

**TITLE:**

*Time For Decisive Action to  
Stop the Attacks on  
the Public's Right to Know*

**SUBMISSION BY:**

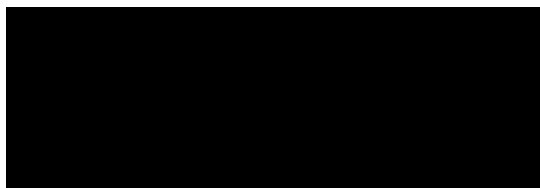
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**SUBMITTED TO:**

The Parliamentary Joint Committee on Intelligence and Security –  
Inquiry into the Impact of the  
Exercise of Law Enforcement and Intelligence Powers  
on the Freedom of the Press

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### QUOTE:

*“It was a surreal moment: standing with a group of Australian Federal Police (AFP) officers around a big screen, sifting through 9,214 emails and documents belonging to my colleagues. I felt like I was having surgery but was still conscious. I was seeing and hearing things which I’d rather not be. It felt a complete violation of us both as journalists and citizens – and it had nothing to do with national security. It was at that moment that I felt there was something sick about modern Australia – that an institution as important as the media had come to this” (Lyons, 2019b).*

### Introduction

In June 2019, the Australian Federal Police executed search warrants – more widely referred to as ‘raids’ – involving two major news establishments, News Corp journalist Annika Smethurst and on the Australian Broadcasting. These events have brought into sharp relief the gravity of such actions for media freedom – and importantly – for democracy itself. The chilling details of the raids were graphically transmitted in real time by the ABC’s head of investigative journalism, John Lyons, via Twitter and it included vision of the warrant itself showing the wide range of evidentiary materials sought – handwritten/digital notes; diary/ies; correspondence – internal and external; emails and other electronic forms of messaging; minutes; reports; briefing documents; assessments; graphics, sketches, photographs or imagery/vision – drafts and final (Lyons, 2019c). The AFP had “downloaded more than 9000 documents” at the ABC (Sales, 2019). The AFP had earlier sought the finger and palm prints of ABC journalists Dan Oakes and Sam Clark (Lyons, 2019a). As Lyons put it on the 7.30 Report: “...that request for fingerprints may well mark a red-letter day for the Australian media. Journalists were now being treated as common criminals” (Sales, 2019).

### The law’s acknowledgement of journalist-source confidentiality

It is trite to say that journalists confidential sources merit special treatment. It was the recognition of this imperative that led to the launch of an Australia-wide move towards providing legislative protection through journalists’ shield laws. The federal shield laws passed in March 2011 were the first passed in Australia. Since then such laws have been introduced in all state and Territory jurisdictions, except Queensland, although as the Media Alliance has noted “the laws are not identical, contain gaps and failings, and still expose journalists to potential convictions” (Dobbie, 2019, p. 109). These laws recognised, as a default position, that

journalists should be able to claim protection for their sources, albeit in defined circumstances. Legislators lauded these protections as important. For example, the Explanatory Memorandum pertaining to the *Evidence Amendment (Journalists' Privilege) Bill 2009* noted that it was an “important reform” and that it:

“...has potential benefits for the community in informing Australians on public interest matters generally. In particular, where government matters are concerned, the amendments may encourage more informed political debate and more thorough scrutiny of the political process – which are necessary for an open and accountable government” (para 13).

One South Australian Member of Parliament speaking during parliamentary debate on that state’s attempt at introducing shield law, pointedly asked members of the house “to be honest when they think about” source protection, noting:

“There would not be a member in this house who could honestly say we have not had people contact us, or provide us information anonymously because they state in that material their concern about the repercussions of that disclosure” (Chapman, 2014, p. 2566).

These sources, as this submitter’s own research has shown, include Federal and State and Territory ministers, elected representatives other than ministers, senior and junior public servants, and even law enforcement officials (Fernandez, 2015, p. 314). Veteran ABC journalist Kerry O’Brien noted some AFP officers “have themselves leaked to us in the past” (ABC News, 2019). Over the years there has been a steady erosion of the protections afforded to journalists and their confidential sources. Examples of the laws that threaten journalists’ ability to fulfill their professional obligations to carry out public interest reporting have been listed by a group of leading Australian media organisations. These laws include the following Commonwealth laws:

- *Australian Security Intelligence Organisation Act 1979 Act*, section 35P (unauthorised disclosure of information);
- *Telecommunications Interception and Access Act 1979* (Chapter 4, Part 4–1, Division 4C, access to telecommunications data, Journalist Information Warrants);
- *Criminal Code Act 1995 – Espionage and related offences* (Part 5.2); *Secrecy of Information*, (Part 5.6);

- *Crimes Act 1914 – Unauthorised disclosure of information* (Division 4, section 15HK; Division 8, section 3ZZHA), (Australia’s Right to Know Coalition, 2019, para 5).

The June 2019 AFP action was not the first time that the police in Australia have carried out such actions involving the media. Previous such actions have involved the execution of search warrants on Channel Seven’s Pymont and Eveleigh offices (Olding et al, 2014); and The Sunday Times premises in Perth (Select Committee into the Police Raid on The Sunday Times, 2009). The former resulted in the AFP saying it “unreservedly apologises” for their action (Rao, 2014). The search warrants were subsequently quashed by the Federal Court (ibid). In The Sunday Times case the parliamentary committee found that “alternative methods of investigation should have been employed before resorting to a search warrant, having regard to resource requirements and other western Australia police priorities” (Select Committee into the Police Raid on The Sunday Times, 2009, Finding No 9, p. *ii*).

The June 2019 events have been widely described as ‘raids’ and the outgoing AFP Commissioner Andrew Colvin, in his interview with ABC’s 7.30 Report, sought to point out that these were searches carried out, in the ABC case, through negotiations “for quite a while” (Sales, 2019). For convenience, this submission refers to these events as ‘raids’. It is not uncommon for such searches to be referred to as a raid, as in the case of previous actions against Channel Seven and The Sunday Times referred to above. The AFP’s June 2019 actions aroused widespread public indignation and saw media rivals unite in their umbrage.

“It’s pretty rare to get all the media in our land singing from the same songbook. But if the Australian Federal Police raids on journalists this week achieved on thing, it was to unite everyone from Alan Jones to the *Green Left Weekly*” (Berkovic, 2019).

Another media commentator observed, “strange alliances are taking shape” involving the Big Three media organisations (the ABC, News Corp and Nine Entertainment) “which rarely agree on anything” now “agreeing on a united agenda for change” and enjoying the backing of 11 other media organisations (Merritt, 2019). The recent raids highlight “the fundamental importance of investigative journalism and the protection of confidential sources” (Ananian-Welsh, 2019a). The gravity of the threats posed by such raids cannot be over-stated. Five-time Walkley Award winner and Australian Media Hall of Fame inductee Tony Koch observed, the recent raids “are much more sinister than they are being portrayed” (Koch, 2019). Koch stated:

“It is an incredibly big leap to claim the information revealed by the respective journalists was a ‘threat to national security’. What rubbish” (Koch, 2019).

The ABC's Chair, Ita Buttrose stated:

“It is impossible to ignore the seismic nature of this week's events: raids on two separate media outfits on consecutive days is a blunt signal of adverse consequences for news organisations who make life uncomfortable for policy makers and regulators by shining lights in dark corners and holding the powerful to account” (Buttrose, 2019).

These concerns are borne out by how the public has responded in a poll involving 1089 voters who have expressed a high degree of concern about press freedom, metadata and the encryption legislation (Karp, 2019). Since the poll was conducted, the Commonwealth Ombudsman has revealed a series of illegal. Metadata searches, including Western Australia police obtaining invalid warrants targeting journalists and Australian Capital Territory police accessing data 116 times without proper authorisation (ibid).

### **The raids and the mixed responses from the government and AFP**

The manner in which the various government leaders and the AFP have responded to criticism of the raids has been steeped in equivocation and prevarication. Award-winning journalist Koch, referred to above, has described the responses to the public outcry from the Prime Minister Scott Morrison and Home Affairs Minister Peter Dutton as “lukewarm” (Koch, 2019). Soon after the raids occurred the Prime Minister Scott Morrison said it “never troubles me that our laws are being upheld” (Remeikis, 2019). He said:

“Australia believes strongly in the freedom of the press and we have clear rules and protections for the freedom of the press. There are also clear rules protecting Australia's national security and everybody should operate in accordance with all of those laws passed by our parliament...It never troubles me that our laws are being upheld.” (ibid).

Home Affairs Minister Peter Dutton, in a similar vein, while professing to “believe in the freedom of the press” added: “We have clear rules and protections for that freedom of the press and we also have clear rules and laws protecting Australia's national security” (Kelly, Magnay and Ferguson, 2019). Mr Dutton also conceded: “If the law needs to be modernised you can have that discussion” (Ferguson, 2019). The outgoing AFP Commissioner Andrew Colvin took the view that the AFP investigations were “not a great attack on press freedoms in this country” and said he “didn't believe this was intimidation” (Vincent, 2019). Speaking on ABC's 7.30 Report, Mr Colvin said:

“Of course, I absolutely support press freedom, it’s a part of democracy...I think the right for the press to report those matters is fundamentally important...and we have to balance those rights...I fundamentally agree that our democracy relies on a free press, it relies on the ability for people to come forward with information...we need to work out where that balance is...” (Sales, 2019).

Speaking earlier at a press conference, the Acting AFP Commissioner Neil Gaughan said: “The AFP is a strong supporter of press freedom” (Ferguson, 2019).

The Attorney-General Christian Porter, after initially holding out hope that the journalists were not the real targets of the raids, appeared to backtrack. Mr Porter was initially quoted as saying:

“I can say I would be seriously disinclined to approve prosecutions except in the most exceptional circumstances and would pay particular attention to whether a journalist was simply operating according to the generally accepted principles of public interest journalism” (Hunter, 2019).

A few weeks later, however, in a dramatic turnaround Mr Porter “backed away from earlier assurances that journalists aren’t being targeted by police” (Shields, 2019). This backflip illustrates the seriousness of the disjuncture within government regarding the raids. As the Shadow Attorney-General observed: “While the threat of prosecution hangs over the heads of these journalists, the freedom of all Australian journalists to do their jobs, and the public’s right to know, are harmed” (Hunter, 2019).

The Prime Minister’s and Home Minister’s reference above to “clear rules and protections” for the press bears scrutiny. It is well-recognised that Australia stands out for its failure to expressly and constitutionally protect freedom of expression. Queen’s Counsel Geoffrey Robertson said of the raids:

“What an irony. As the free world celebrates D-day and the heroes who kept it free from the Gestapo’s ‘knock on the door’, the international news on the BBC leads with the spectacle of the police raid on the ABC offices. This could not happen in other advanced democracies, which all have constitutional protections for journalists and their sources of information, although of course it does go on in Istanbul and Rangoon – and now in Sydney. How did we become so out of sync on press freedom, invasions of which are the sign of a second-rate country?” (Robertson, 2019).

The Shadow Attorney-General Mark Dreyfus described the event thus:

“Police raids of journalists in Australia are an extraordinary event...Instead, the government is treating the raids of journalists as business as usual” (Dreyfus, 2019).

He said what is happening here is “some of the freedoms that our forefathers fought for on D-Day, 75 years ago just to remind people, are being threatened” (Ferguson, 2019). The decline is a global one, and in the view of David Kaye, the United Nations rapporteur monitoring the state of freedom of expression in the world, Australia has “gone a lot further” in the backsliding on basic protections (Miller, 2019).

Australia is the only liberal democracy lacking a Charter of Human (Ananian-Welsh, 2019b). There are ample grounds to argue that Australia’s laws lack clarity in many instances and even where clarity is found there are often grounds that militate for reform. Senior media executive and lawyer Bruce McWilliam, speaking following the AFP raids, spoke of the “lack of sensible parliamentary scrutiny” of national security laws, particularly those allowing police to obtain journalists’ metadata:

“They told the public that it was to protect national security however the fact is they can seek access [to journalists’ metadata] regardless of the reasons...the fact is it’s an unlimited and dangerously wide power. The main issues never get debated. It gets rushed through and some unknown parliamentary draughtsman just crams all this rubbish into the legislation and it gets made law with no one understanding let alone debating the consequences. All under the guise of some overriding imperative and it impacts everyone’s rights” (Koziol, 2019).

It appears that the same lack of scrutiny infected the recent AFP raids. As McWilliams noted:

“There is absolutely no hurdle or test to issuing these orders as the police officer swears the affidavit and the magistrate rubber-stamps it. The hearings are in secret and not subjected to critical analysis. The people saying that there are hurdles to be gone through to have subpoenas issued don’t know what they’re talking about” (Koziol, 2019).

At the time of making this submission, serious questions have been raised about a Bill before Parliament – the *Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*. This Bill according to the spokesperson for the Australian Lawyers Alliance, Greg Barns is “extraordinarily broad” and “could be used to prevent whistleblowers, journalists and others who reveal the secrets of the US, Australia and other allies in the so-called war on terror from

entering Australia” (Barns, 2019). It is amply acknowledged that laws can and do encroach into fundamental freedoms and the process of law reform is an incessant one. At this very time a major defamation law review is underway (New South Wales Justice, 2019). Parliamentary committees and Law Reform commissions are continually examining the efficacy of laws including as to general encroachments by the law into rights and liberties. One such major review resulted in a report, in which the Australian Law Reform Commission noted that “[n]umerous Commonwealth laws may be seen as interfering with freedom of speech and expression. There are, for example, more than 500 government secrecy provisions alone” (2015, para 4.7). The Commission also identified some areas as being of concern, including: various counter-terrorism offences provided under the *Criminal Code Act 1995* (Cth); various terrorism-related secrecy offences in the *Criminal Code, Crimes Act 1914* (Cth) and *Australian Security Intelligence Organisation Act 1979* (Cth); and Commonwealth secrecy offences generally, including the general secrecy offences in sections 70 and 79 of the *Crimes Act* (Australian Law Reform Commission, 2015, para 4.6).

The public scepticism towards the justification for the raids is reflected well in the following commentary, in response to the Home Affairs Minister’s view above expressing a commitment to freedom of the press:

“Really? Smethurst revealed in April 2018 that Defence Department Secretary Greg Moriarty and Home Affairs Secretary Mike Pezzullo were discussing how the Australian Signals Directorate could be used domestically to fight cybercrime. An offshoot of such powers meant, technically, it could spy on citizens. Creating an awareness of such laws is not a national security breach. Had the proposal ever been progressed, it would have to be legislated in Parliament. Still, Moriarty called the police. Similarly, the ABC revealed in 2017 allegations of war crimes committed by Australian special forces in Afghanistan in 2011 and 2012. Again, the public had every right to know. Had the allegations been aired while troops were still on the ground, it would have increased their risk and arguably posed a national security threat, but not several years after they left. And what was the point of raiding the ABC, armed with extraordinary powers to alter documents and destroy others, when the alleged leaker, David McBride, had already admitted he handed over the documents relating to the Afghanistan allegations?” (Coorey, 2019, p. 39).

A commitment to freedom of the press is not – as the expression itself may imply – a freedom bestowed on an exclusive class that is seeking special privileges and immunities from



upholding the law. The press' freedom is, at its core, the freedom of the people to exact on those wielding power that qualities of transparency, openness and accountability so they, the people, may make better informed choices about who they elect to govern them.

### **Restore primacy of freedom of expression**

At the time the Australian Law Reform Commission's report, referred to above, into the law's encroachments into traditional rights and freedoms was released the then Attorney-General George Brandis described that report as a "historic document"; "a benchmark for all future generations" and he hoped "future governments will have the wisdom to commission future law reform commissions to bring this body of work up to date" (Brandis, 2016). The author of this submission in a recent book chapter co-authored with Professor Mark Pearson called for for the introduction of workable and explicit public interest defences to allow for the reporting of national security matters without endangering journalists or the sanctity of their obligations to confidential sources (Pearson and Fernandez, 2018, p. 52). We argued that freedom of expression be recognised as the default position, as the starting point against which all other interests must compete with compelling justification in order to prevail:

"All proposed legislation must give first and foremost consideration to the importance of freedom of expression and a free media, in addition to the interests of openness, transparency and accountability in government and public institutions and to the protection of journalists confidential sources and whistleblowers. Where it is argued that a competing interest requires the subordination of the foregoing priorities, the claimant must bear the burden of providing the justification for such subordination, with adequate opportunity provided for the public scrutiny of the claim for such subordination" (pp. 72–73).

This submission reiterates that proposal. The recent AFP raids have served to highlight a crisis for democracy that has been in the making for some years. The constant drum beat evoking public concerns about the threats to national security needs to be properly scrutinised to ensure proportionality of the law's response and to ensure that we do not unwittingly concede defeat to those who are ought to harm our democracy. As academic Lidberg observed:

"The legal framework both major parties have put in place in September 11, 2001, is handing those that want to harm us victory, because all the new and amended national

security and anti-terrorism laws are undermining our civil liberties and seriously impeding our capability of keeping power to account. This is exactly what terrorists want – making our democracy ill” (Lidberg, 2019).

Lawyers with a keen eye on the matter hold a similar view. The president of the Law Council of Australia, Arthur Moses wrote:

“The media raids we have seen could have a detrimental impact on the willingness of sources to come forward with information – classified or not – out of fear of prosecution...If sources are silenced, the media’s ability to effectively hold government to account is severely hindered” (2019).

He cautioned further:

“The moment we turn upon these rights [fundamental values of our society, such as press freedom] is the moment our enemies win.” (ibid).

### **Conclusion**

The time for stock-taking on the state of rights and liberties in Australia has come to a head. The recent AFP raids were far from another day at the office for the AFP. The scale, timing and mode of the actions justifiably gave rise to alarm among right-thinking people locally and abroad. More recently, Queensland Police arrested four French journalists while the journalists were filming a protest at the entrance to a coal loading facility. The charges against the journalists were dropped after “careful consideration of the circumstances including QPS policies and procedures” (Queensland Police News, 2019). The charges were seen as an inappropriate attempt by police to shield corporate interests from scrutiny (Smee, 2019). In a letter to the Queensland Premier, the Chief Executive of the Media, Entertainment and Arts Alliance, Paul Murphy said the journalists were not asked to move on and did not refuse to comply with police requests “because the police made no requests. They were then detained for seven hours and were subsequently charged with trespass” (2019).

We must not proceed on the basis of “business as usual” in respect of assaults on press freedom. The stakes are far too high for ordinary citizens, journalists and those who wish to stand up for what is right. The path forward should heed the following imperatives, each with relevant timeframes for attainment dictated by the ease or complexity of the task:

- (a) ensure a demonstrable public interest in enforcement actions involving the media and such actions should be subject to stricter safeguards against over-reach;
- (b) the laws relied on by enforcement authorities must clearly distinguish between the targets declared to be the aim of the law's reach and others, including journalists, who might get snared as collateral damage;
- (c) a new balance needs to be struck between the protection of citizens' rights and liberties and imperatives that impinge on rights and liberties, such that stronger heed is paid to democratic values and the professed targets of the law's reach to be clearly set out; and
- (d) the professed commitment to freedom of expression must comprehensively consider all laws and processes that obstruct the flow of information that citizens should be entitled to have in exercising their right to scrutinise power.

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