

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

**Name:** The Australian Federal Police

**Date Received:** 8 September 2020

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**AFP**  
AUSTRALIAN FEDERAL POLICE

8 September 2020

The Hon Peter Primrose MLC  
Chair, Privileges Committee  
NSW Parliament Legislative Council

Via email: [privilege@parliament.nsw.gov.au](mailto:privilege@parliament.nsw.gov.au)

Dear Mr Primrose MLC

Thank you for your correspondence dated 12 August 2020, inviting the AFP to provide a submission to the Legislative Council Privileges Committee inquiry into the execution of search warrants by the AFP.

Having had regard to the submission provided on behalf of the Hon Shaoquett Moselmane MLC, I provide the attached submission to assist the Committee with its resolution of the inquiry, in accordance with the inquiry's terms of reference.

Yours sincerely

Ian McCartney APM  
Deputy Commissioner  
Investigations

**INQUIRY INTO THE EXECUTION OF SEARCH WARRANTS BY THE AUSTRALIAN  
FEDERAL POLICE ON THE PARLIAMENTARY OFFICE OF  
THE HON SHAOQUETT MOSELMANE MLC**

**SUBMISSION OF THE AUSTRALIAN FEDERAL POLICE**

**Introduction**

1. The following Terms of Reference have been provided to the Privileges Committee of the Legislative Council of the New South Wales Parliament (**Committee**):
  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 search warrants by the Australian Federal Police (AFP) on the parliamentary office and home of the Honourable Shaoquett Moselmane on 26 June 2020 and in relation to the data and emails of the Honourable Shaoquett Moselmane on 24 July 2020.
  2. That the committee recommend to the House which of the disputed material falls within the scope of proceedings in Parliament.
  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 Mr Moselmane's legal representatives, and seek submissions from the Clerk, 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, if a recommendation cannot be made on the basis of the index and submission received, the committee be given access to the privileged material held in the custody of the Clerk of the Parliaments.
2. The Australian Federal Police (**AFP**) has had regard to the submission provided on behalf of the Hon Shaoquett Moselmane MLC (**Member**) to the Committee on 25 August 2020. The purpose of this submission is to respond to that submission and to assist the Committee with its resolution of the inquiry in accordance with the Terms of Reference extracted above.

**Summary of submission**

3. The claims of privilege made by the Member define the scope of the matter under both the protocols governing the execution of the warrant and the Committee's terms of reference. The AFP accepts the claims of privilege made by the Member in respect of each of the 12 items identified in his submission as forming part of proceedings in Parliament. Given the AFP's acceptance of each privilege claim

made by the Member, there is no remaining dispute concerning the Member's claim for parliamentary privilege.

4. The AFP further submits that the Committee should decline the Member's request that the balance of the materials seized under the warrants, comprising 107 items, should otherwise be withheld from the AFP on grounds unrelated to any claim of parliamentary privilege. This is because:
  - determining and acceding to the Member's request would be outside the scope of the Committee's Terms of Reference,
  - the balance of any dispute between the Member and the AFP, such as the constitutional validity of the offence provisions or the validity of the warrants, is properly a matter for consideration by a court given the nature of that dispute and the need to avoid inconsistent rulings between the legislature and the judiciary,
  - it would be inappropriate for the AFP to be refused access to, and use of, the materials in anticipation of the resolution of High Court proceedings brought by another person in relation to another warrant,
  - this is true not least because the AFP is presently at liberty to use the material seized under the warrants impugned in those unrelated High Court proceedings, and
  - the AFP is investigating a matter directed to safeguarding Australia's basic political processes, and a proper and effective investigation relies, in part, on timely access to the materials seized pursuant to the warrants.
5. In the unlikely event the Member uses his right of reply to expand the items over which he has claimed parliamentary privilege, the AFP respectfully requests that it be given the opportunity to provide further submissions in respect of that additional claim.

**Material over which parliamentary privilege is claimed**

6. The claim for parliamentary privilege is now limited to Items 7, 11, 14, 54, 55, 56, 58, 60, 63, 110, 111 and 112 of the consolidated index annexed to the Member's submission.
7. The AFP accepts the claim of parliamentary privilege over these 12 items. Accordingly, there are no materials in respect of which a dispute exists. By para 2 of the Terms of Reference, there are no materials remaining which must be made the subject of consideration in accordance with the test identified in para 4 nor a recommendation to the Legislative Council by the Committee.

**The balance of the material**

8. The Member no longer presses claims of parliamentary privilege over the remaining 107 items on the consolidated index.
9. The Member submits that these 107 items should not 'be released and/or accessed in view of the institution of proceedings before the High Court of Australia, by

Mr John Shi Sheng Zhang'.<sup>1</sup> He instead seeks 'the embargo that [the material] not be delivered up to the Australian Federal Police until the determination of the High Court proceedings has taken place' on the basis that he has 'fulfilled his obligations as a Sitting Member' of the Legislative Council and 'must be accorded the respect and the privacy equally of and concerning his own items'.<sup>2</sup>

***The focus of the Committee's inquiry***

10. The AFP submits that the task facing the Committee is limited to the determination of whether disputed materials come within the definition of 'proceedings in Parliament'. That is the basis upon which the materials were provided to the Committee. It is, with respect, beyond the role of the Committee to withhold materials seized under the warrants the subject of this inquiry, or otherwise supervise the resolution of the remainder of the dispute, where the resolution of that dispute is properly the role of the courts.
11. As indicated below, it is properly a matter for the courts to determine conclusively disputes over the correct interpretation of a search warrant and the constitutional validity of a statutory offence for which the warrant was issued. Failure to observe the respective roles of Parliament and the courts in respect of determining disputes over parliamentary privilege and the legality of a search warrant could easily lead to conflicting decisions between these two essential arms of government. This is particularly the case given the current judicial proceedings involving Mr Zhang.

***The relevance of the High Court proceeding commenced by Mr Zhang***

12. The bulk of the Member's submission proceeds on a connection drawn between the warrants executed in this matter and the warrants challenged in the High Court proceedings filed by Mr Zhang (S129/2020) (**Zhang proceeding**).<sup>3</sup>
13. The AFP acknowledges that the Zhang proceeding concerns a similar set of facts to those underpinning the warrants executed in this matter, and that the warrants are each based on the investigation of the same offences in the *Criminal Code Act 1995* (Cth). However, that is the extent of any overlap between the two matters. The warrants to which the Committee's inquiry relates are not the same warrants as those in issue in the Zhang proceeding. The warrants in this matter are not the subject of challenge in any court.
14. In any event, the AFP is at liberty to inspect and use in its investigation the materials seized under the warrants challenged in the Zhang proceeding. There is therefore no basis for withholding the documents seized under the warrants at issue in this matter. When the Zhang proceeding was commenced, Mr Zhang sought an undertaking from the AFP not to access or use the material until the final determination of the proceeding. The Commissioner of Police declined to give such an undertaking, but did agree not to access the material for a period of 14 days. This

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<sup>1</sup> Member submission, [4].

<sup>2</sup> Member submission, [11].

<sup>3</sup> Member submission, [4]-[11].

was to allow time for Mr Zhang to seek an order restraining the AFP from accessing the materials, if he chose to do so. Prior to the expiry of that period, the Commissioner advised Mr Zhang that he would not extend the undertaking. Mr Zhang has made no attempt to restrain the Commissioner from accessing or using the materials.

15. Accordingly, since 17 August 2020, the AFP has been at liberty to access and use the material in the Zhang proceeding, despite the challenge to the warrants pursuant to which the material was seized. The AFP submits that it would be incongruous for the AFP to be prevented from accessing and using material in this matter over which privilege is not claimed in anticipation of the resolution of a separate proceeding in which the AFP is presently able to progress its investigation.

***Matters properly left for judicial consideration***

16. In circumstances where no dispute remains concerning the Member's claim for parliamentary privilege in respect of materials seized under the warrants, the AFP respectfully submits that any additional matters are properly left for judicial consideration – a course which, among other things, will remove the real potential for conflicting rulings between the Committee and the courts.
17. In particular, the determination of whether particular documents fall within the terms of the warrants, and the validity of the warrants, are properly matters to be determined by a court, in the event of a prosecution or a challenge to the execution of the warrants. That process involves the application of laws of criminal investigation and in some cases constitutional interpretation, and is properly determined having heard argument about the application of those laws to the criminal investigation.
18. While this is not the forum to discuss the merits or otherwise of the Zhang proceeding, the AFP submits that the warrants impugned in that proceeding are valid. Even if the warrants relevant to this inquiry were, at some point in the future, to be found to be invalid by a court, it would not necessarily follow that the AFP would be prevented from accessing and using the materials. The High Court has recently held that the invalidity of a warrant will not necessarily result in the material seized pursuant to that warrant being ordered to be returned.

***The significance of the ongoing investigation***

19. The investigation being pursued by the AFP is one of significant gravity, and is directed towards safeguarding the integrity of Australian political processes. Regardless of the outcome of the investigation, it is vital that it is conducted transparently and effectively, and timely access to the materials is critical to that purpose.

**Concluding remarks**

20. The AFP respectfully submits that, on the basis that there is no remaining dispute concerning the Member's claim for parliamentary privilege, the proper course is for the Committee to return the materials to the AFP for use in the investigation, save

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for the 12 items identified in the Member's submission. The question of any further qualification or restriction on the use of the remaining documents is properly a matter for another forum, should the Member wish to pursue it.

21. Finally, the AFP notes that the Member has a right of reply to this submission. Consistently with the essential function of a reply, any further submission of the Member should not expand on the substantive claims made by the Member in his primary submission. In the unlikely event that the Member's reply expands the items over which he has claimed parliamentary privilege, the AFP respectfully requests that it be given the opportunity to provide further submissions in respect of that additional claim.

8 September 2020

Ian McCartney APM  
Deputy Commissioner  
Australian Federal Police