

Interview: Richard Ackland AM

Richard Ackland AM is a lawyer, legal publisher and journalist who has written on the law for around 45 years. He is a former host of ABC TV's Media Watch and ABC Radio National's Late Night Live and is the publisher of Justinian and the Gazette of Law and Journalism. Along with Deborah Richards and Anne Connolly, he won the 1999 Gold Walkley for exposing the cash for comment arrangements between commercial radio and the banks. He currently contributes to Guardian Australia and The Saturday Paper. Richard caught up with Patrick Tyson, CAMLA Young Lawyer and Business Affairs Coordinator & Lawyer (Acquisitions) at the ABC for a discussion about press freedom, national security and news in an increasingly digital world.

PATRICK TYSON: Several commentators have observed that since 2001 successive Australian federal parliaments have passed around 75 national security and counter-terrorism laws. This exceeds the number of comparable laws passed by other Western countries such as the UK and the USA. Did the AFP's raids on the ABC and the home of News Corp journalist Annika Smethurst surprise you or was it a development you considered inevitable? What was your initial reaction?

RICHARD ACKLAND: My initial reaction? What a clumsy move by the AFP. Two raids in rapid succession – one on a News Corp journalist and the other on the ABC at its Sydney HQ. Nothing could be more likely to inflame the entire media and set off a concerted campaign to review national security laws that adversely impact news organisations. It soon became a global story about the erosion of a free press in Australia. The attempt to extract documents from the ABC is suspended while the warrant is challenged in the Federal Court.

Was it surprising or inevitable? It's not totally surprising because police have raided news organisations over the years trying to find out how classified information got into the hands of reporters. The arsenal of legislation now gives law enforcement agencies wider and wider powers to protect state secrets and penalise their publication, so it's inescapable that at some point those powers will be used.

The media also operates in a more hostile political environment. Peter Dutton, the Home Affairs Minister, has a hardline approach to national security, declaring that journalists are not "above the law" – except, it seems, when favoured journalists publish classified information from his own agencies critical of the Medevac legislation. When the Medevac Bill was going through parliament, The Australian somehow had a story about how ASIO thought the legislation would undermine regional processing and make border protection more difficult. It was widely suspected to be a security leak from Dutton's people to a supportive newspaper.

Most of the time, the government response has nothing to do with "national security" at all. National security should be about keeping citizens and the country safe from internal and external threats and attacks. Bernard Collaery and Witness K's alleged offences, the reporting of ostensible war crimes by Australian soldiers in Afghanistan, and the story about giving the Australian Signals Directorate sweeping surveillance powers, are all public interest stories and in no way threaten the security or safety of Australia.

The landscape that encompasses national security laws, leaks, and journalism is replete with political theatre and hypocrisy. The only thing the government regards as not secret are ministerial press releases.

TYSON: There was a relatively uncommon display of solidarity between Australian news media

organisations in condemning the AFP's raids. Do you think that, in a perverse way, the raids have had a demonstrably positive impact on cooperation and support between sometimes opposing and competing news media organisations?

ACKLAND: I don't think there would have been media unity had the News Corp journalist, Annika Smethurst, not had her home raided and her computer and mobile phone searched.

In all other respects, News Corp remains the avowed ideological and cultural enemy of the ABC, The Sydney Morning Herald and The Age mastheads. Yes, there is a momentary meeting of minds between News Corp, Nine and the ABC that the authorities should not be putting their hob-nailed boots inside newsrooms and snooping into journalists' electronic devices. How long that happy state of affairs lasts is problematic.

It is likely that the news organisations will be disappointed with the outcome of the reform agenda they are pushing, specifically with the way warrants are issued, the protection of public interest whistleblowers, improved access to government information under FOI laws, and a restriction on the way "Top Secret" is stamped in red ink on every piece of government paper that might usefully be in the public domain. Some of those proposals are now being reviewed by the Parliamentary Joint Committee on Intelligence and Security – the committee that waved the current spate of security laws into existence.

Can you really imagine this government, in particular, giving the media any free kicks?

It is even more troubling that journalists did not do a decent job in relentlessly flagging the dangers of the security measures governments introduced following 2001 World Trade Center attacks. In many instances, elements of the media were cheering on the introduction of laws that now pose a threat to their ability to report.

TYSON: You mentioned several reforms being discussed to better protect press freedom in Australia. There have also been calls for the enshrinement of press freedom within a “Press Freedom Act” and/or a federal Human Rights Act, as well as exemptions or defences in relevant national security legislation for reporting in the public interest. What changes to the law, if any, do you favour and why?

ACKLAND: There should be a national Human Rights Act and it should have happened ages ago. The opponents of such legislation have come up with nothing more original than a mantra that only elected politicians, not judges, should be deciding policy issues. Parliament and the executive arm are not the only decision-making elements in a liberal democracy.

A Human Rights Act would have universal application for society at large, not just to the media’s interest in free speech, which must be balanced against other interests and freedoms. I don’t think legislation, such as a Press Freedom Act, that would reserve specific rights for the media alone would be politically palatable. What I’ve heard about a proposed PFA sounds vague and motherhoody. I may be wrong about that and will probably change my mind next week.

Beyond that, there are elements of the national security laws that could be amended to mitigate the chilling effect on the media. Such as:

- Having actual judges apply more than a momentary consideration to issuing search warrants. Currently, Local Court registrars and political appointees to the AAT can make these decisions, even the Attorney-General.
- If there is to be metadata retention, there needs to be contestable warrants.
- The anti-encryption legislation needs more judicial oversight with merits reviews.
- Whistleblowers from within the Commonwealth public service are hung out to dry if they leak information to the media in the public interest. For example, the Afghan Files published by the ABC and the Witness K case. Whistleblower protection is vital to enabling disclosures in the public interest.
- Having a precise definition of “national security”. It currently applies to any document with “secret” stamped on it or passed over the cabinet table. National security should specifically apply to situations that endanger the life and limb of Australians and to the nation’s infrastructure. At the moment “national security” is being applied farcically where the media has exposed the government’s abuse of power.

TYSON: While you harbour doubts about the Parliamentary Joint Committee on Intelligence and Security, do you think any changes to the law will be forthcoming?

ACKLAND: Maybe I’m wrong to doubt Andrew Hastie MP and his merry tribe on the Committee that has awarded elephant stamps of approval to the national security legislation we have now. These are politicians who made capital by spooking the country with endless pieces of security legislation. So many in fact, that no-one knows with any fine detail what the laws mean, how they will be applied and the penalties for which journalists are potentially liable.

The net effect is that editors play it safe, spike the contentious story that gets too close to “national security” and instead give us a half-page about how to fry mushrooms.

Having said that, I would not be surprised if a few minor recommendations for change did emerge. Hastie, for instance, has been a solid defender of the work done by The Sydney Morning Herald and The Age on the influence of China and its agents on Australian politics. To that end, he has supported the journalism, even stories from well-credentialed journalists that have been battered to pieces by judges in the Federal Court.

TYSON: If editors sometimes play it safe when stories involve “national security”, following the AFP raids have you noticed or experienced greater reluctance from editors, journalists or whistleblowers to be involved in such stories due to fear of personal punishment?

ACKLAND: I think there has always been nervousness about dealing with information the government does not want you to see. Remember last year when the ABC took delivery of filing cabinets full of official documents that had been sold at a second-hand auction in Canberra. Within a matter of days and after publishing a few selected stories, the ABC obediently handed the files to ASIO. The government kicked up a fuss and the public broadcaster got frightened.

The government has succeeded in spooking the media. “National security” can mean whatever the government wants, most usually information that if published would be embarrassing. If a hot “national security” story fell into the lap of a fortunate journalist there would be hours, if not days, of editorial and legal discussion trying to work out the consequences, the extent to which the information would get on the wick of the government, the likelihood of a successful prosecution, and the

costs - monetary and emotional. The greatest caution would be applied.

The principal pieces of “national security” legislation that affect journalism are relatively new – the secrecy and espionage amendments to the *Criminal Code Act 1995* (Cth), metadata retention as a result of amendments to the *Telecommunications (Interception and Access) Act 1979* (Cth), and anti-encryption measures under the *Telecommunications (Assistance and Access) Act 2018* (Cth). These laws criminalise obtaining certain information from government employees and give the state wider access to the electronic communications of journalists, and other citizens. However, as far as I know, no arrests have been made under any of these laws in response to news reporting.

Another problem is the effect on whistleblowers, on whom the media is dependent for high-level scoops on abuses of government power. Journalists have some limited defences under the laws, but not so much for whistleblowers, who face penalties of up to 10 years’ imprisonment.

Journalists even face the possibility of prosecution for “dealing” with government classified information or for receiving a letter where the recipient may be ignorant of the contents.

TYSON: The AFP raids led to a visible increase in public awareness and support for press freedom. Do you expect this to be a long-term shift in the Australian consciousness or is there a risk it will quickly fade away, particularly due to the 24/7 news cycle?

ACKLAND: Something must be happening. We even had Home Affairs Minister Peter Dutton advising the AFP to take account of the “importance of a free and open press” before deciding to raid journalists’ homes and workplaces. He added: “Where consistent with operational imperatives, I expect the AFP to exhaust alternative



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investigative actions prior to considering whether involving a professional journalist or news media organisation is necessary.”

Maybe Dutton was just making nice to News Corp, the favourite and compliant destination of ministerial leaks.

As for being a “long-term shift in Australian consciousness” for press freedom, we need to remember that significant sectors of the media are anything but “fair and balanced”, that news is distorted and dishonest agendas are hammered daily. As a result, community trust in the media, with a few notable exceptions, is at a low ebb. Until that is repaired,

I suspect most members of the community do not give a fig about press freedom.

TYSON: What effect, if any, do you think the issue of press freedom has had on Australia’s reputation and influence internationally?

ACKLAND: Surprisingly significant. In this year’s Reporters Sans Frontières (RSF) World Press Freedom rankings, Australia dropped two places to #21, behind Costa Rica, New Zealand, Jamaica, Uruguay and Surinam.

The concentration of Australia’s mainstream media is one factor that impacts press freedom.

Then we have the most dreadful defamation regime of any comparable democracy, pathetic FOI laws, endless court suppression orders, government lockdowns on reporting on Manus and Nauru, and draconian security laws that inhibit whistleblowers and reporters. As RSF reports, Australia has news and information “black holes”.

Following the raids on the ABC and Annika Smethurst, I received a call from public radio in Sweden and was asked to comment on what was going on with press freedom in this country. The Swedes were interested! There was also wide reporting in the UK, USA, Europe and throughout our region. It’s troubling and embarrassing that successive Australian governments treat citizens as children, or worse, mushrooms who should be kept in the dark.

TYSON: Press freedom is one of many important issues affecting news media. Digital disruption has undeniably transformed the global media environment over the last couple of decades. How well do you think Australia’s traditional news media (newspapers and broadcasters) have innovated and adapted in the new digital era? Is there an area where they are failing to connect with modern audiences?

ACKLAND: Many large and important media organisations feel they could have handled the transition better. For years stories were posted on the internet where they could be read for free. By the time management decided that paywalls were necessary

to keep the show afloat, it was too late – most people had gotten used to having their daily journalism for nothing. It’s been a struggle ever since to get people back behind the paywalls and it took a long time for the news publishers to go “digital-first”. In any event, digital publishing is not generating enough revenue to fund operations properly.

There have been some terrific new digital entrants – Guardian Australia prime among them – with open content. The ABC news website is also a wonderful resource – no wonder the commercial publishers are squealing that the national broadcaster is eating their lunch.

The internet has atomised sources of information so people can find things of specific interest that are not part of the diet of the dailies. That will be an ongoing trend. General news accompanied by narrow silos.

I think print newspapers will survive as they become more local, with greater concentration on investigations with “star” reporters and columnists. At least I hope they survive. I can’t imagine life without daily newspapers. Although, Millennials and Gen-Z already seem to survive in a print-free world.

TYSON: While you are a fan of the traditional print, are there digital tools you think have the potential to innovate news further or generate new revenue streams?

ACKLAND: I don’t think there has been a truly successful news app

that brings you digests of and links to stories of specific and specialised interest. Apple has a news alert but the targeting seems a bit wonky. Others have tried, but there’s still a gap in the app market for something that is truly terrific that tells you everything you really want to know.

Maybe this could be developed by biometrics or identifying readers’ needs by their thumbprint. Another important breakthrough could be for Google to install chips in our head whereby all the important things can be transferred into our brains without having to read or make sense of what is written.



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