman Transcript, Tim Sage, 15 August 2014, p. 1569.

290 Ombudsman Transcript, Tim Sage, 15 August 2014, p. 1570.

291 Ombudsman Transcript, Tim Sage, 15 August 2014, p. 1571.

292 Ombudsman Transcript, Tim Sage, 15 August 2014, p. 1582.

293 Ombudsman Transcript, Tim Sage, 15 August 2014, p. 1579.

294 Ombudsman Transcript, Tom McGrath, 31 July 2014, p. 1058.

The record of the meeting, called 'Record of outcomes reached re: meeting held to discuss management of further allegations generated by the Florida/Mascot Reference',²⁹⁵ minuted the agreement of the parties that matters not otherwise dealt with would be referred to the PIC. The PIC could handle those matters as part of Operation Florida or in another way, or refer a matter to the NSWPF under Part 8A. If Mascot/Florida staff decided that a matter was not part of that reference, it would be referred to SCIA and managed under Part 8A of the Police Act.²⁹⁶

An Information Report about the 14 November 2001 meeting noted: "At this meeting it was agreed that all Florida/Mascot allegations (SODs) would be oversights by the PIC rather than the Ombudsman".²⁹⁷ It was not until mid-2002, when Task Force Volta was established, that matters arising from Mascot became Part 8A complaints and the PIC began to oversight the NSWPF's handling of those complaints. Task Force Volta is described in more detail in section 3.4.3.

Documents provided to Operation Prospect indicate some tension within the PIC about its role in Mascot.²⁹⁸ This was confirmed implicitly by McGrath, who said that PIC would have liked to be more practically involved in the operational, tactical and strategic decision-making – but the NSWCC did not permit such involvement.²⁹⁹ McGrath said he never saw a TI affidavit because he was dealing only with the product and the results.³⁰⁰ He commented, however, that from his observation "some of the material that we finally presented to the PIC, it was very well done in terms of using electronic surveillance, video surveillance, the planning, the execution".³⁰¹

Operation Prospect asked Griffin – who was the PIC Commissioner from 2001-2006, about the relationship between the PIC and the NSWCC during the Mascot investigations and whether there were regular meetings. Griffin did not have a particular recollection, but believed there were. He said there was some antipathy, or something approaching animosity, between the NSWCC and the PIC staff at various levels.³⁰² Although Griffin could not recollect Mascot investigators conducting any specific consultations with the PIC about investigative strategies, he told Operation Prospect that he did not think any such consultations would be anything more than paying "lip service if they thought it was useful to say 'what do you think about x'".³⁰³

The Ombudsman's limited role in oversighting the way Mascot investigated the allegations against police officers was noted in August 2003. At that time, the Ombudsman was advised that Mascot processes would be investigated by Strike Force Emblems (discussed in Chapter 1). The Ombudsman advised the Commissioner of Police that it was not appropriate for the Ombudsman to oversight the Emblems investigation because of jurisdictional limitations on the matters that Emblems may consider – specifically, the conduct of officers of the NSWCC and the PIC, and matters considered by the PIC Inspector.³⁰⁴ The Ombudsman also noted that at least four agencies had played a role in reviewing matters concerning LD warrant 266/2000, and that it may cause added confusion if a fifth agency – the Ombudsman – now became involved in those reviews. However, the Ombudsman also noted the desirability of an external agency with appropriate jurisdiction providing oversight of the Emblems investigation, and referred to a potential role for the PIC Inspector.³⁰⁵ As noted in Chapter 1, the Ombudsman gained the capacity to investigate the way Mascot did its work in 2012 – resulting in Operation Prospect.

295 NSWCC Information Report, *Copy of minutes of meeting held to discuss the management of allegations generated by the Mascot/Florida Reference*, reporting officer: Burn, 10 May 2002 - attachment 'Record of outcomes reached re: meeting held to discuss management of further allegations generated by the Florida/Mascot Reference', 14 November 2001.

296 NSWCC Information Report, *Copy of minutes of meeting held to discuss the management of allegations generated by the Mascot/Florida Reference*, reporting officer: Burn, 10 May 2002 - attachment 'Record of outcomes reached re: meeting held to discuss management of further allegations generated by the Florida/Mascot Reference', 14 November 2001.

297 NSWCC Information Report, *Copy of minutes of meeting held to discuss the management of allegations generated by the Mascot/Florida Reference*, reporting officer: Burn, 10 May 2002.

298 PIC internal memorandum from Tom McGrath, Investigations Special Advisor to Tim Sage, Assistant Commissioner, 29 September 2000; Email from Detective Inspector Catherine Burn, Mascot Reference, NSWCC to Superintendent John Dolan, Commander of SCU, Mascot Reference, NSWCC, 5 September 2001.

299 Ombudsman Transcript, Tom McGrath, 31 July 2014, pp.1064-1065.

300 Ombudsman Transcript, Tom McGrath, 31 July 2014, p. 1068.

301 Ombudsman Transcript, Tom McGrath, 31 July 2014, p. 1060.

302 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 49.

303 Ombudsman Transcript, Terrence Griffin, 3 June 2016, p. 55.

304 Letter from Bruce Barbour, Ombudsman, NSW Ombudsman, to Commissioner Ken Moroney, NSWPF, 12 August 2003, p. 2.

305 Letter from Bruce Barbour, Ombudsman, NSW Ombudsman, to Commissioner Ken Moroney, NSWPF, 12 August 2003, pp. 2-3.

3.4 Duration and outcomes of the Mascot investigations and the start of Operation Florida

3.4.1 Continuation of Mascot work by PIC and Task Force Volta

Operation Prospect has principally focused on complaints and allegations about legal and administrative flaws that occurred during the Mascot investigations. That is a necessary line of inquiry, but it is only part of a broader picture.

Mascot started in 1999 with the information that Sea gave to the NSWCC. Mascot was initially managed as a covert investigation – to protect Sea and to help collect electronic evidence. The Mascot investigations uncovered significant criminal and corrupt conduct by NSW police officers. This corrupt conduct was both historical and ongoing – occurring between the 1980s and 2001 – and involved serious and ongoing criminal activity not detected by the Royal Commission into the NSW Police Service.

The bulk of the investigative work on serious police corruption that had been done by Mascot was shared with the PIC after it joined the investigation in 2000. Mascot continued to collect information and evidence covertly until October 2001, when the PIC started public hearings under the banner of ‘Operation Florida’. At this point, the Mascot investigations and the role of Sea was revealed. Mascot’s investigation of allegations continued, but the investigation was no longer conducted in secret.

Although the PIC was able to finalise the investigation of the more serious police corruption uncovered by Mascot’s investigations, a number of other matters that had been listed on Mascot’s Schedule of Debrief remained. These were ultimately considered and finalised by a NSWPF task force called Volta from 2002-2003.

3.4.2 Operation Florida

In October 2000, the PIC began 14 months of public hearings based on the evidence gathered by Mascot investigators. The information and evidence that Mascot had amassed informed these hearings and culminated in the PIC’s two volume ‘Operation Florida’ report to Parliament in June 2004.³⁰⁶ This report detailed the evidence and findings of the PIC’s public hearings into allegations of corruption, misconduct and criminal activity involving NSW police officers. The corrupt activity by NSW police officers included:

- soliciting and receiving bribes from drug dealers
- organising or ‘green-lighting’ drug trafficking
- stealing cash and property
- reducing charges in return for payment
- perverting the course of justice
- assaulting suspects
- ‘verballing’ suspects
- ‘loading’ suspects
- organising or ‘greenlighting’ break and enter offences.³⁰⁷

The report showed that a range of police officers and commands were implicated in corrupt and criminal conduct including detectives from the Northern Beaches of Sydney, the Armed Hold Up Squad or Unit attached to the Major Crime Squad North, the NSWPF Drug Enforcement Agency (DEA), the Major Crime Squad North Drug Unit based at the Gosford Drug Unit and North Sydney Drug Unit, and officers attached to Task Force Magnum set up in 1991 to investigate armed robberies of armoured vehicles.

³⁰⁶ Police Integrity Commission, *Report to Parliament – Operation Florida*, Volumes 1 and 2, June 2004.

³⁰⁷ Police Integrity Commission, *Report to Parliament – Operation Florida*, Volume 1, June 2004, p. i.

The PIC formally acknowledged that Operation Florida relied on 'the excellent investigative work by the officers from NSW Police and the NSW Crime Commission' that had produced 'startling evidence of police corruption over a lengthy period'.³⁰⁸

The Operation Florida report was organised into seven segments that detailed different clusters of criminal and corrupt activity by NSW police officers uncovered in the Mascot investigations and Operation Florida public hearings. A brief description of each segment follows.

3.4.2.1 Northern Beaches segment

This segment concerned ongoing corrupt and criminal activity in 2000 and 2001 by detectives working in the Northern Beaches of Sydney, particularly the Manly/Davidson Local Area Command. A group of detectives were involved in 'routinely' stealing money and other items during the execution of search warrants, reducing criminal charges in exchange for payment, and receiving regular payments from drug dealers to continue dealing "without police interference".³⁰⁹ The PIC emphasised that the success of this segment of Florida relied on important work by Sea and a civilian covert operative and on a significant amount of electronic evidence derived from LDs and TIs.

As a result, six police officers were criminally prosecuted and received custodial sentences, and \$103,292 was collected from five of those officers, in proceedings under the *Criminal Assets Recovery Act 1990*. Three civilians were also criminally prosecuted and the practising certificate of a solicitor was cancelled by the Law Society of NSW.³¹⁰

3.4.2.2 Guns segment

The focus of this segment was the activities of the Armed Hold Up Unit attached to Major Crime Squad North between about 1985 and 1996. Evidence was presented of the collection and retention of a number of weapons by members of the Armed Hold Up Unit "for the apparent purpose of improperly using them to 'load' suspects and/or otherwise strengthen the prospects of success of prosecution".³¹¹ The success of this segment also relied on the work of Sea and two police covert operatives as well as on electronic evidence, including surveillance film and audio recordings.³¹² Nine former police officers were found to have engaged in police misconduct.

3.4.2.3 Let's Dance segment

In February 1992, there was a police operation called 'Let's Dance' that involved the arrest of two offenders with large quantities of money and illicit drugs. This segment examined an allegation that, during this operation, police stole approximately \$85,000 from the Manly Pacific Hotel and \$25,000 from one of the offender's premises and distributed it among involved police officers. The documentation prepared for the prosecution of the two offenders also intentionally understated the amount of money found by police. Covertly recorded conversations between Sea and other involved officers formed the basis of the allegations. As a result, eight officers were found to have engaged in police misconduct.³¹³

308 Police Integrity Commission, *Report to Parliament – Operation Florida*, Volume 1, June 2004, p. ii.

309 Police Integrity Commission, *Report to Parliament – Operation Florida*, Volume 1, June 2004, p. ii.

310 Police Integrity Commission, *Report to Parliament – Operation Florida*, Volume 1, June 2004, pp. iii-v.

311 Police Integrity Commission, *Report to Parliament – Operation Florida*, Volume 1, June 2004, p. vi.

312 Police Integrity Commission, *Report to Parliament – Operation Florida*, Volume 1, June 2004, p. vii.

313 Police Integrity Commission, *Report to Parliament – Operation Florida*, Volume 1, June 2004, p. vii-viii.

3.4.2.4 Letters of assistance segment

This segment focused on the creation of 'letters of assistance' by members of the NSWPF's DEA, which detailed alleged assistance provided by an offender to police to present to a sentencing judge to seek a sentence reduction for that offender.³¹⁴ The practice of discounting or reducing sentences for offenders if they provided significant assistance to police has clear benefits to both law enforcement and convicted offenders. This segment examined the allegation that letters of assistance prepared by members of the DEA for two individuals were fraudulent and prepared in exchange for cash payments.³¹⁵ As a result, two former police officers were found to have engaged in police misconduct. The ODPP advised the NSWPF that there was insufficient evidence for criminal prosecutions.³¹⁶

3.4.2.5 Newport segment

The Newport segment examined the execution of search warrants at West Ryde and Newport in Sydney in February 1992 by members of the Major Crime Squad North Drug Unit, based at the Gosford Drug Unit and the North Sydney Drug Unit. The allegations included police theft of \$10,000 and a gold ingot during one of the search warrants, assistance being corruptly provided to an offender in relation to charges brought, and \$50,000 being corruptly shared between relevant police officers. The PIC reported that assistance was improperly provided to the offender and two officers were found to have engaged in misconduct. There was insufficient admissible evidence in relation to the other allegations.³¹⁷

3.4.2.6 Magnum segment

Task Force Magnum was set up in 1991 to investigate a series of armed robberies of armoured vehicles. The focus of this segment was restricted to the investigation of the 1991 robbery of Danny's Seafood Restaurant at La Perouse in Sydney, for which two people were arrested and prosecuted. The allegations included that police fabricated evidence and admissions in relation to these two people. The charges against one person were dropped and the other person was found not guilty. The person whose charges were dropped made a formal complaint about the police involved. After an internal police investigation, four police officers were charged with conspiracy to pervert the course of justice. They were all found not guilty in the District Court in Sydney in 2000. One of these officers later alleged that he and other officers had given false evidence at their trial.

Three officers, including Sea, gave evidence to Operation Florida that they and other officers fabricated evidence in relation to the two people charged with the robbery of Danny's Seafood Restaurant.

The investigation of this segment resulted in one serving and nine former police officers being found to have engaged in police misconduct.³¹⁸

3.4.2.7 King segment

This segment explored evidence in relation to four matters involving ex police officer James King. Two of the incidents involved allegations that King and other police officers conspired to pervert the course of justice in relation to two separate prosecutions of King in 1994 and 2001 for driving while intoxicated. In a third matter, it was alleged that King and another officer entered into a corrupt arrangement with an informant to keep the majority of reward money ostensibly paid to the informant. The fourth matter involved an allegation that King helped Sea to launder Sea's corruptly obtained money.³¹⁹

As a result, one serving police officer and five former officers were found to have engaged in police misconduct.³²⁰

314 This longstanding practice is enshrined in s. 23 of the *Crimes (Sentencing Procedure) Act 1999*.

315 PIC, *Report to Parliament – Operation Florida*, Volume 1, June 2004, p. ix.

316 PIC, *Report to Parliament – Operation Florida*, Volume 1, June 2004, pp. 232, 234.

317 PIC, *Report to Parliament – Operation Florida*, Volume 1, June 2004, p. x-xi.

318 PIC, *Report to Parliament – Operation Florida*, Volume 1, June 2004, p. xii.

319 PIC, *Report to Parliament – Operation Florida*, Volume 1, June 2004, p. xiii.

320 PIC, *Report to Parliament – Operation Florida*, Volume 1, June 2004, p. xiii.

3.4.2.8 Prosecutions

The Mascot investigations – together with the further exposure of information in the PIC's public hearings – resulted in 13 people (police officers as well as civilians) being prosecuted for a range of criminal offences. These included supply of prohibited drugs, accepting bribes (contrary to section 200(1) of the Police Act), perjury, making a false statement, a range of offences relating to perverting the course of justice, inciting a person to bribe a police officer, receiving a corrupt reward contrary to section 249B of the *Crimes Act 1900*, being an accessory before the fact to a break, enter and steal, and giving false or misleading evidence.

Some of those who pleaded guilty or were found guilty of criminal offences were named in the early Mascot LD warrants. The full list of those prosecuted and their sentences are set out in Chapter 10, Volume 2 of the PIC's Operation Florida Report to Parliament.

Not all of the suspects named in Sea's original allegations were prosecuted. Although ongoing corrupt activity – such as that in the Northern Beaches segment – resulted in the successful criminal prosecution of police officers, the majority of allegations of corrupt conduct did not lead to criminal charges. There were a number of reasons for this. Some of the criminal offences relating to historical conduct were statute barred by the time the Operation Florida hearings ended. In some cases where there were strong grounds for suspicion, the ODPP advised that there was no reasonable prospect of a conviction so no charges were laid.

3.4.2.9 Action taken by the Police Commissioner about police misconduct

The PIC found that 27 officers had engaged in police misconduct. Based on those findings, disciplinary and internal management actions were taken in relation to at least 10 officers. Seven officers were suspended while their conduct was investigated. Some others resigned or were medically discharged while the Commissioner of Police considered removing them from the NSWPF under section 181D of the Police Act, but before that process was completed. At least one officer was subject to non-reviewable action under section 173 and Schedule 1 to the Police Act.

Volume 2 of the PIC's Operation Florida Report sets out which police officers were suspended or subject to other action as a result of misconduct uncovered by the Mascot investigations and Operation Florida hearings.

3.4.2.10 Resignations and dismissals

At least 20 police officers who were named in the Mascot Schedule of Debrief resigned or were otherwise dismissed as members of the NSWPF during or shortly after the completion of the Mascot investigations – but before the Operation Florida report was finalised. As internal management action could only be taken against serving police officers, no management action was ultimately taken in relation to the allegations against these former officers – even if the PIC considered they had engaged in misconduct.

Volume 2 of the PIC's Operation Florida Report sets out the people who resigned, were medically discharged or retired on medical grounds during or after the Mascot/Florida investigations. Some of them resigned during the course of the section 181D removal process.

3.4.2.11 Other suggested developments

On 2 March 2003, an article was published in *The Sun-Herald* that mentioned the suicide of one police officer and the attempted suicide of three other officers who were either named in one or more allegations by Mascot or who had worked on the Mascot investigations.³²¹

Operation Prospect is aware that one police officer who was named in Mascot's Schedule of Debrief committed suicide, though it is not possible to attribute the suicide to the Mascot investigations. That officer does not seem to have been considered a person of interest in Mascot – he was not a target of investigation and was not named in any Mascot LD warrant.

³²¹ Sutton, Candace. 'Why cops took their eye off the streets', *The Sun-Herald*, 2 March 2003.

Another officer who worked on Mascot and who attempted suicide gave evidence to Operation Prospect relating to experiencing various stresses, including work in Mascot. It is not possible to attribute this person's state of mind solely to their experience working as part of the Mascot investigations.

3.4.3 Task Force Volta

In mid-2002, the Commissioner of Police – Mr Ken Moroney – authorised the establishment of a new police task force, codenamed Volta, to start in September 2002. It was to deal with 199 medium to low risk allegations or events in the Schedule of Debrief that had not been finally dealt with by Mascot at that time.³²² All officers who were named on the Schedule of Debrief but who were yet to be investigated remained under suspicion until Task Force Volta. Volta formed part of the 'clean up' phase – following up on many allegations that were left uninvestigated, and reaching a final conclusion about whether officers had engaged in any misconduct.

The SCU staff still attached to the Mascot reference continued to manage and investigate the remaining high priority matters, and also kept control of a lesser volume of medium and low priority matters. This work was not done under a NSWCC Reference, but under the complaints management framework of Part 8A of the Police Act.³²³ Task Force Volta was led by Jewiss as Commander. He had previously worked on the Mascot investigations. The Task Force Volta Complaints Management Team sat on a fortnightly basis.³²⁴ Task Force Volta concluded for investigative staff on 27 September 2003.³²⁵

Operation Prospect has not investigated Task Force Volta. The allegations that it finalised were managed under Part 8A of the Police Act. As required by that Act, they were subject to the oversight of the Ombudsman and the PIC.

Operation Prospect has nevertheless analysed many Task Force Volta documents, and considered the processes it followed. This was done to assess the way that Mascot allegations were concluded and to determine if the allegations were appropriate and serious enough to be investigated under the NSWCC Mascot references. The chapters that follow make reference to Task Force Volta documents and processes where they are relevant to the way that Mascot investigations targeted individuals for investigation.

322 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.

323 NSWPF internal memorandum from Detective Inspector Paul Pisanos, *Operation Mascot – An Investigator's Overview*, 25 August 2003, p. 6.

324 NSWPF internal memorandum from Greg Jewiss, Commander, Task Force Volta, 6 November 2003, p. 3.

325 NSWPF internal memorandum from Greg Jewiss, Commander, Task Force Volta, 6 November 2003, p. 4.

Chapter 4. Mascot structure, governance, and personnel

4.1 Chapter overview

Chapter 3 explained how the Mascot investigations were established under a reference to the NSWCC. This chapter explains the structure of the Mascot Task Force, how it operated, and its relationship to other NSWCC governance processes. The personnel who worked on the Mascot investigations – including police and NSWCC staff – and the officers who played a leading role are listed. The analysis of their role is discussed in other chapters where, in some cases, the names of officers are anonymised.³²⁶

4.2 Police task forces and the NSWCC

The Mascot Task Force was established under section 27A of the NSWCC Act. Under section 27A(1), the NSWCC Management Committee could arrange with the Commissioner of Police for a police task force to assist the NSWCC to carry out an investigation into relevant criminal activity.

Section 27A provided:

27A Police task forces to assist Commission

- (1) *The Management Committee may make arrangements with the Commissioner of Police for a police task force to assist the Commission to carry out an investigation into matters relating to a relevant criminal activity.*
- (2) *In assisting the Commission to carry out such an investigation, the police task force is (subject to subsection (3) under the control and direction of the Commissioner of Police.*
- (3) *The Management Committee may give directions and furnish guidelines to the Commission and the Commissioner of Police for the purpose of co-ordinating such an investigation, and the Commission and the Commissioner shall comply with any such directions and guidelines.*

The Management Committee, acting under section 27A(3), had issued the *Section 27A Task Forces – Directions and Guidelines*. These directions and guidelines stated the obligation of police task force members to assist the NSWCC:

1. (a) *The Police Task Force (by whatever name) will assist the Commission to carry out the investigation into matters relating to a relevant criminal activity referred to the Commission by the Committee for investigation and carry out any police work arising out of related confiscation action.*
- (b) *In assisting the Commission, the Police Task Force will ensure that the directions of the Commission relevant to the Commission's investigations are complied with.*
- ...
3. *Subject to these directions and guidelines, the Police Task Force will, in accordance with section 27A(2), be under the direction and control of the Commissioner of Police.*³²⁷

³²⁶ Chapter 1 explains the protocol followed by Operation Prospect in anonymising names in this report.

³²⁷ NSWCC, *NSW Crime Commission Act, Section 27A, Task Forces – Directions and Guidelines*, undated, p. 1.

The directions and guidelines required the members of a police task force to approach the Commission in the first instance for approval to apply statutory investigative powers, and required compliance with NSWCC formal procedures in preparing documents:

5. *The Police Task Force will approach the Commission in the first instance, subject to operational exigencies, should the Police Task Force seek to apply statutory investigative powers including the issue of:*
 - i) *a summons under section 16 of the Act*
 - ii) *notices under sections 10 or 17 of the Act*
 - iii) *a search warrant under the Act or the Search Warrants Act*
 - iv) *a warrant under the Listening Devices Act*
 - v) *a warrant under the Telecommunications (Interception) Act.*
 6. *The Police Task Force will comply with any formal procedures for the preparation of documentation necessary for an application for a warrant, summons or notice referred to in paragraph 5.*
- ...
- (f) *The Commander or his deputy will report at least weekly to the Commission and/or members of the staff of the Commission nominated by the Commission as required. The Commander will also report all significant developments in the investigation as and immediately when they occur. The Commander will similarly report to his/her Police Service supervisor consistently with the Act.³²⁸*

It is clear from those directions and guidelines that police task force members were to assist the NSWCC in conducting its investigations and were subject to Commission directions. As stated in direction 1(a) and (b), NSWCC investigations were conducted under the direction and control of the NSWCC and its senior officers. However – in terms of line management, day-to-day supervision, performance management and (when required) disciplinary matters – police officers were under the direction and control of more senior police.

Police officers working for the NSWCC did their work as staff of the NSWCC,³²⁹ although they retained their rank, seniority and remuneration as police officers.³³⁰ The practice adopted in the Mascot Task Force was that police officers were sworn in as NSWCC staff members, and they gave an undertaking to comply with the NSWCC Act secrecy provisions and the duties and obligations of the NSWCC for corruption prevention.³³¹ Among the NSWCC documents they were required to comply with were the NSWCC Code of Conduct, the NSWCC Staff Handbook, the NSWCC Investigation Manual, the NSWCC Confiscation Division Manual (in relation to the confiscation of the assets of criminals) and the Directions and Guidelines issued under section 27A.³³²

The NSWCC Annual Report 1999-2000 outlined that “Investigations of matters referred to the Commission are usually conducted by teams consisting of members of the NSW Police Service and Commission staff...”. The report noted that:

... the teams of task force police officers and Commission staff have day-to-day carriage of investigations and report to the Commission through weekly operations meetings. Police in task forces report through, and are supervised within, the NSWPF command structure. With few exceptions, the results of criminal investigation work is the outcome of joint operations with other agencies, mainly the NSW Police Service. The Commission's contribution to these operations varies from case to case.³³³

³²⁸ NSWCC, *NSW Crime Commission Act, Section 27A, Task Forces – Directions and Guidelines*, undated, p. 2.

³²⁹ NSWCC Act, s. 3 (member of staff of the Commission).

³³⁰ NSWCC Act, s. 32(6).

³³¹ See for example: NSWCC, *Induction for Task Force Police and other officers*, Detective Inspector Catherine Burn, 10 September 1998.

³³² NSWCC, *NSW Crime Commission Act, Section 27A, Task Forces – Directions and Guidelines*, undated.

³³³ NSWCC, *Annual Report 1999/2000*, 16 November 2000, p. 13.

4.3 Mascot staffing and personnel

The Mascot Task Force was physically located within the NSWCC premises, as were other joint task forces. As discussed in Chapter 3, the Mascot reference was formally started in February 1999. The early investigation work was done by NSWPF officers from the Special Projects Unit (SPU), working at the NSWCC on the Gynea Reference. In mid-1999 – as part of a NSWPF restructure – the Special Crime and Internal Affairs Command (SCIA) was established (replacing the Internal Affairs Command), and the Special Crime Unit (SCU) was established within SCIA (replacing the SPU).

The SCU was a discrete unit within SCIA that worked in partnership with the NSWCC and was housed at NSWCC premises. The Mascot Task Force was formed within the existing SCU structure. It was staffed by NSWPF officers sworn into the NSWCC, as well as NSWCC staff such as analysts, monitors and NSWCC executive officers.³³⁴ As a result, some of the key personnel in the Mascot investigations are referred to in this report in connection with their work in SCIA, SCU and the Mascot Task Force.

4.4 NSWCC structure and personnel at the time of Mascot

4.4.1 NSWCC structure

The NSWCC reported to the Management Committee – which consisted of the Minister for Police, the Commissioner of Police, the Chairperson of the National Crime Authority, and the Commissioner of the NSWCC.³³⁵

At the time of the Mascot investigations, the NSWCC was headed by Commissioner Phillip Bradley and John Giorgiutti was the Solicitor to the Commission and Director of Operations. At that time, the NSWCC had three investigative teams each headed by an Assistant Director – Tim O'Connor, Mark Standen and Michael Lulan (financial investigations).³³⁶ There was also an Assistant Director (Technical) – Nick Dowling – and an Assistant Director (Operation Support) – Alison Brook.

The Commissioner, Director and Assistant Directors made up the Management Team. It was responsible for the Commission's strategic planning and for achieving the Commission's aims and objectives.³³⁷

In 1999-2000 the NSWCC had 91 permanent staff – including intelligence analysts, lawyers, legal clerks, telephone intercept administrators, financial investigators, administration officers, transcription officers, and monitors who listened to TI and LD product.³³⁸

Each investigation team was led by an Assistant Director as the Director of Investigations. Other staff included a Manager of Investigations, intelligence analysts, financial investigator/s, lawyer/s, a TI administrator and monitors.³³⁹ Those NSWCC staff worked with police who had been seconded to work on a specific reference as part of a task force.

³³⁴ Various documents and evidence have informed Operation Prospect of this, see for example the 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 NSWPF, PIC and NSWCC, *Regarding a joint pursuit of allegations of corruption*, undated.; NSWCC Confidential minutes of Mascot team meetings; the NSWCC Management Committee minutes; the "Operation Mascot Staff List" which lists police and NSWCC staff, their telephone numbers and start dates; and multiple NSWCC Induction forms signed by NSWPF officers.

³³⁵ NSWCC Act, s. 24(1).

³³⁶ NSWCC, *Annual Report 1999/2000*, 16 November 2000, p. 33.

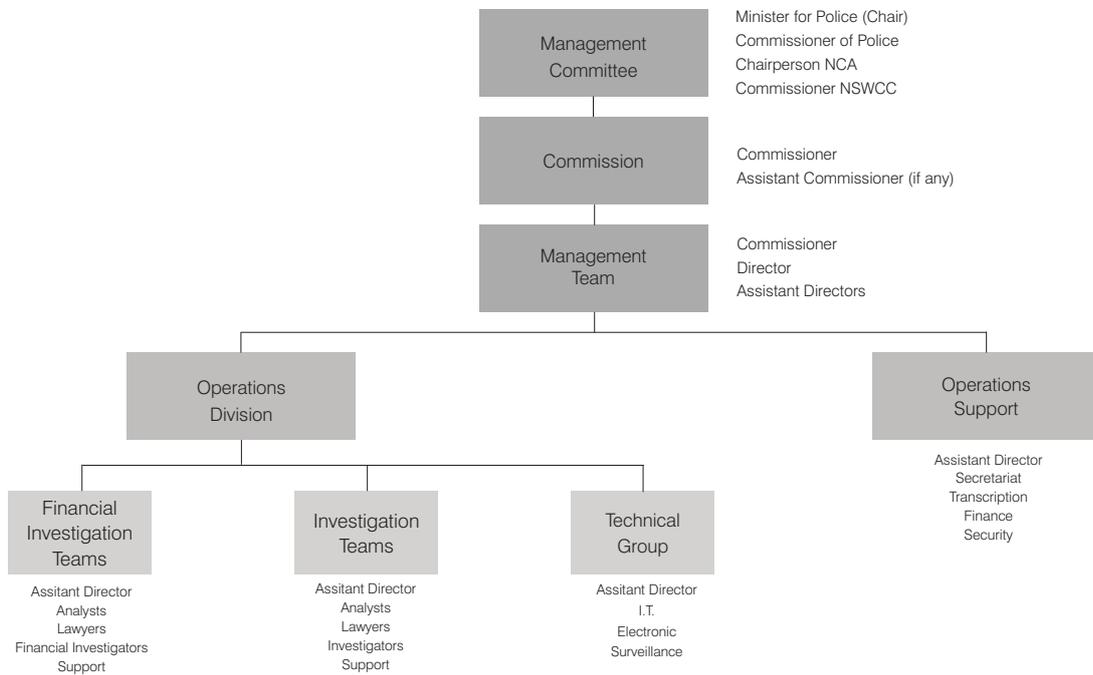
³³⁷ NSWCC, *Annual Report 1999/2000*, 16 November 2000, p. 33.

³³⁸ NSWCC Act, *Annual Report 1999/2000*, 16 November 2000, p. 33.

³³⁹ NSWCC Act, *Annual Report 1999/2000*, 16 November 2000, Appendix D.

Figure 2 sets out the organisational chart for the NSWCC between 1999 and 2001:

Figure 2: NSWCC Organisational Chart



Source: NSWCC, Investigation Manual, December 1999, p. iv.

4.4.2 NSWCC executive officers involved in Mascot

Three NSWCC executive staff played a key role in the Mascot investigations – Bradley, Standen and Giorgiutti. Bradley, as the Commissioner of the NSWCC, implemented a flat reporting structure that meant he was involved in many day-to-day operational matters. Standen was the Assistant Director assigned to the Mascot investigations. Giorgiutti, though not as involved as Bradley or Standen, had input into the investigation at various times. The role that each played will be noted briefly at this point – they are each referred to throughout this report.

Various documents considered by Operation Prospect indicate that Bradley was closely involved in the Mascot investigations strategies and was well versed in investigation activities ('taskings') and achievements. Minutes of meetings (see 4.5.3) show that Bradley attended regular meetings about Mascot, he retained sole responsibility for approving controlled operations and TI warrant applications, and he wrote many memos and emails that reveal both his knowledge of the Mascot investigations – as well as his concern at times about the direction of the investigation.³⁴⁰

Standen was the Assistant Director primarily responsible for the overall direction of the Mascot investigations.³⁴¹ Standen told Operation Prospect that he made the final decisions about Mascot operational strategy or tactics,³⁴² but the day-to-day running of Mascot was left to the Mascot Team Leader – Detective Inspector Catherine Burn from the NSWPF.³⁴³ O'Connor told Operation Prospect that Mascot was "one of Standen's investigations".³⁴⁴

340 See for example: Email from Commissioner Phillip Bradley, NSWCC, to Mark Standen, Assistant Director Investigations, NSWCC, 9 May 2001; NSWCC internal memorandum from Commissioner Phillip Bradley to Mark Standen, Assistant Director Investigations, NSWCC copying Director and Solicitor to the NSWCC, Superintendent John Dolan, Commander of SCU, Mascot Reference, NSWCC and Assistant Commissioner Andrew Scipione, Commander of SCIA, NSWPF, 9 May 2001.

341 Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2,965; Ombudsman Transcript, Mark Standen, 21 March 2015, p. 5; NSWCC, *Annual Report 1999/2000*, 16 November 2000.

342 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 79.

343 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 5.

344 Ombudsman Transcript, Tim O'Connor, 11 July 2014, p. 423.

Similarly, NSWPF Mascot investigator Detective Senior Constable Darren Boyd-Skinner stated that Standen reviewed all the Mascot affidavits and was the “central Crime Commission figure involved in the operation itself”.³⁴⁵

Giorgiutti, as Solicitor and Director of Operations, also played an important role. As discussed in Chapter 5, NSWCC policy made him responsible for reviewing all applications for LD warrants. He was listed on all Mascot affidavits as the Solicitor to the NSWCC. The Solicitor for the NSWCC is the legal representative of the NSWCC as a corporate entity, and may start and carry on proceedings in any court on behalf of the NSWCC. Giorgiutti also regularly attended Mascot meetings.

4.4.3 NSWCC staff involved in Mascot

A number of NSWCC staff who were not police officers worked on the Mascot investigations, particularly in the early period. They included:

- a senior monitor,³⁴⁶ two analysts³⁴⁷ and Neil Owen (solicitor)³⁴⁸ – all appointed over January and February 1999
- an intelligence officer³⁴⁹ – from mid-1999.
- another solicitor³⁵⁰ and an analyst³⁵¹ – from mid to late 2000.

Generally, the solicitors for the NSWCC provided legal advice to the operational areas and prepared court documents in accordance with relevant statutes. This included applications, affidavits and warrant documents for LDs and TIs. One solicitor, Neil Owen, witnessed the majority of the Mascot LD affidavits.

4.4.4 Senior police involved in Mascot

The relationship between the NSWPF’s SCIA and the NSWCC is discussed in Chapter 3 to this report. As noted there, the Mascot investigations sat within the SCU of SCIA.

Superintendent Malcolm Brammer was appointed in February 1997 as Acting Commander of the Internal Affairs Command (renamed SCIA in mid-1999). He was appointed as Commander in July 1998 and remained in that position until May 2001.³⁵²

Superintendent John Dolan was appointed Commander of SCU in mid-1999 and remained in that position until December 2001.³⁵³ Dolan was responsible at the time for Mascot and other police task forces within the NSWCC. He had an oversight role in relation to police working on Mascot, and was the senior officer to whom Burn – the Mascot Team Leader – reported. Dolan regularly attended the weekly Mascot meetings.

³⁴⁵ Ombudsman Transcript, Darren Boyd-Skinner, 11 July 2014, p. 353.

³⁴⁶ Email from [NSWCC staff member], Operations Support Manager, NSWCC to Linda Waugh, Deputy Ombudsman, NSW Ombudsman, 22 April 2015; Ombudsman Transcript, [senior monitor], 8 May 2014, p. 5: states start date was in 1999; Ombudsman Transcript, [senior monitor], 8 May 2014, p. 29: states end date was in 2002.

³⁴⁷ Email from [NSWCC staff member], Operations Support Manager, NSWCC to Linda Waugh, Deputy Ombudsman, NSW Ombudsman, 22 April 2015; Ombudsman Transcript, [NSWCC analyst], 3 April 2014, p. 5: states start date was March 1997.

³⁴⁸ Email from [NSWCC staff member], Operations Support Manager, NSWCC to Linda Waugh, Deputy Ombudsman, NSW Ombudsman, 22 April 2015; Ombudsman Transcript, [NSWCC solicitor], 21 October 2014, p. 2327: states start date was March 1996; Email from Neil Owen, solicitor, NSWCC to NSWCC “ALL” email distribution list, 12 April 2002: states end date was 12 April 2002.

³⁴⁹ Email from [NSWCC staff member], Operations Support Manager, NSWCC to Linda Waugh, Deputy Ombudsman, NSW Ombudsman, 22 April 2015; Statement of Information (interview), [a NSWCC staff member], 2 May 2014, p. 3: states start date was in March 1999.

³⁵⁰ Email from [NSWCC staff member], Operations Support Manager, NSWCC to Linda Waugh, Deputy Ombudsman, NSW Ombudsman, 22 April 2015.

³⁵¹ Email from [NSWCC staff member], Operations Support Manager, NSWCC to Linda Waugh, Deputy Ombudsman, NSW Ombudsman, 22 April 2015; Ombudsman Transcript, [NSWCC analyst], 7 May 2014 p. 165: states end date was early 2002 for Mascot and left NSWCC in 2006.

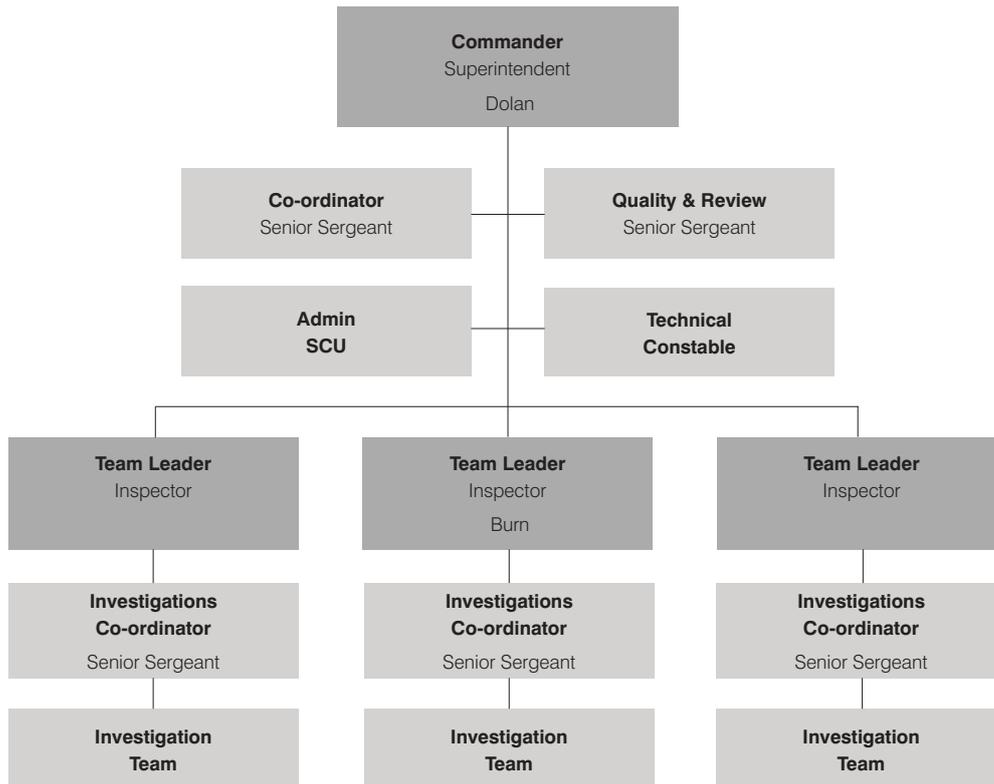
³⁵² NSWPF, Record of interview between Assistant Commissioner Reith and Commissioner Brammer, 13 June 2002, p. 5; PIC, *PODS Person profile for Malcolm Brammer*, accessed by NSW Ombudsman on 8 August 2014, pp. 2-3; NSWCC, *Mascot //Boat Staff*, 4 June 2003, p. 1.

³⁵³ NSWCC, *Mascot //Boat Staff*, 4 June 2003, p. 1; NSWPF internal memorandum from Detective Superintendent M. Wright, 18 November 2003, p. 1; PIC, *PODS Person profile for John Dolan*, accessed by NSW Ombudsman on 8 August 2014, pp. 2-3.

The SCU was divided into three sections, each headed by a Team Leader. Burn was team leader for the Mascot Task Force. She began work in the SCU in December 1998, before the formal commencement of the Mascot reference. She was appointed as a Team Leader responsible for the Mascot investigations when they formally started in February 1999.³⁵⁴ She remained in that position until she left SCIA in December 2002³⁵⁵ – except for several months in early-mid 2002 when she acted as Commander of the SCU after Dolan left. In evidence to Operation Prospect, Burn commented that Mascot was her only investigative operation from 1999 until she left SCIA.³⁵⁶

The following figure shows the structure of the SCU:

Figure 3: SCU Structure



Source: Adapted from NSWPF, Strike Force Tumen, Complaint Number [number], volume 5 – attachment ‘Special Crime Unit Current authorised positions, 12 March 2002’.

4.4.5 Police investigators involved in Mascot

The NSWPF Mascot personnel records do not comprehensively identify who worked on Mascot and when. What is clear from the existing records, including organisation charts, is that the NSWPF Mascot investigations team was led by a Team Leader who supervised a mix of senior sergeants, sergeants, senior constables and constables. NSWPF officers transferred in and out of Mascot. In 2001 there were at least 22 NSWPF investigators working full-time on Mascot.³⁵⁷

354 NSWPF Record of interview between Detective Inspector Galletta, Detective Inspector Jenkins and Superintendent Burn, 2 December 2002, pp. 3-4; NSWCC, *Mascot III/Boat Staff*, 4 June 2003, p. 1.

355 NSWPF Record of interview between Detective Inspector Galletta, Detective Inspector Jenkins and Superintendent Burn, 2 December 2002, p. 3; NSWCC, *Mascot III/Boat Staff*, 4 June 2003, p. 1.

356 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2,695.

357 NSWPF internal memorandum from Detective Inspector Paul Pisanos, *Operation Mascot – “An Investigator’s Overview”*, 25 August 2003, p. 2.

Operation Prospect has decided not to list and name all the officers who worked in Mascot. Many were junior officers who are not the subject of adverse comment or findings in this report. It would be unfair for the criticisms in this report to be directed at them. If a finding is made against an individual officer in this report, their rank at the relevant time period is noted. It should also be reiterated Mascot investigators achieved significant positive outcomes some of which are detailed in section 3.4 of Chapter 3.

Many of the NSWPF staff in the Mascot team worked on temporary appointments at a higher grade than their substantive NSWPF position. These were known as 'section 66 appointments', which were special temporary appointments by the Commissioner of Police under section 66 of the Police Act.

4.4.6 Induction process and policies

On induction into the NSWCC, NSWPF officers were required to read and sign a four page NSWCC form titled 'Induction for Task Force Police and Other Officers'. The front page required the inductee to confirm that they had signed the Secrecy Form and the Code of Conduct. The induction form was countersigned by the Commissioner of the NSWCC in two places, with the following forewords:

*I appoint the above officer as a member of the staff of the Commission pursuant to section 32 of the New South Wales Crime Commission Act 1985 for the purpose of conducting investigations.*³⁵⁸

And:

*Pursuant to section 66(2) of the Telecommunications Interception Act 1979 (TI Act), I authorise the above officer to receive information obtained by interceptions under the warrants issued to the Commission.*³⁵⁹

From 2000, the inducted officer also then signed the following acknowledgement:

*I acknowledge that I have read section 29 of the New South Wales Crime Commission Act and undertake to abide by it and the other documents which have been brought to my attention today.*³⁶⁰

The following two pages of the induction form addressed the secrecy requirements in section 29 of the NSWCC Act. The inductee was required to sign a declaration acknowledging their duty "to familiarise myself with the contents of the Commission's Staff Handbook"³⁶¹ and that they were aware of the secrecy provisions and penalties for breaching those provisions.

The final page of the induction form listed six documents, and stated the inductee was "required to familiarise themselves with the contents of each".³⁶² The inductee signed an undertaking to do so within one month of signing. Those documents were:

- General Induction Paper for Task Force Members
- NSW Crime Commission Code of Conduct
- NSW Crime Commission Staff Handbook
- NSW Crime Commission Investigation Manual
- NSW Crime Commission Confiscation Division Manual.

From 2000, this list also included the:

- NSW Crime Commission Act, Section 27A Task Forces – Directions and Guidelines.³⁶³

³⁵⁸ NSWCC, Induction for Task Force Police officers and other officers, 1999.

³⁵⁹ NSWCC, Induction for Task Force Police officers and other officers, 1999.

³⁶⁰ NSWCC, Induction for Task Force Police officers and other persons, 2000, p. 1.

³⁶¹ NSWCC, Induction for Task Force Police officers and other persons, 1999, p. 2.

³⁶² NSWCC, Induction for Task Force Police officers and other persons, 1999, p. 4.

³⁶³ NSWCC, Induction for Task Force Police officers and other persons, 2000, p. 1.

Following the title of each document was a short summary of its contents. The General Induction Paper for Task Force Members contained description of the NSWCC and its relationship with the NSW Police Service. The NSWCC Staff Handbook provided an outline of the establishment and administration of the NSWCC, and covered topics such as recruitment and induction, personnel, security and corruption prevention, registry, meetings, correspondence, finance and information technology. The NSWCC Investigation Manual stated that it:

*... details procedures covering all aspects of the investigation function of the Commission. NSW Police Service officers should pay particular attention to this manual, as many of its chapters relate directly to the procedures used in cooperative work between the Commission and the Strike Forces.*³⁶⁴

One further document which ought to be mentioned here is the NSWCC General Induction Paper which was given to all officers as they were inducted into the NSWCC. Operation Prospect requested this document from the NSWCC who advised that it did not hold a copy in its records.

Bradley in his submissions referred to this document and quoted the supervisory arrangements outlined in that document as:

Although you are a member of the staff of the Commission, you are not under the direct supervision of the Commission or any of its officers. Normally you will report, subject to the legislation, to your supervisors in your parent agency.

*If you are a NSW police officer your deployment is governed by section 27 A of the New South Wales Crime Commission Act 1985 and the Directions and Guidelines issued by the Commission's Management Committee. In particular, those directions and guidelines provide that police in Task Forces assisting the Commission remain under the command and control of the Commissioner of Police*³⁶⁵

The analysis in the remainder of this chapter regarding the direction and control of the Mascot investigations paint a quite different operational picture, in which the NSWCC and senior officers played a far more involved and influential role in the Mascot Task Force.

4.5 Mascot meetings and liaison

4.5.1 Daily meetings of Mascot staff

Several former Mascot officers gave evidence to Operation Prospect that all members of the Mascot Task Force met nearly every day, sometimes more than once a day.³⁶⁶ In these meetings staff provided updates, reported on their progress, and discussed proposed investigative activities and methodologies. The meetings were informal³⁶⁷ and usually not minuted.

The evidence of former Mascot staff was that Burn usually chaired the meetings, with Dolan sometimes in attendance.³⁶⁸ Bradley did not attend the daily meetings.³⁶⁹ Standen recalled that he attended the meetings in an ad hoc fashion and that was supported by the recollection of another Mascot investigator.³⁷⁰ The limited minute records available to Operation Prospect confirm that Burn and the Mascot investigators and analysts attended these meetings.³⁷¹

364 NSWCC, Induction for Task Force Police officers and other persons, 1999, p. 4.

365 Bradley, M, Submission in reply, 8 February 2016, p. 11.

366 Statement of Information (Interview), [officer], 5 May 2014, p. 16-17; Statement of Information (Interview), [officer], 30 January 2014, p. 32; Ombudsman Transcript, [NSWCC senior monitor], 8 May 2014, p. 36; Statement of Information (Interview), [officer], 13 March 2014, p. 20.

367 Ombudsman Transcript, [NSWCC analyst], 3 April 2014, p. 49.

368 Statement of Information (Interview), [officer], 13 March 2014, p. 20; Statement of Information (Interview), [officer], 5 May 2014, p. 17; Ombudsman Transcript, Gregory Jewiss, 29 July 2014, p. 904.

369 Ombudsman Transcript, [NSWCC senior monitor], 8 May 2014, p. 62.

370 Ombudsman Transcript, Mark Standen, 21 March 2014, p. 27; Statement of Information (Interview), [Mascot investigator], 30 January 2014, p. 33.

371 NSWCC, *Confidential minutes of Mascot team meeting*, 29 August 2000; NSWCC, *Confidential minutes of Mascot team meeting*, 30 August 2000; NSWCC, *Confidential minutes of Mascot team meeting*, 31 August 2000.

Former Mascot staff recalled the following items being discussed at the daily meetings:

- Sea's debriefs and contact with his handlers³⁷²
- the role and next steps for Sea³⁷³
- oral briefings about the material obtained on LDs.³⁷⁴

4.5.2 Weekly activity reports

Mascot outcomes were reflected in 'Weekly Activity Reports' from 18 January 1999. These reports began under the NSWCC Gymea Reference and continued when the Mascot reference was formally granted in February 1999. The reports detailed weekly outcomes, actual opportunities, potential opportunities and proposed activities. They were issued throughout the course of the Mascot investigations – initially by Burn, and later by other senior police officers in the Task Force. In approximately June 2000, the format of the reports was amended, however, the matters covered in them remained substantially the same. The last of the Weekly Activity Reports was dated 31 January 2003.

4.5.3 Weekly Mascot staff/team meetings

In relation to weekly operations meetings the NSWCC Investigation Manual states:

While the NSWCC Act refers to Task Forces, the Police Service prefer the expression Strike Forces which will be used in the following text.

Operations meetings are held weekly with Strike Force Commanders. They are attended by the Commissioner, Director, Assistant Director, Investigations, investigation team members assigned to that particular investigation, and any other person nominated by the Commissioner to attend the meeting. The purpose of the meeting is for all participants to advise the Commission on the current status of the investigation and to discuss the future course of the investigations.

At each operations meeting, the Strike Force Commander and/or Commission analyst tables a Report.³⁷⁵

A limited number of Information Reports record the minutes of 'office meetings' in early 1999 (an Information Report was one of the most common documents used by staff to record events and information). The minutes of these meetings indicate that they were attended by Burn, the NSWPF Mascot investigators and NSWCC analysts. In these meetings, staff discussed the responsibilities of different officers,³⁷⁶ proposed strategies and targets,³⁷⁷ and LD applications and controlled operations.

In February 2000, Mascot began to formally minute meetings attended by senior NSWCC and NSWPF staff. It is unclear whether these meetings were held before this date as no records of such meetings were produced to Operation Prospect.

The meetings occurred weekly. Regular attendees included Bradley, Giorgiutti, Standen, Dolan, Burn, the NSWCC senior monitor and some of the NSWCC analysts. Mascot investigators and other NSWCC staff attended the meetings irregularly. Brammer also attended from time to time.

372 Statement of Information (Interview), [officer], 13 March 2014, p. 22.

373 Statement of Information (Interview), [officer], 13 March 2014, p. 18.

374 Ombudsman Transcript, [NSWCC senior monitor], 8 May 2014, p. 37; Statement of Information (Interview), [officer], 13 March 2014, p. 18.

375 NSWCC, Investigation Manual, December 1999, p. 2.2.

376 NSWCC Information Report, *Office Meeting on the 03/03/1999*, reporting officer: Jewiss, 9 March 1999.

377 NSWCC Information Report, *Office meeting on the 18/01/99*, reporting officer: [Mascot investigator] 18 January 1999.

4.5.4 PIC attendance at Mascot meetings

Shortly after a memorandum of understanding (MOU) was signed between the Police Integrity Commission (PIC), the NSWCC and the NSWPF in June 2000 to instigate a joint pursuit of allegations of police corruption³⁷⁸ (see Chapter 3), PIC staff began to attend the regular Mascot meetings. The PIC personnel attending those meetings included PIC Commissioner P.D. Urquhart QC and Assistant Commissioner Tim Sage.

4.5.5 Operations Coordination Committee meetings

The June 2000 MOU established the Operations Coordination Committee (OCC), which was made up of senior representatives from the three agencies participating in the Mascot/Florida operation.³⁷⁹ The MOU required the OCC to meet regularly to determine matters such as the exchange of information, witness protection and informer management, operational strategies, staffing resources, accommodation and the conduct of PIC hearings.³⁸⁰ The OCC meetings were generally held weekly. The first record of OCC minutes is for a meeting on 20 July 2000 and the last for 14 October 2002.

A review of OCC minutes shows that the agency representatives most usually in attendance at OCC meetings were:

- NSWCC – Bradley, Standen, Giorgiutti
- PIC – Sage, Tom McGrath, Michelle O'Brien (Commissioner Urquhart attended some meetings)
- NSWPF – Brammer, Dolan, Burn.

Other senior staff attended as needed.³⁸¹

4.5.6 SCU meetings

There are limited records that indicate that SCU 'Team Leaders' or 'Management' meetings were held weekly from approximately July 2000. These meetings were organisational as opposed to operational and were for management to discuss staffing, budgets and resources.

4.6 Direction and control of Mascot

4.6.1 Evidence obtained by Operation Prospect

Section 4.5 outlined the in-house Mascot meetings, including the Mascot team meetings that occurred on roughly a weekly basis. Regular attendees at the weekly meetings were Bradley, Brammer, Standen, Giorgiutti, Burn, other senior officers working on Mascot, and the NSWCC analysts. These meetings discussed the investigative strategies being pursued and the results.

378 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 NSWPF, PIC and NSWCC, *Regarding a joint pursuit of allegations of police corruption*, June 2000.

379 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 NSWPF, PIC and NSWCC, *Regarding a joint pursuit of allegations of police corruption*, June 2000, p. 2.

380 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 NSWPF, PIC and NSWCC, *Regarding a joint pursuit of allegations of police corruption*, June 2000, p. 3.

381 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 NSWPF, PIC and NSWCC, *Regarding a joint pursuit of allegations of police corruption*, June 2000.

It is clear that day-to-day supervision and tasking of Mascot investigators, all of whom were NSWPF officers, fell to the senior police officers on the Mascot team. Standen, who was responsible for the NSWCC staff working on Mascot (for example, analysts and legal officers),³⁸² said in relation to Dolan and Burn:

I mentioned earlier that I was responsible for the, um, Crime Commission staff and the direction generally, and that Catherine Burn was in looking after the investigation. But also on my floor, that's Level 1, um, there was a joint investigation, um, longstanding taskforce, which included other police from the Special Crime Unit, um, headed by various people, but at this time, ah, Superintendent John Dolan. And so John was senior in rank to Catherine Burn, and, ah, in a – in a similar way to me having a – an oversight of the Crime Commission staff working on Level 5 in Mascot, John Dolan had a similar oversight role in relation to the – the police working on Mascot. But the day to day running of the investigation was left to Catherine Burn, ah, who, um, in my opinion was very confident, very well organised, um, and had a very good memory, and, um, as far as I'm concerned, that appeared to be doing quite a good job.³⁸³

When asked about decisions on operational strategy or tactics, and by whom and where such decisions were made, Standen made the following comment:

Q: *Where was that decision taken; was it taken in the Catherine Burn group, was it taken in the Phillip Bradley meetings, was it taken, you know, more with joint discussions between you, Mr Dolan and Ms Burn, was Ms Burn making those decisions alone?*

A: *No, usually – no, usually by me. I think they – they, um, they had a prospective approach. So they – they were – be quite happy to try anything as far as I think, um, but anything they considered lawful, um, and usually didn't have to go beyond me.³⁸⁴*

Dolan's evidence to Operation Prospect about the reporting structure for Mascot indicated that he felt he was under the direction and control of Bradley – more so than Brammer or Police Commissioner Peter Ryan.³⁸⁵

However, Bradley's perception of the Mascot operational structure is at odds with Dolan's account. Bradley's evidence to Operation Prospect in November 2014 was that he was not involved in supervising police:

The Crime Commission staff are ultimately responsible to me and in fact that distinction was made very clear at all times whenever the opportunity arose, because, I mean, I was responsible for getting - soon after I arrived at the Crime Commission - removing police as employees of the Crime Commission, and having a situation where any police, whether they're working on the premises or elsewhere, reported within their command structure and were not subject to supervision by me and that my staff were subject to supervision by me and to the extent that there was ever any conflict, then my views had to prevail.³⁸⁶

Bradley gave similar evidence to Operation Prospect in July 2014, when he was asked about managing the interface between NSWCC staff and police officers attached to the NSWCC:

My view was that the police should remain policemen and be governed by the Police Commissioner, and that they should assist us in a kind of partnership relationship. I didn't want to be responsible because it would be a futile ambition to supervise the police, and I wanted them to be subject to their own disciplinary arrangements because I've seen lots of examples where it didn't work, and that was one of the reasons I got rid of the internal police team.³⁸⁷

³⁸² Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2,965; Ombudsman Transcript, Mark Standen, 21 March 2015, p. 5.

³⁸³ Ombudsman Transcript, Mark Standen, 21 March 2014, p. 5.

³⁸⁴ Ombudsman Transcript, Mark Standen, 21 March 2014, p. 79.

³⁸⁵ Ombudsman Transcript, John Dolan, 31 October 2014, p. 2,600.

³⁸⁶ Ombudsman Transcript, Phillip Bradley, 24 November 2014, p. 2,967.

³⁸⁷ Ombudsman Transcript, Phillip Bradley, 14 July 2014, p. 493.

Bradley gave evidence that – although he had oversight of police tasked to the NSWCC – it “wasn’t oversight in the sense of supervision”.³⁸⁸ Bradley went on to identify Dolan as the head of the Mascot investigations from the beginning, with the formal command residing with Brammer. In terms of his own role, Bradley said:

*Well, I oversaw it [Mascot] in the sense that it was a matter that the Commission had referred to it for investigation, and I was the commissioner, and to the extent to which my staff were involved I supervised them ultimately, and I had a fairly strong interest in the matter because it was an important matter.*³⁸⁹

Giorgiutti, the next most senior officer to Bradley at the NSWCC, gave evidence that the NSWCC was essentially a flat structure and every senior person reported to Bradley.³⁹⁰ In relation to Mascot he said:

*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.*³⁹¹

In 2011, David Patten QC conducted a Special Commission of Inquiry into the NSWCC. It considered a number of issues about the NSWCC. With regard to the structure of the NSWCC, he stated:

The Commission currently operates under what may be described as a flat management structure. This flat structure is not reflected in its formal organisation charts, but the arrangements under Mr Bradley meant that Special Commission of Inquiry into NSW Crime Commission management hierarchy was deliberately minimised, so that large numbers of Commission staff in practice reported directly to Mr Bradley on particular matters, or in the case of more junior staff, directly to the respective Directors of Criminal or Financial Investigations, without intermediate reporting layers.

The flat structure has been in place for some time. In the past, even though Mr Giorgiutti was the sole Director of the Commission (with Assistant Directors “beneath” him), staff including Mark Standen when he was Assistant Director did not in practice report to Mr Bradley through Mr Giorgiutti. In anticipation of the commencement of the New South Wales Crime Commission Amendment Act 1996, Mr Bradley convened a meeting attended by the Solicitor to the Commission, Assistant Directors and Investigation Managers on 11 November 1996. Notes of that meeting indicated that Mr Bradley told the attendees that the restructure was a “significant change of direction and relationships” and that the core management group would have to operate on the basis of mutual trust, with decisions taken by the group to be adhered to and supported by all.

The notes also record that Mr Bradley “said that he was always accessible to the group and encouraged discussion on management issues if things were going wrong. He said that he often failed to involve or communicate with key personnel about important decisions and he needed to be reminded of this.”

Many people I interviewed, both inside and outside the Commission, remarked on Mr Bradley’s involvement in an extraordinary number of decisions at the Commission, including very detailed decisions about operational matters. This would appear to be a reflection of the flat management structure, as well as Mr Bradley’s personal management style and superior corporate knowledge, developed over more than 20 years at the Commission.

*Mr Bradley favoured the retention of the flat management structure given the small size of the Commission. He advocated the efficiency of the arrangement, pointing out that the expense involved in creating extensive chains of command in some other agencies did not provide the public with good value for money. He noted the advantages of having the respective Directors involved in the detail of all operations and suggested that this was feasible in an organisation the size of the Commission. He indicated that he had responded to past suggestions that the Commission should have a layer of strategic development staff to the effect that he was capable of making all necessary strategic decisions for the Commission, if provided with adequate information.*³⁹²

388 Ombudsman Transcript, Phillip Bradley, 14 July 2014, pp. 493-494.

389 Ombudsman Transcript, Phillip Bradley, 14 July 2014, p. 522.

390 Ombudsman Transcript, John Giorgiutti, 11 August 2014, p. 1344.

391 Ombudsman Transcript, John Giorgiutti, 11 August 2014, p. 1343.

392 Patten, D, *Special Commission of Inquiry into the New South Wales Crime Commission* (Report), 30 November 2011, pp. 49-51.

A range of Mascot staff recalled Bradley's involvement in Mascot meetings and his familiarity with the details of the investigations.³⁹³ Burn gave evidence that Bradley was involved in decisions about who was targeted in Mascot investigations.³⁹⁴ A Mascot senior constable indicated that Bradley sat in on Mascot meetings during which Mascot staff would "explain to him where we were up to and what was going on and so forth".³⁹⁵ A Mascot constable recalled Bradley's active participation in team meetings³⁹⁶ and said of Bradley: "He was always very vocal and talking about ... what was happening ... he knew everything, like he knew all the – the names of everyone, like he knew – he was quite knowledgeable of the whole job".³⁹⁷

4.6.2 Written submissions about the direction and control of Mascot

The preliminary views adopted by Operation Prospect about the direction and control of Mascot were, as part of the procedural fairness process, given to 18 individuals and two agencies for comment. The individuals included NSWCC senior officers, senior police involved in Mascot and Mascot investigators. The agencies were the NSWCC and the NSWPF. The following submissions by parties are noted.

4.6.2.1 Bradley

Bradley submitted on multiple occasions that he did not supervise police. In a written submission dated 25 September 2015 he put forward eight points to indicate he did not supervise police. These points included sections 3 and 27A of the NSWCC Act, the Directions and Guidelines issued by the Management Committee, that the Commissioner of Police was on the Management Committee, and that Bradley had no "say in the recruitment, selection, training, deployment of [*sic*] discipline of police". He contended that Brammer, Dolan and Burn had responsibility for supervising police.³⁹⁸

In a submission dated 30 November 2015, Bradley agreed that he was part of the "responsible senior management in respect of the direction, oversight and control of the Mascot investigations whereas Burn and Dolan performed the 'day to day' and 'on the ground' supervision and management of Mascot investigators".³⁹⁹

It is accepted that Bradley had no direct control over the careers or day-to-day actions of police officers. However, it is clear that Bradley was in a position to direct or control the Mascot investigations – which necessarily entailed directing and controlling the investigators, namely police officers. This is based on his role as Commissioner, the Mascot references to the NSWCC, and the formation of the Mascot Task Force under the NSWCC Act. The weight of the evidence before Operation Prospect and discussed in this report is that Bradley exercised that direction and control over the Mascot investigations, including the work of the police officers seconded to Mascot.

4.6.2.2 NSWCC

The chapters that follow include comments and findings about the institutional responsibility of the NSWCC for the conduct of staff of the Mascot Task Force. The chapters also make recommendations that the NSWCC apologise to individuals for certain actions or inactions of Mascot and NSWCC staff. The NSWCC has made submissions to Operation Prospect that rejected these comments, findings and recommendations.

393 Statement of Information (Interview), [officer], 10 March 2014, p. 19; Ombudsman Transcript, [NSWCC analyst], 7 May 2014, p. 25.

394 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2710.

395 Ombudsman Transcript, [officer], 10 February 2014, p. 11.

396 Statement of Information (Interview), [officer], 13 March 2014, p. 24.

397 Statement of Information (Interview), [officer], 13 March 2014, p. 31.

398 Bradley, P, Submission in reply, 28 September 2015, pp. 7-8.

399 Bradley, P, Submission in reply, 30 November 2015, p. 2.

The NSWCC's general response to the recommendations was that it:

*... will not use valuable and scarce resources to carry out any action which is recommended as a result of this fundamentally flawed investigation, and particularly because the relevant events which are said to form the basis for recommended action took place up to 17 years ago and no attempt is made to establish relevance to the current functions of the Commission.*⁴⁰⁰

The Ombudsman's general response to that comment is to say that the Ombudsman has a duty and responsibility to undertake the Operation Prospect investigation, and to report on any conduct of public authorities that flouted the standards for good public administration stated in the Ombudsman Act and the Police Act. It is disappointing that the NSWCC has not embraced that tenet.

The NSWCC made a specific point about section 27A of the NSWCC Act which requires separate analysis: the NSWCC submission consistently noted that section 27A of the NSWCC Act stated that police officers in NSW task forces were under the direction and control of their own superiors.⁴⁰¹ This view was grounded in section 27A(2), which stated:

(2) In assisting the Commission to carry out such an investigation, the police task force is (subject to subsection (3)) under the control and direction of the Commissioner of Police.

An important qualification in that subsection is that it is subject to section 27A(3), which provided that the Management Committee could issue directions and guidelines that "the Commission and the Commissioner shall comply with". As outlined earlier, the directions and guidelines in operation at the time required a police task force to comply with the Commission's directions – as stated in clause 1(b) of the Directions and Guidelines:

*(b) In assisting the Commission, the Police Task Force will ensure that the directions of the Commission relevant to the Commission's investigations are complied with.*⁴⁰²

The NSWCC submitted that clause 1(b):

*... did not and could not detract from the provisions of s 27A of the [NSWCC] Act, and did not empower the Commission to control the actions of the police members of the taskforce. In any case, in Mascot, the Commission did not give directions and the issue of compliance with them does not arise.*⁴⁰³

The NSWCC submission went on to say:

*The relevant operational activity of equipping Sea with listening devices and controlling his field activities for the purposes of gathering evidence was carried out by the police members of the task force. As police officers they were subject to their statutory obligations and liabilities as prescribed in the Police Act 1990 and other laws of New South Wales regulating their conduct, as well as the Police Rules and Instructions, and/or the Commissioner's Handbook. Any exercise of the powers of a police officer was beyond, and was understood to be beyond the control of the Commission.*⁴⁰⁴

The NSWCC also said that there was no arrangement whereby it could direct staff of another organisation to take or not take specific action.⁴⁰⁵

Operation Prospect accepts that Mascot's operational activities were under the day-to-day control and management of NSWPF officers inducted into the NSWCC. However, Operation Prospect does not accept the NSWCC's contention in reliance on section 27A(2) that the Commission did not have any responsibility relating to NSWPF officers in the Mascot investigations. Operation Prospect also does not accept that the direction and control of Mascot was solely in the hands of the NSWPF. It is therefore appropriate that some findings and recommendations in this report apply to the NSWCC.

400 NSWCC, Submission in reply, 29 July 2016, p. 2.

401 NSWCC, Submission in reply, 16 December 2015, pp. 5-6.

402 NSWCC, *NSW Crime Commission Act, Section 27A, Task Forces – Directions and Guidelines*, undated, p. 1.

403 NSWCC, Submission in reply, 16 December 2015, p. 6.

404 NSWCC, Submission in reply, 16 December 2015, p. 6.

405 NSWCC, Submission in reply, 16 December 2015, p. 7.

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 (see Chapter 5). 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.

4.6.2.3 Standen

Standen did not make any submission about the direction and control of Mascot, beyond commenting on his involvement in particular Mascot activities.

4.6.2.4 Giorgiutti

Giorgiutti submitted⁴⁰⁶ that the Ombudsman could not find as a matter of fact that he had any responsibility for the direction, oversight or control of the Mascot investigations. He pointed to the findings of the Patten report⁴⁰⁷ on the flat structure of the NSWCC, and noted that during the Mascot investigations Bradley headed the NSWCC – while Giorgiutti was the Solicitor to the Commission and 'titular' Director. He further noted that the NSWCC had "three investigative teams each headed by an Assistant Director". Those Assistant Directors together with the head of corporate services, himself and Bradley constituted the 'Management Team' – not to be confused with the Management Committee. Giorgiutti again quoted the Patten report noting that Bradley's "opinion would prevail" if there was any disagreement within the management team meetings.

Giorgiutti also submitted that there was a perception that he was not "enthralled by the investigation", and so either Bradley or Standen kept him out of the loop by installing a NSWCC solicitor to work directly on Mascot.⁴⁰⁸ Giorgiutti stated that Neil Owen, the solicitor assigned to work on Mascot, did not report to him.⁴⁰⁹

Owen submitted to Operation Prospect that he had no involvement in the operational side of the Mascot investigations and that this was the result of the internal structures of the NSWCC.⁴¹⁰

4.6.2.5 Brammer

Brammer's submission to Operation Prospect noted that the NSWPF provided human and physical resources to the Mascot investigations, and that these were under the management and supervision of the NSWPF. However, the police officers who were attached to SCIA/SCU and were part of the Mascot investigations:

*[O]perated under the secrecy and coercive powers of the NSWCC and subject to its assessment, directions and authorisation regarding the targeting of individuals and lawful use and deployment of its intrusive technology.*⁴¹¹

406 Giorgiutti, J, Submission in reply, 10 May 2016, pp. 18-22.

407 Patten, D, *Special Commission of Inquiry into the New South Wales Crime Commission* (Report), 30 November 2011.

408 Giorgiutti, J, Submission in reply, 10 May 2016, p. 28.

409 Giorgiutti, J, Submission in reply, 10 May 2016, p. 28.

410 Owen, N, Submission in reply, 13 August 2015, p. 10.

411 Brammer, M, Submission in reply, 14 September 2015, p. 12.

Brammer accepted that he had “functional management” of the SCU, but said “this was remote from the day-to-day interaction with the Mascot team”.⁴¹² He further submitted:

*There was no doubt in my mind at the time that Mr. Bradley and NSWCC senior management exercised and maintained control and had an intricate knowledge, influence and involvement in the day-to-day functioning of the Mascot investigations particularly in regards to the use of its coercive powers and the deployment of SEA.*⁴¹³

He said his opinion was based on feedback from Dolan and Burn, his own interaction with Bradley, and the minutes of Mascot meetings.⁴¹⁴

4.6.2.6 Dolan

Dolan submitted that he was “working across a number of references not just Mascot” and that “the responsibility that operational activities were undertaken according to law and for correcting problems in Mascot was Burn’s”. He also submitted that Burn was responsible for the operational issues involving Sea.⁴¹⁵

4.6.2.7 Burn

Burn acknowledged that as Mascot Team Leader she:

*[L]ed and managed the investigations that were being conducted by Operation Mascot. I had broad oversight over those investigations, many of which were being conducted simultaneously by different officers in the team. I supervised those officers.*⁴¹⁶

She made the point however, that she:

*[R]elied on those officers to perform their roles with due diligence and care and I did not consider it to be part of my role to verify the factual accuracy and completeness of their work.*⁴¹⁷

With regard to the direction and control of Mascot, Burn submitted that:

- Dolan had an oversight role for the police working at Mascot,⁴¹⁸ which enabled him to have a considerable controlling interest in the investigation.⁴¹⁹
- Standen was responsible for the Mascot investigations and the NSWCC staff working on it.⁴²⁰
- Bradley’s interest and role was substantial.⁴²¹

Those three points made by Burn accord with the majority of other evidence before Operation Prospect.

4.6.2.8 Submissions by individual NSWPF Mascot investigators

A number of NSWPF former Mascot investigators made submissions or gave evidence on the direction and control of Mascot. Many submitted that they followed established NSWCC practices, followed the directions of more senior staff, and had no role in determining operational strategies or targets.

412 Brammer, M, Submission in reply, 14 September 2015, p. 23.

413 Brammer, M, Submission in reply, 14 September 2015, p. 23.

414 Brammer, M, Submission in reply, 14 September 2015, p. 23.

415 Dolan, J, Submission in reply, 24 August 2015, pp. 3-4.

416 Burn, C, Submission in reply, 25 September 2015, Appendix 2, p. 6.

417 Burn, C, Submission in reply, 25 September 2015, Appendix 2, p. 6.

418 Burn, C, Submission in reply, 25 September 2015, Appendix 2, p. 7.

419 Burn, C, Submission in reply, 25 September 2015, Appendix 2, p. 3.

420 Burn, C, Submission in reply, 25 September 2015, Appendix 2, pp. 7-8.

421 Burn, C, Submission in reply, 25 September 2015, Appendix 2, p. 8.

A common observation in those submissions of former Mascot investigators was that Standen was the NSWCC Assistant Director responsible for the Mascot investigations and that he reported to Bradley. Standen made all decisions about operational strategies and tactics. Also, Burn was responsible for the day-to-day running of the investigation⁴²² and Burn reported to Dolan – who in turn reported to Brammer.

Another former investigator observed:

*... during the whole time I worked at the NSWCC long standing operational procedures were in place. The police working there, including the Mascot investigators followed the procedures. Although it was a secret/covert working environment the operational activity and procedures were endorsed and predominately occurred in full view of the NSWCC management.*⁴²³

A number of former Mascot staff told Operation Prospect that Burn appeared to be the primary decision maker in terms of the Mascot reference and displayed a comprehensive knowledge of the investigation, including the events listed on the Schedule of Debrief and targets.⁴²⁴ Others indicated that Dolan and Burn both appeared to be running the show.⁴²⁵

A former senior investigator for Mascot said Burn “knew everything. That was her whole job was to control the whole job”.⁴²⁶ He said that Dolan and Burn ran the investigation together:

*There was definitely all the – the, you know, it was the Cath or John way, it was their show, and people used to, you know, say things like that. It was known throughout the – the troops who were working there that, you know, it didn't really matter what was going to be said, it was going to be whichever they direct it.*⁴²⁷

The submissions of former Mascot investigators commented frequently on their working environment and pressures. These points are referred to throughout the report, but can be summarised briefly at this point.

Many investigators commented on the enormous workload, the fast pace and short turnaround times, the immense volume of material to be analysed, and the evolving and expanding scope of Mascot activities and strategies. This often meant that the officers did not fully understand how the work assigned to them fitted into a larger investigation strategy.

Staff were spread across three floors of the NSWCC premises and were not always aware of relevant discussions occurring between other staff. The covert and sensitive nature of the investigation added to this complexity. Junior officers in particular explained how they relied heavily on other staff – particularly senior and specialist staff – in preparing reports and applications and deposing affidavits.

Many now accept there were errors in parts of their work, but they were not so aware at the time. They submitted they acted in good faith at all times and with a strong motivation to detect and deal with historical and entrenched police corruption and misconduct. Many officers also explained their comparative inexperience at the time, and the meagre guidance and training they received on matters such as LD and TI application processes and handling informants and undercover operatives. They noted also that some senior officers had forceful and domineering personalities, backed by considerable policing and investigation experience, and newer and less experienced staff members could be inhibited about questioning investigative decisions and strategies.

A senior Mascot staff member commented that the investigation was conducted “under extremely difficult and dysfunctional circumstances”.⁴²⁸ Operation Prospect accepts that this observation of a senior officer is likely to apply with greater force to the experience of many junior officers involved in the Mascot investigation.

422 [Mascot investigator], Submission in reply, 25 November 2015, p. 101.

423 [Mascot investigator], Submission in reply, 10 August 2015, p. 4.

424 Ombudsman Transcript, [Mascot investigator], 26 March 2014, p. 46.

425 Statement of Information (Interview), [Mascot investigator], 27 August 2013, pp. 16-17; Ombudsman Transcript, [Mascot Investigator], 16 April 2014, p. 16; Ombudsman Transcript, [NSWCC analyst], 8 May 2014, pp. 25-26.

426 Ombudsman Transcript, [Mascot investigator], 16 April 2014, p. 153.

427 Ombudsman Transcript, [Mascot investigator], 16 April 2014, p. 19.

428 [Senior Mascot staff member], Submission in reply, 25 September 2015, Appendix 2, p. 4.

4.7 Conclusions about Mascot direction and control

On the basis of the oral and documentary evidence provided to Operation Prospect, the view formed is that Bradley and Standen and, to a lesser extent, Giorgiutti were the responsible senior managers for the direction, oversight and control of the Mascot investigations. Dolan and Burn, as the most senior police officers, also shared that responsibility – although subject to NSWCC direction in the overall conduct of the investigation. In addition, Dolan and Burn performed the ‘day-to-day’ and ‘on the ground’ supervision and management of Mascot investigators.

The seniority of those five listed officers gave them an opportunity to be directly involved in operational decision-making and in many cases they were. On the other hand, it is understandable that they were not always across the detail of such a large and complex investigation. For example, Bradley, Brammer and Burn explained that they did not generally have direct input into the compilation of LD and TI affidavits or read or approve them in draft. They were not aware of many of the defects in Mascot documentation until taken through the documents in subsequent inquiries into Mascot processes. Many other examples are given in this report of operational lapses that are now acknowledged by the senior managers.

Chapter 5. Mascot investigative methodology

This chapter explains the investigative methodology used by the Mascot Task Force. A prominent theme is the heavy reliance on the use of LDs, especially body worn LDs that were operated by the primary Mascot informant, Sea. This chapter considers:

- the different approaches taken in the covert and overt phases of the Mascot investigations
- how Sea was deployed
- Mascot's reliance on LDs as a primary investigative tool
- the legislative framework for LD and TI warrants, and some of the key terms in the legislation
- common features of the Mascot LD warrant applications and affidavits.

5.1 Covert and overt phases of the Mascot investigations

The first phase of the Mascot investigations, from February 1999 until October 2001 was covert. Sea worked undercover for Mascot and the investigations were generally kept secret from anyone outside the NSWCC.

The predominant investigative strategy for this covert stage of the investigations was the extensive deployment of Sea with LDs while meeting with police officers suspected of corruption. The LDs were worn, concealed on his body, hidden in his briefcase or bag, or set up in vehicles or on premises. Sea could turn the body worn LD on and off (e.g. by flicking a switch in the pocket of his pants). Mascot's aim was to corroborate Sea's original disclosures and to capture additional evidence that police officers named by Sea or their associates may be involved in corrupt or criminal activities. Mascot sought evidence of past, current or even future corruption and criminal acts.

A great deal of work was done to a high standard, and Mascot succeeded in identifying many corrupt police officers, some of whom participated in significant corrupt and criminal activity. Many admissions that were recorded by LD were used in the Operation Florida public hearings conducted by the Police Integrity Commission (PIC) which commenced in October 2001⁴²⁹ and marked the commencement of the overt stage of the investigations. The LD recordings were also used in later prosecutions.

Burn, who was the Team Leader of the Mascot investigations, made the following submission to Operation Prospect about the successes of Mascot:

Given the magnitude of the operation and the number of allegations that were made, it was inevitable that mistakes would be made. While I do not seek to excuse these mistakes, I submit that the Ombudsman should attempt to maintain a proper perspective on them. For every investigative strategy [that is now being examined], with the benefit of hindsight, ... due to complaints about the way it was conducted, there are many others that were properly pursued and resulted in a very real way in the reduction of corruption affecting the NSWPF.⁴³⁰

The objective during the overt stage of the Mascot investigations included public exposure of systemic corruption and misconduct and gathering evidence in preparation for disciplinary and management action against officers.⁴³¹ This was a successful strategy. The prosecutions were stronger and more successful as a result both of the combined evidence gathered in the overt and covert phases of the investigations, and the associated 'rollover' of officers who confessed their past involvement in corrupt activities and named others who had been involved with them. The outcomes of Mascot and Operation Florida hearings have been addressed further in section 3.4.2.

The identity of Sea, and the extent of his involvement as an undercover operative and informant, was exposed shortly after the commencement of PIC's Operation Florida hearings.

⁴²⁹ NSWPF internal memorandum, *Mascot investigation – operational planning*, undated and unsigned.

⁴³⁰ Burn, C, Submission in reply, 25 September 2015, p. 12.

⁴³¹ NSWPF internal memorandum, *Mascot investigation – operational planning*, undated and unsigned.

5.2 How Sea was deployed

Sea was both a registered NSWCC informant who made allegations about the corrupt actions of police, and an undercover operative who obtained evidence for Mascot by use of LDs. Mascot's use of Sea as both an informant and an undercover operative was the subject of many of the complaints investigated by Operation Prospect. Complaints received by Operation Prospect included that individuals were unfairly targeted, individuals were named on LD applications and warrants without justification, conversations were recorded without warrant authority, and investigations continued for too long.

It is therefore important to describe in general terms the deployment of Sea. He was initially deployed to gather evidence to corroborate his allegations of historical criminal and corrupt conduct. Later, he was deployed to gather evidence relating to contemporary criminal and corrupt conduct of police officers. It appears that Mascot had more success in investigating and prosecuting the latter – contemporary conduct – than the former. The investigation of historical corruption seems to have been more diffuse, 'gossip based' and lacking clear direction.

5.2.1 Strategies for investigating corruption

The Mascot strategy for investigating corruption largely relied on Sea initiating conversations with police who Sea alleged had been involved in corruption and as a consequence were named in the Schedule of Debrief (see Chapter 3). Sea was tasked to direct the conversation towards incidents that he had described in his debrief interviews, and the conversation would be recorded on his body worn LD. Sea and the officers who were the targets of an investigation would sometimes drink large quantities of alcohol during those meetings. Mascot paid for Sea's expenses, including alcohol and meals for those purposes.⁴³²

Sea gave evidence to Operation Prospect that during Mascot he was "a heavy drinker" and was also taking medication.⁴³³ He said he would "do lots of liquid lunches and so forthwith [sic] with particular people to gather evidence".⁴³⁴ He said he drank alcohol in order to fit in and remain trusted by the targets who also drank heavily at the meetings:

*Well, no-one would talk to me after I initially got out [of the mental health facility] because I used to drink light beer and um, they thought I was a Martian ... and um, given previous history, of course, but for some reason it wasn't working, um, just having a light beer here and there. ...And, um, the successful method which became successful was the lunches and the grog.*⁴³⁵

After some time away from work on medical leave, Sea returned to work at Manly Local Area Command. He later moved to Crime Agencies. At both places he recorded conversations to corroborate allegations of misconduct by police attached to the unit in which he served.

Then Detective Sergeant Damien Henry, a senior Mascot investigator, described Sea's early deployment as follows:

*[M]y recollection is he went back to work and he was transferred to Manly, and as he got better and more operational, his hours increased. That was a change, but initially in broad terms, the decision was that in a covert phase, while he was covert, to get him to try and electronically corroborate facts that he was involved in that he knew about matters that if it was to go overt, people would shut down on, if that makes sense. But in broad terms, that was the plan, to keep him out there working as long as he could, and I think he went far past anybody's expectations. But it wasn't until a year had passed probably at least that he became of some value doing contemporary corruption stuff, and that's when I say it constantly changed. When he was at Manly there were, certainly [Mascot Subject Officer 23] and [Mascot Subject Officer 18] were quite active, and there was a lot of contemporary corruption that he was investigating. So initially he was probably doing more historical stuff, then he was doing his daytoday corruption activity with [MSO23], [MSO18] and others...*⁴³⁶

⁴³² The NSWCC Informant Management Plan provided for informants to be paid 'sustenance'. The Director of Investigations had the authority to approve sustenance of up to \$250, which could be paid out in smaller sums by other officers, depending on the amount of each allocation. See the NSWCC, *Informant Management Plan*, undated, p. 5.

⁴³³ Ombudsman Transcript, [Sea], 21 August 2013, p. 101.

⁴³⁴ Ombudsman Transcript, [Sea], 21 August 2013, p. 102.

⁴³⁵ Ombudsman Transcript, [Sea], 21 August 2013, p. 102.

⁴³⁶ PIC, Record of interview between Chief Investigator McGrath, PIC, Senior Lawyer O'Brien, PIC and Sergeant Henry, NSWPF, 21 May 2002, p. 13.

John Dolan, who had been Commander of the SCU, told Operation Prospect that Mascot relied heavily on electronic corroboration. As Dolan explained, “if you have one person say this is what happened you might as well not even try. So we need some form of corroboration and there’s no better corroboration than electronics”.⁴³⁷ Dolan described the process of planning the Mascot investigations: “we cauterised each, each offence and allocated them to personnel ... and the task of those personnel were to develop plans for investigation”.⁴³⁸

5.2.2 How Mascot determined who would be targeted

The evidence given to Operation Prospect suggests that Mascot was a dynamic series of investigations. That is, Mascot grew in scope as more LD product was obtained and evaluated against a fertile background of known and confirmed corruption. Investigation priorities could be ‘opportunistic’: if Sea was likely to run into people who were suspected of having knowledge or involvement in corruption, he would be tasked to record conversations on a LD. Due to this approach, he would at times gather information that was neither strongly corroborative nor related to the most serious allegations.

Sergeant Greg Jewiss, a Mascot investigator, gave evidence that “there were specific people who were targeted because there was a lot more direct evidence ... and involvement in multiple matters. For others they were on the periphery, and we really didn’t know what we had because we didn’t have direct stuff”.⁴³⁹

Dolan and Mascot’s Team Leader, then Detective Inspector Catherine Burn, both told Operation Prospect that the investigation was driven by opportunity. Dolan explained, “So if Sea, for instance, had a phone call from one of those people that he had nominated, the opportunity arose, so we would take that opportunity”.⁴⁴⁰ Burn identified that decisions about who was to be targeted were “dependent upon Sea’s capability and his location”.⁴⁴¹ Burn said that discussions about who would be targeted were conducted with Dolan, Bradley, and at times, Brammer, and Standen. Her evidence was that the opportunistic nature of the deployment was tied to the covert nature of the investigations. Only after the investigations became overt, and “the informer was out of play and safe and secure”, could Mascot conduct a more exhaustive investigation of people who Sea had named.⁴⁴²

Then Sergeant Greg Moore, another senior Mascot investigator, told Operation Prospect that decisions about who would be targeted were made by the management team (presumably meaning those named above by Burn), who he trusted to act appropriately.⁴⁴³ He said:

*I know that there’s a lot of serving and former officers that feel they were unfairly targeted. All I can say is that on the information that I was aware of, any officer that was identified as either a witness, or an involved officer in the investigation I would, on the information available to me, believe that they were fairly targeted.*⁴⁴⁴

Under questioning from Operation Prospect, Moore elaborated on his view that there were adequate grounds to explore whether the Mascot targets had acted wrongly:

Q: ... did it never cross your mind that people might be deployed with listening devices to invade the privacy of people who have done nothing wrong?

A: Well, that’s the nature of the investigation potentially to explore whether they had done something wrong. If there’s an allegation there well that’s an opportunity to test that and I--

437 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2,592.

438 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2,590.

439 Ombudsman Transcript, Gregory Jewiss, 29 July 2014, pp. 911-912.

440 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2,590.

441 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2,710.

442 Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2,712.

443 Ombudsman Transcript, Greg Moore, 23 July 2014, p. 658.

444 Ombudsman Transcript, Greg Moore, 23 July 2014, p. 658.

Q: *But what about if the allegation was totally baseless, groundless, or in some cases, non-existent? How did you as a serving police officer ensure that you weren't put in the position to be used in that way to pursue investigations that were baseless?*

A: *I don't think that - that wasn't my experience in investigations - there was any evidence of that type of behaviour. I think, you know, we've all got enough to do in our everyday work to start chasing rabbits down burrows needlessly.*

Q: *But how would you know you weren't chasing rabbits down burrows needlessly if you didn't go back and look at the initial information that was being acted upon?*

A: *Like I say, there was a combination of assessments of our superiors to identify what the priorities were, I suppose, but also, yes, there was appreciation of a level of justification for those strategies that there was awareness within the unit that, you know, why people - why strategies were being actioned.⁴⁴⁵*

Moore was a deponent on many Mascot affidavits in support of LD applications. He told Operation Prospect that as an investigator and deponent of affidavits supporting applications for LD warrants, he had confidence that his senior officers were making the right decisions about who should be investigated through the use of a LD, and that "the ground-level investigators weren't going to be privy to all information relevant to the reference".⁴⁴⁶

5.2.3 How long people remained targets

The covert nature of the Mascot investigations influenced how long people remained targets. This was confirmed by Burn, in response to a question suggesting that a person marked as a target was "a target forever during Operation Mascot":

... well, whilst ever it was a covert operation, absolutely. One of the restrictions on this whole operation was the fact that it was covert, so a lot of evidence gathering that we might have been able to undertake [sic], you couldn't undertake because either it would compromise or expose informants.⁴⁴⁷

The implications of this approach are taken up in later chapters, and particularly in Chapter 17. A recurring theme is that the strong (and successful) focus on maintaining the covert nature of the investigations meant that some exculpatory evidence was not sought, or was overlooked, including in affidavits that were sworn in support of LD applications. The operational focus (as noted earlier) was upon taking up 'opportunities' that arose to use Sea to test allegations and officers.

Due to the long term covert period of the Mascot investigations, allegations were not investigated or disposed of in a timely way. This caused many police officers named in the Mascot Schedule of Debrief to remain under suspicion for the duration of the Mascot investigations. Minor or weak allegations were not investigated or tested for years. The resolution of these outstanding allegations did not commence until mid-2002, and was not completed until mid-2003, under the supervision of Jewiss in Task Force Volta (which is briefly described in Chapter 3).

Operation Prospect asked Jewiss:

How was the question of expeditious resolution of investigations dealt with in Mascot if you had people sitting on schedules of debrief for years before the matters of which they have been accused were written off?⁴⁴⁸

He replied:

It wasn't.⁴⁴⁹

⁴⁴⁵ Ombudsman Transcript, Greg Moore, 23 July 2014, pp. 659-660.

⁴⁴⁶ Ombudsman Transcript, Greg Moore, 23 July 2014, p. 662.

⁴⁴⁷ Ombudsman Transcript, Catherine Burn, 11 November 2014, p. 2,711.

⁴⁴⁸ Ombudsman Transcript, Gregory Jewiss, 29 July 2014, p. 934.

⁴⁴⁹ Ombudsman Transcript, Gregory Jewiss, 29 July 2014, p. 934.

Jewiss was then asked if he had any concerns about “the way Mascot went about its operations”, and he replied:

*I think it was above my pay scale but it was - I think it was a decision taken in an effort to collect evidence, corroborative or otherwise, in relation to the allegations made, whilst we could, and then do the follow-up investigations afterwards. There was very much an air of secrecy. Other matters, other strike forces, task forces, whatever investigations, had been tasked with doing similar things on a smaller scale, and they always leaked. This was the first occasion when an investigation of this type was undertaken by the New South Wales police, and to my knowledge it didn't leak whilst we were actively engaged in the investigation.*⁴⁵⁰

5.3 Reliance on LDs

As outlined above, the Mascot investigations relied heavily on the use of LDs, and to a lesser extent on the use of telecommunications interceptions (TIs), to gain corroborative evidence of the instances of corruption recorded in the Mascot Schedule of Debrief. In an internal memorandum dated 13 April 2002 Burn recorded that the use of LDs was “paramount to the Mascot operation”.⁴⁵¹

Mascot staff, particularly senior staff, told Operation Prospect that Mascot made limited use of other traditional investigative techniques, and instead focused on getting people talking so their conversations and reactions could be recorded.

In his evidence to Operation Prospect, Dolan discussed the methodology of using Sea to record as many people as possible:

*Yes, it was a decision made very early in the piece and it was something very new to me, it was uncharted waters; and the names on the warrant related directly to the debriefing of Sea and because of the strategy, the strategy was that Sea at any time could run into one of these people and that should that opportunity arise we didn't want to miss the opportunity of him being deployed to record a conversation that may go into obtaining evidence.*⁴⁵²

Though he said “it was brand-new territory” for him, he understood the reasoning as to why Mascot named so many people on the warrants and, in any event, “I didn't see it as my place to question the Commissioner of the New South Wales Crime Commission”.⁴⁵³

5.4 Legislative framework for obtaining a LD warrant

5.4.1 Overview of the LD Act

At the time of the Mascot investigations, the use of a LD could be authorised under the LD Act, which has since been repealed.⁴⁵⁴ The LD Act is described in more detail in Appendix 3 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 the LD Act.⁴⁵⁵ One exception was that the device was used pursuant to a warrant granted under the Act by an ‘eligible’ Judge of the Supreme Court of NSW. Other offences applied to the communication, publication or possession of material obtained in contravention of the LD Act.⁴⁵⁶ Such material was also inadmissible in civil or criminal proceedings except in limited circumstances.⁴⁵⁷

450 Ombudsman Transcript, Gregory Jewiss, 29 July 2014, p. 934.

451 NSWCC internal memorandum from Detective Inspector Catherine Burn, Acting Commander of SCU to Commander of SCIA, 13 April 2002, p. 1.

452 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2,599.

453 Ombudsman Transcript, John Dolan, 31 October 2014, p. 2,599.

454 Now governed by the *Surveillance Devices Act 2007*.

455 LD Act 1984, s. 5.

456 LD Act, ss. 6, 7 and 8.

457 LD Act, s. 13.

A LD warrant could authorise the use of a LD for up to 21 days. It was normal practice in Mascot to obtain a warrant for that period. An application could be made for a new warrant in the same terms (known colloquially as a 'rollover' warrant).⁴⁵⁸ A new application and supporting affidavit was required, although the practice in Mascot was that a rollover application and affidavit were usually in substantially the same terms as the preceding application (sometimes with new material added to the existing text). Rollover warrants were commonly sought in the Mascot investigations, particularly for the LDs worn by Sea. In fact, the warrants for Sea's body worn LD were rolled over from January 1999 to October 2001, with the exception of the month of April 1999 when he was on annual leave.

5.4.2 Application for a LD warrant

A warrant to authorise the use of a LD could be granted by a judicial officer upon receiving an application from a person stating that they suspected or believed a prescribed offence had or was likely to be committed and that the use of a device was necessary to obtain evidence in the investigation of that offence.⁴⁵⁹ The prescribed offences for which a LD warrant could be obtained were offences punishable by indictment, and other offences prescribed under 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.⁴⁶⁰ Section 16(2) of the LD Act specified five matters the Judge shall 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.*

The LD Act further provided in section 16(4) that a warrant granted under the Act was to specify the following information:⁴⁶¹

- 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 in force
- the name of any person who could use the LD pursuant to the warrant
- where practicable, the premises on which the LD was to be installed or the place it was to be used
- any conditions relating 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.

The LD Act did not specify the form that an application for a warrant must take. Indeed, the LD Act did not expressly require that an application be made in writing, although that would seem an inescapable formality. The practice followed in Mascot was that a warrant application would be made in writing and supported by an affidavit (often quite lengthy) that would address the matters the judicial officer was required to consider in deciding whether to grant a warrant and how to frame the warrant. A draft warrant for adoption (or amendment) by the judicial officer would typically accompany the warrant application.

⁴⁵⁸ LD Act, s. 16(6).

⁴⁵⁹ LD Act, s. 16.

⁴⁶⁰ LD Act, s. 16(1).

⁴⁶¹ LD Act, s. 16(4).

Issues concerning the interpretation and application of the LD Act have arisen frequently in Operation Prospect, as indeed they have arisen in earlier reviews relating to Mascot. Many of the issues are considered further in Chapter 13, in Appendix 3 to this report, and in section 5.4.3 of this chapter. Appendix 3 refers to a report of the Inspector of the PIC that summarised advice received from the Crown Solicitor on legal aspects of the requirements of the LD Act.⁴⁶² Two points in that advice can be noted here.

The first is that a LD warrant should “where practicable” specify the name of any person whose private conversation may be listened to or recorded. The “where practicable” requirement means that a person’s name should be specified if it can be ascertained “with known means or resources ... or is capable of being carried out in action or is feasible”. Implicit in that requirement, the Inspector’s report stated, is that the private conversation of a person who is not specified in a warrant may be recorded, for example, if they happen to be in premises or at a place where a LD is being used.

Second, the names specified in the warrant can include people who are not reasonably suspected of having committed a prescribed offence or having information relating to a prescribed offence. The investigation of a prescribed offence may be assisted by recording or listening to the private conversations of those other persons. The LD Act recognises those points, the Inspector’s report stated, through provisions about how to deal with information that is recorded by the use of a LD.

Later chapters in this report also discuss deficiencies that were apparent in the warrant applications and affidavits that were prepared in the Mascot investigations. A common criticism is that affidavits did not deal accurately or fully with matters that should have been addressed. Those matters can be drawn by implication from the list of criteria in section 16 of the LD Act that a judicial officer was to consider in deciding whether to grant a warrant and how to frame the warrant.

For the moment it is sufficient to summarise briefly some of the key issues that should be addressed meaningfully in a warrant application or affidavit:

- the prescribed offence(s) that the applicant suspected or believed either had been or were likely to be committed
- the name of any person whose private conversation may be recorded or listened to by the use of the LD
- as to each such person, how recording or listening to their private conversations would be relevant to the investigation (for example, the recording may collect evidence of a previous offence, planning for a future offence, or the identity of an offender)
- the extent to which the privacy of any person is likely to be affected, including those not suspected of being involved in an offence but who are likely to be recorded
- alternative means of obtaining evidence that may have been considered, and if appropriate, the unsuitability of those alternatives to using a LD
- any previous warrants that were sought or granted in connection with the prescribed offence(s) being investigated.

5.4.3 Other relevant features of the LD Act

Three other sets of provisions in the LD Act that are relevant to Operation Prospect can be noted briefly. They relate to reporting and accountability, offences, and the admissibility of evidence. Together, these provisions underscore the tight restrictions the LD Act placed on the use of LDs and the care required by anyone applying for and executing a LD warrant. More detail about each of these features of the LD Act is provided in Appendix 3.

⁴⁶² Inspector of the PIC, *Operation Florida – RE: Listening Device Warrant, Report by Inspector of Preliminary Investigation*, 29 April 2002, p. 5-6.

The first is the reporting and accountability requirements in sections 17 and 19 of the LD Act. Section 17 required a person applying for a warrant to serve a notice on the Attorney General that contained particulars of many of the matters that were to be specified on a warrant – such as the prescribed offence(s), the type of listening device to be used (premises, body worn, car etc), the premises on which the device may be installed, alternative means considered for obtaining evidence, and the names of people whose private conversations may be recorded. A judicial officer was not to grant a LD warrant unless satisfied that the notice had been served on the Attorney General and that the Attorney General had had an opportunity to be heard by the Court in relation to the granting of the warrant.⁴⁶³

Section 19 of the LD Act required the person to whom a warrant had been granted to provide a written report to both the Court and the Attorney General stating whether a LD had been used pursuant to the warrant, and if so, to provide particulars of people whose private conversations were recorded, the period during which the LD was used, the location of the use, and the use that may be made of evidence and information obtained using the LD. The report was to be provided to the Court and the Attorney General within the time specified in the warrant.⁴⁶⁴ It was an offence not to comply with this reporting requirement.⁴⁶⁵

As noted earlier, the main offence provision in the LD Act was section 5 which made it an offence to use a LD to record a private conversation, unless the use and recording came within an exception listed in the LD Act. Two relevant exceptions were that the device was used pursuant to a warrant granted under the Act by an eligible Judge,⁴⁶⁶ and that there was unintentional hearing of a private conversation by means of a LD.⁴⁶⁷

Four other offence provisions that are relevant to later chapters of this report are in sections 6, 7, 8 and 22 of the LD Act:

- Section 6 made it an offence for a person knowingly to communicate or publish information about a private conversation that had come to that person's knowledge as a result, direct or indirect, of the unlawful use of a LD. There are listed exceptions, including that the communication or publication was reasonably necessary in connection with a serious narcotics offence, or the parties to the private conversation that was unlawfully recorded consented to the use of the material.⁴⁶⁸
- Section 7 provided that a person who used a LD (lawfully or not) to record a private conversation to which they were a party was not to communicate or publish, directly or indirectly, information about the conversation to another person. There are exceptions to this offence provision, including that the communication or publication was made in the course of legal proceedings,⁴⁶⁹ to protect the lawful interests of the person making the communication or publication,⁴⁷⁰ or to a person as permitted by the LD warrant.⁴⁷¹
- Section 8 made it an offence to possess a record of a private conversation knowing that it was obtained, directly or indirectly, by the unlawful use of a LD. Exceptions to this offence include that the record was in the possession of the person in connection with proceedings for an offence against the LD Act,⁴⁷² or as a consequence of a communication or publication that was permitted by the Act.⁴⁷³
- Section 22 required that irrelevant material obtained by the use of a LD was to be destroyed "as soon as practicable". Specifically, this obligation applied to evidence or information that "does not relate directly or indirectly to the commission of a prescribed offence". Failure to comply with this obligation was an offence.

463 LD Act, s. 17(2).

464 LD Act, s. 19(1).

465 LD Act, s. 19(3).

466 LD Act, s. 5(2)(a).

467 LD Act, s. 5(2)(d).

468 LD Act, s. 6(2).

469 LD Act, s. 7(2)(b).

470 LD Act, s. 7(2)(c).

471 LD Act, s. 7(2)(e).

472 LD Act, s. 8(2)(a).

473 LD Act, s. 8(2)(c).

The LD Act also governed the admissibility of evidence obtained by the use of a LD, in sections 13 and 14. Section 13 provided that where a private conversation has come to the knowledge of a person in contravention of section 5, it was inadmissible in any civil or criminal proceedings. There are listed exceptions, including the use of the evidence in proceedings for an offence against the LD Act,⁴⁷⁴ and in proceedings for a serious indictable or narcotics offence if a court decides in the public interest to admit the evidence.⁴⁷⁵

Section 14 provided that a private conversation that was recorded pursuant to a LD warrant, and that had inadvertently or unexpectedly come to the knowledge of a person, may be used as evidence in criminal proceedings if the evidence relates to an offence for which the warrant was granted.

5.4.4 Key legal aspects of the LD Act arising in Operation Prospect

Compliance by Mascot staff with the provisions of the LD Act has been a major focus of Operation Prospect. Some provisions of the LD Act are straightforward. Other provisions are more problematic and require careful application of statutory construction principles. Three issues will be mentioned here, and these are considered at greater length in Appendix 3. Due to the complexity of one section of the LD Act, Operation Prospect obtained the advice of the Solicitor General (discussed below).

5.4.4.1 Section 5 – strict liability and honest and reasonable mistake

Section 5 of the LD Act creates the offence of using or causing a LD to be used to record or listen to a private conversation. A question arising is whether that is a strict liability offence or incorporates a mental state or 'mens rea' element. The view taken by Operation Prospect is that section 5 of the LD Act is a strict liability offence.⁴⁷⁶ Consequently, an offence occurs if the evidence establishes, on an objective basis and beyond reasonable doubt, that a person "used or caused to be used" a "listening device" to "record or listen" to the "private conversation" of another person, unless an exception in section 5(2) of the LD Act applies. The most important exception is that the LD was used in accordance with a warrant granted by an eligible Judge.⁴⁷⁷ Classifying section 5 as a strict liability offence means that it is not necessary to prove that a person has used or caused a LD to be used, knowing that it was wrong to record a private conversation without the knowledge or agreement of the participants in that conversation.

Though section 5 is a strict liability offence, the common law defence of honest and reasonable mistake will be available to any person who may have contravened that section. In essence, a person is not guilty of a strict liability offence if they had an "honest and reasonable, but mistaken, belief, in a state of affairs such that, if the belief were correct, the conduct of the accused would be innocent".⁴⁷⁸ Important elements of the defence are that the belief was both honest and reasonable, and that the mistake related to matters of fact and not law. The defence is not enlivened by mere "ignorance of the law" or the facts, or "an absence of concern", and "does not extend to cover unreasonable mistakes".⁴⁷⁹ The defence would be available in relation to a breach of section 5 as the defence has not been expressly or clearly excluded by the LD Act.

The defence of honest and reasonable mistake is relevant to chapters in this report which conclude that a LD was intentionally used to record a private conversation without a LD warrant being in place at the time (for example, Chapter 11). Matters that are referred to in those chapters concluding that the defence would probably be available include, in relation to individual officers:

- the officer who caused the listening device to be used was not the officer who had applied for the warrant
- the officer believed that the person to be recorded was named on a LD warrant

474 LD Act, s. 13(2)(c).

475 LD Act, ss. 13(2)(d) and (3).

476 See also *Viola v Berrivale Orchards Ltd* [2000] FCA 797; (2000) 99 FCR [580].

477 LD Act, s. 5(2)(a).

478 *CTM v The Queen* [2008] HCA 25 at [8] per Gleeson CJ, Gummow, Crennan & Kiefel JJ.

479 *CTM v The Queen* [2008] HCA 25 at [7].

- the warrants were not ordinarily available to the officers who were arranging for a listening device to be used
- there was an absence in Mascot of cross-check systems between warrant documentation, operational work and listening device product
- many Mascot officers said they received little training or guidance in LD warrant processes
- they relied upon or acted on the instruction of experienced senior officers.

It is nevertheless a decision to be made individually in each instance as to whether the defence of honest and reasonable mistake is available.

5.4.4.2 Section 6 – communicating an unlawfully obtained recording

The second issue is with regards to section 6 of the LD Act, which makes it an offence for a person to knowingly communicate or publish a private conversation which is known to that person as a result of a LD having been used to record the conversation in contravention of section 5 of the LD Act. The Solicitor General advised Operation Prospect on two aspects of section 6. The Solicitor General advised, first, that an offence is made out only if the person communicating or publishing the record of the private conversation was aware that the record was obtained as a consequence of a LD being used in contravention of section 5 of the LD Act. The common law presumption that guilty intent (or mens rea) is a required element of a criminal offence applies to section 6.⁴⁸⁰ The Solicitor General advised, second, that a communication or publication of a LD record between two or more persons within the same legal entity (for example, between two police officers) could constitute communication or publication for the purposes of section 6.

The knowledge element in section 6 is relevant to chapters in this report which note that Mascot officers transcribed or summarised the contents of LD recordings that were obtained in breach of section 5. Generally, the evidence before Operation Prospect suggests that the officers were unaware that the LD product was unlawfully obtained. This was principally because Mascot lacked cross-check systems between warrant documentation, operational work and LD product. It was a normal and accepted practice for officers to transcribe or refer to LD product without consulting the text of a warrant, which may not have been readily available.

5.4.4.3 Meaning of “private conversation”

The third issue has to do with the meaning of “private conversation”. This is a bedrock element of the LD Act. In a practical sense, a LD warrant is only required to record or listen to a *private* conversation. Similarly, the restrictions imposed by the Act on the possession, use and dissemination of recorded conversations apply only if it was a private conversation that was recorded. The term is defined in section 3 of the LD Act as follows:

... “private conversation” means 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.*

There is case law on the meaning of the term, and in particular on whether the parties to a conversation can reasonably be taken to have desired that the words spoken would not be listened to by others. The case law is discussed in Appendix 3 (which notes that caution is required in applying cases that were decided in relation to similar though differently worded definitions of ‘private conversation’ in other legislation). In brief, whether a conversation is private is a question of fact to be determined having regard to matters such as the setting in which the conversation occurred, the nature of the matters discussed, the course of conversation, and the expectations of the participants. No one circumstance will be conclusive; for example, a conversation occurring in a public setting may or may not be a private conversation.

⁴⁸⁰ See also *Awad v Commissioner of Taxation* (2000) 104 FCR 206 at [20] per Lindgren J: “knowledge is an essential element of contravention”.

5.5 NSWCC LD Manual

The NSWCC's *Listening Devices Manual* (LD Manual) restated the main requirements of the LD Act and provided additional guidance. It was expected that the LD Manual would be followed not only by NSWCC staff but also by NSWPF officers working on the Mascot investigations. The NSWPF Internal Affairs Investigation Manual in place at the time of the Mascot investigations advised that "[w]hen utilising listening devices under the control of the New South Wales Crime Commission, Police will comply with Crime Commission Standing Operating Procedures".⁴⁸¹ This reference to 'Standing Operating Procedures' can be read as a reference to the LD Manual. A number of former Mascot staff gave evidence confirming that when applying for LDs they followed the NSWCC processes, rather than NSWPF processes.⁴⁸²

The LD Manual outlined procedures for obtaining warrants and complying with the reporting requirements set out in the LD Act. The LD Manual recorded the following points, under the heading '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 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.*⁴⁸³

A step-by-step guide at the end of the LD Manual set out which office holders had responsibility for ensuring compliance with the different steps in completing a LD warrant application. The first version of the guide applied in the period June 1998 - December 1999 and listed the following NSWCC officers as playing a role:

Director – John Giorgiutti.

Assistant Director, Investigations – Tim O'Connor and Mark Standen.

Director's Assistant – [name].

*Lawyer – [name].*⁴⁸⁴

A new version of the guide applied from December 1999. The checking processes in the guide had not changed in any significant way, although the personnel and their responsibilities were changed. The officers listed were:

Assistant Director, Investigations – Tim O'Connor and Mark Standen.

Director – John Giorgiutti.

Manager/Assistant Manager, Secretariat – [name] and [name]

Senior Monitor – [name], [name] and [name].

*Lawyer – Neil Owen and [name].*⁴⁸⁵

481 NSWPF, *Internal Affairs Investigation Manual – Listening Devices*, January 1999, p. 6.

482 Ombudsman Transcript, [officer], 27 August 2013, p. 48; Ombudsman Transcript, Greg Randall, 10 April 2014, p. 68; Statement of Information (Interview), [officer], 2 April 2014, p. 46.

483 NSWCC, *Listening Devices Manual*, December 1999, p. 2.

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

485 NSWCC, *Listening Devices Manual*, December 1999, pp. 28-31.

The guide stated that the NSWCC Assistant Directors of Investigations (Standen in the case of Mascot) were to approve a warrant application being made, including a renewal application, and advise the NSWCC lawyer that a warrant was to be sought. The Assistant Director was also required to approve all documents relating to the application, and check that all information required in the application was provided and supported.⁴⁸⁶ The NSWCC Director, who at all relevant times was Giorgiutti, was responsible for approving all documents after an application had been prepared and checked by the NSWCC lawyer.

These arrangements were also confirmed in an email from Burn to investigators on 22 December 1999:

As part of the process when applying for LD/TL warrants could whoever has responsibility for the affidavit consult with Mark Standen about the matter before presenting the affidavit to Neil Owen. Consultation should take the form of letting him know what we have planned. If he has any difficulties with it, then ask him to contact me.

*Thanks, Cath*⁴⁸⁷

An instruction given in an email from Burn to Mascot investigators on 11 May 2000 indicates that investigators were to prepare affidavits, and the affidavits were then to be checked by NSWCC hierarchy and lawyers:

SOPS for Mascot

*1. TL/LD warrants – Notify [name], Mark Standen, Neil Owen, and [name] (TLs) that we intend to prepare affidavits for warrants. This is probably best done via the email system. Make sure they know that you are available to discuss the affidavit with them. When affidavits are ready notify the same people and ensure a timeframe is given.*⁴⁸⁸

The LD Manual stated that the use of a LD was generally prohibited except pursuant to a warrant.⁴⁸⁹ The LD Manual contained a short overview of offences under the LD Act, noting that it was “an offence to use or cause to be used a listening device, communicate unlawfully listened to conversations, or possess unlawfully recorded conversations, except as specifically allowed by the Act”. While the LD Manual referred to some offence sections (for example, sections 5, 10 and 11) it did not deal directly with some others (notably sections 6, 7 and 8). The LD Manual emphasised that criminal penalties applied to a failure to comply with the reporting requirements in section 19 of the LD Act.

The LD Manual canvassed issues relating to the privacy of people likely to be recorded by a LD,⁴⁹⁰ including the unintentional recording of people who were not suspects in an investigation. The requirement in section 16(2)(b) of the LD Act that a judicial officer considers the extent to which the privacy of any person is likely to be affected by the use of the LD was explained as follows:

*If there are particular factors that render the potential invasion of privacy more or less than usual then they should be included. Examples of this would be where installation is at business premises rather than a residence, or that only the suspected person resides at the address where the device is to be installed, where the premises are only used for the purpose of drug organisation co-ordination or distribution or the part of the premises where the device is to be installed is only so used. The same comments are also relevant in the case of vehicles. An example at the other extreme would be the proposed installation of a listening device in a doctor's surgery, solicitor's office, or bedroom in residential premises, or where people not suspected of involvement in the offence (eg children) also reside at the premises.*⁴⁹¹

The practice that appears to have been adopted by the NSWCC was that all NSWCC staff (including police officers inducted into the NSWCC) working on a particular task force would be named in a Schedule to the affidavit sworn in support of the warrant application and the warrant as persons permitted to ‘use’ the LD on behalf of the person applying for the warrant and deposing to the affidavit.

⁴⁸⁶ NSWCC, *Listening Devices Manual*, December 1999, p. 25.

⁴⁸⁷ Email from Detective Inspector Catherine Burn, Mascot Reference, NSWCC to ‘Level 5 Investigations’, NSWCC, 22 December 1999, .

⁴⁸⁸ Email from Detective Inspector Catherine Burn, Mascot Reference, NSWCC to ‘5 Special Crime Unit’, NSWCC, 11 May 2000.

⁴⁸⁹ NSWCC, *Listening Devices Manual*, December 1999, p. 4.

⁴⁹⁰ NSWCC, *Listening Devices Manual*, December 1999, p. 6.

⁴⁹¹ NSWCC, *Listening Devices Manual*, December 1999, p. 6.

5.6 Common features of Mascot LD applications and affidavits

A large number of LD warrant applications, supported by sworn affidavits, were made during the Mascot investigations. Many applications sought authority to use multiple LDs of different kinds. The devices were variously to be worn by Sea (as a body worn LD), to be carried by him (in his mobile phone or in a briefcase), to be installed at his home (both on the exterior property and within the premises), to be installed at his workplace or in a motor vehicle, and some had a video device. One application could result in warrant authorisation for the use of up to seven LDs.

The Mascot affidavits contained the substantive detail about the grounds for the application, the LDs to be used, and the private conversations that may be recorded. The affidavits typically adopted a common form, utilising the same introductory information and with the same allegations and offences. Information was frequently copied from previous affidavits, particularly in rollover applications. The explanation as to why a LD warrant was required could vary from one affidavit to another because the targets (people whose conversations were to be recorded) were changed. Care was not always taken to remove names or paragraphs that were not relevant to the particular application that was being made.

The common form for the affidavits was as follows:

Introductory paragraphs: the affidavit would commence by noting that there was widespread corruption in the NSWPF and that there was an overarching need to record the conversations of many police, based on information obtained from Sea who had informed the NSWCC of the widespread corruption.

Paragraph 3: this paragraph would set out the number and types of LDs that were being applied for, and the persons whose conversations Mascot intended to record or listen to by the use of each LD.

Paragraph 4: this paragraph would set out the prescribed offences that the deponent suspected had been, were being or were going to be committed. A typical statement read as follows:

4. I suspect that the prescribed offences ("the offences") of

- corruption, contrary to section 200 of the Police Service Act 1990 NSW*
- corruptly receive a benefit, contrary to section 249(B) of the Crimes Act 1900 NSW*
- conspiracy to pervert the course of justice, contrary to section 319 of the Crimes Act 1900 NSW*
- tampering with evidence, contrary to section 317(a) of the Crimes Act 1900 NSW*

*have been committed and I believe that, for the purposes of an investigation into the offences or of enabling evidence to be obtained of the commission thereof or the identities of the offenders, the use of the listening device is necessary.*⁴⁹²

Paragraph 5: this paragraph would typically contain a number of sub-paragraphs that set out the facts and grounds upon which the LD was sought. These facts and grounds supported the application for a LD warrant. The same initial sub-paragraphs were used in all Mascot affidavits, explaining that:

- Sea had approached the NSWCC on 16 December 1998 and provided information about his knowledge of and involvement in numerous instances of police corruption throughout his career.
- Sea had provided a 10-page induced statement to the NSWCC on 19 December 1998 which provided an overview of his service history and incident or 'instances' of corruption.
- Affidavits sworn before March 1999 noted that Sea had admitted himself to hospital with depression after providing his induced statement to the NSWCC (this is discussed further below).

The sub-paragraphs that followed would refer specifically to past incidents of corruption and to contact between Sea and/or other police officers at which corrupt events were discussed. These sub-paragraphs could vary from one affidavit to the next.

⁴⁹² See for example: LD affidavit 003/1999, pp. 1-2.

Closing paragraphs: all Mascot affidavits contained the following closing paragraphs:

6. *The nature of the offences and the degree of criminality involved are serious.*
7. *The privacy of any persons whose conversations may be recorded and listened to by the [Sea] body device will only be invaded to the extent necessary to gain evidence or information related to an indictable offence.*
8. *Information that is likely to be obtained through the use of the [Sea] body device will assist the investigation into the offences by providing evidence of the commission of the offences or the identity of an offender(s). Alternative investigative methods are not likely to succeed and it is highly unlikely the suspected persons would assist or co-operate if directly interviewed about [Sea's] allegations. All of the 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. Successfully proving the allegations made by [Sea] will rely on covertly obtained corroborative evidence.*

All Mascot affidavits were sworn before NSWCC Solicitor, Neil Owen, with the exception of one sworn on 12 January 2001.⁴⁹³

For unknown reasons, a sub-paragraph referring to Sea's admission to hospital with depression was removed from affidavits from March 1999 and did not reappear. This may have been a relevant factor for a judicial officer to consider in deciding whether to grant a LD warrant, as noted in subsequent chapters.

5.6.1 First Mascot affidavits

The first five Mascot affidavits in support of LD warrant applications were sworn in January 1999. They are summarised below as they provide insight into the early direction of the investigation and the reliance placed on disclosures by Sea in his debrief interviews in January 1999.

The applications/affidavits sought authority to record conversations between Sea and a select group of officers with whom he had worked and had social contact. Other names were introduced into later affidavits as the debrief interviews were analysed by Mascot investigators. LD warrants were granted for each of these five applications.

5.6.1.1 LD affidavit 003/1999

The first Mascot LD affidavit was sworn on 6 January 1999 by Detective Sergeant Damien Henry, a senior Mascot investigator who had worked on the GyMEA reference (see Chapter 3).⁴⁹⁴ The affidavit named three people (in addition to Sea) who Mascot proposed to record/listen to by use of a LD: Mascot Subject Officers (MSO) 3, 8 and 16. All three had worked with Sea in police investigations and task forces in the late 1980s and early 1990s, which Sea alleged had involved police corruption.⁴⁹⁵ The application/affidavit sought only one body worn LD to be worn by Sea.

The affidavit refers to MSO1 and MSO13, though they were not named as people Mascot sought to record/listen to. The affidavit also noted that:

- Officers involved in Task Force Magnum were recently investigated by Task Force Ancrum, which was looking into allegedly fabricated armed robbery charges and conviction of a particular criminal. Sea had been involved in the arrest and interview of that criminal.⁴⁹⁶
- In November or December 1998, MSO1 had provided Sea with a copy of an affidavit that had been prepared by the Commander of Ancrum. The NSWCC did not know how MSO1 had obtained a copy of that affidavit.

⁴⁹³ LD affidavit 01/00052-00056.

⁴⁹⁴ LD affidavit 003/1999.

⁴⁹⁵ These included Task Force Top Cat (1988), where Sea worked with MSO8; Task force Pivot (1989), where Sea worked with MSO16 and another officer named MSO13; Task Force Magnum (1991), where Sea worked with MSO13, MSO16 and MSO1; and Task Force Borlu, where Sea worked with MSO3.

⁴⁹⁶ LD affidavit 003/1999, p. 2.

Task Force Magnum was a NSWPF task force established in 1991 to investigate a growing number of armed robberies on armoured vehicles.⁴⁹⁷ When Sea first came to the NSWCC he had a copy of the Ancrum affidavit, which named him (among others) as a person suspected of having 'loaded' and/or 'verballed' a number of suspects during the course of the investigations. Mascot investigators suspected someone from Internal Affairs – where Task Force Ancrum was situated – had leaked this information to the subjects of the Ancrum investigation.

The affidavit explained that Mascot investigators intended for Sea to call MSO3 to provoke a meeting with himself and MSO8 and MSO16.

5.6.1.2 LD affidavit 022-5 of 1999

The second Mascot affidavit was sworn on 11 January 1999 by Sergeant Troy Kaizik, a Mascot investigator.⁴⁹⁸ The application/affidavit sought four listening devices for a period of 16 days (and not the maximum 21 days available under the LD Act). One device was for Sea's vehicle, and three were for his property and premises.

The affidavit named eight people as those who Mascot proposed to record/listen to: MSO1, MSO13, MSO15 and MSO11 as well as the four people named in the previous warrant (Sea, MSO3, MSO8 and MSO16). The affidavit noted that MSO15 and MSO11 had been trying to contact Sea, and that Kaizik suspected "those attempts at contact relate to the offences, and to the desire of [MSO15] and [MSO11] to influence [Sea]'s conduct in that regard".⁴⁹⁹

This second affidavit contained the same facts and grounds as the first, with additional material noting that MSO3 was due to meet with Sea, and that Mascot suspected MSO11 and MSO15 of trying to influence Sea.

5.6.1.3 LD affidavit 028 of 1999

The third affidavit on 14 January 1999 was also sworn by Kaizik, in support of an application for a body worn LD to be worn by Sea. The affidavit named nine people whose private conversations would be recorded: the eight officers in the earlier affidavit, plus an additional civilian who it was alleged had corrupt contact with suspected police officers. The affidavit indicated that a NSWCC informant had provided information about a builder, which alleged he had been involved in money laundering with some of the police officers named by Sea. The NSWCC wanted to arrange for Sea to meet with an officer to test this information.

5.6.1.4 LD affidavit 031-035 of 1999

The fourth affidavit on 22 January 1999 was also sworn by Kaizik. It named an additional police officer to be recorded/listened to, MSO5. The affidavit contained the same facts and grounds as the previous affidavits, with the addition of information from a recorded conversation between Sea and MSO8 about the Task Force Ancrum affidavit, and information about MSO5, who was suspected of fabricating admissions in a police notebook in relation to the arrest and charging of three suspects for an attempted armed robbery discussed in Chapter 14.

5.6.1.5 LD affidavit 061 of 1999

The fifth affidavit was sworn by Burn on 29 January 1999, and was for a body worn LD for Sea to record/listen to the same people as in the previous affidavit. The facts and grounds in the affidavit are substantially the same as in previous affidavits, with the addition of information suggesting that Sea was soon to meet with MSO3 and that this presented an opportunity for Sea to gather more information.

⁴⁹⁷ PIC, *Report to Parliament – Operation Florida*, Volume 2, June 2004, Magnum Segment, pp. 273-327.

⁴⁹⁸ LD Affidavit 022-5/1999.

⁴⁹⁹ LD Affidavit 022-5/1999, p. 5.

5.7 Mascot use of TIs

The Mascot investigations also used TI to obtain intelligence, but relied on this method far less than on LDs. The use of TIs was governed at the time by the *Telecommunications (Interception) Act 1979* (Cth). The Act has since been amended and renamed the *Telecommunications (Interception and Access) Act 1979* (Cth) (TI Act). This report refers to both versions of the Act as the TI Act. The following description is of the TI Act in operation at the time of the Mascot investigations. Appendix 3 contains more detailed description of the TI Act.

5.7.1 TI warrants

The TI Act made it an offence for a person to intercept a communication passing over a telecommunications system, except as authorised under the TI Act.⁵⁰⁰ One method of authorisation was pursuant to an interception warrant granted under the Act.⁵⁰¹ An application for an interception warrant could be made by a law enforcement agency (including the NSWCC and the NSWPF) to an eligible Judge or eligible member of the Administrative Appeals Tribunal.⁵⁰² The issuing authority could grant a warrant to authorise telecommunications interception for up to 90 days.

An application for a warrant was to be in writing,⁵⁰³ and set out the name of the agency making the application and the name of the person making the application on the agency's behalf.⁵⁰⁴ The application had to be accompanied by an affidavit that set out:

- the facts and other grounds on which the application was based⁵⁰⁵
- the requested time period for the warrant to be in force, and the reasons why that period was considered necessary⁵⁰⁶
- the name of each person to which the application related
- particulars of any previous warrant applications or warrants issued in relation to the telecommunications service or person named in the application
- particulars of the use made by the agency of information obtained by interceptions under previous warrants.⁵⁰⁷

An application could also be made by telephone in urgent circumstances.⁵⁰⁸

Two types of TI warrants could be granted at the relevant time: a warrant permitting the interception of a communication to or from a service specified in the warrant, such as a particular land line or mobile phone (a telecommunications service warrant); and a warrant permitting the interception of any telecommunications service that a named person was using or was likely to use (a named person warrant). Of the 246 TI warrants granted to Mascot, all were telecommunications service warrants.

A TI warrant could be obtained at that time for the investigation of two classes of offences: *class 1* offences were offences such as murder, kidnapping and narcotics related offences;⁵⁰⁹ and *class 2* offences were for particular categories of serious criminal conduct that were punishable by at least seven years' imprisonment (such as money laundering, offences under Part VIA of the *Crimes Act 1914* (Cth),⁵¹⁰ and unlawful access to computer data).

500 TI Act, s. 7(1).

501 TI Act, s. 7(2)(b).

502 TI Act, s. 39.

503 TI Act, s. 40(1).

504 TI Act, s. 41.

505 TI Act, s. 42(2).

506 TI Act, s. 42(3).

507 TI Act, p. 42.

508 TI Act, s. 43.

509 TI Act, s. 5.

510 As in force at July 2000.

5.7.2 Dealing with intercepted information

The TI Act restricted the use that could be made of information that was lawfully obtained under a TI warrant.⁵¹¹ It was an offence under the TI Act to use, record or communicate the information unless that activity came within an exception stated in the Act. This general prohibition in the TI Act applied to “lawfully obtained information”⁵¹² that was described as “intercepted information” and “designated warrant information”.⁵¹³

The TI Act permitted specific dealings with intercepted information and designated warrant information.⁵¹⁴ For example, an officer could deal with intercepted information for a “permitted purpose”,⁵¹⁵ that included investigating a prescribed offence, matters relating to legal proceedings, communicating information about relevant offences to other agencies, and keeping records required for inspection under the TI Act.

Section 79 of the TI Act dealt with the destruction of restricted records (namely, a record of anything obtained by TI). Under that provision, the Commissioner for the NSWCC was to cause restricted records to be destroyed if those records were not likely to be required for a permitted purpose in relation to the NSWCC.

5.7.3 NSWCC TI manual

The NSWCC had a manual in place at the time of the Mascot investigations that investigators were expected to follow, relating to TI applications and use. It was the NSWCC Telecommunications Interception User Procedure Manual⁵¹⁶ (1998), later replaced by the NSWCC Telephone Interception Manual (2001).⁵¹⁷

TI services were managed in the NSWCC by the Information Technology and Telecommunications Unit (ITTU). The ITTU was separate from the investigation teams that decided whether to apply for a TI warrant and managed the transcription and analysis of TI product. It later became known as the Secretariat (under the 2001 manual). Communications that were being intercepted under a warrant obtained by the NSWCC were relayed to the NSWCC and could be monitored live by investigators.

The NSWCC manual (1998) set out the role of those directly involved in obtaining TI material. The case officer (the investigator who was to be the applicant for the TI warrant) was responsible for preparing the application and affidavit. A NSWCC legal officer would vet the draft affidavit, and the application for the warrant was to be reviewed by the Solicitor to the Commission (at all relevant times during the Mascot investigations this was Giorgiutti), who “determines whether or not the application for the warrant will be proceeded with”.⁵¹⁸ The 1998 stated:

*If the Solicitor to the Commission gives permission for the application to be made and gives its approval of the draft affidavit, 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.*⁵¹⁹

The legal officer was required to submit the final form of the affidavit, application and warrant to the Solicitor to the Commission for approval before the application was signed by a member of the NSWCC⁵²⁰ (the deponent of the affidavit).

511 TI Act, s. 63.

512 ‘Lawfully obtained information’ is information obtained by intercepting a communication passing over a telecommunications system, in circumstances where that interception was not in contravention of the general prohibition in s. 7(1) of the TI Act. The current TI Act uses the term ‘lawfully intercepted information’ instead (with a substantively identical definition), as subsequent versions of the TI Act also enable law enforcement agencies to access stored communications and data as well as to intercept telecommunications.

513 ‘Designated warrant information’ is information relating to a warrant application; the issue of a warrant; the existence/non-existence of a warrant; the expiry of a warrant or any other information which is likely to enable the identification of the telecommunications service or subject person (s. 6EA of the TI Act). The current TI Act now refers to ‘interception warrant information’ rather than designated warrant information, but the definition in the current TI Act is substantively identical to the definition of “designated warrant information” which appeared in the TI Act at the time of the Mascot reference.

514 TI Act, Part VII.

515 TI Act, s. 67.

516 NSWCC, *Telecommunications Interception User Procedure Manual*, 28 July 1998.

517 NSWCC, *Telephone Interception Manual*, June 2001.

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

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

520 NSWCC, *Telecommunications Interception User Procedure Manual*, 28 July 1998, p. 13.

The 2001 manual included a step-by-step guide for the application procedure that assigned slightly different roles in preparing an application.⁵²¹ This version of the manual stated that the case officer should discuss the intention to apply for a TI warrant with the Assistant Director, Investigations, (for Mascot, this was Standen); a decision about whether to proceed with the application would be made at the weekly operations meeting.⁵²² The Assistant Director, Investigations, was to advise the lawyer that a warrant would be sought, and check the affidavit, giving the case officer any minor amendments to make before resubmitting the affidavit to the Assistant Director, Investigations.⁵²³ The lawyer was required to prepare applications and warrant forms using the information supplied in the affidavit, as well as checking the accuracy of the warrant and the description of the offences.⁵²⁴ The lawyer would then submit the final draft affidavit, application and warrant to the NSWCC Commissioner or relevant Assistant Director for approval and signature.⁵²⁵ If the NSWCC Commissioner was satisfied that the application should be made, the case officer would swear the affidavit before the lawyer.⁵²⁶

The NSWCC had a team of TI monitors, who were not police officers, but were temporary employees, often university students.⁵²⁷ Mascot investigators would also undertake monitoring duties at times. TI monitors would listen to the intercepted call, identify parties to the conversation and make a summary of the relevant contents of the call, and make a transcript of relevant calls.⁵²⁸ Monitoring was usually performed in a specific 24 hour monitoring area within the NSWCC, and all materials created (including tapes, summaries and transcripts) were managed and kept within the TI Secretariat.⁵²⁹

The NSWCC manual discussed the restrictions on communication of TI product imposed by the TI Act. The NSWCC had log books to track the content of TI product, including what information was summarised and transcribed. A TI Administrator created and maintained files for all warrants, which included registering all the warrant documentation. The Manager of the ITTU/TI Secretariat was responsible for all aspects of record keeping for TI warrants, including recording the dissemination of TI product within the NSWCC and to outside agencies, and the destruction of TI material.⁵³⁰

The NSWCC manual also included details about the NSWCC's reporting requirements in relation to the use of TI, the use of TI product in criminal briefs, and adherence to the record destruction requirements of the TI Act.

521 NSWCC, *Telephone Interception Manual*, June 2001, p. 36.

522 NSWCC, *Telephone Interception Manual*, June 2001, p. 21.

523 NSWCC, *Telephone Interception Manual*, June 2001, p. 23.

524 NSWCC, *Telephone Interception Manual*, June 2001, p. 23.

525 NSWCC, *Telephone Interception Manual*, June 2001, p. 24.

526 NSWCC, *Telephone Interception Manual*, June 2001, p. 24.

527 Ombudsman Transcript, [NSWCC analyst], 24 March 2014, p. 24; Ombudsman Transcript, John Dolan, 31 October 2014, p. 2593; Ombudsman Transcript, [officer], 16 April 2014, p. 251.

528 NSWCC, *Telecommunications Interception User Procedure Manual*, 28 July 1998, p. 6; NSWCC, *Telephone Interception Manual*, June 2001, p. 28.

529 NSWCC, *Telephone Interception Manual*, June 2001, p. 28.

530 NSWCC, *Telephone Interception Manual*, June 2001, p. 27.

Appendix 1. Legislative amendments to enable Operation Prospect

To enable the Ombudsman to conduct Operation Prospect, it was necessary to amend the *Ombudsman Act 1974* (Ombudsman Act), the *Crime Commission Act 2012* (Crime Commission Act) and the *Police Integrity Act 1996* (PIC Act). Many of the amendments were modelled on similar provisions governing the investigative work of the Independent Commission Against Corruption (ICAC) and the Police Integrity Commission (PIC). The three amending acts were the *Ombudsman Amendment Act 2012*, which commenced in November 2012 (Act 100/2012), the *Independent Commission Against Corruption and Other Legislation Amendment Act 2013*, which commenced in June 2013 (Act 35/2013), and the *Royal Commissions and Ombudsman Legislation Amendment Act 2013*, which commenced in September 2013 (Act 65/2013).

Ombudsman Act 1974

There were a number of amendments made to the Ombudsman Act to facilitate the Ombudsman's Operation Prospect investigation.

Section	Reasons for amendment
Schedule 1, Item 19	"Excluded conduct of public authorities" was amended to give the Ombudsman powers to investigate the NSWCC or PIC, but only if "the conduct relates to a matter referred to the Ombudsman by the Inspector of the New South Wales Crime Commission ... or by the Inspector of the Police Integrity Commission ...". This removed the main impediment to investigating complaints about the Mascot investigations.
Section 19	Section 19(4) was inserted to allow the Ombudsman to appoint counsel to assist the Ombudsman or appear before section 19 hearings.
Section 19A	A new "restriction on publication of evidence" power was inserted, enabling the Ombudsman to give a direction to restrict the publication of evidence or information. Before making a direction, the Ombudsman must be satisfied that it is necessary or desirable in the public interest. The maximum penalty for contravening a section 19A direction is 50 penalty units and/or 12 months' imprisonment. The power to restrict publication mirrors those under the <i>Independent Commission Against Corruption Act 1988</i> (ICAC Act) and the PIC Act. Its purpose is to "provide a significant forensic benefit to an Ombudsman's inquiry by maintaining strict confidentiality of investigation-related information". ¹
Section 19B	A new "publication of evidence given at an inquiry" power was inserted, enabling the Ombudsman to prohibit the publication of evidence or information provided to an inquiry, except as permitted by the Ombudsman or the regulations. ² The maximum penalty for breaching this provision is 50 penalty units and/or 12 months' imprisonment. As with section 19A, the section 19B power mirrors similar prohibitions in the ICAC Act and the PIC Act and helps to preserve the forensic value of investigation-related information.
Section 19C	A new "disclosures prejudicing investigations" power was inserted in November 2012, requiring a public authority that is required or summonsed to give evidence or produce a document, not to disclose any information about that requirement or summons that is likely to prejudice the investigation. A further amendment in June 2013 clarified that this power refers to a requirement to produce a statement of information under section 18 of the Act or a summons to give evidence before a section 19 inquiry. The restriction only applies if the notice of that requirement or summons specifies that information about the requirement or summons must not be disclosed. The maximum penalty for breaches of section 19C is 50 penalty units and/or imprisonment for 12 months. As with sections 19A and 19B, the power to restrict prejudicial disclosures is intended to protect witnesses and preserve evidence.
Section 21(3)	In June 2013, shortly after Operation Prospect started, the "limits on secrecy and privilege" provisions were extended to clarify that Crime Commission and PIC information may be provided to the Ombudsman, notwithstanding the secrecy provisions that the Crime Commission Act and the PIC Act impose on current and former staff.
Section 34	Subsection 34(1)(b6) was inserted to allow the Ombudsman to give evidence and/or produce documents in criminal proceedings resulting from an investigation under the Act, but only if the investigation related (whether or not entirely) to a matter referred to the Ombudsman by the Inspector of the PIC or the Inspector of the Crime Commission. In almost all other circumstances, the Ombudsman and his staff may not give evidence in legal proceedings in respect of any information obtained in the course of their duties.
Section 35(3)	This subsection was amended to extend the general protections contained in section 35(1) to former staff, including the Ombudsman and any counsel appointed under section 19(4).
Section 35A(4)	A new "immunity of Ombudsman and others" subsection confers the same protections and immunities a barrister has when appearing for a party in the Supreme Court on any counsel assisting the Ombudsman or representing a person at a section 19 inquiry.

¹ Second reading speech, Attorney General, Mr Greg Smith MP, NSWPD (Hansard), Legislative Assembly, 20 November 2012, p. 17,099.

² Section 19B(1) states that the restriction does not apply to publication "as permitted by the Ombudsman or the regulations". However, as at the time of writing, the Ombudsman Regulation 2011 does not contain any clauses relating to the publication of such information.

Crime Commission Act 2012

Amendments were also made to the Crime Commission Act to facilitate the Operation Prospect investigation.

Section	Reasons for amendment
Section 63	Subsection 63(2) was inserted to ensure that, where the Inspector of the NSWCC refers a matter to another public authority or official for consideration or action, that referral must specify the terms of the referral in writing.
Section 80A	Section 80A was inserted to enable the Commissioner of the NSWCC, and any officer of the NSWCC acting with the Commissioner's approval, to provide evidence, documents or information to the Ombudsman. Section 80A(1) permitted the voluntary disclosure of Crime Commission information. Section 80A(2) and (3) clarified and confirmed the Ombudsman's powers to compel the Commissioner of the NSWCC, and any officer of the NSWCC, to give evidence or produce documents to the Ombudsman, but only in respect of a matter referred to the Ombudsman by the Inspector of the NSWCC or the Inspector of the PIC, and only where the evidence or documents were relevant to the referred matter. Without section 80A, the secrecy provisions at section 80 of the Crime Commission Act would have precluded any current or former NSWCC officers and any NSWPF officers who were or had been members of a task force assisting the NSWCC from providing such evidence or documents. Section 80A applied retrospectively and despite section 80 of the Crime Commission Act or any other law.

Police Integrity Commission Act 1996

The PIC Act was also amended to provide the Ombudsman with coercive powers in relation to the PIC upon referral of a matter from either the Inspector of the PIC or the Inspector of the Crime Commission.

Section	Reasons for amendment
Section 60(2)	This subsection was amended to provide the Ombudsman with powers to compel the Commissioner of the PIC, or any other officer of the PIC, to give evidence or produce a document in relation to a matter referred by either the Inspector of the PIC or the Inspector of the NSWCC, if that evidence or those documents were relevant to the matter referred.
Section 90	Section 90(2) provides that a referral of a matter by the Inspector of the PIC to another agency for consideration or action (under section 90 of the PIC Act), must specify the terms of the referral in writing.

Appendix 2. Ombudsman's jurisdiction

Appendix 1 summarised the legislative amendments that were required to enable Operation Prospect to proceed. This appendix provides an overview of:

- the Ombudsman's current jurisdiction to investigate and conduct inquiries under the provisions of the *Ombudsman Act 1974* (Ombudsman Act), the *Police Act 1990* (Police Act) and the *Royal Commissions Act 1923* (Royal Commissions Act) into the matters that were the subject of Operation Prospect
- the authority of the Ombudsman to make findings of wrong conduct, adverse comment and recommendations
- the provisions for referring evidence to the NSW Director of Public Prosecutions for consideration of criminal proceedings.

On 9 November 2016 the NSW Parliament passed legislation to establish the Law Enforcement Conduct Commission (LECC) which will have the powers and functions for civilian oversight of the NSW Police Force (NSWPF) currently performed by the Ombudsman and by the Police Integrity Commission (PIC). The LECC is expected to start operation early in 2017.

From that time, the Ombudsman's office will no longer have a role to independently oversight the handling of complaints by the NSWPF about the conduct of police officers.

2.1 Complaints

Section 12 of the Ombudsman Act enables any person, including a public authority, to complain to the Ombudsman about the conduct of a public authority (this definition is set out in section 5), unless the conduct is excluded from the Ombudsman's jurisdiction by Schedule 1 of the Act or excluded by virtue of taking place in time periods relating to the assent of the Act.³

'Conduct' is broadly defined in section 5(1) of the Ombudsman Act as follows:

conduct means:

- (a) any action or inaction relating to a matter of administration, and
- (b) any alleged action or inaction relating to a matter of administration.

A 'matter of administration' is not defined in the Ombudsman Act and is a very broad concept at common law. It can include a decision to act as well as an action, a refusal or failure to take a decision to act or to take an action, the formulation of a proposal or intention to take an action, or the making of a recommendation.

Schedule 1 of the Ombudsman Act excludes conduct of a police officer when they are exercising the functions of a police officer with respect to crime and the preservation of the peace. Complaints of this type must be made under the Police Act.

Section 126 of the Police Act enables any person to make a complaint about the conduct of a police officer. A complaint about police officer conduct can be made to the Commissioner of Police,⁴ the PIC,⁵ or the Ombudsman⁶.

³ Ombudsman Act, s. 12(1).

⁴ Police Act, s. 130.

⁵ Police Act, s. 131.

⁶ Police Act, s. 132.

Under section 121 of the Police Act, conduct of a police officer means any action or inaction (or alleged action or inaction) of a police officer:

- (a) *whether or not it also involves non-police participants, and*
- (b) *whether or not it occurs while the police officer is officially on duty, and*
- (c) *whether or not it occurs outside the State or outside Australia.*⁷

For a complaint to be made under section 126 it must allege or indicate one or more of the following:

- (a) *conduct of a police officer that constitutes an offence,*
- (b) *conduct of a police officer that constitutes corrupt conduct (including, but not limited to, corrupt conduct within the meaning of the Independent Commission Against Corruption Act 1988),*
- (c) *conduct of a police officer that constitutes unlawful conduct (not being an offence or corrupt conduct),*
- (d) *conduct of a police officer that, although not unlawful:*
 - (i) *is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or*
 - (ii) *arises, wholly or in part, from improper motives, or*
 - (iii) *arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or*
 - (iv) *arises, wholly or in part, from a mistake of law or fact, or*
 - (v) *is conduct of a kind for which reasons should have (but have not) been given,*
- (e) *conduct of a police officer that is engaged in in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.*⁸

2.2 Investigation of matters referred by the Inspectors of the PIC or NSWCC

In October 2012 Mr David Levine QC – in his capacity as the Inspector of the PIC and pursuant to section 90(1)(f) of the *Police Integrity Commission Act 1996* (PIC Act) – referred a broad range of ‘matters’ to the Ombudsman. The matters primarily concerned allegations of misconduct by members and staff of the NSW Crime Commission (NSWCC) and the officers of the NSWPF seconded to the NSWCC under section 27A of the (now repealed) *New South Wales Crime Commission Act 1985* – who were engaged to conduct investigations under the Mascot and Mascot II references, as well as PIC officers in relation to Operation Florida.

The PIC Inspector’s referral extended to all related matters and included complaints received by the PIC Inspector which alleged the unlawful and/or improper dissemination of documents and other material from hardcopy files and/or the computer systems of the NSWPF, the NSWCC and/or the PIC. The Ombudsman also took over all complaints under section 156(1) of the Police Act that had been made to the NSWPF and that fell within scope of the matters referred.

In his conduct of Operation Prospect, the Acting Ombudsman has authority under section 13 of the Ombudsman Act to investigate the matters referred, including allegations of misconduct by executive officers of the NSWCC and the Commissioner and officers of the PIC.

7 Police Act, s. 121.

8 Police Act, s. 122.

2.3 Investigation of a public authority

The Ombudsman may investigate the 'conduct' of a 'public authority' (whether a current or former public authority) under section 13(1) of the Ombudsman Act if that conduct is not 'excluded conduct' under Schedule 1 to the Ombudsman Act, and whether or not any person has complained to the Ombudsman about the conduct under section 12 of the Ombudsman Act.

'Public authority' is defined in section 5(1) of the Ombudsman Act as follows:

public authority means:

- (a) *any person appointed to an office by the Governor,*
- (b) *any statutory body representing the Crown,*
- (c) *any Public Service agency or any person employed in a Public Service agency,*
- (d) *any person in the service of the Crown or of any statutory body representing the Crown,*
- (d1) *any person employed by a political office holder under Part 2 of the Members of Parliament Staff Act 2013,*
- (e) *any person in relation to whom or to whose function an account is kept of administration or working expenses, where the account:*
 - (i) *is part of the accounts prepared pursuant to the Public Finance and Audit Act 1983,*
 - (ii) *is required by or under any Act to be audited by the Auditor-General,*
 - (iii) *is an account with respect to which the Auditor-General has powers under any law,*
 - (iv) *is an account with respect to which the Auditor-General may exercise powers under a law relating to the audit of accounts where requested to do so by a Minister of the Crown,*
- (f) *any person entitled to be reimbursed his or her expenses, from a fund of which an account mentioned in paragraph (e) is kept, of attending meetings or carrying out the business of any body constituted by an Act,*
- (f1) *any accredited certifier within the meaning of the Environmental Planning and Assessment Act 1979,*
- (g) *any holder of an office declared by the regulations to be an office of a public authority for the purposes of this Act,*
- (g1) *any local government authority or any member or employee of a local government authority, and*
- (h) *any person acting for or on behalf of, or in the place of, or as deputy or delegate of, any person described in any of the foregoing paragraphs.*

This definition also applies to a former public authority – including any person who no longer works for the NSW public service but who was a public servant at the time of the alleged conduct.

2.4 Investigation of a current or former police officer

The Ombudsman has authority under section 156 of the Police Act to investigate under the Ombudsman Act complaints about the conduct of NSW police officers, as well as any investigation of that complaint and any related issues. Under section 159(1) of the Police Act, if it appears to the Ombudsman that any conduct of a police officer could be, but is not, the subject of a complaint, the Ombudsman may also make that conduct the subject of an investigation under the Ombudsman Act.

Under section 123 of the Police Act, the Ombudsman's powers apply to and in respect of a former police officer (in relation to conduct occurring while he or she was a police officer) in the same way as they apply to and in respect of a police officer. A complaint about a former police officer may be made and dealt with as if the former police officer were still a police officer.

2.5 Investigation of a judge/Administrative Appeals Tribunal member

Schedule 1 of the Ombudsman Act provides a list of excluded conduct of public authorities. It includes at item 2(a) 'a court or a person associated with a court', and at item 2(b) 'a person or body (not being a court) before whom witnesses may be compelled to appear and give evidence, and person associated with such a person or body, where the conduct relates to the carrying on and determination of an enquiry or any other proceedings'.

The Ombudsman cannot therefore investigate the conduct of a judge or tribunal member.

In relation to Operation Prospect, the Ombudsman is also precluded from investigating the conduct of judges (current and former) who issued listening device warrants under the (now repealed) *Listening Devices Act 1984* (LD Act) by reason of the immunity provided by section 3A of the LD Act. The Ombudsman is similarly precluded from investigating the conduct of members (current and former) of the Administrative Appeals Tribunal who issued telecommunication interception warrants under the *Telecommunications Interception Act 1979* (Cth) (TI Act), by reason of section 6DA(4) of the TI Act and because the actions of federal officers do not fall under the NSW Ombudsman Jurisdiction.

The Ombudsman has received advice from Senior Counsel that neither a sitting nor a former judge can be compelled to give evidence in respect of matters in which they have been judicially engaged. See for example *Zanatta v McCleary* [1976] 1 NSWLR 230 at 234 and 239.

2.6 Investigation of a legal advisor to a public authority

Item 6 of schedule 1 to the Ombudsman Act excludes from investigation by the Ombudsman any conduct of a public authority where the public authority is 'acting as a legal adviser to a public authority or as legal representative of a public authority'. The excluded conduct is narrow in scope and is confined to "a matter within the doctrine of legal professional privilege".⁹

The Ombudsman has received advice from Senior Counsel that if a legal adviser had a sufficient degree of independence from their employer, legal professional privilege would attach and their conduct would be excluded. However, if the conduct of a legal practitioner working 'in-house' or for a public authority lacked the requisite independence of a legal practitioner that conduct would not be 'excluded conduct' within item 6 of schedule 1.

⁹ Committee discussion of Ombudsman Bill 1974, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 29 August 1974, p. 777.

2.7 Requirements by public authority to give information

Section 18 of the Ombudsman act allows the Ombudsman to require a public authority (being an agency or a public servant) to provide information or a document or thing:

18 Public authority to give information etc

- (1) *For the purposes of an investigation under this Act, the Ombudsman may require a public authority:*
 - (a) *to give the Ombudsman a statement of information,*
 - (b) *to produce to the Ombudsman any document or other thing, or*
 - (c) *to give the Ombudsman a copy of any document.*
- (2) *A requirement under this section must be in writing, must specify or describe the information, document or thing required, a must fix a time and specify a place for compliance.*

A number of public authorities issued section 18 notices opted to attend an interview which was electronically recorded and transcribed. This became their written statement of information.

2.8 Making or holding an inquiry using powers, authorities, protections and immunities

If the Ombudsman decides to hold an inquiry in an investigation under section 19(1) of the Ombudsman Act, the Ombudsman is enabled under section 19(2) of the Ombudsman Act to exercise powers under Division 1 of Part 2 of the Royal Commissions Act. In conducting a section 19 inquiry, the Ombudsman has the same powers, authorities, protections and immunities conferred on a commissioner of a Royal Commission by Division 1, Part 2 of the Royal Commissions Act – including the power to summon “any person” (including but not limited to a ‘public authority’) to attend to give evidence and/or produce documents in a hearing.

2.8.1 Compellability and privileges

Section 21 of the Ombudsman Act applies when a witness is called to give evidence in a hearing under section 19 of the Ombudsman Act. Section 21(2) provides that the Ombudsman must set aside the requirement if it appears to the Ombudsman that any person has a ground of privilege whereby – in proceedings in a court of law – the person might resist a like requirement, and it does not appear to the Ombudsman that that person consents to compliance with the requirement. Subsection (3), however, prevents a public authority from making a claim of privilege which the public authority might claim in a court of law, or from refusing to give evidence on the grounds of any duty of secrecy or other restriction on disclosure applying to a public authority or a former public authority.

In a section 19 inquiry a witness may, if appropriate, make a claim for privilege on the basis of self-incrimination. A public authority, however, cannot assert any privilege against self incrimination because of section 21(3) of the Ombudsman Act.

2.9 Ombudsman authority to make findings and recommendations

2.9.1 Adverse findings about and recommendations to a public authority

The Ombudsman Act sets out under section 26(1) and (2), the scope of the findings and recommendations available to the Ombudsman about the conduct of a public authority after an investigation such as the Operation Prospect investigation:

26 Report of investigation

(1) *Where, in an investigation under this Act, the Ombudsman finds that the conduct the subject of the investigation, or any part of the conduct, is of any one or more of the following kinds:*

- (a) *contrary to law,*
- (b) *unreasonable, unjust, oppressive or improperly discriminatory,*
- (c) *in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory,*
- (d) *based wholly or partly on improper motives, irrelevant grounds or irrelevant consideration,*
- (e) *based wholly or partly on a mistake of law or fact,*
- (f) *conduct for which reasons should be given but are not given,*
- (g) *otherwise wrong,*

the Ombudsman is to make a report accordingly, giving his or her reasons.

(2) *In a report under this section, the Ombudsman may recommend:*

- (a) *that the conduct be considered or reconsidered by the public authority whose conduct it is, or by any person in a position to supervise or direct the public authority in relation to the conduct, or to review, rectify, mitigate or change the conduct or its consequences,*
- (b) *that action be taken to rectify, mitigate or change the conduct or its consequences,*
- (c) *that reasons be given for the conduct,*
- (d) *that any law or practice relating to the conduct be changed,*
- (d1) *that compensation be paid to any person, or*
- (e) *that any other step be taken.*

These findings and recommendations may be made by the Ombudsman in relation to a public sector department, agency or officer (as a 'public authority') following an investigation regardless of when the conduct occurred (provided that it occurred after the commencement of relevant statutory provisions) and whether the public authority is a current or former public authority.

2.9.2 Adverse findings against a current or former serving police officer

As noted earlier, the jurisdiction of the Ombudsman in relation to an investigation into police conduct applies to the conduct of that person as a police officer at the relevant time, whether that individual remains a current serving NSW police officer or not. The Ombudsman may make findings against a current or former police officer about their conduct as a police officer at the relevant time within the types of conduct specified in section 122 of the Police Act:

122 Application of Part to certain complaints

- (1) *This Part applies to and in respect of a complaint that alleges or indicates one or more of the following:*
- (a) *conduct of a police officer that constitutes an offence,*
 - (b) *conduct of a police officer that constitutes corrupt conduct (including, but not limited to, corrupt conduct within the meaning of the Independent Commission Against Corruption Act 1988),*
 - (c) *conduct of a police officer that constitutes unlawful conduct (not being an offence or corrupt conduct),*
 - (d) *conduct of a police officer that, although not unlawful:*
 - (i) *is unreasonable, unjust, oppressive or improperly discriminatory in its effect, or*
 - (ii) *arises, wholly or in part, from improper motives, or*
 - (iii) *arises, wholly or in part, from a decision that has taken irrelevant matters into consideration, or*
 - (iv) *arises, wholly or in part, from a mistake of law or fact, or*
 - (v) *is conduct of a kind for which reasons should have (but have not) been given,*
 - (e) *conduct of a police officer that is engaged in in accordance with a law or established practice, being a law or practice that is, or may be, unreasonable, unjust, oppressive or improperly discriminatory in its effect.*

2.9.3 Recommendations

Section 26(2) of the Ombudsman Act provides that the Ombudsman may make certain recommendations (including that an apology be given to an individual):

- (2) *In a report under this section, the Ombudsman may recommend:*
- (a) *that the conduct be considered or reconsidered by the public authority whose conduct it is, or by any person in a position to supervise or direct the public authority in relation to the conduct, or to review, rectify, mitigate or change the conduct or its consequences,*
 - (b) *that action be taken to rectify, mitigate or change the conduct or its consequences,*
 - (c) *that reasons be given for the conduct,*
 - (d) *that any law or practice relating to the conduct be changed,*
 - (d1) *that compensation be paid to any person, or*
 - (e) *that any other step be taken.*

2.10 Procedural fairness requirements

Procedural fairness is a condition of the Ombudsman's exercise of his statutory powers. That obligation is imposed both by common law and by the Ombudsman Act s. 24, which requires that:

- (1) *In an investigation under this Act, the Ombudsman shall give an opportunity to make submissions on the conduct or police conduct the subject of the investigation:*
- (a) *if practicable, to the public authority whose conduct or police conduct it is, and*
 - (b) *to any other person given notice under section 16.*

- (2) *Where, in an investigation under this Act, the Ombudsman considers that there are grounds for adverse comment in respect of any person, the Ombudsman, before making any such comment in any report, shall, so far as practicable:*
- (a) inform that person of the substance of the grounds of the adverse comment, and*
 - (b) give the person an opportunity to make submissions.*

2.11 Reporting provisions

The Ombudsman has reporting powers under both the Ombudsman Act and the Police Act.

The Ombudsman may report under the investigation report powers contained in section 26 of the Ombudsman Act and section 157 of the Police Act. The Ombudsman also has available special report power under section 31 of the Ombudsman Act and section 161 of the Police Act. The Ombudsman's investigation report powers are not mutually exclusive, so something that is the subject of a report under the investigation report powers may also be the subject of a report under the special report powers.

2.12 Referral of a matter to the NSW Director of Public Prosecutions

The Ombudsman may, at any time, furnish information obtained in the discharge of his statutory functions to the NSW Director of Public Prosecutions under section 31AB(1) of the Ombudsman Act. In relation to Operation Prospect, the Ombudsman is permitted to disclose such information by the provisions of section 34(1)(b6) of the Ombudsman Act "for the purpose of any criminal proceedings resulting from an investigation ... but only if the investigation related (whether or not entirely) to a matter referred by the Inspector of the Police Integrity Commission ... to the Ombudsman for investigation". It should be noted that, for the purposes of section 34(1)(b6) of the Ombudsman Act, Operation Prospect is an investigation that relates ("whether or not entirely") to matters that have been referred by the Inspector of the PIC to the Ombudsman for investigation.

Appendix 3. Mascot legal and policy requirements

This appendix sets out the relevant legal and procedural requirements that were in place at the time of the Mascot investigations.

3.1 LD legislation

The *Listening Devices Act 1984* (LD Act) was the relevant statute authorising the use of listening devices in New South Wales during the Mascot investigations.¹⁰ The LD Act has since been repealed and replaced by the *Surveillance Devices Act 2007* (SD Act) which commenced on 1 August 2008.

Under the LD Act, a LD included an “instrument, apparatus, equipment or device capable of being used to record or listen to a private conversation simultaneously with its taking place”.¹¹ The LD Act was amended in 2000 to clarify that a LD may also have a visual or tracking capacity.¹²

3.1.1 When the use of a LD was permitted

Section 5(1) of the LD Act prohibited the use of LDs to listen and record record private conversations. This prohibition did not apply if:

- the use was authorised by a warrant granted under the LD Act
- the use was authorised pursuant to an authority granted by or under the *Telecommunications (Interception) Act 1979* (Cth) (TI Act) or any other Commonwealth law
- the use of a LD to obtain evidence or information in connection with an imminent threat of serious violence to people or of substantial damage to property, or a serious narcotics offence, was in circumstances where it was necessary to use the device immediately to obtain that evidence or information
- the unintentional hearing of a private conversation was by means of a LD
- the use of a LD was 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.¹³

A party to a private conversation could also lawfully use a LD to record that conversation if:

- all of the principal parties to the conversation consented, expressly or impliedly, to its use, or
- a principal party to the conversation consented to the LD being so used and:
 - the recording of the conversation was reasonably necessary for the protection of the lawful interests of that principal party, or
 - the recording was not made for the purpose of communicating or publishing the conversation, or a report of the conversation, to people who were not parties to the conversation.¹⁴

Contravening section 5(1) of the LD Act, whether by act or omission, was a criminal offence which could be tried summarily or on indictment. The penalties for this offence (and other offences under Part 2 of the LD Act) were:

- for an individual convicted summarily, a fine up to 40 penalty units and/or imprisonment for up to two years
- for an individual convicted on indictment, a fine up to 100 penalty units and/or imprisonment for up to five years.¹⁵

¹⁰ The sections referred to in this appendix are those in force from 31 July 2000 to 6 July 2003.

¹¹ *Listening Devices Act 1984* (repealed) (LD Act), s. 3(1).

¹² *Crimes Legislation Amendment Act 2000* s. 3(1A) – in force from 31 July 2000.

¹³ LD Act, s. 5(2).

¹⁴ LD Act, s. 5(3).

¹⁵ LD Act, s. 11.

3.1.2 Warrants authorising the use of LDs

Warrants authorising the use of LDs were issued by eligible Judges pursuant to Part 4 of the LD Act. An eligible Judge was a Judge of the Supreme Court who had been declared by the Attorney General (with the Judge's consent) as eligible to exercise functions under the LD Act, such as issuing warrants authorising the use of LDs.¹⁶

A person could apply for a warrant authorising the use of a LD if that person suspected or believed that a "prescribed offence" had been, was about to be, or was likely to be committed, and that the use of a LD was necessary to investigate the offence or the identity of the offender.¹⁷ A prescribed offence was an offence (including offences under a law of the Commonwealth or of another State or Territory) that was punishable on indictment or otherwise was of a class or description prescribed for the purposes of Part 4 of the LD Act.¹⁸

Section 16 of the LD Act set out the grounds upon which a LD warrant could be sought and granted:

16 Warrants authorising use of listening devices

- (1) *Upon application made by a person that the person suspects or believes:*

 - (a) *that a prescribed offence has been, is about to be or is likely to be committed, and*
 - (b) *that, for the purpose of an investigation into that offence or of enabling evidence to be obtained of the commission of the offence or the identity of the offender, the use of a listening device is necessary,*

an eligible Judge may, if satisfied that there are reasonable grounds for that suspicion or belief, authorise, by warrant, the use of the listening device.

- (2) *In determining whether a warrant should be granted under this section, the eligible Judge shall 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 this Part in connection with the same prescribed offence.*
- (3) *Where a warrant granted by an eligible Judge under this section authorises the installation of a listening device on any premises, the eligible Judge shall, by the warrant:*
 - (a) *authorise and require the retrieval of the listening device, and*
 - (b) *authorise entry onto those premises for the purpose of that installation and retrieval.*
- (4) *A warrant granted by an eligible Judge under this section shall specify:*
 - (a) *the prescribed offence in respect of which the warrant is granted,*
 - (b) *where practicable, the name of any person whose private conversation may be recorded or listened to by the use of a listening device pursuant to the warrant,*
 - (c) *the period (being a period not exceeding 21 days during which the warrant is in force,*

¹⁶ LD Act, s. 3A.

¹⁷ LD Act, s. 16(1).

¹⁸ LD Act, s. 15.

- (d) *the name of any person who may use a listening device pursuant to the warrant and the persons who may use the device on behalf of that person,*
 - (e) *where practicable, the premises on which a listening device is to be installed, or the place at which a listening device is to be used, pursuant to the warrant,*
 - (f) *any conditions subject to which premises may be entered, or a listening device may be used, pursuant to the warrant, and*
 - (g) *the time within which the person authorised to use a listening device pursuant to the warrant is required to report pursuant to section 19 to an eligible Judge and the Attorney General.*
- (5) *A warrant granted under this section may be revoked by an eligible Judge at any time before the expiration of the period specified in the warrant pursuant to subsection (4)(c).*
- (6) *Subsection (4)(c) shall not be construed as preventing the grant of a further warrant under this section in respect of a prescribed offence in respect of which a warrant has, or warrants have, previously been granted.*
- (6A) *A warrant under this section may be in or to the effect of the form set out in Schedule 2.*
- (6B) *If an eligible Judge grants a further warrant under this section before the expiry of an existing warrant in respect of the same premises, the requirement to retrieve the listening device under the existing warrant is waived by force of this subsection, and the listening device is taken to be installed under the further warrant.*
- (7) *The regulations may provide that, in such circumstances as are prescribed, the functions of an eligible Judge under this section may be exercised by an eligible judicial officer. For that purpose a reference in sections 16, 17, 19 and 20A to an eligible Judge is to be read and construed as a reference to an eligible judicial officer.*

An eligible Judge could issue a warrant for use of a LD if satisfied there were reasonable grounds for the person's suspicion or belief. The factors which an eligible Judge was required to consider in reaching this conclusion were set out in section 16(2) above.

Section 16(4)(b) is particularly relevant to the warrants issued during the Mascot investigations. The publication of warrants listing dozens of names (such as LD warrant 266/2000) as individuals whose private conversations might be listened to or recorded led to the complaints that resulted in the investigation of the propriety of the Mascot investigations.

An eligible Judge could grant a warrant that referred to a participant or potential participant in the conversation by an assumed name or code name if the eligible Judge was satisfied that this was necessary to protect the safety of the person.¹⁹ An applicant could also refer to a participant by an assumed name or code name in reports to the Attorney General about the warrant.²⁰

A warrant authorising the installation of a LD on premises also had to authorise and require the retrieval of the device, and had to authorise entry onto the premises for the purposes of installing and retrieving the device.²¹

At the time of the Mascot investigations, warrants issued under the LD Act could only authorise the use of LDs for a maximum of 21 days.²² These warrants could not be varied after being issued, but further warrants could be sought and granted for the same matters. The LD Act specifically permitted eligible Judges to grant further warrants for a prescribed offence, even if multiple warrants had previously been issued or an existing warrant authorising the installation of a LD on particular premises had not yet expired.²³

¹⁹ LD Act, s. 20A(1).

²⁰ LD Act, s. 20A(2).

²¹ LD Act, s. 16(3).

²² LD Act, s. 16(4)(c).

²³ LD Act, s. 16(6) and 16(6B).

The eligible Judge could also authorise the use of a LD where a police officer made that application over the telephone or radio in urgent situations. For these 'radio/telephone warrants', the eligible Judge had to be satisfied that the police officer had reasonable grounds to suspect or believe:

- (a) *that a prescribed offence has been, is about to be or is likely to be committed, and*
- (b) *that, for the purpose of an investigation into that offence or of enabling evidence to be obtained of the commission of the offence or the identity of the offender, the immediate use of a listening device is necessary.*²⁷

While a warrant granted under section 16 was required to specify a period of no more than 21 days during which the warrant was to be in force, a warrant granted by telephone or radio was required to specify a period of no more than 24 hours during which the warrant was to be in force; section 18(8).

3.1.5 Meaning of 'private conversation'

The LD Act only prohibited the use of LD to listen to or to record 'private conversations'. This term is defined in section 3 of the LD Act:

private conversation means 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.*

The term 'private conversation' is used and defined similarly in other State statutes dealing with surveillance and LDs that have been the subject of judicial comment. A number of cases have dealt with what constitutes a private conversation.²⁸

3.1.6 Communicating, publishing and possessing recorded information

As well as prohibiting the use of a LD except in circumstances authorised by the LD Act, Part 2 of the LD Act prescribed a number of offences in relation to dealing with information that was recorded by a LD. The penalties for these offences were the same as those for offences against section 5(1) of the LD Act.²⁹

Under section 6 of the LD Act, it was an offence to "knowingly communicate or publish to any other person a private conversation, or a report of a private conversation, that has come to the person's knowledge as a result, direct or indirect, of the use of a listening device" that was used in contravention of section 5 of the LD Act.³⁰ However, that prohibition did not apply in any of the following circumstances:

- (a) *where the communication or publication is made:*
 - (i) *to a party to the private conversation,*
 - (ii) *with the consent, express or implied, of all the principal parties to the private conversation, or*
 - (iii) *in the course of proceedings for an offence against this Act or the regulations,*
- (b) *where the communication or publication is not more than is reasonably necessary in connection with:*

²⁷ LD Act, s. 18(2). The eligible Judge was not to grant a warrant authorising the use of a LD under this section if they were satisfied that it would be practicable in the circumstances for a warrant to be applied for and granted under the provisions of section 16 of the Act (s. 18(3)).

²⁸ *Carr v Western Australia* [2007] NCA47 (2007) 232 CLR 138; *R v Henry* [1992] QCA 336; *Dimech v Tasmania* [2016] TASC33; *Re Surveillance Devices Act 1998; Ex parte TCH Channel Nine Pty Ltd* [1999] WASC 246; *Right v Stevens* [2009] WASC 102; *DPP (NSW) v Fordham*; [2010] NSWSC 795; *Chappell v Griffin Coal Mining Company Pty Ltd* [2016] FCA 1248.

²⁹ LD Act, s. 11.

³⁰ LD Act, s. 6.

- (i) *an imminent threat of serious violence to persons or of substantial damage to property, or*
- (ii) *a serious narcotics offence, or*
- (c) *to prevent a person who has obtained knowledge of the private conversation otherwise than in a manner referred to in that subsection from communicating or publishing to another person the knowledge so obtained by the person, notwithstanding that the person also obtained knowledge of the conversation in such a manner.*³¹

Under section 7 of the LD Act, it was an offence for a person who had been a party to a private conversation and who had used a LD to record the conversation (whether or not the use was permitted) to communicate or publish “any record of the conversation made, directly or indirectly, by the use of the device” to any other person.³² However, this offence was not committed if the communication or publication:

- (a) *is made to another party to the private conversation or with the consent, express or implied, of all of the principal parties to the conversation,*
- (b) *is made in the course of legal proceedings,*
- (c) *is not more than is reasonably necessary for the protection of the lawful interests of the person making the communication or publication,*
- (d) *is made to a person who has, or is, on reasonable grounds, by the person making the communication or publication, believed to have, such an interest in the private conversation as to make the communication or publication reasonable under the circumstances in which it is made, or*
- (e) *is made by a person who used the listening device to record the private conversation pursuant to a warrant granted under Part 4 or pursuant to an authority granted by or under the Telecommunications (Interception) Act 1979 of the Commonwealth or any other law of the Commonwealth.*³³

Under section 8 of the LD Act, it was an offence to possess a record of a private conversation knowing that it had been obtained, directly or indirectly, by the use of a LD used in contravention of section 5 of the LD Act.³⁴ However, no offence was committed if the person had possession of the record:

- (a) *in connection with proceedings for an offence against this Act or the regulations,*
- (b) *with the consent, express or implied, of all of the principal parties to the private conversation, or*
- (c) *as a consequence of a communication or publication of that record to that person in circumstances that do not constitute an offence against this Part.*³⁵

It was also an offence to manufacture, supply (or offer to supply) or possess a LD for use in contravention of section 5 of the LD Act.³⁶

3.1.7 Reporting on the use of LD warrants

Once a warrant was granted, section 19 of the LD Act required the person granted the warrant to provide a report to the eligible Judge and to the Attorney General within a time specified in the warrant advising whether or not the LD was used. After receiving a report under section 19(1) of the LD Act, an eligible Judge could direct

31 LD Act, s. 6(2).

32 LD Act, s. 7(1).

33 LD Act, s. 7(2).

34 LD Act, s. 8(1).

35 LD Act, s. 8(2).

36 LD Act, s. 9.

that any record of evidence or information obtained by the use of the LD to which the report related be brought into the Court³⁷ to be kept in accordance with section 19(3) of the LD Act.³⁸ Section 19 provided:

19 Reports

- (1) *A person to whom a warrant has been granted under this Part authorising the use of a listening device shall, within the time specified therefor in the warrant, furnish a report, in writing, to an eligible Judge and to the Attorney General:*
 - (a) *stating whether or not a listening device was used pursuant to the warrant, and*
 - (b) *if a listening device was so used:*
 - (i) *specifying the name, if known, of any person whose private conversation was recorded or listened to by the use of the device,*
 - (ii) *specifying the period during which the device was used,*
 - (iii) *containing particulars of any premises on which the device was installed or any place at which the device was used,*
 - (iv) *containing particulars of the general use made or to be made of any evidence or information obtained by the use of the device, and*
 - (v) *containing particulars of any previous use of a listening device in connection with the prescribed offence in respect of which the warrant was granted.*
- (2) *Where a report is given to an eligible Judge under subsection (1), an eligible Judge may direct that any record of evidence or information obtained by the use of the listening device to which the report relates be brought into the Court, and a person to whom any such direction is given shall comply with the direction.*
- (3) *A record brought into the Court pursuant to subsection (2) shall be kept in the custody of the Court and may, by order of the Court, be made available to any person.*
- (4) *The person on whose application an order has been made under section 16A must, within the time specified for the purpose in the order, furnish a report, in writing, to an eligible Judge and to the Attorney General:*
 - (a) *stating whether or not the listening device concerned was retrieved during the currency of the order, and*
 - (b) *if the listening device was not so retrieved, giving the reasons why it was not retrieved.*

*Maximum penalty: 20 penalty units or imprisonment for a term of 12 months, or both.*³⁹

3.1.8 Inadmissibility of evidence

Under section 13(1) of the LD Act, evidence of private conversations which came to the knowledge of a person by the use of a LD in contravention of section 5 of the LD Act could not be given in any civil or criminal proceedings. Exceptions to this prohibition included:

- where all principal parties to the conversation consented to the evidence being given
- where the conversation had also come to the knowledge of a person in another manner that was not the result of a contravention of section 5
- in proceedings for an offence against the LD Act or the relevant regulations

³⁷ LD Act, s. 19(2).

³⁸ LD Act, s. 19(3).

³⁹ LD Act, s. 19.

- if the court considered that the evidence should be admissible in proceedings for a serious narcotics offence or an offence punishable by imprisonment for life or 20 years or more (or in proceedings for or in connection with the grant of bail in those proceedings).⁴⁰

Private conversations that inadvertently or unexpectedly came to a person's knowledge as a result of the use of a LD pursuant to a warrant could be used in evidence even if the warrant was not granted for the purpose of allowing that evidence to be obtained.⁴¹ However, if that evidence related to an offence for which a warrant could not be granted or if the application upon which the warrant was granted was not made in good faith, the evidence would be inadmissible.⁴²

3.1.9 Destruction of irrelevant records

The destruction of irrelevant records was regulated by section 22, which provided:

22 Destruction of irrelevant records made by the use of a listening device

- (1) *This section applies to the use of a listening device:*
- pursuant to a warrant granted under Part 4, or*
 - in the circumstances referred to in section 5 (2) (c).*
- (2) *A person shall, as soon as practicable after it has been made, cause to be destroyed so much of any record, whether in writing or otherwise, of any evidence or information obtained by the person by the use of a listening device to which this section applies as does not relate directly or indirectly to the commission of a prescribed offence within the meaning of Part 4.*

*Maximum penalty: 20 penalty units or imprisonment for a term of 12 months, or both.*⁴³

3.1.10 Legal opinions about the operation of the LD Act

In his Preliminary Investigation Report into Operation Florida in 2002,⁴⁴ the Inspector of the Police Integrity Commission (PIC Inspector) outlined his interpretation of relevant provisions of the LD Act. That outline included references to advice provided by the Crown Solicitor.

In summary, the PIC Inspector's and the Crown Solicitor's interpretations of the LD Act considered that the warrant should list the names of every person who may be recorded or listened to by the use of a LD pursuant to the warrant, to the extent that their names "can be ascertained by known means or resources" at the time of applying for the warrant.⁴⁵ At the same time, use of the LD was not limited to recording only those persons named in the warrant, provided that the use of the LD complied with the purpose authorised by the warrant.⁴⁶

The PIC Inspector and the Crown Solicitor considered that a warrant authorised "the use of a listening device" for the purpose of an investigation of a prescribed offence or enabling evidence to be obtained of the commission of the offence or the identity of the offender.⁴⁷ In their view, while the LD could only be used pursuant to the warrant for these purposes, there was no other restriction as to how it could be used, including no restriction on whose private conversations may be recorded or listened to.⁴⁸ This accommodated the possibility that admissible evidence may come from people who happen to be in a place where a LD is installed, even if such people were not suspected of involvement in the offence or investigators did not know such people may have relevant information about the offence.

⁴⁰ LD Act, s. 13(2).

⁴¹ LD Act, s. 14(1).

⁴² LD Act, s. 14(2).

⁴³ LD Act, s. 22.

⁴⁴ Inspector of the Police Integrity Commission, *Report: Operation Florida Re: Listening Device Warrant*, 29 April 2002, pp. 4-12.

⁴⁵ Inspector of the Police Integrity Commission, *Report: Operation Florida Re: Listening Device Warrant*, 29 April 2002, p. 6.

⁴⁶ Inspector of the Police Integrity Commission, *Report: Operation Florida Re: Listening Device Warrant*, 29 April 2002, pp. 14-15.

⁴⁷ Inspector of the Police Integrity Commission, *Report: Operation Florida Re: Listening Device Warrant*, 29 April 2002, p. 14.

⁴⁸ Inspector of the Police Integrity Commission, *Report: Operation Florida Re: Listening Device Warrant*, 29 April 2002, p. 14.

The PIC Inspector and the Crown Solicitor said that in determining whether to grant a warrant, the eligible Judge was required to have regard to matters listed in section 16(2)(a)-(e).⁴⁹ These subsections did not expressly require the eligible Judge to consider whether the private conversations of people not reasonably suspected of having information about the prescribed offence would be listened to or recorded.⁵⁰ However, section 16(2)(b) obliged the eligible Judge to consider the extent to which the privacy of any person may be affected in determining whether or not to grant the warrant.⁵¹

In relation to the names that must be specified in the warrant, the Inspector and the Crown Solicitor considered that section 16(4)(b) of the LD Act required the warrant to specify, where practicable, the name of any person whose private conversation may be recorded or listened to by the LD pursuant to the warrant. In their view, these names should have been included “whether or not such person is reasonably suspected of having information relating to the prescribed offence”.⁵²

The PIC Inspector concluded that it was erroneous to think “that for any person to be named in a warrant there must be reasonable grounds to suspect the person was involved in a prescribed offence or at least had some information about it”.⁵³ In his view, and the view of the Crown Solicitor, the decision to include a name in a warrant depended on whether the person may be recorded or listened to by the LD pursuant to the warrant:

*What is relevant to whether a name must be specified, where practicable, is not whether the person is reasonably suspected of having information relating to the prescribed offence or of having been involved, directly or indirectly, in the prescribed offence but whether the person is a person whose private conversation may be recorded or listened to by the use of a listening device pursuant to the warrant.*⁵⁴

3.2 Telecommunications interceptions legislation

The TI Act was the relevant legislation regulating the use of telecommunications interceptions during the Mascot investigations. The TI Act provided a scheme whereby law enforcement agencies could be authorised to access the content of communications in real time, or stored communications, under a warrant issued by an eligible Judge or a nominated Administrative Appeals Tribunal (AAT) member.

The TI Act has undergone changes since the Mascot investigations, including being renamed as the *Telecommunications (Interception and Access) Act 1979* (Cth). Throughout this report we refer to the legislation by its current title, and use the abbreviation ‘TI Act’.⁵⁵

The *Telecommunications (Interception) (New South Wales) Act 1987* (TI (NSW) Act)⁵⁶ set out the record keeping and reporting requirements relating to the use of TI under the TI Act by eligible authorities, and the Ombudsman’s responsibilities for inspecting and monitoring compliance with the legislation by those agencies.

49 Inspector of the Police Integrity Commission, *Report: Operation Florida Re: Listening Device Warrant*, 29 April 2002, pp. 8 and 15.

50 Inspector of the Police Integrity Commission, *Report: Operation Florida Re: Listening Device Warrant*, 29 April 2002, p. 15.

51 Inspector of the Police Integrity Commission, *Report: Operation Florida Re: Listening Device Warrant*, 29 April 2002, p. 5.

52 Inspector of the Police Integrity Commission, *Report: Operation Florida Re: Listening Device Warrant*, 29 April 2002, p. 14.

53 Inspector of the Police Integrity Commission, *Report: Operation Florida Re: Listening Device Warrant*, 29 April 2002, p. 17.

54 Crown Solicitor NSW, quoted in Inspector of the Police Integrity Commission, *Report: Operation Florida Re: Listening Device Warrant*, 29 April 2002, p. 17.

55 Now the *Telecommunications (Interception and Access) Act 1979* (Cth) (TI Act) – in force since 13 June 2006.

56 Now the *Telecommunications (Interception and Access) (New South Wales) Act 1987* (TI (NSW) Act) – in force since 29 November 2006.

3.2.1 Applications for TI warrants

Section 7 of the TI Act has always included a general prohibition on the interception of communications passing over a telecommunications system:

7 Telecommunications not to be intercepted

- (1) A person shall not:
- (a) intercept;
 - (b) authorize, suffer or permit another person to intercept; or
 - (c) do any act or thing that will enable him or her or another person to intercept; a communication passing over a telecommunications system.⁵⁷

Despite this general prohibition, section 7(2) of the TI Act permits telecommunications to be intercepted under particular circumstances, which relevantly include the interception of a communication under a warrant.⁵⁸

Agencies could apply to an eligible Judge or nominated member of the AAT for a warrant to use a telecommunications interception.⁵⁹ An agency included a Commonwealth law enforcement agency, and eligible State authorities. At the start of Operation Mascot, this included:

- the NSWPF
- the NSWCC
- the ICAC
- the PIC.⁶⁰

Applications generally had to be made in writing,⁶¹ and contain both the name of the agency and the name of the person making the application on behalf of the agency.⁶² The application had to be accompanied by an affidavit which set out (among other things):

- the facts and other grounds on which the application was based⁶³
- the requested time period for the warrant to be in force, and reasons why it was considered necessary for the warrant to be in force for that period⁶⁴
- if the application was for a named person warrant, the name or names of each person to whom the application related⁶⁵
- the number of any previous warrant applications or warrants issued in relation to the telecommunications service(s) or person(s) named in the application⁶⁶
- particulars of the use made by the agency of information obtained by interceptions under previous warrants.⁶⁷

Applications could also be made by telephone in urgent circumstances.⁶⁸

The eligible Judge or nominated AAT member could ask for further information in connection with an application for a warrant under the TI Act. Section 44(2) of the TI Act required that this information be provided either on oath (if the application was made in writing) or orally or otherwise as directed by the Judge or AAT member.⁶⁹

⁵⁷ TI Act, s. 7(1).

⁵⁸ TI Act, s. 7(2)(b).

⁵⁹ TI Act, s. 39(1).

⁶⁰ TI Act, s. 39(2).

⁶¹ TI Act, s. 40(1). This was subject to s. 40(2) which allowed for urgent applications to be made via telephone.

⁶² TI Act, s. 41.

⁶³ TI Act, s. 42(2).

⁶⁴ TI Act, s. 42(3).

⁶⁵ TI Act, s. 42(4A)(a).

⁶⁶ TI Act, ss. 42(4)(a) and 42(4)(b) and 42(4A)(c) and 42(4A)(d).

⁶⁷ TI Act, ss. 42(4)(c) and 42(4A)(e).

⁶⁸ TI Act, ss. 40(2) and 43.

⁶⁹ TI Act, s. 44.

3.2.2 Warrants authorising the use of TIs

At the time of the Mascot investigations, only access to real-time communications was available.⁷⁰ There were two types of warrants: telecommunications service warrants and named person warrants. Their availability depended on the relevant offence being investigated. Relevant offences were categorised into class 1 and class 2 offences. Telecommunications service warrants permitted the interception of communications to and from the services that were specified in the warrant – for example, a particular land line or mobile telephone service irrespective of who might use that service. Named person warrants permitted the interception of any telecommunications service which the named person was using or was likely to use, and were less frequently available than telecommunications service warrants.

Class 1 offences were offences such as murder, kidnapping and narcotics related offences.⁷¹

Class 2 offences included offences with maximum penalties of seven years' imprisonment or more which fell within specified serious types of crime involving particular types of conduct. Class 2 offences also included certain organised crime activities, serious drug activities, money laundering offences, and offences under the *Crimes Act 1914* (Cth) involving unlawful access to data on Commonwealth and other computers.⁷²

For applications for warrants related to the investigation of class 1 offences, the eligible Judge or nominated AAT member was required to be satisfied that:

- the requirements of sections 39-44 had been complied with, and that, where the application had been made by telephone, there were sufficiently urgent circumstances when an application made by telephone was sought⁷³
- there were reasonable grounds for suspecting a particular person was using or was likely to use the telecommunications service (for telecommunications service warrants)⁷⁴ or was likely to use more than one service (for named person warrants)⁷⁵
- information obtained from telecommunications intercepted under a warrant would be likely to assist investigation of a class 1 offence in which the particular person was involved.⁷⁶

The eligible Judge or nominated AAT member was also required to have regard to the availability and utility of alternative investigative methods that did not involve TI.⁷⁷

For applications for warrants to investigate class 2 offences, the eligible Judge or nominated AAT member was required to be satisfied that:

- the requirements of sections 39-44 had been complied with, and that, where the application had been made by telephone, there were sufficiently urgent circumstances when an application made by telephone was sought⁷⁸
- there were reasonable grounds for suspecting a particular person was using or was likely to use the telecommunications service (for telecommunications service warrants)⁷⁹ or was likely to use more than one service (for named person warrants)⁸⁰

70 TI Act, s.6 defined interception of a communication passing over a telecommunications system as "listening to or recording, by any means, such a communication in its passage over that telecommunications system without the knowledge of the person making the communication". The current version of the TI Act also includes provisions governing access to 'stored communications' and 'telecommunications data'.

71 TI Act, s. 5.

72 TI Act, s. 5D.

73 TI Act, s. 45(a) and (b) and s. 45A(a) and (b).

74 TI Act, s. 45(c).

75 TI Act, s. 45A(c)

76 TI Act, s. 45(d) and 45A(d)

77 TI Act, s. 45(e) and 45A(e)

78 TI Act, s. 46(1)(a) and (b) and s. 46A(a) and (b).

79 TI Act, s. 46(1)(c).

80 TI Act, s. 46A(1)(c).

- information obtained from telecommunications intercepted under a warrant would be likely to assist investigation of a class 2 offence in which the particular person was involved.⁸¹

The eligible Judge or nominated AAT member was also required to have regard to:

- how much the privacy of any people would be likely to be interfered with by the interception
- the gravity of the conduct constituting the offence(s) under investigation
- how much the information obtained from the interceptions authorised by the warrant would be likely to assist in connection with the investigation of the offence(s), and
- the availability and utility of alternative investigative methods that did not involve TI.⁸²

Warrants could also authorise entry onto premises, where the application sought such authorisation. A warrant authorising entry onto premises could be issued where the Judge or nominated AAT member was satisfied that it would be impracticable or inappropriate to intercept communications otherwise than by using equipment or a line installed on those premises.⁸³

The prescribed form for the warrant was set out in a schedule to the TI Act. The eligible Judge or nominated AAT member could issue conditions or restrictions relating to interceptions under the authority of the warrant.⁸⁴ Warrants had to specify the period for which the warrant was in force (the warrant period), which could be for up to 90 days.⁸⁵ Once issued, the Judge or AAT member could not vary the warrant to extend the warrant period, but further warrants could be sought and issued in respect of the same telecommunications services and/or named persons.⁸⁶

Agencies other than the Australian Federal Police (AFP) were required to notify the Commissioner of AFP of any warrants issued to them.⁸⁷ Warrants granted under the TI Act to agencies other than the AFP did not come into force until that notification was received.⁸⁸ If the chief officer of an agency (other than the AFP) was satisfied (during the warrant period) that the grounds on which the warrant was issued ceased to exist, the chief officer was required to revoke the warrant.⁸⁹ This revocation would necessitate the discontinuance of any TI relying on that warrant.⁹⁰

3.2.3 Dealing with intercepted information

The TI Act not only restricts the interception of telecommunications, it also restricts the use that can be made of lawfully obtained intercept information. Even if a conversation is lawfully intercepted under a warrant, a person cannot use, record or communicate anything about the intercepted conversation unless the TI Act allows the person to deal with that information in that way. When Operation Mascot began, the TI Act included a general prohibition on all dealings with “lawfully obtained information”⁹¹ and “designated warrant information”,⁹² regardless of whether that material was obtained lawfully or not.⁹³

81 TI Act, ss. 46(1)(d) and 46A(1)(d).

82 TI Act, ss. 46(2) and 46A(2).

83 TI Act, s. 48.

84 TI Act, s. 49(2).

85 TI Act, s. 49(3).

86 TI Act, s. 49(4) and (5).

87 TI Act, s. 53.

88 TI Act, s. 54.

89 TI Act, s. 57.

90 TI Act, s. 58.

91 “Lawfully obtained information” is information obtained by intercepting a communication passing over a telecommunications system, in circumstances where that interception was not in contravention of the general prohibition at section 7(1) of the TI Act, s. 6E. The current version of the TI Act uses the term “lawfully intercepted information” instead (with a substantively identical definition), as subsequent versions of the TI Act also enable law enforcement agencies to access stored communications and data as well as to intercept telecommunications.

92 “Designated warrant information” is information relating to a warrant application; the issue of a warrant; the existence/non-existence of a warrant; the expiry of a warrant or any other information which is likely to enable the identification of the telecommunications service or subject person (s. 6EA). The TI Act now refers to “interception warrant information” rather than “designated warrant information”, but the definition in the current version of the TI Act is substantively the same to the definition of “designated warrant information” which appeared in that Act at the time of Operation Mascot.

93 TI Act, s. 63(1).

Under section 63 it was an offence (punishable by up to two years' imprisonment)⁹⁴ to communicate, make use of, or make a record of any intercepted information, or to give any intercepted information in evidence in a proceeding,⁹⁵ except in the circumstances permitted by the TI Act. Dealing with 'designated warrant information' was also an offence, except where those dealings were specifically permitted by the TI Act.

63 No dealing in intercepted information or designated warrant information

- (1) *Subject to this Part, a person shall not, after the commencement of this Part:*
- (a) *communicate to another person, make use of, or make a record of; or*
 - (b) *give in evidence in a proceeding;*
- lawfully obtained information or information obtained by intercepting a communication in contravention of subsection 7(1).*
- (2) *Subject to this Part, a person must not, after the commencement of this subsection:*
- (a) *communicate designated warrant information to another person; or*
 - (b) *make use of designated warrant information; or*
 - (c) *make a record of designated warrant information; or*
 - (d) *give designated warrant information in evidence in a proceeding.*⁹⁶

The TI Act permitted specific dealings with intercepted information and designated warrant information.⁹⁷ For example, employees of telecommunications services could, in the performance of their duties, communicate intercepted information relating to the operation, maintenance and supply of telecommunications services and enabling the interception under a warrant.⁹⁸ Officers of agencies could deal with intercepted information for permitted purposes.⁹⁹ A permitted purpose was defined to include the investigation of a prescribed offence, matters relating to legal proceedings, communicating information about relevant offences to other agencies, and keeping records required for inspection under the TI Act.¹⁰⁰ The TI Act also permitted limited further dealings with lawfully-communicated interception information and designated warrant information by the recipient, although such dealings could only be for one or more of the purposes for which that information was communicated.¹⁰¹ Intercepted information and designated warrant information could also be used in an 'exempt proceeding'.¹⁰² Following amendments to the TI Act in mid-2000, such information could be given in evidence in any proceeding after it had been given in an exempt proceeding.¹⁰³

3.2.4 Reporting requirements

Unlike the LD Act, where the person granted the warrant was required to provide a report about the use of the LD,¹⁰⁴ TI interceptions conducted under the authority of a TI warrant were dealt with in a different way. The TI Act contained requirements for Commonwealth agencies.¹⁰⁵ Reporting requirements for State agencies were in the complementary State legislation. For New South Wales agencies, the TI (NSW) Act required the chief officer of an agency to keep documents relating to warrants issued to that agency,¹⁰⁶ warrant applications, and particulars about how intercepted information was used or communicated.¹⁰⁷

94 TI Act, s. 105.

95 Collectively, these actions will be referred to as "dealing with" intercepted information and/or designated warrant information.

96 TI Act, s. 63.

97 TI Act, Part VII.

98 TI Act, s. 63B.

99 TI Act, s. 67.

100 TI Act, s. 5.

101 TI Act, s. 73.

102 TI Act, s. 74. 'Exempt proceedings' were defined in s. 5B, and included prosecution of prescribed offences and police disciplinary proceedings.

103 TI Act, s. 75A.

104 As set out in 3.1.7 above

105 TI Act, s. 94.

106 TI (NSW) Act 1987, s. 4.

107 TI (NSW) Act, s. 5.

The agency would provide this information to the relevant State Minister,¹⁰⁸ who would then provide it to the relevant Commonwealth Minister.¹⁰⁹ The Commonwealth Minister reported annually about warrants authorising the use of telecommunication interceptions.¹¹⁰

Part 3 of the TI (NSW) Act gave the NSW Ombudsman responsibility for monitoring agency compliance with record-keeping requirements through inspections of agency records. The TI (NSW) Act required the Ombudsman to report the results of those inspections to the State Minister. These provisions of the TI (NSW) Act have remained substantively the same since Operation Mascot started in 1999. However, following the commencement of the *Law Enforcement Conduct Commission Act 2016* (LECC Act), these monitoring and compliance functions will become the responsibility of the Law Enforcement Conduct Commission.

3.3 Controlled operations legislation

Controlled operations were regulated by the *Law Enforcement (Controlled Operations) Act 1997* (CO Act)¹¹¹ and *Law Enforcement (Controlled Operations) Regulation 1998* (CO Regulation) at the time of the Mascot investigations (and it is this legislation and regulation that is referred to throughout this section). Together, the CO Act and CO Regulation created legislative framework for authorising NSWCC and NSWPF officers and other people to engage in conduct that would otherwise be illegal in order to obtain evidence, make arrests and frustrate criminal and/or corrupt activity.

The purpose of a controlled operation is to investigate, arrest or frustrate criminal activity and/or corruption¹¹². Commissioners of the NSWCC and NSWPF (and their delegates)¹¹³ can authorise the conduct of a controlled operation in which participants can undertake 'controlled activities' (criminal offences or corrupt conduct) in order to investigate criminal or corrupt conduct. The types of criminal or corrupt conduct which could be authorised as part of a controlled operation were not prescribed at the time of Operation Mascot. Any offence could be authorised as a controlled activity, as long as it did not involve conduct which was likely to seriously threaten safety or property, and the conduct so authorised was appropriate in the circumstances. The legislative framework created detailed requirements for applying, granting, reporting and monitoring controlled operations, and imposed a mandatory code of conduct.

An important requirement of the system was that the controlled operations could not be directed towards entrapment. This meant the operations could not induce or encourage the subject to engage in any offences and/or corruption that they could not reasonably be expected to engage in without that encouragement or inducement.¹¹⁴

3.3.1 Terms

A "controlled activity" is an activity that involves criminal and/or corrupt conduct, but which is deemed to be lawful by the CO Act. To be lawful, the participant must engage in that activity in the course of and for the purposes of an authorised operation, and the conduct itself must be authorised by, and undertaken in accordance with, the authority granted to conduct that operation.¹¹⁵ The form of criminal and/or corrupt conduct that can be authorised is not restricted to any particular kinds of activities. In practice, the following activities are more commonly the subject of an authority to conduct a controlled operation:

- purchase, possession and conversations/negotiations for the purchase of prohibited drugs, stolen goods and firearms and/or ammunition
- trespass
- operation of surveillance devices.¹¹⁶

108 TI (NSW) Act, s. 6.

109 TI (NSW) Act, s. 7.

110 TI Act, Part IX, Division 2.

111 The Act was assented to in December 1997 and commenced in March 1998.

112 *Law Enforcement (Controlled Operations) Act 1997* (CO Act), s. 3.

113 CO Act, s. 29; *Law Enforcement (Controlled Operations) Regulation 1998* (CO Regulation) 1998, r. 13

114 CO Act, s. 7; CO Regulation, Schedule 1, cl.5.

115 CO Act, ss. 3 and 16.

116 NSW Ombudsman, *Law Enforcement (Controlled Operations) Act 1997, Annual Report 2009-2010*, pp. 23-42.

A “controlled operation” is an operation that may or may not involve a “controlled activity” but which must be conducted for one or more of the following purposes:

- obtaining evidence of criminal activity (being any criminal offence) or corrupt conduct (as defined in the *Independent Commission Against Corruption Act 1988*)
- arresting a person involved in criminal activity or corrupt conduct
- frustrating criminal activity or corrupt conduct
- carrying out an activity that is reasonably necessary to facilitate any of the above three purposes.¹¹⁷

Controlled operations are commonly employed in serious criminal investigations, and the vast majority of controlled operations target drug offences. Other offences targeted include robbery, firearms, murder, fraud and rebirthing of stolen motor vehicles (NSWPF), fraud, money laundering and murder (NSWCC).¹¹⁸ Authorities to conduct controlled operations are commonly employed to authorise a NSWPF officer to purchase illicit drugs from a suspect. The controlled operation authority provides the NSWPF officer with indemnity from departmental, criminal and civil liability for purchasing the illicit drugs.

3.3.2 Applications

The CO Act and CO Regulation set out the procedures for applying for and granting approval to conduct a controlled operation. At the time of Operation Mascot, retrospective authorisation could only be sought where unlawful conduct was undertaken to protect a person from death or serious injury.¹¹⁹

At the time of Operation Mascot, upon application by a “law enforcement officer”, the Commissioners of the NSWCC and the NSWPF (and their delegates)¹²⁰ could grant an authority to that officer to conduct a controlled operation on behalf of that agency.¹²¹

Applications could be made either formally (in writing) or urgently (for example, oral or telephone applications).¹²² A formal application was required to provide the following particulars:

- a plan of the proposed operation
- nature of the criminal activity and/or corrupt conduct for which the proposed operation was to be conducted
- the nature of the controlled activity
- details about any previous applications sought or granted.¹²³

117 CO Act, s. 3.

118 Ministry for Police and Emergency Services, *Review of the Law Enforcement (Controlled Operations) Act*, August 2011, p 1.

119 CO Act, s. 14. This restriction has since been relaxed so as to allow retrospective controlled operations authorities to be granted in situations where the conduct to be authorised was either necessary to ensure the success of the controlled operation or to prevent the loss of relevant evidence in respect of another form of criminal activity or corrupt conduct (that is, other than the criminal activity or corrupt conduct in respect of which the controlled operations authority was granted). It is still a necessary precondition to granting a retrospective authority that the participant could not have avoided that risk otherwise than by engaging in the relevant conduct.

120 At the time of Operation Mascot, the senior NSWPF staff who could receive a delegation of the power to exercise functions under the CO Act (including authority to grant a controlled operation) included any person for the time being occupying any of the following roles: Deputy Commissioner, Field Operations; Deputy Commissioner, Specialist Operations; Commander, Crime Agencies; Commander, Internal Affairs; Commander, Specialist Services Group: CO Regulation, rr. 13(a)(i)-(v).

In the case of the NSWCC, these powers could be delegated to any person holding or occupying the position of Director: CO Regulation, r. 13(d).

121 CO Act, s. 6.

122 CO Act, s. 5(2).

123 CO Act, s. 5(2A).

3.3.3 Authorisation

The person considering the application could authorise the controlled operation either conditionally or unconditionally,¹²⁴ but only if he/she was satisfied of the various factors set out in section 6(3) (discussed below) of the CO Act.¹²⁵ The person determining the application could require the applicant to produce further information¹²⁶ and was required to keep a written record of the reasons why they were satisfied as to the matters in section 6(3) of the CO Act.¹²⁷ The person could not grant the requested authority if the proposed operation involved:

- inducing or encouraging another person to engage in criminal/corrupt activity of a kind the other person “could not reasonably be expected to engage in unless so induced or encouraged”
- conduct that was likely to seriously endanger the health or safety of any person or result in serious loss/damage to property.¹²⁸

The CO Act also imposed limitations on civilians participating in a controlled operation.¹²⁹

3.3.4 Form of authority

Authorities to conduct a controlled operation could either be “formal” (in writing, signed by the person granting the authority)¹³⁰ or “urgent” (oral or by telephone).¹³¹ Whatever its form, the authority was required to identify:

- the operation, by reference to the plan accompanying the application
- the law enforcement officer conducting the operation
- each person who may engage in controlled activities, and whether they were operating under an assumed name
- the nature of the controlled activities in which each participant could engage
- the duration of the authority (which could be for up to six months in the case of a written authority, and up to 72 hours for an urgent authority)
- the conditions of the authorisation, if any.¹³²

The participants could be identified by assumed names or code names, so long as the person granting the authority kept records of the participants’ true names.¹³³

3.3.5 Effect of the authority

In effect, the authority allowed each law enforcement and/or any civilian participant in the controlled operation to engage in the controlled activities specified in the authority.¹³⁴ Despite any other law, a participant in a controlled operation was deemed not to have acted unlawfully or corruptly for engaging in an authorised controlled activity so long as it was authorised by, and engaged in accordance with, the authority for the operation.¹³⁵ Similarly, any ancillary offence or corrupt conduct engaged in and in connection with a controlled activity (such as aiding or abetting) was also deemed not to be unlawful or corrupt conduct.¹³⁶

124 CO Act, s. 6(1)(a).

125 CO Act, s. 6(3).

126 CO Act, s. 5(3).

127 CO Act, s. 6(5).

128 CO Act, s. 7(1).

129 CO Act, s. 7(3).

130 CO Act, s. 8(1)(a).

131 CO Act, s. 8(1)(b).

132 CO Act, s. 8(2).

133 CO Act, s. 8(3).

134 CO Act, s. 13.

135 CO Act, s. 16.

136 CO Act, s. 18.

3.3.6 Conduct of controlled operations

The CO Regulations included a “code of conduct”.¹³⁷ Contravention of the code of conduct was taken to be misconduct for the purposes of any disciplinary proceedings.¹³⁸ The code of conduct in operation at the relevant time provided as follows:

- Applicants for controlled operations authorities must act in good faith when applying for an authority to conduct a controlled operation or a variation of such an authority.
- Applications must disclose all relevant information of which the applicant is aware, and must not include any information which is materially incorrect or misleading.
- The officer responsible for a controlled operation (‘principal law enforcement officer’) must disclose any changes of circumstances that are likely to require a variation of the authority of that operation to the chief executive officer of their agency.
- The principal law enforcement officer must brief all participants in a controlled operation, ensuring that each participant understands their role and undertakes not to engage in controlled activities except as authorised.
- Law enforcement officers participating in a controlled operation (‘law enforcement participants’) must act in good faith and comply with the principal law enforcement officer’s lawful directions for the operation.
- Law enforcement participants must take all reasonable steps to ensure that participants do not:
 - induce or encourage suspects to engage in criminal and/or corrupt conduct in which those suspects could not reasonably be expected to engage unless so induced or encouraged
 - engage in conduct likely to seriously endanger the health or safety of any person or to result in serious loss or damage to property, or
 - engage in unlawful activities beyond the controlled operation.
- Reporting officers must act in good faith in making their reports, and must ensure that all of the information required is included in the report and that the report does not contain materially incorrect or misleading information.
- Law enforcement participants in a controlled operation must ensure that notices of any breaches of this code of conduct are given to the chief executive officer of the agency as soon as practicable.¹³⁹

3.4 Integrity testing

Throughout the course of the Mascot investigations, Part 10A of the *Police Service Act 1990*¹⁴⁰ empowered the NSWPF to conduct integrity testing of its own officers. The Commissioner of Police, or another police officer authorised by the Commissioner, could conduct a program (known as an ‘integrity testing program’) to test the integrity of any particular police officer or class of police officers.¹⁴¹ No other NSW government agency has an express jurisdiction to conduct an integrity testing program.

Section 207A of the Police Act permitted a person who was participating in the program to offer a police officer whose integrity was being tested the opportunity to engage in behaviour contrary to the principles of integrity required of a NSWPF officer. The opportunity could be created by either an act or an omission by the person participating in the integrity testing program.

¹³⁷ CO Regulation, Schedule 1. A code of conduct is also included in the current version of the CO Regulation.

¹³⁸ CO Act, s. 20(5).

¹³⁹ CO Regulation, Schedule 1.

¹⁴⁰ This Act is now known as the *Police Act 1990* (NSW). Part 10A was inserted into this Act in 1996 and has remained unchanged to the date of this report.

¹⁴¹ Police Act, s. 207A(1).

The relevant Integrity Testing Policy and Guidelines ('guidelines') applied during the period of Mascot's covert phase were dated 22 May 1997.¹⁴² Standing Operating Procedures were issued by the Integrity Testing Unit, Special Crime and Internal Affairs Command in October 2002, but as these procedures did not apply during the relevant time periods of Operation Mascot, they are not commented upon here.

The guidelines noted that "Integrity Tests would be conducted by the Integrity Testing Unit (ITU)", and that the Commander, Office of Internal Affairs, was responsible for the ITU.¹⁴³ The guidelines further noted that the Commissioner's delegation of the power to approve integrity tests resided with the same Commander.¹⁴⁴

The guidelines detailed what was to occur in a Targeted Integrity Test, where a specific officer or area of operation had "been identified as possibly corrupt, or engaged in an area of serious misconduct or criminal activity".¹⁴⁵ The identification of a target was to be done by "deliberate and aggressive gathering of information on high risk locations, functions, processes and individuals".¹⁴⁶

The guidelines indicated that NSWPF officers would not be randomly selected for integrity testing.¹⁴⁷

The guidelines stated that the integrity test itself should imitate the nature of the allegations:

*For example, if the prior allegations state that the targeted officer is removing property from drug dealers, then a scenario is created where an operative plays the part of a drug dealer.*¹⁴⁸

The guidelines stated that an integrity test could produce a result of 'pass', 'fail' or 'inconclusive'¹⁴⁹ and that: "Re-testing may be conducted where additional intelligence supports that need".¹⁵⁰

3.5 NSWCC policies and procedures

Both the NSWCC and NSWPF had a large number of policies and procedures in place to ensure that matters as diverse as controlled operations to Codes of Conduct and Ethics were clearly regulated. The Mascot investigations were conducted under the NSWCC references Mascot and Mascot II. Police officers who worked on any NSWCC investigation were sworn in as NSWCC staff members and were required to comply with NSWCC manuals, policies and procedures while performing duties at the NSWCC.

The NSWCC had the following policies and procedures in place during the Mascot investigations:

- Controlled Operations – Law Enforcement (Controlled Operations) Act 1997 – Draft Manual – printed 29 August 2000
- Informant Management Plan, undated
- Investigation Manual, Manual Release December 1999 (Chapter 1-3, 6, 8-10, 13), January 2002 (Chapters 4-5, 7), February 2002 (Chapter 14), July 2004 (Chapter 12)
- Task Forces – Directions and Guidelines – 6 March 1992
- NSW Crime Commission Act Section 27A – Task Forces – Directions and Guidelines 1998¹⁵¹
- NSWCC Investigation Division Manual – 26 June 1995
- Listening Devices Manual – versions dated 29 June 1998 and December 1999
- Telecommunications Interception User Procedure Manual – printed 28 July 1998

142 NSWPF, *Integrity Testing Policy and Guidelines*, 22 May 1997.

143 NSWPF, *Integrity Testing Policy and Guidelines*, 22 May 1997, p. 1.

144 NSWPF, *Integrity Testing Policy and Guidelines*, 22 May 1997, p. 1.

145 NSWPF, *Integrity Testing Policy and Guidelines*, 22 May 1997, p. 2.

146 NSWPF, *Integrity Testing Policy and Guidelines*, 22 May 1997, p. 2.

147 NSWPF, *Integrity Testing Policy and Guidelines*, 22 May 1997, p. 2.

148 NSWPF, *Integrity Testing Policy and Guidelines*, 22 May 1997, p. 4.

149 NSWPF, *Integrity Testing Policy and Guidelines*, 22 May 1997, p. 2.

150 NSWPF, *Integrity Testing Policy and Guidelines*, 22 May 1997, p. 2.

151 Adopted by the Management Committee on 7 October 1998. NSWCC, *Management Committee Meeting*, 7 October 1998.

- Telephone Interception Manual – June 2001
- NSWCC Code of Conduct – versions dated November 1998 and July 1999.

These policies and procedures are discussed in detail in relevant chapters of this report.

3.6 Protections and secrecy requirements for documents and information

3.6.1 Secrecy requirements in the NSWCC Act 1985

Section 29 of the now-repealed *New South Wales Crime Commission Act 1985* (NSWCC Act) imposed strict secrecy obligations on current and former members and staff of the NSWCC, and members of police task forces assisting the NSWCC. The provision is set out below:

29 Secrecy

- (1) *This section applies to:*
 - (a) *a member of the Commission, and*
 - (b) *a member of the staff of the Commission, and*
 - (c) *a member of a police task force assisting the Commission in accordance with an arrangement under section 27A, and*
 - (d) *a person to whom information is given either by the Commission or by a person referred to in paragraph (a), (b) or (c) on the understanding that the information is confidential.*
- (2) *A person to whom this section applies who, either directly or indirectly, except for the purposes of this Act or otherwise in connection with the exercise of the person's functions under this Act, and either while the person is or after the person ceases to be a person to whom this section applies:*
 - (a) *makes a record of any information, or*
 - (b) *divulges or communicates to any person any information,*
being information acquired by the person by reason of, or in the course of, the exercise of functions under this Act, is guilty of an offence punishable, on conviction, by a fine not exceeding 50 penalty units or imprisonment for a period not exceeding one year, or both.
- (3) *A person to whom this section applies shall not be required to produce in any court any document that has come into the person's custody or control in the course of, or by reason of, the exercise of functions under this Act, or to divulge or communicate to a court a matter or thing that has come to the person's notice in the exercise of functions under this Act, except where the Commission, or a member in the member's official capacity, is a party to the relevant proceedings or it is necessary to do so:*
 - (a) *for the purpose of carrying into effect the provisions of this Act, or*
 - (b) *for the purposes of a prosecution instituted as a result of an investigation conducted by the Commission in the exercise of its functions.*
- (4) *In this section:*

court *includes any tribunal, authority or person having power to require the production of documents or the answering of questions.*

produce *includes permit access to.*¹⁵²

¹⁵² *New South Wales Crime Commission Act 1985* (repealed) (NSWCC Act), s. 29.

Section 7 of the NSWCC Act authorised the NSWCC to release information in the course of liaising with other bodies and organisations:

The Commission may, with the approval of the Management Committee:

- (a) *disseminate intelligence and information to such persons or bodies as the Commission thinks appropriate, and*
- (b) *co-operate and consult with such persons or bodies as the Management Committee thinks appropriate.*¹⁵³

The functions of the Commission could be delegated to the Commissioner, an Assistant Commissioner or a member of staff of the Commission.¹⁵⁴

3.6.2 Secrecy protections in the Crime Commission Act 2012

Section 80 of the *Crime Commission Act 2012* (Crime Commission Act) contains a similar secrecy provision as under the Act in force at the time of the Mascot investigations.

80 Secrecy

(1) *This section applies to a person:*

- (a) *who is or was an executive officer, and*
- (b) *who is or was a member of the staff of the Commission, and*
- (c) *who is or was an Inspector or a member of the staff of the Inspector, and*
- (d) *who is or was an Australian legal practitioner appointed to assist the Commission or who is or was a person who assists, or performs services for or on behalf of, such an Australian legal practitioner in the exercise of the Australian legal practitioner's functions as counsel to the Commission, and*
- (e) *who is or was a member of a task force assisting the Commission in accordance with an arrangement under section 58, and*
- (f) *to whom information is given by the Commission or by a person referred to in paragraph (a), (b), (c), (d) or (e) after expressly informing the person that the information is to be treated by the person as confidential.*

(1A) *This section applies to a person conducting a review under section 78B in relation to the person's functions under that section.*

(2) *A person to whom this section applies must not, directly or indirectly, except for the purposes of this Act or otherwise in connection with the exercise of the person's functions under this Act:*

- (a) *make a record of any information, or*
- (b) *divulge or communicate to any person any information,*
being information acquired by the person because of, or in the course of, the exercise of functions under this Act.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

(3) *A person to whom this section applies cannot be required:*

- (a) *to produce in any court any document or other thing that has come into the person's possession, custody or control because of, or in the course of, the exercise of the person's functions under this Act, or*

¹⁵³ NSWCC Act, s. 7.

¹⁵⁴ NSWCC Act, s. 9(1).

- (b) to divulge or communicate to any court any matter or thing that has come to the person's notice in the exercise of the person's functions under this Act.
- (4) Despite this section, a person to whom this section applies may divulge any such information:
- (a) for the purposes of and in accordance with this Act, or
 - (b) for the purposes of a prosecution or disciplinary proceedings instituted as a result of an investigation conducted by the Commission in the exercise of its functions, or
 - (c) in accordance with a direction of the Commissioner, Inspector or Management Committee, if the Commissioner, Inspector or Chairperson of the Management Committee certifies that it is necessary for the information to be divulged in the public interest, or
 - (d) to any prescribed authority or person, or
 - (e) if the disclosure is made to a registered medical practitioner or registered psychologist for the purposes of that health practitioner providing medical or psychiatric care, treatment or counselling (including but not limited to psychological counselling) to a person to whom this section applies.
- (5) An authority or person to whom information is divulged under subsection (4), and any person or employee under the control of that authority or person, is, in respect of that information, subject to the same rights, privileges, obligations and liabilities under subsections (2) and (3) as if he or she were a person to whom this section applies and had acquired the information in the exercise of functions under this Act.
- (6) In this section:
- court** includes any tribunal, authority or person having power to require the production of documents or the answering of questions.

produce includes permit access to or inspection of.¹⁵⁵

3.6.3 Secrecy requirements in the PIC Act

Section 56 of the *Police Integrity Commission Act 1996* (PIC Act) contains the following secrecy provision that was in force at the time of the Mascot investigations:

56 Secrecy

(cf ICAC Act s 111; RC (PS) Act s 30)

- (1) This section applies to:
- (a) a person who is or was an officer of the Commission, and
 - (b) a person who is or was an officer of the Inspector, and
 - (c) a person who is or was an Australian legal practitioner appointed to assist the Commission or who is or was a person who assists, or performs services for or on behalf of, such an Australian legal practitioner in the exercise of the Australian legal practitioner's functions as counsel to the Commission, and
 - (d) a person or body referred to in section 15 (6), 18 (4), 77 (5) or 83 (6), and
 - (e) an authorised person referred to in section 18A, and
 - (f) a person who conducts a review under section 136B, but only in relation to the exercise of the person's functions under that section.

¹⁵⁵ *Crime Commission Act 2012*, s. 80.

- (2) A person to whom this section applies must not, directly or indirectly, except for the purposes of this Act or otherwise in connection with the exercise of the person's functions under this Act:
- (a) make a record of any information, or
 - (b) divulge or communicate to any person any information,
- being information acquired by the person by reason of, or in the course of, the exercise of the person's functions under this Act.
- Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.
- (3) A person to whom this section applies cannot be required:
- (a) to produce in any court any document or other thing that has come into the person's possession, custody or control by reason of, or in the course of, the exercise of the person's functions under this Act, or
 - (b) to divulge or communicate to any court any matter or thing that has come to the person's notice in the exercise of the person's functions under this Act,
- except for the purposes of a prosecution, disciplinary proceedings or proceedings under Division 1A or 1C of Part 9 of the Police Act 1990, arising out of an investigation conducted by the Commission in the exercise of its functions.
- (4) Despite this section, a person to whom this section applies may divulge any such information:
- (a) for the purposes of and in accordance with this Act, or
 - (b) for the purposes of:
 - (i) a prosecution, or
 - (ii) disciplinary proceedings, or
 - (iii) the making of an order under section 173 or 181D of the Police Act 1990, or
 - (iv) proceedings under Division 1A or 1C of Part 9 of that Act,arising out of an investigation conducted by the Commission in the exercise of its functions, or
 - (c) in accordance with a direction of the Commissioner or Inspector, if the Commissioner or Inspector certifies that it is necessary to do so in the public interest, or
 - (d) to any prescribed authority or person, or
 - (e) to a registered medical practitioner or registered psychologist for the purposes of that health practitioner providing medical or psychiatric care, treatment or counselling (including but not limited to psychological counselling) to a person to whom this section applies.
- (5) An authority or person to whom information is divulged under subsection (4), and any person or employee under the control of that authority or person, is subject to the same rights, privileges, obligations and liabilities under subsections (2) and (3) in respect of that information as if he or she were a person to whom this section applies and had acquired the information in the exercise of functions under this Act.
- (6) In this section:
- court** includes any tribunal, authority or person having power to require the production of documents or the answering of questions.
- produce** includes permit access to.¹⁵⁶

¹⁵⁶ Police Integrity Commission Act 1996 (PIC Act), s. 56.

3.6.4 Protection of confidential information under the Police Regulation 2008

At the time of the events discussed in Volume 6 to this report, the relevant protections for confidential information were set out under regulation 75 of the Police Regulation 2008:

75 Confidential information

- (1) *A member of the NSW Police Force or a student of policing must treat all information which comes to his or her knowledge in his or her official capacity as strictly confidential, and on no account without proper authority divulge it to anyone.*
- (2) *In particular, a member of the NSW Police Force or a student of policing must observe the strictest secrecy in regard to NSW Police Force business, and is forbidden to communicate without proper authority in any way to any person outside the NSW Police Force any information in regard to police or other official business connected with his or her duties, or which may come to his or her knowledge in the performance of them.*
- (3) *Nothing in this clause operates so as to impede the due performance of operational police duties or to prevent the giving of information if it is reasonable to do so for the purpose of dealing with an emergency when life or property is at risk.¹⁵⁷*

A range of NSWPF policies and procedures also set out the general requirements and expectations of police officers. This includes a requirement to comply with all policies and procedures and guidelines that relate to police duties, which is set out in the *NSWPF Code of Conduct and Ethics*.¹⁵⁸

3.7 Oversight of the NSWCC during Mascot

During the Mascot investigations, no external agency or parliamentary committee had an external oversight role for the NSWCC (in relation to operations, decision-making and investigating allegations of wrong and improper conduct). The NSWCC Management Committee which had independent members had a limited role in oversight.

3.7.1 NSWCC Management Committee

The NSWCC Management Committee – comprised of the Minister for Police and Emergency Services, the Commissioner of Police, the Chairman or another nominated member of the National Crime Authority (and from June 2003 the Chair of the Board of the Australian Crime Commission when it replaced the National Crime Authority), and the NSWCC Commissioner¹⁵⁹ – in addition to functions relating to the referral of matters to the NSWCC for investigation,¹⁶⁰ also had a function to “review and monitor generally the work of the Commission”.¹⁶¹

3.8 Changes to NSWCC oversight since Mascot

A number of years after the Mascot investigations, a number of changes were made which expanded the external oversight of the NSWCC considerably. Further changes will occur in 2017.

¹⁵⁷ Police Regulation 2008 (repealed), r. 75. The current equivalent provision is Police Regulation 2015, r. 76.

¹⁵⁸ NSWPF Professional Standards Command, ‘Code of Conduct & Ethics’, *Police Weekly*, 2006, vol 18, issue 40, p. 5.

¹⁵⁹ NSWCC Act, s. 24.

¹⁶⁰ NSWCC Act, s. 25.

¹⁶¹ NSWCC Act, s. 25(1)(b).

3.8.1 Expansion of the PIC jurisdiction to include the NSWCC

In July 2008 the jurisdiction of the PIC was expanded to include the detection, investigation and prevention of misconduct of officers of the NSWCC.¹⁶² In May 2012 further amendments were made to the PIC Act intended to give equal standing to the functions of preventing misconduct of the NSWCC officers as is given to preventing police misconduct.¹⁶³ The *Police Integrity Commission Amendment Act 2012* consolidated the principal functions of the PIC to provide for equal focus on officer misconduct, where that is now defined to include 'misconduct of a Crime Commission officer', as well as police officers.¹⁶⁴

3.8.2 Special Commission of Inquiry into the NSWCC

In 2011 the Assistant Director of the NSWCC, Mark Standen, was convicted of serious drug importation and supply charges and of conspiring to pervert the course of justice.¹⁶⁵ This raised concerns about the performance, accountability and governance structures of the NSWCC, and led to the *Special Commission of Inquiry into the New South Wales Crime Commission* (Special Commission) conducted by Mr David Patten.

Reporting in November 2011 the Special Commission considered a range of matters – including whether the NSWCC was complying with the NSWCC Act and the *Criminal Assets Recovery Act 1990*, whether the terms of those Acts remained suitable, and whether the accountability mechanisms in place for the NSWCC were appropriate.¹⁶⁶

The Special Commission found the accountability mechanisms for the NSWCC to be inadequate.¹⁶⁷ To address this, there were recommendations to change the membership of the Management Committee,¹⁶⁸ the structure of the NSWCC,¹⁶⁹ and to create an Inspector of the NSWCC. The Inspector would be involved in ensuring compliance with its governing legislation, assessing the effectiveness and appropriateness of its procedures, and dealing with complaints of misconduct and maladministration.¹⁷⁰

3.8.3 Introduction of an Inspector for the NSWCC and a role for the Parliamentary Joint Committee

After the Special Commission, the NSWCC Act was repealed and replaced by the Crime Commission Act. The then Attorney General stated that the Bill was intended to implement the Special Commission's recommendations and to strengthen the NSWCC's accountability:

*This includes increased oversight and management of the Crime Commission, a stronger independent management committee, oversight by a parliamentary joint committee, scrutiny of an independent inspector and improved procedures relating to employment, management and human resources handling.*¹⁷¹

Part 4 of the Crime Commission Act introduced the role of the Inspector whose principal functions include auditing the operations of the NSWCC, and dealing with complaints of abuse of power, misconduct, impropriety or maladministration by NSWCC officers.¹⁷² The Act explicitly states that the Inspector 'is not subject to the Commission in any respect'.¹⁷³

162 *Police Integrity Commission Amendment (Crime Commission) Act 2008* inserted ss. 5B and 13B into the PIC Act.

163 PIC Amendment Bill 2012, Explanatory note, Overview of Bill at (a).

164 *PIC Amendment Act 2012*, s. 4. See also ss. 3 and 13 of the same Act.

165 Patten, D. *Special Commission of Inquiry into NSW Crime Commission*, 30 November 2011, p. 186.

166 Patten, D. *Special Commission of Inquiry into NSW Crime Commission*, 30 November 2011, p. 186.

167 Patten, D. *Special Commission of Inquiry into NSW Crime Commission*, 30 November 2011, p. 6-7.

168 Patten, D. *Special Commission of Inquiry into NSW Crime Commission*, 30 November 2011, p. 7.

169 Patten, D. *Special Commission of Inquiry into NSW Crime Commission*, 30 November 2011, pp. 11-12.

170 Patten, D. *Special Commission of Inquiry into NSW Crime Commission*, 30 November 2011, p. 12.

171 NSWPD, Second reading speech, Greg Smith, Attorney General 18 September 2012 p. 40.

172 Crime Commission Act, s. 62(1)(a)-(d).

173 Crime Commission Act, s. 62(3).

The Crime Commission Act also extended the jurisdiction of the Parliamentary Joint Committee (constituted under Part 4A of the *Ombudsman Act 1974* (Ombudsman Act)) so that the committee's responsibilities include monitoring and reviewing the exercise of functions by the NSWCC, its Management Committee, and the NSWCC Inspector.¹⁷⁴

3.8.4 Transfer of oversight of the NSWCC to the LECC

In 2017, the roles of the NSWCC Inspector and the PIC will be transferred to the new Law Enforcement Conduct Commission (LECC) under the LECC Act. The functions of the LECC will be broadly similar to those currently exercised by the PIC, the NSWCC Inspector and the Ombudsman.¹⁷⁵ The LECC's jurisdiction will include the oversight and investigation of allegations of serious misconduct¹⁷⁶ and maladministration by NSWCC officers or the NSWCC itself.¹⁷⁷ The NSW Government may appoint an Inspector of the LECC¹⁷⁸ who will have jurisdiction over the LECC, and the Parliamentary Joint Committee constituted under the Ombudsman Act will be renamed the 'Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission'. The Parliamentary Joint Committee will retain a role with respect to the NSWCC and its Management Committee and its functions will be extended to include monitoring and reviewing the exercise of the LECC and the LECC Inspector's functions under the LECC Act.¹⁷⁹

174 Crime Commission Act, Part 5.

175 Law Enforcement Conduct Commission Bill 2016, Explanatory note, Overview of Bill, p.2.

176 LECC Act, s. 10.

177 LECC Act, s. 11(1) and 11(2).

178 LECC Act, s. 120(1).

179 LECC Act, s. 131(a).

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