

**INQUIRY INTO INQUIRY INTO EXECUTION OF SEARCH
WARRANTS BY THE AUSTRALIAN FEDERAL POLICE**

Name: The Hon Shaoquett Moselmane

Date Received: 25 August 2020

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25 August 2020

Mr Steven Reynolds
Deputy Clerk of the Parliament of New South Wales
Clerk to the Privileges Committee of the Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Email:

c.c. David Blunt
Email:

c.c. Federal Agent Duncan Hayes
Counter Terrorism and Special Investigations Command
Email:

Dear Mr Reynolds,

**Re: Submission by the Hon Shaoquett Moselmane MLC - Claims for Privilege
Re Execution of Search Warrant on Residence and Parliamentary Office
(New South Wales Upper House) – 26 June and 23-25 July 2020**

I attach to this letter the Submission of the Hon Shaoquett Moselmane MLC as drawn by me seeking to claim privilege with respect to the Consolidated Index of Items that have been prepared and submitted in a format that will, for ease of reference, readily enable the items claimed in respect of the privilege invoked to be identified and resolved by the Committee.

The Consolidated Index is not attached to the Submission; however, if it were so required, I would ensure that it was forwarded forthwith or so soon after the submission has been sent, as require to be filed by close of business today, 25 August 2020.

I am not in my Chambers but I have undertaken the compilation of the submission and its dispatch to you by electronic copy and if required I will file a hard copy signed but no earlier



than Friday morning 2020, when I will return to Sydney to my Chambers. Accordingly, I attach the submission for the Committee and its constituent members.

Respectfully submitted,

S.J. STANTON

**BEFORE THE PRIVILEGES COMMITTEE
OF THE LEGISLATIVE COUNCIL
OF THE NEW SOUTH WALES PARLIAMENT**

**RE: EXECUTION OF SEARCH WARRANT ON PARLIAMENTARY OFFICE
(NEW SOUTH WALES UPPER HOUSE)
OF THE HON SHAOQUETT MOSELMANE ON JUNE 26 AND JULY 23-25 2020**

**SUBMISSIONS AS TO CLAIMS OF PARLIAMENTARY PRIVILEGE
BY THE HON SHAOQUETT MOSELMANE MLC**

May it please the Committee,

1. I appear for the Hon Shaoquett Moselmane MLC (hereafter "the Member") and as instructed I make these submissions of and concerning the claim for parliamentary privilege that are to be made with respect to items that are contained in an Index of Items seized and for ease of reference the claims that will be undertaken will refer to the items that satisfy what we respectfully submit is the three step test as adopted and implemented by this Honourable House to determine and to ensure that claims for Parliamentary Privilege are, if made, assessed and ultimately adjudicated upon, in compliance with the test that has been so adopted.
2. The Index of Items that will be relied upon constitutes the totality of the items seized and held by the Clerk of the House as the third party repository agreed between the Australian Federal Police and the Member.
3. The items that are claimed that satisfy what we would respectfully submit is the three-fold test as adopted are as follows:
 - (a) Items 7, 11, 14, 54, 55, 56, 58, 60, 63, 110, 111 and 112.
4. The balance of the items, we would respectfully submit, whilst not claims for parliamentary privilege are nevertheless items that must in the circumstances be acknowledged as items that cannot be released and/or accessed in view of the institution of proceedings before the High Court of Australia, by Mr John Shi Sheng Zhang.

5. The proceedings constitute an application for a constitutional or other Writ and have been instituted in the Sydney office of the Registry of the High Court of Australia in proceedings between Zhang and the Commissioner of Police, being the Australian Federal Police Commissioner together with the Magistrates who constitute the second and fourth defendants and the Registrar as a Justice of the Peace as the Third Defendant in the issuing of the proceedings for the execution of the search warrants in question.
6. The Writ ideally should be before the Committee and a copy of it will be forwarded in due course or alternately we would ask that it be made available by the Clerk of the Committee.
7. The Writ ideally need not be re-visited in its full force and effect save that it should be noted that in paragraph 38 – 40 the references to the Warrants and the alleged offences in respect of which they are said to relate are challenged effectively and similarly in a challenge so made and undertaken, the contents or what one may call, to use the vernacular, the “fruits” of the Warrants so being sought and executed, are asserted to be both unlawfully obtained and more importantly if the challenge is successful would be rendered illegally obtained insofar as the Warrant had no force and effect to so undertake the procurement of the items in question by the seizure pursuant to the Warrant.
8. The constitutional challenge that has been undertaken and in particular the relief sought is, we would respectfully submit, a matter that needs to be set out in terms of the claim for the embargo of the items until the High Court challenge is completed.
9. The relief sought effectively is as follows:

“Relief

41. The Court should grant a declaration as to the invalidity of the Provisions. Mr Zhang has standing to seek the declaratory relief sought in circumstances where the seizure of some items under the Warrant (authorised only by s. 3F(1) [sic 3F(1)] of the *Crimes Act* in respect of warrants that are in force is pending the resolution of claims for parliamentary privilege. Mr Zhang therefore has a sufficient interest in having his legal position clarified which goes beyond a mere intellectual or emotional concern, in the sense that if he loses this action he suffers a disadvantage, being the potential

seizure of material and ongoing retention of that material by the AFP. In that regard, his position is distinct from persons not yet charged with an offence who had no more interest than anyone else in clarifying what the law is^{43, 44}.

42. By reason of the Provisions' invalidity the Warrants are also invalid. The power to issue a warrant under s.3E(1) of the *Crimes Act* is enlivened in the issuing officer is satisfied that there are reasonable grounds for suspecting that there is or will be "evidential material" at the relevant premises. "Evidential material" is relevantly defined in s.3C(1) to mean "a thing relevant to an indictable offence". Section 3E(5)(a) and (c) requires that the Warrant state the offence to which it relates, and the kinds of evidential material that are to be searched for under the Warrant. Where there is no such offence, the Warrant will be invalid *ab initio*⁴⁵.
43. The power to make an order under s.3LA of the *Crimes Act* is enlivened if, among other matters, the Magistrate is satisfied that there are reasonable grounds for suspecting that "evidential material" is held in, or is accessible from, the particular computer or data storage device (sec 3LA(2)(a)). The Orders were therefore also invalid by reason of there being no offence to which any *evidentiary material* could relate.
44. Writs of Certiorari should issue to quash the Warrants and Orders on the basis of their invalidity. The Court should grant the injunction in terms sought at [7] on the basis that in the absence of valid Warrants, the search of Mr Zhang's personal and business premises was a trespass, the seizure and removal of Mr Zhang's property is unlawful, damages are an inadequate remedy to compensate Mr Zhang for his loss.

⁴³ *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 at 530 (Gibb CJ)

⁴⁴ *Smethurst* at [106], Gageler J; *Kuczborski v Queensland* (2014) 254 CLR 51 at [175]-[177].

⁴⁵ The warrants are also invalid by reason of their failure to state the offences to which the particular warrant related, contrary to s.3E(5)(a) of the *Crimes Act*.

⁴⁶ *NSW v Kable* (2013) 252 CLR 118 at [51].

⁴⁶ *Smethurst* at [119], [122] (Gageler J); [186], [196]-[197] (Gordon J)."

10. Accordingly, in the circumstances there is, we would respectfully submit, clearly a matter of concern with respect to the proceedings before the High Court of Australia and in that regard it would, of necessity, in our respectful submission, be both appropriate, just and in due conformity to the acknowledgement of the proceedings currently before the High Court of Australia, and the fact that they are clearly justiciable of issues concerning matters of constitutional concern of sufficient gravity to warrant the acknowledgment of the concern that the Hon Member expresses and seeks to ensure is upheld.

11. Accordingly, in that regard and more particularly as he has undertaken a faithful and clearly conscientious invocation of the parliamentary privilege so made and provided, he has fulfilled his obligations as a Sitting Member of this Honourable House and has undertaken to uphold the privilege of this House and its Members in circumstances where he must be accorded the respect and the privacy equally of and concerning his own items in respect of which he seeks the embargo that they not be delivered up to the Australian Federal Police until the determination of the High Court proceedings has taken place.
12. We reserve our right to reply as afforded upon receipt of the submissions by the Australian Federal Police.

Respectfully submitted,

v STÉPHEN J. STANTON
Counsel for Shaoquett Moselmane MLC

25 August 2020