

## Second Reading

**Reverend the Hon. Dr GORDON MOYES** [11.31 a.m.]: I move:

That this bill be now read a second time.

The object of the Ombudsman Amendment (Removal of Legal Professional Privilege) Bill 2010 is to amend the Ombudsman's Act 1974 to enable the Ombudsman to obtain information that is subject to the client legal privilege of a public authority. Section 21 of that Act provides that the Ombudsman must set aside a requirement that a person provide information during an investigation or inquiry if it appears that the information is subject to a privilege of a public authority based upon legal professional privilege, known as "client legal privilege".

I will not go into great detail about this because all members know that the introduction of the legislation is the result of a request from the Ombudsman and that it pertains to the heart of the Ombudsman's work. The NSW Ombudsman's administrative review role includes dealing with complaints primarily about the administrative conduct of public sector agencies. The role relating to compliance review includes reviewing compliance with the law and good practice in the way agencies perform their functions; for example, compliance with procedural fairness and good practice in investigations, the use of police powers and so on, reviewing compliance with the law and good practice in the handling of and response to allegations and complaints, and reviewing compliance with appropriate standards of service provision. As all members understand, this goes right to the heart of the Ombudsman's powers.

It is important to note that the Ombudsman's Act provides a very high level of confidentiality that is solely reliant upon receiving, analysing and correctly storing very sensitive information. Examples of such sensitive information include witness protection and covert operations audit functions; police, corrections and hospital records; direct access to the Computerised Operational Policing System [COPS] database and the police complaints database; direct access to the Department of Community Services database, the Key Information Directory System [KIDS]; access to sensitive information regarding terrorism; and access to sensitive information regarding the actions of criminal organisations.

Legal professional privilege allows for protected communications between a lawyer and a client without the stress of what they say or provide being used against them. The Ombudsman has recommended that legal advice should be sought only in order to obtain information on legal questions, particularly where there is any uncertainty, and not in relation to the broader questions of the reasonableness of the course of action. There is nothing to prevent lawyers, if they choose, from giving advice on non-legal issues as part of their service to a client. Mr Justice Murphy stated in *Barker v Campbell*:

The client's legal privilege is essential for the orderly and dignified conduct of individual affairs in a social atmosphere which is being poisoned by official or unofficial eavesdropping and other invasions of privacy. The individual should be able to seek and obtain legal advice and legal assistance for innocent purposes, without the fear that what has been prepared solely for that advice or assistance may be searched or seized under a warrant.

The member for Port Macquarie, Mr Peter Besseling, stated in the other place:

This bill does not seek to remove the claim of legal professional privilege for an individual under investigation by the office of the New South Wales Ombudsman. This amendment would retain the existing protection of individual claims of legal professional privilege, which the Ombudsman must consider when exercising coercive powers. Originally, when established in 1975, the sole function of the Ombudsman was to investigate complaints about New South Wales public sector agencies, not including police and local councils.

Problems began to arise only when the agency claimed legal professional privilege and chose to refuse to provide the Ombudsman with important documents and information that allow for the fair and reasonable investigation of an agency. In June this year the NSW Ombudsman produced a special report to Parliament under section 32 of the Ombudsman's Act 1974 entitled "Removing Nine Words—Legal Professional Privilege and the NSW Ombudsman". In this report the current Ombudsman, Bruce Barbour notes:

It is clearly in the public interest for my office to be able to access all relevant information we need to conduct full and thorough investigations, drawing upon all, not only some, of the facts.

He further states:

Sometimes, Government agencies are intent upon preventing us from doing our job, challenging our involvement in matters and where possible preventing us from accessing information. One of the most frequently used tools is the claim of legal professional privilege. These claims are quite often shown to be without foundation, and appear to be primarily aimed at frustrating our investigations.

Again, the Ombudsman states:

I am not questioning the importance of the privilege. I am advocating for its proper use. It is not in the public interest to be used as an obstructive tool in the face of fair, reasonable and appropriate scrutiny of an independent watchdog

body.

This bill seeks to avoid delays and costs to the taxpayer by removing unnecessary burdens on the Ombudsman and the government agencies involved. In order to fight corruption and to provide the highest possible level of service, and, I might say, transparency in action, government departments must have systems in place that allow scrutiny of their practices through the principles of transparency and accountability. Furthermore, to protect the sensitivities surrounding individuals and commercial-in-confidence operations it is right and proper that the role of scrutineer falls to a government agency watchdog that can investigate and implement systems that uphold such principles. Such investigations must allow the watchdog to go about its business free from impediments that are subject to anything other than those that trample on individual freedom for those that are not in the public's best interest. The Ombudsman is now restricted when agencies claim legal professional privilege. Simply put, the watchdog is muzzled. The Ombudsman's report cites numbers of examples that highlight the frustrations. One simple example relates to the operation of the Office of the Board of Studies and the Freedom of Information Act 1989. The report states:

After completing his Higher School Certificate, a student requested information about the exams, including his raw marks, by lodging an FOI application with the Office the Board of Studies (OBOS). After being refused access, he sought through an external review from our office. On our very first dealings with the OBOS, it was clear that they were reluctant to cooperate with our investigation and provide us with information. In particular, they refused to provide us with 66 documents on the basis of legal professional privilege.

During our investigation, we interviewed the senior officer responsible for preparing the OBOS' response to our requirement to produce documents. When he was asked why the OBOS relied on the privilege, the senior officer said:

I guess it's a right which we possess which is recognised in law. I guess the question you're asking me is in my mind similar to being asked you know to justify the principles of procedural fairness or the rule of law...

On another occasion the same officer said:

Well as I've already explained, it's a right and there's a number of public interest reasons which I don't really have in my mind but there are a number of public interest reasons in favour of retaining the right of legal professional privilege and the Office has a policy of not waiving legal-professional privilege unless compelled by law and I'm not in a position to change that policy.

Despite repeated attempts to gain access to information over which legal professional privilege was claimed, the Ombudsman said he was never able to obtain the information. The Ombudsman further said:

This made it particularly difficult for us to determine the facts in this case. The evidence indicated it was possible a number of letters from the Office of the Board of Studies to the student had been either drafted by their legal advisers or were largely based upon legal advice. Finding out who wrote these letters was important, and we were never able to establish this beyond doubt.

The strength of our findings and recommendations following investigations relies entirely upon establishing the facts in a matter. In this case, being unable to review those 66 documents prevented us from being able to make recommendations for improvement to some of the Office of the Board of Studies' practices.

As mentioned in the other place by Mr Peter Besseling, the member for Port Macquarie:

This particular situation highlights the absurdity of a situation whereby the very body that has been charged with investigating a government department is being denied access to the very same information that was denied to the freedom of information applicant in the first place due to the inclusion of the words, "other than a claim based upon legal professional privilege".

In every other State in Australia the wording of the legislation makes clear that it is in the public interest to provide the Ombudsman with access to all relevant information. The current wording of the New South Wales Act seems to have the opposite effect. I do not believe that there will be any debate about this issue because members on all sides of the House want improved transparency and greater access for a watchdog. We do not want a key watchdog over government agencies or any other important aspect of the Government to be muzzled. This proposed amendment also aligns more directly with legislation guiding other New South Wales oversight bodies able to require the production of information or compel attendance at hearings, including the Police Integrity Commission, the Independent Commission Against Corruption and the Office of the Information Commissioner. The Joint Committee on the Office of the Ombudsman and the Police Integrity Commission has scrutinised the exact subject of this bill before us today and recommends the Premier amend sections 21 and 21A of the Ombudsman's Act 1974 to ensure that public authorities can no longer claim legal professional privilege in regard to the requirement of these sections.

**The PRESIDENT:** Order! I place the Hon. John Ajaka on a call to order for failing to have his mobile phone on silent mode.

**Reverend the Hon. Dr GORDON MOYES:** In a brief summary, this particular bill makes it very clear that what we are seeking to do is to remove the opportunity for agencies that need to be investigated to claim that their information is under legal privilege and therefore is not available to the watchdog. I ask members of all parties to support this bill, which I commend to the House.