

**SELECT COMMITTEE ON THE CONDUCT AND PROGRESS OF THE OMBUDSMAN'S INQUIRY
"OPERATION PROSPECT"**

On behalf of Deputy Commissioner Catherine Burn the following submission is made:

1. What is suspicion based on reasonable grounds? At the time of the issuance of the listening device warrants the subject of this Inquiry in 1998-2001, the now repealed Listening Devices Act 1984 in section 16 provided as follows:

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.*

Two points should be made. The first is that all that is required is a suspicion. It does not require formation of an actual belief still less of knowledge. A long series of authority establish that a suspicion is merely a belief that something might possibly have happened, it is no more than that. As for the reasonable grounds which is a requirement imposed in fact upon the judge issuing the warrant (that is that he or she must be satisfied that there are such reasonable grounds), it is apparent that the matters set out by Deputy Commissioner Burn in her supplementary answers easily satisfy the requirements of reasonable suspicion.

2. During the course of the Inquiry, and specifically on Tuesday 10 February 2015, no member of the Committee suggested to Deputy Commissioner Burn that she did not hold the suspicion in question, nor that that suspicion was in any way other than reasonable. In such circumstances we respectfully suggest that the Committee is not entitled to make any finding that Deputy Commissioner Burn did not have the reasonable suspicion in question. To do so would be a breach of elementary requirements of procedural fairness and, as those members of the legal profession who are part of the Committee will be well aware, would be an elementary breach of the Rule in *Browne v Dunn*, which itself is no more than an example of the rules of procedural fairness.

12 February 2015