Submission No 1

INQUIRY INTO OPERATION OF STANDING ORDER 52

Organisation: Department of Premier and Cabinet

Date Received: 12 August 2022

Department of Premier and Cabinet

Ref: A5443425
12 August 2022

Ms Susan Want
Director, Procedure Office
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Re: DPC submission to the inquiry into the operation of standing order 52

Dear Ms Want,

I refer to the Procedure Committee's inquiry into the operation of standing order 52 and the email from Mr Alex Stedman of 20 June 2022 inviting the Department of Premier and Cabinet to make a submission to the inquiry.

I enclose a submission prepared by the Department of Premier and Cabinet which addresses the matters sets out in inquiry's terms of reference and was prepared with input from other NSW Government departments and agencies.

The Department has no objection to the enclosed submission being published on the Legislative Council's website.

Sincerely,

Kate Boyd PSM
Deputy Secretary, General Counsel

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Premier and Cabinet

NSW GOVERNMENT

Submission

Procedure Committee Inquiry into Standing Order 52

Executive Summary

In November 2020, the Department of Premier and Cabinet (**DPC**) participated in a Roundtable meeting convened by the President regarding the operation of standing order 52 of the Legislative Council (**SO 52**).

DPC provided a submission to the Procedure Committee for the purposes of the Roundtable, dated 28 October 2020 (see Appendix 1 of the *Report of the roundtable meeting to consider aspects of the operation of standing order 52,* February 2021).

Given that the matters that were canvassed at the 2020 Roundtable are highly relevant to the present inquiry, DPC's 2020 Roundtable submission (at **Annexure 1**) should be taken to be DPC's primary submission to the present inquiry.

This further submission supplements the 2020 Roundtable submission with relevant updates and includes matters relating to the terms of reference that have been raised with DPC and the Clerk by NSW Government agencies. It also contains recommendations for potential amendments to the procedures established under SO 52 for the Committee's consideration.

DPC remains concerned that the current use of SO 52 imposes an unsustainable administrative burden on the Executive.

Since 2019, 406 orders have been passed, and 1,849 non-privileged and 2,091 privileged boxes of documents have been returned by the Executive, estimated to amount to around one million documents. It is difficult to accept that it is reasonably necessary for the House to require the production of such a vast quantity of material for its legislative and scrutiny functions. It is also concerning to leaders of the NSW public service who are responsible for the health, safety and wellbeing of their employees at work. The submission recommends practical steps for the House to consider that would address this issue.

The submission also notes with concern the emerging practice of orders for papers being directed to independent investigative agencies, and to the Executive for documents concerning active proceedings, industrial negotiations, investigations or inquiries by independent bodies, and public sector workplace investigations. The impacts on legal proceedings and confidential negotiations should be considered before orders are passed so that ongoing deliberative and investigative functions of government agencies and independent investigative bodies are not prejudiced. The Public Service Commission and DPC are also very concerned that orders may seek the production of documents concerning bullying and harassment complaints, and that this will strongly deter people from coming forward to make complaints, undermining the sector's efforts to maintain safe workplaces.

DPC notes it was generally agreed at the 2020 Roundtable that there was a need to clarify the meaning of privilege under SO 52. While this would be helpful, DPC is concerned that the current focus on the definition of 'privilege' distracts from the key issue, which is the need for greater clarity around the respective roles of the independent legal arbiter and the House in relation to the public disclosure of State papers.

The submission reiterates concerns that automatic publication of all non-privileged State papers may not be reasonably necessary for the exercise of the House's functions and creates significant risks for the State and individuals. It also raises concerns that there are inconsistent practices regarding the opportunity to make further privilege submissions following the appointment of an independent legal arbiter.

Finally, the submission raises legal and security risks associated with the eReturns project.

Recommendations

Reducing the administrative burden of SO 52

1. The Clerk should convene workshops and issue a practice note for Members and their staff on the drafting of resolutions under SO 52.
2. A practice note could be adopted detailing the following:
   (a) Orders should have a **clear public interest purpose** and connection to the legislative and scrutiny functions of the House, for example, the State papers are needed for a Committee to complete an inquiry or for the Council to debate in a fully-informed manner some matters before the House.
   (b) The *Government Information (Public Access) Act 2009* (**GIPA Act**) should be a 'first resort' for access to government information.
   (c) The **time period** covered by each order should be no more than 12 months unless the order seeks a specific document(s) beyond that time period.
   (d) Orders should identify **specific documents of interest**, either by category (eg requesting 'reports' rather than 'all documents' or 'all communications') or by substance (eg requesting 'documents evidencing' a particular matter rather than 'all documents relating to' that matter).
   (e) The procedures of the House should create opportunities for **engagement and consultation** between members, responsible Ministers and agencies to ensure that orders are not unreasonable in scope and are targeted to the documents that will assist the House with its functions (eg requiring notices of motion to sit on the notice paper for 7 days before they are passed (unless urgent) so that scope and timeframes can be refined following consultation and limiting the number of orders passed to no more than 10 per sitting week).
   (f) Ministers and agencies should be given **at least 21 days to respond** (15 working days) to all orders, unless there is a clear public interest in documents being returned within a shorter timeframe.
3. The 'clock' should stop while the negotiations under SO 52A(4) occur, and should restart once completed. This mirrors the regime under section 60(4) of the GIPA Act.

Investigations, inquiries and court proceedings

4. Before passing a resolution under SO 52 to order the production of documents from an independent investigative body, the House should refer the draft order to the committee oversighting the body and, if considered necessary by the committee, consult with the independent investigative body to ensure that the order does not interfere with or curtail any investigation by that body.
5. That the House refrain from ordering the production of documents which relate to current court proceedings until after the finalisation of the proceedings. Alternatively, orders

seeking documents that are relevant to matters before the courts or relevant to active negotiations should be confined in scope as far as possible, to avoid actual or perceived interference with those proceedings. Having regard to the limited availability of legal resources to prepare submissions in these circumstances, submissions that go beyond establishing that proceedings or negotiations are on foot should not be required to support claims of privilege.

6. That the House consider making a new standing order, similar to proposed Standing Order 52C, which provides that documents concerning workplace complaints and investigations in any public sector agency are not required to be produced under SO 52.

Privilege

7. Any definition of privilege adopted by the House for the purposes of SO 52 should include documents which are subject to a legally recognised category of privilege derived from the common law or statute.
8. That the House consider the purpose and rationale for automatic publication of non-privileged documents with a view to adopting an alternative procedure whereby members review each document that is proposed to be published and consider whether publication is:
   (a) reasonably necessary for the House to exercise its functions; and
   (b) in the public interest.
9. That the House consider varying SO 52 so that when a claim of privilege over a document is disputed by a Member:
   (a) timely notice of a disputed claim of privilege is required to be given;
   (b) each affected agency/Minister's Office is given the opportunity to review the objections and, where possible and appropriate, review its claims for privilege and seek to negotiate a mutually acceptable outcome to release documents;
   (c) where such outcome is not achieved, each affected agency/Minister's Office is given the opportunity to make further submissions in response within a reasonable timeframe, with any further submissions required to be taken into account by the independent legal arbiter;
   (d) agencies are advised once the arbiter has made a report;
   (e) where an agency has produced a document that belongs to or originates from another agency and that document is the subject of a privilege dispute, the originating agency should also be given an opportunity to make submissions to the arbiter about the disclosure of that document. This is because in most cases, the originating agency would be better placed to identify any harm that may flow from publication of the document;
   (f) submissions in support of a claim of privilege should address any reasons why the submissions themselves should be considered privileged and not published. The independent legal arbiter must take such reasons into account before deciding whether to publish, or disclose the contents of, the submissions together with the arbiter's decision about the dispute; and
   (g) the House must debate any motion to publish the arbiter's decision in relation to a dispute and any associated privilege submissions and documents determined by the arbiter not to be privileged.
10. That the following amendments to SO 52 be considered:

(1) Where a document is subject to a claim that it contains personal information that should not be made public but is not otherwise subject to a claim of privilege:

(a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons why the personal information should not be made public,

(b) the documents in their original form are to be made available only to members of the Legislative Council, and not published or copied without an order of the House,

(d) any member may, by communication in writing to the Clerk, indicate that a document containing personal information is proposed to be published in the public interest, and

(d) the Clerk is to write to DPC and advise that a redacted version of the document or documents must be provided for publication within seven days of the Clerk's communication.

11. That the House consider adopting the following additional paragraph in SO 52:

(1) For the purposes of SO 52, personal information, which should not be made public unless it is in the public interest to do so, includes:

(a) mobile telephone numbers,

(b) email addresses,

(c) home addresses,

(d) Bank account details,

(e) signatures.

(2) Where a document contains information described in paragraphs (1)(a)-(e) and it is reasonably practicable to redact the information before making a return:

(a) the information may be redacted from the document,

(b) an unredacted copy of the document is not required to be provided with the return,

(c) any member may, by communication in writing to the Clerk, request that an unredacted version of the document is provided, and

(d) the Clerk is to write to DPC and advise that an unredacted version of the document must be provided within seven days of the Clerk's communication.

12. That the House consider developing a panel of independent legal arbiters to resolve disputed claims of privilege to reduce the burden on any single arbiter and give the House the benefit of a more diverse range of opinions, including expertise in specific areas of law that may be relevant to a particular dispute.

13. That SO 52 be amended to provide for a presumption that certain information (such as 'health information' and 'personal information' as defined by the *Health Records and Information Privacy Act 2002*) which falls within the scope of a SO 52 is privileged and therefore:

- a privilege submission is not required to be made by the agency; and
- the document is automatically placed in the 'privileged document' index / bundle.

14. That a practice note be adopted recommending that before issuing an order under SO 52, the member and/or the Council considers whether the personal information is specifically required and, if not, makes that clear in the terms of the order.

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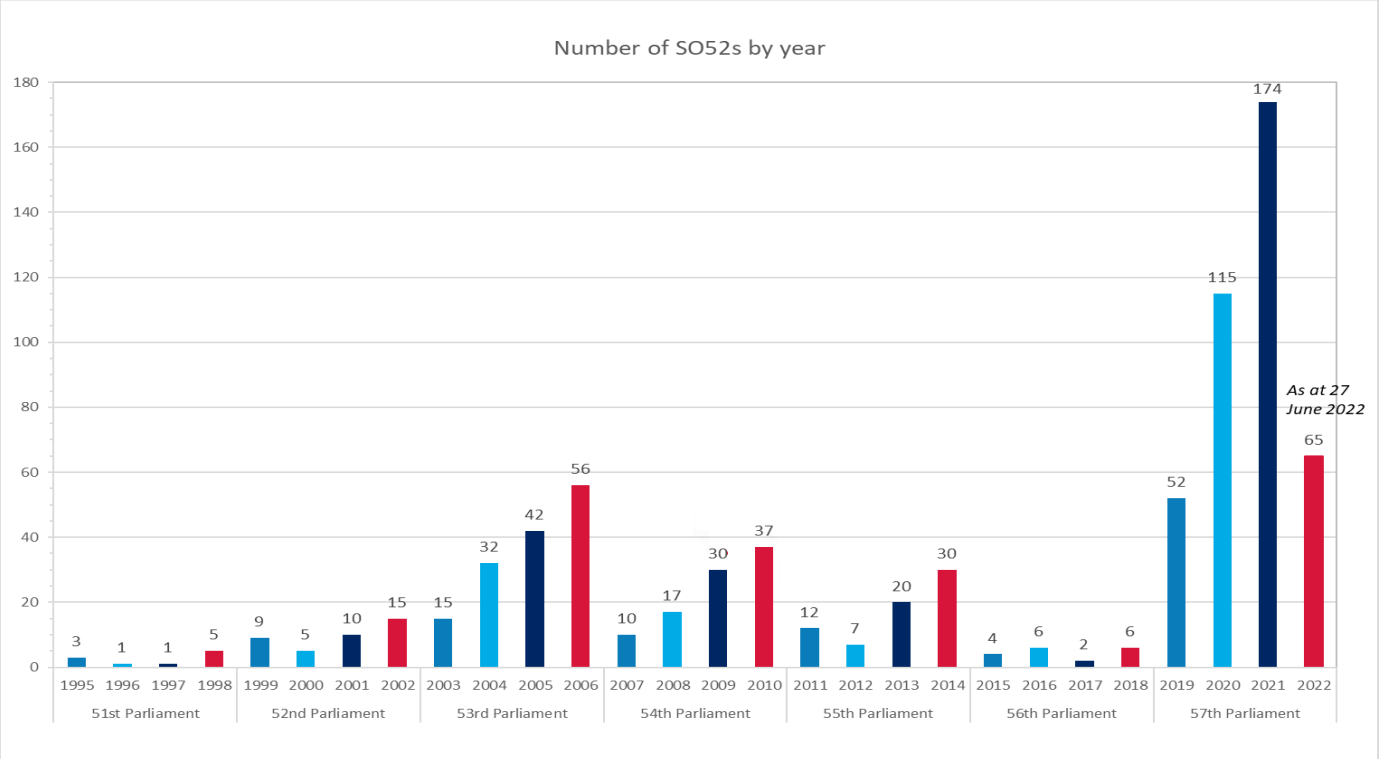
1. Reducing the administrative burden of SO 52

As noted in the DPC Submission to the 2020 Roundtable,[1] the processing of orders made under SO 52 places a significant burden on the Executive. This burden has grown considerably during the 57th Parliament due to: the significant number of orders passed, and the increase in orders that are broad in scope, have terms which are unclear or contain no clear subject matter, and which provide inadequate time to respond.

Additionally, the current process for variation of orders does not allow for these issues to be properly addressed.

1.1 There has been a substantial increase in the number of orders

The table below shows number of orders under SO 52 passed by year in the last six Parliaments.



As of 27 June 2022, 406 orders have been passed since the 2019 State general election. This is over 22 times the number of orders passed in the previous four-year term. Orders for papers continued to be made throughout COVID-19 lockdowns and while agencies dealt with bushfires and floods.

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[1] DPC Comments on Discussion Paper – Current issues relating to Order for Papers, *Report of the Roundtable meeting to consider aspects of the operation of standing order 52*, Legislative Council, February 2021, p. 33 (**DPC's Submission to the Roundtable**) at Annexure 1.

By way of comparison with other Australian jurisdictions, from 2019 to 2021:

- The Victorian Legislative Council made a total of 19 orders for papers, an average of around 6.3 orders per year.
- The Commonwealth Senate made a total of 162 orders for papers, an average of 54 orders per year.

The following table shows the number of boxes returned to the House to respond to the orders passed in the 57th Parliament the Government.

Year	Number of SO 52s passed	Privileged boxes returned to the Legislative Council	Non-privileged boxes returned to the Legislative Council
2019 (post Election)	52	231	265
2020	115	813	823
2021	174	619	740
2022*	65	186	263
TOTAL	**406**	**1,849**	**2,091**

1.2 The increase in orders has had a significant impact on public sector resources and staff wellbeing

Responding to SO 52 resolutions imposes a considerable financial and administrative burden on the Executive. As noted in a letter from the Secretary of DPC to the Clerk of the Legislative Council dated 10 December 2021, the process requires agencies to dedicate considerable time, effort, and resources, often at short notice and outside of normal business hours.

DPC's Submission to the Roundtable outlined tasks that agencies are generally required to undertake in response to an order for papers.[2] These include interpreting the scope of the order, conducting searches for documents on various document management systems, reviewing documents for relevance and privilege, indexing, printing and certifying documents and preparing submissions in support of privilege claims.

Based on estimates provided by seven Departments, in the 2021/22 financial year agencies spent:

- between **274** and **3,768** hours internally dealing with order for papers. On average, each agency spent **2,621** such hours during the financial year.
- between **$5,298 and $1,208,811** on external costs in connection with orders for papers. On average, each agency spent **$401,823** during the financial year.

These figures do not take into account the time and cost spent by three Departments, Executive agencies, statutory bodies and Ministers Offices responding to orders in 2021/22.

Based on the above information and averages, the estimated combined time that government agencies spent on all orders for papers in in the 2021/22 financial year is 65,512 hours. The estimated external cost to government agencies is $10,045,528.

[2] DPC Comments on Discussion Paper – Current issues relating to Order for Papers, *Report of the Roundtable meeting to consider aspects of the operation of standing order 52*, Legislative Council, February 2021, p. 33 (**DPC's Submission to the Roundtable**).

As recognised in the Secretary's letter to the Clerk dated December 2021, NSW public sector agencies do not have an unlimited capacity to respond to an ever-increasing number of orders for papers within the short timeframes being provided. As the Secretary's letter notes, it is also inevitable that the heavy burden that responding to SO 52 places on public sector agencies will involve a diversion of agency resources away from programs and services which help the citizens of NSW, including in response to the COVID-19 pandemic.

1.3 The impact of SO 52 could be substantially reduced if orders were narrower in scope and imposed reasonable timeframes for compliance

As outlined above, the burden on the Executive arising from the current use of SO 52 is significant. DPC acknowledges the extraordinary power of the House to compel the production of State papers (other than Cabinet documents) which are reasonably necessary for the House's scrutiny and legislative functions. However, the volume and scope of orders made during the current Parliament demonstrate that the House has tended not to limit the number or scope of orders so as to avoid an unreasonable burden on the Executive.

The Government has consistently raised in debates in the Council the impact on the Executive of the scope of orders for papers. If this single issue were to be addressed by the House, it would obviate the need for almost all of the other recommendations made in these submissions.

Many orders for papers are very broadly drafted and difficult to respond to in accordance with their terms. Agencies have raised the following examples with DPC:

- Many orders cover large periods of up to 10 years, while others do not specify a time period at all;
- Orders often relate to broad subject matters or multiple topics and projects (for example, one order sought twenty different categories of documents);[3]
- Orders frequently use terms such as *'all documents'* rather than a more specific request for document types (eg reports) relating to the subject matter of the order;
- Orders often specify very short timeframes for production (eg 7 days) regardless of their scope;[4]
- Agencies are often named in multiple standing orders at the same time (for example, during the two sitting weeks of November 2021, DPC and the Department of Planning and Environment (**DPE**) were named in 23 separate standing orders), which may have a significant impact on the groups of staff responsible for coordinating the agency's response and create work health and safety risks for employees.

As DPC has submitted previously, the House has such powers as are reasonably necessary for the exercise of its constitutional functions. There is some doubt as to whether orders such as those described above are reasonably necessary and therefore lawful and appropriate.[5]

DPC submits that the House should adopt procedures to ensure that orders are appropriately targeted, including closer consultation with responsible Ministers and agencies on the terms of proposed resolutions under SO 52, and specifically excluding classes of documents and/or

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[3] Central Barangaroo, 12 May 2022 sought twenty categories of documents. Powerhouse Ultimo Renewal, Powerhouse Parramatta and Museum of Applied Arts and Sciences, 8 June 2022 sought 14 categories of documents. Transport Asset Holdings Entity of NSW – further order, 24 February 2022 sought 14 categories of documents.

[4] Rail negotiations, 18 May 2022, 5- and 7-day turnaround. Disruption to rail services and documents referred to in the media, 23 February 2022, 7-day turnaround.

[5] Advice of M G Sexton SC and A M Mitchelmore, *Question of Powers of Legislative Council to Compel Production of Documents from Executive*, 9 April 2014, pp.5- 7.

document types that are not required (eg drafts, intra-departmental emails and communications, general correspondence from the public etc).

There may be hundreds or thousands of email chains with public servants' or private citizens' contact details caught by an order for papers that may not be appropriate for publication. Because of the House's position with respect to the automatic publication of documents which are not privileged, this information must be redacted at considerable expense (unless there is a broader claim of privilege over the document and that claim is upheld).

Unlike the regime established under the GIPA Act, where processing charges can be issued and applications narrowed or rejected on the grounds that they would constitute a substantial and unreasonable diversion of the agency's resources, members do not bear any of the cost of orders for papers under SO 52. DPC submits that members should be required to consider the cumulative financial and administrative burden imposed by orders for papers on the Executive prior to a resolution being passed.

The broader the scope of an order, the more cumbersome and time-consuming it is for agencies to prepare returns. This causes delayed returns, which are often broken up into multiple tranches, and the production of a significant volume of irrelevant and ephemeral material that is of little value to the House at significant cost. It is difficult to see how this assists Members or the House or serves the public interest.

Agencies have attempted to address this by prioritising the return of key documents that are likely to be of most assistance to the House.

Where the scope of an order is broad or unclear, agencies could be encouraged to submit an alternative approach for compliance with the order under Sessional Order 52A for the relevant member to consider. For example, the agency may offer to produce documents under specific, agreed categories or search terms. The House could reserve its right to require production of any remaining documents following an agency's return. The benefit of this approach for the House is that documents which are more relevant to its inquiries would be received expeditiously. The benefit to the Executive is that often it will not be put to the expense of conducting broad searches, resulting in potentially millions of unnecessary documents having to be processed and reviewed, often at significant public expense.

Minimum timeframe for production

Agencies should be given at least 21 days (15 working days) to respond to all orders unless the House determines that there is a clear public interest in documents being provided within a shorter timeframe.

Unless the order identifies one or a small number of specific documents, 21 days is the minimum reasonable timeframe for responding to an order for papers. At a minimum, an order requires the steps noted above at [1.2]. A minimum period of 21 days would be more consistent with the GIPA Act, which allows 20 working days, plus extensions for consultation, to complete a similar (but less onerous) process.

DPC notes that of the 81 variation applications lodged by agencies under SSO 19, 73 have sought an extension to the due date for responding to the order. 37 of these requests were accepted in full, 30 were partially accepted and only 6 were rejected. A 21-day minimum timeframe would reduce the administrative burden associated with lodging variation applications under the proposed SO 52A (discussed further below).

It is also important that orders correctly name the agencies and Ministers' Offices from which documents are sought. The Clerk is informed of Ministry changes as soon as possible after they occur. Schedule 1 of the *Government Sector Employment Act 2013*, the *NSW Public Sector Governance Framework* chart (published on the DPC website), and legislation establishing statutory bodies, such

as the *Transport Administration Act 1988* or Schedule 5 to the *State Owned Corporations Act 1989*, provide information on current Ministers and agencies.

Members could, before drafting or moving a motion for an order, consult with agencies on the terms of the order, its likely impact and the volume of documents likely to be captured. Errors in the naming of agencies and Ministers could be addressed at that point.

Legal or other advice created as a result of the order

DPC opposes any amendment to SO 52 that would incorporate a requirement to produce 'any legal or other advice created as a result of the order of the House'. Such documents do not exist as at the date an order is passed and therefore cannot validly be sought.

As the Solicitor General noted in his advice of 9 April 2014 with Anna Mitchelmore of counsel, which has been tabled in the House:

> *"[i]t is difficult to see how an order can identify a document and so demand its production if the document has not yet been brought into existence."*

The Solicitor General and Ms Mitchelmore went on to conclude that it was:

> *"doubtful, in our opinion, that an order can validly refer to documents that have not yet come into existence at the date of the order."*

Accordingly, DPC opposes any amendment to SO 52 which purports to seek the production of documents that cannot lawfully be requested.

1.4 The timeframe for compliance should be extended by the time it takes to consider an agency's request to vary the scope of an order

The variation process under proposed SO 52A and its predecessor (SSO 19) was introduced to provide agencies with an opportunity to raise concerns and make submissions about the scope of an order and its impact after an order is made. It also provides an opportunity for the House to vary the order so as to narrow its scope.

Since its introduction, only 8 variation applications have sought amendments to the scope of orders, 5 of which were accepted in full, 2 of which were accepted in part, and one which was rejected in full. SO 52A has been more frequently used to seek extensions of time. As noted above, 73 variation applications have sought an extension to the due date for responding to the order, of which 37 were accepted in full, 30 were partially accepted and 6 were rejected.

The lack of applications seeking to vary the scope of orders is likely due to the fact that the time to respond to an order continues to run while agencies await a response to their application. Due to the short timeframes for returns to orders, agencies are required to continue to work on the order, negating much of the benefit of a variation. At least one scope variation application resulted in an expanded scope being adopted.[6]

To address this, DPC submits that the period for responding to an order should be extended by the amount of time it takes for a variation request to be considered. This mirrors the regime under section 60(4) of the GIPA Act, which provides that the time period within which the application is required to be decided is paused while the applicant is being given an opportunity to amend the application.

[6] Order for papers, Core Integrity, 23 May 2021. Although a scope reduction and 21-day extension was granted, an additional agency, Service NSW, was required to produce documents.

1.5 Orders should have a clear public interest purpose and a connection to the legislative and scrutiny functions of the House

As was noted in DPC's submission to the Inquiry into the 2009 Mount Penny Return to Order,[7] there is currently no requirement that a motion for an order under SO 52 reference any current inquiry by the Council or one of its Committees. As noted in the submission:

> *"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."*[8]

Given the many thousands of documents that have been returned in this Parliament, this is not surprising. However, it calls into question the purpose of orders which are so broadly cast. As noted in the DPC submission:

> *"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."*

Since the Inquiry, many orders for papers have been made which have no clear connection to public interest objectives, including where the House has ordered the production of papers without a clear subject matter.[9]

DPC acknowledges that the Legislative Council may occasionally have very limited information when making a resolution ordering the production of documents.

Nevertheless, where a motion does not specify its subject matter or impose limits on its scope such as by date range or document type, it is questionable whether the House is able to properly consider the necessity of the resolution and whether the motion is "reasonably necessary" for it to effectively perform its function as a House of scrutiny.

The opinion of the Solicitor General and Ms Mitchelmore of Counsel dated 9 April 2014 has been tabled in the House and published. That advice notes that:

> *"It would be reasonable in our view, to query or dispute an order that contained an impractical deadline or referred to no specific subject matter in relation to the documents sought … or referred to a subject matter that was so broad and unwieldy as to place great practical difficulties on compliance."*[10]

The DPC Submission to the Mt Penny Inquiry suggested the House consider adopting reforms to address these concerns, including:

> 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*

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[7] Annexure B, *Suggested Improvements to Standing Order 52 process, Department of Premier and Cabinet Submission*, Privileges Committee Inquiry into the 2009 Mount Penny Return to Order.

[8] 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.

[9] Order for papers, Emails from the Premier, 12 May 2021; Order for papers, Treasury projects, 22 June 2022.

[10] Advice of M G Sexton SC and A M Mitchelmore, *Question of Powers of Legislative Council to Compel Production of Documents from Executive*, 9 April 2014, p. 7.

Council to debate in a fully-informed manner some matters (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 proceeding. (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).*[11]

These recommendations were strongly opposed by the Clerk of the Parliament's submission, largely on the basis that such requirements would place limits on the exercise of the powers of the House to order State Papers. DPC respectfully submits that these remain relevant considerations for the House when deciding whether to pass a resolution ordering the production of State papers, particularly given the substantial increase in the scope and volume of orders for papers in this term of Parliament.

An alternative to amending the sessional and standing orders in relation to point 1, above would be to include this statement in a practice note to guide Members. In relation to point 2, this could be included as an alternative to automatic publication of non-privileged documents by the House. Members could then include in the terms of their Notices of Motion that any documents for which a claim of privilege is not made will be used for the purposes of the Committee inquiry only.

1.6 The GIPA Act should be a 'first resort' for access to Government information

The GIPA Act establishes a comprehensive statutory regime for public access to Government information. Informally requesting information from agencies under section 8 of the GIPA Act in the first instance allows agencies and Members to discuss the information sought, helping Members to understand the information actually held by the agency, and allowing the terms of a request to be amended accordingly. This benefits both Members and agencies by reducing administrative burden and avoiding irrelevant or insignificant information being provided and does not prevent the House from passing a resolution under SO 52 at a later time.

Access applications under the GIPA Act also have timeframes for response, review rights, provision for unreasonable and substantive diversion of resources, and other transparency requirements including identifying all documents that have been refused access (such as for reasons of Cabinet confidentiality).

Recommendations

1. The Clerk should convene workshops and issue a practice note for Members and their staff on the drafting of resolutions under SO 52.
2. A practice note could be adopted detailing the following:
   a) Orders should have a **clear public interest purpose** and connection to the legislative and scrutiny functions of the House, for example, the State papers are needed for a Committee to complete an inquiry or for the Council to debate in a fully-informed manner some matters before the House.
   b) The **GIPA Act** should be a 'first resort' for access to government information.

[11] Annexure B, *Suggested Improvements to Standing Order 52 process, Department of Premier and Cabinet Submission*, Privileges Committee Inquiry into the 2009 Mount Penny Return to Order, p. 8.

Recommendations

c) The **time period** covered by each order should be no more than 12 months unless the order seeks a specific document(s) beyond that time period.

d) Orders should identify **specific documents of interest**, either by category (eg requesting 'reports' rather than 'all documents' or 'all communications') or by substance (eg requesting 'documents evidencing' a particular matter rather than 'all documents relating to' that matter).

e) The procedures of the House should create opportunities for **engagement and consultation** between members, responsible Ministers and agencies to ensure that orders are not unreasonable in scope and are targeted to the documents that will assist the House with its functions (eg requiring notices of motion to sit on the notice paper for 7 days before they are passed (unless urgent) so that scope and timeframes can be refined following consultation and limiting the number of orders passed to no more than 10 per sitting week).

f) Ministers and agencies should be given **at least 21 days to respond** (15 working days) to all orders, unless there is a clear public interest in documents being returned within a shorter timeframe.

3. The 'clock' should stop while the negotiations under SO 52A(4) occur, and should restart once completed. This mirrors the regime under section 60(4) of the GIPA Act.

2. Investigations, inquiries and court proceedings

An important part of the oversight role of the House is the review of current matters before the Government. On some occasions those matters are commercially sensitive or otherwise privileged.

The House has occasionally ordered the production of documents concerning active proceedings,[12] industrial negotiations, [13] investigations or inquiries by independent bodies, [14] and public sector workplace investigations.[15]

In 2021, DPC raised concerns about the exercise of the power conferred by SO 52 to order the production of documents that relate to matters that are the subject of investigation by the Independent Commission Against Corruption (**ICAC**), the Ombudsman, and Special Commissions of Inquiry.[16]

DPC is aware that a number of orders have sought documents relating to investigations the disclosure of which may result in a breach of the secrecy provisions in sections 111 or 114 of the *Independent Commission Against Corruption Act 1988*.

[12] Order for papers, Central Barangaroo, 11 May 2022.

[13] Order for papers, Rail negotiations, 18 May 2022.

[14] Order for papers, Councillor Sarah Richards, Hawkesbury City Council, 11 May 2022; Order for papers, Ombudsman's Investigation into SafeWork NSW, 15 September 2020; Mr David Baynie, 8 June 2022.

[15] Order for papers, Western Parkland City Authority, 25 November 2021

[16] DPC's Submission to the Roundtable, p. 35.

2.1 SO 52 should not prejudice the ongoing deliberative and investigative functions of government agencies and independent investigative bodies

Independent investigative agencies such as the ICAC and the Ombudsman have been established by the Parliament to oversight the Executive. The Electoral Commission has been granted similar powers to investigate and enforce possible breaches of electoral, funding and disclosure laws, including by political parties and Members.

Members may not necessarily be aware of an investigation by such a body. Where the existence of such an investigation is known, however, the House should exercise restraint by not seeking production of papers which would potentially interfere with or curtail such investigations. This may occur if an order for papers diverts public servants from attending to notices to produce documents to the investigative body, or if persons of interest are made aware of investigations, or confidential investigative techniques, through the process of responding to orders for papers.

A number of independent officers have written to the House expressing their concerns, including the NSW Ombudsman,[17] the NSW Electoral Commissioner[18] and, as noted in the DPC Submission to the Roundtable, Mr Bret Walker SC, Commissioner of the Special Commission of Inquiry into the Ruby Princess.[19] Mr Walker's correspondence raised concerns that the call for papers would be a 'disastrous impediment' to the Commission's work and would be likely to impede the progress of his investigations.[20] The Ombudsman and the Electoral Commissioner's concerns related to their ability to respond to orders for papers in light of their specific statutory functions and powers, including enforcement functions, and their responsibilities to exercise those functions and powers independently, confidentially and with regard to procedural fairness,[21] and in a manner that is strictly politically neutral, while acknowledging the important oversight role of the House.[22] These letters have been tabled in the House.

The House should carefully consider the emerging practice of naming independent investigative agencies in orders for papers under SO 52. These bodies are overseen by Committees of Parliament established under statute and, in some cases, are independent statutory appointees (eg the Inspector of the ICAC). The House should reflect on the appropriateness of seeking documents of independent oversight bodies, particularly where their enabling legislation requires secrecy with respect to such investigations. The increasing use of SO 52 to order the production of State papers by independent integrity agencies has the potential to undermine the effective exercise of their critical statutory functions, contrary to the public interest.

One way to reduce this risk is to require, perhaps in a practice note or sessional order, that before making a resolution under SO 52 seeking documents from an independent investigative body, the House should refer the draft order to the relevant oversight committee for consideration and, if

[17] Letter from Paul Miller to David Blunt, 'Standing Order 52: Ombudsman's investigation into SafeWork NSW', 21 September 2020.

[18] Letters from John Schmidt to David Blunt, 'Call for papers, Councillor Sarah Richards, Hawkesbury City Council', dated 1 and 30 June 2022.

[19] Letter from Bret Walker SC to David Blunt, 'Re: Motion of Robert Borsak LCM dated 12 May 2020', 13 May 2020.

[20] Letter from Bret Walker SC to David Blunt, 'Re: Motion of Robert Borsak LCM dated 12 May 2020', 13 May 2020.

[21] Letter from Paul Miller to David Blunt, 'Standing Order 52: Ombudsman's investigation into SafeWork NSW', 21 September 2020.

[22] Letters from John Schmidt to David Blunt, 'Call for papers, Councillor Sarah Richards, Hawkesbury City Council', dated 1 and 30 June 2022.

considered necessary by the committee, consultation with that body to ensure that the order does not interfere with or curtail an investigation.

2.2 Papers relating to workplace investigations should be exempt from SO 52 to protect the confidentiality of complainants

The NSW Government has a zero-tolerance approach to bullying, discrimination and harassment. All employees have a right to work in a workplace free from improper behaviour. This commitment gives effect to the government sector core values in section 7 of the *Government Sector Employment Act 2013*, the *Code of Ethics and Conduct for NSW Government Sector Employees*, among other obligations imposed on NSW government sector agencies and their employees.

There has been a concerted effort by the sector to eliminate bullying since 2012, when the first People Matter Employee Survey (**PMES**) revealed its prevalence (29% of respondents reported having experienced bullying, and 48% reported having witnessed bullying). The corresponding statistics in 2021 (the most recent year for which PMES results are available) is 14% and 22%. Among the measures taken by the Public Service Commission (**PSC**) are the commencement, in 2021, of several pilot programs with various NSW government sector agencies to target areas of healthy work design, with the intention of reducing arrangements or conduct that may contribute to bullying and other negative workplace behaviours.

The PSC is continuing to work closely with SafeWork NSW as the agency leading the "Mentally Health Workplaces Strategy" and the "NSW Government's Work Health and Safety Sector Plan". Workplace mental health is primarily the responsibility of SafeWork NSW. However, the PSC's Positive and Productive Workplace Guide is a feature of the Plan, which includes the adoption of robust plans to prevent bullying.

This includes a clear set of values and appropriate behavioural expectations which define bullying and other unreasonable behaviour, requires the collection of data and evidence to identify problem areas, and allows for early intervention when bullying and other unacceptable behaviour arise.

The PSC is undertaking a current program of work to support the NSW public sector to address sexual harassment, following endorsement by the Chief People Officer Group in November 2021. This program of work aligns with the Australian Human Rights Commission's Respect@Work report recommendations, and adopts the best practice principles of other jurisdictions.

The PSC has also established a sector-wide working group, called the Equality and Respect Working Group, with representatives from WomenNSW, the Anti-Discrimination Board, SafeWork NSW and across each cluster.

The PSC and DPC are very concerned that the powers of the House may be used to seek the production of documents concerning bullying and harassment complaints, and that this will strongly deter people from coming forward to make complaints, thereby undermining the sector's efforts to maintain safe workplaces. At present, because of the increased use of SO 52, public sector employers are unable to offer their employees any assurance that records of their complaint will remain confidential and that their anonymity will be protected.

It is essential that staff feel safe to raise concerns about alleged bullying or harassment, and confident that details of their complaint will not be released to third parties or made public. The publication of unsubstantiated allegations undermines the integrity of the investigative process, and deprives persons the subject of complaints of procedural fairness.

Publication of this information could also deter staff from assisting workplace investigations (eg as witnesses) and, in turn, hamper the ability of the NSW government sector to take steps to prevent bullying, harassment and discrimination. This can happen either by preventing an investigation fully encompassing the issues raised, or by preventing staff from raising complaints in the first place.

Inappropriate disclosure of documents relating to workplace investigations into bullying or harassment may also expose complainants and others to a risk of re-traumatisation (that is, a new experience of trauma that exacerbates the original trauma that they experienced when being subjected to, or witnessing, harassment, bullying or other unacceptable behaviour).[23]

DPC notes that a new proposed Standing Order 52C was recently adopted as a sessional order, which provides that "documents [sought under SO 52] concerning workplace complaints and investigations in a Minister's office subject to the NSW Ministerial Offices Respectful Workplace Policy are not required to be included in a return to order." The PSC and DPC support this change and strongly recommend that the House consider extending this exemption to documents concerning workplace complaints and investigations in any public sector agency.

2.3 The impacts on legal proceedings and confidential negotiations should be considered before orders are passed

Documents relating to active legal proceedings and negotiations, including ongoing enterprise bargaining negotiations, are very likely to be sensitive. Agencies have strongly submitted that such documents should be deemed to be privileged (as long as the supporting submission demonstrates the existence of current proceedings or negotiations) until the relevant proceedings or negotiations have concluded.

The reasons for this approach are:

- Disclosure would reveal internal strategies and positions that are not in the public interest to be made public while the matters are current.
- Parties in dispute involving high value, contentious matters may be less likely to communicate settlement offers if they believed those offers would be made public, even though there would be a strong public interest in them doing so.
- Where a response to an order on a contested proceeding or negotiation must be prepared concurrently with substantively progressing that matter, it is difficult for the subject matter experts to perform both tasks simultaneously. Availability of resources to respond to an order within the time constraints is particularly limited in these cases and could be accommodated by removing the need to develop submissions beyond establishing that proceedings or negotiations are on foot, particularly given the strong basis for privilege.

While it is no doubt within the power of the House to scrutinise the actions of the Executive in its commercial dealings with third parties, the power should not be used for an improper purpose (eg to influence or interfere with the resolution of a dispute between Government and third parties that is currently before the Court).

DPC respectfully submits that orders for the production of documents which relate to matters currently before the courts should be made after the finalisation of the proceedings. Alternatively, if considered necessary, such orders should be confined in scope to avoid any actual or perceived interference with the proceedings and the diversion of key staff and resources.

[23] The risk of re-traumatisation in situations like this is broadly recognised. It is similar to the concept of "secondary" (or "vicarious") trauma, where a person who is not directly subject to trauma witnesses or deals with trauma suffered by another person (see Safe Work Australia, *Work-related psychological health and safety: A systematic approach to meeting your duties: National guidance material*, January 2019, p 12 (at https://www.safeworkaustralia.gov.au/system/files/documents/1911/work-related_psychological_health_and_safety_a_systematic_approach_to_meeting_your_duties.pdf).

Recommendations

1. Before passing a resolution under SO 52 to order the production of documents from an independent investigative body, the House should refer the draft order to the committee oversighting the body and, if considered necessary by the committee, consult with the independent investigative body to ensure that the order does not interfere with or curtail an investigation by that body.
2. That the House refrain from ordering the production of documents which relate to current court proceedings until after the finalisation of the proceedings. Alternatively, orders seeking documents that are relevant to matters before the courts or relevant to active negotiations should be confined as far as possible in scope to avoid interference. Having regard to the limited availability of legal resources to prepare submissions in these circumstances, submissions that go beyond establishing that proceedings or negotiations are on foot should not be required to support claims of privilege.
3. That the House consider making a new standing order, similar to proposed Standing Order 52C, which provides that documents concerning workplace complaints and investigations in any public sector agency are not required to be produced under SO 52.

3. Privilege

At the 2020 Roundtable concerning orders for papers, it was generally agreed that there would be value in clarifying the meaning of "privilege" under SO 52.

The Report of the Review of the Standing and Sessional Orders by the Procedure Committee from March 2022 considers a number of proposals, including a proposal to define privilege. The Procedure Committee proposes privilege to mean that it is not in the public interest for the document or portions of the document so identified to be made available other than to members of the Legislative Council, or to be published or copied without an order of the House.

DPC considers that this definition does not adequately protect documents that are subject to a legally recognised privilege derived from the common law or statute. The common law recognises both legal professional privilege and public interest immunity as fundamental common law rights or, perhaps more accurately, immunities – not merely as rules of evidence.

DPC is concerned that the current focus on the definition of 'privilege' distracts from the key issue, which is the need for greater clarity around the respective roles of the independent legal arbiter and the House in relation to the public disclosure of State papers.

The independent legal arbiter evaluates and reports independently of the House and is not a delegate of the House. Where a claim of privilege is made, which is disputed by a Member, the independent legal arbiter's role is to review the matter and provide a *legal* opinion to the House on whether the documents fall within a legally recognised category of privilege.

It remains a matter for the House – not the arbiter – to determine whether publication is necessary for the effective exercise of the functions of the House and in the public interest, aided by the independent legal arbiter's conclusions about whether the documents are subject to a legally recognised category of privilege.

Recommendations

7. Any definition of privilege adopted by the House for the purposes of SO 52 should include documents which are subject to a legally recognised category of privilege derived from the common law or statute.

4. Automatic publication

Under the current process, the question of whether or not a document should be published only comes before the House where a privilege claim is made and disputed by a Member. If the Executive does not claim privilege over a document, it is automatically published without any review or active consideration by the House of the contents of the document, whether public disclosure is reasonably necessary for the House to fulfil its functions, or the public interest reasons for and against disclosure. DPC has several fundamental concerns with this approach.

4.1 Automatic publication of all non-privileged State papers may not be reasonably necessary for the exercise of the House's functions

Even orders that are relatively narrow in scope result in the return of documents that, on inspection by Members, turn out to have little or no relevance to the House's area of inquiry. It is difficult to see a proper and lawful basis for the automatic publication of documents of this kind, given their limited connection with the proper exercise of the scrutiny functions of the House.

As noted in DPC's Roundtable Submission,[24] in 2014 a former Crown Solicitor advised that, to the extent that SO 52 purported to permit the House to publish Executive documents other than for the purpose of exercising a function of the House, there would be a question about its validity.[25]

4.2 Automatic publication of non-privileged documents creates significant risks for the State and individuals

As outlined in DPC's Roundtable Submission,[26] there have been several occasions where automatic publication of documents by the House has resulted in the public disclosure of sensitive personal information, contrary to privacy principles and the public interest. Following a recent report of the independent legal arbiter finding that documents were not subject to legal professional privilege or public interest immunity,[27] documents containing the names of junior staff within Regional NSW were published by the House. There are compelling public interest reasons why the names and personal details of public officials in compliance and enforcement roles should not be made public. The tragic death of Glen Turner, an environment compliance officer who was murdered during a routine inspection[28], demonstrates the risks that these staff face in their day-to-day work.

Documents produced in response to orders under SO 52 also present risks to members of the public whose personal information is contained therein. A 2021 Report by the Australian Institute of Criminology notes that from March 2020 to March 2021, routine personal information such as names

[24] At p. 13.

[25] Crown Solicitor, *Submission to the Honourable Keith Mason AC QC prepared on behalf of the Department of Premier and Cabinet*, 21 July 2014, [4.13].

[26] DPC's Submission to the Roundtable, p. 2..

[27] Report of the Hon. Keith Mason AC QC, Monaro Farming Systems – Further Order, 14 February 2022.

[28] Holden, K, Inside the case of environment officer Glen Turner's murder by farmer Ian Turnbull (smh.com.au) (date accessed 20/07/2022), *Sydney Morning Herald*, 28 May 2021.

and addresses were the most commonly misused forms of personal information in connection with criminal activity, and that personal information was most commonly misused to obtain money from a bank.[29]

The fact that agencies are required to review increasingly high volumes of documents within very tight timeframes means that there is a high risk of personal information being overlooked and automatically published by the House.

In this context, DPC submits that the practice of automatic publication by the House falls short of any reasonable standard for the management of personal and/or sensitive government information, and is well below the standard expected of the government agencies from which the information is sought.

As discussed further in section 9.1 below, the Department encourages the House to carefully consider the legal risks presented by automatic publication, in the form of exposure of the Clerk of the Parliaments, parliamentary staff, and the State of New South Wales to potential liability in relation to defamation and copyright.

Recommendations

8. That the House consider the purpose and rationale for automatic publication of non-privileged documents with a view to adopting an alternative procedure whereby members review each document that is proposed to be published and consider whether publication is:
    - reasonably necessary for the House to exercise its functions; and
    - in the public interest.

5. Independent legal arbiter process

DPC received a number of submissions from agencies proposing reforms to the independent legal arbiter process provided for under SO 52. Below is a brief analysis of the arbiter's recent decisions as well as a summary of agency submissions and proposals for reforms.

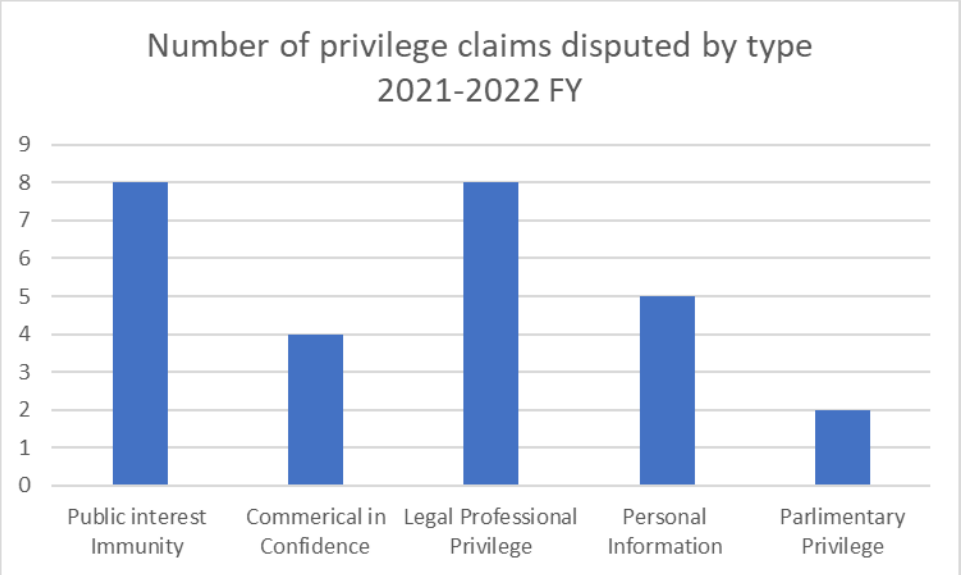
5.1 Analysis of arbiter decisions and issues

The number of privilege disputes decreased in the last financial year from 17 in the 2020-2021 financial year to 14 in the 2021-2022 financial year. Of the 14 privilege disputes, agencies requested an opportunity to make further submissions for nine disputes; however, they were only afforded the opportunity to make further submissions four times. This is less than the 2020-2021 financial year where agencies were afforded the opportunity to make further submissions seven times.

As shown in graph below, legal professional privilege and public interest immunity are the largest categories of disputed privilege claims. Legal professional privilege has been a contested issue, with the arbiter introducing a balancing test to determine whether the claim should be upheld. Agencies may now be required to establish not only that a document is subject to legal professional privilege at common law, but that release of the document is not in the public interest. DPC submits that this arbiter's role should be limited to opining on whether a legally recognised form of privilege

[29] McAlister M & Franks C 2021. *Identity crime and misuse in Australia: Results of the 2021 online survey*. Statistical Bulletin no. 37. Canberra: Australian Institute of Criminology, at pp 6-8, available at https://doi.org/10.52922/sb78467

applies to the documents in question, so that this may be considered by the House in determining whether documents should be published. The public interest test has also impacted upon personal information claims. The impact is demonstrated below in the case of the Transport Asset Holding Entity (**TAHE**), where a personal information claim was denied on the basis that no argument was advanced to convince the arbiter that it was not in the public interest to disclose the document.



5.2 There are inconsistent practices regarding the opportunity to make further privilege submissions

It is common practice for agencies making a privilege submission to request a further opportunity to make submissions in the event that a member disputes the privilege claim. This request to make further submissions is generally made because agencies are unable to make fulsome submissions over individual documents within the often unreasonably short timeframes for responding to the order. Consequently, agencies often make privilege submissions in respect of categories of documents, rather than individual documents, which are necessarily stated at a level of generality that is not as persuasive as it could be. In the past, the arbiter has generally provided a further opportunity to make submissions, albeit within a short timeframe reflective of the arbiter's own timeframe for reporting to the House.

However, on some occasions the arbiter has not provided agencies with an opportunity to make further submissions. DPC has been advised that, as a result, the arbiter has not been in possession of all relevant information to enable him to make an informed decision about where the public interest lies, and documents containing highly-sensitive information have been made public.

A Member who disputes the validity of a privilege claim will usually make specific submissions on the reasons for disputing the claim of privilege over particular documents. It is arguably a denial of procedural fairness not to provide the agency with an opportunity to be heard in response to these submissions.

It would not, ordinarily, be reasonable to conclude that the requirements for procedural fairness were met because the agency had an opportunity to specify the basis of its claim of privilege when making the original submissions. It is not plausible to suggest that, in making its original submissions, the agency could reasonably anticipate, and pre-emptively address, all potential objections or counterarguments that might be made to its privilege claims over each document. These claims are, as outlined above, commonly made by agencies in circumstances of very

considerable time pressure. By contrast, there is no time limit within which a Member must lodge a claim challenging the validity of the claim of privilege. As a result, a Member may have had considerably greater time to prepare submissions to the arbiter challenging privilege claims over particular documents, than the agency had to complete all of the multiple steps (including drafting privilege submissions) required in responding to an order for papers.[30]

TAHE letter

DPC notes the issues raised by TAHE in its letter to the Clerk dated 15 June 2022 in which it sets out some consequences of the failure to be provided with further opportunity to make submissions.

The TAHE letter noted a recent example where privilege submissions made in respect of documents produced by TAHE and Treasury concerning TAHE interests were disputed and neither TAHE nor Treasury were with provided notice of the dispute, an opportunity to make further submissions, or notice of the arbiter's recommendations. DPC also confirms that it received no notice of the dispute.

In the case of the TAHE documents, TAHE made privilege claims over several Board packs, and submitted that the public interest in maintaining the confidentiality of those Board papers was to foster open and frank discussions and the achievement of the Board's commercial and financial objectives. The submission requested an opportunity to make further specific submissions should a dispute be raised in respect of the privilege claim over a particular document. No such opportunity was provided to TAHE before the arbiter concluded that the Board packs were not privileged, nor was TAHE given notice of the arbiter's engagement or report.

In the case of the Treasury documents that affected TAHE's interests, a report containing the CV and confidential assessment report for the recruitment of their current CEO, was the subject of a disputed claim of privilege without Treasury or TAHE having any opportunity to make submissions as to the public interest in publishing the document.

TAHE noted in its letter that the privilege submission made by Treasury in respect of the report did not include any comments on the considerations against disclosure beyond asserting that it was not in the public interest to do so, and further noted that the arbiter's report had only commented (after noting the information was clearly personal information) that no argument was advanced to support the assertion that it is not in the public interest to disclose the information. The Privileges Committee then incorrectly summarised that the arbiter had found that the information was not privileged and resolved to publish the information.

DPC submits that an opportunity should be afforded to agencies to make further submissions relating to the public interest in publishing documents the subject of a privilege claim.

As TAHE advanced in its letter, it is preferable for that opportunity to be offered to all agencies and offices named in the order. While the recent trend of offices and agencies named in an order is to coordinate their returns to avoid duplication, this is not always a complete and comprehensive process and often agencies will produce documents that have been authored by other agencies, or which other agencies have a significant interest in. Further, the limited time available to agencies to prepare a privilege submission means that agencies are not able to consult with affected agencies on their privilege submission to ensure it takes account of all relevant considerations pertaining to the claim. If the opportunity to make further submissions in respect of a disputed privilege claim is offered to all named offices and agencies, the office or agency best placed to make submissions in respect of particular documents will be able to make those submissions. Alternatively, if more time were offered, the agency that produced the document/s the subject of the disputed claim could undertake consultation.

In 2009, DPC made a submission to the Mt Penny Privileges Committee Inquiry that, where an independent legal arbiter is appointed to provide advice to the Council in respect of contested

[30] See DPC's Roundtable Submissions at p. 33.

privilege claims, the executive agency that claims privilege be given an opportunity to make submissions directly to the arbiter in relation to the contested claim.[31] The rationale being:

> *"The effect of* [not being able to make further submissions or respond to contrary arguments] *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 find 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.*
>
> *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."*[32]

Recommendations

9. DPC recommends that the Committee consider recommending that the House vary SO 52 to require:
   (a) timely notice of a disputed claim of privilege is required to be given;
   (b) each affected agency/Minister's Office is given the opportunity to review the objections and, where possible and appropriate, review its claims for privilege and seek to negotiate a mutually acceptable outcome to release documents;
   (c) where such outcome is not achieved, each affected agency/Minister's Office is given the opportunity to make further submissions in response within a reasonable timeframe, and any further submissions must be taken into account by the independent legal arbiter;
   (d) that agencies are advised once the arbiter has made a report; and
   (e) where an agency has produced a document that belongs to or originates from another agency and that document is the subject of a privilege dispute, the originating agency should also be given an opportunity to make submissions to the arbiter about the disclosure of that document. This is because in most cases, the originating agency would be better placed to identify the harm that would be expected from publication of the document.
   (f) These recommendations could be adopted through the following revisions to the language of SO 52(9) as proposed in the Report of the Review of the Standing and Sessional Orders by the Procedure Committee from March 2022:
      (9) In instances where a claim of privilege disputed, the Clerk will provide timely notice of the dispute, including any available information regarding the basis for the dispute, through the Department of Premier and Cabinet or directly to an independent agency.
      (a) if, after 7 days, the dispute has not been resolved through agreement, the independent legal arbiter ~~may~~ shall, other than in exceptional circumstances,

[31] Annexure B, DPC Submission to Mt Penny Inquiry, Recommendation 4, p. 9.

[32] Annexure B, DPC Submission to Mt Penny Inquiry, pp. 8-9.

Recommendations
request, through the Clerk, additional submissions through the Department of Premier and Cabinet or directly from an independent agency and the member disputing the claim of privilege. Such submissions are: (i) to be lodged with the Clerk and made available to the independent legal arbiter, and (ii) may be provided to the parties to the dispute but may not be otherwise published.

5.3 Personal information

At the 2021 Roundtable, there was discussion regarding how best to deal with personal information under SO 52, noting that all participants agreed that personal information should generally be redacted from documents. DPC submitted that it is not always practicable in the time given under an SO 52 for an agency to redact all personal information from a document, particularly where a broader claim of privilege is made over a document and there is an expectation that the document will not be made public.

Procedural changes are needed to recognise the passage of time since SO 52 and its predecessor were introduced and the increasing use of email and other platforms to communicate, as well as the range and volume of orders made and papers produced under SO 52. Personal information often proliferates throughout State papers in email chains and other correspondence, spreadsheets and grant applications. For the vast majority, there are likely to be few (if any) public interest considerations in favour of publishing such documents. In these circumstances, requiring redacted versions of *all* such documents to be prepared is time-intensive, expensive and a serious waste of public resources.

The independent legal arbiter has endorsed the agreement of Members that certain personal "private" information may be redacted from documents, avoiding the need for the arbiter to resolve such disputes. The arbiter has noted that Members will always have access to unredacted versions of the documents and the capacity to access such information if it is really needed.

However, while these views may be broadly accepted, it was noted by DPC in the Roundtable that, on occasion, personal information has effectively 'slipped through the cracks' and has been published by the House in reliance on the arbiter's report rejecting a broader privilege claim over documents which contain personal information.

Ministry of Health submission

The Ministry of Health has submitted that there should be an initial presumption that certain information which falls within the scope of a Standing Order 52 is privileged and therefore:

- a privilege submission is not required to be made by the agency; and
- the document is automatically placed in the 'privileged document' index / bundle.

The Ministry submitted that information that should fall within this category includes:

- 'Health Information' (as defined in section 6 of the *Health Records and Information Privacy Act 2002* (**HRIPA**)), given the sensitivity of such information. Individuals' 'health information' often appears in documents within Health's possession, custody or control. It is not appropriate for such sensitive information to be disclosed for the purposes of a Standing Order 52. It is time consuming for Health to be required to make privilege submissions in relation to such information and to redact, in some cases, voluminous references to health information.

- 'Personal information' (as defined in section 5 of HRIPA) includes information about:
    - NSW Government staff members which is not related to their role, for example, personal addresses, and personal mobile or telephone numbers, particularly in an increasingly fractious social media environment. Being required to produce such information may also impede the willingness of NSW Government staff members to provide their personal information in future correspondence as a means of contact; and
    - any individual, for example, date of birth, address and contact numbers. In a recent example, it greatly assisted that a Standing Order 52 expressly required the agencies to make 'appropriate redactions to the personal details of correspondents' which meant the redactions could be made without a privilege submission being required.

In relation to 'personal information', in many cases, the personal information is not relevant to the Legislative Council's consideration of documents produced in response to a SO 52 and does not need to be disclosed. Therefore, an alternative approach may be that, before issuing a SO 52, the Legislative Council considers whether the personal information is specifically required and, if not, makes that clear in the content of the SO 52.

Overall, the public interest in the non-disclosure of the information listed above outweighs the interest in its disclosure. Such information would ordinarily be protected from public disclosure under common law or pursuant to the GIPA Act or the *Privacy and Personal Information Protection Act 1998*. Requiring NSW Government Departments to redact the information listed above and make an associated privilege submission is a time-consuming process and an unreasonable use of time.

Options for dealing with personal information considered by the Procedure Committee

The Committee recently considered this issue in its Review of the Standing and Sessional Orders and option for a proposed definition of personal information and amendment to the procedures for dealing with personal information under SO 52. The Committee considered four options for defining 'personal information' for the purposes of SO 52[33] and procedures for claiming that documents should not be made public because they contain personal or private information and for disputing such claims.

DPC supports a different option, with elements of Options 1 and 2, which we call Option 5, as follows:

> ***Option 5: Member may indicate that a document or documents containing personal information are required for publication in the public interest; agency is given 7 days to return redacted documents***
>
> *(2) Where a document is subject to a claim that it contains personal information that should not be made public but is not otherwise subject to a claim of privilege:*
>
> *(a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons why the personal information should not be made public:*
>
> *(b) the document in its original form is to be made available only to members of the Legislative Council, and not published or copied without an order of the House,*

[33] Also note that section 192I of the *Crimes Act 1900* defines "identification information" by listing eleven categories of information that can be used to identify a person.

(d) any member may, by communication in writing to the Clerk, indicate that a document containing personal information are required for publication in the public interest, and

(d) the Clerk is to write to DPC and advise that a redacted version of the document must be provided for publication within seven days of the Clerk's communication.

Transport and Infrastructure Cluster proposal

An alternative proposal was suggested by the Transport and Infrastructure Cluster, whereby personal information in documents captured by an Order is redacted, with no unredacted copy in the privileged production. Orders have taken this approach in the past – for example in relation to the Member for Kiama order for papers passed on 24 March 2022 – and this reduces the duplicative effort of producing both redacted and non-redacted copies of documents containing personal information of no interest to the House. This approach would both be more efficient and would minimise the effort of Members to compare redacted and unredacted versions of documents where only minor redactions are made (such as names and contact details from correspondence).

For some returns, one or other of these proposals may be the most appropriate course, and it would therefore be beneficial to provide either option to agencies or Ministers' Offices in dealing with personal information.

DPC submits that the alternative proposal should be more acceptable to the House if it adopts a definition of personal information for the purposes of SO 52, and if a Member had any concerns about an agency's redactions of personal information, the original form of the documents could be provided within a further 7 days (or probably sooner).

(3) Where a document contains information described in paragraphs (1)(a)-(e) and it is reasonably practicable to redact the information before making a return:

(a) the information may be redacted from the document,

(b) an unredacted copy of the document is not required to be provided with the return,

(c) any member may, by communication in writing to the Clerk, request that an unredacted version of the document be provided, and

(d) the Clerk is to write to DPC and advise that an unredacted version of the document must be provided within seven of the Clerk's communication.

5.4 Publication of privilege submissions

There is sometimes a need for privilege submissions to detail matters in a way in which the submissions themselves reveal privileged information.

It has been a regular practice of independent legal arbiters to publish privilege submissions despite DPC's regular request that they remain confidential.

There should be a process by which submissions may be received confidentially by the independent legal arbiter so that agencies do not feel constrained by publication when advancing privilege claims.

A procedure could be adopted whereby the initial privilege submission provided with a return is prepared on the basis that it will be published on the Parliament's website. However, if privilege is

challenged, an agency could be given time to provide further confidential submissions that more specifically address the reasons in support of the privilege claim.

As noted above, in some cases agencies have been invited by independent legal arbiters to send representatives to make oral privilege submissions. DPC supports this alternative if the House does not agree to non-publication of privilege submissions.

5.5 Additional independent legal arbiters

The arbiter most frequently appointed in recent times is a widely respected former Judge and Solicitor-General of NSW with considerable experience in considering privilege claims in the context of Standing Order returns. However, on a number of occasions the arbiter has noted that there is a difficulty for him in reviewing all documents over which privilege is claimed within the relevant timeframe. This difficulty is compounded where the House has referred multiple privilege disputes to the same arbiter.

Given the volume of orders and the frequency of privilege disputes, it may be beneficial to develop a panel of independent legal arbiters to resolve disputed claims of privilege. This will reduce the burden on the current arbiter and give the House the benefit of a more diverse range of opinions, including expertise in specific areas of law that may be relevant to a particular dispute. It would also enhance the public perception of the legal arbiter's independence and impartiality.

Recommendations

10. That the House consider varying SO 52 so that when a claim of privilege over a document is disputed by a Member:
    (a) timely notice of a disputed claim of privilege is required to be given;
    (b) each affected agency/Minister's Office is given the opportunity to review the objections and, where possible and appropriate, review its claims for privilege and seek to negotiate a mutually acceptable outcome to release documents;
    (c) where such outcome is not achieved, each affected agency/Minister's Office is given the opportunity to make further submissions in response within a reasonable timeframe, which further submissions must be taken into account by the independent legal arbiter;
    (d) agencies are advised once the arbiter has made a report;
    (e) where an agency has produced a document that belongs to or originates from another agency and that document is the subject of a privilege dispute, the originating agency should also be given an opportunity to make submissions to the arbiter about the disclosure of that document. This is because in most cases, the originating agency would be better placed to identify the harm that would be expected from publication of the document;
    (f) submissions in support of a claim of privilege should address any reasons why the submissions themselves should be considered privileged and not published. The independent legal arbiter must take such reasons into account before deciding whether to publish, or disclose the contents of, the submissions together with the arbiter's decision about the dispute; and

Recommendations

(g) the House must debate any motion to publish the arbiter's decision in relation to a dispute and any associated privilege submissions and documents determined by the arbiter not to be privileged.

11. That the following amendments to SO 52 be considered for option:

(1) Where a document is subject to a claim that it contains personal information that should not be made public but is not otherwise subject to a claim of privilege:

(a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons why the personal information should not be made public:

(b) the documents in their original form are to be made available only to members of the Legislative Council, and not published or copied without an order of the House,

(d) any member may, by communication in writing to the Clerk, indicate that a document or documents containing personal information are required for publication in the public interest, and

(d) the Clerk is to write to DPC and advise that a redacted version of the document or documents must be provided for publication within seven days of the Clerk's communication.

12. An additional paragraph of SO 52 could be adopted as follows:

(2) For the purposes of SO 52, personal information, which should not be made public unless it is in the public interest to do so, includes:

(a) mobile telephone numbers,

(b) email addresses,

(c) home addresses,

(d) Bank account details,

(e) signatures.

(2) Where a document contains information described in paragraphs (1)(a)-(e) and it is reasonably practicable to redact the information before making a return:

(a) the information may be redacted from the document,

(b) an unredacted copy of the document is not required to be provided with the return,

(c) any member may, by communication in writing to the Clerk, request that an unredacted version of the document is provided, and

Recommendations

(d) the Clerk is to write to DPC and advise that an unredacted version of the document must be provided within seven of the Clerk's communication.

13. That the House consider developing a panel of independent legal arbiters to resolve disputed claims of privilege to reduce the burden on the current arbiter and give the House the benefit of a more diverse range of opinions, including expertise in specific areas of law that may be relevant to a particular dispute.
14. There should be an initial presumption that certain information (such as 'health information' and 'personal information' as defined by the HRIPA) which falls within the scope of a SO 52 is privileged and therefore:
    - a privilege submission is not required to be made by the agency; and
    - the document is automatically placed in the 'privileged document' index / bundle.
15. That a practice note be adopted including a recommendation that before issuing an order under SO 52, the member and/or the Council considers whether the personal information is specifically required and, if not, makes that clear in the terms of the order.

6. eReturns

The Department continues to engage with the Procedure Office of the Legislative Council to develop a platform for electronic returns in response to orders for papers under SO 52 (**eReturns**).

DPC is aware that the current position of the Legislative Council Procedure Office is that, subject to documents over which privilege is claimed, all documents returned would be made accessible online to the public, such as via the NSW Parliament's website. Members of the public would have the ability to copy, print and share documents classified as non-privileged. Such an outcome markedly increases the degree and likelihood of potential harm resulting from inadvertent disclosures of sensitive or confidential materials.

As noted above, the Department has previously raised concerns with the Procedure Office regarding the automatic publication of documents to a public website that require consideration prior to the implementation of eReturns.

A brief summary of key issues has been outlined below.

6.1 Legal risks

The Department encourages the House to carefully consider the extent to which the Clerk of Parliaments, parliamentary staff, and the State of New South Wales may be exposed to potential liability in relation to the Procedure Office's proposal to automatically publish non-privileged documents in response to the implementation of eReturns.

For example:

- the online publication of documents produced under SO 52 could give rise to an action for breach of confidence that could be brought in a court outside the State of New South Wales.
- there is no specific defence in the *Copyright Act 1968* (Cth) (the **Copyright Act**) for the publication of parliamentary papers Accordingly, automatic publication of documents by the eReturns system may result in the infringement of copyright under the Copyright Act where

documents returned under SO 52 constitute original literary or artistic works. Original works that are not produced under the direction or control of the State will have the copyright owned by the third party. That third party may have cause under the Copyright Act to bring a claim of potential damages or an account of profits against the infringer who made the documents available online, being the Clerk of Parliaments, officers of the Legislative Council, or possibly the State of New South Wales.

- based on the terms of the current Standing Orders, there is a risk that officers or employees of the Parliament could be sued for defamation for their involvement in the eReturns process without being afforded coverage by existing statutory protections.

6.2 Security risks

The Information and Privacy Commission NSW (**IPC**) has recently published a Practice Guide concerning the redaction of signatures on public facing documents.[34] The IPC Practice Guide recognises the increased likelihood of unintended harm toward a public official by revealing personal information to the public via digital platforms and the increased risk of public officials being victims of identity theft.

The IPC Practice Guide maintains the view that, as government increasingly adopts digital technology, it is essential that agencies maintain robust privacy protection information systems by taking reasonable security safeguards to minimise the chance of loss, unauthorised access, use, modification or disclosure and against all other misuse of the personal information of public servants.

The Department acknowledges the suggestion raised by the Clerk of the Parliaments in correspondence dated 17 June 2022 (which we are advised has been available to the Procedure Committee as outlined in the letter) that outlines the option to make documents, not subject to claims of privilege, publicly available via the Parliament's portal through a system of user registration.

While this is a step forward, the above proposal is not in line with current practice in relation to non-privileged documents, which must be inspected in the office of the Clerk, and increases the risk of harm to individuals and critical government assets. It also does not appear to address the legal risks identified above. Currently, individuals must inspect non-privileged documents in the Office of the Clerk, and may then photocopy documents (and publish them online without restriction). The proposal to introduce online registration does not, in DPC's view, ameliorate the increased risk of harm caused by the online publication of many millions of pages of government documents collated urgently in response to an SO 52, such as the:

- increased risk of privacy breaches, and consequent harm to individuals, including risks to their personal safety and increased risk of identity theft; and
- increased vulnerability of government agencies to cyber attacks, other security threats and critical infrastructure impacts.

Given these concerns, it may be the case that the current system of supervised access by the Clerk is required to continue, to minimise the potential for the misuse of information released using the eReturns platform, consequent harm and other risks outlined above.

[34] Information and Privacy Commission NSW, *Practice Guide: Redacting signatures on public facing documents* (May 2022) [https://www.ipc.nsw.gov.au/sites/default/files/2022-05/Practice_Guide_Redacting_signatures_on_public_facing_documents_May_2022.pdf].

6.3 DPC access to documents uploaded

The Department has previously advised the Procedure Office that there must be a reliable and efficient mechanism to access the Parliament portal to inspect the content of returns, including the capacity for the Department to have read-only access to the files uploaded in each eReturn.

The ability to confirm the content of returns in the Parliament portal is critical for the Department's accountability to undertake the following actions:

1. confirm both the content of returns to ensure effective and complete upload has occurred,
2. seek correction of errors in returns, and
3. if necessary, review privileged documents in the event of a dispute regarding the privileged status of a document.

Ability to correct errors in returns

The Department also considers it to be appropriate to ensure that there is an established process by which members of the Department may rectify certain eReturns that contain material that amounts to an inadvertent disclosure of privileged or Cabinet information.

The current practice of the Clerk of the Parliaments has been to allow for select rectifications to occur under limited circumstances. However, as raised previously, the implementation of eReturns will likely increase the risk of privileged or Cabinet materials being inadvertently revealed to the public given the current proposal for:

1. the automatic publication of non-privileged documents to be accessible to the public via the NSW Parliament website; and
2. Members of the Legislative Council to have access to the documents on their own computers.

It is crucial that there are adequate measures in place to protect the security of documents (for example, to ensure there is no way to edit or manipulate documents) after they have been uploaded to the Parliament portal.

Such measures would be in line with the current practice in relation to privileged documents, which must be viewed in the Procedure Office under the supervision of Procedure Office staff members. Additionally, those who view privileged documents are bound by certain conditions, such as that no copies can be made of the documents.

7 Acknowledgments

DPC would like to acknowledge the following agencies' contributions to this submission:

- Department of Communities and Justice
- Department of Customer Service
- Department of Education
- Department of Planning and Environment
- Department of Regional NSW
- Ministry of Health
- NSW Police Force
- Public Service Commission
- Transport and Infrastructure Cluster
- Treasury

Annexure 1

Comments on Discussion Paper – Current issues relating to Orders for Papers

Executive Summary

The Department of Premier and Cabinet (**DPC**) has prepared the following paper in response to the Discussion Paper provided by the Procedure Committee Secretariat on 3 September 2020.

DPC welcomes consideration by the Procedure Committee of potential amendments to the procedures established under Standing Order 52 (**SO 52**), particularly in relation to the following issues.

Minimising the administrative burden on the Executive in responding to calls for papers

The significant increase in calls for papers under SO 52 since March 2019 has had a substantial cost in terms of diversion of resources, external legal fees and document management services. This has impacted on the ability of agencies to fulfil their statutory functions effectively and deliver services in the public interest, particularly during the 2019-20 bushfires and the COVID-19 pandemic.

There have, however, been occasions where Ministers and agencies have been given advance notice of proposed orders so that they may advise members about the estimated number of documents captured. This consultation has led to a reduction in the scope of the order and/or an extension of time to comply.

DPC would support some form of notice requirement (e.g. that motions seeking orders for papers remain on the notice paper for at least 7 days before being moved) to give members an opportunity to be properly informed about the administrative burden of proposed orders on agencies, and to consider amendments to scope or timeframes that might minimise that burden, before they are made.

DPC also welcomes the proposal by the Hon. David Shoebridge MLC for a sessional order which provides that DPC may write to the Clerk to seek approval of the House for the scope of an order to be varied in certain circumstances.

Clarifying the respective roles of the legal arbiter and the House in relation to papers over which privilege is claimed

A defining feature of legal professional privilege at common law is that, if the communication attracts the privilege, no further balancing of public interest considerations is required. In a number of recent reports, however, the legal arbiter has applied public interest considerations apparently derived from public interest immunity to determine whether or not documents are subject to legal professional privilege under SO 52.

DPC disagrees with this approach and contends that the legal arbiter's role is to provide a legal opinion as to whether documents are subject to legal professional privilege at common law. It is then a matter for the House to balance competing public interest considerations for and against publication of the documents, noting that the House may only authorise the publication of State papers where it is reasonably necessary for the exercise of its functions.

DPC agrees with the observations of the Hon Joseph Campbell QC that '…the House continues to have an important and responsible role to play, about the nature and extent of publication of a document that will be permitted, even if an [independent legal arbiter] decides that the document is not privileged'.[1] DPC

[1] J Campbell, *Report under SO 52 on Disputed Claim of Privilege – Contamination at Power Station Associated Sites*, 18 September 2020, p 9.

observes that there are at least two recent cases where the House appears to have relied solely on the report of the legal arbiter on disputed privilege claims without undertaking its own assessment of whether certain documents should in fact be made public. This has resulted in the public disclosure of sensitive personal address details despite the impact on the privacy and personal safety of the individuals concerned.[2]

The automatic publication of documents

Under the current SO 52, if privilege is *not* claimed over documents returned by the Executive, the documents are automatically published by authority of the House. Publication occurs even before Members have had an opportunity to review the documents and consider whether such publication is:

- reasonably necessary for the House to exercise its functions; and
- in the public interest.

This puts the onus on agencies to undertake a detailed legal review of every document caught by the resolution within extremely short timeframes to ensure that any personal information is identified, redacted or claimed as privileged to protect the information from automatic disclosure to the public.

An alternative to automatic publication would be for Members to identify the specific documents which they consider must be made public in order for the House to exercise its functions, and to provide the Executive with a reasonable opportunity to either redact those documents for personal information, or to make a further privilege claim before publication. This would significantly reduce the time and effort required by the Executive to identify and redact personal information and reduce the number of disputed privilege claims referred to the legal arbiter.

In addition, the automatic publication of agencies' submissions in support of the case for privilege necessarily hinders the detail and quality of those submissions. The procedure under SO 52 would be improved if agencies were given the opportunity to make further, confidential submissions to assist the legal arbiter in determining certain privilege claims.

Digital production of State papers under SO 52

The House has increasingly sought returns to orders in electronic format despite the fact that there is no platform or protocol established by the House for the secure production of electronic records. DPC is committed to working with the Parliament to establish a digital solution, however, as noted above, it is concerned that automatic publication of electronic returns on a public website is not appropriate in circumstances where agencies are not given sufficient time to respond to returns and redact all personal information.

[2] See Order for Papers – Rules Based Environmental Water, 17 June 2020, and Order for Papers – Stronger Country Communities Applications, 5 August 2020.

The administrative burden of compliance

Since the general election last year, by DPC's count, the Government has provided 1,404 boxes of documents in response to 125 separate orders for papers. These figures, although substantial, do not convey the full extent of the time, effort and resources that must be marshalled, almost always at short notice, to respond to these orders, many requiring staff to work long hours and weekends to finalise their agencies' returns.

Responding to an order for papers generally requires the following tasks:

- interpreting the scope of the order;
- conducting electronic and physical searches for documents;
- conducting line-by-line review of each document;
- consulting, where practicable, with third parties whose information is contained in the documents;
- obtaining necessary instructions and/or legal advice in relation to potential privilege claims;
- preparing privileged and non-privileged indexes;
- preparing submissions in support of any privilege claim;
- compiling privileged and non-privileged bundles;
- ensuring all certifications are received from relevant agencies; and
- arranging for physical delivery of documents.

Time and effort is duplicated where orders seek copies of exactly the same documents from multiple agencies, particularly where one portfolio agency can be identified as primarily responsible for the relevant matter.

Identification of the documents which may be subject to privilege is an extremely resource-intensive task. It can require hundreds of hours of time of senior subject matter experts and in-house legal counsel, or external legal assistance at considerable cost, to identify privileged information, confirm that there is a sufficient basis for claiming privilege, separately index these documents and prepare a privilege claim. In order to adequately complete this task, every document that is within the scope of an order must be scanned line-by-line to ensure that any privileged information is not missed.

This burden has become increasingly difficult to manage. It is not uncommon for personal information such as mobile phone numbers and addresses to be littered and repeated throughout email chains. Agencies must consider their obligations under the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*, any relevant secrecy laws, legal professional privilege, and the generally accepted grounds of public interest immunity, including commercial-in-confidence, in a very limited timeframe.

In addition to the examples provided in the Briefing Paper, DPC is aware of the following statistics from 2020, by way of example, which represent between 5,930.5 and 6,530.5 hours of officer time. It is noted that at least some of these orders have been made during the COVID-19 pandemic:

Order	Estimated hours worked to comply	No. of non-privileged boxes	No. of privileged boxes
Floodplain harvesting	105 hours	12 boxes	14 boxes
Transport Asbestos Registers	175 hours	74 boxes	28 boxes
Powerhouse Museum	400 hours	17 boxes	9 boxes
Supplies to public schools	535 hours	9 boxes	1 box
Stronger Country Community Fund Grants	195 hours	1 box	5 boxes
Funding for independent disability advocacy services	295.5 hours	6 boxes	3 boxes
Community Funds and Grants	369 hours	15 boxes	27 boxes
Koala habitat and population	1456 hours	10 boxes	33 boxes
Three orders relating to the administration of the Workers Compensation Scheme	2400 to 3000 hours		

The numerous orders relating to the administration of the Workers Compensation Scheme, in particular, have created great practical difficulties for the relevant agencies. After the first order, the Executive wrote to the Clerk outlining the substantial resources and costs that would be required to respond to the order in its present form.[3] The letter requested that the terms of the order be amended by confining their terms (which included 17 paragraphs), to reduce the burden on the affected agencies. The letter noted the advice of the Solicitor General and Anna Mitchelmore of 2014, which has been tabled in the House, which states that:

> It would be reasonable in our view, to query or dispute an order that contained an impractical deadline or referred to no subject matter in relation to the documents sought – but, for example, by location only – or referred to a subject matter that was so broad and unwieldy as to create great practical difficulties upon compliance.

Unfortunately, this attempt to amend the terms of the order was unsuccessful.

The costs of compliance with orders cannot be assessed solely by reference to external costs (such as fees for legal and document management services) necessarily incurred in order to comply with orders. Any assessment of costs should also take into account the considerable extent to which public servants are diverted from performing their other duties whilst responding to orders.

[3] Letter from the Hon Damien Tudehope MLC to the Clerk of the Parliaments, 17 June 2020.

On any measure, the increase in orders for papers since March 2019 has been extraordinary. DPC is grateful to the Clerk for acknowledging in the Discussion Paper that the large number of orders and their broad scope necessarily impacts on the capacity of the Executive to comply, while continuing to fulfil their statutory functions and deliver services in the public interest.

However, DPC respectfully points out that the graphs on page 2 and 3 of the Discussion Paper misrepresent the significant increase in orders for papers by comparing the total number of orders and boxes year-on-year, with the total numbers as at August 2020. Although it may seem a minor point, it is important that the true extent of this increase is reported accurately. In DPC's view, a truer reflection of the comparative increase in orders for papers in 2020 would not involve comparison of a 12-month period with an 8-month period, but would compare the total numbers to August across the years, or a comparison by month.

While DPC acknowledges that the manner of the exercise of the power conferred by SO 52 is entirely a matter for the House, DPC is concerned that there have been several occasions where the House has ordered the production of documents that relate to matters the subject of investigations by the Independent Commission Against Corruption, the Ombudsman, and a Special Commission of Inquiry. DPC respectfully submits that, where the Parliament has conferred statutory powers and functions on agencies to investigate particular allegations or conduct independently, the compulsory production of evidence relating to that investigation to the House (and in turn, to the public at large) may be contrary to the public interest. As noted in Commissioner Bret Walker SC's letter to the Clerk regarding the order for all papers provided to the Special Commission of Inquiry into the Ruby Princess:

> It would be a disastrous impediment to the continuing work of the Special Commission for Commission staff to be required to produce anything falling within the proposed call. Additionally, it is likely to impede the progress of investigations being undertaken by the Commission if the other government departments and agencies that are proposed to respond to the call are deflected from producing in response to my Commission, should they be required to produce in response to a resolution of the Legislative Council.[4]

This is to say nothing of the additional burden that such calls for papers place on the agencies that are also required by law to collate and provide documents to assist investigative bodies with their inquiries, often within strict timeframes and with offences and penalties for non-compliance.

There have also been occasions where the House has ordered the production of documents concerning infrastructure projects while active procurement processes are ongoing,[5] the disclosure of which would place the State at a significant disadvantage in commercial negations, at a cost to the taxpayer.

The House has also ordered the production of the NSW Government's bargaining parameters[6] in relation to current industrial award negotiations and arbitrations before the Industrial Relations Commission (the **IRC**). This not only diverts resources away from these matters, but potentially undermines the arbitration process,

[4] Letter from Commissioner Bret Walker SC to the Clerk of the Parliaments, *Re: Motion of the Hon Robert Borsak dated 12 May 2020*, 13 May 2020.
[5] For example, Western Harbour Tunnel and Beaches Link Business Cases, 18 June 2020; Dam Infrastructure Projects, 5 August 2020; Young High School joint use library and community facility, 17 June 2020.
[6] See Wages Policy Taskforce, 16 September 2020

and the decision of the Full Bench of the IRC[7] that it is not in the public interest for these documents to be used in the IRC proceedings.

Notification of motions seeking orders for papers

It is important that the House exercise care and precision when using the extraordinary powers conferred by SO 52. A member does not always have perfect information when drafting an order. While the Executive is usually given very little advance notice of a proposed order, on occasion, Ministers and agencies have been able to inform members and the House of the estimated volume of documents captured by a proposed order, which has resulted in a reduction in scope or an extension of time to comply. However, in the current environment in which there are large numbers of notices given on an average sitting day, it is not always possible for estimates to be obtained, and for these discussions to occur before a resolution is made. As a result, the House is often not able to be adequately informed about the potential costs of the orders it is considering and the time it would take to comply with them, and there is often little time within which possible amendments to the terms of the order can be discussed with the member intending to move the motion.

Many orders raise complex issues about their scope and validity, including whether the order is required to be made under SO 53. It is difficult for the Government and the House to give proper consideration to these issues on one day's notice.

A suggested reform to address this issue, which could presumably be done by way of sessional order, would be to impose a notice requirement, such that:

- motions seeking orders for papers remain on the notice paper for at least 7 days before being moved (with an exception for motions that are passed as formal business); or
- the Leader of the Government of the House be provided with a copy of the proposed motion at least 7 days before it is placed on the notice paper.

The Leader of the House could also be required to provide an estimate to the House of the likely resources and other costs required to comply with the order, before the motion is moved. Alternatively, these reforms could be applied only to large-scale orders, where the return to order is expected to be in excess of a specified number of items.

The House could of course move to dispense with any such sessional orders in a particular case where it considered these additional requirements inappropriate.

Approval of the House to vary the scope of an order

DPC is also supportive of the proposal by the Hon. David Shoebridge MLC for a sessional order which provides that DPC may write to the Clerk to seek approval of the House for the scope of an order to be varied in certain circumstances.

DPC would welcome amendments to the proposed procedure to allow DPC to write to the Clerk to seek the approval of the House to vary an order for papers where it considers that:

- the timeframe for production of documents for an order for papers is unduly onerous;

[7] Transcript of Proceedings, *Crown Employees (Public Sector – Salaries 2020) Award & Ors* (Industrial Relations Commission of NSW, 2020/00079899) Full Bench, Commissioner Sloan, 11 August 2020).

- the terms of the order are likely to capture a significant number of documents which may not be directly relevant to the apparent purpose of an order (e.g. ephemeral records, historical records, documents that contain information that is publicly available);
- the terms of the order are likely to result in significant duplication of effort and/or identical records being produced by more than one agency;
- the order is not directed to an agency that is known or reasonably expected to hold the records sought; or
- the order captures records the disclosure of which would prejudice the ongoing deliberative or investigative processes of a Government agency (for example, an ongoing Special Commission of Inquiry or a Royal Commission).

Clarifying the roles of the legal arbiter and House in relation to privileged papers

DPC respectfully agrees with the observations of the legal arbiter in the *WestConnex Business Cases* report[8] that:

- The legal arbiter evaluates and reports independently of the House and is in no sense the delegate of Parliament or the House.
- The legal arbiter's role is to report the outcome of his or her evaluation as to the validity of any (still) disputed claim of privilege that is (still) pressed, taking account of the contents of the documents and any submissions duly received.
- It is then up to the House to decide what steps to take, it not being bound to accept the report of the legal arbiter (which is not to say that the House has the liberty to disregard privilege, only that it must decide what to do).

There may be compelling reasons why the House should *not* authorise the publication of documents. However, the House has only rarely determined not to table documents where the legal arbiter has ruled that they are not privileged.[9] On one occasion, before the legal arbiter's report was received, a member gave a contingent notice that, on the report of the arbiter being published, he would move a motion for the publication of the documents.[10]

This is particularly concerning where the order for papers itself is broadly cast, and documents produced may contain sensitive information which is of limited relevance to the scrutiny functions of the House. In these circumstances, there is no demonstrated need for the documents to be disclosed publicly in order for the House to properly exercise its functions. This is particularly the case where documents contain plainly confidential information, such as personal address details or telephone numbers. Whilst confidentiality itself is not a separate ground of privilege, it is an important factor in assessing a claim for public interest immunity,[11] particularly where the documents were provided on the basis of confidentiality,[12] and a factor for the House to consider in determining whether or not to make a document public.

Privilege under SO 52

A claim of 'privilege' under SO 52 may be made over certain documents which the Legislative Council has power to compel Ministers to produce. This general power was recognised by the High Court in *Egan v Willis* (1998) 195 CLR 424.

In *Egan v Chadwick* (1999) 46 NSWLR 563, the Court of Appeal held that the Executive could not rely on legal professional privilege (subject to any inconsistency with Ministerial responsibility (at 579 [88])), or public interest immunity, to resist production of documents to the House.

[8] K Mason, *Report under SO 52 on Disputed Claim of Privilege – WestConnex Business Cases*, 8 August 2014, page 5.
[9] Want and Moore, *Annotated Standing Orders of the NSW Legislative Council*, pg. 166; *Minutes*, NSW Legislative Council, 8 May 2003, p 72; 10 March 2010, p 1688
[10] Want and Moore, *Annotated Standing Orders of the NSW Legislative Council*, pg. 166; *Minutes*, NSW Legislative Council, 26 November 2009, p 1574
[11] See, for example, *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405, 433–434 (Lord Cross; the other Lords agreeing); *Sankey v Whitlam* (1978) 142 CLR 1, 42–43 (Gibbs ACJ).
[12] *Jacobsen v Rogers* (1995) 182 CLR, 589–590 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

A key feature of the current procedure established by SO 52 is that, if privilege is not claimed over documents, the documents will be automatically published by authority of the House (SO 52(4)).

The term 'privilege' is ordinarily used to describe a right, or immunity, against being compelled to produce documents or to provide information.[13] The term 'privilege' in SO 52, however, is not used in this ordinary sense. The effect of a successful claim of privilege under SO 52 is that the documents produced to the House are not made public and may only be inspected by Members of the House.

There are no decided cases on the interpretation of SO 52. The immediate predecessor to SO 52 was the sessional order of 2 December 1998, which was made before *Egan v Chadwick* was decided the following year (as noted in the Report of the Independent Legal Arbiter, the Hon Keith Mason AC QC, *Landcom Bullying Allegations 2019, Part 1: Treasury return of papers,* 13 September 2019, at page 3).

There are some substantive differences between the 1998 sessional order and SO 52 which was made in May 2004 and has not been amended since. It is notable that the 1998 sessional order dealt specifically with privileged documents identified as Cabinet documents. The fact that SO 52 – made after *Egan v Chadwick* – does not refer to Cabinet documents is consistent with the view that SO 52 is not concerned with a privilege against production of documents to the House.

There is, accordingly, some uncertainty about the meaning of 'privilege' under SO 52.

Public interest immunity

When a claim of public interest immunity is to be determined by a court, the court will be required to balance:

- the harm that may be caused by disclosing the information, against;
- the harm that may be caused to the administration of justice by withholding the information.[14]

The second limb of the balancing exercise is assessed by considering the significance of the information to the matters in issue in the particular court proceedings.

The application of this limb of the balancing exercise must necessarily be different in the parliamentary context when a claim of public interest immunity is made over documents produced under SO 52.

This difference manifests in two significant respects, as noted in DPC's submissions on the recent order for papers concerning Premier's rulings in relation to disclosures under the *NSW Ministerial Code of Conduct* (at [16]-[18]).

First, the Legislative Council's non-statutory power to obtain documents from the Executive is not for the purpose of administering justice in curial proceedings. The Legislative Council's power to obtain documents is exercisable insofar as it is reasonably necessary for the performance of its functions to make laws and review executive conduct in accordance with the principle of responsible government.[15]

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[13] See, for example, *Glencore International AG v Commissioner of Taxation* [2019] HCA 26; (2019) 265 CLR 646; at [12] (legal professional privilege), and *HT v R* [2019] HCA 40; (2019) 374 ALR 216; especially at [29] (public interest immunity).
[14] *Sankey v Whitlam* (1978) 142 CLR 1 at 38-39; *Alister v R* (1984) 154 CLR 404 at 412 and 434; *NLC* at 616-617.
[15] See the summary of *Egan v Willis* (1996) 40 NSWLR 650 and *Egan v Willis* (1998) CLR 424 in *Egan v Chadwick* (1999) 46 NSWLR 563, [2] (Spigelman CJ).

Secondly, in the parliamentary context, the members of the Legislative Council already have access to the documents in question.

It follows that, in assessing a claim of public interest immunity in relation to documents returned under SO 52, the legal arbiter is required to balance:

- the harm to the public interest arising from disclosure of the documents to the public; and
- the public interest in disclosure arising from the significance and relevance of the documents to the Legislative Council's proceedings, and the need for those documents to be made public in the course of those proceedings.[16]

DPC notes Professor Twomey's observation that it is arguable that the evaluative role of the independent legal arbiter should be confined to deciding whether the documents fall within a privileged category, and that there are good grounds for arguing that the independent legal arbiter should not undertake the balancing task as, like a judge, the arbiter does not have the relevant experience to assess the significance of information for the legislative or accountability functions of the House.[17]

Legal professional privilege

In contrast to public interest immunity, a defining feature of legal professional privilege at common law is that if the communication attracts the privilege, no further question of balancing or considering additional public interest considerations arise.[18] Unlike public interest immunity, there is no need to adjust the common law test of legal professional privilege for the parliamentary context.

In the recent order for papers relating to allegations of bullying at Landcom, the Honourable Adam Searle MLC submitted to the legal arbiter that legal professional privilege did not apply in that context. The Member referred to a decision of the current arbiter in the *Sydney Stadiums* report,[19] where the arbiter, in rejecting claims of legal professional privilege, took into account that the House and its Members had an "obvious interest in unhampered access" to that information. The arbiter also emphasised that Members may need to check the correctness of the legal advice received by the State.

In the *Landcom* matter, NSW Treasury made submissions[20] that legal professional privilege at common law should be applied under SO 52. NSW Treasury submitted that, by contrast to public interest immunity, there

[16] A Twomey, 'Executive Accountability to the Senate and the NSW Legislative Council' (2008) 23 Australasian Parliamentary Review 257, 265; K Mason, *Report under SO 52 on Disputed Claim for Privilege: WestConnex Business Case*, 8 August 2014, pp. 6-7.
[17] Twomey refers to *Egan v Chadwick* (1999) 46 NSWLR 563, per Spigelman CJ at [52] – [53], including his Honour's observation that it is inappropriate for a court to determine the importance of information for a parliamentary function. See A Twomey, 'Executive Accountability to the Senate and the NSW Legislative Council', Legal Studies Research Paper No. 07/70, at p. 8.
[18] K Mason, *Report under SO 52 on Disputed Claim for Privilege – WestConnex Business Cases*, 8 August 2014 at p. 7; see also *Egan v Chadwick* (1999) 46 NSWLR 563 at 577 [75], and *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 at [29].
[19] K Mason, *Report under SO 52 on Disputed Claims of Privilege – Sydney Stadiums*, 22 May 2018.
[20] These submissions, which form Annexure C to the letter from the General Counsel of DPC of 3 September 2019, are reproduced in the Arbiter's report (at pp. 29-33 of the PDF version).

was no need to adjust the common law test of legal professional privilege, and that no further question of balancing or considering additional public interest considerations arise.[21]

The legal arbiter, in his report of 13 September 2019, essentially rejected NSW Treasury's submissions on this point (whilst not completely eliminating the possibility that common law legal professional privilege might have some application in a future matter). The arbiter found (at pages 3-4) that public interest considerations, apparently derived from public interest immunity and from the need for Members to access information in exercising the scrutiny functions of the House, were significant. As a result, the arbiter determined that documents which attract legal professional privilege may not – due to the weight attached to the considerations discussed above – necessarily be privileged under SO 52.

DPC acknowledges that the ability of Members to make use of documents produced to the House, in fulfilling the constitutional scrutiny functions of the House, may be restricted if the House does not authorise Members to make the contents of those documents public.

These considerations do not, however, justify the legal arbiter departing from a central feature of common law legal professional privilege. SO 52 does not, as outlined above, in any way prevent the House from taking these considerations into account at a later stage if, after receiving the legal arbiter's report, the House wishes to consider whether to authorise publication of the documents.

There is also no reason to conclude that the purposes or objects of SO 52 would be better advanced by the legal arbiter addressing considerations of this kind when considering a legally-recognised privilege which, at common law, does not permit any assessment of public interest considerations.

First, these kinds of considerations would require the legal arbiter to make a judgment about the use which Members may be likely to make of information contained in the documents. The fact that the House has authorised the appointment of a *legal* arbiter, who must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge, supports the view that the nature of the arbiter's task is to evaluate and report on whether a document is within a legally-recognised category of privilege.

Secondly, in circumstances where the House may wish to consider whether to authorise publication of a document, there is every reason to think that the House would be assisted by a report from a legal arbiter confirming whether or not the document is subject to legal professional privilege at common law.

If the legal arbiter determines that the document is *not* subject to legal professional privilege at common law, that determination would no doubt assist the House in determining whether to authorise the publication of the document.

As noted above, it remains a matter for the House to decide whether to authorise publication of the documents in order to exercise its constitutional scrutiny and oversight functions.

Clarification of the respective roles of the legal arbiter and House

The legal arbiter evaluates and reports independently of the House and is not a delegate of the House. It must therefore remain a matter for the House to decide whether to authorise publication of the documents in order to exercise its constitutional scrutiny and oversight functions.

[21] K Mason, *Report under SO 52 on Disputed Claim for Privilege – WestConnex Business Cases*, 8 August 2014, at page 7; see also *Egan v Chadwick* (1999) 46 NSWLR 563 at 577 [75], and *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 at [29].

DPC is concerned that the current overlap in these two roles – with the arbiter determining privilege known to law, but in doing so, both the arbiter and the House determining whether publication is in the public interest – leads to an overreliance by both the legal arbiter and the House on the decision-making of the other. In DPC's view, the practical effect of this has tended to create a vacuum, or gap in the exercise of responsibility, between the arbiter and the House.

This vacuum has resulted in the personal address details of members of the public being published by the House, regardless of the impact on the privacy of individuals and the potential risk to their safety. This is contrary to well-established principles that protect personal information held by government agencies under the *Privacy and Personal Information Protection Act 1998* (NSW).

On 1 September 2020, the legal arbiter determined that correspondence with individual landowners and associated documents were not privileged.[22] In a similar decision on 11 September 2020, the legal arbiter found that letters between a Minister and his constituents were also not privileged.[23] In doing so, the legal arbiter dismissed the respective submissions of the Department of Planning, Industry and Environment (**DPIE**) and the Office of the Deputy Premier that the documents were privileged on privacy grounds. The submissions of the Office of the Deputy Premier were dismissed as 'bland and unhelpful',[24] while DPIE's submissions were described as amounting to a 'waste of public expenditure on the part of officers of the House who are charged with their processing'.[25]

The documents over which privilege was claimed contain the email addresses, mobile phone numbers and, in some cases, the residential addresses of individuals. There is no evidence that the House considered the impact of publishing these details on the privacy or personal safety of the individuals involved prior to passing the resolution to table and publish the documents. In this regard, it appears that the House relied solely on the findings of the legal arbiter with respect to privilege. In DPC's view, this demonstrates the House's overreliance on the legal arbiter's report on disputed privilege claims, leading to outcomes that are fundamentally at odds with the moral and statutory responsibilities of government with respect to the protection of the personal information of individuals.

[22] K Mason, *Report under SO 52 on Disputed Claim of Privilege – Rules Based Environmental Water*, 1 September 2020.
[23] K Mason, *Report under SO 52 on Disputed Claim of Privilege – Strong Country Communities Applications*, 11 September 2020
[24] See above, n 22, p 2.
[25] See above, n 21, p 1.

Automatic publication

A notable feature of SO 52 is that if privilege is *not* claimed over documents returned by the Executive, the documents will be published by authority of the House. This occurs even before Members have had any opportunity to review the documents.

Even with a carefully crafted order, it could be expected that many documents would ultimately, on inspection by Members, turn out to have little or no relevance to the particular exercise by the House of its scrutiny function.

If it were not for the procedure put in place by SO 52, then it would be a matter for the House, in the exercise of its discretion in the public interest, to determine whether to table and make public documents produced to it.[26] The power to authorise publication presumably exists because it is reasonably necessary for the performance of the House's functions of making laws and of scrutinising the Executive.

A former Crown Solicitor submitted in 2014 that, to the extent SO 52 purported to permit the House to publish Executive documents other than for the purpose of exercising a function of the House, there would be a question about its validity.

As the legal arbiter, the Hon Joseph Campbell QC, stated in his report on *Contamination at Power Station associated sites:*

> The House continues to have an important and responsible role to play, about the nature and extent of publication of a document that will be permitted, even if an [independent legal arbiter] decides that the document is not privileged. In exercise of that role the House has, in the past, decided that documents that are not privileged should none the less be published in a redacted form that omits certain details that are not essential for the purpose that the House seeks to achieve.[27]

The current procedure under SO 52 would be equivalent to a court *automatically* admitting into evidence, or otherwise authorising the publication of, all documents produced under subpoenas or discovery. A non-party to judicial proceedings ordinarily requires leave to access materials produced under subpoena but not admitted into evidence. Similarly, in Royal Commissions and statutory inquiries, where documents are produced under notices to produce or summonses, the documents are not routinely published. Instead, somewhat like a court, Royal Commissions and inquiries only admit a selection of relevant materials into evidence, and they are only made public at that point.

Further, DPC understands that Parliamentary committees do not automatically publish all submissions received during an inquiry. Committee staff first review submissions, before their publication is authorised by the committee.

DPC is not aware of any equivalent procedure whereby all documents received under a summons or other compulsory process are automatically published, without any review of their contents, unless an objection to publication is made by the person required to produce the documents.

One consequence of this procedure under SO 52 is that the Executive is required to make a privilege claim to prevent the automatic publication of personal information (such as home addresses and personal mobile

[26] See *Egan v Chadwick* (1999) 46 NSWLR 563 at 593-594, [139].
[27] J Campbell, *Report under SO 52 on Disputed Claim of Privilege – Contamination at Power Station associated sites*, 18 September 2020, p 9.

numbers) which, on any view, should not be made public and are not relevant to the exercise by the House of its scrutiny function.

The Executive also considers it is required to make a privilege claim to prevent the automatic publication of documents which are the subject of parliamentary privilege as a result of automatic publication in accordance with SO 52. The purpose of parliamentary privilege is to protect the interests and proper functioning of the Parliament, rather than of the Executive. It is therefore appropriate for the Executive to draw these matters to the attention of the House, so that it may decide what impact may be caused by publication of documents.

In addition, many of the documents publicly released by the House under SO 52 may be subject to statutory secrecy or non-disclosure provisions which restrict the use and disclosure of the information by the Executive. It seems an odd result that information which Parliament has decided should be subject to statutory restrictions on its use and disclosure should be publicly released by the House, without any consideration or review as to the appropriateness of doing so.

The current process under SO 52 prematurely puts the onus on the Executive to conduct the detailed review necessary for assessing potential privilege claims within short timeframes and in circumstances where this task may be redundant because publication of many of the documents may not in fact be considered by any member to be relevant to the exercise of the House's functions.

The House could agree to an alternate procedure whereby automatic publication is dispensed with for documents which the Executive identifies as potentially containing personal information. Members could then identify which of those documents are required to be published, and provide the Executive with a reasonable opportunity to redact those documents for personal information before publication. This would reduce the time and effort required by the Executive to identify and redact for personal information, while also addressing concerns raised by the legal arbiter and minimising disputed privilege claims. This would also address some of the Government's concerns regarding the return of electronic records outlined below.

DPC also notes that the automatic publication of agencies' submissions in support of the case for privilege necessarily hinders the detail and quality of those submissions. The procedure under SO 52 would be improved if agencies were given the opportunity to make further, confidential submissions to assist the legal arbiter in determining certain privilege claims.

Electronic returns

The House has increasingly sought returns to orders in electronic and text searchable format, although there is no platform or protocol currently available for the secure production of data in electronic form.

The Solicitor General's advice with Anna Mitchelmore of 2014, which has been tabled in the House, notes the following in relation to electronic production:

> The tenor of SO 52 suggests the production of documents in printed form: the order is for documents to be "tabled in the House" and when returned they are to be "laid on the table by the Clerk.
>
> However, it may be convenient for the Council to request that the documents be provided in a different form and also convenient for the Executive to supply the documents in, for example, electronic form. We do not consider that the terms of the order would preclude the Council from adopting or sanctioning that course.

While DPC would of course welcome the efficiencies that would be gained by digitising the SO 52 process, the security and integrity of State papers returned to the Parliament under SO 52 is paramount.

DPC acknowledges the cost and logistical challenges of returning paper records, and is indeed heavily impacted by this procedure given that its own record-keeping systems are digital. Representatives of DPC and the Procedure Office have had preliminary discussions regarding the secure production and storage of electronic records in response to orders for papers. DPC is committed to assisting the Parliament to establish a digital solution.

However, the automatic online publication of documents for which either there is no claim of privilege, or for which the arbiter has ruled are not the subject of privilege, raises significant concern. In DPC's view, this process does not reflect best practice in relation to publication of government information to ensure that the risk of harm posed by such publication is minimised.

The Information Commissioner has determined that placing personal contact details of an individual, including personal phone/mobile numbers, residential address and email address, and signatures, on a council website in relation to Development Applications was not in the public interest and would undermine the protection of personal information and individual privacy.[28] The relevant Guideline draws a distinction between publication on a website and other forms of disclosure (at [61]-[64]):

> Information published in digital form on a website can be accessed by people at any time, and downloaded, copied, modified and republished in various formats. Once published and captured, the information…can no longer be controlled, or contained to the original publication context.
>
> While the internet can significantly enable the object of the GIPA Act to open and disseminate Department information to the public, the risk of failing to balance the GIPA Act's restrictions where there is an overriding public interest against disclosure should not be underestimated in the online information environment.

[28] *Information Access Guideline 3 – For local councils – personal information contained in development applications; What should not be put on council websites,* which is in relation to obligations on councils to publish open access information under the *Government Information (Public Access) Act 2009*.

Disclosure of personal information held in electronic records, such as signatures, financial information, and photographs, provides opportunities for identify theft or other criminal acts against the person with very harmful consequences.

In DPC's view, automatic publication of electronic returns on a public website is not appropriate in circumstances where agencies are not given appropriate timeframes to respond to returns and redact all personal information.