NSW Ombudsman

Removing nine words

Legal professional privilege and the NSW Ombudsman

A special report to Parliament under section 31 of the *Ombudsman Act 1974.*

June 2010

NSW Ombudsman

Our logo has two visual graphic elements; the 'blurry square' and the 'magnifying glass' which represents our objectives. As we look at the facts with a magnifying glass, the blurry square becomes sharply defined, and a new colour of clarity is created.

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June 2010

The Hon Amanda Fazio MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon Richard Torbay MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Madam President and Mr Speaker

I submit a report pursuant to s.31 of the *Ombudsman Act 1974*.

I draw your attention to the provisions of s.31AA of the *Ombudsman Act 1974* in relation to the tabling of this report and request that you make it public forthwith.

Yours faithfully

Bruce Barbour
Ombudsman

Foreword

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.

The New South Wales *Ombudsman Act 1974* stands alone among Ombudsman Acts around the country in permitting and protecting such claims, preventing us from having access to information over which an agency claims privilege.

I am now bringing this matter to the attention of Parliament after having repeatedly and unsuccessfully attempted to have our Act amended to remove this obstruction.

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.

This report provides some case studies of where my office has been unable to require the production of information claimed to be privileged. It also references comparable pieces of legislation and their application. Finally, it outlines the simple amendment needed to bring the Ombudsman Act into line with similar Ombudsman and watchdog legislation in NSW and around Australia.

All that is required to correct this anomaly is the removal of nine words, 'other than a claim based on legal professional privilege' repeated twice, from our Act. It is unclear why there is such reluctance to put forward this simple but important amendment.

Bruce Barbour
Ombudsman

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Introduction

We try to resolve complaints and matters brought to our attention quickly and informally. This is good for every party involved – complainants, agencies and our office.

However, there will always be matters where it will be necessary for the Ombudsman to conduct a formal investigation. Of the large number of matters we deal with every year, only a small number necessitate us using our royal commission powers. To properly investigate a matter we will sometimes require the production of documents and information, and occasionally require individuals to give evidence at a formal hearing.

There are only two lawful reasons why an agency can refuse to provide us with information when we are conducting an investigation. The first is to claim that the document is a cabinet document.[1] The second is to claim legal professional privilege over the information.

The *Ombudsman Act 1974* (the Ombudsman Act) is the only Parliamentary Ombudsman legislation in Australia that permits a claim of legal professional privilege by an agency to prevent the Ombudsman from accessing information. The Ombudsman has sought to have this anomaly corrected for some time with no success.

- In March 2008, the Ombudsman raised the issue with the Parliamentary Joint Committee on the Ombudsman and Police Integrity Commission (PJC) during its general meeting. In its final report, the PJC commented:

  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. The Committee intends to write to the Premier and the Attorney General seeking an amendment to the Ombudsman Act to remove the legal professional privilege exemption.

  Following that meeting, the Ombudsman wrote to the then Director General of the Department of Premier and Cabinet stressing the need for legislative change.
- In November 2008, the Ombudsman was provided with an opportunity to comment on a draft amending instrument. The amending Bill was never introduced in Parliament. It is unclear why this did not proceed. The amendment that was put forward, while not optimal, was relatively straightforward and uncontroversial.
- In February 2009, the Ombudsman made a number of recommendations to the Premier following an investigation into the RTA's handling of a number of FOI requests. One of these was:

  That the Ombudsman Act 1974 be amended in accordance with the suggestions made by this office to the Parliamentary Joint Committee in March 2008 and subsequently endorsed by that Committee, by removing the provisions in section 21(3)(b) which prevent the Ombudsman from requiring the production of documents that are subject to a claim of legal professional privilege.

  In a letter dated 5 January 2009, the Acting Deputy Director General (General Counsel) advised the Ombudsman '*that the Government will advise you of its intention on this point before Parliament resumes in March 2009*.'
- In May 2009, this issue was still unresolved when the Ombudsman met with the PJC. In its report following the meeting, the PJC gave the following account of its actions following the 2008 meeting:

  On the basis of the evidence given by the Ombudsman, the Committee wrote to both the Premier and the Attorney General in October 2008 seeking an amendment to the Ombudsman Act to remove the legal professional privilege exemption. Almost one year has passed and no response has been received by the Committee despite follow up action being taken by the Committee Secretariat. The Committee will again write to the Premier and the Attorney General raising these matters and seeking a full and prompt response.

  The Chair of the Committee again raised the issue in correspondence with both the Premier and the Attorney General, but received no response.
- In July 2009, the Ombudsman again wrote to the Premier seeking advice on the progress of the amending Bill. There was no response.
- In September 2009, the Ombudsman once again wrote to the Premier following up on this and several

1 Section 22 of the *Ombudsman Act 1974*.

other requests for information. He received a response at the end of October from the Deputy Director General (General Counsel) for the Department of Premier and Cabinet, stating that '*draft legislation is still being developed regarding your proposal about documents subject to legal professional privilege for the consideration of the Government in the near future*.'

- In October 2009, the Ombudsman wrote to the Director General of the Department of Premier and Cabinet seeking clarification of the Deputy Director General's advice, asking to be provided with the proposed wording for the legislation being developed and a timeframe for it going before Parliament.
- On 27 November 2009, the Ombudsman received another letter from the Deputy Director General (General Counsel) of the Department. The letter acknowledged earlier correspondence on this issue, but went on to comment:

  As you will appreciate, the Government regularly considers proposals for legislative amendments across a wide range of areas. It is ultimately a matter for the elected government of the day to determine its legislative program, including when it will consider particular proposals for legislative amendments and, if approved, when those proposed amendments will be introduced.
- On 30 November 2009, the Ombudsman raised the issue with the PJC again at its sixteenth general meeting. The PJC released its final report of that meeting which contained a recommendation for legislative change. The Committee stated that it:

  …believes the Ombudsman should be able to carry out his investigations without hindrance and at this stage can see no reason why the Ombudsman in NSW should be out of step with the Ombudsman in other jurisdictions.

  The Committee has recommended:

  That the Premier amend ss 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 these sections.
- On 30 November 2009, the *Independent Commission Against Corruption and Ombudsman Legislation Amendment Bill 2009* was assented to. This Bill could and should have been drafted to include the required amendment to the Ombudsman Act.

This brief chronology demonstrates the delays, obfuscations and difficulties experienced in trying to obtain a relatively simple but important amendment to the Ombudsman Act.

Chapter 1.
Legal professional privilege

The relationship between a lawyer and their client is an important one. It is built on trust and a high level of confidentiality. Legal professional privilege is designed to protect communications between a lawyer and a client, allowing a client to be open and truthful with their lawyer without worrying what they say or provide can be used against them.

The scope of the common law privilege has been extended by the courts so that it is now largely the same as the *Evidence Act 1995* (NSW)[2], which outlines two 'limbs' of legal professional privilege:

> ***118 Legal Advice***
>
> *Evidence is not to be adduced if, on objection by a client, the court finds that adducing evidence would result in disclosure of:*
>
> *a. a confidential communication made between the client and a lawyer, or*
>
> *b. a confidential communication made between 2 or more lawyers acting for the client, or*
>
> *c. the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person,*
>
> *for the dominant purpose of the lawyer, or one or more lawyers, providing legal advice to the client.*
>
> ***119 Litigation***
>
> *Evidence is not to be adduced if, on objection by a client, the court finds that adducing evidence would result in disclosure of:*
>
> *a. a confidential communication made between the client and another person, or between a lawyer acting for the client and another person, that was made, or*
>
> *b. the contents of a confidential document (whether delivered or not) that was prepared,*
>
> *for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.*

1.1 The rationale for the privilege

Any discussion of legal professional privilege almost always begins with a quotation from one of a number of High Court cases. As the following cases show, legal professional privilege is considered by the Court to be central to the administration of justice.

In *Grant v Downs*[3] Justices Stephen, Mason and Murphy observed that:

> *The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision. None the less there are powerful considerations which suggest that the privilege should be confined within strict limits.*[4]

Several years later, in *Baker v Campbell*[5] Justice Murphy argued the privilege should extend beyond legal proceedings to the application of a search warrant:

> *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 and unofficial eavesdropping and other invasions of privacy. The individual should be able to seek and obtain legal advice and legal assistance for innocent purposes,*

2 This was the view expressed by Einstein J in Michael Wilson and Partners Limited v Robert Colin Nicholls & Ors [2009] NSWSC 763.
3 (1976) 135 CLR 674.
4 as above at 685 per Stephen, Mason and Murphy JJ.
5 (1983) 153 CLR 52.

without the fear that what has been prepared solely for that advice or assistance may be searched or seized under a warrant.[6]

Justice Wilson expressed similar sentiments:

The multiplicity and complexity of the demands which the modern State makes upon its citizens underlines the continued relevance of the privilege to the public interest. The adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society and unless abrogated or abridged by statute the common law privilege attaching to the relationship of solicitor and client is an important element in that protection.[7]

In *Daniels*[8] the majority of the Court said:

Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.[9]

Recently in *Osland*[10], Justice Kirby commented that:

In the case of natural persons, legal professional privilege has been described as a basic human right. Legal persons, such as a constitutional State, a department or agency of the State, or a corporation, are not human beings. They are thus not entitled to the protection of human rights law as such. Nonetheless, they are, in my view, entitled to the benefit of the ample and protective approach which the common law adopts in respect of legal professional privilege.[11]

This statement was accompanied by some clarification. While the scope of legal professional privilege was not a ground of appeal, Kirby J did observe that:

Simply addressing questions or documents to lawyers does not necessarily cloak all of the matters discussed, or all of the documents then produced, with immunity from later production to a court on the basis of legal professional privilege.[12]

He went on to warn:

It would be a mistake to assume that all communications with government lawyers, no matter what their origins, purpose and subject matter, fall within the ambit of the State's legal professional privilege. Advice taken from lawyers on issues of law reform and public policy does not necessarily attract privilege. Especially in the context of the FOI Act, and legal advice to government, courts need to be on their guard against any inclination of lawyers to expand the ambit of legal professional privilege beyond what is necessary and justifiable to fulfil legal purposes.[13]

Justice Kirby's warning is an important one. While there is no questioning the importance of the privilege when applied correctly, it should not be used as a device to delay or frustrate attempts to get to the facts of a matter. It is certainly not in the public interest to rely on it to avoid fair, reasonable and appropriate scrutiny by an independent watchdog body.

6 as above at 89 per Murphy J.
7 as above at 95 per Wilson J.
8 *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543.*
9 as above at 553 per Gleeson CJ and Gaudron, Gummow and Hayne JJ.
10 [2008] HCA 37 (7 August 2008).
11 As above at para 82.
12 As above at para 85.
13 As above at para 89.

Chapter 2.
The Ombudsman Act

In order to understand how and why our office is restricted in its work by claims of legal professional privilege, it is necessary look briefly at the relevant sections of our Act.

Part 3 of the Ombudsman Act outlines the Ombudsman's investigative and conciliatory powers. Once an investigation notice has been issued to a public authority[14], the Ombudsman can require the production of a statement of information, a document or thing or a copy of any document.[15] The Ombudsman can also compel the giving of evidence in a closed hearing, using powers conferred by the *Royal Commissions Act 1923*.[16] Finally, the Ombudsman has the power to enter and inspect any premises used by a public authority as a public authority.[17]

The relevant sections of the Act relating to privilege are section 21 and 21A:

> ***21. Limits on secrecy and privilege***
>
> *1) This section applies if, in an investigation under this Act or an inquiry under section 19, the Ombudsman requires any person:*
>
> *a. to give any statement of information, or*
>
> *b. to produce any document or other thing, or*
>
> *c. to give a copy of any document, or*
>
> *d. to answer any question.*
>
> *2) The Ombudsman must set aside the requirement if it appears to the Ombudsman that any person has a ground of privilege, whereby, in proceedings in a court of law, the person might resist a like requirement and it does not appear to the Ombudsman that that person consents to compliance with the requirement.*
>
> *3) The requirement may however be made despite, and is not required to be set aside because of:*
>
> *a. any rule of law which, in proceedings in a court of law, might justify an objection to compliance with a like requirement on grounds of public interest, or*
>
> *b. any privilege of a public authority which the public authority might claim in a court of law,* ***other than a claim based on legal professional privilege,*** *or*
>
> *c. any duty of secrecy or other restriction on disclosure applying to a public authority.*
>
> ***21A. Privilege as regards entry and inspections on public premises***
>
> *1) The Ombudsman must not exercise powers under section 20 if it appears to the Ombudsman that any person has a ground of privilege, whereby, in proceedings in a court of law, the person might resist inspection of the premises or document or thing or production of the document or thing and it does not appear to the Ombudsman that that person consents to the inspection or production.*
>
> *2) The powers may however be exercised despite:*
>
> *a. any rule of law which, in proceedings in a court of law, might justify an objection to an inspection of he premises or document or thing or to production of the document or thing on grounds of public interest, or*
>
> *b. any privilege of a public authority which the public authority might claim in a court of law,* ***other than a claim based on legal professional privilege****, or*
>
> *c. any duty of secrecy or other restriction on disclosure applying to a public authority.*

The highlighted text in both sections allows an agency to choose to refuse to provide us with information over which it claims legal professional privilege. This is one of only two ways a public official can refuse to provide the Ombudsman with documents or information. The only other relates to Cabinet proceedings.[18]

14 Section 16.
15 Section 18.
16 Section 19.
17 Section 20.
18 Section 22.

The Act was not always worded in this way. When it came into force in 1974, section 21 stated that:

> *1) Subsections (2) and (3) apply where in an investigation under this Act, the Ombudsman requires any person –*
>
> *a. to give any statement of information;*
>
> *b. to produce any document or other thing;*
>
> *c. to give a copy of any document; or*
>
> *d. to answer any question.*
>
> *2) The person so required must comply with the requirement notwithstanding –*
>
> *a. any rule of law which in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest;*
>
> *b. any privilege of a public authority; or*
>
> *c. if the person so required is a public authority, any duty of secrecy or other restriction on disclosure applying to that public authority.*
>
> *3) Subject to subsection (2), the Ombudsman shall set aside the requirement if it appears to him that any person has a ground of privilege whereby, in proceedings in a court of law, he might resist a like requirement and it does not appear to the Ombudsman that that person consents to compliance with the requirement.*
>
> *4) Subsections (1), (2), (3) apply to a requirement made under section 18 or made in an inquiry under section 19.*
>
> *5) The Ombudsman may exercise his powers under section 20 notwithstanding –*
>
> *a. any rule of law which, in proceedings in a court of law, might justify an objection to an inspection of the premises or to production of the document or thing, as the case requires, on grounds of public interest;*
>
> *b. any privilege of a public authority; or*
>
> *c. any duty of secrecy or other restriction on disclosure applying to a public authority.*
>
> *6) Subject to subsection (5) the Ombudsman shall not exercise his powers under section 20 where it appears to the Ombudsman that any person has a ground of privilege whereby, in proceedings in a court of law, he might resist inspection of the premises or production of the document or thing, as the case requires, and it does not appear to the Ombudsman that that person consents to the inspection or production.*

In 1993, as part of a raft of reforms to the Act, which included providing for the Ombudsman to report directly to Parliament, '*other than a claim based on legal professional privilege*' was added.

The then Premier John Fahey commented that:

> *The Bill makes clear that the Ombudsman and Auditor General, when carrying out their duties, are to have access to the documents of a public authority except for Cabinet documents and documents the subject of legal professional privilege.*[19]

The Bill passed without amendment, challenge or adverse comment, and there was no further debate around why such a restriction was brought in or felt to be necessary. The Explanatory Memorandum states that:

> *… the Ombudsman will be able to obtain information, documents, things or answers regardless of legal obligations grounded in public policy, a privilege belonging to a public authority (other than legal professional privilege) or secrecy duties or other disclosure restriction.*[20]

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* (CS-CRAMA), one of which is our reviewable death role. Interestingly, when the CS-CRAMA 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.*[21]

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.

19 The Hon John Fahey, New South Wales Parliamentary Debates (NSWPD), Legislative Assembly, 21 May 1993, page 2654.
20 Ombudsman (Amendment) Bill 1993.
21 Section 42(3).

The final aspect of the Ombudsman Act that needs to be considered is the high level of confidentiality it provides. Much of our work is reliant on receiving, analysing and correctly storing very sensitive information:

- we hold information relating to our witness protection and covert operations audit functions
- we are regularly provided with information such as police, corrections and hospital records
- we have direct access to the COPS database, as well as the police complaints database c@ts.i to allow us to effectively perform our police oversight function
- we have direct access to the Community Service's database KIDS to allow us to effectively perform our roles under the CS-CRAMA, and
- to perform our legislative review work we have access to particularly sensitive information around terrorism and more recently the actions of criminal organisations.

Under Section 34, 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.

Chapter 3.
Other Ombudsman and watchdog bodies

3.1 Oversight bodies in NSW

The Ombudsman is not the only NSW oversight body able to require the production of information or compel attendance at hearings. The following is a brief outline of the comparable sections of various Acts, along with some discussion of their application.

Independent Commission Against Corruption

Section 24 of the *Independent Commission Against Corruption Act 1988* states that:

> *1) This section applies where, under section 21 or 22, the Commission requires any person:*
>
> *a. to produce any statement of information, or*
>
> *b. to produce any document or thing,*
>
> *2) The Commissioner shall set aside the requirement if it appears to the Commission that any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist a like requirement and it does not appear to the Commission that the person consents to compliance with the requirement.*
>
> *3) The person must however comply with the requirement despite:*
>
> *a. any rule which in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or*
>
> *b. any privilege of a public authority or a public official in that capacity which the authority or official could have claimed in a court of law, or*
>
> *c. any duty of secrecy or other restriction on disclosure applying to a public authority or public official.*

Police Integrity Commission

Section 27 of the *Police Integrity Commission Act 1996* (the PIC Act) provides that:

> *1) This section applies where under section 25 or 26, the Commission requires any person:*
>
> *a. to produce any statement of information, or*
>
> *b. to produce any document or other thing.*
>
> *2) The Commission must set aside the requirement if it appears to the Commission that any person has a ground of privilege whereby, in proceedings in a court of law, the person might resist a like requirement and it does not appear to the Commission that the person consents to compliance with the requirement.*
>
> *3) The person must however comply with the requirement despite*
>
> *a. any rule that in proceedings in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or*
>
> *b. any privilege of a public authority or public official in that capacity that the authority or official could have claimed in a court of law, or*
>
> *c. any duty of secrecy or other restriction on disclosure applying to a public authority or public official.*

The Police Integrity Commission (PIC) produces guidelines, aimed particularly at legal practitioners, outlining its approach to obtaining, handling and releasing information. The guidelines advise, in relation to section 27:

> *The Commission construes these provisions to the following effect:*
>
> - *A natural person or private corporation may assert a privilege available at law to the person or corporation.*
> - *The privilege must be a substantive privilege that would found a complete objection to the production of documents in a court of law, such as the privilege against self-incrimination or legal professional privilege, as opposed to a residual discretion exercisable by the court to regulate access to documents once produced.*

- *A 'like requirement' is a requirement with the similar function of requiring the production of documents for the purposes of proceedings in a court of law - essentially, a subpoena. The common law governs the privileges available at the ancillary stage of a trial or hearing.*
- *Unless persuaded otherwise, the Commission is of the view that provisions of the Evidence Act 1995 relating to statutory forms of privilege and qualified privilege that may be asserted as an absolute or discretionary bar to the adduction of evidence will not be available.*
- *Public interest immunity, which any person has standing to claim in a court of law in objection to the production of documents or the giving of evidence, may not be asserted.*
- *No form of privilege may be asserted by a public authority or a public official in their official capacity, including legal professional privilege.*[22]

In 2002, the PJC considered a recommendation by police to amend the PIC Act to remove any abrogation of privilege. In its final report, the PJC commented that:

> *The principle underlying s.27(3)(b) of the PIC Act seems sound enough. The proposal that the relevant provisions should be changed is not persuasive and may act to place new constraints on the PIC's ability to gather information. Under the present approach, where personal liability or jeopardy may be involved an individual can claim privilege, including legal professional privilege. But the PIC's capacity to investigate official conduct should not be reduced by allowing privilege to be claimed by public officials acting in that capacity.*[23]

Office of the Information Commissioner

The *Government Information (Information Commissioner) Act 2009* came into force on 17 July 2009. It outlines the role and powers of the newly created Information Commissioner. Section 27 of the Act contains the restrictions placed on the Information Commissioner's coercive powers:

> *1) The Commissioner must not exercise a coercive entry power and must set aside any requirement imposed under a coercive investigation power if it appears to the Commissioner that any person has a ground of privilege, whereby, in proceedings in a court of law, the person might resist a like requirement or the exercise of a like power, unless:*
>
> *a. the privilege is a privilege of an agency, or*
>
> *b. it appears to the Commissioner that the person has waived the privilege.*
>
> *2) However, the Commissioner may exercise a coercive entry or investigative power despite (and is not required to set aside any requirement imposed under a coercive investigative power merely because of):*
>
> *a. any rule of law that, in proceedings in a court of law, might justify an objection to compliance with a like requirement or the exercise of a like power on grounds of public interest, or*
>
> *b. any duty of secrecy or other restriction on disclosure applying to an agency.*

3.2 Australian Parliamentary Ombudsman

While it is possible to compare the legislation of different NSW watchdog bodies, they have different roles and responsibilities. The same cannot be said of Ombudsman offices. Each has its own unique features, but the core work of Ombudsman is the same. This is particularly true when using coercive investigative powers.

The Ombudsman wrote to each Australian Parliamentary Ombudsman seeking their views on legal professional privilege and the operation of the relevant sections of their Acts. Some of their comments, as well as the relevant sections of their Acts, are discussed below.

Commonwealth Ombudsman

When discussing information that may be subject to a claim of legal professional privilege, the then Commonwealth Ombudsman Professor John McMillan observed that:

> *We have found that information of this kind, especially requests for legal advice and the advice itself is a source of high quality investigation information. It commonly provides, in a considered and researched way, a reliable statement of an agency's understanding of a matter. The existence of legal advice, its content and its tenor, can*

22 Police Integrity Commission, ***Guidelines***, as at February 2010, p.3.
23 Committee on the Office of the Ombudsman and the Police Integrity Commission, ***Report of the Sixth General Meeting with the Commissioner for the Police Integrity Commission***, June 2002, p.xxviii.

often indicate an agency's preferred position and its recognition of its strengths and weaknesses. Furthermore, it has for some years been increasingly common that a Commonwealth agency might seek external legal advice in a matter where previously it would rely on common sense and its internal deliberations. If we were unable to obtain privileged information, we would be cut off from any prospect of obtaining anything that might deal in a thorough way with an issue.[24]

Section 9 (4) of the *Ombudsman Act 1976* (Cth) outlines the Ombudsman's powers to obtain documents and information. It provides that:

4) Notwithstanding the provisions of any enactment, a person is not excused from furnishing any information, producing a document or other record or answering a question when required to do so under this Act on the ground that the furnishing of the information, the production of the document or record or the answer to the question:

a. would contravene the provisions of any other enactment (whether enacted before or after the commencement of the Prime Minister and Cabinet Legislation Amendment Act 1991); or

aa. might tend to incriminate the person or make the person liable to a penalty; or

ab. would disclose one of the following:

i. a legal advice given to a Minister, a Department or a prescribed authority;

ii. a communication between an officer of a Department or of a prescribed authority and another person or body, being a communication protected against disclosure by legal professional privilege; or

b. would be otherwise contrary to the public interest;

Interestingly, section 9 (5A) states that:

5A) The fact that a person is not excused under subsection (4) from furnishing information, producing a document or other record or answering a question does not otherwise affect a claim of legal professional privilege that anyone may make in relation to that information, document or other record or answer.

Professor McMillan commented:

Even before the amendments [inserting the section above]*, I understand that we seldom experienced a refusal to provide information that might have been subject to legal professional privilege. In most cases, agencies accepted that they were unlikely to be seen to have waived privilege by providing information to a body such as my office, which is required to investigate in private, whose staff are subject to secrecy provisions and which is cautious about disclosure.*[25]

Queensland Ombudsman

Queensland Ombudsman David Bevan told us his office:

… regularly ask for copies of legal advice of both state and local government agencies. If they query our request we refer them to s.45 of our Act.[26]

Section 45 of the *Ombudsman Act 2001* (Qld) states that:

1) No obligation to maintain secrecy or other restriction on the disclosure of information obtained by or given to officers of an agency, whether imposed by any Act or by a rule of law, applies to the disclosure of information relevant to a preliminary inquiry or an investigation by the ombudsman.

2) In a preliminary inquiry or an investigation, the State or an agency is not entitled to any privilege that would apply to the production of documents, or the giving of evidence, relevant to the investigation, in a legal proceeding.

3) A person has, for the giving of information and the production of documents or other things relevant to a preliminary inquiry or an investigation, equivalent privileges to the privileges the person would have as a witness in proceedings in a court.

This section draws a clear distinction between the ability of an agency and the ability of an individual to claim privilege. It is also interesting to note the section applies to both the Ombudsman's formal investigations and also where preliminary inquiries are made.

24 Letter from John McMillan dated 30 October 2009.
25 As above.
26 Email from David Bevan dated 2 November 2009.

Victorian Ombudsman

Section 18 of the *Ombudsman Act 1973* (Vic) states that:

> *4) The Crown shall not, in relation to an investigation under this Act, be entitled to any such privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings.*

Victorian Ombudsman George Brouwer told us:

> *This provision was part of the original design and structure of the powers available to the Ombudsman and I consider it to be fundamental to the powers necessary for the Ombudsman to properly conduct investigations of government bodies … there is a clear and unmistakable implication that the references to privilege in section 18(4) include legal professional privilege. Such privilege claims have been withdrawn once the authorities have given the issue further consideration* [27]

Western Australian Ombudsman

Section 20 of the *Parliamentary Commissioner Act 1971* (WA) states:

> *2) b) The Crown or any authority to which this Act applies is not entitled in relation to any such investigation to any such privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings.*

Western Australian Ombudsman Chris Field said:

> *Some agencies under investigation have initially refused to provide us with copies of legal advice they have obtained on the basis that such advice is subject to legal professional privilege. In the majority of cases this has been because the agency or its legal advisor has not been aware of the effect, in our view, of section 20(2)(b) of the PC Act. All these matters have been resolved after informal discussions with the agency and/or its legal advisors and the information provided, in most cases, without the need for a formal written notice to produce documents … We say section 20(2)(b) indicates a clear and unambiguous intention to abrogate legal professional privilege in its entirety and, if that is not the case, legal professional privilege is abrogated by necessary implication as the purpose of the PC Act would be clearly frustrated if the Ombudsman was not able to access all relevant documents.*[28]

Tasmanian Ombudsman

Section 24 of the *Ombudsman Act 1978* (Tas) states that:

> *3) A person is not excused from giving information, or producing a record or answering a question, when required to do so under this Act on the ground that to do so would disclose legal advice furnished to a government department or other authority to which this Act applies.*

After commenting that this section has not caused any difficulty for his office, Tasmanian Ombudsman Simon Alston observed:

> *Section 21 of your own Act is certainly an unwieldy and potentially troublesome provision, and it is hard to see a good policy reason for inhibiting investigations and inquiries by an Ombudsman on the ground of legal professional privilege.*[29]

The comments of each Ombudsman, as well as the clear wording of their legislation, reinforces that the public interest in providing Ombudsman with access to all relevant information was clearly considered to be the primary goal of the relevant sections. The current wording of the NSW Act would seem to have the opposite effect.

27 Letter from George Brouwer dated 4 November 2009.
28 Letter from Chris Field dated 2 November 2009.
29 Letter from Simon Alston dated 3 November 2009.

Chapter 4.
Impact on the Ombudsman's work

While Parliament clearly did not view the 1993 amendments as doing anything other than advancing the independence and impartiality of our office, being unable to require the production of information over which a claim of legal professional privilege has been made has undoubtedly hampered our effectiveness.

Most claims of privilege have been made by agencies rather than individuals. These claims often relate in our view to information with only a tenuous link, if any link at all, to either legal advice or to legal proceedings.

The following case studies demonstrate how claims of privilege are used to delay, complicate and frustrate our work. They also show the level of misunderstanding surrounding the concept of legal professional privilege.

Case Study 1: Manufacturing privilege

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.

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 [responding to our preliminary inquiries] *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.

The RTA eventually waived the privilege, but the time taken to do so meant it took even longer to complete our investigation and there was unnecessary additional cost to the community.

Case Study 2: The documents we never saw

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 of the Board of Studies (OBOS). After being refused access, he sought an external review from our office. From 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 …

And on another occasion:

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, we were never able to review the information. 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 OBOS to the student had been either drafted by their legal advisors or were largely based on 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 on 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 OBOS' practices.

Case Study 3: An inappropriate claim

We received an FOI complaint about access to documents outlining the legal costs of a council. After the complainant had gone to the Administrative Decisions Tribunal, we continued to have concerns around the way the council administered its legal costs and claimed legal professional privilege. We tried to resolve the matter informally, only to have the council advise it would not change its approach. In relation to claiming privilege, after citing relevant case law, the Council said:

As you are aware, the Council is claiming legal professional privilege over these documents, and cannot produce these documents to any third party (including the Office of the NSW Ombudsman) without the disclosure amounting to a waiver of its claim to privilege. In these circumstances, it can only be a matter for the Council to determine whether relevant documentation falls within the principles enunciated in the cases referred to above.

Council went on to observe that:

Your office does not have access to the documents and has therefore been unable to fully consider the nature of the material that would be disclosed by Council if it were to produce to [the FOI applicant] *the documentation relating to legal costs.*

We then began a formal investigation into the way Council had determined the initial FOI applications. We found they had inappropriately claimed legal professional privilege over documents relating to legal costs. We recommended the Council refrain from future claims of legal professional privilege over similar documents unless the documents also contain information that is legitimately the subject of privilege. We also found Council had not adhered to an annual reporting requirement to report its legal costs for three years.

The Council agreed to provide the applicant with all remaining documents. They also agreed to only claim privilege over legal cost documents that also contain information that was legitimately privileged.

Conclusion

We are not recommending a substantial change to our Act, to our powers or to our role. The amendment we seek requires the removal of just nine words '*other than a claim based on legal professional privilege*', repeated twice, from the Ombudsman Act.

The amendment would bring the Ombudsman Act into line with other watchdog legislation in NSW, as well as interstate and federal Ombudsman Acts. Such an amendment would also retain the existing protection of individual claims of legal professional privilege, which the Ombudsman must consider when exercising coercive powers.

The public interest and expectation that the Ombudsman be able to properly and thoroughly investigate matters requires that the Ombudsman Act should be amended as a matter of urgency. To fail to do so will mean agencies can continue to frustrate the work of the Ombudsman for no good reason and that NSW will stand alone in Australia in continuing to permit this to occur.

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