Submission No 2

INQUIRY INTO THE UNAUTHORISED DISCLOSURE OF PRIVILEGED INFORMATION BY THE HONOURABLE MARK LATHAM MLC

Organisation: Clerk of the Parliaments

Date Received: 19 September 2025

Inquiry into the unauthorised disclosure of privileged material by the Hon Mark Latham MLC

Summary

Standing Order 52 provides a process by which members can dispute claims of privilege by the Executive through an independent arbiter process and thereby make them public. Publishing documents produced in an SO 52 return outside of this process is a breach of the standing orders. If the system is undermined ultimately it will be the functioning of the House which is likely to suffer.

Egan v Chadwick

The common law power to order state papers, established in the High Court by *Egan v Willis, (1998) 195 CLR 424* is fundamental to the operations of the modern Legislative Council in holding the Executive to account. *Egan v Chadwick* (1999) 46 NSWLR 563 established that the Executive is required to provide documents that in court would be the subject of claims on the various grounds of privilege recognised at law. The Executive had argued that it was not required to table these documents, only state papers not subject to such a claim. All three justices rejected the arguments of the Executive.

Ever since the judgement was tabled in the House on 22 June 1999 orders for papers have resulted in returns of documents in two[1] categories – public documents able to be viewed by all members of the public, and privileged documents only able to be viewed by members of the Legislative Council in the Office of the Clerk.

Privileged documents under Standing order 52

The source of the power to order documents derives from the common law principle of "reasonable necessity", that it is reasonably necessary for the House to order state papers to undertake its constitutional role of holding the Executive to account. While not the source of the power, standing order 52 is the way in which the House regulates its use of the power.

[1] Since 2023 there has been a third category of "personal information" which are privileged but for which members can request they be made public in redacted form without an arbitration process. To avoid complexity I have not discussed this third category in this submission.

For documents which are subject to a claim of privilege, the standing order makes the following specification:

(6) Where a document is considered to be privileged:

(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 for the claim of privilege, and

(b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:

(i) made available only to members of the Legislative Council,

(ii) not published or copied without an order of the House

The standing order then provides a mechanism to dispute the claims made over privileged documents, to establish a process by which a document can be made public:

(8) Any member may, by communication in writing to the Clerk:

(a) dispute the validity of the claim of privilege in relation to a particular document or documents, or

(b) dispute the validity of the claim that the personal information remaining in redacted documents requested under paragraph (7)(c) should not be made public.

(9) On receipt of communication under paragraph (8), the Clerk is authorised to release the disputed document or documents to an Independent Legal Arbiter, for evaluation and report as to the validity of the claim.

(10) The Independent Legal Arbiter is to be appointed by the President and must be a King's Counsel, a Senior Counsel or a retired Supreme Court Judge.

(11) The Independent Legal Arbiter may request through the Clerk additional submissions from the Department of Premier and Cabinet or directly from an independent agency and the member disputing the claim of privilege. Such submissions:

(a) are to be lodged with the Clerk and made available to the Independent Legal Arbiter, and

(b) may be provided to the parties to the dispute but may not otherwise be published or copied without an order of the House.

(12) A report from the Independent Legal Arbiter, together with any submissions received by the Arbiter, are to be lodged with the Clerk and:

(a) made available only to members of the House, and

(b) not published or copied without an order of the House.

(13) Where a document subject to a disputed claim of privilege under paragraph (8) is also subject to a claim that it contains personal information that should not be made public as set out in paragraph (7)(e), prior to the document being published by the House, the Department of Premier and Cabinet is to provide a redacted version of the documents

While the House ultimately makes the decision to publish a privileged document, it does so after receiving the recommendation of the arbiter. This means the House is able to make a collective decision informed by an independent view by an eminent legal mind on whether to uphold the Executive's claims on various grounds of privilege is in the public interest. The standing order does not empower an individual member to publish a document. The publication of a privileged document from a return is a decision of the House having followed the steps detailed in SO 52 (8) – (13).

Administrative processes to maintain confidentiality of documents

As members would be aware, when the Clerk takes receipt of a return from The Cabinet Office the boxes of documents subject to a claim of privilege are immediately placed in the Clerk's meeting room. Each box has "privileged" written in a label on its side. The room is locked and is only opened when a member requests a viewing of the privileged documents.

An index is published on line which identifies each document and notes which documents are subject to a claim of privilege. Members are notified of the return with a link to the index in the Clerk's weekly report to members, and of course the returns are reported to the House.

When a member wishes to inspect a document many will email or call to make an appointment or have their staff email to request an appointment. When given notice staff of the Procedure Office team will ensure that the box of documents or documents requested are taken off the shelves and placed on the meeting table. Upon entering the meeting room members sign an exercise book and identify which return they are examining, and the date.

The Clerk or Deputy Clerk advises members who are new to the Parliament or new to the process of viewing privileged returns that they are able to take notes but may not photocopy or remove documents, and may not discuss the documents with anyone other than other members of the Legislative Council. New members are also told that since the process began there has never been a leak of these privileged documents, then informed of the arbitration process to make documents public.

This briefing is of course not given to experienced members who have previously viewed privileged documents. However since my appointment as Clerk in April 2025 I have attached to the member's register a one page document setting out the rules governing the viewing of the documents. This is provided as attachment one.

The status of the LECC document

I do not wish to discuss the specifics of any advice or assistance provided to a member by myself or by other parliamentary staff. Communications with individual members are confidential and I would only disclose such details under compulsion or with the member's express permission.

To assist the committee however I provide the following publicly available details to enable it to establish the status of the document which appears to be the subject of this inquiry:

- The SO 52 motion by the Honourable Rod Roberts was agreed to on Wednesday 7 August 2024[2]
- A return was delivered by The Cabinet Office to the Clerk on Wednesday 21 August 2024
- The document was referred in the index as "Report under s135 report in Operation Asken" with a claim of privilege based upon PII (Public interest immunity) and Personal information.

A copy of the relevant page of the index is provided as attachment two. Members of the committee can view the document in the Office of the Clerk to determine whether this is the document used in debate on 8 May 2025 which lead to this inquiry.

If referring to the document in the Committee's final report please be aware that it remains a privileged document and the only publication authorised by the House is in the published index reference.

Upholding the importance of confidentiality of SO 52 documents

This is the first time the disclosure of a privileged document returned under standing order 52 has been referred to the Privileges Committee. As discussed in the second edition of *New South Wales Legislative Council Practice:*

> In exercising its powers to order the production of State papers since 1999, the House and members have been scrupulous in paying due regard to claims of privilege over returned documents. Where claims of privilege have been made over documents the confidentiality of those documents has never been breached. [3]

Whatever finding the committee makes on the circumstances referred to it, it is very important that the committee upholds the principle that documents returned under the standing order are to be treated as privileged until and unless the arbitration process is followed to the point where the house resolves publication. If a practice arises where members determine individually that documents should be published, bypassing the way the standing order regulates the treatment of documents, the functioning of the House would become increasingly chaotic. At the very worst an unpredictable treatment of confidentiality could provide a reason, framed as a legal argument, for The Cabinet Office to cease providing documents subject to a claim of privilege.

Standing Order 52 is a powerful scrutiny process which has lead to this House being arguably the most successful and assertive of any upper house in Australia. It is important this power is not undermined.

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[2] *LC Minutes* item 29, 7 August 2025.
[3] Second Edition Federation Press (2021),p675.

Additional inquiry terms of reference

I note that on 9 September 2025 the House adopted additional references regarding (a) the alleged disclosure of the LECC report during a debate in the House on 5 August 2025 and a radio interview and (b) the disclosure of a private address of a private citizen during a Budget estimates hearing (unrelated to the LECC report) held on 26 August 2025.

If it wishes to do so the committee can compare a transcript of the 5 August debate and of the radio interview with the original speech given by the member in the House to determine for itself whether the interview disclosed additional material or simply repeated the original alleged disclosure.

Regarding the disclosure of the private address, the committee at Estimates took the view this was inappropriate and resolved to remove the address from the transcript and the footage and prohibited its publication by the media. From the Hansard of the debate in the House to refer this matter on 9 September it is clear the member disagrees with the committee's decision; the views of other members were also put on the record.

Principles of use of freedom of speech

Unlike the SO 52 matter, there have been other instances where members have been referred to the Privileges Committee or other inquiries for statements they have made in the House under privilege which have been alleged to have abused their freedom of speech. While this is rare the most notable instances are:

- The Hon John Martin who in 1936 made statements alleging conspiracy and corruption in the election of another member[4]
- The Hon Franca Arena who in 1997 made allegations of a high level political cover up of paedophiles[5]
- The Hon Michael Gallacher and the Hon John Hannaford in 1999 raised allegations of sexual harassment against the then Lord Mayor of Sydney, and
- Mr David Shoebridge in 2011 was referred to the Privileges Committee for criticisms he made of the Police Commissioner's prevention of release of information concerning a serial predator.[6]

Other than the Franca Arena matter, which went to a Special Commission of Inquiry, the inquiries concluded without any consequence to the members or indeed any clear finding that there had been an abuse of freedom of speech. In the case of the two most recent

[4] *LC Hansard* 12 November 1936 pp428-430.
[5] See discussion in Frappell and Blunt (ed) *NSW Legislative Council Practice* 2nd edition federation Press (2021) p92, 155.
[6] Privileges Committee, *Statements by Mr David Shoebridge* Report No. 57, November 2011.

cases the Privileges Committee highlighted the lack of adoption of principles of the exercise of freedom of speech as a significant problem in considering such referrals.

Committee hearings now operate under rules known as the Procedural Fairness resolution, adopted by the House following a Privileges committee inquiry[7]. This provides some guidance to members when considering an issue such as this, although noting the resolution concerns rules for witnesses and the incident referred to this committee concerned an individual who was not present as a witness.

When matters are raised in the House rather than committees there are no guidelines or standing orders on what can be said, other than standing orders concerning reflections on other members. This was highlighted in a statement by the President on 5 August 2025, in which he stated:

> I note that the Legislative Council has never adopted any further rules or resolutions setting out, amongst other things, the manner in which members are expected to exercise their privilege of freedom of speech. Other parliaments have. The Privileges Committee of the Legislative Council has on many occasions recommended that the House act in that area. Of note, in 1996 the committee recommended adoption of a draft code of conduct for members, which included the following clause relating to the exercise of freedom of speech:
>
> > Members should be mindful of the privileges conferred when speaking in the House and should seek to avoid causing undeserved harm to any individual who does not enjoy the same privileges.[8]

This means in each instance the Presiding Officer is called upon to make a ruling as to what is an appropriate use of privilege by a member in debate. It would assist proceedings in both the House and committees if a resolution provided at least general principles which a presiding officer could draw upon, knowing those principles had the support of most members.

This is a difficult issue as any principles have to consider than in some instances the freedom of speech in the House is the only safe option to highlight corruption or misbehaviour by powerful individuals who would otherwise be able to use their financial resources to silence a member. On the other hand the freedom of speech in the House also can be used for unfounded attacks by a member on individuals who have little opportunity to respond except through a limited Citizen's Right of Reply process.

In 1996 and in subsequent reports the Privileges Committee has recommended the House adopt a resolution similar to that adopted by the Australian Senate in 1988.[9] This Senate resolution states:

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[7] Privileges Committee *Procedural Fairness for inquiry participants* Report No.75, June 2018.
[8] *LC Hansard* 5/08/25 at 16:33.
[9] Standing Committee on Parliamentary Privilege and Ethics *Report on inquiry into the establishment of a draft code of conduct for members* Report no. 3, October 1996

Exercise of Freedom of Speech

Para 9: That the Senate considers that, in speaking in the Senate or in a committee, senators should take the following matters into account:

(a) the need to exercise their valuable right of freedom of speech in a responsible manner;

(b) the damage that may be done by allegations made in Parliament to those who are the subject of such allegations and to the standing of Parliament;

(c) the limited opportunities for persons other than members of Parliament to respond to allegations made in Parliament;

(d) the need for senators, while fearlessly performing their duties, to have regard to the rights of others; and

(e) the desirability of ensuring that statements reflecting adversely on persons are soundly based.

2. That the President, whenever the President considers that it is desirable to do so, may draw the attention of the Senate to the spirit and the letter of this resolution.[10]

In the short time frame for the current inquiry it is unlikely the committee could make suitable recommendations in this area, but perhaps the committee could examine specifically what such a resolution would look like in a subsequent inquiry.

Status of submission

I appreciate the sensitive nature of this inquiry and that it deals with a confidential document. Subject to this, there is nothing in this submission which would prevent the committee publishing it in part or as a whole.

Steven Reynolds
Clerk of the Parliaments

19 September 2025

[10] Parliamentary Privileges resolution agreed to by the Senate on 24 February 1988, as it appears in appendix 2 of *Odgers Australian Senate Practice* 14th edition (2016)

Attachment 1

LEGISLATIVE COUNCIL

RULES FOR VIEWING DOCUMENTS WITH CLAIMS OF PRIVILEGE OR PERSONAL INFORMATION

1. To ensure the availability of the conference room and the documents to be viewed, members are requested to make a booking to view returns whenever possible. Bookings can be made with the Office of the Clerk on 9230 2773.

2. Before examining documents all members are required by standing order to sign a register.

3. Documents subject to a claim of privilege or personal information can only be **viewed** by current Members of the Legislative Council.

4. Documents cannot be photographed, copied or scanned. Brief note taking is appropriate, however any notes must be to inform the member in the course of their parliamentary duties only, and also cannot be disclosed.

5. Members should not discuss the contents of the documents with any persons except with other current Members of the Legislative Council. To do so may constitute a contempt.

6. Standing order 52 provides a process to members to dispute claims of privilege via evaluation by an Independent Legal Arbiter. Members should lodge a dispute in writing with the Clerk. Disputes should not disclose privileged information, but address the basis of the claim. Following evaluation by the Arbiter, a resolution of the House is required to implement any recommendations, including that any documents be made public, either in full or with certain redactions.

7. Standing order 52 also provides a process for members to request redacted versions of personal information documents. Occasionally agencies proactively provide redacted personal information documents in the public return. When this does not happen, members may write to the Clerk requesting documents be provided with personal information redacted.

8. Please take due care when viewing documents by keeping documents in order and in the condition received, including any dividers or clips. To assist in maintaining the documents in an organised and orderly manner, we request that documents be returned to the box from which they were taken and in the order they were found. Documents and boxes must not be marked.

9. No documents may be removed from the conference room, and the door must remain open.

10. In accordance with relevant resolutions and memorandum concerning the Records of the House, returns not viewed for over 12 months may be transferred to State Archives for storage. Members will be consulted should storage needs necessitate the transfer of recently viewed returns. Members may request the retrieval of transferred returns at any time.

Clerk of the Parliaments
Approved: April 2025

Attachment 2

Document ID	Categories	Document Type	Title	Document Date	Coded Author	Privilege Basis
NPF.0001.0003.0022	(b)	Presentation	2-Culture Action Group-Plan Information Pack .pptx		NSWPF	PII/PII - Other
NPF.0001.0003.0023	(b)	Document	3-Culture Action Plan Template .docx		NSWPF	PII/PII - Other
NPF.0001.0003.0026	(d)	Document	Supt Fauls ICA.pdf		NSWPF	Personal Information; PII - Other
NPF.0001.0003.0027	(d)	Document	Supt Fauls TOKA 2020.pdf	1/12/2020	NSWPF	Personal Information; PII - Other
NPF.0001.0003.0028	(d)	Document	Supt Fauls TOKA 2021.pdf	1/03/2021	NSWPF	Personal Information; PII - Other
NPF.0001.0003.0029	(d)	Document	Supt Garner ICA.pdf		NSWPF	Personal Information; PII - Other
NPF.0001.0003.0030	(d)	Document	Supt Garner TOKA.pdf	1/03/2021	NSWPF	Personal Information; PII - Other
NPF.0001.0003.0031	(d)	Document	Supt Moore ICA.pdf		NSWPF	Personal Information; PII - Other
NPF.0001.0003.0032	(d)	Document	Supt Moore TOKA.pdf	1/12/2020	NSWPF	Personal Information; PII - Other
NPF.0001.0003.0034	(b)	Spreadsheet	2022 Professional Standards Command.xlsx		NSWPF	PII/PII - Other
NPF.0001.0003.0036	(b)	Spreadsheet	2023 Professional Standards Command.xlsx		NSWPF	PII - Other
NPF.0001.0003.0038	(g)	Email	LECC response on ILAV audit [SEC=PROTECTED]	9/08/2024	NSWPF	Personal Information; PII - Other
NPF.0001.0003.0039	(g)	Email	FW: Response LECC interest in Unaccounted ILAVs, CLAVs & Over Body Armour [SEC=OFFICIAL]	9/08/2024	NSWPF	Personal Information; PII - Other
NPF.0001.0003.0040	(g)	Document	Triage form EXT2022 1916.pdf	6/10/2023	NSWPF	Personal Information; PII - Other
NPF.0001.0003.0048	(b)	Spreadsheet	Complaint Document - Copy of Professional Standards Command - Misconduct identified in yellow.xlsx		NSWPF	PII/PII - Other
NPF.0001.0003.0050	(b)	Document	Triage.pdf	21/11/2022	NSWPF	Personal Information; PII/PII - Other
NPF.0001.0007.0001	(g)	Email	LECC response on ILAV audit [SEC=PROTECTED]		NSWPF	PII - Other
NPF.0001.0007.0002	(g)	Email	FW: Response LECC interest in Unaccounted ILAVs, CLAVs & Over Body Armour [SEC=OFFICIAL]		NSWPF	PII - Other
NPF.0001.0007.0003	(g)	Document	Triage form EXT2022 1916.pdf		NSWPF	PII - Other
NPF.0001.0008.0001	(a)	Document	Report under s 135 report in Operation Askern.pdf		LECC	Personal Information; PII - Other
NPF.0001.0009.0003	(a)	Document	OoC 3.3.pdf		NSWPF	LPP; Personal Information