

Privileges Committee

# **Execution of search warrants by the Australian Federal Police**

Ordered to be printed 13 October 2020

**New South Wales Parliamentary Library cataloguing-in-publication data:  
New South Wales. Parliament. Legislative Council. Privileges Committee.**

Execution of search warrants by the Australian Federal Police / Legislative Council, Privileges Committee.  
[Sydney, N.S.W.] : the Committee, 2020. – [60] pages ; 30 cm. (Report 80 / Privileges Committee)

Chair: The Peter Primrose MLC.

"October 2020"

ISBN 9781920788919

1. Moselmane, Shaoquett.
2. Australian Federal Police.
3. New South Wales. Parliament—Privileges and immunities.
4. Searches and seizures—New South Wales.
5. Warrants (Law)—New South Wales.
6. Legislative bodies—Privileges and immunities—New South Wales.
7. Legislators—Privileges and immunities—New South Wales.
- I. Title
- II. Primrose, Peter.
- III. Series: New South Wales. Parliament. Legislative Council. Privileges Committee. Report ; 80.

345.9440522

328.944 (DDC22)

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## Terms of reference

1. That the Privileges Committee inquire into and report on the status of documents and other things the subject of claims of parliamentary privilege arising from the execution of 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.<sup>1</sup>
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 representative, 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 submissions received, the committee be given access to the privileged material held in the custody of the Clerk of the Parliaments.

The terms of reference were referred to the committee by the Legislative Council on Wednesday 5 August 2020.<sup>2</sup>

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<sup>1</sup> The reference to 26 June 2020 and 24 July 2020 refer to dates on which search warrants were executed.

<sup>2</sup> *Minutes*, NSW Legislative Council, 5 August 2020, p 1160.

## Committee details

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### Committee members

<b>The Hon Peter Primrose MLC</b>	Australian Labor Party	<i>Chair</i>
<b>Revd the Hon Fred Nile MLC</b>	Christian Democratic Party	<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 Trevor Khan MLC</b>	The Nationals	
<b>The Hon Natasha Maclaren-Jones MLC</b>	Liberal Party	
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## Chair's foreword

This report covers a unique situation for the Legislative Council. In June of this year an investigation team of the Australian Federal Police (AFP) executed search warrants on the home and Parliament office of the Honourable Shaoquett Moselmane, as well as other locations. While unprecedented for the House, this was not completely unanticipated, as in 2010 the Privileges Committee had engaged with the AFP as part of an earlier inquiry and come to an informal agreement that should the matter ever arise, the AFP would use the same guidelines that were the subject of a memorandum of understanding with the Commonwealth Parliament: *The AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*.

This informal arrangement was put to the test under very extreme circumstances when the search warrants were executed in the middle of this year without prior warning and in full glare of the media. As this report shows, the guideline worked thanks to the willingness of the member and his legal representative to co-operate with the investigation and with this committee, and because of the professionalism of both the AFP immediate investigation team and the Clerks. The AFP investigation officers respected the role of the Clerks as the neutral third party and the Clerks worked to ensure the investigation was not unnecessarily impeded. This contrasts with some recent instances in the Senate in 2016 and 2017 and with the difficulties this committee experienced in 2003-2004 with the Independent Commission Against Corruption during the Breen matter. In both these other execution of search warrants, breaches of privilege and a possible contempt followed investigations by the relevant Privilege Committees.

The respectful approach to determining privilege issues over the documents seized has carried over into the operations of this committee. I would like to thank all members of the committee for taking a constructive and non-partisan approach, as is the tradition when dealing with matters that go to the heart of the rights and responsibilities of members and the Parliament. It has assisted the process to deal with the issues quickly and efficiently, and the Committee has come to a clear agreement on which of the items seized by the AFP are privileged and need to be returned to Mr Moselmane.

In the course of conducting this inquiry a number of issues have been raised that are outside the terms of reference given by the House. For instance the committee is very aware that currently the memorandum of understanding with the ICAC provides less protection for privilege than the AFP guideline, as the ICAC memorandum only covers searches at Parliament House, not members' homes or other offices. There are also unresolved issues about the rights given to a member to claim privilege over material held by a member's staff, which are certainly relevant to the current instance. Chapter 5 of this report details a number of outstanding issues that the House may wish to refer to this committee for further deliberation – they are serious questions and it is worth spending time in this Parliament to resolve them.

The Honourable Peter Primrose  
**Chair**

## Recommendations

### **Recommendation 1**

**14**

That the House adopt 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, in any future determinations as to whether an item attracts parliamentary privilege, being a 'proceeding in parliament'.

### **Recommendation 2**

**19**

That the House uphold the claim of privilege by Mr Moselmane in relation to 12 items from the 119 items of evidence currently held by the Clerk of the Parliaments, listed as Attachment A in the submission to the committee from the Clerk of the Parliaments.

## Chapter 1      The AFP guideline on execution of search warrants

### The AFP search warrants

- 1.1 The circumstances leading to this inquiry are unique in the long history of the Legislative Council. The execution of the search warrant represents the use of a Commonwealth law by part of the executive arm of the Federal government on the premises of a state legislature against an elected member. While there are several instances of searches of members' offices in either House by the NSW Police and by the Independent Commission Against Corruption (the ICAC), this is the first time a member of the Legislative Council has had a search warrant executed on their office and home by the Australian Federal Police (AFP)<sup>3</sup>.
- 1.2 The search warrants executed on the Honourable Shaoquett Moselmane and his staffer Mr John Zheng were authorised under various sections of the *Crimes Act 1914* (Cth), to obtain evidence for the possible prosecution of Mr Zhang under the so-called "foreign interference" laws, that is s 92 of the *Criminal Code 1995* (Cth). These provisions are reproduced as Appendix 2. The various search warrants dated 25 June sought evidence from several premises, including Parliament House, as to the commission of offences under s92.3, to the effect that:
- Between about 1 July 2019 and 25 June 2020, John Sheng Zhang and others did, contrary to s92.3 (1) [and s92.3 (2)] intentionally engage in conduct, namely:
- (1) While acting on behalf of Chinese State and Party apparatus engaged, through a private social media chat group and in other fora, with Shaoquett Moselmane, an elected Australian official, to advance the interests and policy goals of a foreign principal, being the Government of the People's Republic of China (PRC), in Australia by providing support and encouragement to Moselmane for the advocacy of Chinese State interests, and
  - (2) In doing so was reckless that the conduct would influence the political process of an Australian State or Commonwealth or influence the exercise in Australia of an Australian democratic or political right or duty, in that the conduct would influence the NSW branch of the Australian Labor Party's policy positions on the PRC and the views of members of the NSW electorate in regard to the PRC.
  - (3) Zhang et al concealed from or failed to disclose to Moselmane that they were acting on behalf of or in collaboration with Chinese State and Party apparatus including the Ministry of State Security and the United Front Work Department.<sup>4</sup>
- 1.3 Contrary to implications in some media reports on the day the search warrants were executed, and in subsequent reporting, the warrants do not allege that Mr Moselmane has committed offences under the Commonwealth legislation.

<sup>3</sup> Although this is the second instance of an AFP search warrant for a NSW MP – an AFP search warrant was executed on the office of Ms Noreen Hay, a Legislative Assembly member, as part of an investigation into electoral fraud in 2015 -<https://www.abc.net.au/news/2015-07-02/afp-raids-office-of-new-south-wales-mp-noreen-hay/6591410>

<sup>4</sup> Search Warrant for Search of a Premises at 6 Macquarie St Sydney, Australian Federal Police, 25 June 2020.

### **The 2010 Privileges Committee inquiry into a memorandum of understanding with NSW Police**

- 1.4 While unique, the search was not completely unanticipated. In 2010 the Privileges Committee held an inquiry which sought to develop a protocol and proposed memorandum of understanding with the NSW Police on searches of member's offices. This followed the execution of a protocol with the ICAC following a difficult interaction with the Parliament in 2003-2004 with the search of the parliamentary office of the Honourable Peter Breen.<sup>5</sup>
- 1.5 As part of the 2010 inquiry the committee wrote to the Federal Police Commissioner to seek the Commissioner's view as to the likelihood of the AFP executing a search warrant on the premises of members and whether a search warrants protocol was required. The report of the committee stated that the AFP had responded that there would likely be very few occasions where evidence relevant to a federal offence would be located on the premises of a member of the New South Wales Parliament, but should it arise the 2005 Memorandum of Understanding between the Presiding Officers of the Commonwealth Parliament and the AFP with associated guidelines would be an appropriate framework for dealing with claims of parliamentary privilege.<sup>6</sup> The Acting National Manager of Policy and Governance with the AFP stated:
- There does not appear to be any pressing requirement for the AFP to enter into an additional protocol with NSW or other state parliaments covering the same issues that are currently dealt with in the AFP MoU.<sup>7</sup>
- 1.6 The relevant document is the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved* (The AFP guideline). It appears at Appendix 3 , and has not changed since the committee was made aware of it in 2010.
- 1.7 The Privileges Committee noted two differences between the AFP guideline and the draft protocol put forward by the NSW Police:
- In the AFP guideline documents for which a claim of privilege is made, are to be delivered into the safekeeping of a neutral third party, instead of the Clerk as designated by NSW Police; and
  - The AFP guideline provides the option of seeking the determination of parliamentary privilege to be made by either a court or the parliament, whereas the NSW Police protocol specifically excludes the courts as an option.<sup>8</sup>
- 1.8 The committee in 2010 concluded these differences were not significant, because the "neutral third party" could be interpreted as referring to the Clerk, and that should a court be chosen as the option under the AFP guideline:

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<sup>5</sup> Privileges Committee, *Parliamentary Privilege and seizure of documents by ICAC* , Report 25, December 2003, *Parliamentary Privilege and seizure of documents by ICAC No. 2* Report 28, March 2004.

<sup>6</sup> Privileges Committee *A memorandum of understanding with the NSW Police Force relating to the execution of search warrants on members; premises*, Report 53, September 2010 pp 12-13.

<sup>7</sup> Privileges Committee *A memorandum of understanding with the NSW Police Force relating to the execution of search warrants on members; premises*, Report 53, September 2010 p 13.

<sup>8</sup> *Ibid* p 13.

While the House would be highly unlikely to accept any dispute over a claim of privilege ever being determined by the courts, this would presumably be made clear by resolution of the House should the matter ever arise.<sup>9</sup>

- 1.9 The committee concluded that the correspondence from the AFP was sufficient for its purposes:

With this written commitment on the public record, and the small likelihood of such a matter ever arising, there does not appear to be any pressing requirement for NSW Parliament to enter into an additional memorandum of understanding with the AFP.<sup>10</sup>

- 1.10 Chapter Two considers how the guideline was used in the current instance and Chapter Five considers whether the understanding between the NSW Parliament and the AFP should be formalised.

- 1.11 However, when put to the test in the circumstances that are the subject of this report, essentially the judgement of the committee in 2010 was sound. As seen in the next chapter, the AFP followed the guideline, the Clerk received the documents for safekeeping as the neutral third party and the House was nominated by the member to determine the claims of privilege. The role of each party was acknowledged, and the parliamentary officers involved advised that the AFP investigation team to date have acted professionally and respectfully in their dealings on this matter. This contrasts with the recent Senate experience which considered contempt matters in relation to the way search warrants were executed, as considered below.

### **Senate Privileges Committee inquiries and the AFP Guideline**

- 1.12 The AFP guideline itself was adopted federally in 2005 as a practical response to a court declining to take jurisdiction in a dispute between the Senate and the AFP to resolve competing claims of parliamentary privilege over seized documents.<sup>11</sup>

- 1.13 The first major test of its utility came on 19 and 20 May 2016 when the AFP executed search warrants at offices and homes of Senator Stephen Conroy, the home of a staff member and the Senator's Parliament House office. In these instances the AFP was investigating a complaint by the National Broadband Network (NBN) Co Ltd regarding unauthorised disclosure of information by NBN employees to the Senator. The documents seized were sealed and delivered to the Clerk of the Senate to enable a claim of parliamentary privilege to be made. However the search itself involved alleged breaches of the AFP guideline; and the Senator claimed the investigation itself was a contempt of parliament through the improper interference with his capacity to carry out his functions, including his work on the NBN Select Committee.

- 1.14 The AFP raids have been the subject of at least four Senate Committee of Privileges reports,<sup>12</sup> and in each the execution of the warrants was criticised although definitive statements of

<sup>9</sup> *Ibid* p13.

<sup>10</sup> *Ibid* p13.

<sup>11</sup> *Crane v Getbing* (2000) 97 FCR 9.

<sup>12</sup> The Senate Committee of Privileges *Status of material seized under warrant: Preliminary Report* 163<sup>rd</sup> Report December 2016 *Search Warrants and the Senate* 164<sup>th</sup> Report March 2017, *Parliamentary Privilege and intrusive powers*, 168<sup>th</sup> Report, March 2018, *Parliamentary Privilege and search warrants* 174<sup>th</sup> Report, April 2019.

whether a contempt had occurred were not made – the outcome, in that privilege was upheld over the entire evidence obtained, was considered a sufficient protection.<sup>13</sup>

- 1.15** As a result of the experience the Senate in 2018 passed a resolution making a number of statements calling on all executive agencies to observe the rights of the Parliament, and in its 2019 report recommended further amendments to the MoU and the AFP guideline “so that it can deliver its stated purpose”.<sup>14</sup>
- 1.16** The Senate reports and recent experience provide useful background. As will be demonstrated in future chapters the execution of the search warrants has proved to be a much more straight forward and uncomplicated experience for the NSW Parliament. However this committee will continue to monitor any changes which occur at a Federal level because they impact on the NSW Parliament which currently shares the same guideline but without the benefit of a Memorandum of Understanding.

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<sup>13</sup> Senate Committee of Privileges *Search Warrants and the Senate* 164th Report, March 2017 p19, see also Steven Reynolds, “Parliamentary Privilege and Searches by Investigatory Agencies” paper presented to LegalWise seminar June 2017 p 17.

<sup>14</sup> The Senate Committee of Privileges *Parliamentary Privilege and search warrants* 174th Report, April 2019, p 13.

## Chapter 2 The privilege claims arising from the execution of the warrants

This chapter outlines the events which led to the current inquiry, including the process of using the AFP guideline as a framework for resolving claims of parliamentary privilege.

### The search process – first warrants

- 2.1 At just before 7.00 am on Friday 26 June 2020 the Australian Federal Police (AFP) notified, through the parliamentary administration, the President of the Legislative Council that a search warrant was to be executed at both the home address and the parliamentary office of the Honourable Shaoquett Moselmane.<sup>15</sup> The AFP advised that Mr Moselmane’s legal representative was present with Mr Moselmane at his home address and sought permission to execute the warrant on the parliamentary precincts. The AFP further advised that in undertaking any searches and seizures of evidence they would follow the AFP *National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved* (The AFP guideline).
- 2.2 In addition to the search warrants for Mr Moselmane’s home address and parliamentary office, additional search warrants were issued for two other premises related to Mr Moselmane’s staffer, Mr Zhang. As the current inquiry is only into the claims of privilege by Mr Moselmane, any matters relating to Mr Zhang will only be referred to where necessary to give context to Mr Moselmane’s claims, or where they are relevant to issues concerning the AFP guideline generally.
- 2.3 The search warrants were provided to the Clerk in redacted form, and later appeared as part of the subsequent High Court filing by Mr Zhang’s legal representative.<sup>16</sup> In his second submission to this inquiry, Mr Moselmane indicated that at the time the search warrant was executed at his home his legal representative was informed by the AFP agent in charge of the investigation that he was not a suspect in the case.<sup>17</sup> Despite this legal position, media reports on the day and through the subsequent weekend framed Mr Moselmane as the focus of the investigation. Criticisms of the attendance of the media at the execution of the warrant by Mr Moselmane are detailed below.
- 2.4 The President granted permission for the execution of the warrant on Mr Moselmane’s parliamentary office on the condition that the Clerk of the Parliaments or the Deputy Clerk be present at all times during the search and the member or his legal representative had the opportunity to make claims of parliamentary privilege over any items seized. It was agreed between Mr Moselmane’s legal representative and the AFP that any items subject to a claim of privilege would, under paragraph 5.11 of the AFP guideline, be delivered into the safekeeping of the Clerk or Deputy Clerk as the neutral third party.
- 2.5 On the completion of the search of the office at around 8pm on 26 June, all items subject to a claim of privilege by Mr Moselmane’s legal representative were taken into the custody of the Clerk. According to the second submission from Mr Moselmane the execution of the warrant

<sup>15</sup> The AFP were already in attendance at the home of Mr Moselmane by the time the Parliament was notified.

<sup>16</sup> High Court of Australia Notice of Filing ZHANG v The Commissioner of Police & Ors , 3 August 2020.

<sup>17</sup> Submission 1a, The Hon Shaoquett Moselmane, p 3.

on his home address, which had begun at 6:30 am, was completed at 1:30 am on Saturday 27 June.<sup>18</sup>

- 2.6 Further items were later delivered into the custody of the Deputy Clerk on 27 and 28 June. On each receipt of documents an evidence record sheet was provided numbering each item contained in the sealed bags.

### **Review of the evidence from first search warrants**

- 2.7 After consultation with the Clerk, Mr Moselmane and Mr Zhang's legal representatives and the AFP investigation team attended a function room in the Parliament for five days – Thursday 16, Friday 17, Monday 20, Tuesday 21 and Wednesday 22 July – with the aim of identifying only the specific items of interest to the investigation. This was not a further collection of evidence, rather it was an attempt to narrow the evidence to those items that were relevant to the AFP investigation. The evidence held by the Clerk was taken to the room, and at the conclusion of each day the room was locked. At the conclusion of the first three days the evidence was retained by the Clerk, together with additional items created as a result of the searches, such as translations of documents, recordings of phone calls and USBs containing documents saved from the original evidence.
- 2.8 The Clerk obtained written guarantees from the head of the AFP investigation unit at the end of each day that no items were copied/imaged and removed from Parliament House or sent back to Headquarters during this time. This step was requested because of the occurrence in the Conroy matter, where the AFP investigation relayed images of the evidence back to a remote location, leading to allegations of interference with parliamentary privileged material and a possible contempt of the Senate.<sup>19</sup> This assurance extended to translations that were made of documents, with all electronic and hard copies of translations provided to the Clerk and no copies retained by the AFP.
- 2.9 Mr Moselmane's legal representative was offered the opportunity to be present during the AFP review of the evidence but declined provided the Clerk or Deputy Clerk was present at all times during the time the evidence was in the room and that the officers prepared an independent list to verify the access to documents. This was undertaken, and both the Clerk and the AFP provided a record of the documents accessed to Mr Moselmane's representative.
- 2.10 Following these three days of review a detailed list of the items relevant to the investigation was prepared, with descriptive titles to identify the documents sought. This was provided to Mr Moselmane's legal representative with a request to clarify whether claims of parliamentary privilege were still maintained over the items identified in the narrowed down list of documents and other things.
- 2.11 Over the remaining two days the same process was adopted for Mr Zhang's material, with his legal representatives present at all times.

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<sup>18</sup> Submission 1a, The Hon Shaoquett Moselmane, p 6.

<sup>19</sup> Senate Committee of Privileges *Search warrants and the Senate* 164th Report March 2017 pp 14-17.

**The search process – second warrants**

- 2.12** On the day of the initial search of the parliamentary premises it was apparent that IT equipment that formed part of Mr Moselmane's parliamentary entitlements were not covered by the terms of the search warrants. This was because Mr Moselmane's office was one of a number of offices having ceiling replacement work undertaken, so the IT equipment was held by the IT Department for safekeeping, and not in his office. The equipment was retained by the Director of Information Services, Department of Parliamentary Services and stored securely with the understanding the AFP would obtain a further search warrant to obtain access to search the drives of the devices.
- 2.13** A further search warrant was executed in July to enable searches of the hard drives of the parliamentary IT files and emails of Mr Moselmane and Mr Zhang, in the Jubilee Room at Parliament House. The warrant was executed in the Jubilee Room on Friday 24 and Saturday 25 July 2020, with the Clerk or Deputy Clerk present at all times as independent observers and as the custodian of the evidence. The legal representatives of Mr Moselmane and Mr Zhang attended during the searches. At the conclusion of the searches electronic copies of the documents identified were prepared by the AFP and provided to the Clerk, and the IT equipment was returned to the Director of Information Services. The AFP investigation unit provided written confirmation to the Clerk on 27 July that no documents had been copied/imaged and removed or transmitted outside of Parliament House. All items were removed from AFP computers and storage devices prior to departing the premises.
- 2.14** Following the execution of the further warrants, the legal representative of Mr Moselmane was on 27 July provided a new detailed index of the documents and given an opportunity to claim privilege over these new items. On 28 July Mr Moselmane's legal representative advised that privilege was claimed over a number of these items.
- 2.15** As a result, there were two separate indexes resulting from the execution of the search warrants in early and late July, each of which had separate claims of privilege made by Mr Moselmane's legal representative. To assist the committee process, the Clerk later prepared a new index which combined all items over which a claim of privilege had been made by Mr Moselmane.

**Mr Zhang's legal action**

- 2.16** On Friday 31 July the Clerk was notified verbally by Mr Zhang's solicitor that he had that day commenced proceedings in the High Court of Australia, challenging the legality of the search warrants executed by the AFP in respect of Mr Zhang. On 3 August 2020 the Clerk received correspondence which indicated that the proceedings would concern arguments as to the constitutional validity of the offence provisions underpinning the investigation, which if successful would result in the warrants being declared invalid. The letter advised that the Australian Government Solicitor, acting on behalf of the AFP, stated that the AFP would refrain from acting upon the seized material until 17 August 2020 but that the undertaking did not (and could not) extend to processes currently underway to resolve parliamentary privilege. Mr Zhang's legal representative also acknowledged the autonomy of the parliament in this:

We pause to briefly observe that the operations of such processes are exclusively for the Legislative Council, including its Privileges committee, to determine and not for the executive, including the AFP<sup>20</sup>.

- 2.17 However his legal representative went on to request that no further action be taken by the Council towards assessing the claims of privilege while the legal proceedings were on foot as, should the warrants be declared illegal, the Council would have no task to perform.

### **Referral by the House**

- 2.18 The execution of the search warrants occurred during the winter break in parliamentary sittings. When sittings resumed on 4 August 2020 the President the Honourable John Ajaka MLC made a statement to the House advising of the execution of the search warrants, but indicated that he would await the receipt of a sealed copy of the application being sought from the High Court by Mr Zhang's representatives and would report to the House again once it was received. The President further reported correspondence received from Mr Moselmane seeking leave of absence from the Parliament and further indicating:

I formally seek to advise and notify you that neither my staff nor myself will seek access to the physical confines of my parliamentary office or any other service which pertains to the use of my office including but not limited to emails, computer and/or electronic devices or telephones that would normally be available to me and/or my staff; save where I am required by the Australian Federal Police to attend and assist in the ongoing investigation.

For abundant caution I also seek to advise that my staff will not attend on the House or seek to utilise any of the services referred to Committee comment.<sup>21</sup>

- 2.19 The following day the Leader of the House, the Honourable Damian Tudehope MLC, with support from the Opposition, suspended standing orders to move referral of the determination of Mr Moselmane's claims of privilege to the Privileges Committee, notwithstanding Mr Zhang's High Court action:

The submission of the Government side of the House...—is that this place is sovereign of its own affairs. The question of access to the Parliament and the seizure of documents from a member of this place is a substantial question that needs to be determined and should not have to wait for the High Court determination, which could be 12 months hence. It could be at any period.

The submission that we should not do anything until the raid on the Parliament is determined leaves in abeyance the question of access to this House by law enforcement officers and the manner and protocols about access to the House. We think it is important that the privilege issue be determined and that protocols be set in place. We ought to put in train the privilege claim relating to those documents right now and set up protocols for the circumstances in which the Australian Federal Police or other law

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<sup>20</sup> Correspondence from Dennis Miralis, Partner, Nyman Gibson Miralis to Clerk of the Parliaments, 3 August 2020.

<sup>21</sup> *Hansard*, NSW Legislative Council, 4 August 2020.

enforcement officers ought to seek access to the records and affairs of members of the House. I seek leave to refer the matter today<sup>22</sup>.

- 2.20** The House agreed to the motion and the determination of Mr Moselmane's privilege claims was referred to this committee. This report is the committee's advice to the House in response to the reference.

### **Member's criticisms of the execution of the search warrant**

- 2.21** The reference to this committee did not extend to an examination of the execution of the search warrants themselves. This is because there were none of the issues involved in the NBN Conroy matter in the Senate, where the way the search warrants were executed was the major focus of at least two of the Privileges Committee inquiries.
- 2.22** There is no doubt, however, that this has been an extremely stressful event for the member, which began with an AFP investigation team arriving at his front door at 6.30 am accompanied by a number of media representatives. The committee notes the criticisms raised by the member in his second submission as to the way this was handled:

The AFP, either through federal agents within their rank or acting in conjunction with the Minister for Home Affairs and/or his staff, have enabled the press, in particular Mr. Nick McKenzie from the Age and others as can be seen in the media coverage of the execution of the warrant, to be in attendance well before the arrival of the AFP agents. This was hardly a coincidence, and more importantly was effectively done to humiliate and ridicule the Member in circumstance where the AFP federal agent in charge of the investigation at the time, and of whom no criticism can be made, did indicate to counsel attending that the Honourable Member was not a suspect. However, he has been effectively portrayed and treated as a suspect in the manner in which the execution of the search warrant was publicized to the world, including the invasion to his family within his home and next door in the unsightly and offensive manner in which the press sought to enter his elderly father's home, who subsequently suffered a near fatal infarction and is again admitted to hospital for further treatment from that infarction which occurred as a result of the entry into his home by the media, unannounced, uninvited and effectively a trespass.<sup>23</sup>

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<sup>22</sup> *Hansard*, NSW Legislative Council, 5 August 2020.

<sup>23</sup> Submission 1a, The Hon Shaoquett Moselmane, p 3 para 10 (i).



## Chapter 3 The test of parliamentary privilege

This chapter discusses the relevant test to apply in the committee's determination as to whether the documents seized by the Australian Federal Police and potentially in dispute attract parliamentary privilege, being 'proceedings in parliament'. The chapter considers the test used by this committee in a previous matter pertaining to search warrants in 2003 and 2004, and a modification made to that test by the Senate Privileges Committee when it was asked to make a determination in the Conroy matter.

### The question before the committee

- 3.1** In accordance with ss 5.10 and 5.11 of the AFP Guideline (Appendix 3), Mr Moselmane has claimed parliamentary privilege over certain documents seized under the two AFP search warrants. The House has subsequently tasked the committee with reporting on the status of the documents and other things the subject of the claims of parliamentary privilege, and with recommending to the House which of the disputed material falls within the scope of 'proceedings in parliament'. To do so the committee must determine the appropriate test to apply.
- 3.2** In doing so, the committee has had reference to its previous experience in making similar determinations following a search being executed in the office of the Hon Peter Breen MLC by officers from the Independent Commission Against Corruption (ICAC) in 2003. The committee has also had reference to a modification made to that test by the Senate Privileges Committee when it was tasked with a similar determination following the execution of search warrants at a senator's Melbourne office, at the home of one of his staff, and at Parliament House, Canberra. These cases are discussed below.

### The Breen matter

- 3.3** As noted in Chapter 1, 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 (ICAC). That matter led to two inquiries by this committee, the first in 2003<sup>24</sup> and the second in 2004<sup>25</sup>.
- 3.4** Having found that ICAC had breached parliamentary privileges in its seizure of documents from Mr Breen's office, the committee developed a simple three step test for the determination of whether or not documents fall within the scope of 'proceedings in parliament'. The three tests related to the creation, use and retention of documents for the purposes of or incidental to the transacting of business in a House or a committee, as follows:<sup>26</sup>

<sup>24</sup> NSW Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, Parliamentary privilege and seizure of documents by ICAC, report No 25, October 2003, p 8.

<sup>25</sup> NSW Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, Parliamentary privilege and seizure of documents by ICAC No 2, report No 28, March 2004, p 8.

<sup>26</sup> NSW Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, Parliamentary privilege and seizure of documents by ICAC No 2, report No 28, March 2004, p 8.

- (1) Were the documents **brought into existence** for the purposes of or incidental to the transacting of business in a House or a committee?
  - YES → falls within ‘proceedings in Parliament’.
  - NO → move to question 2.
- (2) Have the documents been **subsequently used** for the purposes of or incidental to the transacting of business in a House or a committee?
  - YES → falls within ‘proceedings in Parliament’.
  - NO → move to question 3.
- (3) Have the documents been **retained** for the purposes of or incidental to the transacting of business in a House or a committee?
  - YES → falls within ‘proceedings in Parliament’.
  - NO → does not fall within ‘proceedings in Parliament’.

3.5 As noted in Chapter 1, the same inquiry recommended that the House refer a further inquiry to the committee to inquire into the development of a protocol for the future execution of search warrants on members’ offices. This led to adoption of a protocol with ICAC and later, a protocol and memorandum of understanding with the NSW Police on searches of members’ offices. As discussed in Chapter 1 in turn, this led to an acknowledgment that the Australian Federal Police’s Memorandum of understanding with the Commonwealth Parliament would be an appropriate framework for dealing with claims of parliamentary privilege if a search were conducted in NSW.

### **The Senate’s modification of the test**

- 3.6 As also canvassed in Chapter 1, while the AFP guideline itself was adopted federally in 2005, the first major test of its utility came on 19 and 20 May 2016 when the AFP executed search warrants at offices and homes of Senator Stephen Conroy, the home of a staff member and the Senator’s Parliament House office.
- 3.7 In accordance with the guideline, Senator Conroy claimed parliamentary privilege over the seized documents which were delivered into the custody of the Clerk. Senator Conroy maintained his claim of privilege and asked for the question to be placed before the Senate for determination.
- 3.8 As in the NSW case, the question before the House was whether the documents fell within the meaning of ‘proceedings in parliament’. (A second question put before the committee involved allegations that contempts were committed in the execution of the warrants, but is not pertinent to this discussion of the relevant test.)
- 3.9 In advice to the committee, the Clerk of the Senate commended the NSW test but noted the different statutory regime in force in the Commonwealth – while parliamentary privilege in NSW relies on the common law doctrine of ‘reasonable necessity’ (alongside other sources), the Commonwealth relies on the definition in s 16(2) of the *Parliamentary Privileges Act 1984 (Cth)*

which states: '*...proceedings in Parliament* means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee'.<sup>27</sup>

**3.10** The Clerk of the Senate advised the committee that in determining whether the documents in dispute were 'proceedings in parliament', particular reference should be had to terms of s 16(2). She recommended in particular:

- That questions 1 and 2 of the NSW test be adapted to reflect the language of subsection 16(2) of the Commonwealth Act, as follows:
  - 'Were the documents brought into existence in the course of, or for the purposes of or incidental to the transacting of business in a House or a committee?
  - 'Have the documents been subsequently used in the course of, or for the purposes of or incidental to the transacting of business in a House or committee?
- That question 3 of the NSW test be amended to remove any risk of hypothesis in the question and instead apply an evidentiary test as to the purpose for which the documents had been retained, as follows:
  - ~~'Have the documents been~~ Is there any contemporary or contextual evidence that the documents were retained or intended for use in the course of, or for the purposes of or incidental to, the transacting of the business of a House or a committee?<sup>28</sup>

**3.11** The Clerk of the Senate proposed the addition of two additional notes, one of which was adopted by the committee. The test ultimately adopted by the committee was summarised as follows:<sup>29</sup>

<sup>27</sup> Background paper: Parliamentary privilege and the execution of search warrants on members' premises – Determination of claims of privilege, Dr Rosemary Laing, Clerk of the Senate, dated August 2016, p 3.

<sup>28</sup> Background paper: Parliamentary privilege and the execution of search warrants on members' premises – Determination of claims of privilege, Dr Rosemary Laing, Clerk of the Senate, dated August 2016, p 3; and Clerk of the Senate's advice, dated 1 November 2016, pp 6-9, in Senate Committee of Privileges *Search Warrants and the Senate* 163rd Report, December 2016, pp 45-48.

<sup>29</sup> Senate Committee of Privileges *Search Warrants and the Senate* 164th Report, March 2017 p 6.

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.

- 3.12** In his submission to this inquiry, the Clerk of the Parliaments of the Legislative Council noted that, in responding to the committee's request to advise whether the documents potentially in dispute were proceedings in parliament, he supported the Senate's modification of the three-step test used by this committee in the determination of the Breen matter in 2003 and 2004.<sup>30</sup>
- 3.13** On that basis, the committee resolved that this test be adopted to guide its assessment of the documents in dispute for the purposes of the current inquiry. It also notes that the Senate used the test to reach a determination on privilege without the need to inspect the documents and other things themselves, relying upon the description in the Senator's submission, the warrant and the intersection between the documents seized and the parliamentary responsibilities of the Senator.<sup>31</sup>
- 3.14** The committee recommends that the modified Breen test be adopted in any future determinations as to whether an item attracts parliamentary privilege, being a 'proceeding in parliament'.

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### Recommendation 1

That the House adopt 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, in any future determinations as to whether an item attracts parliamentary privilege, being a 'proceeding in parliament'.

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<sup>30</sup> Submission 3, Clerk of the Parliaments, p 2.

<sup>31</sup> Senate Committee of Privileges *Search Warrants and the Senate* 164th Report, March 2017 p 8.

## Chapter 4 The claims of privilege by Mr Moselmane

This chapter considers the claims of parliamentary privilege by Mr Moselmane, the response to these claims by the AFP and the Clerk of the Parliaments and makes recommendations to the House. The chapter also considers the return of the non-privileged documents to the AFP, an issue which arose from submissions to this inquiry.

### Submissions process

- 4.1 At its first meeting on 11 August 2020 to consider the inquiry, the Committee resolved that:
- Mr Moselmane be invited to make a submission to support his claims of privilege by 26 August 2020
  - on receipt of the submission, it be forwarded to the Commissioner of the AFP to respond to the submission by 8 September 2020
  - that both Mr Moselmane and the Clerk of the Parliaments be invited to respond, if they wish, to the AFP submission by Tuesday 15 September 2020.
- 4.2 Although the terms of reference enable the committee to access the evidence held by the Clerk, the committee did not consider this necessary unless the submission process failed to resolve disputes over the claims of privilege. The committee also resolved that the submissions be treated as confidential to the committee until decided otherwise. The submissions were held in the office of the Clerk, and read by members with no copies being taken. In reporting on this inquiry, the committee has chosen to publish the submissions, except for attachments (which attachments include the list of non-privileged documents appended to the first submission by Mr Moselmane).

### Mr Moselmane's submission

- 4.3 The submission received from Mr Moselmane's legal representative greatly narrowed the documents in contention. The list referred by the House to the committee described 119 documents and other things over which parliamentary privilege was claimed. In the submission, Mr Moselmane only continued to maintain privilege over 12 items, meaning the other 107 were available for the AFP investigation.
- 4.4 However the treatment of these 107 items was of concern to Mr Moselmane because of the proceedings instituted by his staffer, Mr Zhang, in the High Court. The submission notes:

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 in so far 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.<sup>32</sup>

<sup>32</sup> Submission 1, The Hon Shaoquett Moselmane, p 2 para 7.

- 4.5 The member has therefore requested the 107 non-privileged documents be retained by the Clerk until the High Court claim has been resolved:

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.<sup>33</sup>

### **The AFP submission**

- 4.6 As requested, the Deputy Commissioner of the AFP provided a submission in response to the committee on Tuesday 8 September 2020. In the submission the AFP accepted that all 12 of the items over which Mr Moselmane continued to claim privilege related to parliamentary proceedings.

- 4.7 In response to the members' request for Parliament to retain the documents until the High Court case has been resolved, the AFP submitted the committee should decline the member's request, on several grounds:

- 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.<sup>34</sup>

- 4.8 While these points were expanded upon in the submission, there is one detail which is worth highlighting. The AFP does not regard the High Court action as a prohibition on using the evidence gathered in regard to Mr Zhang, other than that held by the Clerk and currently subject to a claim of privilege:

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 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

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<sup>33</sup> Submission 1, The Hon Shaoquett Moselmane, p 4 para 11.

<sup>34</sup> Submission 2, Australian Federal Police, p 2 para 4.

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.

... The AFP submits 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 a separate proceeding in which the AFP is presently able to progress its investigation.<sup>35</sup>

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

- 4.9 The Clerk of the Parliaments accepted there was now no disagreement between the two parties as to which documents were subject to parliamentary privilege, and supported their conclusion:

In my view each of the 12 documents identified meet either step 1 or step 2 of the three step 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, date March 2017, entitled *Search Warrants and the Senate*.<sup>36</sup>

- 4.10 To simplify the process the Clerk provided as an appendix a list of each of the 12 items (Appendix 4) and recommended that, following the committee tabling its report, the Chair of the committee give a notice of motion to uphold Mr Moselmane’s claim of privilege over those items.

- 4.11 The Clerk noted the request from Mr Moselmane not to release the other 107 items and the contrary arguments by the AFP, and concluded:

It is my understanding that generally speaking I do not have the authority to do anything other than to release most of the other 107 items to the AFP once the House has determined the status of the 12 documents referred to above.<sup>37</sup>

- 4.12 He did however make a caveat in relation to seven items seized pursuant to the warrant executed on 23 July, as the warrant covered both Mr Moselmane and Mr Zhang in the same warrant, so has a connection to the High Court proceedings. The Clerk indicated that he would inform both Mr Moselmane and Mr Zhang’s legal representatives, and should either of them object to the return of those seven items to the AFP he would obtain written legal advice prior to taking any further action.

### **Mr Moselmane’s supplementary submission**

- 4.13 The supplementary submission from Mr Moselmane’s legal representative is primarily concerned with the member’s fears of the consequences for his reputation and for the impact on his personal life should the non-privileged material be returned to the AFP. As noted in Chapter Two, at the 6.30 am raid on his home the media were present with the AFP, and the day coincided with a very extensive article appearing in *The Age*. He expressed disappointment

<sup>35</sup> Submission 2, Australian Federal Police, p3-4, para 14-15.

<sup>36</sup> Submission 3, Clerk of the Parliaments, p 2.

<sup>37</sup> Submission 3, Clerk of the Parliaments, p 2.

that the AFP have not corrected media reports which implied Mr Moselmane was the focus of the investigation:

The Australian and the Australian Financial Review, which as recently as Friday (11/09/2020) continues to assert that the Honourable Member is a suspect in proceedings. This is all done in complete disregard of the Honourable Member's position and, more importantly, without any denial by the AFP that he is a suspect or a person of interest when they have made that statement expressly to the member and his counsel at the time the search warrant was executed, yet they are silent when it comes to making the statement public and/or affirming it in writing to the Honourable Member in question.<sup>38</sup>

- 4.14** Further, his concern is that the material which has been held in confidence by the Clerk may be used in the media once it is within the control of the AFP:

If as we anticipate this material is circulated and/or disseminated, it will cause grave reputational damage of a more aggravated and far more acute state than has already occurred with respect to the Honourable Member in question. A matter of some concern is the appearance now being made in various media outlets of photographs of individuals who are said to be involved in the investigation. Who it is that is leaking and/or allowing these photos to be put into media circulation is unknown to the Honourable Member, but nevertheless he is somewhat apprehensive, and rightly so, that the material which will remain within the control of the AFP will find its way into media outlets when it should be kept under tight scrutiny for the purpose of the investigation and not otherwise.<sup>39</sup>

### **Committee comment**

- 4.15** The committee's task is to resolve the claims of privilege made by Mr Moselmane. Given the narrowing of his claims in his first submission and the acceptance of the narrower claims by the AFP in its submission, there is now no dispute between the two parties. The role of the committee is to decide whether it accepts the assessment of Mr Moselmane and the AFP and to ask two questions:

- are any of the 12 items not relevant to parliamentary proceedings; and
- do any of the other 107 items relate to parliamentary proceedings applying the three step test, notwithstanding that Mr Moselmane has not made such a claim?

- 4.16** The 12 items are listed as Appendix 4, and represent numbers 7, 11, 14, 54, 55, 56, 58, 60, 63, 110, 111 and 112 in the consolidated index sent to Mr Moselmane. With the exception of item 14 the items are all either extracts of Hansard, drafts of notices or speeches to be delivered in parliament. As such they clearly satisfy the first step of the test of the Breen Privilege test: documents brought into existence for the purposes of or incidental to the transacting of business in a House or a committee.

- 4.17** Item number 14 in the consolidated index is the only one of the 12 items which is not as easily characterised as being created for a parliamentary proceeding. It is titled by the AFP as "Speech

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<sup>38</sup> Submission 1a, The Hon Shaoquett Moselmane, p 4 para 12.

<sup>39</sup> Submission 1a, The Hon Shaoquett Moselmane, p 6 para 18.

to Chinese community language teachers presentation.doc” and described in the following terms:

Speech acknowledging support of the Australian Chinese community, and recognising a number of named individuals in attendance.

Congratulates a number of Chinese community language teachers.

- 4.18** It does not appear the speech was delivered in parliament, although it may be that it has been inaccurately titled. It is possible with more information provided that the item may satisfy the second or third step of the privilege test, if perhaps the member intended drawing from this material in a speech to the House. However given the AFP does not dispute the claim, the committee is happy to do likewise, without further examination of the item or requesting the member to provide extraneous material to justify the claim. No harm is done to either the House if the claim is overly expansive in this instance, although if the matter was in dispute the committee would likely have required further detail from the member.
- 4.19** As to the question of whether any of the other 107 items may relate to parliamentary proceedings, the committee is guided by the submission of the Clerk, who did not raise any concerns. The committee can therefore conclude its main task without the need for further submissions or any need to inspect the evidence. The committee recommends the House uphold the claims of privilege by Mr Moselmane.

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### **Recommendation 2**

That the House uphold the claim of privilege by Mr Moselmane in relation to 12 items from the 119 items of evidence currently held by the Clerk of the Parliaments, listed as Attachment A in the submission to the committee from the Clerk of the Parliaments.

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### **Return of the non-privileged documents**

- 4.20** There is however one remaining issue which is very much in dispute between Mr Moselmane and the AFP – the return of the other 107 non-privilege items. To some extent this is not a matter for this committee, which only has the task of recommending to the House which documents should be retained on the basis of privilege. Once this determination is made it is the Clerk, as the neutral third party holding the non-privileged evidence, who must decide the course of action. However the approach taken is important because of the other Memorandum of Understandings the Parliament has in place with the NSW Police and the ICAC. These also give a similar role to the Clerk, and rely upon mutual trust and co-operation in handling of evidence.
- 4.21** In his submission to the committee received on 15 September in response to the submissions from Mr Moselmane and the AFP, the Clerk advises that his obligation is to act both lawfully and consistently with the obligations the House has agreed to follow in voluntarily binding itself to the AFP guideline, noting though this has not been formalised in a memorandum of understanding. The committee’s understanding is that the Clerk intends to return the non-privileged evidence upon the House determining the privilege claim, with the caveat that written

legal advice may need to be sought before returning a very small number of Mr Moselmane's items obtained from the 23 to 25 July warrant, which is one of the warrants subject to the Zhang High Court proceedings.

- 4.22** In endorsing the Clerk's intention to return the non-privileged material, the committee acknowledges the concerns expressed by Mr Moselmane in his supplementary submission are not without foundation. The committee emphasises it has been able to make its assessment relying only upon the submissions received. The committee regards the evidence gathered by the AFP in relation to Mr Moselmane to be confidential material, and it has not had any need to inspect the evidence itself during this inquiry. It expects and trusts the AFP investigation unit in the course of its further inquiries will likewise deal sensitively with the material as it pursues its investigation.

#### **Committee comment**

- 4.23** The committee believes an executive agency of a federal government examining material relating to the parliamentary and community activities of a state Member of Parliament needs to act very carefully when handling material obtained from that member. This is a very sensitive area for the policing arm of the federal executive to be working in when the member is not accused of any criminal offence. This is particularly so when the Parliament of New South Wales through the President, the Clerk, the House, its Privileges Committee and parliamentary staff have co-operated and sought to expedite the resolution of all these matters.

## Chapter 5 Other Issues Arising

This chapter considers several matters which have arisen during this inquiry that are not covered by the current terms of reference but may require future consideration by this Committee.

### Seven issues

5.1 This inquiry has had a very narrow focus, in examining the claims of privilege made by Mr Moselmane following the execution of AFP search warrants on 26 June and 24 July 2020. There are a number of issues arising from this inquiry which may be the subject of further work by this committee or which have been identified by members as otherwise requiring clarification. These are:

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

### Mr Zhang's claims of privilege

5.2 Under paragraph 5.11 of the *AFP guideline for Execution of Search warrants where Parliamentary Privilege may be involved* a member's staff is given the same rights to claim parliamentary privilege over their documents as the member. This was followed in the execution of the search warrants, with Mr Zhang's legal representation, independent of Mr Moselmane's legal representative, being present during searches and assessment of documents and making a claim based upon the separate index prepared.

5.3 Parliamentary privilege is typically associated with the rights and immunities enjoyed by members in engaging in parliamentary proceedings. However the term refers to the immunities of the Houses of Parliaments and committees and the powers to protect these processes.<sup>40</sup> In that respect a member's staffer is entitled to the protections in relation to parliamentary proceedings, in the same way that for instance a witness giving evidence to a parliamentary committee enjoys the protection of privilege.

<sup>40</sup> Lynn Lovelock and John Evans *NSW Legislative Council Practice*, Federation Press 2008 p 47.

5.4 While able to claim the privilege, Mr Zhang or any other staffer, once claimed the matter needs to be determined to establish which evidence the AFP has access to in its investigations. Although not clearly articulated in the protocol, the AFP has acted on the assumption that the member's staffer has the same option as the member to choose between a court and the Legislative Council to determine the claims of privilege. The committee has not considered Mr Zhang's claims for two reasons:

- no advice has been provided as to the choice made, and
- because of the action taken in the High Court by Mr Zhang to challenge the constitutional validity of the search warrants by which the documents and other things were obtained.

5.5 If Mr Zhang's action is successful the documents currently held by the Clerk of the Parliaments will need to be returned to him. If the action is unsuccessful the Clerk who currently holds the documents and other things will require prompt advice as to the whether the House or a court will be required to determine Mr Zhang's claims. In this regard, it should be noted that in its 2010 report which considered the AFP protocol, the then Privileges Committee stated:

While the House would be highly unlikely to accept any dispute over a claim of privilege ever being determined by the courts, this would presumably be made clear by resolution of the House should the matter ever arise.<sup>41</sup>

#### **The rights of a member to claim privilege over staffer's documents.**

5.6 While the AFP protocol is clear in relation to the independent rights of a member's staff to claim privilege over their documents, it is silent on the member's rights over those same staffer's documents. In the Conroy matter it appears the interests of the member and the member's staff were congruent, and were treated as one global claim made by the member. In the current situation there is potential for the legal interests of the member and that of the staffer to diverge, as from the search warrants the focus of the investigation is Mr Zhang rather than the member.

5.7 All the duties of a staffer employed by a member of the Legislative Council relate to supporting a member in their parliamentary duties. Often research may be commissioned by the member with the staffer collecting a wide range of material which the member intends to use for future parliamentary speeches, or as background for work on a committee inquiry. This was clearly the case in the Conroy matter where the staffer held material for use in a parliamentary committee inquiry into the NBN. While not relevant in the current instance, if a staffer does not have access to adequate legal advice a situation could arise where material which a member would claim privilege over is provided to the AFP by the staffer without such claim being made. The Senate Committee of Privileges in a 2019 report commenting on the need to revise the AFP protocol, stated:

The provision of information to a senator may lead to inquiry and legislative action in relation to a matter of immense public interest. That is why proceedings in Parliament are protected by parliamentary privilege and why the Houses have the power to deal with interference with their proceedings<sup>42</sup>.

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<sup>41</sup> NSW Legislative Council Privileges Committee, *A memorandum of understanding with the NSW Police Force relating to the execution of search warrants on members; premises*, Report 53, September 2010, p 13.

<sup>42</sup> Senate Committee of Privileges, *Parliamentary Privilege and the use of search warrants*, 74th Report, April 2019, p14, quoting a 1997 report of the same committee.

- 5.8 A parliamentary staffer will not always be aware of the use a member may make of their research. It is important the member has an independent right to make a claim of privilege, though it is acknowledged this may create complexity at the point of the initial execution of the search warrant if not occurring on parliamentary premises. This is an issue which requires further discussion with the AFP and potentially other agencies, and could be addressed in a later inquiry. Again, the committee notes in this instance the staffer appears to have had access to extensive legal advice, indeed more extensive legal support than the member.

### **Alleged seizure of Mr Zhang's laptop by Australian Border Force**

- 5.9 On 21 September 2020 Mr Moselmane wrote to the President of the Legislative Council the Honourable John Ajaka advising him of an ABC on line report which appeared on 16 September 2020. The President forwarded the correspondence to the committee, noting that the issue raised was outside the current terms of reference.
- 5.10 The ABC report referred to by Mr Moselmane alleged that on 28 January 2020 the Australian Border Force (ABF) accessed and searched the contents of laptops and phones of Mr Zhang and his family at Sydney Airport when they arrived from China after Lunar New Year<sup>43</sup>. In his letter Mr Moselmane advised that Mr Zhang had not informed him of this incident.
- 5.11 If the ABC report is accurate there are a number of issues of serious concern to the committee:
- If the Australian Border Force or other federal agencies had concerns that Mr Zhang was under the influence of a foreign power, why was no attempt made to warn either the member he worked for, or more importantly the President of the Legislative Council until the raids in late June? Surely there were a number of risks to the NSW Parliament, if the ABF's suspicions were well founded, in having the individual continue to work in the parliamentary environment?
  - Why did Mr Zhang not report the incident to Mr Moselmane, given both the potential damage to Mr Moselmane's reputation and the risk that privileged material relating to Mr Moselmane's parliamentary work was contained on the laptop?<sup>44</sup>
  - Does the ABF currently hold material seized from Mr Zhang's laptop that relates to parliamentary proceedings, and if so how do they intend to address this, given there is no protocol or memorandum of understanding between the ABF and the NSW Parliament?
  - Given there appears to be considerable activity by federal law enforcement agencies in the area of the new foreign interference laws, is there a need for a general protocol, based upon the AFP guideline, to be entered into by the NSW Parliament and the Federal executive?
- 5.12 The committee notes that any claims of Mr Zhang have not been referred to it by the House, and so does not believe it has a role to pursue the concerns raised by Mr Moselmane in his letter. However the circumstances are very concerning, particularly the failure of the Australian Border Force to alert the President of their concerns in January about a parliamentary employee,

<sup>43</sup> <https://www.abc.net.au/news/2020-09-15/australian-police-accessed-chinese-diplomat-communications/12665724>

<sup>44</sup> In his correspondence Mr Moselmane advises that Mr Zhang resigned from his position on the 16 September 2020 when the ABC article revealed the January incident.

who continued to work in the NSW Parliament until the execution of search warrants in late June, and only formally resigned his position in September. While the committee makes no reflections or comments on Mr Zhang, if the Privileges Committee receives a future reference regarding the use of intrusive search powers (see below) this issue of the role of federal law enforcement agencies and their obligation to inform the Parliament when their activities may impinge on the privileges of a House could be considered.

### **A formal protocol with the AFP**

- 5.13** As indicated in Chapter One, when this committee examined the issue of search protocols in 2010 the AFP indicated that it was considered very unlikely that the AFP would execute a search warrant on a state MP, but if it did so it would use the National Guideline. It has done so in this instance, and unlike the Senate experience in 2016 the guideline has been closely followed and resulted in a co-operative and professional relationship between the AFP investigative unit and parliamentary officers.
- 5.14** Once the current matter is concluded, there is value in this committee reviewing the protocol and formalising the arrangement with a memorandum signed by both Presiding Officers. Such an inquiry may examine at least two areas requiring clarification - the right of the member to claim privilege of a staffer's documents, and whether a time limit needs to be established for a member or staffer to elect the method of determination of privilege by a court or House.

### **Gaps in the ICAC protocol**

- 5.15** If the AFP Protocol was examined and formalised in a future inquiry it would also provide an opportune time to revisit an omission in the current Memorandum of Understanding in the ICAC protocol. The search on the member's home in the current inquiry was covered by the AFP guideline, and the President was appropriately notified. If the ICAC was the agency conducting the search, there is currently no requirement to notify a Presiding Officer or Clerk of the search unless the warrant relates to the parliamentary precincts, and a very unsatisfactory situation could have arisen. An inquiry held in 2014 almost reached agreement on expanding the coverage of the ICAC protocol to members' homes and electorate offices but the Commission ultimately rejected the proposed amendment by the Committee to the draft protocol.<sup>45</sup>

### **Intrusive searches by agencies**

- 5.16** In its 2017 report number 168 *Parliamentary privilege and the use of intrusive powers* tabled in March 2018 the Senate Committee of Privileges discussed a number of ways in which law enforcement and intelligence agencies could obtain evidence:
- Interception of communications using surveillance devices
  - Access to stored communications content
  - Access to metadata, and

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<sup>45</sup> NSW Legislative Council Privileges Committee *A Revised Memorandum of Understanding with the ICAC* Report 71 November 2014.

- Journalist information warrants.
- 5.17 It contrasts the conventional search warrant approach covered by the AFP guideline with an established protocol for raising privilege with these other methods of gathering evidence which are not currently covered by any memorandum of understanding:

The procedures mandated in the National Guideline enable parliamentarians to raise claims of privilege in relation to seized material and respect the rights of the relevant House to determine those claims. The execution of the warrant provides the trigger for a member or senator to avail themselves of these protections and for the relevant House to conduct any necessary oversight.

By contrast, covert intrusive powers are exercised without the knowledge of the target of the investigation. It is generally acknowledged that the integrity and efficacy of investigations by law enforcement and intelligence agencies often depend on the secrecy that surrounds the exercise of such powers. However, this inherent secrecy means it is unclear how a Member of Parliament might raise a claim of parliamentary privilege in such circumstances, or what assurance the Parliament might have that an investigating agency has had proper regard to privilege in exercising its powers.<sup>46</sup>

- 5.18 The Senate Committee considered a number of submissions from various parliaments and law enforcement agencies and recommended the Presiding Officer develop protocols to set out agreed processes to be followed by law enforcement and intelligence agencies when exercising intrusive search powers.<sup>47</sup>
- 5.19 As the current instance involves a federal offence and the involvement of the AFP and potentially other federal agencies with access to surveillance technologies, this is a matter the NSW Parliament also needs to address. The failure of the ABF to inform the President of the alleged seizure of Mr Zhang's laptop and (above) highlight the potential threats to the privileges of the House in the current environment.
- 5.20 The committee encourages the President and the House to consider referring this to the committee as a matter for a future inquiry.

#### **Legal expenses incurred by a member**

- 5.21 When a member is required to appear before the ICAC their legal costs may be covered by the Office of the General Counsel, Department of Justice.<sup>48</sup> This is appropriate as it enables a member to be fully supported with legal representation in proceedings which will potentially adversely impact their career and reputation. In the current inquiry there is no such support available to the Hon. Shaoquett Moselmane who, while not the focus of any potential prosecution, has nevertheless suffered reputational damage, being suspended from his Party and, under threat of suspension from the Parliament, voluntarily absented himself from the precincts and parliamentary sittings. As a result, the member has already incurred significant

<sup>46</sup> Senate Committee of Privileges, *Parliamentary privilege and the use of intrusive powers* Report 168, March 2018 p 22.

<sup>47</sup> Senate Committee of Privileges, *Parliamentary privilege and the use of intrusive powers* Report 168, March 2018 p 29.

<sup>48</sup> Independent Commission Against Corruption *Information for Witnesses* brochure, February 2020.

legal costs from many days of examination of documents by the AFP, and these costs have been entirely self-funded.

- 5.22** The member has co-operated with the investigation, at great personal financial cost. It is acknowledged that the provisions under which the search warrant have been issued relate to a Federal crime, and that usually it would be not appropriate for a member charged with a crime to be assisted with legal costs. However the current Federal legislation is arguably very different to other offences, with a strong political element to the offence provisions relating to political interference by foreign powers.
- 5.23** Many Members of the Legislative Council take a strong interest in affairs of other countries, establish parliamentary friendship groups with a focus on a particular country, attend functions and interact with consuls and local communities. It is possible other Members in future in other state parliaments may find themselves in the position of Mr Moselmane. If a Member is investigated but ultimately not charged with any offence, the committee urges consideration of an ex gratia payment to offset the extensive costs of co-operating with an investigation by a federal agency.

## Appendix 1 Submissions

No	Author
1	The Hon Shaoquett Moselmane
1a	The Hon Shaoquett Moselmane
2	The Australian Federal Police
3	The Clerk of the Parliaments



## Appendix 2 Criminal Code, Division 92

Schedule The Criminal Code  
 Chapter 5 The security of the Commonwealth  
 Part 5.2 Espionage and related offences  
 Division 92 Foreign interference

Section 92.1

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### Division 92—Foreign interference

#### Subdivision A—Preliminary

##### 92.1 Definitions

In this Division:

*deception* means an intentional or reckless deception, whether by words or other conduct, and whether as to fact or as to law, and includes:

- (a) a deception as to the intentions of the person using the deception or any other person; and
- (b) conduct by a person that causes a computer, a machine or an electronic device to make a response that the person is not authorised to cause it to do.

*menaces* has the same meaning as in Part 7.5 (see section 138.2).

#### Subdivision B—Foreign interference

##### 92.2 Offence of intentional foreign interference

*Interference generally*

- (1) A person commits an offence if:
  - (a) the person engages in conduct; and
  - (b) any of the following circumstances exists:
    - (i) the person engages in the conduct on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal;
    - (ii) the conduct is directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal; and
  - (c) the person intends that the conduct will:
    - (i) influence a political or governmental process of the Commonwealth or a State or Territory; or

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*Criminal Code Act 1995*

Compilation No. 126

Compilation date: 29/12/18

Registered: 17/1/19

The Criminal Code Schedule  
The security of the Commonwealth Chapter 5  
Espionage and related offences Part 5.2  
Foreign interference Division 92

Section 92.2

- (ii) influence the exercise (whether or not in Australia) of an Australian democratic or political right or duty; or
- (iii) support intelligence activities of a foreign principal; or
- (iv) prejudice Australia's national security; and
- (d) any part of the conduct:
  - (i) is covert or involves deception; or
  - (ii) involves the person making a threat to cause serious harm, whether to the person to whom the threat is made or any other person; or
  - (iii) involves the person making a demand with menaces.

Note: An alternative verdict may be available for an offence against this subsection (see section 93.5).

Penalty: Imprisonment for 20 years.

*Interference involving targeted person*

- (2) A person commits an offence if:
- (a) the person engages in conduct; and
  - (b) any of the following circumstances exists:
    - (i) the conduct is engaged in on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal;
    - (ii) the conduct is directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal; and
  - (c) the person intends that the conduct will influence another person (the *target*):
    - (i) in relation to a political or governmental process of the Commonwealth or a State or Territory; or
    - (ii) in the target's exercise (whether or not in Australia) of any Australian democratic or political right or duty; and
  - (d) the person conceals from, or fails to disclose to, the target the circumstance mentioned in paragraph (b).

Note: An alternative verdict may be available for an offence against this subsection (see section 93.5).

Penalty: Imprisonment for 20 years.

*Criminal Code Act 1995*

159

Compilation No. 126

Compilation date: 29/12/18

Registered: 17/1/19

The Criminal Code Schedule  
 The security of the Commonwealth Chapter 5  
 Espionage and related offences Part 5.2  
 Foreign interference Division 92

Section 92.4

*Interference involving targeted person*

- (2) A person commits an offence if:
- (a) the person engages in conduct; and
  - (b) any of the following circumstances exists:
    - (i) the conduct is engaged in on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal;
    - (ii) the conduct is directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal; and
  - (c) the person is reckless as to whether the conduct will influence another person (the *target*):
    - (i) in relation to a political or governmental process of the Commonwealth or a State or Territory; or
    - (ii) in the target's exercise (whether or not in Australia) of any Australian democratic or political right or duty; and
  - (d) the person conceals from, or fails to disclose to, the target the circumstance mentioned in paragraph (b).

Penalty: Imprisonment for 15 years.

*Other matters*

- (3) For the purposes of paragraphs (1)(b) and (2)(b):
- (a) the person does not need to have in mind a particular foreign principal; and
  - (b) the person may have in mind more than one foreign principal.

**92.4 Offence of preparing for a foreign interference offence**

- (1) A person commits an offence if:
- (a) the person engages in conduct; and
  - (b) the person does so with the intention of preparing for, or planning, an offence against another provision of this Subdivision (foreign interference).

Penalty: Imprisonment for 10 years.

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Chapter 5 The security of the Commonwealth  
Part 5.2 Espionage and related offences  
Division 92 Foreign interference

Section 92.5

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- (2) Section 11.1 (attempt) does not apply to an offence against subsection (1).
- (3) Subsection (1) applies:
- (a) whether or not an offence against this Subdivision is committed; and
  - (b) whether or not the person engages in the conduct in preparation for, or planning, a specific offence against a provision of this Subdivision; and
  - (c) whether or not the person engages in the conduct in preparation for, or planning, more than one offence against this Subdivision.

**92.5 Defence**

It is a defence to a prosecution for an offence by a person against this Subdivision that the person engaged in the conduct:

- (a) in accordance with a law of the Commonwealth; or
- (b) in accordance with an arrangement or agreement to which the Commonwealth is party; or
- (c) in the person's capacity as a public official.

Note: A defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3)).

**92.6 Geographical jurisdiction**

Section 15.2 (extended geographical jurisdiction—category B) applies to an offence against this Subdivision.

**Subdivision C—Foreign interference involving foreign intelligence agencies**

**92.7 Knowingly supporting foreign intelligence agency**

A person commits an offence if:

- (a) the person provides resources, or material support, to an organisation or a person acting on behalf of an organisation; and

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Foreign interference Division 92

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Section 92.8

- (b) the person knows that the organisation is a foreign intelligence agency.

Note: An alternative verdict may be available for an offence against this section (see section 93.5).

Penalty: Imprisonment for 15 years.

**92.8 Recklessly supporting foreign intelligence agency**

A person commits an offence if:

- (a) the person provides resources, or material support, to an organisation or a person acting on behalf of an organisation; and  
(b) the organisation is a foreign intelligence agency.

Penalty: Imprisonment for 10 years.

**92.9 Knowingly funding or being funded by foreign intelligence agency**

A person commits an offence if:

- (a) the person:  
(i) directly or indirectly receives or obtains funds from, or directly or indirectly makes funds available to, an organisation or a person acting on behalf of an organisation; or  
(ii) directly or indirectly collects funds for or on behalf of an organisation or a person acting on behalf of an organisation; and  
(b) the person knows that the organisation is a foreign intelligence agency.

Note: An alternative verdict may be available for an offence against this section (see section 93.5).

Penalty: Imprisonment for 15 years.

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Division 92 Foreign interference

Section 92.10

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**92.10 Recklessly funding or being funded by foreign intelligence agency**

A person commits an offence if:

- (a) the person:
  - (i) directly or indirectly receives or obtains funds from, or directly or indirectly makes funds available to, an organisation or a person acting on behalf of an organisation; or
  - (ii) directly or indirectly collects funds for or on behalf of an organisation or a person acting on behalf of an organisation; and
- (b) the organisation is a foreign intelligence agency.

Penalty: Imprisonment for 10 years.

**92.11 Defence**

It is a defence to a prosecution for an offence by a person against this Subdivision that the person engaged in the conduct:

- (a) in accordance with a law of the Commonwealth; or
- (b) in accordance with an arrangement or agreement to which the Commonwealth is party; or
- (c) in the person's capacity as a public official.

Note: A defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3)).

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 Theft of trade secrets involving foreign government principal Division 92A

Section 92A.1

**Division 92A—Theft of trade secrets involving foreign  
 government principal**

**92A.1 Theft of trade secrets involving foreign government principal**

- (1) A person commits an offence if:
- (a) the person dishonestly receives, obtains, takes, copies or duplicates, sells, buys or discloses information; and
  - (b) all of the following circumstances exist:
    - (i) the information is not generally known in trade or business, or in the particular trade or business concerned;
    - (ii) the information has a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were communicated;
    - (iii) the owner of the information has made reasonable efforts in the circumstances to prevent the information becoming generally known; and
  - (c) any of the following circumstances exists:
    - (i) the conduct is engaged in on behalf of, or in collaboration with, a foreign government principal or a person acting on behalf of a foreign government principal;
    - (ii) the conduct is directed, funded or supervised by a foreign government principal or a person acting on behalf of a foreign government principal.

Penalty: Imprisonment for 15 years.

- (2) For the purposes of paragraph (1)(a), *dishonest* means:
- (a) dishonest according to the standards of ordinary people; and
  - (b) known by the defendant to be dishonest according to the standards of ordinary people.
- (3) In a prosecution for an offence against this section, the determination of dishonesty is a matter for the trier of fact.
- (4) For the purposes of paragraph (1)(c):

**Schedule The Criminal Code**

**Chapter 5 The security of the Commonwealth**

**Part 5.2 Espionage and related offences**

**Division 92A Theft of trade secrets involving foreign government principal**

**Section 92A.2**

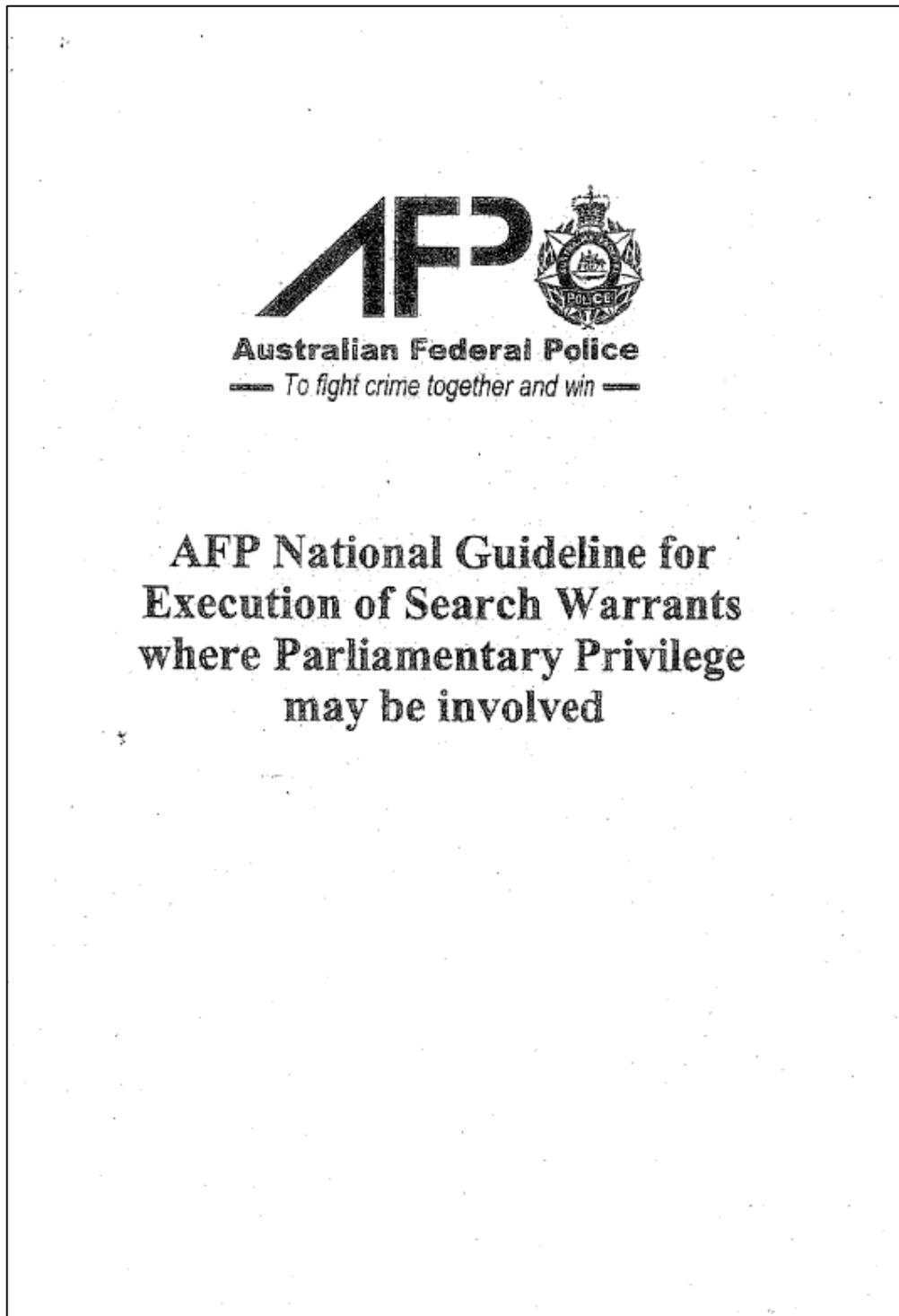
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- (a) the person does not need to have in mind a particular foreign government principal; and
- (b) the person may have in mind more than one foreign government principal.

**92A.2 Geographical jurisdiction**

- (1) Section 15.2 (extended geographical jurisdiction—category B) applies to an offence against section 92A.1.
- (2) However, subsections 15.2(2) and 15.2(4) (defences for primary and ancillary offences) do not apply.

## Appendix 3 The AFP Guideline



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## **AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved**

### **1. Preamble**

This guideline sets out procedures to be followed where the Australian Federal Police ('the AFP') propose to execute a search warrant on premises occupied or used by a member of Federal Parliament ('a Member'). The guideline applies to any premises used or occupied by a Member, including the Parliament House office of a Member, the electorate office of a Member and the residence of a member.

The guideline is designed to ensure that search warrants are executed without improperly interfering with the functioning of Parliament and that Members and their staff are given a proper opportunity to raise claims for parliamentary privilege or public interest immunity in relation to documents or other things that may be on the search premises.

### **2. Legal background**

A search warrant, if otherwise valid, can be executed over premises occupied or used by a Member. Evidential material cannot be placed beyond the reach of the AFP simply because it is held by a Member or is on premises used or occupied by a Member.

However, it can be a contempt of Parliament for a person to improperly interfere with the free performance by a Member of the Member's duties as a Member. The Houses of Parliament have the power to imprison or fine people who commit contempt of Parliament.

Some of the principles of parliamentary privilege are set out in the Parliamentary Privileges Act 1987. They are designed to protect proceedings in Parliament from being questioned in the courts but they may also have the effect that documents and other things which attract parliamentary privilege cannot be seized under a search warrant.

Parliamentary privilege applies to any document or other thing which falls within the concept of "proceedings in parliament". That phrase is defined in the Parliamentary Privileges Act to mean words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee. It includes evidence given before a committee, documents presented to a House or a committee, documents prepared for the purposes of the business of a House or committee and documents prepared incidentally to that business. It also includes documents prepared by a House or committee. The courts have held that a document sent to a Senator, which the Senator then determined to use in a House, also fell within the concept of proceedings in Parliament.

It is not always easy to determine whether a particular document falls within the concept of "proceedings in parliament". In some cases the question will turn on what has been done with a document, or what a Member intends to do with it, rather than what is contained in the document or where it was found.

It is also possible that a document held by a Member will attract public interest immunity even if it is not covered by parliamentary privilege. The High Court has held that a document which attracts public interest immunity cannot be seized under a search warrant (*Jacobsen v Rogers* (1995)127ALR159).

Public interest immunity can apply to any document if the contents of the document are such that the public interest in keeping the contents secret outweighs the public interest in investigating and prosecuting offences against the criminal law. Among other things, public interest immunity can apply to documents if disclosure could damage national security, defence, international relations or relations with the States, or if the document contains details of deliberations or decisions of the Cabinet or Executive Council, or if disclosure could prejudice the proper functioning of the government of the Commonwealth or a State.

Public interest immunity can arise in any situation, but it is more likely to arise in relation to documents held by a Minister than by a Member who is not a Minister.

Further information in relation to the legal principles which apply in these cases can be found in the DPP Search Warrants Manual. That document is not a public document but has been provided to the AFP by the DPP and is available to AFP officers on the AFP Intranet.

### **3. Purpose of the guideline**

This guideline is designed to ensure that AFP officers execute search warrants in a way which does not amount to a contempt of Parliament and which gives a proper opportunity for claims for parliamentary privilege or public interest immunity to be raised and resolved.

### **4. Application of the guideline**

4.1 The guideline applies, subject to any overriding law or legal requirement in a particular case, to any premises used or occupied by a Member including:

- the Parliament House office of a Member
- the electorate office of a Member; and
- any other premises used by a Member for private or official purposes on which there is reason to suspect that material covered by parliamentary privilege may be located.

4.2 The guideline should also be followed, as far as possible, if a search warrant is being executed over any other premises and the occupier claims that documents on the premises are covered by parliamentary privilege.

4.3 If a Member raises a claim for Legal Professional Privilege (sometimes called client legal privilege) in respect of a document, the executing officer should follow the normal procedure that applies in cases where a claim for Legal Professional Privilege is made in respect of a document that is on premises other than those of a lawyer, law society or like institution. The fact that Legal Professional Privilege has been claimed by a person who is a Member does not alter the normal rules that apply in such cases.

### **5. The Substantive Guideline**

#### **Procedure prior to obtaining a search warrant**

5.1 An AFP officer who proposes to apply for a search warrant in respect of premises used or occupied by a Member should seek approval at a senior level within the AFP (the relevant National Manager if available, otherwise a Manager) before applying for the warrant.

5.2 If approval is given, the officer should consult the office of the appropriate DPP before applying for a search warrant. In cases involving alleged offences against Commonwealth law, the appropriate DPP is the Commonwealth DPP. In cases involving alleged offences against ACT law, the appropriate DPP is the ACT DPP. The appropriate DPP can provide assistance to draft the affidavit and warrant and can provide any legal advice required in relation to the execution of the warrant.

5.3 Care should be taken when drafting a search warrant to ensure that it does not cover a wider range of material than is necessary to advance the relevant investigation.

#### **Procedure prior to executing a search warrant**

5.4 If the premises that are to be searched are in Parliament House, the executing officer should contact the relevant Presiding Officer before executing the search warrant and notify that Officer of the proposed search. If a Presiding Officer is not available, the executing officer should notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee.

5.5 The executing officer should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the Member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the search warrant so as to minimise the potential interference with the performance of the Member's duties.

#### **Executing the search warrant**

5.6 If possible, the executing officer should comply with the following procedures, unless compliance would affect the integrity of the investigation:

- (a) a search warrant should not be executed over premises in Parliament House on a parliamentary sitting day;
- (b) a search warrant should be executed at a time when the Member, or a senior member of his/her staff, will be present; and
- (c) the Member, or a member of his/her staff, should be given reasonable time to consult the relevant Presiding Officer, a lawyer or other person before the warrant is executed.

5.7 If the Member, or a senior member of his/her staff, is present when the search is conducted, the executing officer should ensure that the Member, or member of staff, has a reasonable opportunity to claim parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises.

5.8 There is a public interest in maintaining the free flow of information between constituents and their Parliamentary representatives. Accordingly, even if there is no claim for privilege or immunity, the executing officer should take all reasonable steps to limit the amount of material that is examined in the course of the search.

5.9 As part of that process, the executing officer should consider inviting the Member, or a senior member of his/her staff, to identify where in the premises those documents which fall within the scope of the search warrant are located.

### Procedure to be followed if privilege or immunity is claimed

**5.10** If the Member, or a member of staff, claims parliamentary privilege or public interest immunity in respect of any documents or other things that are on the search premises the executing officer should ask the Member, or member of staff, to identify the basis for the claim. The executing officer should then follow the procedure in paragraph 5.11 unless the executing officer considers a claim to be arbitrary, vexatious or frivolous. In the latter circumstances, the procedure in paragraph 5.13 should be followed.

**5.11** The executing officer should ask the Member, or member of staff, making the claim whether they are prepared to agree to the following procedure to ensure that the relevant documents are not examined until the claim has been resolved:

- The relevant document or documents should be placed in audit bags in accordance with the AFP national guideline on exhibits. A list of the documents should be prepared by the executing officer with assistance from the Member or member of staff;
- The Member, or member of staff, should be given an opportunity to take copies of any documents before they are secured. The copying should be done in the presence of the executing officer;
- The items so secured should be delivered into the safekeeping of a neutral third party, who may be the warrant issuing authority or an agreed third party;
- The Member has five working days (or other agreed period) from the delivery of the items to the third party to notify the executing officer either that the claim for parliamentary privilege or public interest immunity has been abandoned or to commence action to seek a ruling on whether the claim can be sustained. In this respect, it is a matter for the Member to determine whether he/she should seek that ruling from a Court or the relevant House;
- When a member notifies the executing officer that the member will seek a ruling on a claim of parliamentary privilege, the items are to remain in the possession of the neutral third party until the disposition of the items is determined in accordance with the ruling; and
- If the Member has not contacted the executing officer within five working days (or other agreed period), the executing officer and the third party will be entitled to assume that the claim for parliamentary privilege or public interest immunity has been abandoned and the third party will be entitled to deliver the items to the executing officer.

**5.12** If the Member, or member of staff, is not prepared to agree to the procedure outlined above, or to some alternative procedure which is acceptable to the executing officer, the executing officer should proceed to execute the search warrant doing the best that can be done in the circumstances of the case to minimise the extent to which the members of the search team examine or seize documents which may attract parliamentary privilege or public interest immunity.

**5.13** In some cases a Member, or member of staff, may make a claim which appears to be arbitrary, vexatious or frivolous, for example a claim that all the documents on the relevant premises attract parliamentary privilege or public interest immunity and that, therefore, the proposed search should not proceed in any form. If that occurs, the executing officer should consider whether there is a reasonable basis for that claim. If there is a reasonable basis for that claim, it may be necessary for a large number of documents to be placed in audit bags. However if the executing officer is satisfied, on reasonable grounds, that there is no proper basis for the claim he/she should inform the Member, or member of staff, that he/she intends to proceed to execute the search warrant unless the Member, or member of staff, is prepared to specify particular documents which attract parliamentary privilege or public interest immunity.

5.14 The AFP will notify the Attorney-General (in his/her capacity as First Law Officer) and the Minister responsible for the AFP (if different) in any case where a claim of parliamentary privilege has been made by or on behalf of a Member.

#### **Obligations at the conclusion of a search**

5.15 The executing officer should provide a receipt recording things seized under the search warrant (whether requested or not). If the Member does not hold copies of the things that have been seized, the receipt should contain sufficient particulars of the things to enable the Member to recall details of the things seized and obtain further advice.

5.16 The executing officer should inform the Member that the AFP will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the Member's duties. The AFP should provide or facilitate access on those terms. It may also provide or facilitate access on any other grounds permitted under applicable laws and guidelines.

5.17 The AFP will comply with any law including the requirements set out in the legislation under which the relevant search warrant was issued.

## Appendix 4 List of documents

### Submission – Inquiry into the execution of search warrants by the AFP

#### ATTACHMENT A

7. Document – ‘PEOPLE’S REPUBLIC OF CHINA FOUNDING SEVENTIETH ANNIVERSARY.docx’
  - A motion by Mr Moselmane to the House in relation to the seventieth anniversary of the founding of the People’s Republic of China.
11. Document – ‘NoM Commemoration of 200 years of Chinese Migration.docx’
  - Draft Notice of Motion from Mr Moselmane, regarding celebrations of the 200<sup>th</sup> Anniversary of Chinese Migration to Australia.
  - Details notable attendees and acknowledges the organising committee, including president Professor Xiangmo Huang and others.
14. Document – ‘Speech on Chinese Community Language teachers presentation.doc’
  - Speech acknowledging support of the Australian Chinese community, and recognising a number of named individuals in attendance.
  - Congratulates a number of Chinese community language teachers.
54. Document – ‘Rockdale Council resignation letter.doc’
  - Appears to be collection of Hansards (inaugural speech) cut and pastes of Moselmane in Parliament.
  - Near bottom of document, talking about Australia Chinese Association. Also his history with China.
55. Document – ‘November 22 DRAFT Notice of Motion.doc’
  - Collection of draft notice of motion. Some relate to Australian Federation of Chinese organisations of Vietnam, Kampuchia, Laos re peaceful reunification of China.
56. Document – ‘Inaugural speech – SPECIAL ADJOURNMENT.doc’
  - Moselmane’s inaugural speech to Parliament, gives thanks to Chinese Consul members in attendance at this moment – Peng Douyi, Fu Aiming
58. Document – ‘Inaugural Speech – Hansard.doc’
  - Moselmane’s inaugural speech to Parliament, gives thanks to Chinese Consul members in attendance at this moment – Peng Douyi, Fu Aiming
60. Document – ‘Shaoquett Moselmane MLC inaugural speech.doc’
  - Moselmane’s inaugural speech to Parliament, gives thanks to Chinese Consul members in attendance at this moment – Peng Douyi, Fu Aiming

2.

63. Document -- 'shaoquett FINAL speech LATEST Wednesday.doc'
  - Appears to be draft of inaugural speech.
  
110. HON%20SHAOQUETT%20MOSELMANE%20-%20Inaugural%20speech[1].pdf
  - a. Inaugural speech for Moselmane.
  
111. Draft motion for Australian Chinese Daily 20120309.docx
  - a. Draft motion to note and congratulate the Australian Chinese Daily in its role for promoting Australian-Chinese communities.
  
112. November 22 Draft Notice of Motion.doc
  - a. Several motions put forward by Moselmane relating to Australian Chinese community and in promotion of the peaceful reunification of China.

## Appendix 5 Minutes

### Minutes No. 7

Tuesday 11 August 2020

Privileges Committee

Room 814/815, Parliament House, Sydney and over Webex, 1.00 pm

#### 1. Members present

Mr Primrose (*Chair*)

Revd Nile (*Deputy Chair*)

Mr Donnelly

Ms Fachrmann (participating by Webex) (until 1.38 pm)

Mr Khan

Mrs Maclaren-Jones (participating by Webex)

Mr Mason-Cox (participating by Webex)

Mrs Ward (participating by teleconference) (from 1.07 pm)

In attendance by Webex: David Blunt

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

#### 2. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 6 be confirmed.

#### 3. Inquiry into execution of search warrants by the AFP

##### 3.1 Terms of reference

The committee noted the following terms of reference referred by the House on Tuesday 4 August 2020:

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 representative, 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 submissions received, the committee be given access to the privileged material held in the custody of the Clerk of the Parliaments.

### 3.2 Briefing by the Clerk of the Parliaments to the committee

The Clerk of the Parliaments briefed the committee on the new terms of reference and related matters.

The committee noted that the Chair had circulated the following documents:

- (a) the AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved
- (b) extract from report 164 of Senate Privileges Committee dated March 2017 entitled "Search warrants and the Senate" (pg 6)
- (c) Hansard of President's statement on Tuesday 4 August 2020
- (d) Hansard of the motion moved by Minister Tudehope and subsequent debate on Wednesday 5 August.

### 3.3 Submissions

Resolved, on the motion of Revd Nile: That the index of documents the subject of a claim of parliamentary privilege by Mr Moselmane, and the search warrants issued by the Australian Federal Police (AFP), be made available for inspection by members of the committee in the Office of the Clerk but not otherwise distributed to members.

Resolved, on the motion of Revd Mr Nile:

- (a) That submissions be invited from the Australian Federal Police, Mr Moselmane and the Clerk of the Parliaments.
- (b) That:
  - (i) Mr Moselmane be invited to provide his first submission by Tuesday 25 August 2020,
  - (ii) the AFP be provided Mr Moselmane's submission and be invited to make a submission by Tuesday 8 September 2020,
  - (iii) Mr Moselmane be provided the AFP's submission and be invited to make a second submission in response by Tuesday 15 September 2020,
  - (iv) the Clerk of the Parliaments be provided the submissions made by Mr Moselmane and the AFP and be invited to make a submission by Tuesday 15 September 2020.

Resolved, on the motion of Mr Khan: That the terms of the resolution agreed to be made available to Mr Moselmane, the AFP and the Clerk of the Parliaments as soon as practicable following this meeting.

## 4. Adjournment

The committee adjourned at 2.07 pm *sine die*.

Steven Reynolds  
**Committee Clerk**

### Minutes No. 8

Thursday 24 September 2020

Privileges Committee

Room 1043, Parliament House, Sydney, 2.00 pm

#### 1. Members present

Mr Primrose (*Chair*)  
Revd Nile (*Deputy Chair*)  
Mr Donnelly  
Ms Faehrmann

Mr Khan  
 Mrs Maclaren-Jones  
 Mr Mason-Cox  
 Mrs Ward

In attendance: David Blunt, Steven Reynolds, Jenelle Moore.

## 2. Draft minutes

Mrs Ward requested that the report make clear, in the form of a footnote or similar, that the terms of reference refer to search warrants *executed on* 26 June and 24 July 2020.

Resolved, on the motion of Mrs Ward: That draft minutes no. 7 be confirmed.

## 3. Correspondence

The committee noted the following items of correspondence.

### *Received:*

- 22 September 2020 – Letter from President the Honourable John Ajaka to the Chair, forwarding correspondence from the Honourable Shaoquett Moselmane dated 21 September 2020, concerning an ABC on line report regarding an alleged Australian Border Force detention of his former staffer Mr John Zhang on 28 January 2020.

### *Sent:*

- 12 August 2020 – Letter from the Chair to Mr Stephen Stanton on behalf of the Hon Shaoquett Moselmane MLC, inviting Mr Moselmane to make a submission to the inquiry.
- 12 August 2020 – Letter from the Chair to The Commissioner, Australian Federal Police inviting him to make a submission to the inquiry.
- 12 August 2020 – Letter from the Chair to Mr David Blunt, Clerk of the Parliaments inviting him to make a submission to the inquiry.

Resolved, on the motion of Mrs Maclaren-Jones: That the committee keep the correspondence from President the Honourable John Ajaka to the Chair, forwarding correspondence from the Honourable Shaoquett Moselmane MLC, dated 21 September 2020 confidential, as per the recommendation of the secretariat, as it contains identifying and/or sensitive information.

## 4. Inquiry into execution of search warrants by the AFP

### 4.1 Submissions

The committee noted that the following submissions were received by the secretariat. According to resolution of the committee of 11 August 2020, the submissions were made available for inspection by members of the committee in the Office of the Clerk but not otherwise distributed to members:

- Submissions from Mr Stephen Stanton on behalf of the Hon Shaoquett Moselmane MLC, dated 25 August 2020
- Submission from Mr Ian McCartney APM, Deputy Commissioner, Australian Federal Police, dated 8 September 2020
- Submission from Mr Stephen Stanton on behalf of the Hon Shaoquett Moselmane MLC, dated 15 September 2020
- Submission Mr David Blunt, Clerk of the Parliaments, dated 15 September 2020.

### 4.2 Briefing from the Clerk of the Parliaments on his submission

The Clerk of the Parliaments briefed the committee on the matters the subject of his submission to the inquiry.

Resolved, on the motion of Mr Donnelly:

- (a) That the committee recommend to the House that it uphold the claim of parliamentary privilege made by Mr Moselmann over 12 documents set out in Appendix A to the submission made by the Clerk of the Parliaments, which the Australian Federal Police and the Clerk of the Parliaments agree meet the three-step test as falling within the definition of 'proceedings in parliament'.
- (b) That, on the committee reporting, the Chair of the committee give a notice of motion in the House to give effect to this recommendation.

The Clerk of the Parliaments undertook to provide the committee with further advice as to whether the 12 documents set out in Appendix A would be returned to Mr Moselmann or retained by the Clerk.

Resolved, on the motion of Mr Khan:

- (a) That the committee recommend to the House that the remaining 107 documents and other items seized from Mr Moselmann by the Australian Federal Police and currently in the custody of the Clerk of the Parliaments do not fall within the definition of 'proceedings in parliament'.
- (b) That, on the committee reporting, the Chair of the committee give a notice of motion in the House to indicate that the House requires the Clerk of the Parliaments to return those 107 items to the Australian Federal Police.

Mr Blunt left the meeting at 2.32 pm.

#### **4.3 Consideration of draft report outline**

The committee considered a draft report outline distributed by the Chair.

Resolved, on the motion of Revd Mr Nile: That the committee accept the draft report outline.

Resolved, on the motion of Mrs Maclaren-Jones:

- (a) That the deadline for circulation of the report set by SO 227, as amended by sessional order, not apply for this inquiry.
- (b) That the Chair distribute a draft report to members by Friday 2 October 2020.
- (c) That the secretariat liaise with members to identify a suitable date for a report deliberative during the week commencing Tuesday 6 October 2020.

#### **5. Other business**

Mrs Maclaren-Jones proposed that the committee review the procedures governing the Register of Disclosures by Members of the Legislative Council, taking into consideration the procedures operating in the Federal Parliament.

Resolved, on the motion of Mrs Maclaren-Jones: That the secretariat provide the committee with further advice as to the appropriate mechanism for the committee to review the rules for disclosures by members.

Resolved, on the motion of Mr Mason-Cox: That the Chair write to the Clerk of the Parliaments to request that he seek a briefing from the Clerk of the Legislative Assembly, or else request the President consult the Speaker, on the circumstances of action by the ICAC on Wednesday 23 September 2020 and the powers used by officers to attend on the parliamentary precincts.

#### **6. Adjournment**

The committee adjourned at 2.54 pm *sine die*.

Steven Reynolds  
**Committee Clerk**

**Draft minutes No. 9**

Thursday 8 October 2020

Privileges Committee

Room 814/815, Parliament House, Sydney, 4.30 pm and *via WebEx***1. Members present**Mr Primrose (*Chair*)Revd Nile (*Deputy Chair*)

Mr Donnelly (via electronic participation)

Ms Faehrmann (via electronic participation)

Mr Khan

Mrs Maclaren-Jones

Mrs Ward (via electronic participation)

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

**2. Apologies**

Mr Mason-Cox

**3. Draft minutes**

Resolved, on the motion of Revd Mr Nile: That draft minutes no. 8 be confirmed.

**4. Correspondence**

The committee noted the following items of correspondence.

***Sent:***

- 24 September 2020 – Letter from the Chair to Mr David Blunt, Clerk of the Parliaments, requesting a briefing from the Clerk of the Legislative Assembly on the entry of the Independent Commission Against Corruption (ICAC) onto parliamentary precincts on 23 September 2020.

The committee clerk briefed the committee on power used by the ICAC to obtain evidence at the Parliament on a sitting day.

Resolved, on the motion of Revd Mr Nile: That the committee receive a further report on the matter from the committee clerk at the next meeting, including options for the development of a protocol governing the entry of investigative agencies into the parliamentary precincts.

**5. Inquiry into execution of search warrants by the Australian Federal Police****5.1 Consideration of draft report**

The committee considered the Chair's draft report entitled *Execution of search warrants by the Australian Federal Police*, previously circulated.

The Chair circulated his draft foreword.

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

Resolved on the motion of Mrs Maclaren-Jones: That:

- (a) the submissions and correspondence relating to the inquiry be tabled in the House with the report,
- (b) on tabling, all unpublished attachments to submissions be kept confidential by the committee,
- (c) on tabling, all unpublished submissions and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee, and

- (d) the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling.

### **5.2 Report tabling**

The Chair advised the committee that the report be tabled on Tuesday 13 October 2020.

### **5.3 Media release**

The Chair discussed with the committee arrangements for issue of a media release on tabling of the report.

## **6. Adjournment**

The committee adjourned at 5.00 pm *sine die*.

Steven Reynolds  
**Committee Clerk**