Report of the roundtable meeting to consider aspects of the operation of standing order 52

Table of contents

Foreword

I am pleased to present this report of the roundtable meeting held on 3 November 2020 to discuss aspects of the operation of standing order 52.

The roundtable, which was proposed by the independent legal arbiter, the Hon. Keith Mason AC, QC, provided a valuable opportunity for key stakeholders to raise their concerns and to propose options for reform.

I would like to thank all participants for engaging so constructively with some of the more challenging aspects of the exercise of the Legislative Council's power to order State papers.

Hon John Ajaka MLC
President

Background

1.1 In several of his recent reports, the independent legal arbiter, the Hon. Keith Mason AC, QC, raised concerns about the substance of claims of privilege being made in relation to a number of orders for papers. Among other things, Mr Mason expressed frustration with unsupported or inappropriate claims of privilege, which in his view failed to demonstrate an understanding of the principles enunciated in his previous reports.[1]

1.2 In July 2020 the Procedure Committee received a Discussion Paper on current issues relating to orders for papers, touching on several of Mr Mason's concerns. The paper is included at Appendix 1.

1.3 On 16 September 2020, the Legislative Council resolved that, in light of the arbiter's concerns and frustrations regarding the substance of privilege claims, the President convene a roundtable meeting before the end of the 2020 parliamentary sitting year.[2]

1.4 In a memorandum to the Clerk of the Parliaments dated 24 September 2020, Mr Mason raised three specific issues for discussion at the roundtable: the definition of privilege; how to best deal with 'genuinely private information'; and the broader 'conciliation' role of the arbiter. The memorandum is included at the end of the 'Principles' document which is provided at Appendix 3.

1.5 On 28 October 2020 the Department of Premier and Cabinet (DPC) presented a response to the Discussion Paper prepared for the Procedure Committee. This can be found at the end of Appendix 1.

1.6 On 3 November 2020, pursuant to the resolution of the House, the President convened the roundtable proposed by Mr Mason. The participants included the Leader of the Government, the Hon Don Harwin; the Leader of the House, the Hon Damian Tudehope; the Deputy President, the Hon Trevor Khan; the Assistant President, the Hon Rod Roberts; the Minister for Education and Early Childhood Learning, the Hon Sarah Mitchell; the Leader of the Opposition in the Legislative Council, the Hon Adam Searle; the Deputy Leader of the Opposition in the Legislative Council, the Hon Penny Sharpe; the Hon Emma Hurst, representing the Animal Justice Party; Mr David Shoebridge, representing The Greens; the Clerk of the Parliaments, David Blunt and General Counsel, DPC, Ms Kate Boyd.

1.7 On 10 November 2020 the House agreed to a sessional order, proposed by Mr Shoebridge, to formalise a process for agencies to seek to vary the scope of an order for papers where the timeframe for production is unduly onerous or the terms of the order are too broad.[3] On 24 November, the sessional order was invoked for the first time when the House agreed to vary the due dates in relation to four orders for papers.[4]

1.8 This report summarises the key issues discussed at the roundtable and the reforms proposed by participants to address these matters.

---

[1] See for example, Rules Based Environmental Water, 1 September 2020.

[2] *Minutes,* NSW Legislative Council, 16 September 2020, p 1295.

[3] *Minutes*, NSW Legislative Council, 10 November 2020, p 1555.

[4] *Minutes,* NSW Legislative Council, 24 November 2020, p 1846.

Key themes discussed at the roundtable

1.9 The following section discusses four key themes discussed at the roundtable: the increase in the scope and volume of orders; the quality of privilege claims; the challenges posed by personal information in documents returned to the House and whether 'privilege' should be defined under standing order 52.

The scope and volume of orders

1.10 As detailed in the Discussion Paper to the Procedure Committee, the 57th Parliament has seen a significant increase in the number and scope of orders for papers. Several stakeholders, including Mr Tudehope, suggested that this increase is at the heart of the issues raised at the roundtable:

> Potentially at the crux of the problem and why we are here today is the foregoing issue of the volume of material that is being asked to be produced and considered by DPC and the Government in terms of making its claims.[5]

1.11 This view was shared by Mr Mason: 'Some recent problems … from my perspective, are pretty obviously the sheer volume of the disputes and in some cases the documents.' [6]

1.12 According to Mr Searle, one of the reasons for the increase in the number of orders is the reduced efficacy of other accountability mechanisms:

> The Government has worked very strenuously over the last 10 years to undermine the efficacy of question time, of questions on notice, of answering questions in budget estimates and … the Government Information (Public Access) Act [GIPA] process ... The frustration of having to grapple with these processes has in part informed the increasing resort to Standing Order 52 applications. [7]

1.13 Ms Sharpe expressed a similar view:

> The difficulty that we have here is that the practice and the mistrust in relation to dealings between members of Parliament through either the GIPA Act or through the questions on notice and other processes, and often between individual Ministers, has led to a point where people are willing to use SO 52s that I think are too wide ... [8]

1.14 Mr Shoebridge suggested that the quality of answers to questions had contributed to a 'major trust deficit' with the Government of the day and that 'Genuine engagement in those other processes will lift a significant amount of the pressure off the SO 52 power.' [9]

1.15 While Government members acknowledged that there was scope for increased negotiation and discussion between ministers and other members to refine the scope of orders, they disagreed with the assertion that ministers were not already in the practice of engaging in those

[5] Mr Tudehope, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, pp 4-5.

[6] Mr Mason, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 2.

[7] Mr Searle, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 7.

[8] Ms Sharpe, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 10.

[9] Mr Shoebridge, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 11.

discussions. Mrs Mitchell pointed to specific examples where negotiation had narrowed the scope of an order to the satisfaction of both the member and the department.[10]

1.16 Mr Tudehope and Ms Boyd also observed that DPC were particularly well placed to assist members to identify which agencies are responsible for which functions in government. Ms Boyd suggested that, if that assistance was sought in future, it would minimise duplication and ensure that members target orders more effectively.[11]

1.17 The management of personal information contained in documents published under standing order 52 was a significant theme discussed at the roundtable.

1.18 There was general agreement that privacy was not a recognised head of privilege, as articulated by Mr Mason: ' … the bottom line is I have real difficulty in seeing privacy, even email privacy, as privilege.' Nevertheless, participants, including Mr Mason, agreed that in many cases genuinely private information, such as phone numbers, email addresses and bank account details, should remain private: 'I recognise all sorts of reasons why it should be respected and protected but it is not really within the call of privilege.'[12]

1.19 Ms Boyd acknowledged that agencies sometimes make overly expansive privilege claims because they don't have time to redact personal information from large orders with short timeframes. She noted the unfortunate consequence of a privilege claim made in relation to the Rules Based Environmental Water and Stronger Country Communities Fund returns. In those instance the arbiter rejected the 'very general and sweeping' privilege claims made by the agencies in relation to privacy, but in the absence of an agreed process to redact personal information, the home addresses of certain constituents were published.[13]

1.20 However, Ms Boyd also suggested that the subsequent publication of the data by the House may reflect an overeliance on the arbiter's assessment on the validity of the privacy claim, without due regard for the impact that publication of data can have on the personal safety and privacy of individuals. She suggested that consideration should be given not only to the validity of a claim but whether information needed to be published to enable the House to carry out its functions.[14]

1.21 Mr Mason suggested that the House and the Executive should devise an agreed approach to the redaction of genuinely private information,[15] acknowledging that the 'detail and timing' of such a solution would take some consideration.[16] Ms Boyd also advocated for the development of an alternative procedure for flagging personal information.[17]

---

[10] Mr Tudehope and Mrs Mitchell, Transcript – Roundtable - to discuss standing order 52, 3 November 2020, pp 20-21.

[11] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 14; Mr Tudehope, ibid, p 20.

[12] Mr Mason, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 3.

[13] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 15.

[14] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 15.

[15] Mr Mason, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 3 and 18.

[16] Mr Mason, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 18.

[17] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 15.

1.22 According to Mr Searle, privacy is a problem that is 'more imagined than real.' [18] because the House always agrees to requests regarding privacy and there is never any pushback from members: '… no one wants to publish the private details of everyday citizens.' [19] Mr Searle did not accept that the Government lacks the resources to remove personal information, citing his previous experience in private legal practice where he routinely dealt with a large number of documents, short timeframes and fewer resources than the Government has at its disposal. Mr Shoebridge expressed similar sentiments also based on his own professional experience.[20] Notwithstanding his comments regarding the privacy 'problem' Mr Searle said he was open to administrative solutions to address the issue.[21]

1.23 Mr Tudehope and Ms Boyd both highlighted the seriousness with which they took their responsibility to protect privacy, and the need for an alternative procedure for dealing with such information. The Government suggested that dispensing with the automatic publication of documents returned would go some way to address this issue. This issue is discussed later in the chapter.

The quality of privilege claims

1.24 Concerns about the quality of privilege claims made by some government agencies was a major impetus for Mr Mason's proposal for a roundtable. Mr Mason has been very critical of what he perceives as generic and unfocussed claims prepared by seemingly inexperienced 'players',[22] that do not reflect the jurisprudence provided by previous reports.[23]

1.25 While mindful of DPSs heavy workload and other priorities, Mr Mason also noted an apparent absence of quality control by DPC over submissions.[24]

1.26 Mr Searle was also critical of many of the Government's privilege claims, suggesting that some claims appear to be made 'to try to slow things down rather than engage with the process'.[25]

1.27 Ms Boyd acknowledged participants' concerns about the quality of certain privilege claims, but suggested that poor quality submissions were largely a consequence of the volume and breadth of orders and tight timeframes. 'These are orders that in a private litigation context would take

[18] Mr Searle, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 7.

[19] Mr Searle, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 7.

[20] Mr Shoebridge, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 11.

[21] Mr Searle, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 7.

[22] Mr Mason, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, pp 3-4.

[23] Memorandum from Mr Mason to the Clerk of the Parliaments, 24 September 2020, p 1. For example, in the Westconnex, Sydney Stadiums and Stronger Communities Fund reports, the arbiter firmly rejected the claims of parliamentary privilege made by the Executive. Mr Mason observed that parliamentary privilege exists to protect parliament from obstruction of its powers by the courts and other bodies; it does not exist to protect the Executive from scrutiny by the Parliament. Notwithstanding Mr Mason's clear words in these earlier reports, parliamentary privilege was again claimed in September 2020 in relation to documents returned as part of the order relating to Rules Based Environmental Water. The arbiter swiftly concluded that the claim was without any merit. See Part B: A summary of each of the reports of Independent Legal Arbiters - the Hon Keith Mason AC QC and The Hon J C Campbell QC, pp 22-23.

[24] Mr Mason, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 3.

[25] Mr Searle, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 8.

months or years to produce to the court.'[26] According to Ms Boyd, it was therefore not realistic to expect that agencies would be able to craft quality privilege submissions.[27] Nor was it realistic, she suggested, to expect DPC to be able to review every claim:

> … we [DPC] try our best to ensure that General Counsels across the sector are apprised of the relevant decisions of the arbiter and that they understand public immunity principles to ensure that a consistent approach is taken .... it is just not realistic for DPC to review every document and test every privilege claim to ensure that the return is to the standard that the House will appreciate or accept. So we do our best, but it is not a perfect process.[28]

1.28 Ms Boyd contended that the automatic publication by the House of documents upon which there is no claim of privilege or privilege has not been upheld by the arbiter, encourages agencies to take an overly cautious approach and to submit less than ideal privilege claims:

> What they [the agencies] are trying to do is flag to us that these documents are sensitive in the context where if they do not make that claim, the document is published to the world at large ... It is really just a protective measure that we are forced to take because the onus is on Government to do that where automatic publication occurs. [29]

1.29 Mr Harwin also noted that the large volume of orders, coupled with the automatic publication of documents, invariably affects the quality of Government submissions:

> … as soon as the documents arrive, they are published. Therefore, the Government naturally has to have extensive claims of privilege. If the volume is very large, it is difficult to come up with quality submissions to the arbiter as to why they should be privileged.[30]

1.30 DPC rejected any notion that problematic privilege claims stemmed from a lack of respect for the Council's role in executive accountability, as Ms Boyd explained:

> … especially in DPC we have a very unique understanding of the scrutiny role of the House, a respect for the role that it plays in responsible government and the public interest. That is always the way we assess these matters …[31]

1.31 Ms Boyd also explained that agencies' concerns about the inadvertent publication of personal or private information in particular, was a major factor in drafting privilege claims, as discussed below.

[26] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 20.

[27] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 14.

[28] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 20.

[29] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, pp 14-15.

[30] Mr Harwin, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 6.

[31] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 14.

The meaning of 'privilege' under standing order 52

1.32 Mr Mason suggested that the meaning of privilege under standing order 52 was ambiguous and an attempt should be made to define it.[32] Minister Tudehope agreed that it would be helpful to clarify the term.[33] Mr Shoebridge was also supportive as long as any definition codified the current understanding of the practice and procedure.[34] Likewise, Mr Searle was not opposed to clarifying via sessional order, what the House would regard as a claim of privilege.[35]

1.33 While generally supportive of seeking to clarify the definition of privilege and the role of the arbiter, Ms Boyd suggested that a lot of the concerns being raised about privilege claims 'would fall away' if there were fewer and less onerous orders: 'We would like to see the focus on that as opposed to any definition of privilege being the main solution.[36]

1.34 The meaning of privilege in Standing Order 52 is well understood by all the key players: members of the Legislative Council, the independent legal arbiter and DPC. However, at times there would appear to be some confusion about the meaning of this term in the context of the standing order among other government agencies – hence the propensity of some agencies to include extraneous material in privilege claims or submissions to the arbiter seeking to argue the role of the arbiter. Rather than amending Standing Order 52 to define the term 'privilege', the easiest way to address this problem may be through the circulation of additional educational material about the principles articulated by the arbiter (as outlined below at paragraphs 1.48 to 1.52).

Proposals for reform

1.35 The following section discusses several initiatives proposed by participants to address the issues raised during the roundtable. This includes: varying the scope and timeframe for orders via sessional order; holding a workshop on drafting orders; the wider distribution of summary documents prepared for the roundtable; the 'compilation' of documents to provide relevant information sought by an order; the staged publication of documents containing personal information and the introduction of electronic returns.

Varying the scope and timeframe for orders via sessional order

1.36 At the time of the roundtable (3 November 2020) Mr Shoebridge had given notice of a motion to vary standing order 52. The proposed amendment was designed to formalise a process for agencies to negotiate with members to vary the scope of an order for papers where the timeframe for production is unduly onerous or the terms of the order are too broad. If the President and the relevant member agreed to the request, the terms of the order would be varied unless and until the House determined otherwise.[37]

[32] Mr Mason, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 4.

[33] Mr Tudehope, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 4.

[34] Mr Shoebridge, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 12.

[35] Mr Searle, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 8.

[36] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 16.

[37] The sessional order is reproduced in Appendix 4.

1.37 While there was general support for the proposed sessional order among roundtable participants, including the Government, Mr Tudehope's preference was for any negotiation on orders to occur *before* an order was agreed to by the House:

> … we would be wanting an even more vigorous process up-front to say, 'Put the motion on the table, tell us the documents which you are seeking and see if we can negotiate a position before the motion is moved and the order of the House becomes the order of the House'.[38]

1.38 On 10 November 2020 the House agreed to the sessional order proposed by Mr Shoebridge.[39] On 24 November, the sessional order was invoked for the first time when the House agreed to vary the due dates in relation to four orders for papers.[40]

1.39 While open to the proposal for negotiations to occur *prior* to an order being agreed to, Mr Searle observed that in the past he had not received any overtures from the Government in relation to a number of Opposition motions that had been 'on the table' for some time.[41] Mr Shoebridge was less inclined to support Mr Tudehope's suggestion, arguing that while a small number of Ministers might be prepared to negotiate in relation to such motions, most of the time the Government was not:

> The motion is moved and then radio silence … I cannot see the House agreeing to consciously hamper its ability to move SO 52s like that. … I could be wrong, but I think the way of testing that would be engaging in good faith in that over the next little bit. If we can see that there is a willingness and if it is useful, and there may be a way of formalising it at some point, but at the moment it seems like a hollow promise designed to delay.[42]

1.40 The discussion at the roundtable regarding Mr Shoebridge's proposed sessional order took place before the sessional order was agreed to by the House. Having been agreed to relatively recently and utilised in relation to four orders only, members may wish to monitor its operation and impact during the first half of 2021 before giving further consideration to alternative proposals to negotiate the scope and timeframe for orders.

A workshop on drafting orders for papers

1.41 As noted in the recent Discussion Paper prepared for the Procedure Committee, well drafted and targeted motions reduce the likelihood of unnecessary documents being returned. Consistency in drafting also adds to the overall body of precedent on which the House relies to confirm its power to order the production of state papers.[43]

1.42 During the roundtable, Ms Boyd noted the likely impact of more targeted orders on the quality of privilege claims: 'If they [orders] are narrower in scope and they are targeted to key documents

[38] Mr Tudehope, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 20.

[39] *Minutes*, NSW Legislative Council, 10 November 2020, p 1555.

[40] *Minutes,* NSW Legislative Council, 24 November 2020, p 1846.

[41] Mr Searle, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 20.

[42] Mr Shoebridge, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 21.

[43] Current issues relating to Orders for Papers, Discussion Paper - 28 October 2020, p 16.

and agencies, we will have more time to consider whether privilege claims are appropriate and necessary.' [44]

1.43 In the Discussion Paper, the Clerk proposed to conduct a workshop for members and their staff to assist in drafting targeted motions. Mr Tudehope was supportive:

> I welcome the workshop in relation to the drafting of orders … If there is an opportunity of getting better structured orders identifying the documents, then consequently the claims being made would be limited. I would be urging a consideration of that sort of proposal.[45]

1.44 The Discussion Paper also included draft guidelines to assist members in preparing orders. An outline of the proposed workshop and a copy of the guidelines are appended to the Committee's report which is attached at Appendix 1.

1.45 Given broad support for this initiative from the roundtable participants, I have asked the Clerk of the Parliaments to conduct the workshop(s) in early 2021, prior to the sittings of the House. The workshop would also be open to members' staff, given they often play a key role in drafting orders. I have also asked the Clerk to distribute the finalised guidelines to all members following the workshop.

Distributing summary materials prepared for the roundtable

1.46 The following documents were prepared by the Procedure Office to facilitate participants' preparation for the roundtable:

- Part A - Principles articulated by the Independent Legal Arbiters - The Hon Keith Mason AC QC and The Hon J C Campbell QC
- Part B - A summary of each of the reports of Independent Legal Arbiters - the Hon Keith Mason AC QC and The Hon J C Campbell QC
- Part C – Summary of key information about reports prepared since 2014

1.47 During the roundtable, Mr Mason suggested circulating these documents to agencies so that they are aware of what he referred to as the relevant 'jurisprudence' generated by previous arbiters' reports.[46] Mr Shoebridge agreed:

> … the provision of a paper not dissimilar to what we have had distributed here, which sets out at least the House's position about how these things will be done … might be of assistance in those agencies.[47]

1.48 Mr Searle also suggested that the 'Principles' document be made more widely available to members so as to assist them to frame their disputes.[48]

---

[44] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 15.

[45] Mr Tudehope, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 20.

[46] Mr Mason, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 3.

[47] Mr Shoebridge, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 20.

[48] Mr Searle, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 6.

1.49 While not opposed to disseminating the documents to agencies, Ms Boyd noted that DPC currently provides guidance material to agencies subject to an order, and that the lack of sophistication observed in some submissions on privilege is often a consequence of unrealistically tight deadlines.[49]

1.50 Several members commented on the excellent materials prepared for the roundtable and I support Mr Mason's suggestion regarding their wider dissemination to agencies. The 'Principles' document referred to by Mr Mason is appended to this report and, upon tabling of this report, will be readily available to agencies (via DPC) to assist in framing their privilege claims and to members in framing their disputes, as per Mr Searle's suggestion. The 'Principles' document will also be published on the Legislative Council's page on the Parliament's website and will be updated regularly by the Procedure Office.

'Compiling' documents in response to orders

1.51 During the roundtable the Clerk of the Parliaments noted that some agencies and Ministers, especially in the 'education space', facilitated responses to orders by compiling a document which provides the information being sought by the order. While noting Solicitor General's advice from 2014 on the powers of the Council to require the creation of a document, in the Clerk's view, producing one document rather than a 'truckload' might be a pragmatic solution to what would sometimes otherwise be voluminous returns.[50]

1.52 Wherever possible, Ministers and agencies are to be encouraged to adopt a pragmatic approach and to engage in dialogue with Members of the Legislative Council around the nature of the information being sought via Notices of Motion for orders for papers and how that information can be produced most efficiently.

The staged publication of documents containing personal information

1.53 The most significant suggestion for reform discussed at the roundtable was the Government's proposal for the House to dispense with the automatic publication of documents containing personal information.

1.54 According to the Government, one of the reasons agencies make overly expansive or inappropriate privilege claims is because they are concerned that personal or sensitive information may be revealed when documents returned are automatically published by the House (because a privilege claim wasn't made, or because the arbiter did not uphold a claim of privilege).

1.55 In its response to the Discussion Paper prepared for the Procedure Committee, DPC contrasted the way the House deals with compulsorily required documents with how this function is managed by other bodies. The courts, statutory inquiries and Royal Commissions only publish documents *after* they have been reviewed, whereas documents over which a claim of privilege is

[49] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 20.

[50] Mr Blunt, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 18.

not made are published by the House automatically. Similarly, DPC contends, submissions to parliamentary committees are only published *after* they have been reviewed by committee staff.[51]

1.56 As Ms Boyd explained, if a return is small and the timeframe not too tight, it may be possible to provide a redacted and unredacted version of a return. However, given the typical scope and volume of orders, in most cases it is impractical for agencies to identify and redact personal information prior to delivering returns: 'There is no way we can redact all personal information within 21 days on a broadly based order … They are often littered throughout email chains. It is a big issue administratively for us.'[52]

1.57 Ms Boyd admitted that agencies' anxiety about divulging personal information leads to expansive or inappropriate privilege claims where agencies do not have time to redact personal details in the timeframe required.[53] DPC proposed a process which would allow agencies to get a little more time to check for and propose redactions.[54]

1.58 Ms Boyd's proposal would involve dispensing with the automatic publication of documents returned, as explained in DPC's response to the Discussion Paper:

> 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.[55]

1.59 Roundtable participants, including Mr Searle, indicated a willingness to find procedural or administrative ways to deal with this issue, given members will invariably agree to redact personal information from documents returned if it is not relevant to the House's review function.[56] However, the challenge will be to agree on how such a system might work in practice.[57]

1.60 Several of the proposals put forward by DPC to the roundtable, including the suggestion relating to dispensing with automatic publication, have been proposed previously, as noted by the Clerk:

> … a number of those issues were addressed by the Privileges Committee in its 2013 Mt Penny report and a number of those issues were also addressed in submissions made to Mr Mason in relation to his Westconnex report in 2104. I think some of those issues

[51] Department of Premier and Cabinet - Response to the Discussion Paper prepared for the Procedure Committee, 28 October 2020, p 13.

[52] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 18

[53] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 15

[54] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 18

[55] Department of Premier and Cabinet - Response to the Discussion Paper prepared for the Procedure Committee, 28 October 2020, p 14.

[56] Mr Searle, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 7 and 9.

[57] Mr Mason, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 18.

> have probably been argued and dealt with but it does not mean that they cannot be argued and dealt with again, but they have been addressed.[58]

1.61 However, it would appear that the proposal to dispense with automatic publication, as expressed by DPC at the roundtable and in its response to the Discussion Paper, has been refined so that it would now only apply to a specific category of documents – namely those which may contain private information – rather than to all documents returned.

1.62 All of the parties involved in the roundtable agreed that the publication of personal information in returns is often not required for the House to undertake its scrutiny role, and there was considerable goodwill among participants to find a way to protect genuinely private information. However, as the Clerk of the Parliaments noted at the roundtable, in formalising such an approach: 'the devil will be in the detail'.[59] Notwithstanding the challenges involved, I have asked the Clerk to draft a sessional order that will seek to protect privacy without undermining the ability of members to undertake their constitutional responsibilities in a timely manner.

Electronic returns

1.63 The Legislative Council and DPC have been working on a project to develop electronic returns (e-returns) for the past six months. The recent funding received from Treasury for the Parliament's Digital Transformation project means that the Council is now in a position to deliver the project which would provide significant benefits to members, the Parliament, DPC and other agencies. At the roundtable, the Usher of the Black Rod, Ms Jenelle Moore, who is managing the project for the Legislative Council, described how the returns might work in practice, emphasising that the Council was eager to design a system that would satisfy DPCs requirements:

> The eReturns in practice at the moment would involve designing a parliamentary portal that would connect with the Parliament's existing databases for storage and access. That would comprise of four key features. The first one is a secure workspace for authorised users in DPC and other agencies as requested to upload and sort the documents prior to lodging. Secondly, a secure transfer facility for the Parliament to receive the documents, store the documents and make them available either as a public return or a privilege return. A separate viewing platform for public and privileged so privileged documents would be made available only to members and subject to their identity being verified.
>
> Finally, capacity for members to flag documents in a privilege return to form part of their dispute and link capacity for those documents to be made available to the Arbiter.[60]

1.64 Mr Searle noted that the Opposition has been asking for electronic returns for sometime and has developed its own system for producing electronic copies of public returns in the interim by utilising a high speed scanner. This is very much an interim solution only.

---

[58] Mr Blunt, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 17. See Legislative Council Privileges Committee, *The 2009 Mt Penny return to order*, October 2013, chapter 5.

[59] Mr Blunt, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 17.

[60] Ms Moore, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 17.

1.65 Ms Boyd acknowledged that electronic production was a sensible development that would significantly reduce the burden for agencies but cautioned that:

> …The issue is that the integrity of the data and the security of that data are paramount. We have not been willing to merely provide, for example, a USB or a PDF that can be shared or lost or manipulated. It is not appropriate for Government information that potentially is sensitive to be treated in that way and it is inconsistent with our own standards for data security that we apply in agencies.[61]

1.66 Ms Boyd told the roundtable that DPC enjoys a really positive working relationship with the Clerk and his team, and DPC was happy to work with the Parliament to develop a robust system that ensures that their concerns about data integrity are addressed.[62]

1.67 While supportive of the potential efficiencies to be gained from returning documents in electronic format, and affirming its commitment to working with the Parliament to establish a digital solution, DPC holds 'significant concerns' regarding the automatic online publication of documents. Citing a determination by the Information Commissioner regarding the publication of personal details on local government websites, DPC concluded that:

> …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.[63]

1.68 DPC advised that agreement to an alternative procedure for dealing with private information would address some of the Government's concerns regarding the return of electronic records.[64] (see the discussion above).

1.69 The potential for electronic returns to bring efficiencies to and mitigate risks in the administration of order for papers under Standing Order 52 cannot be overstated. I am informed by the Clerk that at its meeting in December 2020 the Parliament's independent Audit and Risk Committee resolved:

> That the Committee notes with concern the risks posed by the current methods of production of documents in paper form, in response to the orders for papers process, and that these risks could be significantly mitigated by the digital production of documents.

1.70 If the absence of a suitable mechanism to deal with documents containing private information is a potential sticking point to electronic returns being embraced by DPC and government agencies, then identifying such a mechanism would appear to be a worthwhile project for concerted attention of interested members and the Legislative Council Procedure Office.

[61] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, pp 15-16.

[62] Ms Boyd, Transcript - Roundtable - to discuss standing order 52, 3 November 2020, p 23

[63] Department of Premier and Cabinet - Response to the Discussion Paper prepared for the Procedure Committee, 28 October 2020, p 16.

[64] Department of Premier and Cabinet - Response to the Discussion Paper prepared for the Procedure Committee, 28 October 2020, p 14.

Appendix 1 Discussion Paper prepared for the Procedure Committee – Current issues relating to orders for papers and response from the Department of Premier and Cabinet

DISCUSSION PAPER – CURRENT ISSUES RELATING TO ORDERS FOR PAPERS

Background

At the committee meeting of 17 June, the Procedure Committee discussed a number of issues concerning orders for papers and the process of evaluating disputed claims of privilege. The President proposed that the Clerk prepare a briefing paper for the Committee to be tabled for the information of members at the next meeting.

This Briefing Paper first provides statistics and details on recent orders for papers agreed to by the Legislative Council.

The Briefing Paper then discusses three main matters relating to orders for papers:

- drafting of orders for papers and a workshop and drafting guidelines proposed by the Clerk
- the potential for electronic returns
- the independent legal arbiter's proposal for a roundtable to discuss the process for evaluating disputed claims of privilege.

Resources

The power of the House to order the production of State papers is fundamental to the constitutional role of the Legislative Council in holding the Government to account under the system of responsible government. The power was confirmed by the High Court of Australia and the New South Wales Court of Appeal in the Egan decisions of the mid to late 1990s.

The following resources may assist in preparing orders for the production of State papers:

- *Lovelock and Evans, Legislative Council Practice, 2008:* Chapter 17 outlines the power of the Legislative Council to order the production of State papers and the Egan cases that confirmed the power.

- *Want and Moore, The Annotated Standing Orders of the New South Wales Legislative Council, 2017:* provides an updated account of the exercise of the power of the Legislative Council to order the production of State papers and a practical and comprehensive analysis of the developments in the arbitration mechanism, claims of privilege and disputes.

- *Stage Three of the Legislative Council Oral History Project: The Legislative Council and Responsible Government: Egan v Willis and Egan v Chadwick:* A monograph telling the story of the Egan

cases that occurred in the late 1990s which enabled the courts to confirm the power of the House to order the Government to provide State papers.

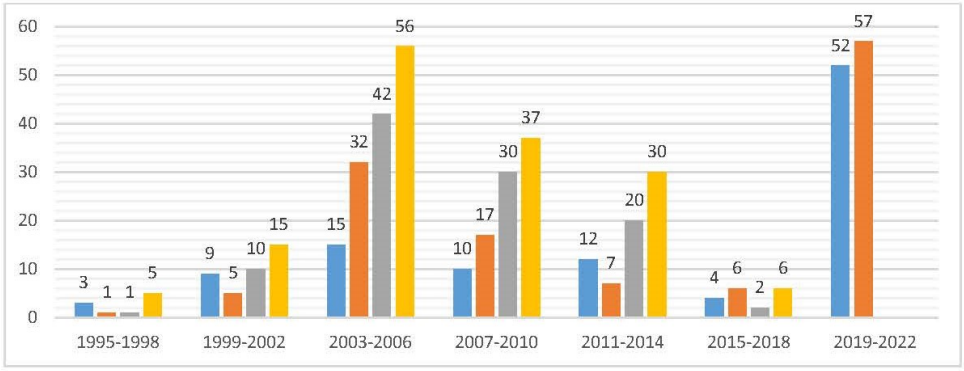
- *The Egan decisions:* In the *Egan* cases, a series of three court decisions between 1996 and 1999 prompted by the refusal of the Treasurer and Leader of the Government in the Legislative Council, the Hon Michael Egan to table certain State papers ordered to be produced by the Legislative Council, confirmed the power of the Council to order the production of State Papers, including those that were subject to claims of legal professional privilege and public interest immunity. See the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650, the decision of the High Court in *Egan v Willis* (1998) 195 CLR 424 and the decision of the New South Wales Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563.

- *NSW Legislative Council Privileges Committee,* 'The 2009 Mt Penny return to order', 2013: In the course of an inquiry into the circumstances surrounding alleged non-compliance with an order for papers, the committee made a number of proposals to improve processes relating to the drafting of orders, the coordination of returns and the arbitration process.

The increase in orders for papers in the 57th Parliament

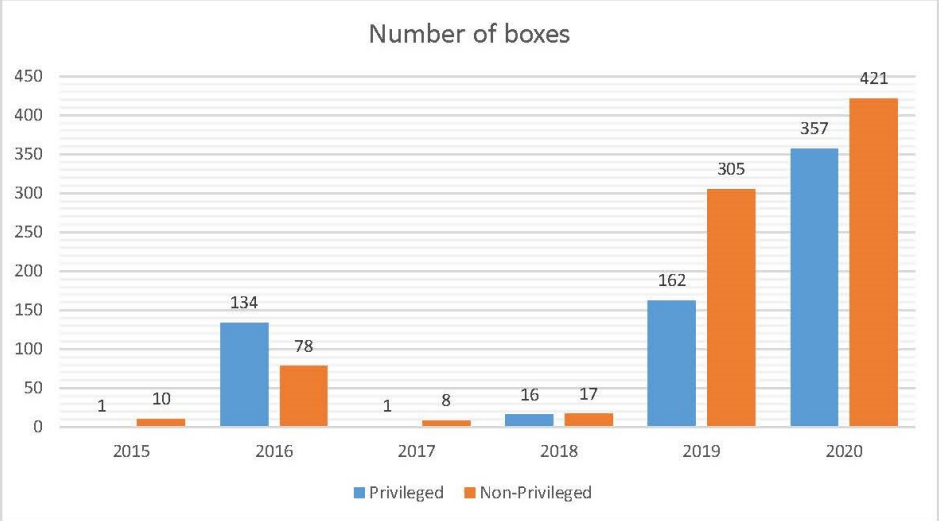
Since 1995 the House has exercised its power on numerous occasions, with numbers of orders peaking in 2006 before reducing over the following 10 or so years.

In the first two years of the 57th Parliament the number of orders has again increased with 52 agreed to in 2019 and 57 so far in 2020, 35 of which contain privileged documents.



Total orders for papers made in 51st Parliament (1995-1998): 10
Total orders for papers made in 52nd Parliament (1999-2002): 39
Total orders for papers made in 53rd Parliament (2003-2006): 145
Total orders for papers made in 54th Parliament (2007-2010): 94
Total orders for papers made in 55th Parliament (2011-2014): 69
Total orders for papers made in 56th Parliament (2015-2018): 18
Orders for papers 57th Parliament (2019): 52
Orders for papers 57th Parliament (2020 to August 2020): 57

While some orders have been very targeted, and have resulted in the production of a single document or a small number of documents, others have been broader in scope and have resulted in the production of thousands of documents. During 2020, 357 boxes of privileged documents and 421 boxes of non-privileged boxes were received. The following graph shows the increase in the number of boxes received in the last financial year compared to previous years.



The large number of orders for papers and the broad scope of orders necessarily impacts on the capacity of the Department of Premier and Cabinet and government agencies to manage the process. A number of these larger returns have been provided in parts. Several of the 57 orders for papers agreed to since February 2020 have initially been returned only in part, with advice that additional documents would be provided at a later date. For example:

- Operator of the Maules Creek Coal Mine and Biodiversity Offsets – final lodgement of documents captured by the order received one month after due date
- Federal Financial Relations Review – first supplementary return received nine days after the due date and a second supplementary return received six weeks after the due date
- Transport Asset Management Plan – partial return received 3 June 2020 and supplementary return received 12 June 2020
- Get Wild Pty Ltd – first partial return received 17 June 2020 with advice that the final return would be received on 20 July 2020. On 23 July the Clerk received correspondence advising that the 20 July 2020 timing was not possible due to the volume of email records captured by the order and that a software solution was being trialled to reduce timeframes. At the time of writing the return has not been received.
- Young High School Joint Use Library and Community Facility – first return received on the due date of 20 July (4 boxes) and the remainder of 120 non-privileged and 70 privileged boxes of documents returned on 29 July 2020.

Correspondence from agencies in response to orders for papers indicate that complying with a return can impose considerable administrative burdens and costs:

- Complaints and Referrals Regarding Unlicensed Electricians was estimated to have taken 312 hours to produce four boxes of public documents
- Personal Protective Equipment was estimated to have taken 770 staff hours to produce four boxes of public and 2 boxes of privileged documents
- Federal Financial Relations Review was estimated to have cost $69,268.69 in external costs to produce 5 boxes of public documents and 1 box of privileged documents

- Workers Compensation Scheme Providers was estimated to cost $1,864.75 in staff hours and $169,172 in external costs for 20 boxes of public documents and 39 boxes of privileged documents.
- Transport Asbestos Registers, which resulted in over 50 boxes of public documents was estimated to have cost $60,000 in printing costs. The correspondence explains that the processing of the order took an average of 10 minutes per record for over 70,000 records.

The increasing number of returns and boxes received has required the allocation of additional Legislative Council staff resources to the management of returns to orders. Legislative Council Procedure Office staff manage the receipt, registration, labelling and storage of returns; assist the independent legal arbiter by identifying disputed documents; re-sort and re-box documents following decisions of the House to make certain documents public; and supervise the viewing of returns to orders. When the level 6 storage area becomes full, Procedure Office staff organise for boxes containing documents returned to orders of the House to be transferred to the care, but not control, of State Archives. The cost of transferring documents to and from State Archives has become increasingly expensive as the number of documents received has increased.

On Tuesday 25 August 2020, Mr David Shoebridge MLC gave notice of a sessional order with the purpose of addressing some of the issues raised by departments and agencies regarding compliance with scope and timeframes of orders for papers. The proposed sessional order provides for the Department of Premier and Cabinet (DPC) to request in writing within 7 days of the date of the passing of an order for papers that the terms of the order be varied. DPC must provide reasons for the request. If the member who initiated the order for papers and the President agree on varied terms the compliance with the varied terms is taken to be compliance with the original order until the House considers the matter on the next sitting day. If the House does not agree with the varied terms the original order remains in force. As business of the House, the proposed sessional order will have precedence when the House next sits.

Drafting workshop

Well drafted and targeted motions ensure the information sought by an order is received and limits unnecessary documents being returned. Consistency in drafting also adds to the overall body of precedent on which the House relies to confirm its power to order the production of state papers.

The Clerk has recently proposed a workshop for members' and their staff to assist in drafting targeted motions.

The workshop would cover:

- the power of the House to order State papers
- the role of the Department of Premier and Cabinet
- the drafting process and deadlines
- the detail required by the Procedure Office so that it can assist in drafting
- the administrative process for managing returns to orders
- the arbitration process
- helpful resources for determining where orders should be directed
- clarification of some of the issues that arose from advice from the Government in this regard following machinery of government changes, which also frustrated some returns to orders.

The workshop will also be an opportunity to discuss the role of the Procedure Office and the information required by the office in order to provide drafting assistance.

While most requests to the Procedure Office for drafting assistance are lodged well in advance of a sitting, some are received very close to the sitting of the House and if these also contain complex instructions, or require further consultation, the short time frame can have a significant impact on the ability of staff to provide quality advice and assistance.

The Procedure Office has developed drafting guidelines to assist members in preparing orders for papers. The guidelines will be discussed at the workshop as they address some of the issues that may delay the production of draft notices of motions for members, including:

- unclear directions that require staff to seek further clarification or conduct initial research in order to understand the request,
- broad date ranges that may not be required and may potentially result in larger than necessary returns.
- unrealistic or unreasonable return dates such as seven days for large volumes of documents.[1]
- inadequate detail or colloquial or imprecise references to policies, programs or legislation.

The workshop will be delivered at a time to capture as many staff and members as possible and could be repeated via webex as necessary. An outline of the proposed workshop is attached at Appendix A. The guidelines are also attached, at Appendix B.

Electronic returns to orders

SO 52 refers to orders for the production of 'documents'. The definition of a document extends to a number of materials and formats under the provisions of s 21 of the *Interpretation Act 1987*, and returns since 2009 have on occasion included data in electronic format on CD and USB.[2]

At present, it is routine for returns to include large volumes of hard copy printouts of emails and other files that might more easily be provided, reviewed and searched in electronic form. When these returns are lodged, Council staff are tasked with supervising large numbers of people viewing hard copy documents, managing photocopying, sorting documents that have been occasionally misfiled in boxes and transferring boxes to storage around the building and offsite to State Archives in order to accommodate the number of documents received. Much of this work could be mitigated if the documents provided were lodged electronically. Likewise, members, their staff and others spend significant hours photocopying documents that could more easily be searched in electronic form.

Correspondence from agency secretaries included within returns indicates that complying with a return can cost an agency tens of thousands of dollars, owing in part to the time and cost involved in printing and boxing documents. As noted above, correspondence relating to the recent Transport Asbestos Register return stated that the cost of printing alone had incurred a cost of $60,000. The cost of transferring documents to and from State Archives has also become increasingly expensive as the number of documents received has increased.

Recent correspondence received by the Clerk in relation to the order for papers relating to the Operator of the Maules Creek Coal Mine and Biodiversity Offsets highlighted the need for the

[1] Following the recommendation of the Privileges Committee in its report into the Mt Penny return to order, 21 days has been generally adopted as the default return date.

[2] See examples in S. Want & J. Moore, *Annotated Standing Orders of the NSW Legislative Council*, Federation Press, 2018, pp 161-2.

Council to be able to receive data in electronic format in order that it can receive all documents captured by the order for papers. In the correspondence the Deputy Secretary, Legal Service in the Department of Planning Industry and Environment (DPIE) advised the Department of Premier and Cabinet that its "return to the Order for Papers included a number of files, known as shapeware, that cannot be printed and require specific software to view. Current advice to agencies is to not provide documents to the Parliament electronically in order to avoid document and content security concerns."

Proposals for electronic lodgement of returns to order were first canvassed during a 2013 inquiry by the Privileges Committee which investigated the administrative process relating to returns, within the context of a broader inquiry into alleged non-compliance with an order for papers.[3] More recently, in response to the current health pandemic, a number of members approached the Clerk to advocate for returns to be made accessible in electronic form, preferably by provision of the documents in electronic form by the agencies the subject of the order. In relation to the Transport Asbestos Registers return referred to above, Transport for NSW enquired about and initially proposed returning the bulk of the relevant documents in electronic form. However, agreement was not able to be reached as to the system and form of such lodgement, hence the $60,000 cost of printing. Nevertheless, DPC did express an interest in working with the Department of the Legislative Council to resolve these issues for future returns.

In 2019, a project to explore the scope for electronic returns to orders was formalised under the *Department of the Legislative Council's 2019-20 Strategic Plan.* Following that scoping exercise, work has begun on the development of the infrastructure to provide for electronic returns as part of a new Parliamentary Portal system.

A working group is currently finalising a Product Plan and designing process maps for the new system. Essentially, the system will provide secure ways to digitally lodge, process, view and manage electronic returns to order via the Parliamentary Portal. Members would be able to view and search documents via the Parliament's website. The two central tenets of this system are security and usability. (A first draft of the Product Plan and process map are attached.)

DPC supports this initial concept and will be a significant stakeholder in the development of the new database.

Depending on DPS IT resources and DPC availability for consultation, a system could be in place within six months.

Proposal for a roundtable with the independent legal arbiter

In 2018, the Hon Keith Mason AC QC, independent legal arbiter, suggested that the President consider convening a meeting of the recurring stakeholders in disputed claims of privilege to discuss any procedural matters of interest. The proposal was prompted by a disputed claim of privilege on the *Sydney Stadiums* return, during which the arbiter found that some of the issues raised in submissions by members and departments relating to his role, the powers of the House and certain administrative processes had complicated the already complex task of assessing the actual claim of privilege the subject of the dispute.[4]

[3] NSW Legislative Council Privileges Committee, *The 2009 Mt Penny return to order*, 2013.
[4] Report on Sydney Stadiums, p 11.

While the arbiter has since observed that recent correspondence from members and agencies indicates there is now a degree of consensus regarding his role generally,[5] Mr Mason has made a series of further observations which infer that certain administrative processes in place for disputes may benefit from further attention of the House – these are discussed in detail at Appendix C.

As the arbiter has provided recommendations as to the form of procedural amendments required to address his concerns, it may no longer be necessary to convene a roundtable. Instead, the secretariat, in consultation with the Clerk, could be tasked with drafting sessional orders for the consideration of the Procedure Committee with a view to trialling new administrative procedures.

However, Mr Mason continues to express concern, and considerable frustration, at the nature of some of the claims of privilege that are continuing to be made despite his repeated findings and recommendations to the House. In a memorandum to the Clerk dated 27 August 2020, Mr Mason again raised his concerns in relation to the current evaluation of the disputed claim of privilege on documents relating to iCare.

Should the memorandum and submissions to the evaluation process on iCare documents be made available to members by the time the committee next meets, it would be useful for members of the committee to take the opportunity to view that material to gain a greater understanding of the matter causing him concern.

Members might also like to take the opportunity to read the arbiter's report, dated 1 September 2020, on a disputed claim of privilege concerning an order for papers on "Rules Based Environmental Water" which expresses similar concerns, and once again raises the idea of a round-table meeting, but this time apparently more focussed on the substance of privilege claims rather than administrative matters in respect of disputes.

[5] Report on Landcom documents, Part 1, p 2.

APPENDIX A – OVERVIEW OF ORDERS FOR PAPERS WORKSHOP

The Procedure Office is developing content for an orders for paper workshop to be delivered to members and SRAs. It is anticipated that the workshop will be delivered over two hours and include the following:

Clerk's introduction:

- welcome and overview of the session
- provide an overview of the Council's power to order the production of state papers
- note order for papers developments since 1998.

The Department of the Legislative Council's view:

- examples of effective orders for papers
- detail the Solicitor General's view of what is unreasonable in responding to an order
- note recent concerns from DPC that certain orders are diverting significant resources from the public service during the pandemic, as well as the administrative burden of certain orders
- explain the role of the small legal branch of DPC that manages orders.

The drafting process and drafting guidelines:

- provide an overview of the drafting guidelines that have been prepared by the Procedure Office
- explain that if the terms of an order are very broad it could result in a very large number of documents being returned which would make it very difficult for members to identify useful material
- refer to useful resources in identifying the appropriate department, statutory agency or minister to direct an order
- detail the support provided by the Procedure Office.

The administrative process by which orders are made, communicated, returned and viewed:

- discuss the administrative processes for the production of state papers as set out in standing order 52
- detail what happens after an order has been made
- explain how documents are returned and indexed (refer to the e-returns initiative)
- outline how documents can be viewed.

The arbitration mechanism and disputed claims of privilege made over document(s):

- detail how under standing order 52 a member can dispute a claim of privilege and initiate the arbitration mechanism
- outline the arbitration process
- explain what happens after the arbiter's report and the House may resolve to make privileged documents public.

Clerk's concluding remarks.

APPENDIX B – DRAFTING GUIDELINES

ORDERS FOR PAPERS

September 2020

These guidelines have been developed to assist members and members' staff to draft notices of motions for orders for papers under standing order 52. Well drafted and targeted motions maximise the likelihood that the information sought by an order is received and limits unnecessary documents being returned. Consistency in drafting also adds to the overall body of precedent on which the House relies to confirm its power to order the production of State papers.

These guidelines and a SO52 motion template are available on the Legislative Council Parliamentary Business page on the intranet. Please also refer to the Style Guide for Notices of Motions available on the intranet.

Information about the power of the House under standing order 52, as well as the process for viewing returns can be found on the NSW Parliament website via the About Orders for Papers webpage. Information regarding previous resolutions and indexes of returned documents, are also available on the NSW Parliament website in the Orders for papers database.

How is a SO52 notice structured?
An order for the production of documents under standing order 52 is drafted in three parts: opening paragraph, subparagraphs, and a final subparagraph.

1. Opening paragraph
The opening paragraph defines the scope of documents sought, identifies to whom the order is directed, establishes the time frame for the return, defines the time frame within which the documents were created, and outlines the subject matter. A clear opening paragraph reduces the chance that the order will be misdirected or misconstrued.

Return due date
The standard timeframe for a return is 21 days. This timeframe seeks to balance members' interest in receiving the documents promptly, with the practical timeframes required by departments and agencies to compile a return. Only orders seeking a single or specific documents should have a shorter timeframe. For larger orders a longer time frame, such as 28 or 35 days or more, may be appropriate.

Document timeframe
Where possible, it is advisable that an order include a document date range to avoid receiving unnecessary documents. For further orders, date ranges are included to ensure that documents previously ordered by the House are not captured a second time. However, date ranges need to be precisely correct to ensure the documents sought are not technically excluded.

Cluster Department/Agency or Minister
Orders should generally be directed to a cluster department or statutory agency. Sometimes directing an order to an agency within a department can help to narrow the focus of an order, but this is not standard practice. Directing an order to a minister includes the minister's office.

If members have sufficient information on which to conclude a document being sought is held by a specific agency or department, that specific entity should be identified in the order. Where it is not clear exactly where the document is held, the order can be directed to the cluster agency or department.

The following resources are useful for determining where to direct the order:
Schedule 1 of the Government Sector Employment Act 2013
Allocation of the Administration of Acts
Transport statutory bodies: Transport Administration Act 1988
Minister's webpage of the NSW Parliament website.

Subject matter
To assist with interpretation of the order and to streamline the drafting of subparagraphs a short description of the subject matter of the order is included in the opening paragraph. This ensures that all the subparagraphs are interpreted within the subject matter and avoids the risk of subparagraphs being misinterpreted. The subject will usually form the title of the order.

2. Subparagraphs
The subparagraphs identify the documents that are ordered. Each subparagraph is interpreted within the parameters of the opening paragraph, but independent of other subparagraphs. That is, each subparagraph must be able to stand alone and must be drafted in a manner that can be clearly understood and not misinterpreted.

The subparagraphs should be as targeted as possible to maximise the likelihood that the desired documents are captured, and unnecessary documents are not. Specific documents sought should be correctly named to ensure they are captured.

Orders which seek a group of documents should be drafted using established phrases to lessen the possibility of misinterpretation. For example, under the *Interpretation Act 1987* a document is any record of information. This includes emails, reports, plans, maps, video footage, and so on. An order seeking 'all documents' includes all types of documents, whereas an order identifying 'all correspondence' would limit the scope of the order. Similarly, 'all' means every, whereas 'any' could be interpreted to mean a single example.

Previously used phrases include:
- all documents relating to/concerning/that provide
- any document which discloses
- all correspondence between

3. Final subparagraph
Any additional instructions must be included as a subparagraph to be captured as part of the order under standing order 52. For example, there is a standard final subparagraph which contains an order that all legal or other advice created as a result of the order is also returned.

How are SO52 notices lodged?
Notices for orders should be submitted to the Procedure Office for review and drafting assistance via email: LC.ProcedureOffice@parliament.nsw.gov.au.

It is strongly recommended that SO52 notices be submitted for review as early as possible so that the Procedure Office can provide the best assistance possible.

Once reviewed the SO52 notice will be emailed to the member (and staff if requested) for presentation in the House.

APPENDIX C – OBSERVATIONS MADE BY THE INDEPENDENT LEGAL ARBITER

In 2018, the Hon Keith Mason AC QC, independent legal arbiter, suggested that the President consider convening a meeting of the recurring stakeholders in disputed claims of privilege to discuss any procedural matters of interest. The proposal was prompted by a disputed claim of privilege on the *Sydney Stadiums* return, during which the arbiter found that some of the issues raised in submissions by members and departments relating to his role, the powers of the House and certain administrative processes had complicated the already complex task of assessing the actual claim of privilege the subject of the dispute.[1]

While the arbiter has since observed that recent correspondence from members and agencies indicates there is now a degree of consensus regarding his role generally,[2] Mr Mason has made a series of further observations which infer that the following administrative processes for disputes may benefit from further attention of the House.

Redaction of personal information

An ongoing point of contention for the current arbiter has been the tendency for agencies to claim 'personal information' or 'confidentiality' privilege which, in Mr Mason's view, is not a valid claim of privilege at law. To obviate the requirement for the arbiter to evaluate such claims, Mr Mason has recommended that the House adopt a sessional order to set out procedures for the redaction of personal information.

Mr Mason has suggested this occur where the information can be redacted in such a way so as not to impede the House in its ability to discuss the subject of the documents, while 'remov[ing] any discouragement stemming from privacy concerns that might inhibit members of the public from making representations to government'.[3] While various options have been canvassed in his assessments over recent years, reports on the Sydney Stadiums and Floodplain Harvesting returns in particular make the case that information such as email addresses, phone numbers, postal addresses, telephone numbers, membership numbers, bank account numbers and credit card numbers may appropriately be redacted.

However, the practical process by which this should occur, particularly whether before or after the return is lodged, would need to be the subject of further discussions with the arbiter and government agencies.

The submission process

Since the months following his initial appointment as arbiter in 2014, Mr Mason has adopted the practice of requesting that the Clerk call for submissions from the parties to each dispute (namely the member disputing the claim and the agencies whose documents are in dispute). The practice of seeking submissions has now become a routine step in the dispute process.

[1] Report on Sydney Stadiums, p 11.
[2] Report on Landcom documents, Part 1, p 2.
[3] Report on Sydney Stadiums, p 10.

However, the arbiter has observed that the submission process has been at times unwieldy, particularly where:

- multiple disputes have been received to a return,
- letters of dispute from members have been revised or added to after initial lodgement with the Clerk (and in some cases after the arbiter has commenced his assessment),
- the privileged status of the documents in dispute becomes the topic of negotiation between members and agencies during the dispute process,
- submissions have canvassed his role or legal definitions of privilege, rather than the substance of the documents in dispute,
- an agency decides not to press a claim of privilege during the dispute process,
- additional documents captured by an order and not previously provided have been identified by an agency and provided late as an 'additional' return.

In observations made across recent reports and clarified in discussions with the Clerk of the Parliaments, the arbiter has articulated that in future his preferred course would be that:

- The President delay appointing the arbiter until the member lodging the dispute has identified all documents in dispute, and formulated the issues in dispute in correspondence to the Clerk.
- The arbiter seek submissions, via the Clerk, from the relevant agencies within a set timeframe. This would provide agencies the opportunity to:
    - advise if a privilege claim previously made will not be pressed,
    - clarify arguments made in support of a privilege claim where the status of particular documents within a larger bundle are in dispute,
    - represent the views of any third parties referred to in the documents, particularly in regard to considerations of privacy or commercial in confidence.
- The arbiter then exercise discretion in seeking an additional response from the member to the submissions made by the agencies.
- All submissions be made 'truly in reply' – that is, speak to why the documents in dispute should remain privileged and available only to members of the Legislative Council, rather than canvassing other matters such as definitions of privilege or the role of the arbiter.

If the House was to be satisfied that the submission process is a useful or even essential step, consideration could be given at some point in the future to authorising by way of a sessional order that submission process to be undertaken before the arbiter is appointed.

Timeframe for the arbitration process

SO 52(6) requires that the arbiter report within seven calendar days. The arbiter has recently observed that it is often not practicable to meet this timeframe, particularly in cases where submissions are invited from agencies.[4]

In practice, the House has not sought to enforce this deadline, acknowledging that the volume and complexity of the documents the subject of most disputes are not compatible with a deadline of one week for evaluation. While most assessments are made within a matter of weeks, in one case a report was provided almost a year after the documents were released.[5]

While the deadline for reporting has not been the subject of dispute between the House and the arbiter to date, the committee may wish to consider whether SO (6) should be amended to give the President discretion in determining the timeframe for return of a report or removing the timeframe altogether.

Clarifying the effect of the arbiter's assessment

It is common for the arbiter to make an assessment that the categories of privilege claimed over portions of a single document, or over a large group of documents, are not valid and the information

[4] For example, report on Sydney Stadiums, p 10.
[5] See Want & Moore, ibid, p 165.

should be published. If the House then resolves to act on the arbiter's recommendations, the Clerks need to carefully identify which documents should be should be removed from the privileged boxes and published. Agencies may also be asked to redact certain information from the documents and these instructions must be precise.

While great care is always taken and the process has worked well to date, it would assist members, the clerks and agencies if the arbiter were asked to append a table to each report which identifies each document in dispute and notes whether the claim/s of privilege have been upheld. This table may not be necessary where large volumes of documents are in dispute and the arbiter makes a uniform assessment, but would be beneficial where a more complex determination has been made.

NSW GOVERNMENT Premier & Cabinet

Reference: A4007286

Mr David Blunt
Clerk of the Parliaments
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Mr Blunt

Response to Discussion Paper – Current issues relating to Orders for Papers

I refer to the briefing paper provided by the Procedure Committee Secretariat on 3 September 2020 entitled *Discussion Paper – Current issues relating to Orders for Papers* (the **Discussion Paper**).

The Department of Premier and Cabinet (**DPC**) has prepared a response to the Discussion Paper, which is enclosed at **Annexure A**.

I also refer to the invitation to participate in the Returns to Orders Roundtable, to be held on 3 November 2020. DPC welcomes the opportunity to discuss matters relating to orders for papers under Standing Order 52.

I note that DPC has a specific opportunity to raise issues of concern and proposals during the Roundtable, at Item 4(c) of the current draft Agenda. The matters we would like to raise are set out in our response to the Discussion Paper at **Annexure A**.

I would like to advise that Ms Sarah Johnson, Director, Legal, will also be attending the Roundtable with me to represent DPC. Ms Johnson can be contacted by telephone on (02) 9228 3133, or by email at sarah.johnson@dpc.nsw.gov.au.

Yours sincerely

Kate Boyd
General Counsel

28 October 2020

52 Martin Place Sydney ■ GPO Box 5341 Sydney NSW 2001 ■ P: (02) 9228 5555 ■ F: (02) 9228 3935 ■ dpc.nsw.gov.au

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

NSW GOVERNMENT | Premier & Cabinet

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]

---

[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.

Appendix 2 Resolution of the House, 16 September 2020

1 MEETING OF THE HOUSE

The House met at 10.00 am according to adjournment. The President took the Chair and read the prayers.

2 RETURNS TO ORDERS ROUNDTABLE (Formal Business)

Mr Searle moved, according to notice:

(1) That this House notes:

(a) the concerns and frustration expressed by the Hon Keith Mason AC QC in successive reports to the House on the validity of claims of privilege over documents returned to orders of the House,

(b) that despite his recommendations and findings that such claims are invalid, the following types of claims of privilege are repeatedly made:
(i) blanket claims of privilege over volumes of document,
(ii) formulaic claims of legal professional privilege without specific or contextual, information to support such claims,
(iii) claims for confidentiality of personal information when no legitimate grounds of privilege exist or are contended,
(iv) claims of "commercial-in-confidence" privilege without supporting detail,
(v) claims of parliamentary privilege over ministerial notes and briefing papers,

(c) the time and cost spent on unnecessary evaluation of disputed claims of privilege due to poorly supported and formulaic claims of privilege, and

(d) the report of the independent legal arbiter, Hon Keith Mason AC QC, dated 1 September 2020, on a disputed claim of privilege on papers relating to "Rules Based Environmental Water" which raises the idea of a round-table meeting, focussed on the substance of privilege claims.

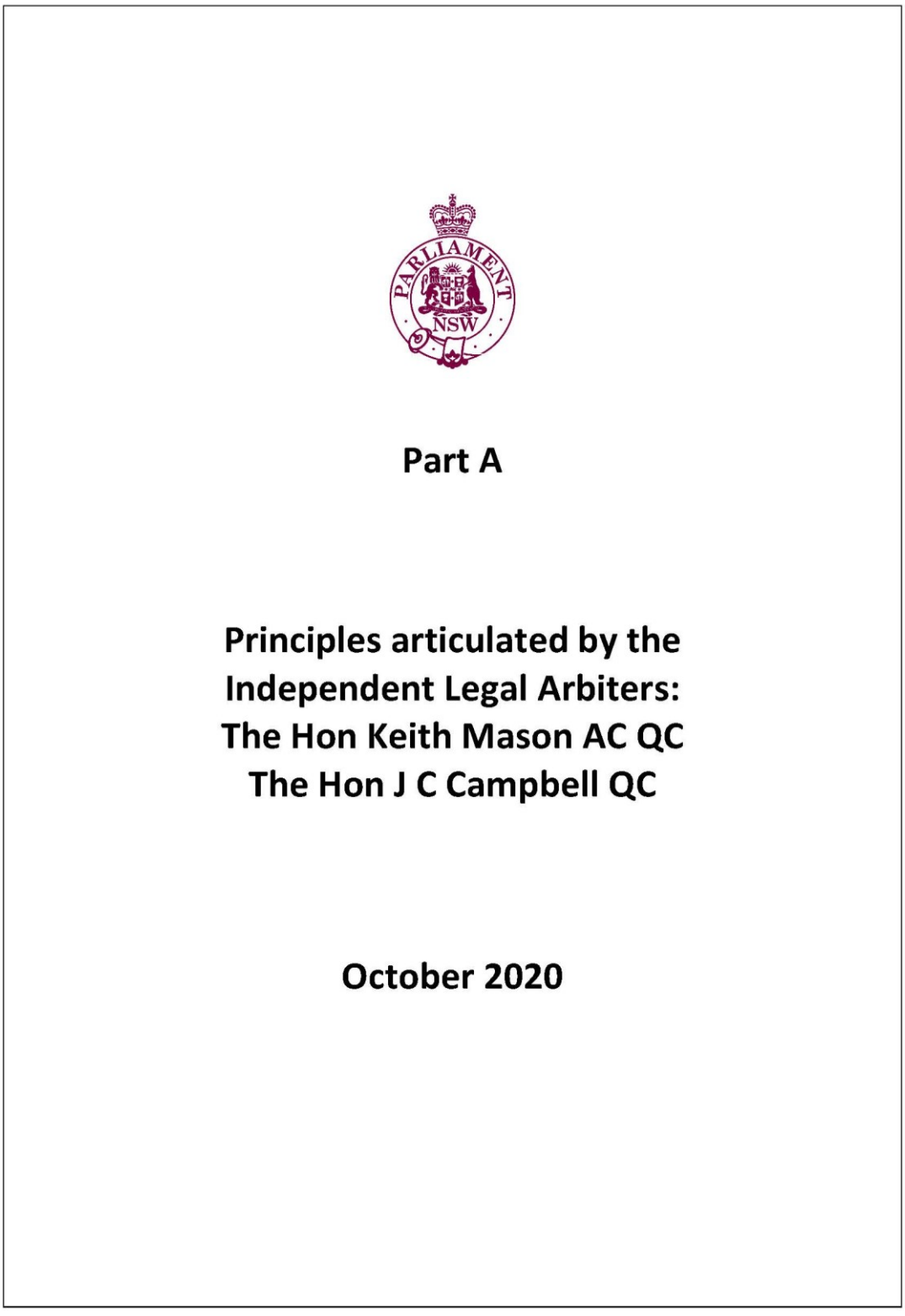
(2) That the President convene a roundtable meeting, before the end of the parliamentary sitting calendar, focussed on the substance of privilege claims,

(a) that the attendees at the roundtable are to be:
(i) the President, the Deputy President and the Assistant President,
(ii) the Leader of the Government, Deputy Leader of the Government and the Leader of the House,
(iii) the Leader of the Opposition and Deputy Leader of the Opposition,
(iv) one member from each crossbench party, and any independent member,
(v) the independent legal Arbiter the Hon. Keith Mason AC QC,
(vi) representatives from the Department of Premier and Cabinet,
(vii) the Clerk of the Parliaments and officers of the Legislative Council, and

(b) that the President Chair the roundtable.

Question put and passed.

Appendix 3 Summary materials prepared for the roundtable meeting



Part A

Principles articulated by the Independent Legal Arbiters:
The Hon Keith Mason AC QC
The Hon J C Campbell QC

October 2020

Contents

List of Arbiters' reports

1. Actions of former WorkCover NSW employee, 25 February 2014
2. WestConnex Business Case, 8 August 2014
3. Crown Casino VIP Gaming Management Agreement, 21 October 2014
4. Byron Central Hospital and Maitland Hospital, 5 December 2014
5. Greyhound Welfare – Further order, 14 February 2017
6. Sydney Stadiums, 22 May 2018
7. Budget Finances 2018-2019: Gaming machine profits, 19 July 2018
8. Crown Casino VIP Gaming Management Agreement (2nd report), 31 July 2019
9. Landcom Bullying Allegations 2019 – Part 1: Treasury return of papers, 13 September 2019
10. Landcom Bullying Allegations 2019 – Part 2: Landcom return of papers, 2 October 2019
11. Allegations concerning the Hon John Sidoti MP [The Hon JC Campbell QC], 4 November 2019
12. Landcom Bullying Allegations 2019 – Part 3: Draft Werman Report, 13 November 2019
13. Premier's rulings on disclosures under the Ministerial Code of Conduct, 17 December 2019
14. Register of Buildings Containing Potentially Combustible Cladding, 13 December 2019
15. Floodplain Harvesting, 11 June 2020
16. The Stronger Communities Fund, 17 July 2020
17. TAFE Underpayments, 17 July 2020
18. Rules Based Environmental Water, 1 September 2020
19. Floodplain Harvesting Exemptions (No. 2), 1 September 2020
20. Payroll Tax Compliance – Further Order, 9 September 2020
21. Stronger Country Communities Applications, 11 September 2020
22. Contamination at power station associated sites [The Hon JC Campbell QC], 18 September 2020
23. Insurance and Care NSW and the State Insurance Regulatory Authority: Interim Report, 22 September 2020

3

Foreword

On Wednesday 16 September 2020 the Legislative Council resolved that I convene a roundtable meeting before the end of the 2020 sitting calendar focussed on the substance of privilege claims. The roundtable meeting is to include key office holders and party leaders together with representatives of the crossbench, together with the independent legal arbiter, the Hon. Keith Mason AC QC, representatives of the Department of Premier and Cabinet, the Clerk of the Parliaments and officers of the Legislative Council.

This document, which is a compendium of the principles articulated by the independent legal arbiter, the Hon. Keith Mason AC QC, together with those articulated by the Hon. Joseph Campbell QC, has two purposes.

Firstly, it has been prepared as an aid to assist members and other participants to prepare for the roundtable.

Secondly, and following (and no doubt informed by discussion at) the roundtable, it is envisaged that this document will be tabled in the Legislative Council and made publicly available in order to assist government agencies in formulating privilege claims and members of the Legislative Council and future independent legal arbiters in considering those claims.

In circulating this document I note that, with the exception of a brief debate in the Legislative Council following the tabling of the Hon. Keith Mason's first report in 2014, each subsequent report has been accepted and implemented by the Legislative Council without demur. This is indicative of broad acceptance by the Legislative Council of the principles articulated by the independent legal arbiter and summarised in this document.

Finally, although this document deals with the reports of the Hon. Keith Mason AC QC and the Hon. Joseph Campbell QC, and they have adopted different administrative procedures and slightly different approaches to legal reasoning from earlier independent legal arbiters, the reports of earlier arbiters, particularly the late Sir Laurence Street, remain pertinent and relevant. Further information about the reports of earlier arbiters may be found in the submissions attached to the Hon. Keith Mason's 2014 report on the disputed claim of privilege concerning the WestConnex Business Case.

Thanks are due to Ms Jenelle Moore and Ms Beverly Duffy for the preparation of this document.

Hon. John Ajaka MLC
President

The role of the House; the Arbiter; and the Executive

In the **WestConnex** report, Mr Mason set out his foundational understanding of the respective roles of the House, the Arbiter and the Executive: the House has the final prerogative in all matters pertaining to access and publication of documents returned under SO 52; the Arbiter's role is to report on the validity of claims of privilege pressed; the burden of demonstrating the validity of a claim of privilege rests with the agency asserting the claim; and the Arbiter may determine that the validity of a claim has changed over time as circumstances have changed:

> Some propositions are clear, in my view. First, Standing Order 52 is not the source of the House's power to compel production of State papers, nor do its terms limit the power of the House to regulate or modify the circumstances under which members or the public may access documents after they are required to be tabled. Secondly, the Arbiter evaluates and reports independently of the House and is in no sense the delegate of Parliament or the House. Thirdly, the 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. Fourthly, it is then up to the House to decide what steps to take it not being bound to accept the report of the Arbiter (which is not to say that the House has the liberty to disregard privilege, only that it must decide what to do). Fifthly, the burden of demonstrating that particular (documented) information is privileged lies upon the body asserting the privilege, this being of the essence of an immunity or privilege. Sixthly, information may conceivably attract privilege at one point of time but not at another.[1]

However, in relation to Mr Mason's sixth point above – that information may conceivably attract privilege at one point of time but not another – it should be noted that Mr Campbell has recently articulated a different view as to his role in assessing claims made following the passage of time.[2]

The Arbiter is appointed for the explicit purpose of determining whether documents should remain privileged from publication, not from production

Mr Mason reaffirmed the court's finding in the *Egan* cases that the Arbiter is appointed for the explicit purpose of determining whether documents should remain privileged from *publication*, not from *production*:

> If, in the present situation one asked: "Privileged from what?" the answer must be: "From dissemination to the general public either through unconditional release, or through disclosure of their particular contents". Speaking hypothetically, the impact of such dissemination or disclosure potentially cuts both ways. From Government's perspective, there is risk of harm if confidential information gets into "the wrong hands" (in the sense of hands other than those chosen by Government or the hands of members of the House). From the House's perspective, there is the desirability of stimulating further information gathering and

[1] WestConnex Business Case, dated 8 August 2014, p 5.

[2] Contamination at power station associated sites, 18 September 2020 , p 3. Mr Campbell stated that on his reading of SO 52, his report should relate to the validity of the claim of privilege as it was made. If events have moved on since the documents were produced and the claim made, his report should not take any such movement into account. In taking this approach, Mr Campbell appears to vary from the approach taken by both Mr Mason and former Arbiters, particularly Sir Laurence Street.

> of debate proceeding without the restrictions consequent upon complying with Standing Order 52 (5) (b) (ii).[3]

More recently, the Arbiter has further articulated his view on the meaning of 'privilege' in a memo to the Clerk, stating that:

> ... "privilege" means that it's not in the public interest for the document or the portion of it proposed for redaction to be made available other than to members of the Legislative Council or to be published or copied without an order of the House.[4]

The memorandum is attached at Appendix 1.

The constitutional role of the House

The focus should always be on the needs of the House in performing its constitutional functions

A concept fundamental to the operation of the orders for papers process is that of the Arbiter in supporting, advising and facilitating the constitutional role of the House. While the courts are confined by reference to the grounds of privilege developed at common law in determining an objection to *produce* documents, the Arbiter is not – firstly, because his or her role is to determine privilege from publication, not production; and secondly because the House's authority to call for papers, use them and publish them stems from its constitutional functions, recognised in the *Egan* cases. In **WestConnex**, Mr Mason cites with approval a submission put forward by the Crown Solicitor's Office that encapsulates this view:

> The Crown Solicitor's Office on behalf of DPC submits that, in addressing any privilege issues touching State papers required to be returned, (a) the Arbiter is not necessarily confined by reference to the grounds of privilege developed at common law to determine an objection to production of documents to a court; and (b) it should be kept in mind that the House's authority to call for papers and its authority to access them, use them, and allow their publication all stem from the constitutional functions recognised in Egan v Willis. I agree. And I also accept that the Arbiter should assume that any dissemination of the papers under the authority of the House will only be for the purpose of exercising the House's constitutional functions.[5]

Later in that report, he articulates this principle thus: 'the focus should always be upon the needs of the House in performing its constitutional functions':

> It should be noted that I am not suggesting that there is a relevant interest in 'the public' gaining access to compulsorily tabled documents. *The focus should always be upon the needs of the House in performing its constitutional functions.* [emphasis added] With some snippets of confidential information the House' s needs will be met if only members are free to access them while remaining under the constraints imposed by Standing Order 52 (5) (b). . .. With most information, however, the House's needs may indicate that it should be free to

[3] WestConnex Business Case, dated 8 August 2014, pp 8-9. Also referenced in Register of Buildings Containing Potentially Combustible Cladding, Greyhound Welfare – Further Order.
[4] Memorandum to the Clerk of the Parliaments from the Hon Keith Mason, AC, QC, 24 September 2020, p 1
[5] WestConnex Business Case, dated 8 August 2014, p 6.

> disseminate the information publicly unless there is a clear overriding need for the confidentiality urged by the Executive.[6]

In doing so, it is not within the purview of the Arbiter to anticipate the manner in which the House intends to use the information – the Arbiter will only have reference to whether documents claimed to be privileged should be published:

> ... I do not accept ... that the House must identify and the Arbiter discern the House's particular reasons for wanting to disseminate documents beyond members lest any objection to the Executive's claim of privilege be imperilled.[7]

Mr Mason came to the same conclusion when the Crown Solicitor's Office suggested that the Arbiter's role extend to an extensive three-part assessment:

> In its submissions on behalf of DPC, the Crown Solicitor's Office has suggested that, when determining whether the public interest in the House publishing the documents in the exercise of a function outweighs the public interest in the documents not being published, it will be necessary for the Arbiter to understand:
> i) the reasons why the Executive submits that, on balance, documents claimed to be privileged should not be published;
> ii) what function the House was exercising when it decided that the order for the production of documents from the Executive was reasonably necessary for the exercise of the function; and
> iii) how publication of the documents is reasonably necessary for the House to fulfil that function.

Mr Mason rejected this representation of his role, stating categorically that he was' not persuaded that my task extends to items (ii) and (iii)...' He described this approach as 'latitudinal.' [8]

The Arbiter referenced these key observations in reports on the **Crown Casino VIP Gaming Management Agreement**, **Register of Buildings Containing Potentially Combustible Cladding** and **Greyhound Welfare – Further Order**.

Legal professional privilege

The common law 'dominant purpose' test applies to claims of legal professional privilege

Mr Mason's understanding of the common law test of legal professional privilege is that it attaches to documents that are:

- prepared with the **dominant** purpose of obtaining confidential **legal advice**, or
- prepared with reference to **litigation** that is in the **contemplation** of the client.[9]

With regards to the first criteria, it must be shown that the dominant purpose of a document was to obtain legal advice. Advice about a policy or decision of the executive does not come under this head

[6] WestConnex Business Case, dated 8 August 2014, p 9. Also referenced in Crown Casino VIP Gaming Management Agreement, Register of Buildings Containing Potentially Combustible Cladding, Greyhound Welfare – Further Order.
[7] WestConnex Business Case, dated 8 August 2014, p 6.
[8] WestConnex Business Case, dated 8 August 2014, p 9.
[9] Report on Landcom Bullying Allegations 2019: Part 1, Treasury return of papers, p 6

of privilege. With regards to the second criteria, Mr Mason suggested that there must be a real prospect of litigation in the contemplation of the client, as distinct from a mere possibility, although the possibility has to be 'more likely than not.' He cited Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority [2002] VSCA 59, (2002) 4 VR 322 at [19] in support of this position. [10]

And just because litigation may occur at some point, does not mean that the claim will be upheld. In relation to the claim of legal privilege over a copy of the 'Werman' report (a report on an investigation into the Chair of Landcom) Mr Mason said:

> Later events may cast 'evidentiary' light on the question of privilege, but are not determinative ... the basis of the claim of privilege does not change its complexion simply because litigation by a former employee may have actually commenced **after** the Werman investigation or because defamation proceedings by someone still connected with Landcom may have been **later** threatened arising out of things said by witnesses during the investigation. [11]

In his report on **Sydney Stadiums**, Mr Mason rejected claims over several documents on the grounds that they would not attract legal professional privilege at common law: 'They contain no more than communications discussing the instructions for advice. Other documents do not reveal the substance of confidential legal advice....'[12] He did however uphold privilege in relation to two documents that could be described as 'embodying legal advice' because they related to 'fairly imminent matters that concern the impact of redevelopment on third parties and discuss legal strategies for addressing them in the near future'.[13]

In **Landcom (Part 1**) Mr Mason rejected a claim of legal professional privilege over the Werman report as it would appear the claim did not meet the 'dominant purpose' test required to attract the privilege:

> The focus of the entire investigation appears to be allegations of breaches of the Landcom code of conduct, something admittedly capable of grounding a claim in damages by an employee, but not necessarily so. The letter ... that forms Annexure 4 to the Report describes the trigger for the original investigation in broad terms without suggesting the existence or imminence of any litigation by the complainant.[14]

In adjudicating an analogous dispute in relation to a report into **TAFE underpayments** (the WorkDynamic report), Mr Mason observed that the TAFE report appeared to be an even 'weaker candidate' for legal professional privilege, noting that at least the Werman report had the potential of becoming the subject of a tort claim. He also noted with regards to the TAFE report that:

> A resolve to consider the taking of disciplinary steps or rectification of administrative short fallings will seldom be close enough to litigation so as to bring it within contemplation to the relevant standard. [15]

In his report on **Greyhound Welfare**, while upholding privilege over several documents, Mr Mason dismissed claims over certain other documents because they did not meet the basis for a claim of legal

[10] Landcom Bullying Allegations 2019: Part 1, Treasury return of papers, p 6
[11] Landcom Bullying Allegations 2019: Part 1, p 7 [emphasis in the original]
[12] Sydney Stadiums, p 7
[13] Sydney Stadiums, p 9
[14] Landcom Bullying Allegations 2019: Part 1, Treasury return of papers, p 7
[15] TAFE underpayments, p 2

professional privilege: '... some of the documents examined appear to be no more than communications of information or instructions to lawyers, or reporting of information by lawyers.'[16]

In **Contamination at power station associated sites**, Mr Campbell upheld the claims over most of the documents over which a claim of legal privilege was made, including correspondence providing or relating to the provision of advice, or a brief from which the substance of legal advice given could be ascertained. However he did not uphold the claims made over emails and correspondence that did not disclose the substance of advice or from which the substance of advice provided could not be inferred. In doing so, the Arbiter outlined the principles he took to be applicable to evaluating the claim. For Mr Campbell, this test at common law is:

> ... that there has been a confidential communication, between a client and the legal advisor, made for the dominant purpose of the client obtaining or the advisor giving legal advice or assistance, or with reference to litigation (including dispute resolution procedures such as arbitration or mediation) that is actually taking place or is in the contemplation of the client.[17]

The Executive bears the onus of demonstrating privilege

In several reports, Mr Mason suggests that the Executive needs to make clear its grounds for claiming privilege: 'I have placed the onus of persuasion on those arguing for privileged status.'[18] He also advised that a 'formulaic attempted invocation of legal professional privilege' will not be accepted as an adequate basis for a claim.[19]

In his adjudication of **TAFE Underpayments**, Mr Mason rejected a claim of legal professional privilege in relation to an investigation report into wage theft (the Workdynamic report) because 'no specific or contextual information to support the claim was offered.' He reiterated that the onus rests with the Executive to show that the investigative exercise was embarked upon for the dominant purpose of obtaining confidential legal advice or with reference to litigation that is in the contemplation of the client.[20]

Even if a document does meet the common law test for legal professional privilege, it may not necessarily be privileged from publication by the House

In **WestConnex**, Mr Mason noted that if a court establishes that legal professional privilege pertains to a particular document, there is no balancing of other interests and the relevant documents are not disclosed:

> ... the law has already struck the balance. If a proper claim has been made and it is not waived by the client, the privilege (or immunity) exists, as a rule of substantive law, yielding only to clearly expressed legislation to the contrary: see *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [9]-[11]. [21]

Whereas in the parliamentary context, the application of this privilege is different. Citing the Court of Appeal in *Chadwick,* which ruled that legal professional privilege is not a ground for refusing to

[16] Greyhound Welfare, p 12
[17] Contamination at power station associated sites, p 5
[18] Sydney Stadiums, p 2
[19] TAFE underpayments, p 1
[20] TAFE underpayments, p 1
[21] WestConnex Business Case, p 7

produce documents to the Legislative Council, Mr Mason said that in the absence of case law directly on point, the case was instructive as to how an Arbiter might assess the validity or otherwise of privilege claims:

> ... Egan and Chadwick throw very helpful light on the reasons why the House has a legitimate need for access to a wide range of information; and why "traditional" applications of common law rules of privilege in the areas of public interest immunity and legal professional privilege do not justify refusing a call for paper. In my view these principles also inform (but do not control) the Arbiter's task. [22]

He further explains in the **WestConnex** report that:

> ... It is at least conceivable that some adjustment of these rules may be called for *in law* in a context where the House is reviewing the conduct of the Executive. For example, the House may be concerned to explore whether a government whose conduct it is scrutinising has sought and followed legal advice in a particular matter. Recognising that legal professional privilege is a right personal to the client, capable of waiver, there may conceivably be circumstances in which the House has a constitutionally-derived legal right to more unrestricted access than the strict application of the common law rules of legal professional privilege may suggest.[23]

It therefore follows that even if a document does attract a claim of legal professional privilege, it may not necessarily be privileged from publication by the House.

Mr Mason observed that one of the agencies making the claim of legal professional privilege in the **Sydney Stadiums** dispute accepted that "constitutional" principles inform questions as to the validity of disputed privilege claims, but nonetheless argued that the policy reasons supporting common law privileges should apply with similar force in relation to papers ordered under SO 52. Mr Mason found it difficult to see how the public policies underpinning legal professional privilege had significant application to the dispute before him:

> It might be otherwise if there was some ... allegedly tortious injury resulted from it **and** there was information that premature disclosure to the public might prejudice government ... It has certainly not been demonstrated to my satisfaction that rejecting the "validity" of these particular claims might inhibit candour between the government agencies and their lawyers ....In the public sector at least, one would expect all such communications to be candid. And one would not be shocked if Parliament wished to satisfy itself both as to the instructions given and the advice received concerning administrative action to be carried out at public expense. [24]

It would appear that such disputes largely revolve around the *emphasis* placed by each party on these different factors:

> Both "sides" in these matters urge differing conception of the gravitational pull of (a) "traditional" privilege principles operating in a non-parliamentary context; and (b) "traditional" models of unrestrained parliamentary access to information in its control.[25]

---

[22] Sydney Stadiums, p 3
[23] WestConnex Business Case, p 7
[24] Sydney Stadiums, p 9 emphasis in the original
[25] Sydney Stadiums, p 3

While grateful for the guidance offered by the various submissions he had received in relation to his role, Mr Mason concluded that: 'None of these approaches offer a truly bright line or yardstick.' Nevertheless, what was clear from the practice of past Arbiters is that the Arbiter's role is to weigh up the relevant considerations in each case:

> As I read the various submissions and the practice of past Arbiters, no-one contends, (post-Chadwick) that claims invoking public interest immunity and legal professional privilege are to be rejected summarily by the independent Arbiter. Nor are they to be accepted summarily either.[26]

In his report on **TAFE underpayments**, Mr Mason noted that even if the WorkDynamic report *did* attract legal professional privilege, the now redacted report falls entirely within the principle stated in Egan v Chadwick (1999) 46 NSWLR 563 at (86) where Spigelman CJ, Meagher JA agreeing at (152], said:

> In performing its accountability function, the Legislative Council may require access to legal advice on the basis of which the Executive acted, or purported to act. In many situations, access to such advice will be relevant in order to make an informed assessment of the justification for the Executive decision. [27]

In **Sydney Stadiums**, the Arbiter found that certain documents would attract legal privilege under the common law, but that 'the real question is whether this common law head of privilege is to be accepted as regards documents called by Parliament, or at least the documents tabled in the present matter.'[28] He cites argument from Mr Searle who submitted that disclosure beyond members should only be withheld if detrimental to the public interest. His response to Mr Searle's argument was:

> I do not read this as an argument that "public interest" in access to confidential legal advice would trump legal privilege in a "traditional" situation ... Rather it is an invitation to factor into my evaluation the range of "constitutional" principles touching on whether a privilege claim framed by reference to "public interest immunity".... etc should continue to be respected by the House ... Assuming that I have understood the submission correctly, I am prepared to approach this particular field of controversy in this manner.[29]

Mr Campbell's views on Legal Professional Privilege

In most respects, Mr Campbell's views regarding the law of legal professional privilege would seem to align with those of Mr Mason:

> The law of legal professional privilege cannot operate in the same way, concerning a call for papers made by the Council, as it operates concerning production of documents under compulsion in a court. It must be modified to take into account the constitutional principle of the accountability of the Executive to the Parliament.[30]

[26] Sydney Stadiums, p 3
[27] TAFE underpayments, p 2
[28] Sydney Stadiums, p 8
[29] Sydney Stadiums, p 8
[30] Contamination at power station associated sites , p 4

Similarly to Mr Mason, Mr Campbell also admits the applicability of the common law in relation to legal professional privilege to non-curial contexts, including in deciding a question or privilege under standing order 52.[31] It would also appear he shares Mr Mason's views regarding the applicability of the 'dominant purpose' test:

> The requirements of a claim of legal professional privilege under the common law are that there have been a confidential communication, between a client and the legal advisor, made for the dominant purpose of the client obtaining or the advisor giving legal advice or assistance, or with reference to litigation ... that is actually taking place or is in the contemplation of the client.[32]

Mr Campbell is also of the view that even if an Arbiter deems that a document meets the common law test, this does not prevent the House from deciding that the document should be disseminated, it is but one factor the House takes into account in making an 'informed and responsible decision' about whether to publish the document.[33]

However, it would appear that Mr Campbell's view in relation to one aspect of his role differs from that of past Arbiters, including Mr Mason. Mr Campbell's reading of SO 52 is that his report should relate to the validity of the claim of privilege as it was made. If events have moved on since the documents were produced and the claim made, his report should not take any such movement into account.[34]

Public interest immunity

This sections deals with claims of privacy/confidentiality/personal information and commercial-in-confidence. While these are not recognised heads of privilege, such claims are essentially a subset of a claim of public interest immunity and may be determined by reference to the public interest. On a small number of occasions, an agency has sought public interest immunity based on statutory secrecy, 'without prejudice privilege' and 'parliamentary privilege'. These claims are also discussed in this section.

The role of the Arbiter in determining public interest privilege claims reflects the constitutional role of the House [35]

In his report on the **WestConnex Business Case**, Mr Mason acknowledged that public interest privilege can be asserted in places other than courts:

> ... the law recognises privilege such as public interest immunity and legal professional privilege, as rights or immunities capable of being asserted outside curial contexts ... There is a right and there may be a duty to assert it [public interest immunity] and High Court authority supports its availability in extra-curial proceeding (Jacobsen v Rogers (1995) 182 CLR 572 at 588-9). When raised, a balancing of potential harms is required.[36]

[31] Contamination at power station associated sites , p 5
[32] Contamination at power station associated sites , p 5
[33] Contamination at power station associated sites, p 5
[34] Contamination of power station associated sites, 18 September 2020 , p 3.
[35] See also 'The Role of the Arbiter' on pp. 4-5
[36] Report on WestConnex, p 7; Contamination at power station associated sites, p 7

Mr Campbell also recognised authority for the application of public interest privilege in contexts other than court proceedings.[37] Both Arbiters contend that the adjudication of public interest privilege claims in a parliamentary setting is distinct from what occurs in a court. Mr Mason's views are summarised below, followed by those of Mr Campbell.

Mr Mason's understanding of the Arbiter's role in determining public interest claims is informed by Egan v Willis: 'As explained in Egan v Willis, the House's right to call for papers stems from its role as a legislator and body scrutinising the activities of Government ... the House's needs for access to documents is quite different to a court's needs.' [38]

In the court context, the public interest is focussed on the proper functioning of the *executive* arm of government and the *public service*. Whereas, in the parliamentary context, the House has a 'countervailing' public interest in performing its *constitutiona*l roles.[39] Mr Mason explored this theme in his report on **Landcom (Part 1):**

> ... the pattern of practice involving Executive claims of public interest immunity shows that independent Arbiters and the House have for many years accepted that some adjustment needs to be made for principles relating to public interest immunity as expounded by courts in the context of litigation or royal commissions when they fall to be applied to a House of Parliament exercising its constitutional roles as explained in Egan v Willis (1998) ...'[40]

While wider public interests associated with public interest immunity should be acknowledged (such as the executive's interests to secure information from third parties under assurances of confidentiality), Mr Mason suggests that as long as overriding harm is not done to the 'proper functioning of the executive arm of government and of the public service', the focus should always be on the needs of the House in performing its constitutional functions: 'Whether any document attracts the privilege can only be evaluated after weighing the legitimate governmental interests against the legitimate competing interest of the House.' [41]

Mr Campbell expressed a similar view in his report on **Contamination at power station associated sites**:

> ...the situation in which the validity of a claim of privilege is made concerning documents produced to the Council is one in which there may be some harm to one aspect of the public interest arising from the document being available to members without the restrictions of clause 5 (b) [of SO52] – it is just that that possible harm to the public interest is not shown to outweigh the public importance of the document being available for use without restriction.[42]

[37] Contamination at power station associated sites, p 7
[38] WestConnex Business Case, pp 6-7
[39] WestConnex, Business Case, p 10 emphasis added
[40] Landcom Bullying Allegations (Part 1) p 4
[41] WestConnex Business Case, dated 8 August 2014, p 11
[42] Contamination at power ptation associated sites, p 10

Mr Campbell's view on Public Interest Immunity

In his report on **Contamination at power station associated sites**, Mr Campbell outlined his 'general considerations' concerning public interest immunity, including his reflections on the similarities and differences between the role of the ILA (Independent Legal Arbiter) and a judge in court context. In court, for instance, a judge can raise questions or seek information about a privilege claim, whereas in the Council, the documents have already been ordered; in a court, a public interest claim is supported by an affidavit which sets out relevant facts to assist the judge to assess a claim, but no 'precisely comparable procedure exists' for the Arbiter. Nor can the Arbiter apply an oath to maximise the likelihood of the claim being made on truthful grounds.[43] These and other factors discussed by Mr Campbell, taken together, create challenges for an ILA:

> In many situations where an ILA is asked to express an opinion concerning public interest immunity privilege these considerations create significant practical difficulties in being able to form a positive conclusion that the harm that is likely to arise from disclosure of the document in question outweighs the benefit this is likely to result from disclosure of the document.[44]

Mr Campbell identified several factors that would appear to address some of the challenges in determining public interest claims in a parliamentary context. First, some weight, he suggested, should be accorded to the fact that the Council has ordered the documents in the first place: 'It cannot be assumed that the Council would exercise its powers to require the production of documents irresponsibly'.[45] Second, he acknowledged that debate in parliament is a critical aspect of a representative democracy and access to documents to allow that is fundamental. And third, unlike a judge, the House makes the ultimate decision regarding the ultimate status of the document. '...the report of the ILA decides nothing – it expresses an opinion, which the House is free to accept, accept in part, or reject totally.' Given the challenges inherent in the role, Mr Campbell urges the parties to disputes to assist the weighing of public interest considerations to 'descend into as much detail' as to why privilege should be claimed or denied.[46]

Mr Campbell noted the fundamental challenge faced by an Arbiter in determining public interest privilege claims in a parliamentary context, as articulated by Priestly JA in *Egan v Chadwick*:

> It is more difficult to understand how interests can be weighed against one another when the contestants are the New South Wales Executive and the Upper House of the New South Wales Parliament; they may be opposed in a political sense but they are not opposed either in a legal sense or one analogous to that applicable in all the cases where public interest immunity has been held to exist.'[47]

Notwithstanding the difficulties, Mr Campbell does not consider his to be an impossible task: 'I would not accept that the weighing task is an inherently impossible one, just that it is a difficult one.' [48]

[43] Contamination at power station associated sites, p 7
[44] Contamination at power station associated sites, p 8
[45] This view perhaps aligns with the 'latitudinal' approach discussed by Mr Mason in his reports, see p 6.
[46] Contamination at power station associated sites, p 9
[47] Contamination at power station associated sites, p 8
[48] Contamination at power station associated sites, p 8

Close attention will always be given to matters of public safety

In his report on **Register of Buildings Containing Potentially Combustible Cladding**, Mr Mason emphasised that in his and other Arbiters' assessments of the public interest, close attention would always be given to matters of public safety, noting that the relevance of public safety concerns in relation to disputed privilege claims have been considered in previous Arbiter reports including *Circular Quay Pylons* and *Greyhound Welfare.* While the claim in relation to the cladding report was pressed on four grounds, Mr Mason only upheld the claim in relation to the first ground, which was that disclosure would endanger public safety: 'The letter from the Commissioner of Police when read with the recent evidence of Mr Hudson to a Committee of the House paints a scenario that deserves to be taken into account no matter how limited the risk may be.'[49]

Privilege will more likely be upheld if they relate to certain categories of people

While Mr Campbell contends that every claim of public interest privilege must be judged on its own circumstances, there are some matters for which there is a higher likelihood that a claim will be upheld: 'These include matters relating to defence secrets, matters of diplomacy, police informers, whistle-blower's, adoption, wardship or ill-treatment of children'. [50]

Agencies need to demonstrate a compelling case of prospective harm in claims for public interest privilege

In his report on **the Crown Casino VIP Gaming Management Agreement,** Mr Mason said that given the relevant parties to the gaming Agreement would, or should, have been aware that an Agreement of this type would attract parliamentary oversight as to whether or not the agreement was in the interests of good government in New South Wales, it was all the more important that those seeking privilege on the basis of public interest immunity should focus on documenting the risk of harm posed by disclosure:

> I am not saying that a claim of public interest immunity would necessary fail in these circumstances. But a compelling case of prospective harm would need to be demonstrated before it succeeded .... In any public interest calculus one needs to address and weigh the reasons said to indicate a risk of harm to the public interest before addressing and weighing the factors supporting openness.[51]

Commercial in confidence

Commercial in confidence is not a head of privilege; such claims will be determined by reference to the public interest.[52]

According to Mr Mason, "Commercial in confidence" and "privacy" are loose and often conclusive expressions. They are not in themselves recognised heads of privacy (even for courts).' [53] When public interest immunity is raised, a balancing of potential harms is required. [54]

[49] Register of Buildings Containing Potentially Combustible Cladding, p 3
[50] Contamination at power station associated sites, p 10
[51] Crown Casino VIP Gaming Management Agreement, pp 6-7
[52] WestConnex Business Case, p 10
[53] WestConnex Business Case, p 10
[54] WestConnex Business Case, p 7

In adjudicating claims of commercial in confidence in his interim report on **Insurance and Care NSW and the State Insurance Regulatory Authority**, Mr Mason said:

> Several documents are said to be privileged under the rubric of "commercial in confidence" but on the *acceptable conceptual basis* that it would be against the *public interest* for them to be disclosed more widely than to members of the House in accordance with the Standing Order.[55]

Commercial harm to private interests does not in itself generate public interest immunity

In his report on **Budget Finances 2018-2019** Mr Mason did not uphold a claim of commercial in confidence privilege in relation to a document which included forecasted taxes on Gaming devices. He cited Egan v Chadwick (1999) 46 NSWLR 563 in support of his contention that ' ... commercial harm to private interests does not in itself generate public interest immunity, let alone immunity precluding unrestricted access by Members in the present context'.[56]

Privilege will more likely be upheld if dissemination compromises the financial interest of taxpayers

In **WestConnex** Mr Mason asserts that privilege claims may be upheld if disclosure compromises the financial interest of taxpayers.[57] Mr Campbell concurs with the view of his fellow Arbiter, in his report on **Contamination at power station associated sites**.[58]

The executive needs to make a compelling case for commercial interests to trump the need for effective parliamentary oversight

A claim of privilege over redacted parts of an Agreement between the Independent Liquor & Gaming Authority and Crown entities was the subject the report on **Crown Casino VIP Gaming Management Agreement.** Crown argued that the redacted parts contained commercial in confidence information that should attract public interest immunity. The Arbiter did not uphold the claim of privilege. Mr Mason argued that the provisions that were being proposed to remain privileged formed part of a contract negotiated by the Authority and approved by the minister under the relevant statutes and as such:

> These factors (and the terms themselves) demonstrate that the whole Agreement furthers statutory functions designed to protect the interests of the public of New South Wales. This does not in itself exclude public interest immunity attaching to part of the agreement, but it is not a propitious start for an argument favouring secrecy over disclosure'[59]

In **Sydney Stadiums** most of the still disputed documents fell under the 'overlapping rubrics' of public interest immunity and commercial in confidence. In relation to schedule 2 of a memorandum of understanding between the government and national rugby league entities, Mr Mason did not uphold privilege for several reasons, including because:

[55] Insurance and Care NSW and the State Regulatory Authority, p 8 emphasis added
[56] Budget Finances 2018-2019, p 2
[57] WestConnex Business Case, p 11
[58] Contamination at power station associated sites, p 10
[59] Contamination at power station associated sites, p 3

> The provenance and costing of the proposals are key elements for parliamentary oversight. The "commerciality" of the broad arrangements (to government at least) appears to me to be at the heart of the matters of interest to parliament.[60]

Privilege will be upheld in relation to sensitive commercial information if this does not impede effective parliamentary scrutiny

In his interim report on **Insurance and Care NSW and the State Insurance Regulatory Authority,** Mr Mason upheld (in principle) a commercial in confidence claim in relation to documents revealing icare's active investment strategies, accepting icare's argument that public dissemination would allow market participants to predict the trading and investment strategy for icare managed schemes. He also upheld privilege in relation to documents concerning ongoing commercial negotiations, on the basis that dissemination would undermine icare's negotiating position to the detriment of the public interest. In relation to documents containing technical specifications of icare's databases, platforms and servers he said: 'The sensitivity of this information is obvious and there is no indication that the House would be impeded in its functioning by maintaining the privilege in the relevant sense'.[61]

In **Byron Central hospital and Maitland Hospital** privilege was claimed in relation to an assessment of the viability for a private operator to offer certain medical facilities in the Byron area. This included commercial modelling data which, according to the government, could affect any future tender processes. The government also sought privilege on specific anticipated costs of the development of Byron Shire Hospital. Mr Mason upheld the privilege in relation to certain redacted portions of the documents, indicating that the exercise had been challenging:

> This has not been an easy matter. However, in my evaluation, there is a risk to the public interest in getting the best value should the projects be approved and go to tender. I am unpersuaded that the very specific information in the redacted portions of otherwise released documents needs to go into the public domain in order that effective parliamentary scrutiny and debate could occur.[62]

Privilege will be upheld in relation to sensitive commercial information if disclosure is not in the public interest

In **Contamination at power station associated sites**, Mr Campbell did not uphold privilege in relation to a category of documents which contain estimates of the potential state liability for remediation of contamination at individual power stations. Treasury claimed disclosure would be commercially harmful by prejudicing future negotiations and potentially harming the public interest. This information is already provided on an aggregated basis. The Arbiter addressed the public interest arguments presented by the member in his report:

> Any public interest in knowing the extent to which the State might be liable for cleaning up contamination at a particular site (rather than at all the sites collectively, as is disclosed in the budget papers) strikes me as slight.[63]

[60] Sydney Stadiums p 5
[61] Insurance and Care NSW and the State Insurance Regulatory Authority, Interim report, p 9
[62] Byron Central hospital and Maitland Hospital, p 2.
[63] Contamination at power station associated sites, p 11

Private, personal or identifying information

Personal information is not a recognised head of privilege, but both agencies and the House should take steps to prevent certain personal information entering the public domain, particularly that relating to private citizens

Since his first report, Mr Mason has maintained that personal or 'private' information is not a recognised head of privilege at law. However, it does not follow that personal information should immediately be published – instead, Mr Mason draws a distinction between the claim of privilege at law, and separately, any determination as to whether the personal information the subject of the claim should be in the public domain.[64]

Where the Arbiter has not upheld a claim of privilege over personal information, he has almost uniformly gone on to indicate support for – or in some cases explicitly recommend – the redaction of information that would reveal certain identifying information.

Personal and privacy claims are determined by reference to the public interest

Mr Mason states in **Westconnex** that the House and the Arbiter should determine the nature and extent of the redactions required by considering the countervailing interest favouring disclosure:

> If the House wants to limit any perceived risk stemming from unconditional publication of confidential but unprivileged documents it is of course free to do so. I reiterate that these considerations do not in themselves justify the overriding of a privilege recognised by law. But, as regards public interest immunity at least, they are aspects of the countervailing interest favouring disclosure that have to be weighed.[65]

This approach is consistent with that adopted by the Hon JC Campbell QC, who recently articulated the public interest considerations that apply to personal information as follows:

> The mere fact that information is personal is not enough, by itself, to give rise to any arguable claim of public interest privilege ... It is only that personal information which is known to have been disclosed in confidence, or that could reasonably be seen as information that the person to whom it related would not want to be generally available, that seems to me to be capable of giving rise to a claim of public interest privilege ...[66]

On occasion Mr Mason has indicated that the public interest in disclosure may have been sufficient to sway him in support of maintaining privilege over certain information. In **Sydney Stadiums**, he stated that he would have been prepared to report that certain information relating to stadium members were covered by a relevantly valid privilege. However, the member disputing the claim had agreed to the redaction of information of individual members of the public, obviating his assessment.[67] In **WestConnex**, Mr Mason was asked to consider a privilege claim made over a username and login. He reported that 'privilege should be recognised for the portion of the document disclosing this information but not to the document as a whole'.[68]

---

[64] For example, see Mr Mason's comments articulating this principle in WestConnex Business Case, 8 August 2014, pp 5, 8; Register of Buildings Containing Potentially Combustible Cladding, 13 December 2019, pp 3 – 5.
[65] WestConnex Business Case, dated 8 August 2014, pp 8-9.
[66] Allegations concerning the Hon John Sidoti MP, 4 November 2019, p 17.
[67] Sydney Stadiums, 22 May 2018, p 10. This information extended to postal addresses, residential addresses, telephone numbers, email addresses, membership numbers, bank account or credit card numbers and Dropbox folder URLs.
[68] WestConnex Business Case, dated 8 August 2014, p 12.

The scope of redactions made must not impede the House in its ability to discuss the subject of the documents, but should not discourage members of the public from making representations to government

In **Sydney Stadiums**, Mr Mason clarified that information should be redacted in such a way so as not to impede the House in its ability to discuss the subject of the documents, while 'remov[ing] any discouragement stemming from privacy concerns that might inhibit members of the public from making representations to government'.[69]

In this regard, Mr Mason has sought to ensure in particular that redactions are guided by the nature or purpose of an individual's interaction with government. The redaction of names is sometimes acceptable. For example, in the report on **Insurance and Care NSW and the State Insurance Regulatory Authority**, the Arbiter agreed to redaction of the names of scheme claimants. Similarly, in **Contamination at power station associated sites**, numerous documents contained full names, contact details, direct telephone numbers and email addresses of various of the employees or other officers of private sector companies and of state departments or instrumentalities. While Mr Campbell observed that 'this is information of a type that does not attract any variety of recognised legal privilege', he acknowledged it was nonetheless information over which employees and officers would have a legitimate interest in preserving their privacy. He noted the public interest in the privacy of individuals not being unjustifiably invaded and recommended the information be redacted.[70]

However, in **Floodplain Harvesting** (Reports 1 and 2), Mr Mason went so far as to ensure that the redaction of email addresses *did not* preclude the identification of the individuals involved, as those individuals had engaged with government in the course of negotiating and lobbying for a particular outcome.[71] In this report he explained that citizens who deal with government must expect that those dealings could be the subject of scrutiny, particularly in circumstances where those citizens are advancing their own interests:

> Except for very unusual categories of information-providers such as whistleblowers and confidential police informants, citizens who deal with government must recognise that the activities of government are subject to Parliamentary scrutiny and that such scrutiny may entail examining exactly whom the government consulted. A fortiori, when those citizens are advancing their own interests, however legitimately.[72]

Similarly, in **Rules Based Environmental Water**, Mr Mason rejected a claim of 'privacy' on the basis that there was 'no sign that the constituents raising issues about water flows, licence trading etc were expecting anything beyond their concerns being fairly and effectively addressed by government'.[73]

In **Stronger Country Communities Applications**, Mr Mason stated that 'privacy' claims ostensibly on behalf of stakeholders whose situations or views are being considered in the framing of detailed executive action will almost never attract a relevant public interest privilege in the parliamentary context. Access to these names relates directly to the processes of government decision-making, the factors taken into account, and the persons whose interests were favoured or disfavoured by the Executive. The Arbiter pointed to his assessment in the **Floodplain Harvesting** report as an example

[69] Sydney Stadiums, 22 May 2018, p 10.
[70] Contamination at power station associated sites, 18 September 2020, pp 16-17.
[71] Floodplain Harvesting, 11 June 2020, p 3; Floodplain Harvesting Exemptions (No 2), 1 September 2020, p 1.
[72] Floodplain Harvesting, 11 June 2020, p 2.
[73] Rules Based Environmental Water, 1 September 2020, p 1.

of the application of this principle. However, he acknowledged that particular instances of truly personal information such as email addresses or phone numbers could be redacted.[74]

It is preferable that the redaction of personal information be negotiated and agreed between members and agencies, rather than at the direction of the Arbiter

Both Mr Mason and other Arbiters have encouraged negotiation between the member disputing the claim of privilege and the relevant agency with a view to agreeing on the nature and extent of any redactions that should be made, in favour of the Arbiter making that determination.[75] This avoids the time and cost incurred by the Arbiter making such assessment and works to ensure that the appropriate balance is struck between accessibility and confidentiality, to the satisfaction of the House and the relevant agencies.

This approach worked well in the **Insurance and Care NSW and the State Insurance Regulatory Authority** report. iCare drew on the approach taken by Mr Mason in WestConnex and Sydney Stadiums to argue in favour of the House accepting the redaction of personal information proposed by iCare. In doing so, icare noted that in these reports Mr Mason had argued that:

- the resolution of disputed claims of privilege relating to personal information generates a substantial waste of time and public money
- it is 'inconceivable' that there is any public interest in the dissemination of such personal information
- there is a real risk of harm stemming from the unrestricted disclosure of this information.[76]

Following consultation, the Arbiter and the member disputing the claim both supported the redaction of the information proposed.[77] Mr Mason has also recommended that the House adopt a sessional order to set out procedures for the redaction of personal information,[78] however the House has not opted to do so to date. If the House did adopt formal procedures to require redaction prior to documents being returned, and given that the scope of redactions agreed between members and agencies to date has varied with reference to the issues that pertain to the particular matter the subject of the dispute, the practical process by which redactions should be agreed and made (including the extent of redactions and the timeframe in which they should be made) and the consequent precise framing of the proposed sessional order,
would need to be the subject of further discussions between the Arbiter, the Clerk and DPC.

Redactions recommended in recent years have extended to: the identity of whistleblowers, informants, witnesses, people who would be at risk of harm if their details were published, or (in some cases) individuals the subject of certain investigatory processes;[79] usernames, logins and membership

[74] Stronger Country Communities Applications, dated 11 September 2020, pp 2-3.
[75] For example, see WestConnex, 8 August 2014; Greyhounds; Sydney Stadiums, 22 May 2018, pp 9-10; Rules Based Environmental Water, 1 September 2020, p 1; Insurance and Care NSW and the State Insurance Regulatory Authority, 22 September 2020.
[76] Insurance and Care NSW and the State Insurance Regulatory Authority, 22 September 2020, p 8 of attached iCare submission.
[77] Insurance and Care NSW and the State Insurance Regulatory Authority, 22 September 2020, p 1.
[78] Sydney Stadiums, 22 May 2018, p 11. See also Memorandum from Mr Mason to the Clerk dated 24 September 2020, attached at Appendix 1.
[79] For example, see reports on Actions of former WorkCover NSW employee; Greyhound Welfare – Further Order; Landcom Bullying Allegations 2019 – Part 1: Treasury return of papers; Landcom Bullying Allegations 2019 – Part 2: Landcom return of papers; Landcom Bullying Allegations 2019 – Part 3: Draft Werman Report; TAFE Underpayments.

numbers;[80] email addresses, phone numbers, postal addresses, telephone numbers;[81] bank account numbers or credit card numbers; [82] and signatures, names of insurance claimants, and conflict of interest forms containing personal information of third parties and employees below the executive level[83].

[80] For example, see reports on WestConnex Business Case; Sydney Stadiums.
[81] For example, see reports on Sydney Stadiums; Floodplain Harvesting; Insurance and Care NSW and the State Insurance Regulatory Authority.
[82] For example, see report on Sydney Stadiums.
[83] For example, see Insurance and Care NSW and the State Insurance Regulatory Authority.

21

Parliamentary privilege

Parliamentary privilege exists to protect the parliament from obstruction or curtailment of its powers by the courts and other such bodies. The privilege does not exist to protect the Executive from scrutiny by the Parliament.

Claims of 'parliamentary privilege' from publication have been made by the Executive in returns to orders on a number of occasions. These claims have been surprising in some respects, as parliamentary privilege, at its essence, exists to protect the parliament from obstruction or curtailment of its powers by the courts and other such bodies. The privilege does not exist to protect the Executive from scrutiny by the Parliament.

In his report on **Sydney Stadiums**, Mr Mason noted that Venues NSW had claimed privilege over briefings supporting anticipated parliamentary questions to ministers on the basis that disclosure would be contrary to the public interest because 'it would potentially undermine the responsibility of the Minister to the House'. He summarily dismissed the claim: 'With respect, I fail to understand this and I do not accept it'. He pointed to similar findings he had made in the WestConnex report (below).[84]

Similarly, in the dispute relating to the **Stronger Communities Fund**, the Government claimed 'parliamentary privilege' on draft supplementary answers to questions prepared in the course of the Budget Estimates inquiry process. The Government asserted that the public interest in maintaining this privilege outweighed the public interest in making the information generally available for use in connection with debate in parliament. The Executive sought to rely on the decision of Austin J, In the matter of *Opel Networks Pty Ltd (in liq)* (2010) 77 NSWLR 126 at 134 [118] which upheld a claim of parliamentary privilege with respect to draft answers sought by a court-appointed liquidator. Pointing again to his decision in the WestConnex report (below), in which he observed that this decision stemmed from the relationship between the *court* and Parliament, and therefore provided no basis for the Executive to assert privilege against scrutiny by Parliament, the Arbiter swiftly concluded that the claim was 'without any legal merit'.[85]

The Arbiter pointed to both these reports for his reasoning in rejecting a claim based on parliamentary privilege in **Rules Based Environmental Water**.[86]

The GIPA Act does not provide a basis for claiming parliamentary privilege against scrutiny of the actions of the Executive by the House

In the **WestConnex** return, the Government used the provisions of the *Government Information (Public Access) Act 2009* (GIPA Act) to argue against the publication of House folder notes returned relating to the WestConnex Business Case. Lawyers for Roads and Maritime Services suggested that, while the GIPA Act does not apply directly, its principles inform the consideration of public interest immunity, and the GIPA Act conclusively presumes an overriding public interest against the disclosure of information to the public the disclosure of which would, but for any immunity of the Crown, infringe the privilege of Parliament.[87]

In response, Mr Mason noted that while there are decisions by the courts in Queensland and New South Wales upholding claims of 'parliamentary privilege' with respect to briefing notes,[88] these all

[84] Sydney Stadiums, 22 May 2018, p 10.
[85] The Stronger Communities Fund, 17 July 2020, p 1.
[86] Rules Based Environmental Water, 1 September 2020, p 2.
[87] WestConnex Business Case, 8 August 2014, p 14.
[88] Mr Mason specifically referenced *Rowley v O'Chee [2000] 1 Qld R 207*, *In the matter of Opel Networks Pty Ltd (in liq) (2010) 77 NSWLR*, *Tziolas v NSW Department of Education [2012] NSWADT 68*.

stemmed from the relationship between *courts and tribunals* on the one hand and Parliament on the other, and they involved the application of Article 9 of the *Bill of Rights 1688*. Therefore, they have no bearing on the activities of Parliament itself or privileges that the *Executive* may assert against the House. Mr Mason concluded:

> The conclusive presumption in the GIPA Act does not bear directly on the present issue. This is for two reasons: first, because the GIPA Act deals with freedom of information applications made by members of the public against the Executive; and secondly, because Parliament's privileges could not, by definition, be infringed by something done under the authority of the House.[89]

Statutory secrecy and other non-disclosure provisions

Statutory secrecy provisions cannot operate to prevent the House from exercising its constitutional role unless they do so by express provision to that effect

A range of statutes in New South Wales make it an offence to disclose certain sensitive information. However, the general parliamentary view has long been that it is a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters the law by express words. Therefore, unless expressly stated, statutory secrecy provisions do not impede the House from exercising its constitutional role.

In the **Crown Casino VIP Gaming Management Agreement** report, the Government, at the request of Crown Group, invoked s 17 of the *Gaming and Liquor Administration Act 2007*, which sets out certain secrecy provisions. The Act does not permit documents to be released to a court, but does permit release to the Minister, Crime Commission, ICAC and NSW Police. It similarly does not prevent information being released under GIPA, unless that information would disclose information concerning certain business affairs of an application for a casino licence.

Mr Mason determined that in light of the Council's constitutional role, which includes oversight of the Minister who is expressly mentioned in the Act, he:

> ... cannot conceive that the Council is disadvantaged in comparison to the bodies mentioned in s 17 [ICAC etc]. Nor is a Parliament a "court" within the scope of s 17(4). And Parliament certainly has not delegated to the Authority the function of certifying conclusively as to the public interest in the present context.
>
> In my opinion, statutory non-disclosure provisions will only affect the powers of the Council if they do so by express reference or necessary implication.[90]

The policies informing secrecy obligations may inform any consideration of a public interest immunity claim, even in the parliamentary context

In **Payroll Tax Compliance – Further Order**, the Arbiter observed that, while secrecy provisions in the *Taxation Administration Act 1996* did not provide immunity from the call for papers or provide a direct basis for upholding privilege, Revenue NSW had been correct in submitting that the policies informing secrecy obligations may inform any consideration of a public interest immunity claim, even in the

[89] WestConnex Business Case, 8 August 2014, p 14.
[90] Crown Casino VIP Gaming Management Agreement, 21 October 2014, pp 4-5.

parliamentary context. However, in that case, considerations in favour of promoting oversight were deemed to carry more weight and the claim of privilege was not upheld.[91]

In the **Budget Finances 2018-2019** report, Mr Mason made the analogous point that both federal and state statutory 'prohibited information' provisions invoked in support of privilege, including those in the *Taxation Administration Act 1953* and the *Gaming Machines Act 2001*, did not purport to address aspects of the relationship between the Upper House and the Executive arm of government.[92]

Similarly, in the **Greyhound Welfare – Further order report**, Mr Mason did not uphold a claim of privilege made over draft extracts of a final report passing between Greyhound Racing NSW and the Special Commission of Inquiry into the Greyhound Racing Industry in NSW that were subject to a non-disclosure regime. He stated that something more than an agreement to maintain confidentiality is needed to generate a basis for privilege as nothing had been advanced or demonstrated to show that the public interest could be harmed in withholding privilege from the documents.[93]

In his report on **Floodplain Harvesting**, Mr Mason stated that 'invocation of private law confidentiality notions or rules drawn directly from the *Government Information (Public Access) Act 2009* or the *Privacy and Personal Information Protection Act 1998* almost never provides a legitimate ground of privilege in the present context beyond the preclusion of the public release of private email addresses and phone numbers'. Citizens who deal with government must recognise that the activities of government are subject to Parliamentary scrutiny and that such scrutiny may entail examining exactly whom the government consulted.[94]

In the report on documents relating to **Allegations concerning the Hon John Sidoti MP**, DPC had submitted that clause 11 of the *Ministerial Code of Conduct* contains a Note stating that GIPA (also at clause 11) provides there is conclusively presumed to be an overriding public interest against the disclosure of the Ministerial Register of Interests. DPC submitted that any finding that the documents were not privileged would be contrary to the intention of Parliament as evidenced by the statutory scheme established by the GIPA Act.

In response, Mr Campbell determined that the GIPA provision is not determinative of any public policy that is to be applied for the purpose of deciding a claim concerning documents produced to the Council – it must be read in the context of its Act. It directs the public interest test that operates in applications for access to information made under GIPA by members of the public.[95]

Without prejudice privilege

Members should address the policy and public interest reasons underlining 'without prejudice privilege' if this claim is made in a dispute

This common law category of privilege was raised in the **contamination at power station associated sites** dispute in relation to several documents. This privilege was claimed over several documents relating to a dispute between AGL and the government. The member disputing the claim did not address this specific claim in her dispute letter, and the Arbiter upheld the privilege in relation to all of the documents over which such a claim was made, stating that:

[91] Payroll Tax Compliance – Further Order, 9 September 2020, p 2.
[92] Budget Finances 2018-2019: Gaming machine profits, 19 July 2018, pp 2-4.
[93] Greyhound Welfare – Further order, 14 February 2017, pp 5-6.
[94] Floodplain Harvesting, 11 June 2020, p 2.
[95] Allegations concerning the Hon John Sidoti MP, 4 November 2019, p 19-20.

> In my view that submission does not take into account the public policy that underlies the common law's recognition of "without prejudice" privilege, or the public interest that is involved in seeking to promote settlement of disputes.[96]

General guidance for members and agencies

Members can assist the Arbiter by advising the purpose for which the documents in dispute will be used by the House in carrying out its constitutional roles

In formulating a dispute to a claim of privilege, a member should ensure that they address why the claims made over particular documents should not stand. However, the Arbiter has also suggested that, where possible, members can assist him in his role by also extending those submissions to address the purpose for which the member intends to use the documents to assist the House in the carrying out its constitutional roles. Mr Mason set out his position in **Register of Buildings Containing Potentially Combustible Cladding**:

> Over the past year or so some concerns have been raised in my mind that lead me to remind Members that, while I would never require those objecting to a claim of privilege to declare in advance their intentions with the disputed information, I will always be assisted by such explanation. I do not see my role as that of granting what in effect is a freedom of information request for the sole purpose of publishing information to the world. My focus is upon the needs of the House in its constitutional roles.[97]

Members and agencies can assist the Arbiter by ensuring that submissions made either for or against privilege address why it is, or is not, in the public interest to publish the documents

Similarly, both members and agencies can assist the Arbiter by ensuring that submissions made either for or against privilege address why it is, or is not, in the public interest to publish the documents. In his report on **Allegations concerning the Hon John Sidoti MP**, Mr Campbell made the following observation:

> It assists greatly in conducting the weighing task that is inevitably involved in a claim for public interest privilege if the officers of the Executive who make the claim of privilege descend into as much detail as possible concerning why it is not in the public interest for the disputed documents to be freed from the limitations of rule 5(b) [of SO 52], and if those members of the House who opposed the claim for privilege identify the public interest that would be served by rejecting the claim for privilege and thereby freeing the documents from the limitations of rule 5(b) [of SO 52].[98]

[96] Contamination at power station associated sites, p 13
[97] Register of Buildings Containing Potentially Combustible Cladding, dated 13 December 2019, p 5.
[98] Allegations concerning the Hon John Sidoti MP, dated 4 November 2019, p 15.

Appendix 1: Memorandum to the Clerk of the Parliaments from the Hon Keith Mason, AC, QC, 24 September 2020

Memorandum to the Clerk relating to Standing Order 52 re *Returns to Orders Roundtable*

24 September 2020

I refer to the resolution by the House on 16 September.

May I raise three issues for discussion, touching the scope of the Standing Order.

The definition of "privilege"

Examination of my reports as adopted by the House over the years will reveal that I proceed from the starting point that the Executive has answered the call for papers to the satisfaction of the House. Claims asserting privilege in that context by reference to "commercial in confidence", "public interest immunity" (in a curial context) or "legal professional privilege" (in a curial context) do not establish a basis for resisting the call for papers: see *Egan v Chadwick* (1999) 46 NSWLR 563. Once tabled, the documents are made available but only to Members of the Legislative Council and they are not to be published or copied without an order of the House (*Standing Order* 52 (5) (b)).

The task of the independent legal arbiter commences after a member "dispute[s] the validity of the claim of privilege in relation to a particular document or documents" and the President appoints the arbiter (*Standing Order* 52 (6) and (7)).

Much confusion exists about the scope of this term in the context of the Standing Order. The topic is discussed generally by me in several reports, most recently *Landcom Bullying Allegations 2019,* 13 September 2019, pp 3-4 and *Register of Buildings Containing Potentially Combustible Cladding,* 13 December 2019, pp 3-5. My understanding is that the House expects more from the arbiter than to consider whether:

- the Executive might have had a claim of privilege had *Chadwick* not been decided as it was decided; or
- the rules and policies underpinning specific categories of privilege at common law or recognised in the *Government Information (Public Access) Act 2009* are to be directly applied to classes of documents despite their tabling in response to a call for papers.

Many submissions prepared on behalf of agencies of the Executive, doubtless at vast expense, ignore these principles, perhaps out of ignorance, perhaps in the hope that an arbiter or the House will adopt a different approach in a particular matter. Perhaps the fault also lies in the lack of focus and guidance offered by the Standing Order itself.

I offer for the consideration of the Roundtable the proposal that the Standing Order be amended to clarify and confirm what "privilege" means in the presently critical context, ie an answered call for papers where the dispute triggered by the Member involves the continuing application of *Standing Order* 52 (5) (b) in its two arms. Might consideration be given to adding to the Standing Order:

> *(10) For the purposes of this Standing Order "privilege" means that it is not in the public interest for the document or the portions of it proposed for redaction to be made available other than to members of the Legislative Council or to be published or copied without an order of the House.*

Genuinely private information

Sometimes general access to the identities of favoured constituents and their communications with the Executive is vital to parliamentary oversight: see *Floodplain Harvesting Exemptions,* 11 June 2020; *Stronger Country Communities Applications,* 11 September 2020.

But there are many times when such information is not required by the House, at least in the sense that it becomes publicly available after documents are tabled and accessible only to Members. Some general standing order or practice needs to be arrived at, hopefully of a nature that the time of all concerned is not wasted.

At present, disputes about categories of genuinely confidential information such as private phone numbers and email addresses, bank account details etc are negotiated and, if necessary addressed in a report in a general way. An ultimately agreed position is usually reached without the necessity of me reading and ruling upon masses of documents. Privacy issues like these do not invariably attract privilege but one infers that the disputing Member is happy to see them accommodated.

It may be better if the House addressed the matter through some standing order that could of course be overridden in appropriate cases.

The broader "conciliation" role of the arbiter

An independent legal arbiter can do nothing to narrow the scope of a call for papers or to resolve disagreements about its compliance. That function is not conferred under the Standing Order.

But once seized of a matter, the arbiter may make enquiries of the "parties" through the Clerk or the officers. Sometimes these will be for assistance in locating key documents. In recent years, it has become my practice on occasions to ask the Executive arm if it wishes to press in full its claim of privilege in light of the Member's submission or some general suggestion on my part, usually by reference to an earlier adopted report. If time permits, this usually triggers a "waiver" of privilege over many documents and a recasting of the submissions tabled in support of the original claim. If time permits (and it often does not) I have endeavoured to allow the Member the opportunity to reconsider his or her position in light of the amended claim.

On rare occasions, the Member has been invited independently to consider modifying the extent of his or her dispute in light of some general principles. I do not see it to be part of my remit to probe the Member's objectives but sometimes wish that I could do so in order better to focus the Member's and my own deliberations.

Might there be a benefit in clarifying the nature and extent of the arbiter's "conciliation" role?

The Hon Keith Mason AC QC

2

27

Appendix 4 Sessional order – varying the scope of an order for papers

41 SESSIONAL ORDER—VARYING THE SCOPE OF AN ORDER FOR PAPERS

Mr Shoebridge moved, according to notice:

(1) That, for the duration of the current session and unless otherwise ordered, in exceptional circumstances, where an agency subject to an order for papers under standing order 52 considers that:

(a) the timeframe for production of documents for an order for papers is unduly onerous, or

(b) the terms of the order is likely to result in producing a significantly large number of documents which are reasonably believed to be not directly relevant to the original order for papers,

(c) the Department of Premier and Cabinet may, by communication in writing to the Clerk within 7 days of the date of the passing of the order for papers, seek the approval of the House for the scope of the order to be varied.

(2) An application to vary the scope of an order for papers must be supported by reasons setting out:

(a) why a review of the period for production of document is required, or

(b) why a review of the nature of the documents relevant to the order for papers is necessary, including a general description or list of the classes of relevant documents (for example: emails (including deleted items), notes of meetings or telephone calls, text messages), or

(c) an estimate of the significant number or volume of documents involved, or

(d) an estimate of the likely cost of complying with the order for papers, or

(e) the required information can be provided by compilation of a document, or

(f) the required documents can be provided by alternative means (for example, by electronic communication in a data storage device).

(3) An application to vary the scope of an order must also include any document brought into existence as a result of this order.

(4) An application under this order must have regard to the objective of the order for papers and the overriding obligation to provide all documents covered by the order for papers.

(5) The Clerk is to provide the correspondence seeking to vary an order to the President and the member who moved the original order for papers.

(6) If the President and the member agree to all or any part of the request, the Clerk is to advise the Department of Premier and Cabinet in writing of the varied terms agreed to.

(7) Compliance with the agreed varied terms of the order is taken to be compliance with the original order of the House until such time as the House considers the varied terms of the order on the next sitting day.

(8) On the next sitting day, the Clerk is to table the correspondence from the Department of Premier and Cabinet and the varied terms of the order.

(9) The House will then decide on a question proposed without amendment or debate, "That the varied terms of the order be agreed to", except a statement by the member who moved the original order for papers and a Minister not exceeding10 minutes each.

(10) If the question is resolved in the negative, the original order remains in force.

Debate ensued.

Appendix 5 Transcript – roundtable to discuss standing order 52

D20/55359

TRANSCRIPT

ROUNDTABLE—TO DISCUSS STANDING ORDER 52

At Preston Stanley Room, Parliament House, Sydney on
Tuesday 3 November 2020

The Committee met at 9:30.

MEMBERS

The Hon. John Ajaka (Chair)

The Hon. Trevor Khan
The Hon. Rod Roberts
The Hon. Don Harwin
The Hon. Damien Tudehope
The Hon. Adam Searle
The Hon. Sarah Mitchell
The Hon. Penny Sharpe
The Hon. Emma Hurst
Mr David Shoebridge

PRESENT

The Hon. Keith Mason, AC, QC

Mr David Blunt
Ms Kate Boyd
Ms Sarah Johnson
Mr Sam Tedeschi
Ms Susan Want
Ms Jenelle Moore

The PRESIDENT: Thank you all. I welcome each and every one of you. I thank The Hon. Keith Mason for being with us today. Please note that we have Hansard present to prepare a transcript, that will not be made public, to assist me in putting together a final report which, of course, will be made available to all of you. On Wednesday 16 September 2020 the Legislative Council resolved that I convene a roundtable meeting before the end of the 2020 sitting calendar, focusing on the substance of privileged claims. I table the extract from the minutes of proceedings and take the resolution as read.

As I see it, the purpose of today's roundtable is to provide an opportunity for the Independent Legal Arbiter, the Hon. Keith Mason, AC, QC, to speak to and answer questions about concerns he has raised in a number of recent reports as well as proposals for reform. The roundtable will also provide an opportunity for members, representatives of the Department of Premier and Cabinet [DPC] and the Clerk to raise relevant issues. As well as the resolution of the House of 16 September 2020 and the recently received DPC response to discussion paper, dated 28 October 2020, I will also take it as read that the following documents have been circulated to all participants:

Principles articulated by the Independent Legal Arbiters:

The Hon. Keith Mason, AC, QC

The Hon. Joseph Campbell, QC

Summary of Reports by Independent Legal Arbiters:

The Hon. Keith Mason, AC, QC

The Hon. Joseph Campbell, QC

Procedure Committee

Discussion Paper—Current issues relating to orders for papers

Whilst there will be a range of perspectives on the issues raised, I am confident that we can all agree to the following: first, the power of the House to order the production of State papers is an important and extraordinary power; secondly, Standing Order 52 and its predecessor, Standing Order 18, and the procedures and conventions developed involving the Department of the Legislative Council, the Department of Premier and Cabinet and the Independent Legal Arbiters have served the Legislative Council extremely well in the period since the Egan cases; thirdly, it is in everyone's interests for the exercise by the House of its power to order the production of documents, compilation and production of the required documents, and the making and resolution of privilege claims to be handled as efficiently and as cost effectively as possible; fourthly, by our presence here today we evidence our commitment to seek to ensure that the system works as effectively and as efficiently as possible.

At the conclusion of this morning's discussion I will be guided by members particularly as to how they wish to proceed, whether by further discussion through the Procedure Committee, less formally, or by moving the relevant motions in the House. As I indicated, I will prepare a report at the conclusion of this meeting, which I will circulate to members. You have all received the agenda, which I will take it has been agreed? Mr Blunt, do we have any apologies?

Mr BLUNT: Reverend the Hon. Fred Nile, the Hon. Mark Latham, and I am not sure about Mr Justin Field.

The PRESIDENT: I think we also have an apology from the Hon. Robert Borsak. The agenda is adopted. Item 4, I call on Mr Mason.

Mr MASON: Thank you, Mr President. To pick up the much bandied word, it truly is a privilege to be here today and I regard it as a privilege to be asked to participate in this role from time to time. I want to make it plain that I do not see myself as having a standing position as independent arbiter [IA]. I am appointed ad hoc each time, but clearly I have been here for a while and in that capacity I feel quite familiar in these surroundings. It is a privilege but it is also a deep irony because I am not sure if everybody in this room knows but I was counsel for Mr Egan at the time he was viciously assaulted by Black Rod when the principles which have given rise to this whole exercise were established. I was then the Solicitor General and represented the Government and Mr Egan when the matter was argued in the Court of Appeal.

My former pupil and friend Bret Walker represented the upper House. He was very pleased to have won the case against his former pupil master. I was then appointed to the Court of Appeal and did not participate in the High Court appeal, but in each of those matters the position of the upper House, namely that it had this very broad power was upheld. Of course, Chadwick's case, as you know, came later and clarified that there were very few defences that could be raised, at least in answer to a call for papers. The word "privilege" was explained in Chadwick. I think some of the difficulty in working out how privilege works, at least in my mind, has flown from the fact that the first manifestation of Standing Order 52 was in a sessional order that was drafted before

Chadwick's case was decided. There has been a continuing ambiguity and uncertainty as to whether privilege in the standing order is to be understood in the way people thought that Chadwick might have come out, or whether it is to be interpreted in light of what Chadwick decided, or whether it has a special meaning in the context of a call for papers that is disputed.

I thought I would very briefly run through the process, at least from my perspective, emphasising again that I see myself as a visitor without any agenda, with an ad hoc appointment each time, whose report as to validity is always subject to acceptance or otherwise, or modification by the House. As soon as I am contacted by Mr Blunt and say, "Yes, I am available," I am sent a formal letter of appointment from the President and arrangements are made to come in, hopefully, so that the 14-day time limit can be met. In recent times it has not always been possible to do that and sometimes the process has meant it has not happened. Sometimes it does not matter because the House is in recess. When I do come in, I am ushered into a room with numerous boxes. I am given the assistance of officers of the upper House to find documents, if that is necessary, and locate them. I have the benefit of the member's letter objecting to the claim of privilege.

As I am sure many of you would know, one of the complications or difficulties, and I use a very neutral term, is that the Government is required under the practice to make its claim of privilege when the documents are tabled, at a time when there is often a vast number of documents in question and without any knowledge other than what can be guessed as to the purpose of the House in the call for papers and without any real knowledge as to whether the claim of privilege will be accepted, modified or whatever. I have found in recent times, partly because of the volume of documents involved, that the submissions in the initial claim of privilege have not necessarily been very focused. That is understandable given the volume of them, but the rules require the Government to put up its hand and to identify the basis of privilege with respect to each document in the index.

Those very generic claims are often related to a fairly general submission that is made. The member's objection does provide focus. Some members provide more focus than others. As the years have gone on I have perceived that the participants on both sides, if I can talk of sides, are becoming more focused in addressing the real issues, with some exceptions, which I will very briefly touch upon. It has become my practice, if time permits, that when the member has said why he or she objects to the claim with reference to identified documents to allow the member's letter to go back to DPC. From my perspective there are two purposes in this. One is to see if the total ambit of the dispute can be reduced, as it is often DPC responding in the form of what is termed a waiver of privilege. We will not debate exactly what is involved, but the reality is that I treat the dispute as no longer being pressed. The other benefit, at least from my perspective, is that DPC or sometimes the client agency that is behind DPC is able to more specifically address the issues that have been raised and focus attention. Sometimes through the Clerk I have had to make sure that everybody consents to this process, but if time permits the member is given an opportunity to respond to the DPC response.

Again, from my perspective the motives are mixed. One is that practice has shown that the member has frequently not pressed the objection in light of the more focused submission from DPC, but sometimes I felt that procedural fairness meant that, because DPC has really put its best foot forward in the second wave of submissions, the member should sometimes be given an opportunity, for my assistance as well as for procedural fairness, to respond. Please note that I am not seeking to justify any of these practices. They are all open to debate. I am just seeking to explain what happens from my perspective. Implicit in what I have said is that I do not see it as any part of my role to be concerned with the response to the call for papers. Occasionally the Government will say, "The reason the document should not be released other than to members is because, on reflection, we should not have answered the call for papers." I take the view that that is a matter between the Government and the House.

It may be that this meeting can come up with some processes that can deal with what happens before the independent arbiter is appointed, but I do not see it as any part of my role to be endorsing or disendorsing whether the Government has answered the call for papers in full, or whether the Government has answered it excessively and, on that account, ought to be able to withdraw them.

Once the papers are before me, I take the view that I have to write the report as to the validity of the claim in light of the submissions that have been received with respect to those papers. Then comes the report. In the course of preparing the report, there are occasions when further information is required by me, or sometimes I am conscious that the officers are liaising with DPC to identify documents. In some matters, and icare is an example of this, it has not always been easy to locate which documents relate to which head of privilege. I realise that there are all sorts of logistical reasons, but it is absolutely essential that I know where to locate a particular document. If they are only described in a generic way or by reference to date, and there are 36 boxes of them, sometimes even the officers are not able to find the particular document that is the subject of a particularly focused debate.

Some recent problems, and again this is looking at it from my perspective, are pretty obviously the sheer volume of the disputes and in some cases the number of documents. Mr Campbell and in one instance for a particular reason Mr Walker have come in as the independent arbiter. Under the note of "inexperienced players"

Executive relies on legal advice may be subject to scrutiny by the House. But if the public interest indicates that it should not happen in public, namely if there is ongoing litigation or if there is a dispute between government agencies, then that factors in to bolster a claim of legal professional privilege that would otherwise not be upheld. Having taken that approach, I deal with document by document but make it plain that, of course, the House is free to arrive at a different position.

Mr Campbell, putting it very crudely, has favoured the position that the rules of common law privilege, which are pretty hard to meet—more often than not privilege is claimed inappropriately and, from my perspective, and I have seen this not just in this role but in my role at the Australian Electoral Commission, we are seeing a tendency for lawyers to be wheeled in to take on roles that might be investigatory or advisory, but the principal role is to cast a pall of privilege over something that is not privileged. Merely because I asked my lawyer to mow my lawn does not mean that that request is privileged. The rules of privilege even under common law require a dominant purpose of litigation or advice and intention that it be confidential. I am perceiving that lawyers are increasingly saying, "Look, give us a gig in this and we can cast a cone of silence over it." So there is an issue with privilege even with common law, but the question is what the House does with it.

Mr Campbell would say, "Applying the common law rules of privilege, I think that this document is and remains privileged, but I am prepared to make recommendations sometimes to the House that it feel free to override or not accept my report that privilege exists." I, on the other hand, have taken the position that while legal privilege is not itself a privilege under Standing Order 52, it goes without saying that the House is free not to follow that position. People in the Government will say that the House will always tend to take a particular position. I cannot say anything about what the House does with the reports.

What I am trying to say is if you are going to tweak Standing Order 52, and if you are going to address the issues that were raised in DPC's recent submission, one choice that you need to address is do you want the IA to have any role in making recommendations? You may not want it, and if that is the case Standing Order 52 should be perhaps framed and you would need to perhaps make it plain that you did not want the IA to have any recommendatory role, and then there is the prospect that you may get an approach from me or Mr Campbell which, depending on the context, one side may be happy with, but always remember that the tables of this matter may turn.

In a memorandum on page 25 of bundle A of my report, I made a suggestion that privilege under Standing Order 52 might be helped with a definition. It has been suggested to me, and I heartily agree, that if you define privilege along the lines of it is not in the public interest for the document or the portions proposed for redaction to be made available other than to members of the Legislative Council, or published or copied, maybe somewhere you need to build into that some statement that what is in the public interest can be informed by the body of reports that have been written over the years and adopted by the House, rather than just starting completely afresh. But that is a matter for the House and that is all that I am going to say. I will answer any questions if you wish to ask them.

The PRESIDENT: Thank you very much, Mr Mason. Colleagues, I am now going to invite members to make their comments. I will turn to members of the Government first, the Opposition second and the crossbench third. Then I will ask representatives from the Department of Premier and Cabinet to make their comments and for the Clerk to make his comments. When that is completed, I will open it up for questions and discussions. In making your comments, if you could hold off any questions because I want to go around. We will start with the Government. Does any one of the Ministers wish to comment?

The Hon. DAMIEN TUDEHOPE: Thank you, Mr President. I thank Mr Mason for being here this morning. It is the first time I think I have had the opportunity to meet with you, although the Government has been on the wrong side of most of your decisions. I do not make that observation lightly or flippantly. In relation to the observations which you have made here this morning I think that there are potentially process problems that need to be identified to make your role more defined and what the House would achieve by properly defining your role. The last observation you made in relation to a good and proper definition of privilege is a really welcome one from the perspective of the Government, so that there is clarity around those things which the Government would be involved in.

I started by saying that there is an issue relating to us being potentially always on the wrong side of your decisions, and some of the adverse comments you have made about the Government. Specifically in your observations in your findings of 20 September, you raise and highlight the issues that relate to claims of privilege which often attach to the submissions made by the Government and are critical in some sense of those claims. That potentially brings us back to the real reason we are here. You did observe that sometimes when you receive a letter from the Clerk, you are ushered into a room with potentially 40 boxes of documents or more containing a large volume of material that you are being asked to consider. Potentially at the crux of the problem and why we

are here today is the foregoing issue of the volume of material that is being asked to be produced and considered by DPC and the Government in terms of making its claims.

I invite you to do this: In your experience as a lawyer and a judge, a government that is required to produce thousands of pages of documents to the House, what is reasonable in terms of making an assessment of the privilege that attaches to each one of those documents? None of your observations in any of the findings that you have made go to that issue and probably it is not part of your role. But the issue which Government is faced with and which the DPC is being asked to certify in relation to, is privilege that is claimed in respect of thousands and thousands of documents, in some cases. I highlight one instance in which the Minister for Education and Early Childhood Learning was involved in respect of a library at Young and boxes and boxes of documents are required to be produced. There is a point before you even get involved where DPC or agencies are asked to make an assessment of privilege that attaches potentially to each one of those documents.

The Hon. DON HARWIN: In a very short time frame.

The Hon. DAMIEN TUDEHOPE: Yes, in a very short time frame.

The Hon. DON HARWIN: Because of the automatic publication.

The Hon. DAMIEN TUDEHOPE: What I would put to you is, in circumstances where you were acting for one of those parties, if in fact you were there and if this was a discovery process which is part of legal proceedings, to have engaged with that process within a very short time frame and produce the documents to the House in accordance with the rules of the House, the decision by the agency or DPC to make a claim for privilege is one which is really in the context of erring on the side of caution because it is better to claim the privilege than not have claimed the privilege in respect of a document that should not be in the public arena, or potentially not in the public arena.

The Government's position in relation to what we hope to achieve out of today is to have a process that is more streamlined in terms of giving the Government an opportunity of assessing the large volume of documents that are sought, which is a process that they can potentially negotiate with the member seeking the production of the documents about curtailing the ambit of the documents that are being sought and focusing on the real claims for privilege that may arise, allowing at least a sufficient period of time during which that process can take place.

Mr MASON: If I may interrupt, in a court situation the judge would have power to extend the time and to set aside the subpoena in whole or in part.

The Hon. DAMIEN TUDEHOPE: Correct. Indeed. And that is the basis on which I would be submitting to you: If you are considering as a judge the ambit and context of some of the claims, you may say and you may find some of the orders being sought are so unreasonable on the Government and the quantity of documents being sought is so unreasonable that it is not in the circumstances something with which the Government can properly comply in the time that is stipulated, either in the order for papers being sought or alternatively to make a claim for privilege that attaches to those documents.

I agree that it is not part of your role in assessing privilege to make observations in relation to that, but it contextualises some of the claims that are being made by the Government in terms of the documents that are being sought. What the Government is potentially seeking out of this process today—and there is a willingness at least to engage in this process—is a more streamlined approach, which makes your job streamlined. The sample position that is being suggested by you has significant merit. You would look at a sample of documents. It gives us an opportunity of making sure: What is that sample? What does it look like? What is the scope of the documents? Is it so voluminous or the time period over which the documents are being sought is so large as to occupy the minds of the agency or DPC in terms of the claims that are being made?

The starting point for the Government is before it even gets to you. However, it may influence, potentially, the sort of observations that you make in respect of the claims made by the Government in relation to privilege. The observations that you also make in respect of privacy are also something that the Government takes very seriously in terms of its observations to make sure that privacy is in fact protected. What the Government would be arguing is that there potentially is another alternative for treating privacy issues in terms of documents being produced. The member who is seeking the productions and potentially the publication of the documents should identify the documents that they want published and would move towards or then give the Government an opportunity of making redactions or whatever is necessary for the purpose of those documents. So it is not necessarily a claim of privilege but the obligation would flow to the member seeking to publish the documents to identify the documents published.

If they are then to assert that an email address or something should be in the public arena, they should make an argument as to why that should in fact be the case. But the process for redaction should follow

identification by the members after potentially a finding by you or the relevant independent arbiter. After that period they should then identify those documents that would then go into the public arena and provide an opportunity to redact after that process rather than before. I think a lot of the issues about redaction and sending documents out to private firms, which you have observed, probably comes from a process where the Government is constricted by its obligations to the constituency to protect their privacy. That process is gone through in a hurried sort of manner and probably should be more streamlined to say that the member calling for the documents should be involved in the process to identify the documents that they want to in the public arena. That would then streamline the process for having them looked at and redacted accordingly.

If the Government is looking at achieving a number of things out of this process today, I want to start by saying we do not necessarily disagree with any of the findings that you make. But we want to contextualise those findings in terms of the process. We think that there are potentially steps. Firstly, we would be arguing that a reasonable opportunity should be given to the agency to make an assessment of the scope of the claims before the argument of the motion in the House so that the House can be properly afforded the opportunity of considering the scope of the documents being sought.

Secondly, the number of documents being sought and the claims being made certainly is rising. In the last two years on the Clerk's figures there have been 109 orders for papers. Some of those are very large; some of them, obviously, are not so large when there is only one document sought, which is not obviously a problem for you. But there are some that are very large and potentially the number of orders for papers need some further consideration in terms of how they are dealt with so that the Government has a reasonable expectation of being able to deal with them (a) within a time frame, and (b) consider the privilege issues that arise.

We would also be seeking a circumstance in which private documents have a separate status and can be then identified by a member, and the circumstances of the publication of those documents can then be addressed. They are the principal circumstances that the Government wants to see out of this process. We would like you having less of a role. It is not that we disagree with you having a role but we want to make your role a lot easier rather than be in the circumstances we are currently faced with where the disposition is to claim the privilege rather than not claim the privilege. We want it to be against a background where it is a considered claim of privilege and the time for making that consideration is properly given to the Government.

The PRESIDENT: Thank you, Minister. Does any other Minister wish to say anything?

The Hon. DON HARWIN: No. I briefly interrupted the Hon. Damien Tudehope at one point to say this is because of the automatic publication of documents.

The PRESIDENT: Yes.

The Hon. DON HARWIN: That is basically the point that the Hon. Damien Tudehope was making, which is that as soon as the documents arrive, they are published. Therefore, the Government naturally has to have extensive claims of privilege. If the volume is very large, it is difficult to come up with quality submissions to the arbiter as to why they should be privileged. So there it is.

The Hon. ADAM SEARLE: Thank you, Mr President, and I thank the arbiter for his time and his insights. The documents that have been produced for this session are very useful, the two documents trying to encapsulate the jurisprudence, as it were, of the arbiter's role, the findings and the principles. If those at this meeting are willing, I would certainly support making those documents more widely available to members of the House because it would assist members in framing their disputes of privilege. Like Mr Mason, at the time of the Egan matter I was the Chief of Staff to the Attorney General of New South Wales. He had certain views that were offered to the Government around what the powers of the House were.

Having heard what the Government has had to say and having read the DPC paper, I think the Government misunderstands the nature of the dispute around privilege. Essentially the Government's argument is, we have to make these claims—many of which turn out to be spurious or not well-founded—because of the automatic publication rule and for the need to protect privacy. I can come back to that. The issue of privacy is a problem that is imagined and not real. I will tell you why. If you look at the TAFE wage theft return to order and the allegations of fraud in the Long Service Corporation, the Government in both cases made two returns, one over which they claim privilege and one which was public. The only difference between the two returns was that the name of individuals was redacted in the public version.

Yes, the Government did claim privilege to keep those names secret but there will never be a dispute. I think at page 17 of one of the papers, Mr Mason, you make the point that wherever we are talking about the personal and private details of everyday citizens, you have often recommended that they not be published. As far as I am aware, the House has never taken a different view. So when it comes to personal and private details the Government can accept that whether they claim privilege or not, or whether they simply deal with it by way of

correspondence to the House, it is not going to make public and divulge things that really are personal and private details of private citizens.

In a sense that is a stalking horse or an issue that is more imagined than real because whenever the issue is raised it is able to be dealt with easily and there is never any pushback from the member seeking the order or from the House. That is a matter that is easily able to be dealt with. It could be dealt with by way of a sessional order but that is unduly complicating things. I think it would be better addressed administratively because no-one wants to publish the private details of everyday citizens. That is not in anybody's interest and it is never necessary.

To put this in context, particularly the increased number of Standing Order 52s, obviously whether there are calls for papers will often depend on the political fortunes of the government of the day and the constellation of powers in the upper House. That is something that either is or is not present but the Government has largely contributed to this situation through two things. The Government has worked very strenuously over the last 10 years to undermine the efficacy of question time, of questions on notice, of answering questions in budget estimates and completely bastardising the Government Information (Public Access) Act [GIPAA] process.

I will give the Government just one example. It was my GIPAA to Transport for NSW over the light rail documents. It was the gateway review reports and the health check reports. Initially I succeeded and then on appeal I did not succeed and the Government persuaded the tribunal to keep the documents secret because—and this was the nub of it—they would reveal commercial-in-confidence information and information containing criticisms of particular stakeholders. Interestingly, the following year there was an order for papers passed by the upper House in relation to the CBD and South East Light Rail calling for a wide variety of documentations including, incidentally, the ones that had originally been sought under GIPAA.

I do not believe the Government took the privilege point over those same documents and when they were revealed they did not have any of the characteristics, in my view, that had been maintained by the Government in the GIPAA process. Having spoken to colleagues across the political spectrum and across the Houses, the experience is putting in GIPAAs and getting answers from the Government—leaving aside Cabinet documents which are in a separate category—suggesting either staggering requests for money for processing fees or various claims ultimately refusing production.

The frustration of having to grapple with these processes has in part informed the increasing resort to Standing Order 52 applications. Not every Standing Order 52 application started life as a GIPAA request but I know a number of crossbench ones did and a number from the Opposition did. But, more importantly, if you want and are seeking information, particularly basic factual information, you can ask a question on notice and get some really mediocre answer. A really good example is one that I have asked for in the past. I know that the Government has a metric for working out how much a teacher costs, a health worker, a nurse, a doctor, a judicial officer. There is a formula; it is the cost, the on costs. It is very easy: Treasury has it.

So I asked how much would appointing an extra Supreme Court judge cost? The answer was: you can find this information in the court's annual report. There are two problems. The annual report did not exist at the time and the annual report does not contain that amount of information. Time after number, and this is not only my experience, you get basic requests for information treated, frankly, contemptuously by Executive Government. I am not levelling that at the people in this room because I have a lot of sympathy for the Ministers at this table, particularly in dealing with the order for papers involving the documents regarding the Stronger Communities Fund, which no doubt we will return to in due course. The point is that you have to operate on instructions given by Executive Government. The different agencies do not seem to have any insight into the process in the upper House or any willingness to engage. That is an attitude problem and if the Government really wants to address the matters that they have raised, my proposal would be that they start by acting in better faith, starting with questions on notice and things like that.

Now as to the misunderstanding that the DPC paper reveals, at page 9 you have the alleged uncertainty over relevant privilege, you have got the discussion of public interest immunity and legal professional privilege at pages 9 to 11, and this leads into a suggestion that the role of the arbiter and the House needs to be clarified. Really what the Government is trying to suggest is a redrawing of the boundaries and the process. For the benefit of the Government, I might just set out quickly what I see as the test here and this is not what I have made up but what I have derived from my experience in participating in the arbiter's process.

In the Court of Appeal case *Egan v Chadwick*, the court found that neither legal professional privilege nor public interest immunity applies in the context of a dispute between the House and the Executive. So the Government, in answer to various calls for paper, trotting out those arguments—and not only those arguments; there is commercial-in-confidence, there is privacy, there is the fact that the call for papers would somehow be contrary to the GIPAA regime, somehow contrary to some secrecy regimes and some legislation—none of these

are responsive to any call for papers and they are certainly not responsible to the outlines of the powers of the House in the *Egan v Chadwick* line of cases.

So you have to assume that the only utility in making these claims time after number is to simply delay the production of documents in the wider public space—you cannot withhold them from the House. It is to basically say, we will put the stop on it, we will see whether the member challenges. Mostly they do not, mostly members will access the privileged documents and make whatever use they can of them. But it is fair to say that the chief function seems to be to try to slow things down rather than engage in the process. Various arbiters have set out what is the privilege. There seems to be some criticism of successive arbiters here, saying that once you identify legal professional privilege or public interest immunity that should be the end of it and there should be no going further. But the Government has misunderstood the issue of privilege that is at issue, and this is from the WorkCover NSW employer arbiter's report of February 2013, that the relevant privilege is what as a matter of law exists between the Executive and the upper House.

It is not the privilege that you might find in litigation between parties. The only descriptors for privilege—this is similar to the arbiter's suggested addition in the documentation—are, first, that the arbiter will only find the privilege exists if disclosure is likely to injure the public interest. That is from the WestConnex arbiter's report quoting Justice Mason in John Fairfax. Secondly, production would cause overriding harm to the proper functioning of the Executive arm of government and the public service. That is from the WestConnex arbiter's report, citing *Sankey v Whitlam.* Thirdly, non-production is necessary in the public interest for the documents not to be disclosed. Those are very high tests but as far as I can determine that is where successive arbiters have rested as to what is the privilege that needs to be satisfied.

Despite that fairly clear yardstick the Government seems to be hell-bent on trying to re-agitate every other line of argument. I agree with the Leader of the House and the arbiter, that something either in the standing order or in a sessional order, clarifying what the House would recognise as a claim of privilege, would actually be quite useful. It may focus the mind of the executive and it may have the effect of reducing the number of disputes particularly. But I would say this to the Government: At the moment the arbiter provides an opinion about whether the relevant privilege exists and where the privilege claim is not upheld, the arbiter, nevertheless, makes a number of suggestions, often about what should not be published and the making of certain redactions. With very few exceptions, the House has followed successive arbiters' recommendations.

If the DPC suggestion were to be followed—that is, the arbiter's role is simply limited to determining whether a privilege exists—based on the two decades of experience we have had, the Government will be making its job even harder and the arbiter would no longer be able to make suggestions which, on my reading, have actually helped the executive interests over time. I think limiting the role of the arbiter in that way would probably be unhelpful to government but we are probably open to it. But we will obviously be happy to have a discussion around that. Again I have discussed the issue of personal private details.

In relation to the proposed sessional order of Mr David Shoebridge, which I think the Government has indicated some support for, we also do not have any issues with that. That is a sensible suggestion. At pages 6 and 7 of the DPC paper, the Government appears to have an additional suggestion to Mr David Shoebridge's proposal. It is not clear what the Government is actually proposing here. At the moment the Government can already write back to the House and make those requests. What is not in the paper, and maybe this is because the Government was frightened to ask, is the Government suggesting that the order of the House should be stopped while that request is extant and that the House, therefore, has to consider the request before the order has to be complied with? That is implicit but not clear. If that is the suggestion we will not be supporting that but obviously we are happy to have a discussion with the Government about how it might, in a timely way, make additional requests.

I take the point about the automatic publication rule, but again going to the first point raised by the Leader of the Government about the short time frames and the large volumes, when I was in private practice, particularly as a junior barrister doing things like discovery, we had to go through often a lot more material with lesser time frames with many more serious consequences than the ones that seem to apply to the Government presently. I will say this: I appreciate that government resources are limited but it is the Government's choice of how and who it gets to go through those materials. Frankly, the Government has far greater resources than individual members of the House.

I am relatively fortunate, as is Mr David Shoebridge, by reason of experience and training in dealing with this but not every member of the House has that and the arbiter would see that in the various different types of disputes of privilege he has received. Sometimes you will get more assistance or less assistance, depending on the information and expertise available to members of the House in putting these disputes on. Again, most of these documents are now stored electronically by government. They are assembled by key word searches in databases. I do not dispute that someone then has to go through them for the purposes of determining privilege but it is not like when the *Egan v Chadwick* line of cases were decided when somebody had to go into the archives. I accept

some documents are in that category but not all of them are in that category. So the assembling of the documents is much more straightforward than it used to be.

In relation to the large volumes and the production, the photocopying and the like, we have been asking for electronic returns for sometime. I know that is dealt with in the Government paper at pages 15 and 16. Really this is not a big technological barrier. At the present, if the arbiter was not always available, we have got a new high-speed scanner available. When there is a return to order, the Opposition now sends staff to access the publicly available documents and we put them through the scanner and we create a PDF. That goes onto our shared internal drive and we then can do searches in our own rooms at our own time rather than just having to access the documents during office hours. In a sense, electronic returns, at least at our end, are now being made. It would be very simple for someone at the Government end, once the documents are produced, to slip them through the scanner and to provide them electronically, based on very basic existing technology. We do not understand why it does not do that, except again, if the intention of the Government is, in fact, to make our job harder in terms of going through the material.

This depends a bit on agencies, but there are very rarely proper indexes provided so going through documents, there are all these different arcane numbering systems, and for arbiters sometimes finding and locating specific documents can be difficult. We think proper indexes to returns would be ideal. Electronic returns, in fact, would be easier for government, would be less time intensive, less costly and less burdensome for everybody. In terms of the privilege return, that could either be dealt with by way of a drive accessed only by password kept on a computer in the Clerk's office if that was necessary, or on a hard drive brought from the DPC and kept under lock and key as the documents are presently, and again only accessed via a computer in the Clerk's office.

This does not require some expensive technologically based solution. It is actually very easy if there is a will. We think that would be very useful. Again the three proposals we support are: having indexes to returns, although I recognise that that would probably not necessarily be agreed to; electronic returns would be in everybody's interests, and I think government should do that; and the sessional order proposed by Mr David Shoebridge. There is the proposal from the arbiter about the House in some way setting out what privilege it will recognise and maybe also averting to the jurisprudence that exists. Those are our key suggestions.

We are happy to engage with the Government about how its concerns about the automatic publication order can be dealt with. As I said, when it comes to privacy, confidential information the problem is more imagined than real. Where that is the only claim of privilege, that is really easily put to bed in a practical sense by the Government now. I would say it does not need to claim privilege to achieve the same objective because the House is never going to, in a practical sense, insist on wilfully publishing some private citizen's banking details or something that is truly commercial-in-confidence. I know I am probably wearing out my welcome here but there are a couple of things in the DPC paper that I thought were worth addressing because they are quite important.

Mr MASON: Excuse me, Mr Searle, could I just ask you a question?

The Hon. Adam SEARLE: Of course.

Mr MASON: How workable would be a system whereby the order for papers prioritises the claim and stated, "We are really after access to the Werman report", but to make sure we get everything you then spell out everything else so that somehow or other the concerns about time would not apply to genuinely identified key documents?

The Hon. ADAM SEARLE: The Opposition would certainly be open to that. In some of our calls for papers we have had cascading times for returns, but I certainly think that is a sensible suggestion, particularly when you are after a very limited class of documents like, as you say, the Werman report, the gateway reviews or the health check reports on light rail from Infrastructure NSW, or the like. If you are after something pretty defined, that is very useful when dealing with the issue of time. In the DPC paper at page 4 there is an understandable concern raised by the Government about an extensive order for papers. The Government wrote, "Ultimately this attempt to amend the terms of the order was unsuccessful." What is missing from this account is that I am told the Opposition in fact wrote back to the Government saying, "We are happy to talk." There were repeated attempts to engage with the office of the Treasurer, and answer there came none.

There was a complete failure by the Executive to engage with the Opposition around the terms of the order. I accept that there was correspondence and, again, the criticism is not levelled at those in this room. There was a complete unwillingness, refusal, pig-headedness, contempt by the Treasurer's office on this occasion to engage with the Government, so the motion proceeded as it was. If the Government will not engage with the House, that is what happens. Following over the next page—

The PRESIDENT: Mr Searle, do you have much more? I am just wary of the time.

The Hon. ADAM SEARLE: No, just two things. On the following page there was reference to Bret Walker's letter to the Clerk about the proposal around orders for papers provided to the special commission of inquiry. Again, what is not in this paper and that is probably because it was not known, is that the order did not proceed at the time it was put on the *Notice Paper*. The House's Public Accountability Committee, of which Mr Borsak—the mover of that motion—was a member, we actually invited the special commissioner to talk to the committee, then looking at similar matters to the special commission of inquiry, to try to understand where the special commission was going in order that the House, in its own process, did not impede the working of the special commission of inquiry. Mr Walker gave a very good briefing to the members and the order proposed did not proceed at that time out of the very considerations raised in the letter.

The House did not trample on the special commission of inquiry. The House awaited the delivery of its report. The concern there raised was in fact addressed through the good sense and restraint of members in the House. In relation to the bargaining parameters issue, this is similar I think, Mr Mason, when you have said, "Sometimes even legal professional privilege won't avail", that sometimes the House needs to look at the material to see what advice the Government got and to see whether it followed that advice. This material was in the same nature. One of the two cases has in fact been resolved, so there is no issue about interference with the course of proceedings. There are still proceedings on foot. There may or may not be a dispute of the privilege raised, but if it is I will be very sensitive to the issue of existing litigation.

Proceedings of the commission are not part of the administration of justice, because the High Court has ruled that way. Whatever we think of the desirability of that outcome, that is a decision for the High Court in the Public Service Association of NSW case and that is a matter of dispute within the House. Again, I know the Leader of the Government and the Leader of the House are tut-tutting, but I did not write the High Court's judgement on that matter. The point is, at no point has this information been misused. Where commercially sensitive material has been provided to the House, that material has never been misused, has never been leaked and has never been used to the detriment of the public interest or even the financial interests of the Government. Again, those problems that are outlined are apprehended if misused, but they have not been, so I would say that the Government's concern is misplaced.

The PRESIDENT: Thank you. I will turn to Mr Shoebridge. Ms Sharpe, do you have anything to say?

The Hon. PENNY SHARPE: I have a very short contribution. I obviously agree with everything that Mr Searle has talked about. There needs to be an honest conversation here about what the dispute is. Governments do not want some of their decision-making to be in the public arena. Governments of all sides, and I have sat on the other side, have resisted that. The difficulty that we have here is that the practice and the mistrust in relation to dealings between members of Parliament through either the GIPA Act or through the questions on notice and other processes, and often between individual Ministers, has led to a point where people are willing to use SO 52s that I think are too wide, that could be too narrow.

The Government must address a number of things, and one is following the GIPA Act, where the presumption is actually to proactively disclose documents, not to make it difficult, expensive and hard to try to get hold of what are reasonable questions in the public interest asked by MPs. That needs to be addressed and Ministers must be willing to honestly engage with individual members when they have SO 52s, even in short periods of time. There are Ministers around this table who manage to do that all the time, but some of their colleagues do not and then whinge about the number of boxes there are. Every MLC I know does not want to be looking at documents that do not deal with the matters for which they are trying to seek information on behalf of the public. None of us want to do that. The need to actively engage would actually solve a lot of those problems.

I know why no-one wants to have the electronic material provided. It is because it is searchable and it is easier for us to find the information. We have to be honest about the needle-in-the-haystack approach that governments have undertaken in relation to the production of documents. We should came to the table properly. MLCs do not ask for this material unless they believe that it is in the public interest and they wish to examine it. Government should be open and prepared to disclose documents that are managed outside the privilege regime and with a robust privilege regime.

We can go a long way to solving the issues that are raised, particularly in the DPC paper, if there was actually some goodwill and reasonableness on behalf of Executive Government when it comes to the production of documents in the public interest. I believe that that breakdown is also fuelling some of the problems that we are now trying to fix through process that actually cannot be fixed by process. They actually have to be fixed by a commitment to openness and transparency, and a willingness to work with individual MPs and not see MPs in contempt and try to make it as hard as possible for MPs to do their job. That is all I have to say.

The PRESIDENT: I will turn to crossbench members. Mr Roberts, I understand you do not have any arguments at this stage?

The Hon. ROD ROBERTS: No, I think the arguments and the frustrations have been highlighted.

The PRESIDENT: I will start with Mr Shoebridge and then check with Ms Hurst.

Mr DAVID SHOEBRIDGE: First of all, thanks, Mr President, for bringing us here. Mr Mason, thank you for your opening and discussion about the issues.

The PRESIDENT: Mr Shoebridge, you may need to speak up a little bit for this end. I do not think the microphone helps the volume.

Mr DAVID SHOEBRIDGE: Well, I am not going to thank you twice, Mr President, but I do appreciate coming around the table. I think it is useful. I will not repeat what Mr Searle and Ms Sharpe have said, but I adopt what they have said. We are here because of a trust deficit, a major trust deficit with the Government of the day. All of the existing accountability mechanisms, apart from SO 52, have become next to useless, and perhaps apart from direct inquiries in committees where you have someone sitting across from you. Answers to questions on notice, and I am not necessarily looking at the individual Ministers here, but your colleagues in the other place treat them with contempt. We have repeatedly found, when we actually require the production of the draft answers given by the bureaucrats to questions on notice, that the draft answers actually contain answers to the questions, then it goes to a Minister's office and all of the actual information is removed from the answer, and we get an answer to the effect that Mr Searle said, which is, "Please see the annual report." Of course, when you go to the annual report, none of the information is contained. I think that is both contemptuous of the Parliament, but it also destroys trust.

If you try to use the GIPAA process, the delays are inordinate, first of all. Even when you win, at first instance, the Government does not stop and it appeals it. Again, there is another six-month delay from the time you make the request to when you actually get a decision. Together with countless hours—I mean, you put the table of hours here that bureaucrats devote to actually answering SO 52 requests. I think if you put the collective time that members of the Opposition and the crossbench have spent in the GIPAA process, it would dwarf this table that you have here, and often for derisory responses. So is it any wonder, in those circumstances when answers to questions on notice are treated with contempt and even when the information is given to the Minister it is actually expressly and deliberately removed to avoid accountability—the GIPAA process is expensive, time-consuming and largely ineffectual—that collectively we respond to SO 52 in the way that we do?

The cost that the Government does not realise is that all those other processes have well-recognised time frames and structures within which you can genuinely engage with the issues and protect whatever genuine interests you have. But instead of protecting the genuine interests and providing genuine information in a structured process that exists outside of SO 52—those processes have been bastardised and made next to useless—so we come to the SO 52 power, where you do not have any of that process. It is really up to the House what, if any, protections you have in that process and we resort to SO 52. Then when the complaint is that SO 52 is being resorted to excessively, collectively the balance of the House says, "Well, you've created this situation." So that is where we start.

Genuine engagement in those other processes will lift a significant amount of the pressure off the SO 52 power. I do not know how that message gets back to your colleagues. Maybe it will not. Maybe that bureaucratic entrenched opposition to providing information is so entrenched that we will just have to keep working on SO 52 and making a more functioning process. In terms of private citizens' phone numbers and emails and the emails and phone numbers of bureaucrats, I have not once seen the House insist upon it when the privilege is sought, even if it does not arguably fall within privilege. The idea that the Government cannot actually put in place a process to black those out in a reasonable time frame, with all the resources that Government has to hand, I just find not credible.

Before I came here I acted for a series of unions in royal commissions and we would have, with far less resources than the Government has, thousands and thousands of pages of documents given to us to consider within 48 hours and you just did it with the resources to hand. You worked professionally to the time frame with vastly fewer resources and often significantly shorter time frames. So when the Government says that it cannot find a junior solicitor or a junior clerk to go through and black out phone numbers and emails and says, "That's the reason we make these unworthy claims for privilege", I think is a completely disingenuous position.

If the Government does not get to the point of producing the documents electronically I think we will just have to simply request that the Clerks do it, that when we get a paper return that we request that the Clerks simply put it through optical scanners and then we have a process whereby it is accessed. Instead of the Opposition doing it and then The Greens doing it and replicating all of those resources, we will just get there that way. But I find it remarkable we have to do that because I know for a fact that the way those documents are compiled on the Government's side is that PDFs are sent to a central location and then printed out, put in boxes and then brought

to the House. It is farcical. We know why it is done. But if we cannot resolve it at that end then we will just resolve it at the other end by requesting the Clerk to go through that process. As soon as it is received, the Clerk can run it through the optical scanner, put it on a common drive and we will all access it. We will get there.

But that does not answer the question on inherently electronic documents. And increasingly there are documents that are not created by paper and then put onto a system but there are inherently electronic documents. Maybe it is the way it is produced, that it has a series of indexes and clickable links on a website or it is an Excel spreadsheet. I do not believe it is complying with the order of the House to print out an Excel spreadsheet and produce an Excel spreadsheet by paper. And I think we will probably test that in the next little bit because I do not think it is complying with the orders of the House.

There are certain documents that are inherently electronic documents and they should be produced in their native format. They should not be converted to another format. And I think we will test that. For example, we have a bunch of documents coming to a call for papers on the Bureau of Crime Statistics and Research, which are a series of data tables. If what we get produced is printed out versions of it, not the actual native document but they have converted to a format where they are not usable, then I think we will test whether or not that is in compliance with the House.

I can point to another example in the Stronger Country Communities Fund production of documents where we got a bizarrely long spreadsheet printed on, I think, A3 paper, which excluded whole datasets and it was designed to be unusable. Again I do not think that is compliance because I think the record that is required to be produced is not a version of it that cannot be used and is printed out. The House requires the actual document to be produced and for inherently electronic documents I think you should produce the electronic document regardless of where we get to on optical character recognition. We do seem to have some fundamental disagreements about the nature of the House's power. I would refer to page 9 of the DPC's paper, which, maybe unintentionally, misunderstands the power. At the bottom it states:

> 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.

I agree with that. But then it goes on:

> 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.

Perhaps that is loose language. I do not know. But we have the power—the House has the power—because that power is reasonably necessary for the performance of our oversight. We do not have to test the exercise of the power in any individual instance against a reasonable necessity test. I keep seeing this suggestion in debates and I keep seeing this suggestion in complaints that the individual exercise of the power has to be tested against the reasonably necessary thing, and it is just wrong. We have the power because the power is reasonably necessary. Having established the power it is up to the House and the principles that have been articulated how that power is exercised. To keep going back and saying every order has to be justified against a reasonably necessary test is plainly a waste of time and is, on my reading, a fundamental misunderstanding of the nature of the power of the House.

The Stronger Country Communities Fund is a case in point about where, if there is at least some environment of trust, a kind of sampling process can be of use. In that case there was a call for papers for a significantly large number of documents involving the expenditure of hundreds of millions of dollars of the Stronger Country Communities Fund. Each of those applications tended to have a whole bunch of annexured documents—any individual application and processes had a bunch of documents about that deep. After the order was made there was an approach from DPC—I think it was DPC—to say to the Opposition and me, "Do you need all the annexures produced in every single case? That will be quite time-consuming and expensive. Perhaps we could show you the nature of the documents that you have asked for and, having had a look at the nature of the documents, we can agree about what annexures should or should not be produced."

We agreed to that. It was a civilised discussion. We went up to the offices in 52 Martin Place. We looked at a series of sample cases and we agreed that only certain annexures were required and the great bulk of copying and production could actually be saved. I think that was a useful process but it required trust and there is a bit of a trust deficit at the moment. But that is an example of a practical process, even using the existing orders. There is enormous merit in avoiding these fights about privilege by just clarifying what we mean.

I respectfully adopt the position adopted by Mr Mason. I think that language of clarification would be useful, provided we say, as I think Mr Mason suggests, that this is not creating a new test now. We are doing this because we are codifying what we understand the existing practice and procedure to be, and I think that is important. I adopt Mr Searle's proposition that if the Government really wants to adopt the approach that the independent arbiter should just barely make a decision on privilege and not be of any further assistance or consider

suggestions and just step away. I do not understand the rationale behind the Government in wanting that, because overwhelmingly those observations favour the Government. Because overwhelmingly what we see is the arbiter saying that this does not meet the privilege test, but there may be rational reasons why the House might exercise some self-restraint and not publish it. Almost uniformly they are the kind of additional observations that independent arbiters have made. They overwhelmingly favour the Government. If that position is pressed, the basis for pressing it is unclear to me and I would be interested in receiving clarification on that.

Finally I say that The Greens actually want this process to work and we want longevity. We think that it is important. To the extent that we can come up with a structured way to resolve post-order disputes—not in terms of whether or not the order should have been made or whether or not the call is right, but in terms of the scope, expense and time frame of producing it—we think that it would be good to have a structured process. We have put in place that suggestion for a structured process, but I see that the Government wants to substantially widen the operation of that. We would be against that because we have a major trust deficit with the Government. If we are going to go down the scope of allowing for a post-order process, we should try it with fairly narrow parameters that try to deal with the most egregious problems. Then we see if it works and if we have an environment of trust, we might come back and revisit it and expand it at some point. But there is a major trust deficit with the Government at the moment.

The Hon. ADAM SEARLE: Tough brief, Mr Tudehope.

(Short adjournment)

The PRESIDENT: Mr Shoebridge has completed his contribution. I understand Ms Hurst does not have anything. I will turn to DPC. I understand Ms Boyd will be speaking on behalf of DPC.

Ms BOYD: I will. Thank you, Mr President. I thank the Clerk for convening and organising this roundtable, and for inviting DPC to participate. I can sense that there is a fair bit of frustration on all sides in relation to the current process, and I can assure you that DPC shares that frustration. It has been a very difficult year, and I acknowledge the contribution and hard work of my colleague from DPC Sarah Johnson, who is our leading practitioner in information access and privacy law, and has done a huge amount of work to make this process workable in the interests of supporting the House. She has a deep personal commitment to open government and transparency, and I thank her on the record for all of that work.

I will open by clarifying DPC's role in relation to Standing Order 52, because I have picked up that there may be a bit of confusion about how much we can do and what we currently do, just to manage expectations around what is achievable. Before an order is passed, we play very much an advisory role. We are well placed to give advice to the Clerk and to members on which agencies are responsible for what function in government. That is because we are responsible for drafting administrative arrangement orders to give effect to machinery of government change. So we can tell you where a function has moved. It can be difficult to assess that for members, so we are definitely well-placed to give that advice. That is critical in minimising duplication, because it means that orders are not proliferated across government to multiple agencies for the same documents that are really held by one primary agency responsible for a program or policy. We would definitely be open to more consultation with the Clerk and members on which is the right agency to approach for particular documents, whether that is by way of the GIPA Act, a standing order or an informal consultation in the interests of proactive release.

Once the order is passed, we play a coordination role only. We do not certify that agencies have produced all documents that they hold. We are not in a position to do that, particularly in relation to Ministers' offices. We have no control or ability to direct agencies or Ministers' offices in relation to their returns. We are a conduit to assist the House so that they do not have to have multiple contact points across government to compile returns for papers. It eases the administrative burden on the Parliament in that sense, so we take on that role and ensure that everyone who is captured by an order knows about it and that they know about the procedure and time frame for responding.

That is a huge administrative task. I cannot overstate how much time goes into ensuring that everybody is aware of the order, particularly where the order is very long or drafted in a very wide and potentially internally inconsistent way, and having discussions with every single agency about what this means and what they are required to do. My observation is that they are all intending to fully comply with the order, but it is very difficult in some instances to interpret what exactly their obligation is and what the scope of the order is. We also have discussions with them on whether particular documents fall within recognised categories of privilege, but only when they come to us and ask us that question. So our ability to ensure that quality submissions are made across government is fairly limited.

Of course, we provide all documents returned and certification letters to the House once agencies have done their work and compiled the documents. Usually we get the documents on the day that they are due to be returned. We are talking 40 or sometimes 50 boxes of documents. We will do our best to review of a sample of the documents to ensure that there are no obvious errors on the face of the return. For example, we make sure that there are no redacted documents in the privileged bundle, or that they have got indexes and things like that. But it is just not realistic for DPC to review every document and test every privilege claim to ensure that the return is to a standard that the House will appreciate or accept. So we do our best, but it is not a perfect process. There are days when it is overwhelming, but we continue to try. I reiterate that especially in DPC we have a very unique understanding of the scrutiny role of the House, a respect for the role that it plays in responsible government and the public interest. That is always the way that we assess these matters, and that is our intent.

We do not have the power to direct the legal function across government, but we have a consultation and educative function, and we try our best to ensure that general counsels across the sector are apprised of the relevant decisions of the arbiter and that they understand public immunity principles to ensure that a consistent approach is taken. I think that there is still a lot of work to be done there, we definitely acknowledge that. I would note that the information access function is not necessarily in the legal teams in all government agencies. In many cases you have reasonably junior clerical or administrative officers coordinating these returns, and they do not have a sophisticated understanding of the relevant categories of privilege. What they are trying to do is flag to us that these documents are sensitive in the context where if they do not make that claim, the document is published to the world at large.

Given the other obligations of government with respect to privacy and other information, particularly commercial-in-confidence information—which is information of third parties in a lot of cases—there is a duty of officers to flag that to the House that these are potentially sensitive documents and you need to think about whether

or not they ought to be published. There is more work to be done to ensure that privilege claims are of a reasonable quality and are valid, but I would not agree that there is any sort of concerted effort to use privilege as basis for non-production or non-publication. It is really just a protective measure that we are forced to take because the onus is on government to do that where automatic publication occurs.

The most practical way to resolve the incidents of disputed privilege claims and the confusion that has arisen in this space is to ensure that the orders themselves are better. If they are narrower in scope and they are targeted to key documents and agencies, we will have more time to consider whether privilege claims are appropriate and necessary. It is just not realistic, given the current scope and volume of what we are dealing with, to expect that agencies will be able to craft quality privilege submissions. The priority is mere compliance with the terms of the order. I also thank the Clerk and say that we enjoy a really positive working relationship with the Clerk and his office. I trust that that will continue. I think it is to the benefit of the Parliament that DPC plays this coordination role but it is challenging when DPC's motives in playing that role are questioned in the House and publicly. But I think it is to the mutual benefit of the House and the Government that we play that role. I will again stress that we cannot certify on behalf of other agencies as to their compliance with the order, particularly Ministers.

I will move now to specific comments raised by the other speakers. Mr Mason, thank you for coming today and for your continuing contribution to the body of legal thought in this space. We really appreciate it. We agree with your comments about the uncertainty of the word "privilege" in the context of Standing Order 52. I think everyone agrees—and this aligns with Mr Searle's comments—that we are not talking about privilege in the sense of privilege against production, which is the usual way that privilege is understood at common law. In that sense we believe that the role of the arbiter is to provide a legal opinion to the House on whether the documents fall within a legally recognised category of privilege. We agree that there is nothing wrong with the arbiter making suggestions to the House as to what to do with the documents.

All we are asking is that the House take a more active role in determining whether publication of particular documents is actually necessary for it to fulfil its scrutiny function. All we are saying is that the arbiter should not be put in a position where the arbiter's report is completely relied on to make that decision about publication. The best example of where that has fallen down to the detriment of the public interest is in relation to the Rules-Based Environmental Water return and also the Stronger Country Communities Fund return. In that case, very general and sweeping privilege submissions were made by both agencies in relation to privacy. The documents in question were constituent letters that raised matters of policy but they also had the home addresses of people in them. The privilege claim was very broad. The arbiter very strongly rejected the privilege claim.

Mr MASON: We all have bad hair days.

Ms BOYD: Yes. The documents, totally in reliance on the arbiter's report, were published. For a practitioner in government who has an understanding of the impact that that can have on the personal safety and privacy of individuals, that result is just completely unacceptable to any government official. But in this case it just went straight through to the keeper and the documents are still public. What we are seeing is perhaps an overreliance on the privilege report and not as much consideration of whether or not the documents actually need to be published for the House to do what it needs to do. We fundamentally agree that there needs to be some alternative procedure for flagging personal information. We obviously try to redact where we have time and we totally accept that that is a really good way of dealing with the issue, but that is not always practicable particularly where the agency thinks that the rest of the document may be subject to a public interest immunity claim, which is what happened in the rules-based environmental water one. The document itself was subject to a broader claim. In that context the address details were not redacted.

What we would suggest is that instead of requiring agencies to within 7, 14 or 21 days not only identify but also redact all that information, the better approach might be for agencies to be able to produce those documents separately, just flagging that before the House decides to publish them, the agency be given an opportunity to redact all personal information. I think that would be a really positive move forward and would take away a lot of the anxiety that agencies face in doing those returns in such strict time frames. I think that is dealt with most of the issues.

I think Mr Searle raised the issue of that privacy question being imagined and not real. I agree with you that there is an easy solution to it but I think it is a real issue. I think the people whose addresses are currently online would think it is a real issue for them, so I do think it is a real problem. But I agree that there seems to be a workable solution to it. Just on electronic production, DPC—and this is outlined in our paper—fully supports progress in that area. It would significantly reduce the burden for agencies and just be a sensible development, we think. The issue is that the integrity of the data and the security of that data are paramount. We have not been willing to merely provide, for example, a USB or a PDF that can be shared or lost or manipulated. It is not

appropriate for Government information that potentially is sensitive to be treated in that way and it is inconsistent with our own standards for data security that we apply in agencies.

So we have had a constructive dialogue with the Clerk's office about the relevant systems that could be looked at to provide a technical solution to electronic production and we will continue to have that discussion in good faith with the Clerk. I will note, though, that the Solicitor General has previously advised—and this is in publicly available advice—that it is arguable that the House's power to call for papers is limited to papers. I know that sounds absurd but that is the advice that we have. I think that is important context as to why things are currently done the way that they are done. But that said, we think it is a sensible move forward to look at methods for electronic production. Provided they ensure the integrity of data and the security of Government information, we will continue to look at that.

We would also support cascading time frames for returns. I think that was an issue that Mr David Shoebridge may have raised. I think that is happening, in effect, anyway with all of these supplementary returns that we are seeing so that precedent is becoming more well established and we would be very happy to see that formalised more. With respect to the issue around inquiries and investigations that are already on foot and orders coming in over the top of that, I was not aware that Mr Walker had briefed the Public Accountability Committee so I apologise for that oversight in our paper but we simply were not aware that that had occurred.

The Hon. ADAM SEARLE: I was trying not to be critical.

Ms BOYD: I note that the *Ruby Princess* return date was changed so that the return did not have to be made until after the inquiry had reported, which was a good thing in our view. However, the House then passed a further order for the bushfire royal commission submissions and papers not long after that. So what we are suggesting is not critical of any of those particular orders but, rather, just that the House—and it is certainly not for us to comment on the manner of the exercise of this power; that would not be appropriate for DPC to question that—we simply point out that that is a relevant factor for the House to consider if you have charged a statutory body with extraordinary investigative powers to look into a matter, should the House's inquiry perhaps await the outcome of that investigation. I note of course that DPC is usually involved in having to assist that investigative agency with the investigation by providing documents within very strict time frames, often with offences for not complying. It puts a double burden on the agency in that case.

I note Ms Sharpe's comments about the proactive disclosure and engagement with agencies. I can only speak for DPC when I say that we would welcome more reliance on the GIPAA framework, particularly the proactive disclosure obligations. We are very keen to, and often do, create records in the interests of or in response to requests where we may hold information generally but not a specific record. In the past we have shown a great deal of interest in doing that and so I would encourage members to attempt a GIPAA or a proactive release as opposed to going straight to SO 52 where documents are held by DPC. I can certainly raise that matter with my colleagues to ensure that more efforts are made in that regard, if that would assist members on any particular areas. I think that is about it. The main things we have sought here seek to address the privilege issue by reducing scope and volume. So yes we agree there is some confusion as to the role of the arbiter and the various claims that can be made but a lot of those would fall away if the orders themselves were not so onerous and there was not so much volume involved. We would like to see the focus on that as opposed to any definition of privilege being the main solution.

The PRESIDENT: Thank you, Ms Boyd. I will just indicate the following because I know some members may need to leave earlier. Now I will be asking the Clerk to make some comments. Then we will be directing questions and discussions to Mr Mason. That will basically finish what will occur today. I will subsequently try, as soon as possible and with the assistance of the Clerk, to prepare a draft report. I will circulate that draft report to members for consideration for all those who have attended today's panel, including DPC, for consideration. I will then probably make some phone calls to ascertain if it would be of benefit for members or a group of members to come back together to discuss that report with the ultimate aim that I will then prepare a final report that will be tabled and made public. I will now ask the Clerk to speak.

Mr BLUNT: Thank you, Mr President. I will be very brief; I just want to address three things. First, I would like to make a few remarks about the discussion paper that was tabled before the Procedure Committee a couple of months ago, including electronic returns. Secondly, I would like to respond very briefly to a few things in the DPC response to the discussion paper. Thirdly, there are a handful of other matters that no-one has mentioned yet today but which are of concern to us from an administrative point of view from the department.

In relation to the discussion paper that was tabled at the Procedure Committee a couple of months ago. I particularly draw the attention of members to the proposal for an order for papers workshop for members and their staff and for drafting guidelines to be issued. If anyone has any comments about the content as circulated please let me know as soon as possible. I would like to propose, Mr President, that we do something in this space

perhaps during the summer recess. But again if anyone has comments about that please let me know. There is a note in relation to the workshop to describe the role of DPC in responding to orders for papers. Perhaps rather than me trying to outline that, I will ask Ms Boyd to assist. I will also ask Ms Moore to say something about our electronic production of returns process and the project we have been working on.

Ms MOORE: The Parliament really welcomes DPC's commitment to electronic returns. We have met with DPC on three occasions to date to have those discussions and they have been really productive and we thank you for that. The injection of funding for the digital transformation projects has put us in a position where the project can realistically be delivered. We have the resources and the focus for us is, with DPC's input, making sure we get the specifications right to get the system right.

The eReturns in practice at the moment would involve designing a parliamentary portal that would connect with the Parliament's existing databases for storage and access. That would comprise of four key features. The first one is a secure workspace for authorised users in DPC and other agencies as requested to upload and sort the documents prior to lodging. Secondly, a secure transfer facility for the Parliament to receive the documents, store the documents and make them available either as a public return or a privilege return. A separate viewing platform for public and privileged so privileged documents would be made available only to members and subject to their identity being verified.

Finally, capacity for members to flag documents in a privilege return to form part of their dispute and link capacity for those documents to be made available to the Arbiter. The foundational framework has already been built so basically the portal itself is being designed and the development team are currently designing a document that will set out the detail of the overall structure so we can continue those conversations with DPC. In terms of next steps, we would see the summer recess as an opportunity to progress some of that work with you hopefully, owing to a slight break in the number of returns to orders being agreed to and we would anticipate being in a position to provide a further update before the House resumes or when the House resumes next year.

The PRESIDENT: Thank you.

Mr BLUNT: If I can now just quickly address the DPC document. I thank Ms Boyd and Ms Johnson for that valuable piece of work. Can I indicate at the outset that like DPC we absolutely value the quality of the relationship and the professionalism of that relationship. We really noticed that a few years ago when there was a return to order that was not coordinated by DPC that came from a statutory body directly, I think Mr Mason noted as well the absence of the quality control from DPC. It really reinforced what a valuable role you play so it is appreciated. Likewise, can I just respond to a few things. On page 5, I can assure you there was certainly no intention on our part to minimise the burden upon DPC and government agencies from the increasing number of orders. In fact, to the contrary we wanted to draw that to the attention of all members.

On page 6 of the DPC response, it makes a couple of suggestions in relation to advance notice being given of orders and having a seven-day cooling off period. If the House was so inclined to adopt such a mechanism we can see no problems from the Department of the Legislative Council point of view. On page 7 reference is made to duplication of effort and/or identical records being produced by more than one agency. Can I highlight a really positive example where that did not happen? Ms Boyd mentioned the *Ruby Princess* return. When that return was received it was with great delight that I noted that it was specifically stated that no document was reproduced more than once. So a process had already been gone through either within DPC or the other agencies to eliminate duplication. So it was possible to do it in that case—

Ms BOYD: We had several months to respond to that return.

Mr BLUNT: Yes, that's right. I think it was about five months. But we certainly saw that as a very positive move.

Coming to Pages 8 to 11 and 13 to 14, there have been comments by various members in relation to those issues about the nature of privilege and the role of the arbiter and automatic publication. I would just make two comments. One is that a number of those issues were addressed by the Privileges Committee in its 2013 Mt Penny report and a number of those issues were also addressed in submissions made to Mr Mason in relation to his WestConnex report in 2014. I think some of those issues have probably been argued and dealt with but it does not mean that they cannot be argued and dealt with again, but they have been addressed.

On pages 12 and 14 a proposal is put forward, just as one is put forward by the Independent Legal Arbiter, about private information. Again, from the point of view of the Department of the Legislative Council we cannot see that there is a difficulty with dealing with this matter in a formal way. The devil will be in the detail in terms of if that is to be the approach. If there is to be a formal solution rather than an informal one, the devil will be in the detail of working out exactly what categories are genuinely private.

Finally, I will respond to page 14. There is a note about claims for parliamentary privilege. I guess this is an area where I do claim some specific expertise. I just back up the comments made by the arbiters in a number of reports about claims of privilege on the basis of parliamentary privilege. I do not know that those sorts of claims are very helpful.

Some other matters that have not been raised by anyone else today—attachments to emails and other documents—some returns to order that are received include attachments to primary documents but in other cases primary documents are produced and the attachments are not produced. So there seems to be some inconsistency in the way various agencies are responding. Recently there was one example where there was a ministerial briefing note that referred to attachments A, B and C. I think one of the three attachments was produced because it was specifically named in the order but the other two attachments that, on the face of it, would have looked to be captured were not produced. I think there needs to be some clarity around that issue about attachments.

Reference was made to the creation of documents and again I recognise the advice of the Solicitor General back in 2014 around that issue but, on the same token, I noticed that some agencies and Ministers have facilitated, particularly in the education space, responses to orders for papers that have involved the creation of a document and the production of that document that have seemed to me, if I can be so bold to suggest, a very sensible approach to produce one document rather than a truckload of documents. That is all I wish to highlight.

The PRESIDENT: We are now at the point of questions or discussions directed to Mr Mason. If a member needs to leave and they want to ask a question before they go, I will allow them, otherwise I will ask crossbench, Opposition then Government members.

Mr DAVID SHOEBRIDGE: Other than if we collectively resolved the privacy issue, if that is taken off the table at the outset, do you see that as having a significant reduction on the burden of work that you do?

Mr MASON: That will not affect me very much but I am conscious it will affect the officers and getting the detail and the timing will be important. Whether there is a general understanding that you do not have to produce documents, the private bits, and at what stage the redaction takes place. Who initiates that? Does the Government do it or does it wait until the member says, "I am particularly interested in these documents", and at that stage, under oath or standing order, the Government redacts? It has not been a big issue. Privacy has not been a big issue for me. There have occasionally been so-called privacy claims which I have advised against but that is another question.

The Hon. DAMIEN TUDEHOPE: Yes, that is why I suggested there was potentially a third category of documents being the privacy claim documents which members can identify.

Mr DAVID SHOEBRIDGE: Can I just go back to making the observation and I think it is supported by the Opposition, it seems to me that the privacy issue is often used—I could be verballing Ms Boyd—as a reason that there are these relatively broad-ranging privilege claims. At least in the eyes of DPC these two issues are tied together. If we have a system whereby there is an acceptance that personal emails, people's private addresses and phone numbers can be redacted from the public documents at the outset, if that information goes down to agencies, and there is the assumption the documents will be produced on that basis, even without it being expressly included in a sessional or standing order, that may allow the real issues to be the focus of any privilege dispute and narrow the issues in dispute greatly, and these are the classes of documents that are in dispute. I understand the Opposition's position. I could be wrong. Neither of us have ever challenged and I do not think Animal Justice Party members have ever challenged legitimate privacy issues.

The Hon. DAMIEN TUDEHOPE: But you have not.

Mr MASON: There is another category, of course, commercial-in-confidence, which again I perceive is part of the urgency and the need for government to err on the side of safety in a pressure situation. But that is a slightly different area.

The Hon. DON HARWIN: That will always be disputed.

Mr DAVID SHOEBRIDGE: I think that is always disputed. But then we go back to our position in terms of what the real issue about privilege and/or immunity is: Is this going to harm people of New South Wales? Is this going to create some actual harm to the Government? There will be cases where commercial-in-confidence information should be kept privileged because it will create harm. Maybe if we clarify the privilege, we can focus on those issues.

Ms BOYD: Just with the redaction, I just want to manage everyone's expectations. There is no way we can redact all personal information within 21 days on a broadly based order. So that is the issue. We would, otherwise, and then we would produce a redacted version in the non-privileged pile and an unredacted version in the privileged pile. That is what occurs for very small orders where we do have time to redact. But the issue is we

do not have the time to do it. They are often littered throughout email chains. It is a big issue administratively for us. It may not constitute much in terms of your disputed privilege claims but it is a big administrative issue. What we would be seeking is a process where we get a little bit more time. If the House thinks any of those documents that contain that information need to be published, that we would get a second bite of the cherry and get to actually redact them.

Mr MASON: But some documents are in a double category. There is a disputed privilege of some merit and there is the privacy.

Ms BOYD: Yes. Before any of the ones that we have identified as having those details in them get published, a communication be made back to the agency saying, "the House has resolved it specifically needs these documents published in order to do its inquiry", or whatever it is doing and we would get an opportunity to then do a redaction rather than trying to do all of that in seven days, or whatever the case may be.

The PRESIDENT: I will ask around the table. Ms Hurst?

The Hon. EMMA HURST: No.

The Hon. ADAM SEARLE: I guess my question is mainly for DPC rather than for the arbiter. I think there is a misapprehension on the part of most members in the House. We rather assume that DPC is exercising a gatekeeper role. If that is a problem I have made this invitation to Tim Reardon to come along to such a function as this and it is a shame he did not come. Perhaps that is something where he as the secretary of DPC could talk with his peers in the other agencies. That would be useful because, as I said, I think there is a misapprehension we sort of understood DPC is playing that coordinating role and a gatekeeper role. If that is not right—

Ms BOYD: We do to an extent but we just cannot certify. The certification is a serious commitment.

The Hon. ADAM SEARLE: I understand on the certification but the submissions are often from DPC rather than from the individual agencies.

Ms BOYD: No, I do not think that is the case. We do not make submissions. We cannot speak to the nature of documents. Often it is very much interwoven with the project or policy at hand, which we cannot speak to. We can certainly talk to them about public interest immunity principles and the threshold for legal professional privilege, which we agree is very high. But it is a question of whether they come to us and then how long we have the documents for before they come back to the House.

The Hon. ADAM SEARLE: In terms of the reviewing of whether documents are privileged, I assume that is chiefly undertaken by the individual agencies affected and there may be an issue of the experience or the skills of the people undertaking that function. The current arrangements with the Crown Solicitor's Office, is this sort of work still core Crown funding? Those agencies could access, for example, barristers through Crown Solicitors to review this material if they do not have the in-house expertise?

Ms BOYD: I will have to take another look at the core legal work guidelines. Everything that DPC does is core legal work, so we do not have to confront that question often, but I am fairly sure that matters concerning the Parliament's powers in general are core legal work.

The Hon. ADAM SEARLE: In which case, maybe those agencies could be encouraged to access expertise rather than having—

Ms BOYD: Yes, and they do.

The Hon. DAMIEN TUDEHOPE: Provided the time is there.

Ms BOYD: But we have seen the results and, as Mr Mason pointed out, often at great cost and for little value, you know, having external legal firms being tasked with trying to assist agencies.

The Hon. ADAM SEARLE: I was not suggesting external firms.

Ms BOYD: No.

The Hon. ADAM SEARLE: Very skilled junior barristers are fairly inexpensive and there are a lot of them, but the point is that the test about what is legal professional privilege, like, a lot of the claims in that space do not come anywhere close. Therefore I assume that people who have made that call in fact have no legal training whatsoever.

Ms BOYD: I cannot speak to what occurs in other agencies, but I am certainly aware of one instance in relation to the Department of Planning, Industry and Environment where the General Counsel has written to the Clerk to apologise for an error with respect to a legal professional privilege claim, but otherwise I cannot speculate

about who is making those calls within agencies. All I can say is that, where we identify a claim that is not well founded, we will point that out to an agency, but our ability to do that is limited where the time frame is so tight.

Mr DAVID SHOEBRIDGE: But the provision of a paper not dissimilar to what we have had distributed here, which sets out at least the House's position about how these things will be done, maybe with an interpretive document from DPC, might be of assistance in those agencies.

Ms BOYD: Yes. Every time an order is passed we send a memo to each agency that is named in the order with guidance material to that effect. It is very plain English and it is drafted knowing that the people who are getting it are not legally trained, but just to give them some idea of what they are dealing with and how to progress these matters. But I do not think it is realistic that they are going to be very sophisticated claims when we are talking seven days or 14 days for all documents relating to a particular matter. If the requests were drafted in a more targeted way and sought particular documents, there would be no barrier to seeking Crown Solicitor's advice or ensuring that the legal function within the department looked at it. These are orders that in a private litigation context would take months or years to produce to the court. It is really that dire in terms of what is being asked of agencies here. I just want to make clear that it is unrealistic to think that those privilege submissions will be consistent or necessarily sophisticated in that context.

The Hon. ADAM SEARLE: I have a couple of things that I will come back to.

The Hon. DAMIEN TUDEHOPE: One thing that I do not know if we have necessarily addressed is a proposal, which I think is contained in the DPC submission, of a period where the motion for seeking the return of documents is lodged and its actual return is a period of seven days. If the motion is brought on a Tuesday, the actual motion is not moved in the House until the following Wednesday, so a consideration to potentially limit the scope of the documents being sought, have negotiations with the department about where the documents are and whether potentially, as Ms Boyd has identified, it is the right agency under the machinery of government that the documents are being sought from, and the scope of the order, the time frame of the order, whether that could be negotiated in that period of time and thereby, again, adopting what Ms Boyd has observed, seeking to limit by negotiation the scope of the standing order would in fact reduce the number of claims which are being made because we are actually reducing the thing.

I accept the sessional order which has been moved by Mr Shoebridge and that, in my view, goes some way towards the proposal that the Government will be suggesting. But, in fact, we would be wanting an even more vigorous process up-front to say, "Put the motion on the table, tell us the documents which you are seeking and see if we can negotiate a position before the motion is moved and the order of the House becomes the order of the House." That might need some tinkering with to make sure that the documents are protected from the date that the motion is moved, but it strikes me that there needs to be much more attention.

I welcome the workshop in relation to the drafting of orders to make sure that you could limit privilege claims if you had a better process, because the current way that we do it is the motion is moved on the Tuesday and the order is made on the Wednesday. Consequently, the opportunity of negotiating a more targeted order is lost. It would be the Government's position that we are not resisting. We know that there is a deficit of trust, and everything seems to be predicated on a deficit of trust, but this goes some way to reciprocating and to saying, "Let's work both ways here." If there is an opportunity of getting better structured orders identifying the documents, then consequently the claims being made would be limited. I would be urging a consideration of that sort of proposal.

The Hon. ADAM SEARLE: That is a suggestion in the DPC paper and that is something that the Opposition will take seriously. I am not agreeing to it, but I can see why you put it forward. For example, I note in relation to SO 52s that the Opposition has a number that have been sitting on the table for some time. I am responsible for a number of those and I have not received—

The Hon. DAMIEN TUDEHOPE: I don't quibble with that.

The Hon. ADAM SEARLE: —any overtures about narrowing the scope. I think that would not be a bad idea in some cases. Whether that can apply to all SO 52s, well—

The PRESIDENT: I will turn to Mr Shoebridge.

The Hon. DAMIEN TUDEHOPE: Just quickly in response.

The PRESIDENT: On this point.

The Hon. DAMIEN TUDEHOPE: If someone wants to move more quickly, they would need to demonstrate the urgency. We can tinker with the way that that would work if there is some urgency attaching to a quick return of a document, but I think if we have an understanding that that period will be used for an assessment

by the relevant agency and/or DPC of the scope of the order, the amount of time that will be taken to comply with the order, the number of documents which are required to be produced, then that would go some way towards limiting the amount of resources which are required to be dedicated to.

The Hon. ADAM SEARLE: I have one follow-up question, but I will defer to Mr Shoebridge.

Mr DAVID SHOEBRIDGE: Just on this point, there has not been any obvious efforts by the great majority of Ministers and agencies to engage in anything like that to date, so it is with a degree of—

The Hon. DAMIEN TUDEHOPE: That is not true.

Mr DAVID SHOEBRIDGE: Well, that is my experience. Most of the time it is radio silence. The motion is moved and then radio silence. The Government coming here and saying, "We would love to have this good-faith negotiation with you and we are open to this discussion or we are open to that", in the absence of any real and meaningful record of that to date it rings quite hollow; I will be quite frank. If there is a degree of scepticism, at least in my camp, it is because it rings extremely hollow. That is not to say that some Ministers do not. I would probably say that the Ministers around the table understand and have discussions, but overwhelmingly it feels like a very hollow submission when you look at practice.

I cannot see the House agreeing to consciously hamper its ability to move SO 52s like that. I think we should be realistic about what the likely achievements are. I do not see that as being a likely outcome, though I could be wrong, but I think the way of testing that would be engaging in good faith in that over the next little bit. If we can see that there is a willingness and if it is useful, and there may be a way of formalising it at some point, but at the moment it seems like a hollow promise designed to delay. That is how I see it. I am not saying that is your position, Ms Boyd, but from the decision-makers in the agencies that is how I see it.

The PRESIDENT: Mr Shoebridge, I just indicate that, noting the time, I will turn to the Minister. Then going to ask is that the questions be directed to Mr Mason. If it is a matter that discussions take place between members, that can be part B when we put a draft report together. But while we have Mr Mason here, that is how we should be using the valuable time. Ms Mitchell, I know you wanted to comment.

Mr DAVID SHOEBRIDGE: Sorry, there was one point. There needs to be an express certification that no documents have been destroyed. Opening negotiations in advance and putting something on the record creates a whole lot of uncertainty.

Ms BOYD: I am not sure that anyone could reasonably give that, Mr Shoebridge. They can do searches and certify on the basis of those searches that no documents are held but I do not know that they would have knowledge as to whether or not documents had been destroyed.

Mr DAVID SHOEBRIDGE: From the giving of the notice at a minimum. Can I say I understand DPC is a prisoner of its instructions and including in matters we discussed last week publicly I accept you are a prisoner of instruction and I actually said that on the record: You are a prisoner of your instructions. I accept DPC has that minimal role.

The Hon. SARAH MITCHELL: I am conscious of what you said to direct questions to Mr Mason but I want to say that in relation to the point that Mr Tudehope has made and Mr Searle and Mr Shoebridge responded to about the time frames, it is sometimes extremely difficult when you get notices on a Tuesday. You do not know until dinnertime Tuesday if they are going to be on on Wednesday. In my portfolio often there will be big ones; there will be wide ones. I would like to say that we do a good job of speaking to the members and trying to negotiate to narrow the scope.

There was a particular SO 52 recently that would have been exceptionally large and would have cost a similar amount to upgrading a school to actually produce it. When I told the member, they were quite horrified by that and we negotiated and worked out an outcome. If there was more time, particularly for the wider scopes that are sometimes given in SO 52s, I do think that would be useful. I also say, with all due respect to those around the table, that the quality of the SO 52s that come through can differ quite a bit from individual members as well. Sometimes they are very straightforward. Other times I think having a little bit of time to negotiate back and forth, which is not just useful to government but is also often useful to the member, who maybe does not know exactly what they are after. Frankly, my experience has been that a quick conversation can sometimes help both sides.

The PRESIDENT: Thank you. Are there questions for Mr Mason?

Ms BOYD: Sorry, I just had one question about the reasonable necessity test for the exercise of the power, whether you have views about that. There is certainly Solicitor General's advice on the record that indicates that obiter in Chadwick was that the exercise of the power is subject to that reasonable necessity test. Did you have any views on that that might be helpful to resolve the question?

Mr MASON: I do have a view—I do not know how helpful it will be—namely that if government does not think the particular call is reasonably necessary for the constitutional functions, government can refuse to produce the papers and the Usher of the Black Rod can exercise her role and the court can decide. That is not very helpful but in theory any call for papers seems to me can be resisted on the basis that it is not reasonably necessary for the functioning of the House.

The Hon. DON HARWIN: Indeed.

Mr MASON: But it is not up to the member to disclose his or her hand in advance. The functioning of the House includes legislation as well as just general government accountability, so it is a pretty easy test to satisfy.

Ms BOYD: I would have thought it odd, though, if the House could impose this burden on government with it being unnecessary or without having some onus to consider how necessary it is.

Mr MASON: Unfortunately the question is: Who decides? It is not the IA's role to decide whether the call was excessive or whether the response was overgenerous. Because of what was decided in *Egan v Willis*, I cannot see—unless government set up some method of someone having an arbitral role in an advisory capacity on the appropriateness of the particular call for papers, and I am certainly not suggesting that that should happen—but if you are talking about the legalities of the matter, if it is not reasonably necessary, refuse to answer and the Black Rod can have something to do.

The Hon. ADAM SEARLE: Mr Mason, just on that point, maybe I have misunderstood the case law but my understanding was that the Court of Appeal or at least some of the members expressed the view that it really was not even for the court to second-guess whether the test, if you like, for the exercise of the power is met.

Mr DAVID SHOEBRIDGE: Correct.

The Hon. ADAM SEARLE: That was really uniquely a matter for the House.

Mr MASON: I can only tell you my understanding and say this is an old Solicitor General speaking anyway. But when push comes to shove, there are limits on the House's power and it is not entirely a non-justiciable area because by setting up an assault by Black Rod you can vest the court with authority to decide the issue. What has happened in *Egan v Willis* and in Chadwick was that it was managed so that a very precise but fairly general question was put to the court. In Egan it was, "Does the House have a power at all?" In Chadwick it was, "What does that power interact with legal privilege and public interest immunity?" Once you descend to whether a particular call for papers passes the Egan test, as it is pretty easy to do, but on its margins it may not, I do not see of any way other than a technical assault and a court case, which is not very productive.

The PRESIDENT: I will indicate what will happen. Clearly my draft report is not going to occur during the next two sitting weeks so I propose to have the draft report circulated before the end of the year. That would then allow members to consider it and that would allow us, if we are to get together again to discuss it, to do so in the early year. My intention is to have the report tabled in the first week of sittings. That does not mean that members—Opposition, crossbench, Government—cannot be discussing any current SO 52s or any other discussions you want to have in the meantime. Of course my door is open if any member wishes to speak to me about it. I think that is the best way forward. The draft report would also include the documents that have been part and parcel of today's roundtable and in-confidences as annexures to that report.

The Hon. ADAM SEARLE: Mr President, one last question for DPC and I am happy for them to take it on notice. I understand the concern over the document security but where there is a public return and documents are physically put in the tabling office and now can be accessed either by members of the public or journalists or staff what is the concern over the electronic return? Is it just that it can be more easily able to be disseminated?

Ms BOYD: The sharing of the data is more around the privilege bundle. But it is also the integrity of the data. So if it were to be produced in a form that could be manipulated there would be uncertainty as to the public record, I think. So that is another concern that we would have. There are systems available to ensure read-only access. I am not suggesting members would manipulate the data. I am suggesting that if the data were to be proliferated online there might be a risk of manipulation occurring. I think we can do better than PDFs. I just think that is a very antiquated approach when there are very sophisticated online platforms for read-only viewing that are searchable and have other functionality. I just think we can do better than that.

Mr DAVID SHOEBRIDGE: Even the Commissioner of Police has pulled back from that argument. That used to be the position of the Commissioner of Police, even in the GIPAA process.

Ms BOYD: I cannot speak for the Commissioner of Police.

Mr DAVID SHOEBRIDGE: He is not the most open information-sharing type that I have ever seen.

Ms BOYD: No, but when you are talking about the volumes of data that we are talking about in some of these I think a cautious approach is warranted. I agree that if it were just one or two documents you could assess the risk of those documents on their merits but when you are talking about sometimes spreadsheets, thousands of pages of data, you need to take a cautious approach. Our view is that the standard should be high and we are happy to work with the Parliament to achieve that and have something that is robust and that ensures all of those matters are addressed. I just do not see why we would not do that.

The PRESIDENT: Thank you. I am sure I speak on behalf of everyone, Mr Mason, when I say thank you very much for your time. We greatly appreciate it.

Mr MASON: Thank you.

The PRESIDENT: Mr Blunt, to you and your whole team, thank you very much for all of your efforts in putting all of this together. Thank you, one and all.

Discussion concluded at 12:09.