Press Freedom Policy Papers
Background Briefing 1/2020

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THE 2019 AFP RAIDS ON AUSTRALIAN JOURNALISTS

SUMMARY

KEY POINTS

- In June 2019, the Australian Federal Police ('AFP') raided the home of journalist Annika Smethurst and the Sydney headquarters of the Australian Broadcasting Corporation ('ABC').
- Both raids concerned news publications based on leaked classified government documents.
- Both Smethurst and the ABC challenged the validity of the search warrants issued over their premises in court.
- The High Court found the warrant over Smethurst's property to be invalid. The ABC's case in the Federal Court was unsuccessful.
- The raids damaged Australia's international reputation on press freedom and prompted two Parliamentary Inquiries and a series of Ministerial Directives.
- The raids are a touchpoint in ongoing debates on the protection of press freedom under Australian law.

REFORM CONSIDERATIONS

- When should the handling of classified material in the course of legitimate journalism be criminalised?
- Should journalists' confidential sources and materials be protected in the search and seizure context?
- How might law address the 'chilling effect' on free speech caused by police raids on journalists?
- Should Ministers be able to veto the progress of police investigations concerning journalism?
- Should press freedom be recognised and protected under Australian law? If so, how?

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Background Briefing 1/2020

In June 2019, press freedom in Australia became the unexpected focus of global attention. Headlines in *The New York Times* claimed that 'Australia May Well Be the World's Most Secretive Democracy'.[i]

The controversy was ignited by two raids on journalists conducted by the Australian Federal Police ('AFP'). The first concerned News Corp journalist Annika Smethurst. The following day, the AFP executed a warrant over the Sydney headquarters of the Australian Broadcasting Corporation ('ABC'). A third raid was planned for News Corp's Holt Street office in Sydney but, the ABC's John Lyons reported, it was put on hold due to the 'quick public and media backlash against the ABC raid'.[ii]

The AFP raids have become a focal point for debate concerning the recognition, protection and health of press freedom in Australia. In this Policy Paper, we provide a background to those raids and consider their legal and political consequences.

The Raids

Annika Smethurst

In April 2018, the *Daily Telegraph* published a series of articles authored by Annika Smethurst. Those articles were based on (and contained images of) a Top Secret departmental memo which concerned a proposal to expand the powers of the Australian Signals Directorate ('ASD') beyond its existing mandate (ie, the collection of intelligence on foreign nationals, the provision of intelligence support to military operations, cyber warfare and information security). Smethurst reported that the proposed new powers would enable the ASD to covertly access Australians' digital information, including financial transactions, health data and telecommunications records without a warrant. This proposal had the potential to seriously undermine privacy in Australia and was of considerable public interest.

On 3 June 2019, a Federal Court judge issued a search warrant which authorised AFP officers to enter and search Smethurst's home, and to access and copy the data on her computers and storage devices. The warrant described the offence that it related to as follows:[iii]

> **On the 29 April 2018, Annika Smethurst and the Sunday Telegraph communicated a document or article to a person, that was not in the interest of the Commonwealth, and permitted that person to have access to the document, contrary to s 79(3) of the *Crimes Act 1914*, Official Secrets.**

On 4 June 2019, AFP officers executed the warrant and conducted a comprehensive search of Smethurst's Canberra home. In compliance with the order, Smethurst also granted the AFP officers access to her phone. The officers copied items from the phone onto a USB device belonging to the AFP.

Timeline of Events

11 July 2017
The ABC publishes *The Afghan Files* by Dan Oakes and Sam Clark alleging human rights violations by Australian special forces in Afghanistan.

29 April 2018
The *Daily Telegraph* publishes reports by Annika Smethurst which reveal a proposal to give new domestic surveillance powers to the Australian Signals Directorate.

7 March 2019
David McBride is charged with releasing classified information to the ABC.

4 June 2019
The AFP raids Smethurst's home in Canberra looking for information about her confidential source.

5 June 2019
The AFP raids the ABC's Sydney headquarters in relation to The Afghan Files reporting.

4 July 2019
The Parliamentary Joint Committee on Intelligence and Security commences its 'Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on Freedom of the Press'.

23 July 2019
The Senate refers an inquiry into 'Press Freedom' to the Standing Committees on Environment and Communications.

4 September 2019
The AFP raids the home of intelligence officer Cameron Gill in relation to the communication of classified information to Smethurst (the investigation was later dropped for lack of evidence).

21 October 2019
The front pages of Australian newspapers are blacked out as part of the Australia's Right to Know press freedom campaign.

17 February 2020
Justice Abrahams of the Federal Court rejects the ABC's challenge to the raids.

15 April 2020
The High Court unanimously declares the search warrant over Smethurst's property invalid. By majority, the Court allows the AFP to retain the seized data.

2 July 2020
The AFP refers its brief of evidence on Oakes to the Commonwealth Director of Public Prosecutions.

The ABC

On 5 June 2019, the AFP executed an eight-hour raid on the ABC's Sydney headquarters.

This raid also concerned publications based on classified government documents. In July 2017, investigative journalists Dan Oakes and Sam Clark published 'The Afghan Files', which expanded on reporting aired on ABC's 7.30 Report. The Afghan Files opened by declaring:

> **Hundreds of pages of secret defence force documents leaked to the ABC give an unprecedented insight into the clandestine operations of Australia's elite special forces in Afghanistan.**[iv]

The leaked documents were said to reveal possible war crimes, including incidents of troops killing unarmed adults and children, the execution of an unarmed detainee and the mutilation of the bodies of enemy combatants. The reports also examined how a 'code of silence' within the defence community enabled those responsible to escape prosecution.

The public interest in the story was acute. However, the open publication of classified documents suggested that federal secrecy laws may have been breached.

The search warrant issued for the ABC premises named Oakes, Clark and the ABC's news director Gaven Morris. During the raid, AFP officers searched through thousands of items which matched the search terms listed in the warrant, including: article drafts, graphics, digital notes, visuals, raw television footage and all versions of scripts related to The Afghan Files. As in the Smethurst raid, AFP officers copied a number of files to USB stick which were removed from the property.

The ABC's executive editor John Lyons live tweets of AFP raid.

The Legal Bases for the Raids

The raids concerned the leaking of classified documents to journalists from within the Department of Defence. The handling and communication of these documents by the journalists and their sources appeared to contravene federal secrecy offences – in particular, **section 79(3) of the *Crimes Act 1914* (Cth)**.

The High Court described section 79(3) of the *Crimes Act* as a 'highly open-textured provision'.[v] It criminalised communicating or permitting another person to have access to 'prescribed documents, articles or information'. Prescribed documents, articles and information was subject to an involved definition in section 79(1), and included defence secrets and documents obtained by a Commonwealth officer (owing to their position as such) that it was their duty to keep secret.

Section 79(3) set out only two exemptions from criminal liability: when the communication was made

(1) to an authorised person or

(2) to 'a person to whom it is, in the interest of the Commonwealth or a part of the Queen's dominions, his or her duty to communicate it'.

Section 79 was in force when the relevant information was communicated to the journalists and subsequently published. However, in December 2018, that section was replaced by a suite of differently framed secrecy offences in **Division 122 of the *Criminal Code Act* 1995 (Cth)**. Relevantly, the new secrecy offence which now applies to non-Commonwealth Officers contains a journalism-based defence.[vi]

Federal secrecy offences provided the clearest basis for the raids. However, the possibility existed for further charges to be laid against the journalists and their sources. For example, mishandling classified government information may amount to **theft of government property, receipt of stolen goods, or even espionage**.

Has Anyone been Charged?

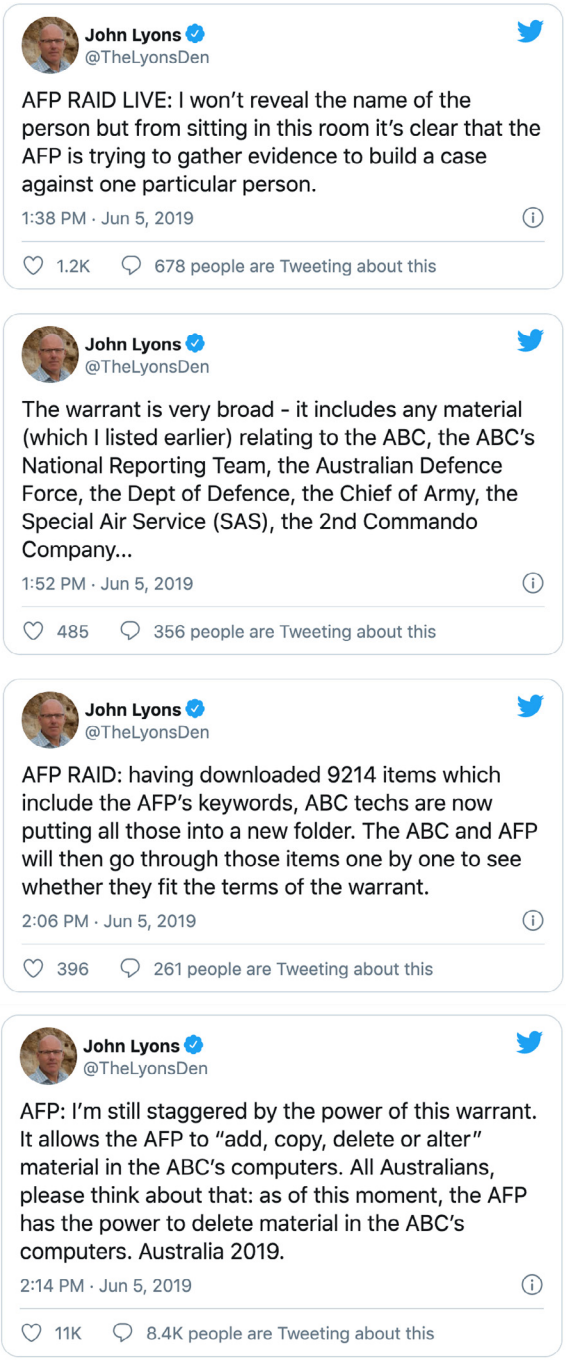
David McBride

Nine-months before the raids, David McBride was charged with a range of criminal offences over his alleged role in providing the ABC with the information that would form the basis of The Afghan Files reports. Between June 2008 and May 2016, McBride had been employed as a military lawyer for the Australian Defence Force. In 2014, he compiled a report on potential war crimes committed by Australian Special Forces soldiers in Afghanistan. McBride pursued his complaint through internal channels as a whistleblower, and then with the AFP, before providing the report to the ABC.

At the time of writing, McBride has pleaded not guilty to a range of offences which include theft of Commonwealth property (the information and documents in the report),[vii] the unauthorised disclosure of a Commonwealth document,[viii] and unlawfully giving information about Australia's defence capabilities.[ix] The criminality of McBride's actions will, in part, depend on whether he is entitled to protection under public sector whistleblower laws.

Dan Oakes

The AFP also took steps towards laying charges against Dan Oakes. In July 2020, the AFP referred its brief of evidence on Oakes to the Commonwealth Director of Public Prosecutions ('CDPP').



It remains to be seen whether the CDPP will determine that charges should be laid against Oakes, and whether Clark or other journalists may face charges. Importantly, changes designed to protect journalists (introduced in the wake of the initial AFP raids) require the personal approval of the federal Attorney-General before any such prosecution may proceed.

Cameron Gill

The raid on Smethurst appeared to be focussed on identifying her confidential source. It was followed, three-months later, by a raid on the home of former intelligence officer Cameron Jon Gill on the suspicion that he was responsible for leaking documents to Smethurst.

The investigation into Gill – who maintains his innocence – was later dropped for lack of evidence. Smethurst still refuses to name her source.[x]

Legal Challenges

The ABC and Smethurst (together with her employer Nationwide News Ltd) separately challenged the AFP raids in court.

Smethurst v Commissioner of Police

Smethurst and her employer, Nationwide News, sought declarations from the High Court that the search warrant over her home was invalid and that section 79(3) of the *Crimes Act* violated the implied freedom of political communication. Smethurst also sought an injunction to compel the return or destruction of the data seized during the raid.

In *Smethurst v Commissioner of Police* (2020) 376 ALR 575, the High Court of Australia unanimously held that the search warrant over Smethurst's property was invalid. Specifically, the warrant failed to properly identify and describe the offence under investigation (section 79(3) of the *Crimes Act*). This rendered the search an unlawful trespass. It was, therefore, unnecessary for the court to consider whether section 79(3) violated the freedom of political communication implied from the *Australian Constitution*.

By narrow majority, the High Court rejected Smethurst's claim for an injunction to compel the destruction or return of the information seized under the invalid warrant. The High Court's decision has been characterised as a 'hollow victory' with 'a sting in the tail' for Smethurst.[xi] At the time of writing the AFP has stated it will not be taking the case any further.[xii]

Australian Broadcasting Corporation v Kane (No 2)

In *Australian Broadcasting Corporation v Kane (No 2)* [2020] FCA 133, Justice Abraham of the Federal Court upheld the warrants that supported the ABC raid, and rejected the ABC's constitutional challenge to the validity of the search warrant provisions in the *Crimes Act*. This constitutional challenge invoked the implied freedom of political communication.

Applying recent case law – particularly, *Comcare v Banerji* (2019) 93 ALJR 900 – her Honour held that, properly construed, section 3E of the *Crimes Act* (which concerns search warrants) imposed a justified and proportionate burden on political communication 'across the range of its potential operations.'[xiii]

While Justice Abraham acknowledged the potential 'chilling effect' on political speech of a law which authorised the issuance of a search warrant for journalists' premises,[xiv] this burden was justified by the 'important and legitimate' purpose of 'gathering evidence against…those who have broken the criminal law' (in all circumstances, and not merely those involving the disclosure of classified information to a journalist).[xv]

ABC v Kane (No 2) effectively puts to rest any suggestion that the implied freedom of political communication may offer journalists legal protection against conduct in pursuance of a valid warrant.

Political Fallout

The raids on Smethurst and the ABC attracted global attention, calling into question the capacity for Australian media to effectively engage in journalism of acute public interest that may also be controversial or embarrassing to government.[xvi]

The raids also prompted the referral of Inquiries to the **Parliamentary Joint Committee on Intelligence and Security** ('PJCIS') and to the **Senate Committees on Environment and Communications**. Each inquiry was tasked with reporting on the state of press freedom in Australia and, particularly, threats to press freedom posed by law enforcement and intelligence powers, warrant procedures, and national security laws. At the time of writing, only the PJCIS Inquiry has reported. That Inquiry made 16 recommendations, ranging from warrant procedures and whistleblower protections to shield laws, journalism-based defences and more. Nonetheless, the four labor members of the Committee – Anthony Byrne, Mark Dreyfus, Jenny McAllister and Kristina Keneally – said the recommendations "do not go far enough" and should be regarded "as a bare minimum – a starting point – for reform".

In the months that followed the raids, both the Minister for Home Affairs, Peter Dutton, and the Commonwealth Attorney-General, Christian Porter, issued **public directives to the AFP** concerning the agency's approach and processes in investigations concerning journalists and journalistic materials. Before the PJCIS, however, representatives of the Department of Home Affairs insisted that law reform was unnecessary as the laws in place were 'appropriate'.[xvii]

At the close of 2019, the ALRC identified press freedom and whistleblowers as one of the most pressing areas for law reform, reflecting widespread calls for clearer recognition and protection of press freedom and whistleblowers.[xviii]

These calls also included a campaign by the **Australia's Right to Know** coalition, an unlikely alliance of Australian media organisations, pushing for stronger protections for press freedom. This campaign called for comprehensive law reform to protect press freedom, including:[xix]

- A right to contest search warrants.
- Expanded whistleblower protections.
- Restrictions on government secrecy.
- Freedom of information reform.
- Exemptions to protect journalists from prosecution under certain national security laws.
- Defamation law reform.

In 2020, Australia dropped 5 places in the **Reporters Without Borders** Global Press Freedom Index. This was directly linked to the AFP Raids on Smethurst and the ABC which, the organisation said, reflected how national security "is used to intimidate investigative reporters."[xx] Australia's reputation as a leader for press freedom in the Asia-Pacific region has, therefore, been called into question.

Implications for Press Freedom

The raids exposed the fragility of press freedom in Australia and the urgent need for considered law reform to protect this core element of free speech, the rule of law and the liberal democratic tradition.

Unlike other Western democracies (where rights to free speech encompass a free press), press freedom is neither recognised nor protected under Australian law. *ABC v Kane (No 2)* confirms that the **implied freedom of political communication** is an inadequate tool for protecting press freedom in Australia.

The raids demonstrate that law enforcement agencies can, and will, investigate journalists and their sources under broadly framed national security laws. The stories which led to these investigations had been in the public arena for some time when the raids occurred. There was no indication that the leaks or the articles posed an ongoing threat to national security. Nonetheless, the investigations continue and the risk of criminal prosecution looms.

In addition to exposing the absence of robust recognition or protection for press freedom and the real prospect of police raids on journalists, the raids raise a host of complex and important questions about the role of law in protecting and threatening press freedom in Australia.

The secrecy offence which replaced section 79(3) contains a defence for legitimate journalistic activities. **Should this kind of journalism-based exemption from criminality be expanded across Australia's national security laws?**

The protection of journalists' confidential materials and sources is a core element of press freedom. Shield laws exist in most Australian jurisdictions to protect source confidentiality in court – **should shield protections extend to the search and seizure context?**

Is law reform the answer to protecting press freedom, or **should Ministers have a stronger role in overseeing AFP investigations into journalism?** Would this advance press freedom, or compromise the independence of the AFP?

Arguably the greatest impact of raids on journalists is a **chilling of free speech**. Journalists and media organisations may drop important stories out of fear of legal repercussions. Those stories may have exposed wrongdoing or corruption, or be of keen public interest. Sources – including whistleblowers – may not come forward with these stories in the first place, out of fear for themselves and expecting that journalists will be unable to protect their anonymity. This chilling effect can damage free speech, accountability and democracy even without prosecutions and the jailing of journalists or sources.

The AFP raids placed press freedom squarely on the political agenda. Their consequences and implications continue to fuel calls for law reform and, for some advocates, the introduction of a federal Media Freedom Act.

Global Press Freedom Index

	2018	2020
1	Norway	Norway
2	Sweden	Finland
3	Netherlands	Denmark
4	Finland	Sweden
5	Switzerland	Netherlands
6	Jamaica	Jamaica
7	Belgium	Costa Rica
8	New Zealand	Switzerland
9	Denmark	New Zealand
10	Costa Rica	Portugal
11	Austria	Germany
12	Estonia	Belgium
13	Iceland	Ireland
14	Portugal	Estonia
15	Germany	Iceland
16	Ireland	Canada
17	Luxembourg	Luxembourg
18	Canada	Austria
19	**Australia**	Uruguay
20	Uruguay	Suriname
21	Suriname	Samoa
22	Samoa	Latvia
23	Ghana	Namibia
24	Latvia	Lichtenstein
25	Cyprus	Cabo Verde
26	Namibia	**Australia**

About the Author

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Dr Rebecca Ananian-Welsh is a constitutional law scholar and Senior Lecturer at UQ Law with combined expertise in courts, national security and press freedom. She has published widely in these fields, including two edited collections and a book and, in 2019, she was awarded the Academy of Social Sciences in Australia's Paul Bourke Award for Early Career Research. Dr Ananian-Welsh's current research combines legal and empirical approaches to examine the impacts of national security law on the press. Prior to joining UQ, Dr Ananian-Welsh held positions with the Gilbert + Tobin Centre of Public Law at UNSW, DLA Piper Sydney, and the Federal Attorney-General's Department.

About the Series

Press Freedom Policy Papers offer short, evidence-based insights and recommendations informed by scholarship and consultation.

Background Briefings outline important events and context to inform policy development and law reform in the area of media freedom.

Series Editors

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iii *Smethurst v Commissioner of Police* (2020) 376 ALR 575, [8].

iv Dan Oakes and Sam Clark, 'The Afghan Files', *ABC News* (online, 11 July 2017) <https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642?pfmredir=sm>.

v *Smethurst v Commissioner of Police* (2020) 376 ALR 575, [217] (Edelman J).

vi *Criminal Code Act 1995* (Cth) s 122.5(6).

vii *Criminal Code Act 1995* (Cth) s 131.1.

viii *Crimes Act 1914* (Cth) s 70(1).

ix *Defence Act 1903* (Cth) s 70(1).

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xii For discussion of the case see: Rebecca Ananian-Welsh, '*Smethurst v Commissioner of Police* and the Unlawful Seizure of Journalists' Private Information' (2020) 24(1) *Media and Arts Law Review* 60.

xiii *Australian Broadcasting Corporation v Kane* (No 2) [2020] FCA 133, [264].

xiv *Australian Broadcasting Corporation v Kane* (No 2) [2020] FCA 133, [343].

xv *Australian Broadcasting Corporation v Kane* (No 2) [2020] FCA 133, [268].

xvi See, eg: Jamie Tarabay, 'Australian Police Raids Target News Media Over Leaked Documents', *The New York Times* (online, 4 June 2019) <https://www.nytimes.com/2019/06/04/world/australia/journalist-raid-annika-smethurst.html>; Charlotte Bellis, 'Australia: Police raid ABC headquarters over Afghanistan stories', *Al Jazeera* (online, 5 June 2019) <https://www.aljazeera.com/news/2019/06/australia-police-raid-abc-headquarters-afghanistan-stories-190605052649208.html>.

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