Supplementary Submission

No 8a

INQUIRY INTO THE 2009 MT PENNY RETURN TO ORDER

Organisation: Department of Premier and Cabinet

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ANNEXURE B

PRIVILEGES COMMITTEE
INQUIRY INTO THE 2009 MOUNT PENNY RETURN TO ORDER

Suggested Improvements to the Standing Order 52 process

Department of Premier and Cabinet Submission

The purpose and uses of Standing Order 52

The NSW Court of Appeal in *Egan v Willis & Cahill*[2] recognised that the Legislative Council has power to order the production of State Papers because, it found, such power is "reasonably necessary" for the proper exercise of its functions, namely "to scrutinise the workings of the executive government".[3] The High Court confirmed this in *Egan v Willis,*[4] holding that the power to order the production of State Papers is reasonably necessary in support of the system of responsible government under which the Council has a role to "question and criticise"[5] the actions of the executive.

The power to order the production of State Papers is, therefore, not a power that exists for its own sake. It exists to facilitate the proper inquiry and scrutiny of executive activities by the Legislative Council.

Since the Court of Appeal's decision, there have been hundreds of orders made under Standing Order 52 in New South Wales. The power is used more often in the Legislative Council than in the upper house of any other Australian jurisdiction. In 2009, there were at least thirty such orders, including the Mt Penny order, equating to around two every sitting week.

Currently there is no requirement that a motion for an order under Standing Order 52 should reference any current inquiry by the Council or one of its Committees. Nor is there any requirement that, once such an order has been made and complied with, any such inquiry should be held. It is not always apparent that documents returned under Standing Order 52 are subject to serious scrutiny by the Council.[6]

The requirement to show a legitimate public interest in an order being made

We consider the power of the Legislative Council to require the production of State Papers to be an essential element of our parliamentary democracy and accordingly support the exercise of that power in the public interest.

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[2] (1996) 40 NSWLR 650.
[3] (1996) 40 NSWLR 650, at 665 (Gleeson CJ).
[4] (1999) 46 NSWLR 563.
[5] (1999) 46 NSWLR 563, at 451 (Gaudron, Gummow and Hayne JJ).
[6] See A Twomey, "Executive Accountability to the Australian Senate and the New South Wales Legislative Council" Legal Studies Research Paper No 07/70, University of Sydney Law School, November 2007, available at <http://ssrn.com/abstract=1031602>, at 15-1.

However, where the Standing Order 52 process is used merely as a 'fishing expedition' or for partisan political reasons, there is a risk that agencies will come to view it more as a cost and a burden with no clear connection to their own public interest objectives.

The following suggestions are offered:

1. In moving a motion for an order under Standing Order 52, consideration could be given to requiring the Member to satisfy the Council that the order is genuinely necessary for the scrutiny function of the Legislative Council. Without limiting the ways in which the Member might do this, examples might include showing that the State Papers are needed for a Committee to complete a current inquiry or for the Council to debate in a fully-informed manner some matter (such as a Bill) currently before the House.

2. Where State Papers are ordered for a particular purpose, such as a Committee inquiry, then they should be made available exclusively for that purpose, similar to the undertaking that applies in respect of documents that are produced to a Court for the purpose of Court proceedings. (This would not prevent a Committee deciding that any of the State Papers should be published in its report of its inquiry in due course.)

The balancing of other public interest considerations - privilege claims

The importance of the Council only exercising its power where it is shown to be legitimately warranted is particularly important having regard to the potential for that power to override other important public interests. There is, of course, a public interest in not imposing unnecessary costs on the executive and therefore on the public purse. Whether that cost is warranted depends on whether the power is being used appropriately.

The second public interest concern arises where documents are sought for which there is a genuine countervailing public interest in maintaining confidentiality.

The power of the Council under Standing Order 52 to override public interest privileges is extraordinary. The process lacks many of the safeguards, consultation processes, and independent oversight mechanisms of other compulsory production processes, such as subpoenas or GIPA applications.[7]

Under the current process, agencies claiming that a document is subject to public interest privilege must make a submission as to the basis for that claim when they return the document. If the privilege claim is challenged, it is reviewed by an 'independent legal arbiter'. No opportunity is given for the agency to make further submissions or to respond to any contrary arguments.

The effect of this process is that agencies are put to the work of preparing comprehensive submissions in support of privilege claims that might never be challenged. Given agencies only have this 'one-shot' to explain the claim, they must proceed on the assumption that the claim will be challenged, or else they risk a decision being made against the claim not because it is deficient but rather because they have not explained with sufficient detail or clarity the basis for it in their original return.

[7] *Government Information (Public Access) Act 2009* (GIPA).

Further, and unlike other processes such as GIPA and court-ordered production, where the privilege exists because of the interests of third parties (such as claims grounded in privacy or commercial confidentiality), no provision exists for those third parties to be given notice of the claim and to be given an opportunity to make submissions as to whether they object to the documents being released.

3. In respect of State Papers that are subject to privilege, consideration could be given to allowing the executive to return initially an index of those State Papers, rather than the documents themselves. The index would identify in general terms the grounds upon which privilege is claimed. If the Council, having regard to that index, wishes to press a request for any of the particular documents, a further resolution could be passed identifying from that index the State Papers that are sought. The executive would then be required to produce those State Papers, which would proceed to be considered in accordance with the procedure under Standing Order 52 for dealing with contested claims of privilege.

4. Where an independent legal arbiter is appointed to provide advice to the Council in respect of contested privilege claims, the executive agency that claims the privilege could be given an opportunity to make submissions directly to the arbiter in relation to the contested claim.

5. Any third party whose personal or business affairs are affected by a contested privilege claim could also be given an opportunity to be make their views known to the legal arbiter.

The use of Standing Order 52 to support public release of Government information

A practice has developed by which the Department of the Legislative Council immediately makes publicly available, and in particular to the media, all documents that have been produced by the executive in response to an order under Standing Order 52 where they have not been the subject of a claim of privilege. Privileged documents may also be released if an independent person appointed by the Council determines, in his or her view, it would be in the public interest that they should be; that decision is not subject to review or appeal by the executive.

As noted above, the purpose of the power referred to in Standing Order 52 is to facilitate the exercise of the functions of the Legislative Council itself. The publication of material in the course of the exercise of that function will in many cases be appropriate and desirable.[8]

It would, however, not appear to be consistent with the special power that is vested uniquely in the Council that it be used simply for the purpose of passing on documents to the media and other third parties. Instead, legislation has been approved by *both* Houses of Parliament (the GIPA Act) that sets out a comprehensive regime by which the media and other third parties are given a legally enforceable right to access Government held information, subject to public interest safeguards and review rights.

[8] See L Lovelock, "The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the *Egan* Decisions Ten Years on" (2009) 24 *Australian Parliamentary Review* 119, at 214-215.

Standing Order 52

Standing Order 52 is not the source of the Legislative Council's power to order the production of State Papers; it merely regulates the procedures of the Council in respect of the exercise of that power.

DPC recommends that Standing Order 52 be amended to reflect the suggestions made above. Further amendments to the Standing Order which the Committee may wish to consider include the following.

Date at which an order speaks

There appears currently to be some confusion as to the date at which an order made under Standing Order 52 'speaks'. An order will be made on a certain date and require the production of documents within a certain period, usually 14 days later.

Technically, it would appear that an order can and should only require the production of State Papers in existence as at the date the order was made. There seems to be no basis for suggesting that the Council has power to impose a continuous obligation on the executive to produce documents as and when they are created into the future.

It has, however, become standard practice for the last paragraph of an order to stipulate that documents produced in responding to the order should also be produced; clearly such documents can only have been created after the date of the order. The executive has chosen to comply with the request made in that paragraph, but we do not accept that the Council has the power to make an order in those terms.

6. Consideration could be given to amending Standing Order 52 to make clear that an order 'speaks' as at the date the order was passed, and accordingly only documents that were in existence as at the date of the order can be required to be produced. The Council can continue to request, but not require, the production of the documents referred to in the last paragraph of its orders.[9] (However, as explained further below, we recommend the consideration be given to discontinuing this practice – see (19) below.)

Provision for the making of supplementary returns

During the course of the hearings we noted that, although the executive strives always to comply with an order under Standing Order 52 within the time specified for compliance (typically 14 days), on occasion additional documents have been identified shortly after a return has been produced and those documents have been produced to the Council by way of a supplementary return.

It may be useful to amend Standing Order 52 to clarify the power of the executive to make such supplementary returns. This may be particularly important in cases where the additional documents may be subject to some confidentiality restriction, and the agency needs to be sure that it is producing the document under a compulsory process to avoid being in breach of some confidentiality obligation or other statutory duty.

[9] It could, of course, *require* the production of these documents by way of a further order made after the return of the main order.

7. Consideration could be given to amending Standing Order 52 to provide that, if additional documents that were subject to an order but not produced are subsequently identified, these may be returned to the House by way of a supplementary return, and the usual procedures (eg with respect to privilege claims) apply.

The exclusion of Cabinet documents

A majority of the Court of Appeal in *Egan v Chadwick*[10] held that the Legislative Council has no power to require the production of Cabinet documents. The confidentiality of Cabinet information is a necessary component of Responsible Government and, in particular, the convention of collective Ministerial responsibility.

The precise scope of the protection for Cabinet documents is, however, not entirely clear.

The Parliament has determined a definition of Cabinet Information for the purposes of the GIPA Act. It may be that this definition is in some respects more strict (that is, narrower) and in some respects less strict (broader) than what the majority of the Court of Appeal would have considered to be a Cabinet document for the purposes of Standing Order 52, noting that the judgments comprising the majority were not themselves consistent in this regard.

It seems reasonable that the Legislative Council should not be precluded from obtaining documents that might be available to any member of the public under the GIPA Act. Accordingly, to provide both clarity and consistency, consideration could be given to amending the Standing Order to expressly note that Cabinet documents are not required to be produced and that, for this purpose, this can be taken to include any document that contains "Cabinet Information" as defined in the GIPA Act.

8. Consideration could be given to amending Standing Order 52 to note expressly that Cabinet documents do not need to be produced in response to an order. It would state that a Cabinet document includes one containing "Cabinet Information" as defined in clause 2 of Schedule 1 of the GIPA Act.

The drafting of orders

The scope of orders

Orders should be targeted to the State Papers that the Council actually needs to perform its functions in the particular case. Although there may be an understandable tendency on the part of members of the Council to cast the net broadly, it is important that orders not be unnecessarily burdensome and they should not seek documents that are not required.

Nor should, as happens from time to time, the executive be subject to any criticism for producing reams of documents that are of no real interest to the Council or its members – agencies have no choice but to produce everything that has been asked for and cannot

[10] (1999) 46 NSWLR 563 (Spigelman CJ and Meagher JA; Priestley JA disagreeing on this point).

substitute the terms of the order for a narrower category of documents which they think the Council might actually find interesting or useful.

In drafting an order, the Council could also specifically consider what documents it does *not* need. For example, many experienced users of the GIPA Act will expressly state in their application that they do not require the production of certain categories of documents, such as drafts of documents before the more recent draft, intra-departmental emails and communications, general correspondence from the public, and so on. Excluding these documents in the terms of an order may help to reduce processing time and cost, and avoid the Council receiving documents that it does not need or want.

9. The scope of orders should be drafted carefully to identify the documents that are actually needed for the Legislative Council's functions, exclude more clearly any documents that are not required, and avoid broad fishing expeditions.

The clarity of orders

Orders passed by the Council under Standing Order 52 can lack the precision of other legal instruments, such as subpoenas and orders for discovery. They can be ambiguous and internally inconsistent. They can be oppressively broad in scope.

Unlike court processes, however, the executive is simply required to comply with an order that has been passed, irrespective of how poorly it has been drafted or how oppressive it might be. There is no opportunity to challenge or clarify the terms of an order once it has been made, despite the fact that the agencies to whom it is directed will typically have had no involvement in its debate and passage.

We have considered whether some process might be adopted by which an agency required to produce documents could seek to challenge or clarify an order on a similar basis to which a subpoena may be challenged, or at least to negotiate or seek clarification as to the proper interpretation of an order which is ambiguous. On reflection, however, we do not consider that this is appropriate given that an order, like a Bill, is a statement of the House as a whole and not merely the voice of a single member (not even the member who moved the Order or the Presiding Officer). The fact that an order under Standing Order 52 is not amenable to challenge or negotiation makes it even more important that it be drafted as carefully and narrowly as possible.

There is nothing to prevent either a member, before drafting or moving a motion for an order, or the Council, before debating that motion, consulting with the agencies which will actually have to comply with it. Advance consultation may also give the mover and the Council an opportunity to consider more directly the likely impact of the order in terms of the extent of documents that it is likely to receive, what confidentiality or other public interest concerns might be raised, and how an order in those terms is likely to be interpreted and applied by the executive.

10. Greater care could be given in the drafting of orders to clarify the particular documents that are sought.

11. Consideration could be given to consulting with the executive agencies named in an order (either separately or, perhaps more practically, through DPC) on the drafting of the order

before it is moved and debated. (The need for such consultation would be less important if our suggestions (9) and (10) above are adopted.)

The adoption of language consistent with GIPA

In most agencies, responsibility for collating returns to orders under Standing Order 52 belongs with those branches that are also responsible for handling the agency's GIPA applications. Agencies have a good understanding of the GIPA Act.

The GIPA Act sets out a prescriptive regime that has been approved by Parliament for accessing government-held information, with appropriate safeguards for third parties and a comprehensive public interest balancing test. There is a good argument that orders under Standing Order 52 should only be considered if for some reason an application under the GIPA Act would not be appropriate or if one has been made but has not yielded a result that is satisfactory to the Council.

Putting that aside, Standing Order 52 practice might be improved more generally if it, and the orders made under it, were to adopt directly some of the concepts and terminology used in the GIPA Act. For example:

(a) under the GIPA Act it is clear that a Minister (taken to include his or her staff) constitutes an "agency"[11] and therefore that requests for documents from that Minister mean documents held by that Minister and his or her office and not, for example, documents held by that Minister's department, to which a separate request would need to be made;

(b) the GIPA Act refers to documents that are "held" by the agency, and makes clear that this includes information that is held by the State Records Authority on behalf of the agency,[12] but does not include information that is already generally available to the public;[13]

(c) the GIPA Act contains provisions regarding defunct agencies, for example providing that if an access application is made to an agency which becomes defunct, it is taken to have been made to the successor agency;[14]

(d) the GIPA Act clarifies that agencies are not required to search electronic back-up records unless they have reason to believe that a relevant record has been lost as a result of a contravention of the *State Records Act 1998;*[15] and

(e) the GIPA Act sets out a clear public interest balancing test for determining when information can be withheld from public release in the public interest, including by providing an exhaustive list of the public interest considerations that might weigh against disclosure.[16]

[11] Section 4(1) GIPA Act (definition of "agency").
[12] Clause 12(1)(c) of Schedule 4, GIPA Act.
[13] Clause 12(2) of Schedule 4, GIPA Act.
[14] Clause 14 of Schedule 4, GIPA Act.
[15] Section 53, GIPA Act.
[16] Section 14, GIPA Act.

12. Consideration could be given to whether greater clarity would be provided by adopting concepts used in the GIPA Act, such as: What is an "agency"? When are documents considered to be "held" by an agency?

13. Consideration could be given to providing in Standing Order 52 that privilege claims may be made on the basis of any ground that would constitute an "overriding public interest against disclosure" (OPIAD) under the GIPA Act.

The timeframe for compliance

It has become usual practice for the Council to impose a 14 day timeframe for compliance with an order under Standing Order 52. This appears to done without reference either to the urgency of the matter or to the size and scope of the order. Where an order merely seeks a particular document from a particular agency, a 14 day turnaround period is feasible. Where, however, an order is expressed in broad terms by reference to general subject matters and requires searching throughout numerous agencies and parts of agencies, 14 days is unreasonable.

14. Consideration could be given to prescribing 28 days as the default period within which documents must be returned. Where an order seeks to impose a shorter timeframe this would be justified when the order is moved and debated.

The Executive's response to orders under Standing Order 52

As mentioned above, the power of the Legislative Council to order the production of documents derives from the common law having regard to what is *reasonably necessary* for the Council to perform its 'scrutiny of executive activities' function.

As such, DPC does not accept that the Council has any power to direct the executive as to the particular manner in which it complies with such an order. For example, and notwithstanding the current text of Standing Order 52, it appears that the Legislative Council has no power to require the executive to produce an index of the documents produced.[17]

A whole-of-government policy

While there is currently no single whole-of-government 'policy' dealing with the manner in which agencies are to respond to orders under Standing Order 52, the detailed memorandum that is provided by DPC to agencies named in an order effectively performs

[17] The executive has voluntarily complied with requests to provide an index and will continue to do so: see A Twomey, "Executive Accountability to the Australian Senate and the New South Wales Legislative Council" Legal Studies Research Paper No 07/70, University of Sydney Law School, November 2007, available at <http://ssrn.com/abstract=1031602>, at 2-3. In this regard we respectfully disagree with the view of the former Clerk of the Parliaments: see L Lovelock, "The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the *Egan* Decisions Ten Years on" (2009) 24 *Australian Parliamentary Review* 119, at 217-218.

that function. An example of that memorandum is set out on pages 63 to 66 of the Committee's Report No.68.

In our view, that memorandum has performed the function of a whole-of-government policy at least as effectively – and perhaps better, given that it is physically provided to each agency on each occasion – than would a 'policy' document sitting on a government website. That said, and subject to the outcomes of this Committee's inquiries, consideration will be given to adopting a whole of government policy that deals with the fundamental obligations and procedures for responding to an order under Standing Order 52.

15. Following consideration of the findings and any recommendations of this Committee, DPC will revise the current memoranda and create a whole-of-government policy explaining the obligations and procedures to be followed by agencies in responding to orders under Standing Order 52. Agencies will be directed to this policy whenever they are named in an order.

Internal agency procedures

Having conferred with the other Directors General on the Senior Management Council, it is clear that all Departments adopt a similar internal process for conducting searches and responding to orders. The procedures adopted by DPC were explained by us in the public hearing.

Although the current memoranda and the proposed new whole-of-government policy will apply to all agencies, this will not avoid the need for each agency to determine particular internal processes for dealing with an order having regard to its own particular structures and governance arrangements.

Training of staff

For most agency staff, complying with an order under Standing Order 52 is a straight-forward exercise for which no special training should be required. Further, in most agencies the unit responsible for collating the returns is also responsible for the agency's compliance with the GIPA Act and other compulsory document production processes, and so can be expected to appreciate both the importance of compliance and the appropriate procedures to be followed.

Agencies have, however, from time to time sought assistance and guidance from DPC particularly as to the types of privilege claims that can be made, and the appropriate way of documenting these in the return to the Council. It is noted that, at present, privilege claims are considered solely in accordance with the common law relating to legal professional privilege and public interest immunity. If our suggestion at (13) above is adopted, it will be much easier for agencies to identify and articulate privilege claims, utilising their existing understanding and the much clearer statutory guidance under the GIPA Act.

The Crown Solicitor regularly conducts training for agency officials on the GIPA Act. Through the Government's Legal Managers Forum, DPC will approach the Crown Solicitor with a view to developing and offering training to agency officials who are involved in

responding to orders under Standing Order 52 particularly in relation to the making of privilege claims.

DPC already conducts information seminars for Ministerial officers in relation to a range of matters, including their responsibilities as "agencies" under the GIPA Act and Standing Order 52. In respect of the current Government, these seminars were included as part of an induction available to all Ministerial staff immediately after the 2011 election. Refresher training, and training for new staff, was held at the end of 2011 and 2012, and is expected to be held again at the end of 2013, and annually thereafter.

16. DPC will approach the Crown Solicitor with a view to the provision of training seminars for agency officials with particular responsibility for responding to orders under Standing Order 52, particularly in relating to the making of privilege claims.

17. DPC will continue to provide training seminars to Ministerial staff annually, which includes information about their obligations in respect of Standing Order 52.

Certification processes

DPC requires agencies named in an order to provide a certification from the head of the agency that, to the best of their knowledge, all documents held by the agency and covered by the terms of the order have been produced.

Obviously, it is not practicable or appropriate for the head of the agency to undertake personally all of the searches that will be necessary to be conducted. In providing the certification, the head of the agency will reasonably need to rely on the diligence and advice of other executive officers throughout the agency. As happens in DPC, an agency head may require those sub-ordinate officers also to provide him or her with a certification in respect of the particular branch of the agency for which they have responsibility. This pyramid-style 'certification' process within an agency appears to be best-practice, and will be recommended in the proposed new whole-of-government policy.

18. The proposed whole-of-government policy will direct agencies responding to an order to require certifications from relevant officers at appropriate levels in the agency to certify that all relevant State Papers have been produced. This certification will be amended to be expressed as being "to the best of the officer's knowledge after having undertaken or directed the undertaking of reasonable searches".

Identification of search parameters

At present, DPC does not require agencies to document the particular methodology, the search parameters or criteria, or the particular search terms involved in electronic searches. Agencies can, of course, create this information if they wish.

One possible impediment to agencies doing this at present is the practice of the Council of asking agencies to produce all documents created in responding to the order.

Say, for example, an order asks for all briefs from DPC to the Premier relating specifically to X in a certain time period. DPC could create a document listing all briefs to the Premier

in that period by subject matter, and identify from that list those that relate to X. Most of the briefs on the list will have nothing to do with X, but the list could if necessary be used in the future to demonstrate the search that was conducted to identify those that did. However, under the terms of the order, DPC would apparently have to produce this document in response to the order. That is, a document would be produced to the Council showing all briefs to the Premier over a certain time period, even though the Council itself only requested those that relate to X.

This is clearly undesirable from the perspective of the Government. Apart from the release of information that has not actually been requested, it also creates an ongoing administrative burden as any new documents created during the searching process have to themselves be copied and added to the index, which becomes a continually moving document.

It is also undesirable from the Council's perspective: presumably the members involved in the debate on the order, and who may have supported its passage, did so on the understanding that they were only requiring the details of briefs relating to X, not details of all briefs relating to every conceivable subject matter.

As noted above, DPC disputes that the Council even has the power to order the production of documents created after the date on which the order was made (except by way of a separate and subsequent order). The point we are making here is that the continued practice of doing so acts as a disincentive to the creation of records which might otherwise be useful if it becomes necessary in the future to understand and reconstruct search processes and methodologies.

DPC would support the adoption, in the proposed whole-of-government policy, of a requirement that agencies create documents identifying who was involved in searches, the search parameters and criteria for electronic documents, and what files were searched. However, we would only do so if the Council ceases its practice of requesting these documents to be produced as a matter of course.

19. Consideration could be given to discontinuing the practice of always requesting the executive to produce "any document which records or refers to the production of documents as a result of this order of the House". Instead, records of the searches conducted could be sought by way of a separate subsequent order only if some legitimate concern arose about possible incomplete compliance with the original order.

20. DPC will consider including in the whole-of-government policy a direction to agencies to create and keep full records of their searches (which could include who was involved in searches, the search parameters and criteria, and what files were searched). However, consideration will need to be given to the additional administrative burden such a requirement will place on agencies, particularly if the Council does not accept recommendation (19) above.

Electronic records of Ministerial officers

DPC's Ministerial and Parliamentary Services IT branch, MAPS IT, provides specialist technology support to Ministers and Ministerial staff, including the provision of email

accounts and network drives.[18] The staff of MAPS IT has the ability to access those accounts and drives only for the purpose of providing that IT support.

DPC does not consider that an order under Standing Order 52 would, in so far as it is directed to DPC, ordinarily be interpreted as covering any 'documents' on this Ministerial office network that are only accessible by DPC (MAPS IT) in this way.[19] It would evidently be undesirable if DPC were routinely required to search such records for these purposes.

Under the recently-enacted *Members of Parliament Staff Act 2013*, clause 7 of Schedule 2 provides as follows:

> **"7 Records of political office holders**
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> (1) Any record of information created or received by a political office holder or the staff of a political office holder that is stored by a person employed in the Department of Premier and Cabinet in connection with the provision of information technology services for the office holder or his or her staff is, for all purposes while the political office holder is holding that office, taken to be in the possession or under the control of the political office holder and not in the possession or under the control of the Department of Premier and Cabinet.
>
> (2) Accordingly, any request or requirement to produce any such record of information is to be made or directed to the political office holder concerned or his or her staff.
>
> (3) This clause extends to records of information in existence before the commencement of this clause."

The *Members of Parliament Staff Act 2013* is expected to be proclaimed to commence in early 2014. In respect of Standing Order 52, DPC considers that the provision reflects the existing practice.

Records of former Ministers

When a Minister ceases to hold office, any records still held by the office are dealt with in accordance the *State Records Act* and, in particular, with the *General Retention and Disposal Authority – Records of a Minister's Office* (GDA 13). Generally that requires:

(a) Cabinet documents to be returned to The Cabinet Office (now DPC);

(b) Departmental or agency-related documents to be returned to the appropriate agency (for example, the relevant portfolio department); and

(c) Other records of portfolio responsibilities that the authority requires to be kept as State archives, to be transferred to the custody of the State Records Authority.

GDA 13 applies to electronic records as much as it does to other records.

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[18] The email accounts and network drives provided to Ministers and their staff by MAPS IT may not be the only place where electronic communications and records of Ministerial offices are kept. For example, Ministers, like other MPs, may be provided with Parliamentary IT services and email accounts (including for the purposes of their electorate offices). Further, DPC would not necessarily know about or have any access to material that might be held on other removable electronic document storage devices or internet-based email and other services.

[19] Particularly where there might from time to time exist any 'back-ups' of such networks, we query whether these would in this form even be considered to constitute "State Papers" in the sense referred to in the *Egan* series of cases.

It allows the destruction of other paper and electronic records that are not required to be kept in accordance with one of the three paragraphs above, and that are no longer required for administrative purposes. GDA 13 provides that the following documents can be deleted/destroyed when no longer required: routine correspondence, general briefing notes, routine enquiries and information requests, and reference material.

GDA 13 also states that:

> "A lot of recorded information flows between an agency and the Minister's office. Much of it represents a work flow as information, briefing documents, letter approvals and so on move between the two, but little of this will need to be retained by the Minister **when** the agency is capturing the whole process on to its files and into its recordkeeping systems. The portfolio agency **should** retain any documents or records that it refers up to the Minister and subsequent approvals, emails, letters and documentation that are referred back to it (for action and/or filing)."

We are aware of the suggestion that has been made to the Committee that Ministers should be required, upon ceasing to hold office, to conduct a 'hand over' with any incoming Minister. DPC does not support this as a workable proposal and considers the current practice, whereby responsibility for briefing the incoming Minister is the responsibility of the relevant portfolio department(s), should remain. This does not, of course, mean that an outgoing Minister cannot, as a matter of collegiality, talk through with the new Minister the issues with which they might have dealt while in office.

Compliance with the *State Records Act* and GDA 13 means that State Records of a former Minister's office continue to be available if required by the Legislative Council under Standing Order 52.

In particular, those records will in most cases be available going forward as records of the relevant portfolio department to whom they were returned upon the Minister ceasing to hold office.

If the former Minister also deposited additional documents with the State Records Authority then those records can be obtained there. If in the future the Legislative Council does propose to make an order seeking State archives deposited by a former Minister, the Council may wish to consider directing the order to "the State Records Authority (in so far is it holds any State archives deposited by the Hon, [*Insert Name*])".
