

Privileges Committee

Execution of search warrants by the Australian Federal Police No. 2

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Terms of reference

1. That the Privileges Committee inquire into and report on the status of documents and other things the subject of claims of parliamentary privilege arising from the execution of various search warrants by the Australian Federal Police (AFP) issued on 25 June and 23 July 2020 on Mr John Zhang, then staffer of the Honourable Shaoquett Moselmane.
2. That the committee recommend to the House which of the disputed material falls within the scope of proceedings in Parliament by no later than 9:30 am on Wednesday 18 November 2020
3. That the committee, for the purposes of making its determination, have access to the relevant search warrants and the indexes of documents and other things in dispute prepared by the AFP and that the committee seek submissions from the Clerk of the Parliaments, Mr Zhang, Mr Moselmane and the AFP regarding the claims of privilege.
4. That, in recommending which documents are privileged, the committee apply the test used in the determination of the matters involving documents seized by the Independent Commission Against Corruption from the Honourable Peter Breen in 2003 and 2004, as amended by the Senate Privileges Committee in its Report 164, dated March 2017, entitled “Search warrants and the Senate”.
5. That in inquiring into the claims of privilege, the committee consider correspondence by Mr Zhang’s legal representative, dated 19 October 2020, and correspondence dated 14 October and 26 October from the Deputy General Counsel, AFP Legal, and any further material provided by either the AFP or Mr Zhang’s legal representative to the House during this inquiry
6. That, if a recommendation cannot be made on the basis of the index and submissions received, the committee be given access to the privileged material held in the custody of the Clerk of the Parliaments.
7. That the report to the House on the claims of privilege by Mr Zhang, contain a recommendation for terms of reference for the Committee to inquire into and report into outstanding issues raised in Chapter 5 of Report no 80 “Execution of Search Warrants by the Australian Federal Police”, and to related issues raised in correspondence to the Clerk of the Parliaments dated 15 October 2020 regarding the alleged seizure of material from Mr Zhang by the Australian Border Force in January 2020.

The terms of reference were referred to the committee by the President of the Legislative Council on Tuesday 27 October 2020.¹

¹ *Minutes*, Legislative Council, 10 November 2020, p 1542.

Committee details

Committee members

The Hon Peter Primrose MLC	Australian Labor Party	<i>Chair</i>
Revd the Hon Fred Nile MLC	Christian Democratic Party	<i>Deputy Chair</i>
The Hon Greg Donnelly MLC	Australian Labor Party	
Ms Cate Faehrmann MLC	The Greens	
The Hon Trevor Khan MLC	The Nationals	
The Hon Natasha Maclaren-Jones MLC	Liberal Party	
The Hon Matthew Mason-Cox MLC	Liberal Party	
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Chair's foreword

This is the second report arising from the events of June and July of this year, when an investigation team of the Australian Federal Police (AFP) executed search warrants on the home and Parliament office of the Honourable Shaoquett Moselmane, and also on premises associated with his then staffer, Mr John Zhang. The first report dealt exclusively with claims of privilege made by Mr Moselmane, whereas this report considers claims of privilege made by Mr Zhang through his legal representatives. This inquiry was referred to the Privileges Committee by the President of the Legislative Council on 27 October 2020, following correspondence received by the Clerk of the Parliaments from the Deputy General Counsel of the AFP and from Mr Zhang's legal representatives.

As with the previous claims, the evidence held by the Clerk as the neutral third party was obtained under the framework given in the AFP National Guidelines for Execution of Search Warrants where Parliamentary Privilege may be involved. These guidelines give a parliamentary staffer the right to make claims of privilege over material seized. However the President, in making the reference, included a requirement that the committee invite submissions from the member, as well as the former staffer. This followed comments made in the committee's first report which stated that it was important that a member have an independent right to claim privilege in situations such as this, as a staffer may not be aware of the use a member may make of their research.

Following a submission process, Mr Zhang's legal representatives greatly narrowed their original claims, and in its recommendations to the House the committee is only suggesting privilege should be upheld on three items, with the rest of the material held by the Clerk to be returned to the AFP.

The inquiry did raise two interesting issues. Firstly, after consultation by our Clerk with the Clerks of the Senate and House of Representatives, the committee determined that the privilege status of a submission to a Federal parliamentary inquiry should be determined by the Federal Parliament, not by the NSW Parliament. Secondly, privilege was not upheld on Chinese translations of speeches in parliament by the member, as these were a republication rather than documents prepared for use in parliament. The implications for members of this latter issue will be one of the matters considered in a third inquiry by the committee, which will look at a range of complex issues arising from these warrants. This third inquiry will also consider the alleged detention and seizure of material from Mr Zhang in January of this year by the Australian Border Force, an incident which neither the member nor the NSW Parliament have been formerly notified of by any Federal agency.

This inquiry operated under a very tight reporting time frame because of the parliamentary sitting calendar. The times given to those making submissions was particularly constrained. I am very appreciative of the co-operation of the four parties who made submissions to this inquiry – the AFP, Mr Zhang's legal representative, Mr Moselmane's representative and the Clerk of the Parliaments, who met all the very tight deadlines set by the committee and were respectful throughout of the committee's process. As with the first inquiry, I am grateful to the members of this committee, who have taken a constructive and non-partisan approach. It is very important that the Privileges Committee operates in this way, as it is given a role that is very important to all members. I am also very appreciative of the work of the Deputy Clerk, Mr Steven Reynolds, the Usher of the Black Rod Jenelle Moore and Acting Council Officer Noora Hijazi at the busiest time of the parliamentary year.

The Honourable Peter Primrose MLC

Chair

Recommendations

Recommendation 1

13

That the House uphold the claim of privilege made by Mr Zhang and Mr Moselmane over the following documents, currently held by the Clerk of the Parliaments:

- Document # 5 (Index of Zhang Shared Network Drive (I Drive))
- Document # 7 (Index of Zhang Shared Network (I drive))
- Document # 6752, 2782, 7377, 6157 (SP03.26JUN20.009).

Recommendation 2

14

That the House not uphold the claim of privilege made by Mr Zhang over the following documents, currently held by the Clerk of the Parliaments, as they do not meet the criteria of the three-step test previously adopted by the House:

- Document # 94 (SP04.26JUN20.001)
- Document # 28 (SP03.26JUN20.19)
- Document # 15 (SP03.26JUN20.45)
- Document # 44 (SP03.26JUN20.45)
- Document # 69 (SP03.26JUN20.45)
- Document # 6 (Index of Zhang Shared Network (I drive))
- Document # 10 (SP03.26JUN20.45)
- Document # 25 (SP03.26JUN20.45)
- Document # 26 (SP03.26JUN20.45)
- Document # 27 (SP03.26JUN20.45)
- Document # 38 (SP03.26JUN20.45).

Recommendation 3

14

That the House order the Clerk of the Parliaments to:

- return those items over which privilege is upheld to Mr Zhang,
- return the remaining documents and other things to the AFP for the purposes of its ongoing investigation.

Recommendation 4

17

That the Chair of the committee seek the following terms of reference from the House for a new inquiry:

1. That the Privileges Committee inquire into and report on the following matters arising from report nos. 80 and 81 of the committee relating to the execution of search warrants by the Australian Federal Police:

- (a) the rights available to a member to make a claim of privilege over documents held by their staffer, regardless of any claims of privilege made by the staffer,
 - (b) the privileged status of translations of parliamentary proceedings, and the implications for members if such translations are not protected by parliamentary privilege
 - (c) the rights available to a staffer to make a claim of privilege over documents,
 - (d) the alleged seizure of material from Mr John Zhang by the Australian Border Force on 28 January 2020,
 - (e) the merits of adoption of a formal memorandum of understanding between the Parliament of New South Wales and the Australian Federal Police (AFP),
 - (f) the application of the current NSW Parliament Memorandum of Understanding with the ICAC to searches of members' homes or other locations outside of the parliamentary precincts, and to other statutory provisions for the compulsory production of documents and electronic records to the ICAC,
 - (g) remote searches and surveillance of members and staff by investigative agencies in circumstances where the parliament has not been made aware a search has been undertaken, including the experience of other parliamentary jurisdictions,
 - (h) any future claim of parliamentary privilege made by the parties the subject of the search warrants by the AFP and arising from the current or a related investigation, and
 - (i) any other related matter.
2. That, for the purposes of this inquiry, the committee have access to correspondence and submissions received during the committee's first and second inquiries into the execution of search warrants by the Australian Federal Police.

Recommendation 5**17**

That the committee write to the Privileges Committee of the Legislative Assembly on completion of that part of the proposed inquiry dealing with a revised memorandum of understanding with the ICAC and a new memorandum of understanding with the AFP, requesting it review the proposals so as to seek to reach joint recommendations to the Presiding Officers.

Chapter 1 The execution of search warrants on Mr John Zhang

This chapter considers how this inquiry came to be referred to the committee by the President, and the process adopted to address the resolution of privilege issues on those documents over which Mr Zhang has made a claim of parliamentary privilege.

The AFP search warrants

- 1.1 As with the Privileges Committee’s first report of the same title, this inquiry arises from the execution of search warrants on various premises associated with the Honourable Shaoquett Moselmane and his then staffer Mr John Zhang. These warrants were authorised under various sections of the *Crimes Act 1914* (Cth), to obtain evidence for the possible prosecution of Mr Zhang under the so-called “foreign interference” laws, that is s 92 of the *Criminal Code 1995* (Cth).
- 1.2 The first report addressed claims of privilege made by Mr Moselmane over evidence collected by the AFP from search warrants executed on Friday 26 June 2020 and Friday 24 July 2020, with the process detailed in Chapter Two of that report.² Following the resolution of the House on 15 October 2020,³ 12 items subject to a claim of privilege were returned to Mr Moselmane, and the remainder of the documents and other things held were returned by the Clerk to the AFP for their continued investigations.
- 1.3 The claims of parliamentary privilege made in relation to documents and other things by Mr Zhang’s legal representatives were not part of the earlier reference by the House to this committee and so were not considered by the committee. The committee noted firstly that Mr Zhang had not advised the AFP whether his intention was to have the claims resolved by a court or by the Legislative Council, and secondly noted that Mr Zhang had initiated a High Court challenge to the constitutional validity of the search warrants.⁴
- 1.4 When the House adopted the recommendations of this committee’s first report it also included in its resolution the following statement:

reaffirms that this House is the appropriate forum for resolution of issues of parliamentary privilege, including documents and things seized by search warrant.⁵

The AFP correspondence October 2020

- 1.5 Following the tabling of the first report, the Deputy Chief Legal Counsel of the AFP wrote to the legal representative of Mr Zhang on 14 October 2020 seeking to progress the resolution of

² Privileges Committee, *Execution of search warrants by the Australian Federal Police*, Report 80, (13 October 2020) pp 5 -9.

³ *Minutes of Proceedings* NSW Legislative Council, 15 October 2020 p 1438

⁴ Privileges Committee, *Execution of search warrants by the Australian Federal Police*, Report 80, (13 October 2020) p22.

⁵ *Minutes of Proceedings* NSW Legislative Council, 15 October 2020 p 1438.

the unresolved parliamentary privilege issues in relation to Mr Zhang,⁶ and indicating that if there was no response within five working days the AFP would make representations to the Clerk that Mr Zhang is no longer maintaining the claim of parliamentary privilege and all documents and other things held by the Clerk should be immediately delivered to the AFP. This was said by the AFP to be consistent with paragraph 5.11 of the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved* (The AFP guideline).

- 1.6 Mr Zhang's legal representatives responded on 19 October 2020 indicating the five working days was unreasonable given the other time frames of the investigation and the number of items to be considered, and that in any case the resolution of the privilege claims was a matter for the Parliament to decide, not the AFP. The correspondence also referred to the seizure of material from Mr Zhang by the Australian Border Force (ABF) which potentially contained privileged material (see below) and the failure of the AFP to address this issue which was raised in Chapter Five of the committee's first report.
- 1.7 The AFP in correspondence dated 26 October 2020 queried many of the assertions made in the letter from Mr Zhang's legal representative, but agreeing that the resolution of parliamentary privilege should be for the Legislative Council to determine. On the same day correspondence was sent by the AFP to the Clerk of the Parliaments, enclosing the exchange of correspondence referred to above. The correspondence respectfully requested that the Parliament consider requesting that Mr Zhang nominate whether he will seek a ruling from Parliament or a court on privilege for the items currently held by the Clerk as the neutral third party, and to also make claims of privilege over the "second tranche" (referred to below) of material currently held by the AFP.

Referral by the President

- 1.8 On 27 October 2020 the President of the Legislative Council, the Hon John Ajaka MLC, wrote to the Chair of the Privileges Committee, the Hon Peter Primrose, enclosing the correspondence from the AFP of 26 October 2020. He advised:

Having considered how to approach the issues raised, it seems to me the most appropriate course of action is to provide the correspondence to the Privileges Committee and use the power given to me in the resolution establishing the Committee to refer an inquiry in similar terms to that just completed to resolve the privilege claims made by the Honourable Shaoquett Moselmane⁷.

- 1.9 The President noted Mr Zhang's legal representatives had not explicitly elected to have their claims determined by the House rather than a court, but noted the resolution of the House of 15 October 2020, and that throughout the Zhang correspondence the primacy of Parliament in the area of parliamentary privilege is acknowledged. The correspondence also noted the committee's first report had suggested that a member should be involved in consideration of privilege claims made by their staffer, and therefore the President requested that the committee invite a submission from Mr Moselmane during its inquiry.

⁶ The correspondence from the AFP, and Mr Zhang's legal representative's subsequent reply, were provided to the Clerk of the Parliaments on 26 October, and subsequently provided to the committee.

⁷ Correspondence 27 October 2020.

The inquiry process

- 1.10** The committee met on 29 October 2020 to initiate work on the inquiry. The President’s terms of reference for the referral included a reporting date of 18 November 2020, a time frame chosen to ensure the committee completed its inquiry prior to the end of sittings in 2020. To meet this reporting date the committee adopted a truncated time frame for submissions compared to the first inquiry: Mr Zhang and Mr Moselmane were requested to make a submission within seven days, after which the AFP and the Clerk of the Parliaments were given effectively one working day and a weekend to respond, with Mr Zhang provided 48 hours to then respond with a supplementary submission if required.
- 1.11** In determining this process the committee considered the potential that Mr Zhang’s legal representatives may not respond to the invitation. If this occurred the committee resolved that the determination of privilege would be made on the basis of the other submissions received.⁸

The indexes

- 1.12** The original correspondence from the AFP to Mr Zhang’s legal representatives dated 14 October referred to three potential indexes of documents for which privilege needs to be resolved:
- The indexes created from the “First Tranche” of evidence. This represents the documents and other things seized by the AFP in the execution of search warrants on or around the 26 June and on 24 July held by the Clerk of the Parliaments pending resolution of privilege issues (also described as Category A documents” and “Category C documents” in Mr Zhang’s submission)⁹.
 - Material from digital devices moved from Mr Zhang’s residential and business premises during the execution of the first and second warrants and seized by the AFP under s3K of the *Crimes Act 1914* (Cth) and held by them awaiting advice from Mr Zhang as to which items are subject to a claim of parliamentary privilege – the “Second Tranche” (or “Category B documents” in Mr Zhang’s submission)¹⁰.
 - Material contained on phones, processing of which has yet to be completed by the AFP, after which Mr Zhang will be invited to identify which items in an index of evidence are subject to a claim of parliamentary privilege – the “Third Tranche”.
- 1.13** In its first inquiry, which only dealt with evidence obtained from Mr Moselmane, the committee was only concerned with First Tranche documents, as the Second and Third Tranches only involved items obtained from Mr Zhang.
- 1.14** At the time of the inquiry beginning the committee only had access to the two indexes of the First Tranche, with the Second and Third tranches awaiting further action by Mr Zhang and the AFP respectively. However it appears that the inquiry led to action being taken by Mr Zhang’s legal representative to review the material held by the AFP, with the Second Tranche items being reviewed at the AFP’s Sydney office on 3 and 4 November 2020. After a claim of privilege

⁸ See minutes of meeting number 11, reproduced as Appendix 3.

⁹ Submission 2, Mr John Zhang, p 2 para7, 11 and 12.

¹⁰ Submission 2, Mr John Zhang, p 2, paragraph 8 -9.

was lodged by Mr Zhang's lawyers the AFP extracted those items, some of which required translations, and delivered the items and an index to the Clerk, as the neutral third party, at 2pm on Friday 6 November 2020. As this was after the submission from Mr Moselmane was received, that afternoon with the Chair's concurrence the Clerk to the committee wrote to Mr Moselmane and his legal representative inviting them to review the new items so as to make any additional claims of privilege.

- 1.15** The committee, as with the first inquiry, has treated the indexes as confidential documents; they have not been distributed to committee members and have been instead inspected in the office of the Clerk. Being mindful of the need to protect confidentiality for an active investigation, at no time in either inquiry have any committee members inspected the actual items, as descriptions in the the index or the submissions has been sufficient for decisions to be made on privilege.
- 1.16** In their first submission to the inquiry, Mr Zhang's legal representative requested that to avoid prejudice to their client any items in the indexes be referred to only by their numerical identification. While the committee understands the importance of this, it has chosen to identify the privileged items in this report, as otherwise the committee would be asking the House to make a decision without understanding what they were upholding privilege over, given the short time frame for consideration of this report's recommendations before the reporting date. The privileged items cannot be used in any future litigation to Mr Zhang's detriment, as parliamentary proceedings cannot be questioned or impeached in any court or place out of parliament.¹¹
- 1.17** The committee has chosen not to publish submissions except to the extent necessary to explain the recommendations in this report, partly as at the request of Mr Zhang's legal representative but also to avoid publishing names of AFP officers in one submission. However the committee is very appreciative of the co-operation of all parties involved in a very tight time frame for responses, each submission has assisted the committee in reaching its conclusions in this report.

Potential seizure of evidence by the Australian Border Force

- 1.18** The first report of the committee noted a media report, referred to in a supplementary submission by Mr Moselmane, that Mr Zhang was detained by the Australian Border Force (ABF) on return from a personal trip to China in January of this year.¹² In correspondence to the Clerk of the Parliaments dated 15 October 2020 the legal representatives of Mr Zhang confirmed that on 28 January 2020 Mr Zhang was detained by officers of the ABF, and that during the interaction the ABF officers were made aware that he was a staffer of a member of the New South Wales Parliament. Further detail was provided, and a request was made for this committee to investigate the matter. The issue was also raised by Mr Zhang's legal representatives in their correspondence of 14 October 2020 to the AFP. In their reply the AFP indicated they had no involvement in the activities undertaken at Sydney Airport on 28 January 2020.

¹¹ See Lovelock and Evans *NSW Legislative Council Practice*, 2008, pp 66-68.

¹² Privileges Committee, *Execution of search warrants by the Australian Federal Police*, Report 80, 13 October 2020, p 23.

- 1.19** As indicated in the first report, the committee is concerned at many aspects of the alleged events of 28 January 2020, including the failure of the ABF not to report to the President of the Legislative Council that one of its employees was suspected of being under the influence of a foreign power, and of the failure of Mr Zhang to report the incident to Mr Moselmane, given the risks to his reputation as a member and the potential for parliamentary privileged material to have been seized.
- 1.20** These are complex issues, and require more time than is available to the committee within this short inquiry time frame. For that reason the committee notes the terms of reference given by the President include the requirement to recommend to the House terms of reference for a third inquiry which is to include “related issues raised in correspondence to the Clerk of the Parliaments dated 15 October 2020 regarding the alleged seizure of material from Mr Zhang by the Australian Border Force in January 2020”. This future inquiry is covered in chapter three of the current report.

Chapter 2 Assessment of the privilege claims arising

This chapter considers claims of parliamentary privilege made over documents by Mr Zhang in his submissions, and the responses provided in submissions from Mr Moselmane, the AFP and the Clerk of the Parliaments. These claims are considered against the three-step test for determining claims of privilege adopted by this committee in its first report on these matters, and subsequently endorsed by the House.

The test of parliamentary privilege

- 2.1 In its first report on the execution of the AFP search warrants,¹³ the committee adopted the three-step test used by the Privileges Committee in the determination of the Breen matter in 2003 and 2004, as amended by the Senate Privileges Committee in 2017.¹⁴ At the committee's recommendation, on 15 October 2020 the House subsequently resolved that this test be adopted in any future determinations as to whether an item attracts parliamentary privilege.¹⁵
- 2.2 Accordingly, the committee has adopted this three-step test in determining the status of the documents subject of claims of parliamentary privilege by Mr Zhang:

STEP 1: Were the documents **brought into existence** in the course of, or for purposes of or incidental to, the transacting of business of a House or a committee?

YES falls within "proceedings in Parliament". NO move to step 2.

STEP 2: Have the documents been **subsequently used** in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?

YES falls within "proceedings in Parliament". NO move to step 3.

STEP 3: Is there any contemporary or contextual evidence that the documents were **retained or intended for use** in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?

YES falls within "proceedings in Parliament".
NO report that there are documents which fail all three tests.

Note: Individual documents may be considered in the context of other documents.

¹³ NSW Legislative Council, Privileges Committee, *Execution of search warrants by the Australian Federal Police*, report no. 80, October 2020, p 14.

¹⁴ In 2003, a search warrant was executed on the office of a member of the Legislative Council, the Hon Peter Breen MLC, by the Independent Commission Against Corruption. That matter led to two inquiries by this committee in 2003 and 2004. The committee developed a simple three step test for the determination of whether or not documents fell within the scope of 'proceedings in parliament'. This test was subsequently used in an amended form by the Australian Senate Privileges Committee in determining claims of privilege made by Senator Stephen Conroy following the execution of search warrants by the AFP in 2016. A summary of the test and the amendments made is provided at Chapter 3 of this committee's first report on the execution of the AFP search warrants.

¹⁵ *Minutes*, NSW Legislative Council, 15 October 2020, p 1438.

The submission process

2.3 As noted in Chapter One, for the purposes of this inquiry Mr Zhang, Mr Moselmane, the AFP and the Clerk of the Parliaments were invited to make submissions to the committee. Following the first round of submissions, additional submissions were received from Mr Zhang, Mr Moselmane and the Clerk of the Parliaments.

2.4 As the documents referred to canvass various indexes, the discussion below references the indexes as they relate to the 'First Tranche' and 'Second Tranche' of evidence. These tranches, and the indexes to which they relate, are explained in detail in paragraph 1.12 of the previous chapter.

Mr Zhang's first submission

2.5 The submission received from Mr Zhang's legal representatives significantly narrowed the list over documents over which a claim of privilege was pressed – only 14 in total from the original 300.

2.6 The 14 documents the subject of privileges claims canvassed in the submissions received can be summarised as follows:

Table 1: Documents and things subject to a claim of parliamentary privilege by Mr Zhang

Indexed item number	Tranche	Category
Speeches, motions and contributions to debates by Mr Moselmane in in the Legislative Council		
Document # 6752,2782,7377,6157 (SP03.26JUN20.009)	First	Category A
Document # 7 (SP03.26JUN20.45)	Second	Category B
Document # 5 (Index of Zhang Shared Network Drive (I Drive))	First	Category C
Chinese translations of copies of speeches, motions and contributions to debates by Mr Moselmane in the NSW Parliament		
Document # 94 (SP04.26JUN20.001)	Second	Category B
Document # 28 (SP03.26JUN20.19)	Second	Category B
Document # 15 (SP03.26JUN20.45)	Second	Category B
Document # 44 (SP03.26JUN20.45)	Second	Category B
Document # 69 (SP03.26JUN20.45)	Second	Category B
Document # 6 (Index of Zhang Shared Network (I drive))	First	Category C
The preparation or submission of a document to a Federal Parliamentary Committee		
Document # 10 (SP03.26JUN20.45)	Second	Category B
Document # 25 (SP03.26JUN20.45)	Second	Category B
Document # 26 (SP03.26JUN20.45)	Second	Category B
Document # 27 (SP03.26JUN20.45)	Second	Category B
Document # 38 (SP03.26JUN20.45)	Second	Category B

2.7 A claim was made over three items listed in the indexes created from the First Tranche of evidence (or Category A and Category C documents):

- 'Document – Log # 6752, 2782, 7377, 6157' from SP03.26JUN20.009
- Document # 5 from Mr Zhang's Shared Network Drive (I Drive)

- Document # 6 from Mr Zhang's Shared Network Drive (I Drive).

2.8 The first two documents comprised speeches, motions and contributions to debates made by Mr Moselmane in the NSW Parliament. The third document was a Chinese translation of a speech.

2.9 In relation to the indexes created from the Second Tranche of evidence (Category B documents), Mr Zhang's legal representatives claim parliamentary privilege over an additional 11 items:

- Indexed item 28 from SP03.26JUN20.19
- Indexed item 94 from SP04.26JUN20.001
- Indexed items 7, 10, 15, 25, 26, 27, 38, 44 and 69 from SP03.26JUN20.45.¹⁶

2.10 These documents fell into the categories set out in Table 1. In making such claims, the submission asserted that the 14 documents over which Mr Zhang pressed his claim of privilege would satisfy the three-step test adopted by this committee in its first report.¹⁷

Mr Moselmane's first submission

2.11 The first submission received from Mr Moselmane's legal representative, dated 4 November 2020, claimed privilege over two of the three documents pressed by Mr Zhang in relation to the First Tranche of documents (Categories A and C).¹⁸

2.12 Mr Moselmane's legal representative noted that the third document from the First Tranche, being Document # 6 from Mr Zhang's Shared Network Drive, was a Chinese translation of a speech. He stated that a claim may be pressed over the document by his client, subject to clarification as to whether the speech was one given by Mr Moselmane in the House.¹⁹

2.13 At the time of the first submission, Mr Moselmane did not have access to the index relating to the Second Tranche of documents (Category B). These were received by the Clerk from the AFP after Mr Moselmane was asked to make his first submission. He was subsequently forwarded that index by the committee to inform his second submission, the substance of which is discussed from paragraph 2.28 below.

The AFP submission

2.14 The AFP submission divided the 14 documents the subject of Mr Zhang's claim into three groups, reflected in Table 1.

¹⁶ Submission 2, Mr John Zhang, p 4.

¹⁷ Submission 2, Mr John Zhang, pp 4-5.

¹⁸ Submission 1, the Hon Shaoquett Moselmane MLC, p 2.

¹⁹ Submission 1, the Hon Shaoquett Moselmane MLC, p 2.

Speeches, motions and contributions to debates made by Mr Moselmane in the NSW Parliament

- 2.15 The AFP accepted the claims of privilege made by Mr Zhang and Mr Moselmane over these documents.

Chinese translations of copies or extracts of speeches, motions and contributions to debates made by Mr Moselmane in the NSW Parliament

- 2.16 The AFP contended these documents did not fall within the scope of 'proceedings in Parliament' because the Chinese language versions did not appear to have been prepared for use in the course of, or for the purposes of or incidental to, the transacting of the business of a House or a committee.
- 2.17 The AFP further observed that Mr Zhang's submission, and Mr Moselmane's submission in relation to certain of those documents then available to him, indicated that the documents were translations of 'copies or extracts' from speeches, motions or contributions to debates – this suggested that the translation was prepared *after* the relevant speech, motion or contribution to a debate was given.
- 2.18 While the AFP acknowledged that Hansard reports of parliamentary proceedings are privileged, they pointed to parliamentary authority stating that if a member publishes his or her speech, this printed statement becomes a separate publication.²⁰ The AFP further drew on case law that supported this position:

- In *British American Tobacco Australia Ltd v Secretary, Department of Health and Ageing*²¹, it was held that subsequent publication of a statement made in Parliament could not be regarded as incidental to the transacting of the business of a House or committee.
- In *Szwarcbord v Gallop*²², the Court held that the privilege that attaches to a document retained for the purpose of tabling in Parliament does not attach to any copies of that document for all purposes.²³

The preparation or submission of a document to a Commonwealth parliamentary committee

- 2.19 The AFP contended that it would be inappropriate for the committee to consider a claim for parliamentary privilege relating to drafts, variations or translations of a submission made to a Federal parliamentary committee as any claim for privilege in relation to these documents should be properly considered by the Commonwealth Parliament. The AFP argued that these documents should be returned to the AFP, who would engage with the legal representatives of Mr Zhang and Mr Moselmane to resolve any privilege claim subsequently made by the Federal Parliament.²⁴

²⁰ Submission 4, the Australian Federal Police, p 5, citing *House of Representatives Practice* (2018, 7th ed) 741 and *Erskine May Parliamentary Practice*, (2011, 24th ed) 224.

²¹ (2011) 195 FCR 123.

²² (2002) 167 FLR 262.

²³ Submission 4, Australian Federal Police, p 5.

²⁴ Submission 4, Australian Federal Police, p 5.

Mr Zhang's second submission

- 2.20** Mr Zhang's second submission reasserted the privilege originally claimed over all 14 documents, with some qualification with regards the documents relating to the submission made to a federal parliamentary committee.
- 2.21** In relation to the speeches, motions and debates made by Mr Moselmane, Mr Zhang's legal representatives noted there was no dispute between the various parties.
- 2.22** In relation to the Chinese translations, Mr Zhang's legal representatives noted that the law cited by the AFP was specific to either the Commonwealth or other states. They contended that, in the absence of guiding precedent in New South Wales, analogy should be drawn to the qualified privilege provided for under the *Defamation Act 2005* which protects members for re-publishing proceedings in Parliament where it can be shown that the republication was justified and fair and was made without malicious intent. Noting census figures which demonstrated that 9.9 per cent of Mr Moselmane's Rockdale Electorate Division identify as having Chinese ancestry, it was submitted that the translations were prepared for the benefit of Mr Moselmane's Mandarin speaking constituents and were thus made without malicious intent.²⁵
- 2.23** In relation to documents pertaining to the submission made to the Federal parliamentary committee, while the claim was pressed, Mr Zhang's legal representatives suggested that, if the committee took the view that it could not determine Mr Zhang's claim of privilege over the documents, the documents should be provided to the Clerk of one of the Federal Houses of Parliament as a neutral third party, rather than returned to the AFP.²⁶

Submissions made by the Clerk of the Parliaments

- 2.24** The Clerk of the Parliaments in making his first submission did not have the benefit of the arguments presented in the AFP submission nor in the supplementary submission received by Mr Zhang's legal representatives. The Clerk found that, while the claims put forward by Mr Zhang's legal representatives initially appeared to be reasonable, having subsequently had the benefit of considering the arguments put forward by all parties when the additional submissions were received, the arguments made by the AFP raised 'interesting and substantive issues for consideration by the committee'.²⁷
- 2.25** In regards to Chinese translations of speeches given by Mr Moselmane in the House, the Clerk observed that the reference to the demographics of the Rockdale Electorate made in the second submission provided by Mr Zhang's legal representatives suggested the purpose of the translations was related to re-publication. Therefore the submission of the AFP in regard to those documents was worthy of careful consideration.²⁸
- 2.26** In considering the arguments put forward by both the AFP and Mr Zhang in relation to the submission prepared for a Federal parliamentary committee, in particular the AFP's argument that the draft submission was a matter for the Federal Parliament to determine, the Clerk

²⁵ Submission 2a, Mr Zhang, pp 2-3.

²⁶ Submission 2a, Mr Zhang, pp 3-4.

²⁷ Submission 3a, Clerk of the Parliaments, p 1.

²⁸ Submission 3a, Clerk of the Parliaments, p 1.

consulted the Clerks of the Australian Senate and the House of Representatives. The Federal Clerks advised that, on the basis of the comity of the parliamentary jurisdictions, it would not be appropriate for the Privileges Committee of the NSW Legislative Council to make a recommendation as to the privileged status of a submission directed to the joint committee of another Parliament.²⁹

- 2.27** In response to Mr Zhang's legal representatives' request that those documents be transferred by the Clerk to the Federal Clerks, the Clerk of the Parliaments advised that he did not have such authority under the terms of the National Guidelines, under which he may only return privileged documents to the member or return other documents to the AFP. The Clerk advised that if privilege was not upheld, the documents would be returned by him to the AFP, and that Mr Zhang would need to raise his claim of privilege in the context of the memorandum of understanding that the AFP has with the Federal Parliament. However he further observed that Mr Zhang is not an employee of the Federal Parliament and may only be in the position of any citizen making a submission to an inquiry in seeking to claim privilege.³⁰

Mr Moselmane's second submission

- 2.28** The second submission provided by Mr Moselmane's legal representative responded to arguments submitted by all parties, and in particular to the 11 items the subject of Tranche 2, the index to which he had not previously had access.
- 2.29** The original claim made over speeches and motions made by Mr Moselmane was pressed. However, the claims made by Mr Zhang over Chinese translations was not supported by Mr Moselmane.³¹
- 2.30** In relation to the claim over documents pertaining to the submission to the Federal parliamentary committee, Mr Moselmane's legal representative stated that he would 'not allow or for that matter undertaken any claim for privilege concerning a matter that is strictly justiciable and within the just and due deliberation of the Commonwealth Parliament and its Privileges Committee'.³²

Committee comment

- 2.31** The committee is tasked with resolving the claims of privilege made by Mr Zhang and, in response, Mr Moselmane. For the purposes of this task the committee will refer to the categories set out in Table 1.
- 2.32** Looking first to the documents containing speeches, motions and contributions made by Mr Moselmane in the House, the committee notes that there is no dispute between parties as to the status of the documents. The committee agrees that these documents clearly fall within the parameters of the three-step test. The committee recommends that the House uphold the claim of privilege made over these documents.

²⁹ Submission 3a, Clerk of the Parliaments, pp 1-2.

³⁰ Submission 3a, Clerk of the Parliaments, p 2.

³¹ Submission 1a, Mr Moselmane, p 1.

³² Submission 1a, Mr Moselmane, pp 1-2.

- 2.33 Turning next to the Chinese translations of copies of speeches, motions and contributions to debates by Mr Moselmane in the NSW Parliament, the committee notes that the second submission made by Mr Zhang's legal representatives appears to confirm that the purpose of the translations was re-publication in the course of distributing content to certain constituents. This appears to bolster the argument made by the AFP that the documents do not fall within the scope of 'proceedings in Parliament', having not been translated for the purpose of using the Chinese language version of the document in the course of, or for the purposes of or incidental to, the transacting of business of a House or committee. The AFP's argument is not contested by the Clerk of the Parliaments or Mr Moselmane's legal representative.
- 2.34 Having applied the three-step test to the explanations and arguments submitted by all parties, and the description of the documents contained in the indexes, the committee concurs that the Chinese translations were not translated for the purpose of using those documents in the course of, or for the purposes of or incidental to the transacting of business of a House or committee. The committee recommends that the claim of privilege over these documents therefore be not upheld and the documents be returned to the AFP.
- 2.35 To this end, the committee notes that many members with diverse community constituencies translate speeches given in parliament and distribute them. In doing so the assumption is that these are protected by the same privilege as the original speech. As the current instance shows, this republication may not attract parliamentary privilege, although we note the argument in the supplementary submission of Mr Zhang's legal representative that verbatim translations may be protected by qualified privilege under *the Defamation Act 2005* provided the republication was justified and fair and made without malicious intent. This protection applies for the purposes of defamation proceedings only, so was not applicable in the current instance.
- 2.36 Finally, turning to the documents prepared for or submitted to a Federal parliamentary committee, the committee notes the advice provided by the Clerk of the Parliaments with the support of the Clerks of the House of Representatives and Australian Senate. In recognition of the comity between the two parliamentary jurisdictions, the committee recommends that the claim of privilege over these documents be not upheld and the documents be returned to the AFP.
- 2.37 The committee further recommends that the House order the Clerk of the Parliaments to return those documents and items over which privilege has been upheld to Mr Zhang and return the remaining documents and things to the AFP for the purposes of its ongoing investigation.

Recommendation 1

That the House uphold the claim of privilege made by Mr Zhang and Mr Moselmane over the following documents, currently held by the Clerk of the Parliaments:

- Document # 5 (Index of Zhang Shared Network Drive (I Drive))
 - Document # 7 (Index of Zhang Shared Network (I drive))
 - Document # 6752, 2782, 7377, 6157 (SP03.26JUN20.009).
-

Recommendation 2

That the House not uphold the claim of privilege made by Mr Zhang over the following documents, currently held by the Clerk of the Parliaments, as they do not meet the criteria of the three-step test previously adopted by the House:

- Document # 94 (SP04.26JUN20.001)
 - Document # 28 (SP03.26JUN20.19)
 - Document # 15 (SP03.26JUN20.45)
 - Document # 44 (SP03.26JUN20.45)
 - Document # 69 (SP03.26JUN20.45)
 - Document # 6 (Index of Zhang Shared Network (I drive))
 - Document # 10 (SP03.26JUN20.45)
 - Document # 25 (SP03.26JUN20.45)
 - Document # 26 (SP03.26JUN20.45)
 - Document # 27 (SP03.26JUN20.45)
 - Document # 38 (SP03.26JUN20.45).
-

Recommendation 3

That the House order the Clerk of the Parliaments to:

- return those items over which privilege is upheld to Mr Zhang,
 - return the remaining documents and other things to the AFP for the purposes of its ongoing investigation.
-

Chapter 3 Further inquiry into related issues

The terms of reference given to the committee by the President included as its final term a requirement for drafting of terms of reference for a third inquiry into any outstanding issues contained in Chapter Five of the first report of the committee on the execution of the search warrants. This current chapter proposes new terms of reference to be approved by the House.

3.1 Chapter Five of the committee's first report contained seven issues which had arisen as a result of the execution of the original AFP search warrants, noting the narrow terms of reference given by the House did not empower it to examine those issues. The seven outstanding issues were listed as:

- The determination of claims of privilege over documents and other things made by Mr Moselmane's staffer, Mr Zhang
- The rights a member has to make a claim of privilege over documents held by their staffer, regardless of any claims of privilege made by that staffer,
- An alleged seizure of electronic devices of Mr Zhang on 28 January 2020 by the Australian Border Force
- Whether the NSW Parliament needs to formally adopt a protocol with the AFP
- The lack of coverage of the current NSW Parliament Memorandum of Understanding with the ICAC on searches of member's homes or other locations outside of the parliamentary precincts
- The possibility for remote searches to be made by agencies without the parliament being aware a search has been undertaken,
- The legal expenses incurred by a state MP the subject of action by a Federal agency.

3.2 The committee has addressed the determination of privilege claims on all material held by the Clerk on the conclusion of this inquiry from search warrants executed on premises associated with Mr Moselmane and Mr Zhang. However neither the Clerk nor the committee has access to the so-called "Third Tranche" of material seized by the AFP from Mr Zhang as the AFP has yet to finish processing of this material. It is also possible that during the course of the investigation by the AFP it may execute further warrants which may relate directly or indirectly to parliamentary activity. For that reason it would be prudent for any new reference to include wording sufficiently broad to allow it to consider any future privilege claims arising from the AFP's current investigation.

3.3 The issue of the seizure of material from Mr Zhang by the ABF in January 2020 is specifically required by the President's referral to be the subject of a future inquiry. This will allow the committee to examine further the broader related issue about the rights of a member to claim privilege regardless of any claims by a staffer. In the current inquiry the committee afforded Mr Moselmane the opportunity to make a submission for this very reason, because the member in most cases has a better understanding of what will be used in parliamentary proceedings than a staff member working under their direction.

3.4 For both the first two inquiries the committee and the AFP have acted under the understanding that the *AFP National Guidelines for Execution of Search Warrants where Parliamentary Privilege may be*

involved (The AFP Guideline) will be followed, on the basis of the informal agreement made in 2010 during an earlier inquiry.³³ It has worked effectively to date because of the respect and co-operation of individuals within the AFP investigation team and the Parliament. However in a situation of conflict an informal arrangement has potential to break down. The committee notes the discussion in its previous report of recent Senate inquiries which recommended improvements to the guideline. It would be valuable for the committee to explore the experience in other jurisdictions of the use of the guideline, with a view to entering a formal memorandum of understanding. Such an inquiry could include considering as a subsidiary issue the legal expenses incurred by members when involved in an investigation such as the current instance.

- 3.5** The examination of the AFP protocol will also provide an opportunity to review the current unsatisfactory state of the memorandum of understanding with the ICAC, which provides less protection for parliamentary privilege than either the AFP guideline or the Parliament's memorandum of understanding with the NSW Police in a situation where a search warrant is executed on premises outside of Parliament House. This review could also look at the arrangements by which the ICAC currently uses its statutory provisions for the compulsory production of documents and electronic records. Reviewing both the AFP and ICAC arrangements together could provide useful comparisons.
- 3.6** An issue which has arisen during this inquiry is the status of translations of parliamentary proceedings by members. This is a matter which has the potential to affect many members of the NSW Parliament, and deserves a more extensive consideration than the committee has been able to give it during this very truncated inquiry.
- 3.7** Finally, the really difficult area of intrusive searches and surveillance needs to be examined, where agencies can potentially seize privileged material without any awareness of a member that this has occurred. The consideration by Senate committees referred to in the first report would be a starting point for such an inquiry.

Terms of reference for third inquiry

- 3.8** Considering the factors raised in Chapter Five of the first report and subsequent developments, the committee recommends the chair of the committee seek terms of reference as outlined in the recommendation below. Given the variety of issues to be considered, the inquiry would be quite complex, and may require interim reports on specific aspects of the inquiry.
- 3.9** It would also be hoped that one outcome would be a memorandum of understanding being entered into by the Presiding Officers with the AFP and a revised memorandum with the ICAC, both of which will also require the equivalent committee in the Legislative Assembly to review any proposal.

³³ Privileges Committee *A memorandum of understanding with the NSW Police Force relating to the execution of search warrants on members' premises*, Report 53, September 2010 pp 12-13.

Recommendation 4

That the Chair of the committee seek the following terms of reference from the House for a new inquiry:

1. That the Privileges Committee inquire into and report on the following matters arising from report nos. 80 and 81 of the committee relating to the execution of search warrants by the Australian Federal Police:
 - (a) the rights available to a member to make a claim of privilege over documents held by their staffer, regardless of any claims of privilege made by the staffer,
 - (b) the privileged status of translations of parliamentary proceedings, and the implications for members if such translations are not protected by parliamentary privilege
 - (c) the rights available to a staffer to make a claim of privilege over documents,
 - (d) the alleged seizure of material from Mr John Zhang by the Australian Border Force on 28 January 2020,
 - (e) the merits of adoption of a formal memorandum of understanding between the Parliament of New South Wales and the Australian Federal Police (AFP),
 - (f) the application of the current NSW Parliament Memorandum of Understanding with the ICAC to searches of members' homes or other locations outside of the parliamentary precincts, and to other statutory provisions for the compulsory production of documents and electronic records to the ICAC,
 - (g) remote searches and surveillance of members and staff by investigative agencies in circumstances where the parliament has not been made aware a search has been undertaken, including the experience of other parliamentary jurisdictions,
 - (h) any future claim of parliamentary privilege made by the parties the subject of the search warrants by the AFP and arising from the current or a related investigation, and
 - (i) any other related matter.
 2. That, for the purposes of this inquiry, the committee have access to correspondence and submissions received during the committee's first and second inquiries into the execution of search warrants by the Australian Federal Police.
-

Recommendation 5

That the committee write to the Privileges Committee of the Legislative Assembly on completion of that part of the proposed inquiry dealing with a revised memorandum of understanding with the ICAC and a new memorandum of understanding with the AFP, requesting it review the proposals so as to seek to reach joint recommendations to the Presiding Officers.

Appendix 1 Submissions

No	Author
1	The Honourable Shaoquett Moselmane MLC
1a	The Honourable Shaoquett Moselmane MLC
2	Mr John Zhang
2a	Mr John Zhang
3	The Clerk of the Parliaments
3a	The Clerk of the Parliaments
4	The Australian Federal Police

Appendix 2 Referral by the President of the Legislative Council

27 October 2020

D20/53853

The Hon. Peter Primrose MLC
Chair
Privileges Committee
Legislative Council
Parliament House
SYDNEY NSW 2000

Dear Mr Primrose,

The Clerk of the Parliaments has referred to me correspondence from the Deputy General Counsel of the AFP dated 14 October and 26 October 2020 and correspondence from Mr John Zhang's legal representative dated 15 October and 19 October 2020 (attached).

The correspondence concerns resolution of claims of parliamentary privilege made by Mr Zhang's legal representatives arising from the execution of search warrants earlier this year. In addition, the correspondence dated 15 October 2020 from Mr Zhang's lawyers refers to the alleged seizure of documents and other things by the Australian Border Force (ABF) on 28 January 2020.

Having considered how to approach the issues raised, it seems to me the most appropriate course of action is to provide the correspondence to the Privileges Committee and use the power given to me in the resolution establishing the Committee to refer an inquiry in similar terms to that just completed to resolve the privilege claims made by the Honourable Shaoquett Moselmane. While Mr Zhang's legal representatives do not explicitly indicate they have elected that the determination of claims of privilege be made by the House rather than a court, their correspondence throughout acknowledges the primacy of Parliament in this area, and I also note the resolution of the House on 15 October 2020 that:

This House is the appropriate forum for resolution of issues of parliamentary privilege, including documents and things seized by search warrant.

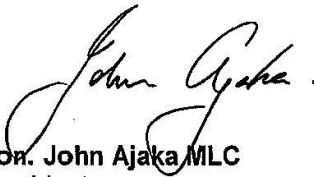
I am mindful that sittings for the year will conclude in the second last week of November. So as to ensure the immediate privilege issues are resolved without the undue delay caused by the summer recess, I have asked your Committee to report by 18 November 2020.

2.

I also note that in the report on the execution of search warrants by the AFP on the premises of the Honourable Shaoquett Moselmane your Committee indicates that a member should be involved in consideration of privilege claims made by a staffer working for that member. For that reason I have asked the committee to invite a submission from the member on the claims made by Mr Zhang's legal representatives.

Finally, I encourage the Committee, on completion of this inquiry, to seek a reference from the House to address many of the issues raised in Chapter 5 of their recent report, which will include consideration of the issues regarding the ABF raised in the correspondence dated 15 October 2020 from Mr Zhang's legal representatives.

Yours sincerely,



Hon. John Ajaka MLC
President



LEGISLATIVE COUNCIL

REFERRAL TO PRIVILEGES COMMITTEE

Referred by President under paragraph 2 (a) of resolution of the House establishing the Privileges Committee, 8 May 2019.

1. That the Privileges Committee inquire into and report on the status of documents and other things the subject of claims of parliamentary privilege arising from the execution of various search warrants by the Australian Federal Police (AFP) issued on 25 June and 23 July 2020 on Mr John Zhang, then staffer of the Honourable Shaoquett Moselmane.
2. That the committee recommend to the House which of the disputed material falls within the scope of proceedings in Parliament by no later than 9:30 am on Wednesday 18 November 2020
3. That the committee, for the purposes of making its determination, have access to the relevant search warrants and the indexes of documents and other things in dispute prepared by the AFP and that the committee seek submissions from the Clerk of the Parliaments, Mr Zhang, Mr Moselmane and the AFP regarding the claims of privilege.
4. That, in recommending which documents are privileged, the committee apply the test used in the determination of the matters involving documents seized by the Independent Commission Against Corruption from the Honourable Peter Breen in 2003 and 2004, as amended by the Senate Privileges Committee in its Report 164, dated March 2017, entitled "Search warrants and the Senate".
5. That in inquiring into the claims of privilege, the committee consider correspondence by Mr Zhang's legal representative, dated 19 October 2020, and correspondence dated 14 October and 26 October from the Deputy General Counsel, AFP Legal, and any further material provided by either the AFP or Mr Zhang's legal representative to the House during this inquiry
6. That, if a recommendation cannot be made on the basis of the index and submissions received, the committee be given access to the privileged material held in the custody of the Clerk of the Parliaments.
7. That the report to the House on the claims of privilege by Mr Zhang, contain a recommendation for terms of reference for the Committee to inquire into and report into outstanding issues raised in Chapter 5 of Report no 80 "Execution of Search Warrants by the Australian Federal Police", and to related issues raised in correspondence to the Clerk of the Parliaments dated 15 October 2020 regarding the alleged seizure of material from Mr Zhang by the Australian Border Force in January 2020.

Appendix 3 Minutes

Minutes no. 11

Thursday 29 October 2020

Privileges Committee

Room 814/5, Parliament House, Sydney, 1.30 pm

1. Members present

Mr Primrose (*Chair*)

Revd Nile (*Deputy Chair*)

Mr Donnelly

Ms Faehrmann

Mr Khan

Mrs Maclaren-Jones

Mr Mason-Cox (via electronic participation)

Mrs Ward (via electronic participation)

In attendance: Steven Reynolds, Jenelle Moore and Noora Hijazi.

2. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 10 be confirmed.

3. Inquiry into execution of search warrants by the Australian Federal Police No. 2

3.1 Terms of reference

The committee noted the following terms of reference referred by the President on Tuesday 27 October 2020, under paragraph 2 (a) of resolution of the House establishing the Privileges Committee, 8 May 2019:

1. That the Privileges Committee inquire into and report on the status of documents and other things the subject of claims of parliamentary privilege arising from the execution of various search warrants by the Australian Federal Police (AFP) issued on 25 June and 23 July 2020 on Mr John Zhang, then staffer of the Honourable Shaoquett Moselmane.
2. That the committee recommend to the House which of the disputed material falls within the scope of proceedings in Parliament by no later than 9:30 am on Wednesday 18 November 2020
3. That the committee, for the purposes of making its determination, have access to the relevant search warrants and the indexes of documents and other things in dispute prepared by the AFP and that the committee seek submissions from the Clerk of the Parliaments, Mr Zhang, Mr Moselmane and the AFP regarding the claims of privilege.
4. That, in recommending which documents are privileged, the committee apply the test used in the determination of the matters involving documents seized by the Independent Commission Against Corruption from the Honourable Peter Breen in 2003 and 2004, as amended by the Senate Privileges Committee in its Report 164, dated March 2017, entitled "Search warrants and the Senate".
5. That in inquiring into the claims of privilege, the committee consider correspondence by Mr Zhang's legal representative, dated 19 October 2020, and correspondence dated 14 October and 26 October from the Deputy General Counsel, AFP Legal, and any further material provided by either the AFP or Mr Zhang's legal representative to the House during this inquiry
6. That, if a recommendation cannot be made on the basis of the index and submissions received, the committee be given access to the privileged material held in the custody of the Clerk of the Parliaments.

7. That the report to the House on the claims of privilege by Mr Zhang, contain a recommendation for terms of reference for the Committee to inquire into and report into outstanding issues raised in Chapter 5 of Report no 80 “Execution of Search Warrants by the Australian Federal Police”, and to related issues raised in correspondence to the Clerk of the Parliaments dated 15 October 2020 regarding the alleged seizure of material from Mr Zhang by the Australian Border Force in January 2020.

3.2 Submissions

Resolved, on the motion of Mr Donnelly:

- (a) That the index of documents the subject of a claim of parliamentary privilege by Mr Zhang be made available for inspection by members of the committee in the Office of the Clerk but not otherwise distributed to members.
- (b) That submissions be invited from Mr Zhang, Mr Moselmane, the Australian Federal Police and the Clerk of the Parliaments.
- (c) That:
 - (i) Mr Zhang, via his legal representatives, be invited to provide his first submission by 5.00 pm on Thursday 5 November 2020,
 - (ii) Mr Moselmane, and his legal representative, be invited to make a submission by 5.00 pm on Thursday 5 November 2020, and to inspect the index of documents over which Mr Zhang has claimed privilege,
 - (iii) the Australian Federal Police and the Clerk of the Parliaments be provided with the submissions made by Mr Zhang and Mr Moselmane and be invited to make a submission by 9.00 am on Monday 9 November,
 - (iv) Mr Zhang, via his legal representatives, be invited to make a further submission to respond to submissions made by Mr Moselmane, the Australian Federal Police and the Clerk of the Parliaments within 48 hours of the submissions being sent to him,
 - (v) legal representatives for Mr Zhang be advised that in the absence of a submission being made by or on behalf of Mr Zhang by Thursday 5 November 2020, as provided at paragraph (a), the committee will, notwithstanding this, act upon the basis of other submissions received,
 - (vi) the terms of this resolution be made available to Mr Zhang, via his legal representatives, Mr Moselmane, the Australian Federal Police and the Clerk of the Parliaments as soon as practicable following this meeting.

3.3 Inquiry timeline

The committee noted that the timeline of the inquiry would be as follows:

- Next meeting to consider submissions received: Thursday 12 November 2020
- Chair's draft report to members: Afternoon of Friday 13 November 2020
- Report deliberative: Monday 16 November 2020
- Report tabling: Wednesday 18 November 2020 (followed by the Chair giving notices of motions to effect the recommendations made by the committee as to the claims of privilege made over documents by Mr Zhang, and to refer a further inquiry to the committee to inquire into matters set out in Chapter 5 of the committee's first report into the execution of search warrants by the AFP).

4. **Adjournment**

The committee adjourned at 1.55 pm until Thursday 12 November 2020.

Steven Reynolds

Committee Clerk

Minutes no. 12

Thursday 12 November 2020

Privileges Committee

Preston-Stanley Room, Parliament House, Sydney, 2.30 pm

1. **Members present**

Mr Primrose (*Chair*)

Mr Donnelly

Mr Khan

Mrs Maclaren-Jones

Mr Mason-Cox

Mrs Ward

In attendance: Steven Reynolds, Jenelle Moore and Noora Hijazi.

2. **Apologies**

Revd Nile (*Deputy Chair*)

Ms Faehrmann.

3. **Draft minutes**

Resolved, on the motion of Mr Donnelly: That draft minutes no. 11 be confirmed.

4. **Correspondence**

Committee noted the following items of correspondence:

Received:

- 11 November 2020 – Letter from the President to the Chair, the Hon John Ajaka MLC to the Chair, enclosing correspondence from Mr Moselmane's legal representative.

Sent:

- 29 October 2020 – Letter from the Chair to Mr Stephen Stanton, inviting Mr Stanton to make a submission on behalf of the Honourable Shaoquett Moselmane MLC in relation to the inquiry into the execution of search warrants by the Australian Federal Police No. 2
- 29 October 2020 – Letter from the Chair to Mr Dennis Miralis, inviting Mr Miralis to make a submission on behalf of Mr John Zhang in relation to the inquiry into the execution of search warrants by the Australian Federal Police No. 2
- 29 October 2020 – Letter from the Chair to the Office of the Commissioner of the Australian Federal Police, inviting the Commissioner to make a submission in relation to the inquiry into the execution of search warrants by the Australian Federal Police No. 2
- 29 October 2020 – Letter from the Chair to Mr David Blunt, Clerk of the Parliaments, inviting Mr Blunt to make a submission in relation to the inquiry into the execution of search warrants by the Australian Federal Police No. 2
- 6 November 2020 – email from Clerk to the Privileges Committee inviting Mr Moselmane and his legal representative inviting him to make a supplementary submission following the receipt from the AFP of additional material from Mr Zhang subject to a claim of privilege

- 9 November 2020 – Email from the Privileges Committee secretariat to Mr Dennis Miralis, inviting Mr Miralis to make a supplementary submission on behalf of Mr John Zhang in response to the attached submissions received from the Australian Federal Police and the Clerk of the Parliaments.

Resolved, on the motion of Mrs Maclaren-Jones: That the letter from the President to the Chair enclosing correspondence from Mr Moselmane's legal representative be kept confidential.

5. Inquiry into execution of search warrants by the Australian Federal Police No. 2

5.1 Submissions

The committee noted the following submissions received by the secretariat. According to the resolution of the committee on Thursday 29 October 2020, the submissions were made available for inspection by members of the committee in the Office of the Clerk but were not otherwise distributed to members:

- Submission from Mr Stephen Stanton on behalf of the Honourable Shaoquett Moselmane MLC, dated Wednesday 4 November 2020,
- Submission from Mr Miralis on behalf of Mr John Zhang, dated Thursday 5 November 2020,
- Submission from Mr David Blunt, Clerk of the Parliaments, dated Friday 6 November 2020,
- Submission from Mr Ian McCartney APM, Deputy Commissioner, Australian Federal Police, dated Monday 9 November 2020.
- Supplementary submission from Mr Dennis Miralis on behalf of Mr John Zhang, dated Tuesday 10 November 2020,
- Supplementary submission from Mr David Blunt, Clerk of the Parliaments, dated Wednesday 11 November 2020, and
- Supplementary submission from Mr Stephen Stanton on behalf of the Honourable Shaoquett Moselmane MLC, dated Wednesday 11 November 2020.

5.2 Chair's draft report

The Chair briefed members on an outline for his draft report.

The committee deliberated.

6. Adjournment

The committee adjourned at 2.50 pm until Monday 16 November 2020 at 5.00 pm.

Steven Reynolds

Committee Clerk

Draft minutes no. 13

Monday 16 November 2020

Privileges Committee

Room 814/815, Parliament House, Sydney, 5.00 pm

1. Members present

Mr Primrose (*Chair*)

Mr Donnelly

Mr Khan

Mrs Maclaren-Jones

Mr Mason-Cox

Mrs Ward

In attendance: Steven Reynolds, Jenelle Moore and Noora Hijazi.

2. Apologies

Ms Faehrmann and Mr Mason-Cox

3. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 12 be confirmed.

4. Inquiry into execution of search warrants by the Australian Federal Police No. 2**4.1 Correspondence**

Resolved on the motion of Reverend Nile: That attachments to the correspondence from the President dated 27 October 2020 referring the inquiry to the committee be kept confidential, except to the extent referred to in the committee's report.

4.2 Consideration of Chair's draft report

The committee considered the Chair's draft report entitled Execution of search warrants by the Australian Federal Police No. 2, previously circulated.

The Chair circulated his draft foreword.

Chapter 1

Resolved, on the motion of Reverend Nile: That chapter 1, as read, be agreed to.

Chapter 2

Resolved, on the motion of Mrs Maclaren-Jones: That chapter 2, as read, be agreed to.

Chapter 3

Resolved, on the motion of Mr Donnelly: That chapter 3, as read, be agreed to.

Recommendations

Resolved, on the motion of Reverend Nile: That the recommendations, as read, be agreed to.

The committee noted that matters pertaining to the attendance of investigatory agencies when both Houses of Parliament are sitting and agreed this issue could be considered by the committee in its next inquiry under paragraph (i) of the proposes terms of reference, being 'any other related matter'.

Resolved on the motion of Mr Donnelly: That:

- The draft report be the report of the committee and that the committee present the report to the House;
- The submissions relating to the inquiry be kept confidential, except as required for inclusion in the report to explain the decisions made by the committee,
- Upon tabling, all unpublished correspondence relating to the inquiry be published by the committee, except for those documents kept confidential by resolution of the committee;
- The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling, and
- The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee.

4.3 Report tabling

The Chair advised the committee that the report be tabled on Wednesday 18 November 2020.

4.4 Media release

The Chair discussed with the committee arrangements the issue of a media release on tabling of the report. Members noted that a media release would not be issued as all relevant information pertaining to the inquiry would be available in the report on the committee's website.

5. Adjournment

The committee adjourned at 5.15 pm *sine die*.

Steven Reynolds
Committee Clerk