LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

4 December 2014

Mr Bret Walker SC
5th Floor
St James Hall
Phillip Street
SYDNEY NSW 2000

Dear Mr Walker

Legislative Council Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect"

As discussed today I seek your advice, on behalf of the Legislative Council Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect," in relation to a number of issues anticipated to arise during the course of the committee's inquiry. The questions relate to:

- statutory secrecy provisions in the *Ombudsman Act 1974* (including amendments to that Act and related Acts that were enacted in late 2012),
- the voluntary provision of information by persons in response to a call for a submissions (as opposed to the answering of lawful questions by a sworn or affirmed witness at a hearing),
- the apparent desire of some potential witnesses to give their evidence under the compulsion of a summons,
- the communication of information to staff in the committee secretariat and whether there can be any doubt that such communications would be protected in the same way as submissions received and evidence provided at a hearing, and
- the circumstances in which a witness before a committee could in effect exercise a right to silence on the grounds that to answer a question may have a deleterious impact upon future legal proceedings or on the grounds of self-incrimination.

Background

On Wednesday 12 November 2014 the Legislative Council established a Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect." A copy of the minutes of proceeding is enclosed.

Parliament House
Macquarie Street Sydney
NSW 2000 Australia

Telephone (02) 9230 2323
Facsimile (02) 9230 2761
council@parliament.nsw.gov.au

The resolution establishing the committee included, at paragraph 6, a statement of the Legislative Council's understanding that a statutory secrecy provision in statute does not affect the power of the House or its committees to conduct inquiries and to require answers to questions unless the provision alters the law of parliamentary privilege by express words. The paragraph indicated that this view is supported by a number of listed authorities, including advices provided by you in 2000 and 2012, and subsequently published by General Purpose Standing Committee No 4 in Report No 26, entitled Budget Estimates 2012-2013," tabled in the Legislative Council on 19 February 2013.

The committee has commenced its inquiry by calling for submissions. A copy of the advertisement calling for submissions and a sample of the letters being sent directly to a number of stakeholders inviting their participation in the inquiry are enclosed, together with a fact sheet on the inquiry that is being provided to stakeholders and which is published on the committee's website.

I have provided some initial advice to the committee, in the form of a flow-chart and verbal advice, as to the sorts of issues that could arise and the subsequent options available to the committee should key witnesses be reluctant to attend or answer questions at hearings. A copy of the flow-chart is enclosed.

I have further briefed the committee in the light of a meeting with legal officers from the Police Association of NSW raising a number of questions about the committee's process and procedures, and the committee has resolved to request that I seek your written advice on the following questions and issues. Any advice you provide will be provided to all members of the committee. The committee may, like GPSC No 4 in February 2013, resolve to publish your advice.

Statutory secrecy and the Ombudsman Act 1974

Paragraph 1 (a) of the committee's terms of reference refers specifically to secrecy provisions included in the *Ombudsman Act 1974* by way of the *Ombudsman Amendment Act 2012*. The *Ombudsman Amendment Act 2012* also inserted new provisions into the *Crime Commission Act 2012* and the *Police Integrity Commission Act 1996*.

The principles from your 2000 and 2012 advices concerning statutory secrecy and parliamentary privilege are abundantly clear, and appear to have received a measure of acceptance from the Solicitor General (although, as the Leader of the Government pointed out in debate on the establishment of the committee, the law remains to be settled on these matters and the statement by the House in the terms of reference as outlined above do not change the law). However, given what appears to be the seeming inevitability of a clash arising during the course of this committee's inquiry between those principles and the specific statutory provisions enacted in 2012, and the potential consequences for inquiry participants, it would be appreciated if you could now confirm whether there is anything specific to those provisions, the current committee

inquiry or any recent legal developments that would possibly lead you to any different conclusion in this instance.

Voluntary provision of information in submissions

The circumstances which led to your advice being sought in 2000 and 2012 both revolved around witnesses giving evidence at committee hearings and the power of the committees to require the answering of lawful questions (although in both cases the committees did not in fact subsequently decide to press the questions notwithstanding the advice that you provided).

It is almost inevitable that the same situation will arise during the course of this inquiry and the committee will need to determine whether or not to press for answers to certain questions.

In the meantime, the committee has called for submissions. Persons making submissions do so voluntarily, either in response to a general call or a specific direct invitation.

Submissions received by a committee (ie those not rejected as outside the committee's terms of reference) are regarded as a proceeding in parliament. This is consistent with the definition of proceeding in parliament as formulated in section 16 of the *Parliamentary Privileges Act 1987 (Cwth)* which has been held to be a correct restatement of the law of privilege which provides that proceedings in parliament includes "the presentation or submission of a document to a House or a committee" and "the preparation of a document for purposes of or incidental to the transacting of any such business."

Given the seeming inevitability of the clash referred to above in the context of this inquiry, for abundant caution and as a result of the sorts of questions posed by representatives of the Police Association, your written advice is therefore sought as to whether there is any reason to consider the disclosure of information in a written submission (that might breach a statutory secrecy provision) would not be afforded the same protection of parliamentary privilege as evidence provided at a hearing in response to a lawful question.

Desire of some participants to give evidence in response to a summons

Prior to your 2000 advice it was standard practice for witnesses attending to give evidence before a committee to be served with a summons upon their arrival. Since that time, witnesses, whilst always sworn or affirmed, have not been served with a summons except where they have refused an invitation to attend and the committee has resolved to require their attendance by way of summons. (In practice it is rare for a summons to be required to be served – sometimes the mere threat of a summons is enough to have a reluctant witness attend – and in the overwhelming majority of cases witnesses attend voluntarily in response to an invitation.) It is anticipated that some key witnesses may decline requests to attend to give evidence at this inquiry. I have given the committee preliminary advice as to its options in that scenario and I may need to seek some further advice from you if certain potential scenarios play out.

In your 2012 advice, however, you agreed that it was advisable to issue a summons in relation to a witness whom the committee intends to compel to answer questions to which he or she has

previously objected. You indicated that "the advantage of a summons is to signify the compulsion under which the witness attends and answers."
It is apparent from the questions posed by representatives of the Police Association of NSW that the practice and experience of police officers is to attend and give evidence before oversight agencies (and the courts) only in response to relevant compulsory attendance notices. They indicated that there appears to be a desire on the part of some potential participants in this inquiry to only attend in response to a summons. This seems to be on the basis that, particularly if a witness was to answer questions in a way that breached a statutory secrecy provision, there would be some sort of greater protection (or perhaps more protection from criticism rather than legal consequences) if that information is provided under compulsion.

Of course, if potential witnesses decline invitations to appear to give evidence the committee will need to consider whether or not to have a summons issued and served to require attendance.

Given the circumstances prevailing in this particular inquiry, as outlined above, and the evolution of committee practices since your 2000 advice, your written advice is sought as to whether, beyond the practicalities and administrative burden that proper service would require, there are any other legal or policy reasons why it would be unwise for the committee to adopt a practice in this particular inquiry whereby witnesses generally attend to give evidence under summons.

Communication with secretariat

During the course of any committee inquiry the committee secretariat plays an important role in supporting the committee in its work. This includes arranging meetings, administering documentation including submissions and transcripts, analysing evidence and drafting the Chair's draft report, and advising the Chair and other members on parliamentary procedure. The secretariat also has an important role liaising with witnesses and other stakeholders.

The Police Association has questioned whether communications with the committee secretariat in relation to the inquiry of information that might be the subject of a statutory secrecy provision would be covered by parliamentary privilege. My predecessors and I have always assumed that such communications are a proceeding in parliament as they are necessarily incidental and essential for the proper conduct of a committee's inquiry. However, for abundant caution, and in view of the potential consequences for inquiry participants and secretariat staff if a different view is taken, your written advice is sought to confirm that such communications would be protected in the same way as submissions received and evidence provided at a hearing.

Right to silence

During a recent select committee inquiry (concerning a pollution incident at the Orica chemical plant in Newcastle) a number of witnesses declined to answer questions on the grounds that their answers could prejudice future potential legal proceedings or on the grounds of self-incrimination. The committee decided not to press for answers to those questions.

Despite the protections provided under *Article 9 of the Bill of Rights* and section 12 of the *Parliamentary Evidence Act 1902* to answers given at a hearing, "a committee would seriously consider any request by a witness that they not be obliged to give self-incriminating evidence in public."[1]

Given the nature of this inquiry, and the possibility that witnesses may claim a right to silence on the grounds of self-incrimination or the potential impact of evidence on future legal proceedings, your advice would be appreciated as to the sorts of principles that should be taken into account by a parliamentary committee in considering how to deal with a refusal to answer questions on these grounds.

Questions for advice

In summary your written advice is sought on the following questions:

1. Is anything specific to the provisions of the *Ombudsman Act 1974*, or the amendments to the *Ombudsman Act 1974*, the *Police Integrity Commission Act 1996* and the *Crime Commission Act 2012*, introduced through the *Ombudsman Amendment Act 2012*, the current committee inquiry or any recent legal developments (since your 2012 advice) that would lead you to any conclusion in this instance different to the conclusions in your 2000 or 2012 advice concerning statutory secrecy and committee inquiries?

2. Is there any reason to doubt that the principles and conclusions set out in your 2000 and 2012 advices (and your answer to question one above) are equally applicable to a submission made to a committee voluntarily in response to a general call or a specific request, as they are to the evidence of a sworn or affirmed witness at a hearing?

3. Despite the change of committee practice since your 2000 advice, beyond the practical and administrative burden of service, are there any other legal or policy reasons why it would be unwise for the committee to adopt a practice in this particular inquiry whereby witnesses generally attend to give evidence under summons?

4. Is there any reason to doubt that communications with the committee secretariat are protected by parliamentary privilege in the same way as submissions received and evidence provided at a hearing?

5. What principles should the committee take into account in dealing with refusals by witnesses to answer questions on the grounds of self-incrimination or the potential impact of evidence on future legal proceedings?

[1] L Lovelock & J Evans, *New South Wales Legislative Council Practice*, Federation Press, 2008, p 517.

Please do not hesitate to contact me on tel 9230 2323, or the Clerk Assistant Committees, Ms Beverly Duffy, on tel 9230 3367, if you require any further information on any of these matters. We look forward to discussing these matters with you in conference on Monday 10 December 2014.

Yours sincerely

David Blunt
Clerk of the Parliaments