



LEGISLATIVE COUNCIL

PRIVILEGES COMMITTEE

# Execution of search warrants by the Australian Federal Police No. 4



Report 92

March 2023

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Privileges Committee

# **Execution of search warrants by the Australian Federal Police No. 4**

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Execution of search warrants by the Australian Federal Police No. 4.

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Chair: Hon Peter Primrose MLC



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## Table of contents

	<b>Terms of reference</b>	<b>iv</b>
	<b>Committee details</b>	<b>v</b>
	<b>Chair’s foreword</b>	<b>vi</b>
	<b>Recommendation</b>	<b>vii</b>
	<b>Conduct of inquiry</b>	<b>viii</b>
<b>Chapter 1</b>	<b>Background</b>	<b>1</b>
	<b>The AFP search warrants and previous inquiries</b>	<b>1</b>
	<b>Outstanding issues</b>	<b>2</b>
	<b>Referral of this inquiry</b>	<b>2</b>
	<b>The inquiry process</b>	<b>3</b>
<b>Chapter 2</b>	<b>Assessment of privilege claims arising</b>	<b>5</b>
	<b>The test of parliamentary privilege</b>	<b>5</b>
	<b>The submission process</b>	<b>6</b>
	The submission from Mr Miralis on behalf of Mr Zhang	7
	The submission from Mr Stanton on behalf of Mr Moselmane	7
	The submission from the Acting Clerk of the Parliaments	9
	The AFP submission	10
	<b>Summary of the claims of privilege</b>	<b>12</b>
	Mr Zhang’s P30 Mobile Phone (SP03.26JUN20.001)	12
	Mr Zhang’s P20 Mobile Phone (SP03.26JUN20.024)	13
	Mr Moselmane’s iPhone Pro mobile phone (SP01.26JUN20.001)	13
	<b>Committee comment</b>	<b>13</b>
<b>Chapter 3</b>	<b>Additional issues</b>	<b>17</b>
<b>Appendix 1</b>	<b>Submissions</b>	<b>18</b>
<b>Appendix 2</b>	<b>Referral by the President of the Legislative Council</b>	<b>19</b>
<b>Appendix 3</b>	<b>Correspondence from the Chair of the committee and the AFP Commissioner</b>	<b>21</b>
<b>Appendix 4</b>	<b>Minutes</b>	<b>24</b>

## Terms of reference

1. That the Privileges Committee further 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 and any incidental documents of Mr Moselmane relating to the investigation of Mr Zhang, as delivered to the Acting Clerk by the AFP on Friday 3 February 2023 .
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 5:00 pm on 2 March 2023.
3. That the committee, for the purposes of making its determination, have access to the relevant 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, 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 Acting Clerk of the Parliaments.

The terms of reference were referred to the committee by the President of the Legislative Council on Friday 10 February 2023.

## Committee details

### Committee members

<b>The Hon Peter Primrose MLC</b>	Australian Labor Party	<i>Chair</i>
<b>Revd the Hon Fred Nile MLC</b>	Independent	<i>Deputy Chair</i>
<b>The Hon Greg Donnelly MLC</b>	Australian Labor Party	
<b>Ms Cate Faehrmann MLC</b>	The Greens	
<b>The Hon Wes Fang MLC</b>	The Nationals	
<b>The Hon Scott Farlow MLC</b>	Liberal Party	
<b>The Hon Shayne Mallard MLC</b>	Liberal Party	
<b>The Hon Taylor Martin MLC</b>	Liberal Party	

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## Chair's foreword

This is the fourth report of the Privileges Committee arising from the execution of search warrants by the Australian Federal Police (AFP) on various premises associated with the Hon Shaoquett Moselmane MLC and his then staffer Mr John Zhang in 2020. The first two reports dealt with privilege claims made firstly by the member and then by Mr Zhang, while the third report addressed a number of policy issues that were raised during the first two inquiries.

This inquiry concerns claims of privilege made in relation to a 'Third Tranche' of material connected with the execution of the search warrants that was delivered to the Acting Clerk of the Parliaments by the AFP on 3 February 2023 and included an index of claims made on behalf of Mr Zhang.

In conducting the inquiry the committee sought submissions from Mr Zhang, Mr Moselmane, the AFP and the Acting Clerk of the Parliaments. Through the submission process the material that is subject to privilege claims has been narrowed to a small number of the items listed in the index delivered by the AFP. Regrettably, however, inconsistencies in the citation of documents claimed to be privileged in the submissions have hampered the committee's ability to assess the claims as it has not been possible to identify certain documents or to reconcile documents that are subject to different claims.

In these circumstances, the committee has concluded that it is satisfied that parliamentary privilege extends to those documents identified in the submission by the Acting Clerk but that it is not in a position to determine privilege claims made on behalf of Mr Zhang or Mr Moselmane within the timeframe available for the completion of this inquiry. This report therefore recommends that in the new Parliament the House refer a new inquiry to the Privileges Committee in relation to the matters that remain unresolved from this inquiry.

This inquiry operated under a very tight reporting timeframe because of the need to ensure the inquiry was completed prior to the suspension of the Legislative Council in the lead-up to the 2023 periodic Council election. The times given to those making submissions were particularly constrained. I am very appreciative of the co-operation of the four parties who made submissions to the inquiry – the AFP, Mr Zhang's legal representative, Mr Moselmane's representative and the Acting Clerk of the Parliaments. I am also grateful to the members of the committee, who have taken a constructive and non-partisan approach, and to the secretariat for their support.



Hon Peter Primrose MLC  
**Committee Chair**



## Recommendation

### Recommendation 1

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That in the new Parliament the House refer a new inquiry to the Privileges Committee in relation to the matters that remain unresolved from this inquiry.

## **Conduct of inquiry**

The terms of reference were referred to the committee by the President of the Legislative Council on Friday 10 February 2023.

The committee received four confidential submissions.

Inquiry related documents are available on the committee's website.

# Chapter 1 Background

This chapter summarises previous inquiries by the Privileges Committee concerning the execution of search warrants by the Australian Federal Police and the circumstances in which the current inquiry was established. The chapter then outlines the process adopted in this inquiry to address the resolution of issues relating to a further claim of parliamentary privilege arising from the execution of search warrants on Mr John Zhang.

## The AFP search warrants and previous inquiries

- 1.1 This is the fourth inquiry by the Privileges Committee to arise from the execution of search warrants on various premises associated with the Honourable Shaoquett Moselmane MLC and his then staffer Mr John Zhang by the Australian Federal Police (AFP). The 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, section 92 of the *Criminal Code 1995* (Cth). As has been noted in previous inquiries, the warrants did not identify Mr Moselmane as having committed any offences, and both on the day and subsequently the AFP confirmed to Mr Moselmane that he was not a suspect despite contrary media coverage.
- 1.2 The first inquiry, which was referred to the committee by the House, considered claims of parliamentary privilege made by Mr Moselmane over evidence collected by the AFP from search warrants executed on 26 June 2020 and 24 July 2020.<sup>1</sup> Following the resolution of the House on 15 October 2020,<sup>2</sup> 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 investigation.
- 1.3 The second inquiry was referred to the committee by the President of the Legislative Council following the receipt of correspondence from the AFP and Mr Zhang's legal representatives and concerned claims of parliamentary privilege arising from the execution of search warrants on Mr Zhang.<sup>3</sup> Following the resolution of the House of 19 November 2020,<sup>4</sup> three documents subject to a claim of privilege were returned to Mr Zhang and the remaining documents, until then held in the custody of the Clerk, were provided to the AFP.
- 1.4 The third inquiry, which was referred to the committee by the House, considered a number of broader issues that had been raised during the first two inquiries for which there had been insufficient time to consider in detail. These issues included the rights available to a staffer to make a claim of privilege over documents, the rights available to a member to make a claim of

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<sup>1</sup> Privileges Committee, *Execution of search warrants by the Australian Federal Police*, Report 80, October 2020.

<sup>2</sup> *LC Minutes*, 15 October 2020, p 1422.

<sup>3</sup> Privileges Committee, *Execution of search warrants by the Australian Federal Police No. 2*, Report 81, November 2020.

<sup>4</sup> *LC Minutes*, 19 November 2020, p 1738.

privilege over documents held by their staffer regardless of any claims of privilege made by the staffer, and the privileged status of translations of parliamentary proceedings.<sup>5</sup>

## Outstanding issues

- 1.5 In its second inquiry concerning the execution of search warrants by the AFP, the Privileges Committee noted correspondence from the AFP to Mr Zhang's legal representatives dated 14 October 2020 which identified three potential indexes of documents for which privilege needed to be resolved:
- Material seized by the AFP in the execution of search warrants and held by the Clerk of the Parliaments pending resolution of privilege issues – 'First Tranche'
  - Material from digital devices moved from Mr Zhang's residential and business premises during the execution of search warrants, seized by the AFP and held by the AFP awaiting advice from Mr Zhang – 'Second Tranche'
  - Material contained on phones, processing of which had yet to be completed by the AFP, after which Mr Zhang would be invited to identify which items in an index of evidence were subject to a claim of parliamentary privilege – 'Third Tranche'.<sup>6</sup>
- 1.6 The committee's report on that inquiry addressed privilege issues relating to the 'First' and 'Second Tranches' identified in the correspondence from the AFP. However, it did not consider issues relating to the 'Third Tranche' comprising material on phones the processing of which had yet to be completed by the AFP.

## Referral of this inquiry

- 1.7 On 3 February 2023 an agent of the AFP delivered to the Acting Clerk of the Parliaments material concerning further claims of parliamentary privilege made by Mr Zhang's legal representatives on his behalf arising from the execution of search warrants in 2020. These claims related to material contained on phones the processing of which had not been completed by the AFP at the time of the committee's second inquiry (so-called 'Third Tranche' material). On the same day the AFP agent wrote to the Acting Clerk confirming delivery of the material.
- 1.8 On 8 February 2023 the President of the Legislative Council, the Hon Matthew Mason-Cox MLC, wrote to the Chair of the Privileges Committee, the Hon Peter Primrose, advising that the Acting Clerk of the Parliaments had referred to him the email from the agent of the AFP. The President advised:

Having considered how to approach the issues raised, it seems to me the most appropriate course of action is to provide the email 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 completed in November 2020 to

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<sup>5</sup> Privileges Committee, *Execution of search warrants by the Australian Federal Police (No.3)*, Report 89, November 2022.

<sup>6</sup> Privileges Committee, *Execution of search warrants by the Australian Federal Police No. 2*, Report 81, November 2020, p 3.

resolve earlier claims of privilege by Mr Zhang (Inquiry into the Execution of Search Warrants by the Australian Federal Police No. 2).<sup>7</sup>

- 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 that the committee’s second and third reports on the execution of search warrants by the AFP had suggested that a member should be involved in the consideration of privilege claims made by a staffer working for that member, and therefore the President requested that the committee invite a submission from Mr Moselmane during its inquiry.

## The inquiry process

- 1.10** The committee met on 10 February 2023 to initiate work on the inquiry. The President’s terms of reference for the referral included a reporting date of 2 March 2023, a time frame chosen to ensure the committee completed its inquiry prior to the suspension of the Legislative Council in the lead-up to the 2023 periodic Council election. To meet this reporting date the committee adopted a short time frame for submissions: Mr Zhang, Mr Moselmane, the AFP and the Clerk of the Parliaments were requested to make a submission within 10 days, with Mr Zhang provided 48 hours to then respond with a supplementary submission if required.
- 1.11** As with the first and second inquiries, the committee has treated the index of material that is subject to claims of privilege as a confidential document: the index has not been distributed to committees members and has instead been inspected only in the Office of the Clerk. Being mindful of the need to protect confidentiality for an active investigation, at no time in any of the three inquiries have any committee members inspected the actual items, as descriptions in the index or the submissions has been sufficient for decisions to be made on privilege.
- 1.12** Also in line with the approach adopted in the previous inquiries, the committee chose not to publish submissions except to the extent necessary to explain the committee’s findings in this report.
- 1.13** The committee adopted an inquiry timeline that it considered would enable conclusion of this matter. However in the event, as discussed in Chapter 2, the committee was not able to conclude this matter in the time available before the end of the Parliament on 2 March 2023. Accordingly, the committee will need to revisit this matter in the new Parliament.

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<sup>7</sup> President of the Legislative Council, Correspondence to the Chair, 8 February 2023.



## Chapter 2 Assessment of privilege claims arising

This chapter considers claims of parliamentary privilege made over documents delivered to the Acting Clerk of the Parliaments by the AFP on 3 February 2023. The committee understands that a claim of privilege was originally made on behalf of Mr Zhang and communicated to the AFP and that this claim formed the basis of the index of privileged items delivered to the Acting Clerk. Subsequently, during this inquiry, further claims were made by Mr Dennis Miralis on behalf of Mr Zhang and by Mr Stephen Stanton on behalf of Mr Moselmane. The Acting Clerk of the Parliaments also provided an assessment of privilege attaching to the documents. These assessments are considered against the three-step test for determining claims of privilege that has been adopted by this committee in previous reports and endorsed by the House.

### The test of parliamentary privilege

- 2.1 In its first report on the execution of the AFP search warrants,<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>
- 2.2 In its second report on the execution of the AFP search warrants, the committee adopted the three-step test in determining the status of the documents subject of claims of parliamentary privilege by Mr Zhang.<sup>11</sup>

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<sup>8</sup> Privileges Committee, *Execution of search warrants by the Australian Federal Police*, Report no. 80, October 2020, p 14.

<sup>9</sup> 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.

<sup>10</sup> *Minutes*, NSW Legislative Council, 15 October 2020, p 1438.

<sup>11</sup> Privileges Committee, *Execution of search warrants by the Australian Federal Police No. 2*, Report no. 81, November 2020, p 7.

- 2.3 In the current inquiry the committee has applied the same test to all claims of privilege made as part of the inquiry. This test provides:

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.

## The submission process

- 2.4 As noted in Chapter One, this inquiry concerns the application of parliamentary privilege to material delivered to the Acting Clerk of the Parliaments by the AFP on 3 February 2023 in connection with the execution of search warrants by the AFP on various premises associated with the Honourable Shaoquett Moselmane MLC and his then staffer Mr John Zhang. The material delivered by the AFP included an index of 27 items. These items can be summarised as follows:

**Table 1 Items listed in the index delivered by the AFP on 3 February 2023**

<b>Mr Zhang’s P30 Mobile Phone (SP03.26JUN20.001)</b>	
WeChat Conversations	Items 1-6
Images	Items 7-13
Documents	Item 14
<b>Mr Zhang’s P20 Mobile Phone (SP03.26JUN20.024)</b>	
WeChat Conversations	Items 15-19
Documents	Items 20-25
<b>Mr Moselmane’s iPhone Pro mobile phone (SP01.26JUN20.001)</b>	
Documents	Items 26-27



2.5 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. Submissions were received from:

- Mr Miralis, Partner at Nyman Gibson Miralis, on behalf of Mr Zhang,
- Mr Stanton on behalf of Mr Moselmane,
- the Acting Clerk of the Parliaments
- Mr Ian McCartney APM, Deputy Commissioner, AFP.

2.6 The committee has chosen not to publish these submissions.

### **The submission from Mr Miralis on behalf of Mr Zhang**

2.7 In his submission to this inquiry on behalf of Mr Zhang, Mr Miralis claimed parliamentary privilege in relation to only one of the 27 items identified in the index: ‘item 16 on Mr Zhang’s P20 Mobile Phone – messages of 30/01/2019 – which are contained in a WeChat item’.<sup>12</sup> In support of this claim Mr Miralis stated:

... the documents over which Mr Zhang asserts privilege would satisfy the amended Breen Test. The documents are exclusively copies, drafts, or translations of material incidental to speeches, motions or debates made Parliament. As such, they satisfy the first step of the amended Breen Test, being documents b[r]ought into existence in the course of, or for purposes of, or incidental to, the transacting of business in a House or Committee.<sup>13</sup>

2.8 In relation to the items with respect to which privilege was not being pressed, Mr Miralis stated that Mr Zhang would be likely to defer to submissions from the member:

Where Mr Zhang does not press assertions of privilege, it is agreed that the Hon. Member may be better placed to advance arguments as to whether such materials ought properly to be covered by parliamentary privilege. In this respect, should Mr Moselmane choose to pursue a broader claim of privilege than that being pressed by Mr Zhang, Mr Zhang would likely defer to the member’s submissions.<sup>14</sup>

### **The submission from Mr Stanton on behalf of Mr Moselmane**

2.9 In his submission to this inquiry on behalf of Mr Moselmane, Mr Stanton made claims of privilege in relation to items on Mr Zhang’s P30 and P20 mobile phones.<sup>15</sup>

<sup>12</sup> Submission 4, Mr Miralis on behalf of Mr Zhang, p 3.

<sup>13</sup> Submission 4, Mr Miralis on behalf of Mr Zhang, p 4.

<sup>14</sup> Submission 4, Mr Miralis on behalf of Mr Zhang, p 3.

<sup>15</sup> In this submission the P30 phone is referred to as ‘SP03.26JUN20.001’ and the P20 phone is referred to as ‘SP03.26JUN20.024’ using the descriptors appearing in the index prepared by the AFP.

***Mr Zhang's P30 mobile phone***

- 2.10** On behalf of Mr Moselmane, Mr Stanton claimed parliamentary privilege in relation to the following documents in the WeChat conversations on Mr Zhang's P30 mobile phone:
- parliamentary speech by Mr Moselmane relating to Lebanon (p 747)
  - parliamentary speech by Mr Moselmane relating COVID 19 and Racism (pp 2733-2734).<sup>16</sup>

***Mr Zhang's P20 mobile phone***

- 2.11** On behalf of Mr Moselmane, Mr Stanton claimed parliamentary privilege in relation to five speeches on Mr Zhang's P20 mobile phone which all appear to have been made by Mr Moselmane and are listed in the WeChat Conversations.<sup>17</sup> The speeches relate to:
- parliamentary speech in tribute to Robert Hawke AC, former Prime Minister of Australia (p 178)
  - parliamentary speech in relation to the Museum of Chinese in Australia (p 188)
  - parliamentary speech in tribute to Robert Hawke ACT (p 1219)
  - parliamentary speech in relation to the Museum of Chinese in Australia (p 1122)
  - parliamentary speech in relation to the Museum of Chinese in Australia (p 1125).<sup>18</sup>
- 2.12** On behalf of Mr Moselmane, Mr Stanton also claimed parliamentary privilege in relation to Document 25 on Mr Zhang's P20 mobile phone, being an extract of the valedictory speech by the Hon Ernest Wong MLC.<sup>19</sup>
- 2.13** Mr Stanton also claimed parliamentary privilege in relation to a document described as 'Item 22 MOSELMANE AND LI JIANJUN discuss Australia – China relation to New South Wales Parliament – Parliament in chambers visit'. In support of this claim Mr Stanton stated:

This is whilst not within the Chamber of the House, ... within the confines of the House and represents a discrete but nevertheless very real aspect of the Honourable Member's business within the House which, whether it be with the Chamber or outside, when it is conducted lawfully – as this is - should be, as it now is sought to be, held as a claim for parliamentary privilege in respect of this matter.<sup>20</sup>

***Images 13-21***

- 2.14** In addition to the claims of privilege raised above, Mr Stanton made a submission not related to parliamentary privilege over images 13-21 on Mr Zhang's P20 mobile phone inclusive.<sup>21</sup> This claim was based on privacy, the assertion that the material does not bear any reference to

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<sup>16</sup> Submission 1, Mr Santos on behalf of Mr Moselmane, pp 2-3.

<sup>17</sup> Submission 1, Mr Santos on behalf of Mr Moselmane, pp 1-2.

<sup>18</sup> Submission 1, Mr Santos on behalf of Mr Moselmane, p 2.

<sup>19</sup> Submission 1, Mr Santos on behalf of Mr Moselmane, p 3.

<sup>20</sup> Submission 1, Mr Santos on behalf of Mr Moselmane, p 4.

<sup>21</sup> Submission 1, Mr Santos on behalf of Mr Moselmane, pp 3-4.

conduct or incidents for which criminal activity could be inferred, and the distress that would be caused if the material were disseminated.<sup>22</sup>

### **The submission from the Acting Clerk of the Parliaments**

**2.15** In his submission to this inquiry the Acting Clerk concluded that of the 27 items listed in the index there are six documents (two of which are duplicates) which meet the three-step test previously used by this committee to assess claims of privilege. The reasoning adopted by the Acting Clerk in his submission is summarised below.

#### ***Mr Zhang's P30 mobile phone***

**2.16** As noted previously, the items listed in the index for Mr Zhang's P30 mobile phone comprised 'WeChat conversations' (Items 1-6), 'Images' (Items 7-13) and 'Documents' (Item 14).

**2.17** In relation to WeChat conversations, the Acting Clerk advised that, as the index only lists the names of those involved and not the content of the conversations, he had to take the step which was not necessary in the previous privilege disputes of examining the content.<sup>23</sup> On examining the content it appeared that each of the items contains separate attachments ranging from two files to over 6,000, with each item representing extracts of exchanges between Mr Zhang and separate others. However, a USB accompanying the index contained a searchable PDF document print-out of the exchanges, which enabled the Acting Clerk to use common search terms related to activity around parliamentary proceedings.<sup>24</sup> Based on this examination, he identified two extracts as privileged:

- An exchange which provides a Hansard transcript of the speech the member has given on Lebanon (p 938)
- An exchange which contains a description of the order of business in the Legislative Council and a Hansard proof of a speech by Mr Moselmane (pp 2917-2918).<sup>25</sup>

**2.18** In relation to the other categories of items on the phone the Acting Clerk advised:

- It is apparent from the descriptions in the index that the images (Items 7-13) on Mr Zhang's P30 mobile phone would not satisfy the requirements of the 'Breen' test of connection to parliamentary proceedings.
- The one document listed in the index on Mr Zhang's P30 mobile phone is a speech by Mr Moselmane (Item 14) that does not appear to be a parliamentary speech.<sup>26</sup>

<sup>22</sup> Submission 1, Mr Santos on behalf of Mr Moselmane, pp 3-4.

<sup>23</sup> The Acting Clerk commented that if the inquiry had a longer timeframe his preference would have been, rather than examining the content himself, to request the AFP to provide a more detailed index descriptor: Submission 2, Acting Clerk of the Parliaments, p 2.

<sup>24</sup> Submission 2, Acting Clerk of the Parliaments, p 2.

<sup>25</sup> Submission 2, Acting Clerk of the Parliaments, p 3.

<sup>26</sup> Submission 2, Acting Clerk of the Parliaments, p 2.

*Mr Zhang's P20 mobile phone*

- 2.19** As noted previously, the items listed in the index on Mr Zhang's P 20 mobile phone comprised 'WeChat conversations' (Items 15-19) and 'Documents' (Items 20-25).
- 2.20** In relation to the WeChat conversations, the Acting Clerk advised that he had to examine the actual documents and use common search terms relating to parliamentary proceedings in line with the process described above with respect to the P30 phone. As a result of this process he identified two transcripts of speeches given by Mr Moselmane in the Legislative Council which he regarded as being privileged, each of which appeared twice in the extracts:
- a speech about former Prime Minister RJ Hawke delivered on 20 June 2019 (pp 1220 and 1580)
  - a speech about the Museum of the Chinese in Australia delivered on 6 August 2019 (pp 1591 and 1227).<sup>27</sup>
- 2.21** In relation to Documents (Items 20-25) listed in the index on Mr Zhang's P 20 mobile phone, the Acting Clerk advised that item 22, headed 'Ernest Wong delivers farewell speech', would appear to be a republication of another member's speech but is not itself privileged. He also advised that all other documents in this category do not appear to involve parliamentary proceedings (despite 'item 25' referring to a meeting in Parliament House).<sup>28</sup>

*Mr Moselmane's mobile phone*

- 2.22** The Acting Clerk advised that the index relating to Mr Moselmane's mobile phone (Items 26 and 27) lists two items which appear to be speeches but that these items do not appear to relate to parliamentary speeches given by the member or other proceedings.<sup>29</sup>

**The AFP submission**

- 2.23** The submission from the AFP addressed claims of privilege by Mr Zhang, claims of privilege by Mr Moselmane and issues relating to other material. In preparing the submission the AFP had the opportunity to review the submission made by Mr Stanton on behalf of Mr Moselmane.<sup>30</sup>

*Claims of privilege by Mr Zhang*

- 2.24** In its submission, the AFP drew the committee's attention to a recent judgment by Justice Hall in the Supreme Court of Western Australia which amongst other things considered the breadth of parliamentary privilege. Justice Hall stated:

... care must be employed regarding which documents attract the protection of parliamentary privilege. It does not extend to any document produced by a member of

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<sup>27</sup> Submission 2, Acting Clerk of the Parliaments, p 3.

<sup>28</sup> Submission 2, Acting Clerk of the Parliaments, p 3.

<sup>29</sup> Submission 2, Acting Clerk of the Parliaments, p 3.

<sup>30</sup> Correspondence from Ian McCartney APM, Deputy Commissioner, National Security, AFP, 20 February 2023, attaching the AFP's submission.

Parliament (or their staff) in undertaking their duties as an elected representative. There must be a close and clear connection between proceedings in the relevant House and the document for it to be potentially protected.<sup>31</sup>

**2.25** The AFP submitted that this judgement is an indication that a clear and close connection with proceedings is especially relevant in considering privilege claims made by members' staff. It further stated that:

it cannot be assumed that all documents prepared, used or otherwise in the possession of a staffer will necessarily have a sufficient connection with a proceeding in Parliament, even where the documents concern something that happened in the Parliament. Ordinarily, it might be expected that the involvement of a staffer in 'proceedings in Parliament' will be less direct than the involvement of a member.<sup>32</sup>

**2.26** In relation to the specific claims under consideration in this inquiry, the AFP stated in its submission that the descriptions of privilege claims contained in the index do not establish that any items fall within the test applied by the committee.<sup>33</sup>

### *Republication of parliamentary speeches*

**2.27** In its submission, the AFP also stated that speeches to Parliament included in WeChat threads which are the subject of privilege claims by Mr Moselmane are unlikely to attract parliamentary privilege at least in their entirety. The basis for this view as articulated by the AFP was that:

- Such items are liable to involve a republication of proceedings which does not in itself attract privilege. In the absence of evidence that the republications were prepared and communicated for purposes of, or incidental to, transacting the business of a House or committee, it is not evident that they attract parliamentary privilege. Various authorities have confirmed that parliamentary privilege does not extend to republications of parliamentary proceedings.<sup>34</sup>
- Such items are liable to include associated commentary which may not, in itself, attract privilege. It does not follow that associated comments will be privileged unless it can be established that they were made or collected for the purposes of the business of a House or Committee.<sup>35</sup>

### *'Image 3'*

**2.28** In addition to opposing claims based on parliamentary privilege the AFP also objected to the member's claim that 'Image 3' items should be withheld for reasons of privacy and because it is asserted they do not bear any reference to criminal conduct. With respect to that claim the AFP stated:

<sup>31</sup> Submission 3, AFP, p 3, citing *President of the Legislative Council of Western Australia v Corruption and Crime Commission* [No. 2] [2021] WASC 223, [133].

<sup>32</sup> Submission 3, AFP, p 3.

<sup>33</sup> Submission 3, AFP, p 4.

<sup>34</sup> Submission 3, AFP, pp 4-5.

<sup>35</sup> Submission 3, AFP, pp 4-5

All police investigations involve privacy issues, and the AFP is bound by privacy and secrecy laws in how it uses and discloses information. The relevance of a given document to a criminal investigation is something for the investigating police to determine, and even if an image did not in itself disclose a criminal act that need not mean that it is not relevant to an investigation. If the Honourable Member or Mr Zhang assert that the warrant did not authorise these images to be taken, then the AFP respectfully submits that this is a matter which is most appropriately a matter for judicial consideration, to avoid the potential for conflicting rulings between the Committee and the courts.<sup>36</sup>

### *Other material*

- 2.29** The AFP's submission stated that, in addition to items listed in the index delivered to the Acting Clerk, the AFP had identified a number of other documents located on devices of Mr Zhang which are similar to items over which Mr Zhang has made a privilege claim. The submission stated that the AFP had provided a copy of these documents to Mr Zhang but had not received any indication that a claim of privilege had been made.
- 2.30** The submission also advised that two documents over which privilege had been claimed by Mr Zhang were also located on an iPhone apparently belonging to Mr Moselmane and that these documents were not the subject of any claims by the member.
- 2.31** The submission maintained that there is nothing in the descriptions of any of these documents which would support a privilege claim.<sup>37</sup>

## **Summary of the claims of privilege**

- 2.32** The committee summarises the claims of privilege over various documents below.

### **Mr Zhang's P30 Mobile Phone (SP03.26JUN20.001)**

- 2.33** Mr Stanton on behalf of Mr Moselmane claimed parliamentary privilege in relation to the following documents in the WeChat conversations:
- parliamentary speech by Mr Moselmane relating to Lebanon (p 747)
  - parliamentary speech by Mr Moselmane relating COVID 19 and Racism (pp 2733-2734).
- 2.34** The Acting Clerk supported privilege in relation to:
- An exchange which provides a Hansard transcript of the speech the member has given on Lebanon (p 938).
  - An exchange which contains a description of the order of business in the Legislative Council and a Hansard proof of a speech by Mr Moselmane (pp 2917-2918).

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<sup>36</sup> Submission 3, AFP, p 6.

<sup>37</sup> Submission 3, AFP, pp 1-2.

**Mr Zhang's P20 Mobile Phone (SP03.26JUN20.024)**

- 2.35 Mr Miralis on behalf of Mr Zhang claimed privilege over 'item 16 – messages of 30/01/2019 – which are contained in a WeChat item'.
- 2.36 Mr Stanton on behalf of Mr Moselmane claimed parliamentary privilege in relation to:
- parliamentary speech in tribute to Robert Hawke AC, former Prime Minister of Australia (p 178)
  - parliamentary speech in relation to the Museum of Chinese in Australia (p 188)
  - parliamentary speech in tribute to Robert Hawke ACT (p 1219)
  - parliamentary speech in relation to the Museum of Chinese in Australia (p 1122)
  - parliamentary speech in relation to the Museum of Chinese in Australia (p 1125).
- 2.37 Mr Stanton also claimed parliamentary privilege in relation to Document 25, being an extract of the valedictory speech by the Hon Ernest Wong MLC.
- 2.38 Mr Stanton also claimed parliamentary privilege in relation to a document described as 'Item 22 MOSELMANE AND LI JIANJUN discuss Australia – China relation to New South Wales Parliament – Parliament in chambers visit'.
- 2.39 The Acting Clerk supported privilege in relation to two documents:
- a speech about former Prime Minister RJ Hawke delivered on 20 June 2019 (pp 1220 and 1580)
  - a speech about the Museum of the Chinese in Australia delivered on 6 August 2019 (pp 1591 and 1227).

**Mr Moselmane's iPhone Pro mobile phone (SP01.26JUN20.001)**

- 2.40 No claims of privilege were made over the documents on Mr Moselmane's iPhone Pro mobile phone.

**Committee comment**

- 2.41 The committee and the House are in a difficult position in relation to the resolution of the claims of privilege made in this inquiry. The documents in question are already in the possession of the AFP, in contrast to the usual scenario contemplated in the current Memorandum of Understanding with the AFP<sup>38</sup> which anticipates that documents over which privilege is claimed are in the possession of the House through the Clerk.

<sup>38</sup> *Memorandum of understanding on the execution of search warrants in relation to a member of Parliament between the Speaker of the House of Representatives, the President of the Senate, the Attorney General and the Minister for Home Affairs*, 23 November 2021, discussed in Privileges Committee, *Execution of search warrants by the Australian Federal Police (No. 3)*, Report No. 89, November 2022, pp 21-24.

- 2.42** The committee understands that a claim of privilege was originally made over all the documents listed in the index from the AFP by Mr Zhang's lawyers. Now, however, the claims of privilege that have been asserted by the parties through the process of this inquiry concern only a small number of documents amongst those identified in the index provided by the AFP.
- 2.43** The committee is tasked with resolving the claims of privilege made by Mr Miralis on behalf of Mr Zhang, by Mr Stanton on behalf of Mr Moselmane, and marrying that with the advice of the Acting Clerk. Unfortunately, however, as noted above, there is no consistency between the parties in their citation of those documents over which privilege is claimed.
- 2.44** In those circumstances, the committee secretariat has been obliged to inspect the documents over which privilege has been claimed. This contrasts with the process followed in the first and second inquiries concerning the execution of warrants where the committee was able to make recommendations concerning claims of privilege based on material put forward in submissions.
- 2.45** Having inspected the documents the secretariat has been able to identify the documents cited in the submission by the Acting Clerk, but not the documents cited in the submissions by Mr Stanton on behalf of Mr Moselmane and by Mr Miralis on behalf of Mr Zhang.
- 2.46** The documents identified as privileged by the Acting Clerk on Mr Zhang's P30 Mobile Phone are:
- An exchange which provides a Hansard transcript of the speech the member has given on Lebanon (p 938).
  - An exchange which contains a description of the order of business in the Legislative Council and a Hansard proof of a speech by Mr Moselmane (pp 2917-2918).
- 2.47** These documents are available in pdf 'SP03.26JUN20.001\_2023-02-02\_Report'.
- 2.48** The secretariat suspects, based on the document descriptions, that the document over which Mr Stanton has claimed privilege on behalf of Mr Moselmane (although with different page numbers – being pages 747 and 2733-2734) are the same document. However, in the time available to the committee, it has not been possible to verify this supposition.
- 2.49** In turn, the documents identified as privileged by the Acting Clerk on Mr Zhang's P20 Mobile Phone are:
- A speech about former Prime Minister RJ Hawke delivered on 20 June 2019 (pp 1220 and 1580)
  - A speech about the Museum of the Chinese in Australia delivered on 6 August 2019 (pp 1591 and 1227).
- 2.50** These documents are available in pdf 'SP03.26JUN20.024\_2023-02-02\_Report'.
- 2.51** Once again, the secretariat suspects, based on the document descriptions, that the documents over which Mr Stanton has claimed privilege on behalf of Mr Moselmane (although with different page numbers – being pages 178, 188, 1219, 1122, 1125) are the same documents.



But again, in the time available to the committee, it has not been possible to verify this supposition.

- 2.52** However, the secretariat was not able to identify on Mr Zhang's P20 Mobile Phone:
- 'Item 16 – messages of 30/01/2019 – which are contained in a WeChat item' over which Mr Miralis has made a claim of privilege on behalf of Mr Zhang
  - 'Document 25, being an extract of the valedictory speech by the Hon Ernest Wong MLC' over which Mr Stanton has made a claim of privilege on behalf of Mr Moselmane
  - 'Item 22 MOSELMANE AND LI JIANJUN discuss Australia - China relation to New South Wales Parliament - Parliament in chambers visit' over which Mr Stanton has also made a claim of privilege on behalf of Mr Moselmane.
- 2.53** It would appear that different parties are working from different documents in this process. This is unfortunate. The secretariat presumes, for example, that 'Document 25' identified by Mr Stanton above, being an extract of the valedictory speech by the Hon Ernest Wong MLC, is Document 22 'Ernest Wong farewell speech in Parliament 181125 translated' in the material available to the committee. But that cannot be verified.
- 2.54** In the circumstances, the committee is satisfied that parliamentary privilege extends to those documents identified by the Acting Clerk. Unfortunately however, the committee is not in a position to conclude this matter. The committee needs to:
- Reconcile those documents identified by Mr Stanton with those identified by the Acting Clerk which the committee is satisfied attract privilege (see paragraphs 2.46 and 2.49 above).
  - Identify and resolve the status of those documents identified at paragraph 2.52 above.
- 2.55** In order to do this, the committee recommends that the House refer a new inquiry into this matter to the Privileges Committee in the new Parliament.

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### **Recommendation 1**

That in the new Parliament the House refer a new inquiry to the Privileges Committee in relation to the matters that remain unresolved from this inquiry.

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- 2.56** Separately, the committee needs briefly to address the AFP submission disputing whether reproduced speeches of members attract privilege. In short, the committee disagrees with the position adopted by the AFP. The immunity of parliamentary proceedings from processes of discovery and seizure by police and other agencies is an entirely separate area of the law of privilege to that concerning the republication of parliamentary proceedings. Quite simply, 'proceedings in Parliament' are immune from processes of discovery and seizure.
- 2.57** Finally, the committee notes that a claim has been made over 'Image 3' items based on privacy, a lack of connection with criminal activity and the distress dissemination would cause. The committee notes that these issues are not matters of parliamentary privilege and are not for this committee to resolve.



## Chapter 3 Additional issues

- 3.1** In its report entitled *Execution of search warrants by the Australian Federal Police (No. 3)*, dated November 2022, this committee considered issues relating to a revised Memorandum of Understanding (MOU) for the execution of search warrants involving a member of the Commonwealth Parliament entered into by the Presiding Officers of the Commonwealth Parliament, the Federal Attorney General and the Minister for Home Affairs in 2021.
- 3.2** In particular, the committee's report considered the 2021 AFP Guideline which accompanied the new MOU, which clarifies that references to 'Presiding Officer', 'Clerk' and 'Houses' include relevant state and territory jurisdictions and not just the Commonwealth jurisdiction.
- 3.3** The report also considered section 6 of the Guideline in which the AFP commits to making an annual confidential report to the privileges committee of each House of the Commonwealth Parliament on telecommunication data requests authorized, surveillance device warrants granted or renewed and telecommunications interception warrants granted or renewed in respect of a member or their staff.
- 3.4** Subsequently, the Chair of the committee wrote to the Commissioner of the Australian Federal Police to:
- acknowledge the committee's understanding that the new Guideline is intended to cover the NSW Parliament, and
  - seek clarification as to whether the AFP will provide annual confidential de-identified reports to the Privileges Committee of the Legislative Council in circumstances where a member of this House is the subject of the categories of surveillance referred to in section 6 of the Guideline.
- 3.5** The committee received a response from the Commissioner of the AFP on 27 February 2023. The correspondence advised that:
- The AFP will apply the 2021 Guideline to any AFP search warrants concerning the NSW Parliament.
  - There are strict secrecy provisions that would prevent the provision of confidential de-identified reports on surveillance device and telecommunications interception warrant to the Legislative Council Privileges Committee.
- 3.6** The correspondence from the Chair of the committee and the AFP Commissioner is included in Appendix 3 to this report.

## Appendix 1 Submissions

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No.	Author
1	Mr Stephen Stanton on behalf of Hon Shaoquett Moselmane MLC
2	Acting Clerk of Parliaments
3	Deputy Commissioner, Australian Federal Police
4	Dennis Miralis, Nyman Gibson Miralis, on behalf of Mr John Zhang

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## Appendix 2 Referral by the President of the Legislative Council



PRESIDENT  
LEGISLATIVE COUNCIL

8 February 2023

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

Dear Mr Primrose

The Acting Clerk of the Parliaments has referred to me an email from an officer of the Australian Federal Police (AFP) dated 6 February 2023.

The email concerns resolution of claims of parliamentary privilege made by Mr Zhang's legal representatives arising from further evidence gained from the execution of search warrants in 2020.

Having considered how to approach the issues raised, it seems to me the most appropriate course of action is to provide the email correspondence to the Privileges Committee and use the power given to me in the resolution establishing Committee to refer an inquiry in similar terms to that completed in November 2020 to resolve earlier claims of privilege by Mr Zhang (Inquiry into the Execution of Search warrants by the Australian Federal Police No. 2). As noted in that inquiry, while Mr Zhang's legal representatives did not explicitly elect to have the claims determined by the House rather than a court, their correspondence throughout acknowledged 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 the resolution of the claims of privilege will ultimately need to be resolved in the next Parliament. So as to ensure the immediate privilege issues can be resolved without undue delay I have asked your committee to report by 2 March 2023.

I also note that in the second and third reports on the execution of search warrants by the AFP on the premises of the Honourable Shaoquett Moselmane your Committee indicated that a member should be involved in consideration of privilege claims made by a staffer working for that member, and trust the committee will again invite a submission from the member on the claims made by Mr Zhang's legal representatives.

Yours sincerely

Hon Matthew Mason-Cox MLC  
President



LEGISLATIVE COUNCIL

PRIVILEGES COMMITTEE

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

**TERMS OF REFERENCE**

1. That the Privileges Committee further 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 and any incidental documents of Mr Moselmane relating to the investigation of Mr Zhang, as delivered to the Acting Clerk by the AFP on Friday 3 February 2023.
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 5:00 pm on 2 March 2023.
3. That the committee, for the purposes of making its determination, have access to the relevant 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, 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 Acting Clerk of the Parliaments.

**Committee membership**

Hon Peter Primrose MLC	Australian Labor Party	<i>(Chair)</i>
Revd the Hon Fred Nile MLC	Christian Democratic Party	<i>(Deputy Chair)</i>
Hon Greg Donnelly MLC	Australian Labor Party	
Ms Cate Faehrmann MLC	The Greens	
Hon Wes Fang MLC	The Nationals	
Hon Scott Farlow MLC	Liberal Party	
Hon Shayne Mallard MLC	Liberal Party	
Hon Taylor Martin MLC	Liberal Party	

## Appendix 3 Correspondence from the Chair of the committee and the AFP Commissioner



LEGISLATIVE COUNCIL

PRIVILEGES COMMITTEE

5 December 2022

Our ref: D22/68256

Reece Kershaw APM  
Commissioner  
Australian Federal Police

Dear Commissioner

I am writing to draw to your attention the third report of the Privileges Committee of the Legislative Council entitled “Execution of search warrants by the Australian Federal Police (No. 3)” [Report \(nsw.gov.au\)](#) which was tabled in the House on Wednesday 16 November 2022. There are two aspects of the report which the committee has resolved that I highlight in this correspondence.

When you made a submission to the inquiry you indicated that the 2005 AFP Guideline for search warrants with the potential to involve parliamentary privilege was in the process of being re-negotiated. During the time period when the inquiry was active, we were advised that the Presiding Officers of the Commonwealth Parliament, the Federal Attorney General and the Minister for Home Affairs entered into a new Memorandum of Understanding for “the execution of search warrants involving a member of parliament”. The AFP Guideline which accompanied the 2021 MoU is examined in Chapter Four of the report, and its impact on the NSW Parliament noted. The report concludes that the new Guideline is a significant step forward because it clarifies that references to “Presiding Officer”, “Clerk” and “Houses” include relevant state or territory jurisdictions, not just the Commonwealth jurisdiction. The process used for the execution of search warrants on the NSW member and his staffer in June 2020 relied upon a previous exchange of correspondence between the Privileges Committee and the AFP, as the 2005 AFP guideline only referred to the Senate and the House of Representatives. The committee has resolved that I write to you to acknowledge our understanding that the new Guideline is intended to cover the NSW Parliament. I have also written to our Presiding Officer the Hon Matthew Mason-Cox so that his office is aware of the coverage of the new Guideline.

There is however one issue for which the Committee has requested clarification. Under section 6 the Guideline states that a confidential report will be provided to the privileges committee on telecommunications data reports authorised, surveillance device warrants granted or renewed and telecommunication intercepts granted or renewed where they relate to a member or their staff. However section 6 is prefaced by the words “For the Commonwealth Parliament” and it is not necessarily clear if this should be interpreted as overriding the general coverage of jurisdictions provided in the definitions section. Could the AFP therefore please clarify whether the AFP will provide annual confidential de-

identified reports to the Privileges Committee of the Legislative Council in circumstances where a member of this House is the subject of the categories of surveillance referred to in section 6?

Yours sincerely

A handwritten signature in blue ink that reads "Peter Primrose". The signature is written in a cursive, flowing style.

The Honourable Peter Primrose MLC  
**Committee Chair**



**OFFICIAL: Sensitive****AFP**

AUSTRALIAN FEDERAL POLICE

Our reference: EC22-003497

**COMMISSIONER**GPO Box 401,  
Canberra ACT 2601 Australia  
Telephone +61 2 5127 4100  
[www.afp.gov.au](http://www.afp.gov.au)

27 February 2023

The Honourable Peter Primrose MLC  
Committee Chair  
New South Wales Legislative CouncilVia email: [Privilege@parliament.nsw.gov.au](mailto:Privilege@parliament.nsw.gov.au)

Dear Mr Primrose

Thank you for your correspondence of 5 December 2022. I would like to take this opportunity to express my appreciation for the highly professional and cooperative manner in which the Privileges Committee of the Legislative Council (the Committee) and the staff of the New South Wales (NSW) Parliament have managed parliamentary privilege claims arising from the 5 June 2020 search warrants.

I note your enquiry as to whether the Australian Federal Police (AFP) will provide the Committee with annual, confidential, de-identified reports on surveillance device and telecommunications interception warrants obtained in relation to a member of the Legislative Council or their staff. Under the *AFP National Guideline on investigations where parliamentary privilege may be involved* (the 2021 Guideline), and the accompanying Memorandum of Understanding between the Commonwealth Executive and Parliament, the AFP is required to provide this reporting to Commonwealth Parliament.

Both the *Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004* (Cth) contain strict secrecy provisions that would prevent the disclosure of that information to the Committee. While we consider there to be some exemptions for reporting to a Committee of Commonwealth Parliament, we do not believe these exemptions apply to NSW Parliament.

Further, in so far as the 2021 guideline applies to search warrants, your understanding is correct. I confirm the AFP will apply the 2021 Guideline to any AFP search warrants concerning NSW Parliament.

I note the previous 2005 Guideline was applied to NSW Parliament by way of a letter to the Clerk of the Privileges and Ethics Committee of the Legislative Council. In view of that process I take this confirmation to be sufficient, but if you believe written confirmation to the Speaker of the Legislative Assembly and President of the Legislative Council is required please do not hesitate to let me know.

Yours sincerely

Reece P Kershaw APM  
Commissioner

POLICING FOR A SAFER AUSTRALIA

**OFFICIAL: Sensitive**

## Appendix 4 Minutes

### Minutes no. 41

Friday 10 February 2023, 1.00 pm

Privileges Committee

Via Webex

#### 1. Members present

Mr Primrose (*Chair*)

Revd Mr Nile (*Deputy Chair*) (arrival 1.07 pm)

Mr Donnelly

Mr Fang (except item 7)

Mr Martin.

In attendance: Steven Reynolds, Jenelle Moore and Taylah Cauchi.

#### 2. Apologies

Ms Faehrmann, Mr Farlow and Mr Mallard.

#### 3. Draft minutes

Resolved, on the motion of Mr Martin: That draft minutes no. 40 be confirmed.

#### 4. Correspondence

The committee noted the following items of correspondence:

##### *Received*

- 2 December 2022 - Email from the Independent Complaints Officer, to the Privileges Committee, attaching the first Independent Complaints Officer quarterly report for September 2022 to November 2022.
- 21 December 2022 – Correspondence from the Hon Matthew Mason-Cox MLC, President of the Legislative Council, to the Hon John Hatzistergos AM, Chief Commissioner, Independent Commission Against Corruption, acknowledging receipt of letter dated 16 December 2022 advising of the amendments to the Commission Operations Manual policy.
- 8 February 2023 - Correspondence from the Hon Matthew Mason-Cox MLC, President of the Legislative Council to the Chair referring an inquiry to the Committee to determine further claims of privilege made by the legal representatives of Mr John Zhang on documents obtained by the Australian Federal Police (AFP) and lodged with the Acting Clerk on Friday 3 February 2023.

#### 5. Disputed claims of privilege

Under trial standing order 52B, the Privileges Committee is given the authority, while the House is not sitting for more than three weeks, to undertake the role usually performed by the House in dealing with disputed claims of privilege over returns to order under standing order 52.

##### 5.1 Method of consideration

The Committee noted that it has previously resolved that, wherever possible and unless circumstances require otherwise, the committee follow the established practice in the House and adopt a two-step process.

##### 5.2 Publication of report of the Independent Legal Arbitrator – Privatisation or efficiency measures relating to Sydney Water or Hunter Water

Resolved, on the motion of Mr Donnelly: That the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 27 January 2023, on the disputed claim of privilege regarding the privatisation or efficiency measures relating to Sydney Water or Hunter Water, be published.

### **5.3 Publication of report of the Independent Legal Arbiter – Exhibited animals and Exhibited animals – Further order**

Resolved, on the motion of Mr Donnelly: That the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 1 February 2023, on the disputed claims of privilege regarding exhibited animals, be published.

### **5.4 Publication of report of the Independent Legal Arbiter – Get Wild Pty Ltd**

Resolved, on the motion of Mr Donnelly: That the report of the Independent Legal Arbiter, the Honourable Joseph Campbell KC, dated 8 February 2023, on the disputed claim of privilege regarding Get Wild Pty Ltd, be published.

## **6. Inquiry into execution of search warrants by the Australian Federal Police No. 4**

### **6.1 Terms of reference**

The Committee noted the following terms of reference referred by the President on 8 February 2023, under paragraph 2 (a) of resolution of the House establishing the Privileges Committee, 8 May 2019:

1. That the Privileges Committee further 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 and any incidental documents of Mr Moselmane relating to the investigation of Mr Zhang, as delivered to the Acting Clerk by the AFP on Friday 3 February 2023 .
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 5:00 pm on 2 March 2023.
3. That the committee, for the purposes of making its determination, have access to the relevant 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, 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 Acting Clerk of the Parliaments.

### **6.2 Submissions**

Resolved, on the motion of Mr Donnelly:

- 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.
- That submissions be invited from Mr Zhang’s legal representatives, Mr Moselmane, the Australian Federal Police and the Clerk of the Parliaments by 5.00 pm on Monday 20 February 2023,
  - (a) 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,

- (b) legal representatives for Mr Zhang be advised that in the absence of a submission being made by or on behalf of Mr Zhang, as provided above, the committee will, notwithstanding this, act upon the basis of all other submissions received,
- (c) 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.

### 6.3 Inquiry timeline

The committee noted a suggested timeline as follows:

- No meeting to consider submissions received.
- Chair's draft report to members will be provided with as much notice as possible but unlikely to be more than 48 hours before the deliberative.
- Report deliberative: 28 February or another date before 2 March 2023.
- Report tabling: no later 5pm 2 March 2023.

## 7. Inquiry into the Special Report No. 14 of the Public Accountability Committee

### 7.1 Chair's draft report

Resolved, on the motion of Mr Donnelly: The committee with the substitute members for the purposes of the inquiry meet on Tuesday 28 February 2023 to consider the draft report prior to the main deliberative.

## 8. Adjournment

The committee adjourned at 1:18 pm, until 28 February 2023 at a time to be determined.

Steven Reynolds  
Committee Clerk

## Minutes no. 42

Tuesday 28 February 2023, 11.31 am  
Privileges Committee  
Via Webex

### 1. Members present

Mr Primrose (*Chair*)  
Revd Nile (*Deputy Chair*)  
Mr Barrett (*for the inquiry into the Special Report No. 14 of the Public Accountability Committee*)  
Ms Boyd (*for the inquiry into the Special Report No. 14 of the Public Accountability Committee*)  
Mr Donnelly  
Mr Fang  
Mr Farlow  
Mr Martin  
Mr Rath (*for the inquiry into the Special Report No. 14 of the Public Accountability Committee*).

Secretariat in attendance: Stephen Frappell, Jock Gardiner, Taylah Cauchi, Noora Hijazi,

Velia Mignacca

### 2. Apologies

Ms Fachrmann  
Mr Mallard.

### 3. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 41 be confirmed.

### 4. Correspondence

The committee noted the following items of correspondence:

#### *Received*

- 16 February 2023 – Correspondence from the Select Committee on Barangaroo sight lines, to the Privileges Committee, attaching advice from the Crown Solicitor's Office provided to the Select Committee on Barangaroo sight lines.
- 17 February 2023 – Correspondence from the Premier, to the Privileges Committee, attaching the government response to Report No. 90 of the Privileges Committee entitled "Review of Members' Code of Conduct (2022)", tabled 16 November 2022.
- 20 February 2023 – Correspondence from Mr Zhang's legal representatives, to the Procedure Committee, requesting for a one day extension for the due date of the submission.
- 20 February 2023 - Correspondence from Ms Higginson's Office, to the secretariat, advising Ms Boyd will be substituting for Ms Higginson at the committee meeting on 28 February regarding the inquiry into Special Report No. 14 of the Public Accountability Committee.

#### *Sent*

- 20 February 2023 - Correspondence from the secretariat, to Mr Zhang's legal representatives, granting a one day extension for the due date of the submission.
- 22 February 2023 - Correspondence from the secretariat, to Mr Zhang's legal representatives, attaching submission nos 1-3 of the inquiry for Mr Zhang to provide a submission in response the attached submissions.

### 5. Disputed claims of privilege

#### **5.1 Publication of report of the Independent Legal Arbiter – Exhibited animals and Exhibited animals – Further order (Second dispute)**

Resolved, on the motion of Revd Nile: That the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 20 February 2023, on the further disputed claim of privilege regarding exhibited animals and the further order, be published.

#### **5.2 Publication of report of the Independent Legal Arbiter – Ministerial Code of Conduct**

Resolved, on the motion of Revd Nile: That the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 20 February 2023, on the disputed claim of privilege regarding ministerial code of conduct, be published.

#### **5.3 Publication of report of the Independent Legal Arbiter – Get Wild Pty Ltd (second dispute)**

Resolved, on the motion of Revd Nile: That the report of the Independent Legal Arbiter, the Honourable Alan Robertson SC, dated 27 February 2023, on the further disputed claim of privilege regarding Get Wild Pty Ltd, be published.

#### **5.4 Tabling of Privileged Documents – Privatisation or efficiency measures relating to Sydney Water or Hunter Water**

Resolved, on the motion of Mr Donnelly: That, in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 27 January 2023, on the disputed claim of privilege regarding privatisation or efficiency measures relating to Sydney Water or Hunter Water, the committee orders that all Sydney Water documents received by the Clerk on 30 November 2022, considered by the Independent Legal Arbiter not to be privileged, be published.

#### **5.5 Tabling of Privileged Documents – Exhibited animals and Exhibited animals – Further order**

Resolved, on the motion of Mr Donnelly: That, in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 1 February 2023, on the disputed claims of privilege regarding exhibited animals and the further order for papers, the committee orders that the following documents considered by the Independent Legal Arbiter not to be privileged, be published:

- (a) Department of Regional New South Wales documents received by the Clerk on 4 August 2021 in response to resolution of the House of 23 June 2021,
- (b) Minister for Agriculture documents received by the Clerk on 31 August 2022 in response to resolution of the House of 10 August 2022, and
- (c) Department of Regional New South Wales documents received by the Clerk 29 September 2022 in response to resolution of the House of 10 August 2022.

#### **5.6 Tabling of Privileged Documents – Get Wild Pty Ltd**

Resolved, on the motion of Mr Donnelly:

- (1) That, in view of the report of the Independent Legal Arbiter, the Honourable Joseph Campbell KC, dated 8 February 2023, on the disputed claim of privilege Get Wild Pty Ltd, the committee orders that:
  - (a) the Department of Regional New South Wales documents received by the Clerk on 17 June 2020, considered by the Independent Legal Arbiter not to be privileged be published, and
  - (b) the following Department of Regional New South Wales documents received by the Clerk on 17 June 2020, considered by the Independent Legal Arbiter not to be privileged, be returned to the Clerk within 7 days, subject to redactions specified in the report:  
(b)(i)187, (b)(i)188, (b)(i)193, (c)(i)24, (d)(i)135, (d)(i)159, (d)(i)161, (d)(i)223, (e)(i)27, (e)(i)28, (e)(i)50, (e)(i)75, (e)(i)76, (f)(i)2, (f)(i)25, (f)(i)28, (g)(i)16, (g)(i)18, (g)(i)50, (g)(i)51, (g)(i)55, (g)(i)60, (g)(i)61, (g)(i)77, (g)(i)79, (g)(i)80, (g)(i)82, (g)(i)92, (g)(i)93, (g)(i)97, (g)(i)98, (g)(i)99 and (g)(i)100.
- (2) That, on receipt on documents referred to in paragraph (1)(b), the redacted documents be published.

#### **6. Inquiry into the Execution of search warrants by the Australian Federal Police No. 4**

The secretariat provided an update to the committee regarding the inquiry into the *execution of search warrants by the Australian Federal Police No. 4*.

#### **7. Inquiry into the Special Report from the Public Accountability Committee concerning an unauthorised disclosure of in camera evidence**

##### **7.1 Consideration of Chair's draft report**

The committee considered the Chair's draft report, previously circulated.

Resolved, on the motion of Mr Donnelly: That: draft report be the report of the committee and that the committee chair present the report to the House.

#### **8. Adjournment**

The committee adjourned at 11.46 am, *sine die*.

Mr Stephen Frappell  
**Committee Director**

**Draft Minutes no. 43**

2 March 2023, 11.32 am

Privileges Committee  
Via Webex

**1. Members present**

Mr Primrose (*Chair*)  
Revd Nile (*Deputy Chair*)  
Mr Donnelly (*arrival 11.34 am*)  
Ms Faehrmann (*arrival 11.40 am*)  
Mr Farlow  
Mr Martin.

Secretariat in attendance: Stephen Frappell, Noora Hijazi and Taylah Cauchi.

**2. Apologies**

Mr Fang  
Mr Mallard.

**3. Draft minutes**

Resolved, on the motion of Revd Nile: That draft minutes no. 42 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence:

***Received***

- 27 February 2023 - Correspondence from Commissioner Reece P Kershaw APM, Australian Federal Police, to the Chair of the Privileges Committee, providing a response to the committee's correspondence dated 5 December 2022 regarding the Execution of Search Warrants by the AFP No. 3.
- 2 March 2023 – Email from the Office of the Commissioner, Australian Federal Police, to the secretariat, agreeing to the publication of the Commissioner's correspondence dated 27 February 2023.

***Sent***

- 1 March 2023 - Email from the secretariat, to the Office of the Commissioner, Australian Federal Police, requesting agreement to the correspondence received on 27 February 2023 being made public.

**5. Inquiry into the Execution of search warrants by the Australian Federal Police No. 4**

**5.1 Chair's draft report**

Resolved, on the motion of Mr Donnelly: That the committee note that the Chair's draft report has been circulated to members less than seven days prior to the report deliberative.

The committee considered the Chair's draft report, entitled "*Execution of search warrants by the Australian Federal Police No. 4*".

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.

**6. Disputed claims of privilege**

**6.1 Tabling of Privileged Documents – Exhibited animals and Exhibited animals – Further order (Second dispute)**

Resolved, on the motion of Revd Nile: That, in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 20 February 2023, on the further disputed claim of privilege

relating to exhibited animals and the further order for papers, the committee orders that the following Department of Regional New South Wales documents received by the Clerk on 31 January 2023, considered by the Independent Legal Arbiter not to be privileged, be published:

- (a) document no. (f)009a, indexed but missing from return of 4 August 2021 in response to resolution of the House of 23 June 2021, and
- (b) document no. 135P, indexed but missing from return of 29 September 2022 in response to further resolution of the House of 10 August 2022.

### **6.2 Tabling of Privileged Documents – Ministerial Code of Conduct**

Resolved, on the motion of Mr Donnelly: That, in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC KC, dated 20 February 2023, on the disputed claim of privilege relating to the ministerial code of conduct, the committee orders that Department of Premier and Cabinet documents nos 4, 4(b), 4(c), 4(d), 5, 5(c), 5(e) and 5(f) received by the Clerk on 2 November 2022, considered by the Independent Legal Arbiter not to be privileged, be published.

### **6.3 Tabling of Privileged Documents – Get Wild Pty Ltd (second dispute)**

Resolved, on the motion of Revd Nile:

- (1) That, in view of the report of the Independent Legal Arbiter, the Honourable Alan Robertson SC, dated 27 February 2023, on the further disputed claim of privilege Get Wild Pty Ltd, the committee orders the following:
  - (a) Department of Regional New South Wales documents received by the Clerk on 4 August 2020, identified by the Independent Legal Arbiter not to be privileged, be published, and
  - (b) Department of Regional New South Wales documents received by the Clerk on 4 August 2020, considered by the Independent Legal Arbiter not to be privileged, be returned to the Clerk within 7 days subject to redactions outlined in the Schedule of the report.
- (2) That, on receipt on documents referred to in paragraph (1)(b), the redacted documents be published.

## **7. Inquiry into the Consideration of disputed claims of privilege as referred by the Clerk under standing order 54 (March 2023)**

### **7.1 Chair's draft report**

Resolved, on the motion of Mr Donnelly: That the committee note that the Chair's draft report has been circulated to members less than seven days prior to the report deliberative.

The committee considered the Chair's draft report, entitled "*Consideration of disputed claims of privilege as referred by the Clerk under standing order 54 (March 2023)*".

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.

## **8. Other business**

Resolved, on the motion of Revd Nile: That the correspondence received from Commissioner Reece P Kershaw APM, Australian Federal Police, providing a response to the committee's correspondence dated 5 December 2022 regarding the Execution of Search Warrants by the AFP No. 3, dated 27 February 2023, be forwarded to the President of the Legislative Council.

## **9. Next meeting**

The committee adjourned at 11.43 am, *Sine die*.

Mr Stephen Frappell  
**Committee Director**





