PARLIAMENT OF NEW SOUTH WALES – LEGISLATIVE COUNCIL
SELECT COMMITTEE ON OMBUDSMAN'S "OPERATION PROSPECT"

OPINION

I am asked to advise the Clerk on behalf of the Select Committee on certain questions generally concerning secrecy provisions in the *Ombudsman Act 1974* (NSW) as they may affect the course of the Committee's inquiry.

2 I note that the resolution of the Legislative Council establishing the Select Committee itself asserted the view of the House that these secrecy provisions do not affect the powers of the Select Committee to require answers to lawful questions. The principle upon which that assertion was based in stated in the resolution of the House to be supported by, among other "authorities", two Opinions of mine dated 2nd (and 9th) November 2000 and 12th November 2012.

3 I confirm that my view of the relevant parliamentary law and statutory interpretation remains the same as it was in 2000 and 2012, and for the same reasons explained in those earlier Opinions.

4 I answer the questions I have been asked, as follows.

5 There is nothing specific in the provisions of the *Ombudsman Act 1974*, the *Police Integrity Commission Act 1996* (NSW) or the *Crime Commission Act 2012* (NSW), or any of them as amended by the *Ombudsman Amendment Act 2012* (NSW),

that supports a conclusion different from those I reached in 2000 and 2012 concerning statutory secrecy and committee inquiries.

6 It remains the case that there are no words or necessary implication to be seen in these statutory provisions that amount to the abrogation by Parliament of this aspect of parliamentary privilege – meaning, in this case, that aspect of the power of the democratic institution to investigate matters in the discharge of its function in our system of responsible government.

7 In particular, the following provisions of the *Ombudsman Act* rather suggest to the contrary, ie that Parliament does not intend that the Executive or executive agencies be paramount over one of its Houses (or its committees) with respect to the assessment of the public interest in obtaining and publishing information about official activities. The provisions of subsecs 19A(2) and 19B(1) cannot sensibly be read as substituting the Ombudsman as an authority superior to the Legislative Council concerning the publication of evidence. The provisions of sec 31 and particularly 31(2) concerning the Ombudsman's special reports to Parliament and their publication are couched in terms that acknowledge the prerogative of the House to determine those matters, in the ordinary course. The same is true of sec 31AA.

8 The provisions of sec 31AC are highly specific and therefore significantly lack any reference to a House or its committees.

9 The provisions of Part 4A concerning the Joint Committee are also quite inapt to impose a restriction on the power of the House to inquire into such matters. The statutory device of instituting a committee jointly of both Houses simply cannot be

understood to have detracted from the authority of each House: the creation of a special delegate does not diminish the power of the principals. Hence the provisions of sec 31H concerning secret or confidential matter before the Joint Committee does nothing to detract from the parliamentary privilege to compel the provision of information as the Select Committee sees fit (subject to resolution otherwise by the Legislative Council itself, of course). Equally, the limits placed by subsec 31B(2) on the authority or mandate of the Joint Committee do not, expressly or by implication, touch the anterior and superior powers of the Legislative Council or the Select Committee as its delegate.

10 It follows, in my opinion, that the provisions of sec 34 of the *Ombudsman Act* do not prevent the provision of information to the Select Committee, nor authorize a person otherwise bound by them to refuse to answer questions before the Select Committee or to provide documents to it.

11 As I advised in 2012, the constitutionally fundamental aspect of parliamentary privilege, being the power to obtain information concerning public affairs, and a proper approach to statutory interpretation combine to render the same approach equally applicable regardless whether a person is answering questions under compulsion or doing so voluntarily.

12 There are, in my opinion, certainly no legal and most likely no policy reasons (from a parliamentarian point of view) why the Select Committee should not generally seek to compel either the attendance or the answering of questions, by summons. There are, as noted by the Clerk, practical and logistical reasons for this not to be standard practice. A policy reason in favour of resort to it is the clarity it gives to the compulsion exerted on persons who would otherwise not be permitted to answer questions or

provide information. On balance, I strongly favour the service of a summons before any substantive questioning.

13 There is no reason to doubt that communications with the Secretariat of the Select Committee are just as protected by parliamentary privilege as formal submissions received and evidence provided at a hearing of the Select Committee. My reasoning remains as in 2000 and 2012, together with common sense.

14 Refusals by witnesses to answer questions on the ground of self-incrimination will raise matters of profound importance to those individuals, and of real systemic significance to the Legislative Council and its procedures. In my opinion, but in the absence of any directly applicable authority, parliamentary proceedings are by their special nature an exception to the general common law rule that renders the privilege against self-incrimination a substantive immunity protecting a person against all kinds of compulsory questioning. That is why legislation sufficiently clear to do so is necessary to abrogate that common law privilege.

15 There is no such wording in the (non-exhaustive) New South Wales legislation directed to evidence in parliamentary proceedings, viz the *Parliamentary Evidence Act 1901* (NSW). But this does not signify the availability of that privilege in parliamentary proceedings, not least because that statute is by no means to be seen as the source or origin of the parliamentary privilege to compel the provision of information.

16 Although New South Wales lacks a House of Commons equivalency provision (such as sec 49 of the *Commonwealth Constitution*), and although its colonial history marked its Parliament as a so-called inferior legislature, the nature and function of the

Houses of Parliament themselves, recognized in *Egan v Willis* (1998) 195 CLR 424 and *Egan v Chadwick* (1999) 46 NSWLR 564, justify cautious resort to the precedents at Westminster. It was clear by 1828 that the House of Commons had the power, being an aspect of parliamentary privilege, to compel questions to be answered and documents to be produced notwithstanding a claim of self-incrimination of a kind that would have provided a privilege to refuse to answer or produce, had the question or demand been made in or for the purposes of a court of law.

17 I say "by 1828" above, because in that year Hansard recorded a privileges debate where Members spoke to this effect, and in terms redolent of an assertion of established prerogative and power, rather than in terms of any novelty. The debate arose in the course of considering the East Retford Disfranchisement Bill, and is reported in Parl Deb (1828) 18, c 966-975. I rely especially on the persuasive speech of the then Mr Robert Peel, Leader of the House (later, of course, baronet and twice Prime Minister). That statesman regarded the non-existence of the privilege as clear, "... for if the witness could refuse to answer any question put to him, no investigation by that House could take place". He called to memory a case that would have attracted legal professional privilege in a court of law, where, as Mr Peel remembered, "the House declared that the rules of the law courts did not apply; but for the ends of public justice it was necessary that he should answer, he being protected from the consequences".

18 Thus, there is no privilege against self-incrimination before the Select Committee by force of law. On the other hand, it is to be expected that any such claim should be regarded with utmost care, lest the interests of an individual be unnecessarily damaged.

19 As a matter of law, Art 9 of the *Bill of Rights* will prevent any self-incriminating statement made to the Select Committee being used against the person in question, on my understanding of the proper ambit of the protection afforded by that 17th century enactment. There is sufficient controversy about that proposition, the scholarly details of which would be otiose for present purposes, to justify the Select Committee being rather less confident than the Speaker in the House of Commons at Westminster was in the same debate as Mr Robert Peel dominated, in 1828. Certainly, the Art 9 protection was an explicit part of the parliamentary understanding displayed in that debate, to justify or ameliorate the non-existence of the common law privilege against self-incrimination.

20 I am also asked about attempted refusals to answer on the ground of a potential impact of the proposed evidence on future legal proceedings. Obviously, given that such a ground is of manifestly less moment than feared self-incrimination, it provides no basis in law to refuse to answer questions or produce information before the Select Committee.

21 But both self-incrimination and the lesser embarrassment of legal proceedings are cases calling for a judicious delicacy on the part of the Select Committee. For example, checking (and inviting argument, perhaps) whether the question or information is really necessary as opposed to merely desirable would be one way to recognize the vulnerability of a person bereft of an enforceable privilege and perhaps facing adverse public comment if not adverse legal outcomes.

22 The other obvious expedient for the Select Committee is to consider orders for the non-publication of certain evidence or references to it, so as to protect such

individuals without detracting from the Select Committee's capacity to investigate relevant matters.

23 The fact sheet provided by the Secretariat of the Select Committee to so-called stakeholders, and published on its web page, concisely notes the position of the Legislative Council concerning statutory secrecy provisions that may arise in the course of the Select Committee's proceedings. It also notes that "any decision to breach statutory secrecy provisions is a serious matter" and counsels the seeking of legal advice by any individual considering doing so.

24 With respect, I have only one minor criticism of this wording. I do not think the word "breach" in the passage quoted above is quite right, to convey the Legislative Council's position. That is, there is no "breach" because the provisions do not extend to this forum. But this is more a debating point than a matter of accuracy, and I do not think it warrants anything in the nature of correction.

25 In my opinion, the statement of the Legislative Council's position about these secrecy provisions, and the encouragement to seek legal advice, are very fair and appropriate.

Fifth Floor St James' Hall

14th January 2015

Bret Walker