

Home Affairs suggests police should apply for permission to search journalists' homes or offices

By political reporter Anna Henderson, ABC News, 28 February 2020

Federal police would have to apply to an independent authority before raiding journalists and media organisations in some cases, according to a proposal put forward by the Home Affairs Department.

Key points:

- The Senate has been investigating press freedom since federal police raided journalists last year
- In a submission, Home Affairs has proposed new standards that could govern raiding journalists
- The proposal has dismissed calls for broad immunity for journalists doing their job

The Department has made a joint submission with the Australian Federal Police (AFP) to the press freedom inquiry that was set up after raids on the home of [News Corp journalist Annika Smethurst](#) and the [Sydney offices of the Australian Broadcasting Corporation](#).

The submission says the AFP are already required by a ministerial direction to "exhaust alternative investigation actions" before conducting a raid.

But the department has further suggested establishing a so-called notice to produce framework in the Crimes Act.

Media organisations would have the chance to "raise concerns" about documents and other information before it is handed over to police and journalists would be able to challenge a request to produce the material.

"This would provide an opportunity for professional journalists and media organisations to put forward any strong, countervailing arguments not to produce material," the submission said.

Home Affairs said in circumstances where police still wanted to conduct a search, it might be appropriate for them to apply to an "independent issuing authority" to make the decision.

However, the submission suggests retaining the power of police to apply for warrants without approaching the independent authority in cases involving serious crimes, urgent operations or where there is a risk material may be destroyed.

"Any framework should not limit the ability for law enforcement to apply for a search warrant in those circumstances," the submission said.

The submission rejects the proposal from the Right to Know group for a broad immunity for journalists.

But it states "information gathering powers should minimise intrusions to the private property and affairs of journalists and business interests of media organisations and limit unnecessary inspection of unrelated information".

It says that includes information that would reveal a journalist's other sources.

Mixed response from lawyers

The submission relates to the action police take in response to the unauthorised disclosure of information by current or former public servants.

"It's obviously not a sufficient reform of the law," Bret Walker QC told the ABC.

"Credit where credit's due, it's a good suggestion they make, I hope it's enacted.

"It doesn't redefine the crime. Secrecy laws are excessive, they criminalise too much disclosure. The laws criminalise too much whistleblowing."

Former Justice of the Supreme Court of NSW Court of Appeal, Anthony Whealy QC, is critical of the proposal.

"The AFP is not suggesting that they won't continue to have the right to issue what I'd call surprise warrants and execute them without warning or notice," he said.

"I don't think that really advances the situation much."

Former Canberra attorney-general Bernard Collaery welcomed the introduction of an independent authority overseeing the issuing of warrants.

"There should be an independent monitor for those types of investigations which involve or are highly likely to involve physical or crypto intrusion," he said.

Mr Collaery is [himself facing prosecution, along with a former senior intelligence officer known as Witness K](#), over revelations Australia had covertly bugged the East Timor government during gas and oil negotiations in 2004.

He also called for police to be required to disclose to the authority affidavits in support of raid warrants.

"The evidence upon which the request is based must be tested independently," he said.

Asked how any such independent authority should be constituted, he said: "It should not be constructed solely by the government.

"The Law Council of Australia and all stakeholders should be consulted, including the Civil Liberties Council and the journalists' union."

The Media Entertainment and Arts Alliance (MEAA) issued a statement criticising the proposal.

"The proposal rejects the notion of contestable warrants and is vague on the concept of independent oversight," an MEAA spokesperson said.

"Our experience of independent monitors in [relation] to metadata does not instil confidence.

"Our position remains that journalists and their sources should not be subjected to the same approach used to investigate crimes."

The submission comes on the same day the ABC announced it would not appeal a Federal Court ruling that found a police warrant used to raid its Sydney headquarters was valid.

Managing director David Anderson said the court's ruling "demonstrates the urgent need for law reform to ensure professional journalism and whistleblowers are appropriately protected."