

REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

Early Childhood Education and Care Sector

The Hon Keith Mason AC KC

20 March 2025

My Interim Report dated 24 February 2025 has been published. Both the Member and the Department have provided further submissions in response to it, at my invitation.

Documents addressed in the Interim Report

Save as indicated below, I confirm the advice in the Interim Report.

Disputed Document DOE.001.0000429

The Member has advised that she does not accept all of the proposed redactions, particularly those recounting the facts identifying the alleged contravention and the name of the service involved. These were never privileged in my evaluation.

As regards this and other similar Undertakings it will, I understand, be acceptable to the Member for the name and birth date of the child concerned to be redacted, as well as the signature, home address and private (as distinct from office) email address of the employee. But not otherwise.

Disputed Document DOE.001.0000610

The Member maintains her objection in its entirety. For the reasons stated in the Interim Report I advise that this document is not privileged. I confirm that, as regards similar documents in the disputed boxes, the invocation of commercial privacy interests does not outweigh the public interest in unhampered access in debate.

Disputed Documents DOE.002.0000079/80

Disputed Documents DOE.002.000067 and DOE.0000069

The first two of these documents are mentioned and briefly discussed on p 7 of the Interim Report. The second two appear to be related so I shall address all of them here, in chronological sequence.

DOE.002.000069 is a 2021 document setting out the scope of the Pilot Scheme next referred to. It contains nothing that attracts a relevant privilege.

DOE.002.0000079 is a consultants' report dated 3 March 2023, commissioned by the Commonwealth Department, entitled *Pilot Evaluation of Joint Monitoring and Data Sharing Project*. It speaks in glowing terms about what was done and achieved by this exercise in co-operative federalism. Relevant to my evaluation, it states more than once that the response to date of 'wilfully non-compliant providers' to the pilot scheme itself has been to lift their game. This

suggests to me that sunlight rather than secrecy ought to guide my assessment.

I indicated in the Interim Report that I discount generalised suggestions that inter-governmental co-operation will be impeded by allowing the report of the pilot scheme to go into the public domain. The extensive record of information gained, lessons learned, and legislative or administrative reform proposed, is the very type of material the Parliament needs in order to carry out its constitutional roles.

As to this and the next mentioned document, the NSW Department of Education confirms its earlier submissions. And, having consulted the Australian Government at my invitation, reports that the Commonwealth Department of Education considers that the two documents 'contain' confidential information that should not be disclosed on stated grounds.

The Commonwealth Department suggests that the names of the identified Family Day Care providers and services should not be disclosed having regard to the commercial interests of the service providers. I do not agree. Information about particular inspections and actions taken that is recorded in this and the next two documents is similar to that which did not attract privilege in the documents analysed in detail in the Interim Report.

The Commonwealth and State Departments of Education, responding to my invitation to be more specific in the redactions they press, have pointed to sections 'relating to or referencing data sharing', sections relating to intelligence capabilities of the Commonwealth department including detection capabilities and datasets used to inform detection activities, and sections 'that propose next steps or recommendations'.

The Member's response to the Interim Report as regards documents *DOE.002.0000079/80* was to state in her letter dated 14 March 2025 that the information in these documents is 'of significant value, particularly as they relate to the interactions between national and NSW regulators'. I certainly agree; and I am unpersuaded that sections of the document proposing next steps or recommendations ought to be withheld from unfettered examination in the House.

With some reluctance I will err on the side of caution as regards some portions of the document which appear to reveal specific intelligence the disclosure of which appears to concern the Commonwealth. I would therefore advise that privilege should be accorded to the following:

Pages 7-8, 12 (under the heading *Data Sharing and Case Support*), 32-3 ('A few....regularly'), 36 (third dot point) and 38-9

If any other specific portion of the document were to be promptly drawn to my attention I would be prepared to expand this advice. But otherwise, the document is not privileged in my evaluation.

Documents *DOE.002.0000080* and *DOE.002.0000067* are Reports about the Joint Monitoring and Compliance Program, prepared by the NSW Department of Education dated 8 December 2022 and 15 November 2023 respectively. The House has a legitimate interest in knowing as much as possible about this **Pilot** Scheme. In any event, the bulk of the documents consists of a series of specific case studies showing actions taken with respect to particular centres. For the reasons broadly stated in the Interim Report re *DOE.001.0000904* this highly relevant information is not privileged in my evaluation.

Disputed Documents DOE. 000874/875

The Member has confirmed that the only redactions which she supports are the names and birth dates of the children. The Interim Report indicated that it was my evaluation that the document was

not privileged. Accordingly, the only acceptable redactions are those identifying particular children by name and/or birth date.

The remaining Department of Education documents that are disputed

Most of the remaining documents in the two boxes of Department of Education Privileged Documents are similar to those in the set of documents that I previously examined as 'samples' and addressed in the Interim Report. I have briefly examined all of the remaining documents nevertheless; and I advise that none of them are relevantly privileged in my evaluation.

I report that documents such as Investigation Reports, Compliance Notices, Prohibition Notices, Breach Letters and Undertakings are not privileged in my evaluation. However, the names of children and their dates of birth are to be redacted with the concurrence of the Member. And limited 'personal information' in the form of signatures, home addresses and private (as distinct from office) email addresses of the employees at centres are also acceptable for redaction.

A number of the disputed documents are said to be privileged on the ground of legal professional privilege (LPP), in addition to public interest immunity (PII). My attitude to free-standing claims of LPP is well known and it has been endorsed by the House.

I have examined each of the disputed documents claimed to attract privilege on grounds that include LPP. Some of them are actually concluded contracts. Some contain advice from lawyers that is of a policy nature (eg *DOE.0000637*). Others are no more than minor suggested tweaks to proposed letters.

Others contain information in the form of confidential legal advice regarding topics such as the impact on public funding arrangements of the restructuring of trusts and corporations associated with Learn and Play centres, other novation arrangements entered into by a service provider, and the availability of fee relief to particular service providers. None of these documents relate to matters that are or are likely to be the subject of dispute let alone litigation. In my evaluation, all of this information is of a nature that it should be as accessible to the Parliament as the Executive arm. The Parliament would be unduly hampered were its Members not able to access and debate it freely and openly.

The documents dealing with past tendering assessments and program guidelines contain no information that, in my evaluation, requires them to be kept secret.

Documents lodged by the Office of the Deputy Premier subject to a disputed claim of privileged

The return of papers on 11 December 2024 included a handful from the Office of the Deputy Premier said to be privileged. I stand corrected, but this claim is also disputed by the Member.

Privilege was asserted under the PII rubric, specifically on the basis that publication would prejudice the proper functioning of government. The brief supporting submission expresses concern that the flow of information about complaints would dry up unless all such information remained privileged. I do not accept this in the general terms that it is expressed. And I confirm advice to that effect after having perused the documents themselves. The only exceptions that I have detected are:

- the revelation of identifying information about a particular child in the email dated 30 May 2024 and its attachments;

-the representations from Mr Anderson MP to the extent that they identify a particular child.

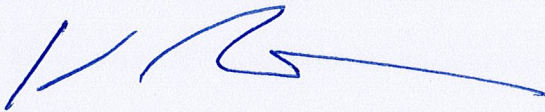
This information should be redacted consistently with the expressed attitude of the Member.

The documents do contain snippets of presumptively protected 'personal information' falling within Standing Order 52 (7) (signatures, private email addresses and the like). Redactions limited to such matters can be made.

Conclusion

If the Department or the Member wished me to revisit any particular matter arising out of this Report then I am naturally happy to do so. I shall however assume that the 'parties' will now be able to agree upon redacted versions of all of the documents in light of the matters discussed herein or any directions from the House.

I thank Ms Allison Stowe for her particular assistance.



The Hon Keith Mason AC KC

ABIGAIL BOYD MLC

MEMBER OF THE NSW LEGISLATIVE COUNCIL

David Blunt
Clerk of the Legislative Council
NSW Parliament

14 March 2025

RE: Dispute of claim of privilege – SO52 Early Childhood Education and Care Sector – interim report

I am writing to respond to the Hon Keith Mason AC KC's *Interim Report Under Standing Order 52 on Disputed Claim of Privilege* for return to order 'Early Childhood Education and Care Sector', dated 24 February 2025.


I would like to thank the Hon Keith Mason AC KC for the considered and thorough manner in which he has sought to address this dispute. I have the following comments in relation to the interim report:

1. In paragraph 3 on page 1 of the interim report it is noted that the documents are being released in tranches. It is perhaps worth noting that there has been no official variation to the scope or timing of the Standing Order 52 motion passed by the House on 13 November 2024. Rather, as a show of good faith, I have attempted to compromise with the Government by informally agreeing to only some of the documents being released by the due date in December 2024, on the understanding that the remainder of the documents would be quickly released in early 2025. Tranche 2 of the documents contained very little useful additional information and together Tranches 1 and 2 represent just a fraction of the documents requested. My attempts to receive further tranches from the Department have not been successful.
2. In relation to disputed document DOE.001.0000429 (page 5), I wish to clarify that I do object to the redaction of the facts identifying the alleged contravention and also the name of the service involved.
3. In relation to disputed document DOE.001.0000610 (page 6), I do not agree with the Department's proposed redactions.
4. In relation to disputed documents DOE.002.0000079 and DOE.002.0000080 (page 7), I maintain that these documents should not be privileged. I found the information in them to be of significant value, particularly as they relate to the interactions between national and NSW regulators.

5. In relation to disputed documents DOE.001.000874 and DOE.001.0000875 (page 7), I do not agree with redaction of centre names. The only redactions should, in my submission, be to the names of children and their birth dates.

I hope that the resolution of dispute on the privilege claims over these documents can be used to avoid the need for disputes on the remainder of the documents due to be delivered under this SO52. In particular, it is my submission that the only personal details that should be redacted in these documents are children's names and their birth dates, extending to their parents names in the rare cases they might be mentioned in connection with an incident. However, I do not believe that it is in the public interest to redact the name of ECEC services, providers or factual circumstances of incidents - all of that information is vital to understanding whether the ECEC Regulator is carrying out its functions appropriately.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'A Boyd', with a stylized, cursive script.

Abigail Boyd MLC

**FURTHER PRIVILEGE DISPUTE SUBMISSIONS FOR RETURN TO ORDER:
Early Childhood Education and Care Sector**

On Friday 7 March 2024 the Department of Education received the Independent Arbiter's *Interim Report Under Standing Order 52 on Disputed Claim of Privilege* (the Interim Report), dated 24 February 2025.

The Department notes that in the Interim Report, the Hon Keith Mason AC KC requested the attitude of the Australian Government in relation to public release of two documents:

- DOE.002.0000079; and
- DOE.002.0000080.

The Commonwealth Department of Education has advised as follows:

The Commonwealth Department considers that the documents contain confidential information and should not be disclosed. This is because the documents contain information about the department's intelligence and investigation capabilities and future plans to detect and investigate criminal activity, particularly fraud against the Commonwealth. Some of the information in the documents could be used to assist members of the public who are engaged in fraud against the Commonwealth to avoid detection or enforcement action. Release of the information could therefore prejudice the Commonwealth's ability to detect, investigate, prosecute and prevent fraudulent activity and could result in taxpayer funds being misappropriated. It is in the public interest for the Commonwealth's fraud detection processes to remain confidential so that the Commonwealth is best placed to protect public funds in its custody.

In addition, the names of the identified Family Day Care providers and services should not be disclosed because the documents contain information about those commercial entities that could be confidential to those entities. The release of this information could have an adverse effect on those providers' and services' reputations and, consequently, commercial interests.

If it is not considered appropriate to withhold the entirety of the documents from publication, the Commonwealth department considers that disclosure of the following parts of the documents are of the most concern:

- *Sections of the reports relating to or referencing data sharing arrangements between the Commonwealth, New South Wales, and any other State or Territory;*
- *Sections of the reports relating to intelligence capabilities of the Commonwealth department including detection capabilities, datasets used to inform detection activities,*
- *Sections of the reports that propose next steps or recommendations;*
- *Names of Family Day Care providers and services.*

On the basis of that information, the Department confirms its submissions already made in relation to those documents.

The Department makes no further submissions on the documents.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Hargans', with a stylized, cursive script.

Sarah Hargans
General Counsel
Legal Services

17 March 2024