

The View: AFP Raids

Paul Fletcher, Communications Minister
(The Australian, 13 June 2019):

“What we want to do is approach this matter in a sober and consultative and calm fashion. As the Prime Minister has said, we’re always open if detailed analysis reveals that there’s a need for further improvement in the laws.”

Peter Dutton, Home Affairs Minister
(2GB, 6 June 2019):

“Obviously it’s a serious breach of our laws when highly classified documents are leaked and the Secretary of the Defence Department makes the decision then to refer that to the federal police. From what I understand of the facts, we’re talking about highly classified national security documents, and they were leaked from the department. That’s a matter that obviously the Defence Department takes very seriously.

All of us support freedom of the press. If the law needs to be modernised you can have that discussion.”

Kristina Keneally, Senator
(The Australian, 13 June 2019):

“The raids that we saw last week demand that all of us in the community - parliamentarians and media organisations - have a very hard look at the national security framework we have in place. It is fundamentally important that we keep Australians safe, but it is also fundamentally important to our democracy that we uphold one of its most basic tenets, and that is the freedom of the press.”

Arthur Moses SC, Law Council of Australia president (Lawyer’s Weekly, 6 June 2019):

“The role of the media as the fourth estate to assist in the public right to know in relation to matters concerning the Parliament, the Executive and the judiciary must never be underestimated. The media must be able to lawfully report on matters of public interest without fear or favour and, where needed, hold the parliament, the executive and judiciary to account. Any chilling effect on this role would be contrary to the governmental transparency and integrity Australians expect. Sunlight is the best disinfectant when there is public scrutiny of the actions of government by the media.”

Chris Flynn, Gilbert + Tobin partner and legal spokesperson for the Alliance for Journalists’ Freedom (Lawyer’s Weekly, 6 June 2019):

“In any democracy, journalism that covers any plan by government departments to allow government agencies to monitor the lives of ordinary citizens is of the highest public interest. As is public discussion of government proposals that affects or limits freedom of private communication between citizens. These raids run the risk of further stifling press freedom in Australia. They reinforce the need for a Press Freedom Act to protect press freedom and free and open debate, and strike the right balance between those things and our national security framework.”

Emily Howie, Human Rights Law Centre legal director (Lawyer’s Weekly, 6 June 2019):

“New espionage laws criminalise journalism and put us all at risk. These raids highlight just how dangerous it has become to reveal information in the public interest if it also touches on anything supposedly linked to national security. It’s outrageous that journalists and their sources could face life imprisonment for revealing information that ultimately protects us all. There are insufficient safeguards to prevent law enforcement agencies from using these powers to expose journalists’ confidential sources. This is shocking for those who are targeted but this surveillance also has a chilling effect on people coming forward. We need urgent law reform to stop punitive investigations and instead encourage truth-telling.

Without a free press, we don’t have democracy. We don’t know what our government is doing behind closed doors. These people should be lauded for revealing the truth but instead they face the real possibility of prison time.”

Kerry Weste, Australian Lawyers for Human Rights president (Lawyer’s Weekly, 6 June 2019):

“The United Nations Human Rights Committee has made it clear that a free, uncensored and unhindered press is essential in any society to ensure freedom of opinion and expression and the enjoyment of other universal human rights. The ability to share information on matters of public interest and to scrutinise government is a fundamental pillar of a democratic society. This can only happen if journalists can access information that is in the public interest and at the same time keep their sources safe and confidential.

The fact that the investigations of Annika's home, computer and phone and of the ABC offices occurred so long after the relevant publications must raise questions about the purpose of the raids.

Australia campaigned for its seat on the United Nations Human Rights Council on the basis that it is an 'international human rights leader' with 'respect for democracy and the rule of law.' Yet we remain the only Western liberal democracy without any federal Human Rights Act to protect rights like freedom of expression. We must ensure that measures designed to protect national security do not diminish our democracy. Legislation must provide a proportionate, necessary and reasonable response to the perceived harms the government seeks to address. When we abandon key democratic principles, such as a press that is free to report on matters of public interest without the journalist and their source being treated as possible criminals, then it is us and not the terrorists who will have damaged our own way of life and undermined our democracy. We must think about the kind of society we want before removing our democratic checks and balances in the name of 'national security'."

Ita Buttrose, ABC Chair
(statement, 7 June 2019):

"On behalf of the ABC, I have registered with the Federal Government my grave concern over this week's raid by the federal police on the national broadcaster.

An untrammelled media is important to the public discourse and to democracy.

It is the way in which Australian citizens are kept informed about the world and its impact on their daily lives.

Observance of this basic tenet of the community's right to know has driven my involvement in public life and my career in journalism for almost five decades.

The raid is unprecedented – both to the ABC and to me.

In a frank conversation with the Minister for Communications, Cyber Safety and the Arts, Paul Fletcher, yesterday, I said the raid, in its very public form and in the sweeping nature of the information sought, was clearly designed to intimidate.

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.

I also asked for assurances that the ABC not be subject to future raids of this sort. Mr Fletcher declined to provide such assurances, while noting the "substantial concern" registered by the Corporation.

There has been much reference in recent days to the need to observe the rule of law.

While there are legitimate matters of national security that the ABC will always respect, the ABC Act and Charter are explicit about the importance of an independent public broadcaster to Australian culture and democracy.

Public interest is best served by the ABC doing its job, asking difficult questions and dealing with genuine whistle-blowers who risk their livelihoods and reputations to bring matters of grave import to the surface.

Neither the journalists nor their sources should be treated as criminals.

In my view, legitimate journalistic endeavours that expose flawed decision-making or matters that policy makers and public servants would simply prefer were secret, should not automatically and conveniently be classed as issues of national security.

The onus must always be on the public's right to know.

If that is not reflected sufficiently in current law, then it must be corrected.

As ABC Chair, I will fight any attempts to muzzle the national broadcaster or interfere with its obligations to the Australian public.

Independence is not exercised by degrees.

It is absolute."

David Anderson, ABC Managing Director
(Lawyer's Weekly, 6 June 2019):

"This is a serious development and raises legitimate concerns over freedom of the press and proper public scrutiny of national security and defence matters. The ABC stands by its journalists, will protect its sources and continue to report without fear or favour on national security and intelligence issues when there is a clear public interest."

Christian Porter, Attorney-General
(ABC's Radio National, 5 June 2019):

"This is an investigation from the AFP. I haven't received yet a briefing on it myself. I had no idea it was going to happen, and that's because these matters are totally independent of the executive government.

It's usually the case that in matters that are sensitive – and clearly this is – that there'll be a

quick briefing to alert someone that it's going to happen, when they're the responsible minister, so I would guess...that the Minister for Home Affairs would have had such a heads up immediately beforehand. But the idea, seriously, that the Morrison government or any minister in the Morrison government was somehow involved in the investigation, or the decision, or the timing of the decision, I mean it's absolutely absurd."

AFP statement (5 June 2019):

"The AFP's role is to investigate breaches of Commonwealth criminal law. When the AFP receives referrals it assesses them for criminality and does not make value judgements on the issue instead identifying whether there has been any contraventions of Commonwealth Law, and when evidence as to whether the offence has been committed or otherwise.

AFP investigators are required to assess all the relevant facts in every matter. This includes enquiries into the classification of the information concerned, how it was handled and who had access to it. The execution of search warrants is an important tool to our investigations to achieve this but is just one aspect of our work. There are many avenues of inquiry and tools available to the AFP in investigations such as this."

Campbell Reid, group executive for corporate affairs, policy and government relations at News Corp Australia (The Australian, 12 June 2019):

"The dangers associated with the ever-expanding dossier of laws that can put journalists in jail has been raised repeatedly with governments and politicians over the past decade. This is not a matter where we need an inquiry to identify the problem.

The government should stop ignoring what it has already been told. Rather than an inquiry, a better solution would be a working group of senior politicians, media representatives and legal experts to work together to reframe legislation so it strikes the right balance between national security and the nation's right to know."

Peter Bartlett, veteran media lawyer and partner at MinterEllison (The Australian, 8 June 2019):

"If the ABC publishes something today which the AFP takes the view is clearly a breach, they should raid tomorrow. Why did they wait two years? ... There needs to be a media exemption where if a reporter acts reasonably and in the public interest, then they're protected."

British Broadcasting Corporation statement (5 June 2019):

"This police raid against our partners at ABC is an attack on press freedom which we at the BBC find deeply troubling. At a time when the media is becoming less free across the world, it is highly worrying if a public broadcaster is being targeted for doing its job of reporting in the public interest."

Daniel Bastard, Asia Pacific head of Reporters Without Borders (SBS, 5 June 2019):

"Persecuting a media outlet in this way because of a report that was clearly in the public interest is intolerable. This kind of intimidation of reporters and their sources can have devastating consequences for journalistic freedom and independent news reporting."

George Williams, Dean of Law at the University of New South Wales. This is developed for CLB from an article published in the Australian.

"Australia leads the world in enacting national security and counterterrorism laws. Some 75 have been passed by our federal Parliament since 11 September 2001. This far exceeds the number of similar laws passed by the United Kingdom and the United States. Our laws also differ because they go further in heightening government secrecy.

The focus over recent days has been on laws that permit the police to seize data and documents from journalists in aid of prosecuting people who reveal government secrets. Many laws now permit this. For example, section 35P of the ASIO Act makes it a criminal offence to disclose information about special intelligence operations in which ASIO officers are granted immunity from civil and criminal liability. A person can be jailed for up to five years merely for disclosing information about such an operation. There is no exception for reporting in the public interest.

Of even greater concern are laws that undermine media freedom in secret. One example is the ability of enforcement agencies to access the metadata of journalists, including things like mobile phone records. This information can be accessed to identify the source of a media story without notifying the journalist. The information can then be used to prosecute people who have supplied information to the journalist.

Another example is the power held by ASIO allowing it to compel any person, including journalists, to answer questions for the purpose of gathering intelligence. A person may even be detained in secret

for up to a week. A journalist will face jail for up to five years if they fail to answer every question put to them. Any person who writes or tweets about the use of this power faces another five year jail term.

I could go on with other examples, many of which have been forgotten once the debate over each law died down. These laws through remain in force, and can be used at the discretion of the authorities. Put together, their impact and scope is shocking in showing how far media freedom has deteriorated.

We can thank our politicians for these laws. They have used the fear of terrorism and threats to community safety to enact laws that shield government from scrutiny. Our liberties have had too few defenders. Each of the laws that restrict media freedom and freedom of speech have been passed with bipartisan support. Parliament has long ceased to be the protector of our democratic rights.

Australia's legal landscape has made this possible. We are the only democratic nation without strong national protection for freedom of speech and of the press. The best we have is an implied freedom of political communication derived from our Constitution. It though has been applied rarely by the High Court, and is likely to be of limited value where national security and the media are concerned.

We lack anything like the First Amendment to the United States Constitution, which states in unequivocal terms that 'Congress shall make no law ... abridging the freedom of speech, or of the press'. Nor do we possess the protections of free speech found in the United Kingdom Human Rights Act 1998, Canadian Charter of Rights and Freedoms 1982 or New Zealand Bill of Rights Act 1990.

Laws like this make a difference. They counterbalance the desire of governments to keep embarrassing and damaging material secret. They also provide legal backing to the media in reporting such information. If we want to avoid more raids and the further erosion of media freedom, we must convince Parliament enact long overdue protection for freedom of speech and of the press."

Prof Peter Greste, Unesco chair in journalism and communication at the University of Queensland, and a founding director of the Alliance for Journalists' Freedom
(The Guardian, 6 June 2019):

"Recent raids by the Australian Federal police on the News Corp journalist Annika Smethurst and the ABC are a serious threat to the most fundamental role that the media plays in a democracy.

By definition, democracy is government by the people. Politicians act on behalf of those who employ them; that is, us Australian voters and taxpayers.

As their employers we have both a right and a responsibility to know what is being done in our names. The means by which that is done is through good journalism.

Of course, there are things that governments need to keep secret. Whether they are the financial or health records of private citizens, or the operational details of our security services, there are places that nobody outside of the agencies involved should have access to. But what happens when things go wrong? What happens when someone abuses the power or authority that we, the voters, have invested in them? What happens when the internal mechanisms of accountability and transparency break down? Or when government officials use the cloak of "national security" to cover up something that we all ought to know about and debate in public?

The tool we recommend is a media freedom act that positively puts the role of the press in the middle of our legal system. At the moment, there is nothing in Australian law that explicitly protects press freedom in the way that the first amendment does in the US constitution.

Such an act would recognise the fundamental importance of national security and the protection of certain commonwealth activities and the identities of key employees, while still providing a basis for journalists to investigate and report on government misconduct.

More than simply making reporting "in the public interest" a defence, it would make it an exception from prosecution. That isn't to suggest that journalists would be immune, but the onus would be on the security agencies to show that the exception of "public interest reporting" does not apply, before charges are laid. In effect, it restores the assumption of innocence which the current legislation has overturned.

There is no evidence that the journalists that the AFP targeted over the past few days did anything that genuinely damaged national security. Rather, those journalists exposed issues that we needed to know about, needed to debate and in some cases needed to change.

To be clear, this is not simply about protecting the rights of journalists to stick their noses into the inner workings of government. This is about ensuring the kind of transparency and accountability that has helped make Australia one of the most stable, prosperous and peaceful places on the planet."

Geoffrey Robertson QC, human rights barrister (SMH, 8 June 2019):

“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?

This week’s raids have diminished Australia’s international standing, so Parliament must at least make amendments requiring police to obtain the DPP’s approval before any future attack on the media and requiring them to make an application to a real judge which the media can contest before any action is taken.

The behaviour of the AFP should be put under intense scrutiny by Parliament. Did it take legal advice before it applied for a warrant and from whom? Did it consider that the ABC had an obvious public interest defence? Does the AFP not consider the alleged murder of civilians by the Australian army is a matter of public interest? The ABC program went out in 2017. Why the long delay if national security were really at stake? What if anything did police tell the court registrar? The source of the leaks, former military lawyer David William McBride, identified himself in March when he said he would defend charges on the grounds he had a duty to report the information. The leaker identified, were not the raids on the ABC entirely unnecessary?

And why did the AFP consider it necessary to ransack Smethurst’s home? If these and many other questions are not answered satisfactorily, then heads should roll.”

Bret Walker SC, a former Independent National Security Legislation Monitor (SMH, 11 June 2019):

“I have no patience whatever for the idea that there is no such thing as a national security secret - I think there are many things which need to be kept secret for the purposes of national security.

Whistleblowing is there because bad things do happen in government. Government is composed of people and people do bad things.

In a democracy ruled by law, we should be welcoming, not persecuting, the release of information ultimately to the public ... about suspicions of wrongdoing in government, so long as those suspicions are formed in good faith.”

Joe Hildebrand, journalist (news.com.au, 9 June 2019):

“I don’t have the slightest problem with federal police raiding journalists at News Corp and the ABC. In fact, my only concern is how they did it.

If the AFP were going to be truly fair dinkum, then they should have slicked back their hair, slapped on a leather jacket and strapped on a pair of waterskis.

Because these guys have just jumped the shark.

Indeed, of the approximately 250,000 or so words in the English language there is probably not one that adequately conveys how utterly stupid the raids are, nor how utterly certain they are to backfire against the very objective the security agencies are trying to achieve.”

Kate McClymont, SMH investigative journalist (Twitter, 5 June 2019):

“Why wait two years to investigate this? Again, the crucial question is the complainant. Police don’t raid without someone lodging a formal complaint. Two media raids in two days is not a coincidence.”

“My take, for what it’s worth, is that in a perverse way the AFP raids have been beneficial. They’ve unified the media, garnered worldwide attention & highlighted the vital service journalists & whistleblowers play in shining a light on things those in power don’t want us to see.”

Kerry O’Brien, Walkley Foundation chair and long-time presenter of the ABC’s 7.30 program (ABC Radio, 6 June 2019):

“If they care about democracy, this does go to the heart of democracy and the democratic process.

You are talking about the media going about its job in providing scrutiny to areas of government where scrutiny is not easy.

You are also talking about the role of whistleblowers, who are mostly well-motivated people who are disturbed about what they are seeing inside the Government in this case.”