Agreement in Principle

Mr PETER BESSELING (Port Macquarie) [4.26 p.m.]: I move:

That this bill be now agreed to in principle.

The objects 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 currently 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 on legal professional privilege, known as client legal privilege.

It is important to note from the outset that 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.

Over time Parliament has significantly expanded the Ombudsman's jurisdiction by bringing the police and local councils within jurisdiction, and giving the Ombudsman a wide range of new functions, which for simplicity can be conveniently categorised as investigating, or otherwise dealing with complaints about public sector agencies, the provision of community services by both government and non-government organisations, and the way certain agencies delivering services to children have handled allegations or convictions about conduct of employees that may be abusive to children.

The oversighting role includes the investigation of complaints about the conduct of police, the use of powers by police and others to conduct controlled operations, and the way certain agencies delivering services to children have handled allegations and convictions about conduct of employees that may be abusive to children. The reviewing function includes reviewing the conduct of agencies relating to freedom of information determinations, the implementation of legislation conferring further powers on police and correctional staff, and the delivery of community services by both government and non-government organisations.

It is important to note the functions of the NSW Ombudsman, particularly as they relate to its role as an independent review body. 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, 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.

Earlier this month the NSW Ombudsman produced a special report to Parliament under section 31 of the Ombudsman Act 1974 titled "Removing Nine Words—Legal Professional Privilege and the NSW Ombudsman". In the 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 on all, not only some, of the facts.

He further adds:

> 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 a 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.

A number of examples of this frustration were cited in the Ombudsman's report involving government agencies and a particular council. This frustration is highlighted in the following case relating to an external review under the Freedom of Information Act 1989:

> A journalist applied to our office for an external review under the *Freedom of Information Act 1989*. He had made a number of requests for information from the Roads and Traffic Authority (RTA), one of which related to information that had been routinely released to the press in the past.
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> When we are dealing with FOI matters, we often make preliminary inquiries under section 13AA of our Act. This section can provide a quick and informal method of resolving matters. Shortly after requesting more information using this section, we became aware the RTA had hired an external consultant to look into how the applications had been handled and prepare a response to our questions. We also found out a private law firm had been engaged, and the

consultant's final report would come from them. At this stage we had not instituted a formal investigation.

After beginning an investigation, we were advised by a number of witnesses that in their view the only reason the RTA retained the external consultant to respond to our preliminary inquiries through a private law firm was so any documentation prepared by the consultant would attract the protection of legal professional privilege. When asked why they thought the private firm had been brought in, the consultant commented:

I would think that they want to create legal privilege to protect documents created under that from perhaps other FOI processes. That's about the only thing it works with these days. So for example I fully expect that whatever comes out of your enquiry the RTA will receive an FOI application from the Daily Telegraph. So, that's why I would do that but whether that was their reason I don't know.

While the external consultant is a lawyer, they were not brought in to provide legal advice. They were conducting an internal investigation into the handling of the journalist's two FOI applications and drafting a response to our preliminary inquiries. The consultant then passed their report through the external law firm, who in turn provided it to the RTA. When questioned, all senior staff described the consultant's role as purely investigative.

Even after we were provided with access to the relevant documents from other sources during the course of the investigation, the Chief Executive of the RTA continued to maintain his claim of legal professional privilege. When asked why he was claiming the privilege, he told us that:

There's, there's a fundamental principle. You said to me in your letter "don't claim legal professional privilege, I want to see everything". I agreed with you that you should see everything but in the future when we're dealing with public issues about this, I'm entitled to that legal professional privilege on those documents because it is legal advice to RTA. I wanted to preserve that as a fundamental principle.

He advised us this was because:

I just don't think it's a good principle to freely release documents to go anywhere that they may go without making some assessment in the future about whose hands they go into, when you're dealing with legal advice.

It is important to note that the Roads and Traffic Authority eventually waived the privilege, but the time taken to do so meant it took even longer to complete the investigation and there was unnecessary additional cost to the community. This particular situation highlights the absurdity of a situation where the very body that has been charged with investigating a government department is being denied access to the very same information that was denied the freedom of information applicant in the first place due to the inclusion of the words, "other than a claim based on legal professional privilege". In the current climate, of all government department interactions with other agencies, individuals and in particular small businesses, this is a clear example of how another layer of red tape can be removed from our system. The request was made, the request was denied and a considerable period of time, energy and money was wasted in the meantime before the document was finally produced anyhow.

The bill seeks to avoid delays and costs to the general public 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, government departments must have systems in place that allow scrutiny of their practices through the principles of transparency and accountability. Furthermore, in order to protect the sensitivities surrounding individuals and commercial-in-confidence operations, it is right and proper that the role of scrutineer fall to a government agency watchdog that can investigate and implement systems that uphold such principles. Such investigations must allow the watchdog to go about their business free from impediments that are subject to anything other than those that trample on individual freedom or those that are not in the public's best interests.

The current legislation, which allows for agencies to claim legal professional privilege, can be likened to a watchdog that has been tethered by a chain or rope, that can bark and snarl and fight against its shackles but cannot be completely effective due to this restraint. Such a restriction invites people to consider activities that would be otherwise unthinkable if the watchdog had the free rein to patrol the boundaries of his responsibilities. We do not wish to encourage such thoughts within our government agencies due to the restrictions placed on the NSW Ombudsman through the highlighted sections of the Ombudsman Act.

It is important to note that, in carrying out his duties, the NSW Ombudsman must deal with many issues within an environment of extreme confidentiality. Much of the work is reliant on receiving, analysing and correctly storing very sensitive information, which includes holding information relating to witness protection and covert operations; audit functions; accepting information such as police, corrections and hospital records; having direct access to the computerised operational policing system [COPS] database as well as the police complaints database to effectively perform a police oversight function; having direct access to the Community Service's database; and performing legislative review work that allows access to particularly sensitive information around terrorism and, more recently, the actions of criminal organisations.

Under Section 34 of the Act it is an offence for the Ombudsman or an officer of the Ombudsman to disclose information obtained in the course of their work unless the disclosure is made in certain very limited

circumstances. Section 35 of the Act states that the Ombudsman and officers of the Ombudsman are not competent or compellable to give evidence or produce any document in legal proceedings. It would be folly to suggest that the proposed amendments to the Ombudsman Act would see anything other than a continuation of this approach to protect the confidential nature of investigations through practices that are currently in place. Many times in this most recent parliamentary session we have seen legislation come before this House seeking to work in harmony with other legislation in place throughout the rest of Australia. In fact, during this parliamentary session 30 pieces of legislation have been amended to achieve just that outcome, including the Road Transport (Vehicle Registration) Amendment (Heavy Vehicle Registration Charges) Bill 2009 and the Credit (Commonwealth Powers) Bill 2010.

The New South Wales Government presides over the only jurisdiction in Australia that places such a restriction on the investigative powers of its Ombudsman and is at odds with the relevant legislation relevant to the Commonwealth Ombudsman and in other States such as Queensland, Victoria, Western Australia and Tasmania. Furthermore, this proposed amendment 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 recently implemented Office of the Information Commissioner. It is also of particular relevance to note the Ombudsman's comments in a report in relation to other responsibilities. He stated:

> In 2002, the Ombudsman was provided with a new role following a merger with the Community Services Commission. New powers and responsibilities were provided under the Community Services (Complaint, Reviews and Monitoring) Act 1993, one of which is our reviewable death role. Interestingly, when this Act was amended to provide us with this role in 2002, the following was included:

For the purpose of the application of sections 21 (3) and 21A (2) of the Ombudsman Act 1974 under this section, the Ombudsman is not required to set aside a requirement, and is not prevented from exercising a power, because of a claim by a public authority based on legal professional privilege.

Clearly, when these changes were being considered, the need for the Ombudsman to have access to all relevant information relating to the death of a child was considered to outweigh a claim of legal professional privilege. Finally, the Ombudsman Act 1974 and the particular provision relating to legal professional privilege, which is the subject of this bill today, has been the subject of the direct scrutiny of this Parliament's own Joint Committee on the Office of the Ombudsman and Police Integrity Commission. In considering the impacts of current legislation on the operations of the New South Wales Ombudsman, the committee has taken a number of steps to address the very issue that is the subject of this bill today.

Those steps include highlighting the impact of legal professional privilege in every meeting with the Ombudsman since 2008, writing to the Premier and the Attorney General raising these matters and seeking a full and prompt response, and dealing with the Acting Deputy Director General (General Counsel) in seeking consideration of an amendment to the Ombudsman Act. It is appropriate that this House acts upon the advice of this Parliament's Joint Committee on the Office of the Ombudsman and Police Integrity Commission, a committee that comprises members from all sides of politics—Labor, Liberal, Greens and Independents. In relation to an exemption for government agencies on the grounds of legal professional privilege the committee stated:

> The Committee cannot see that such an exemption is needed, especially when it does not apply to other aspects of the Ombudsman's jurisdiction. It is also concerning that such a provision can be, and appears to be, used by agencies to frustrate the work of the Ombudsman's Office.

In its last and final report to Parliament tabled in April this year the committee produced only one single important recommendation: that the Premier amend sections 21 and 21A of the Ombudsman Act 1974 to ensure that public authorities can no longer claim legal professional privilege in regard to the requirements of those sections. Today, this Parliament has the opportunity to support that recommendation. I commend the bill to the House.