The law shouldn’t care about the government’s hurt feelings

The ABC's court challenge over the AFP raids will put Australia's freedoms to the test. Hopefully we come out with the right result.

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JOHN LYONS (LEFT), EXECUTIVE EDITOR OF ABC NEWS, IS FOLLOWED BY AN AFP OFFICER. (IMAGE: AAP/DAVID GRAY)

It’s taken a while but, after six years of relentless de-funding and ideological bashing from the Coalition government and its cheer squads, the ABC has finally come out swinging. The final straw came on June 5 when Constable Plod, in the form of the Australian Federal Police, arrived at ABC HQ and started going through the underwear drawers.

It was, by design, chilling. And yet, so ham-fisted that the ABC had to fight back; the public broadcaster has gone to the Federal Court to have the AFP’s search warrant set aside and the thousands of documents they seized, returned.

Seriously, have you read the search warrant? Famously signed off by a Martin Kane, a registrar of the Local Court in Queanbeyan (apparently every judge in NSW was unavailable), the warrant gave the cops power to take every kind of document, tape and computer record imaginable, so long as it "related to" any one of an extremely long list of things. These included, apart from "The Afghan Files" — the ostensible target of the enquiry — the Australian Army, Department of Defence, Afghanistan, *7.30*, and the ABC itself. It was so wide, the AFP could have insisted on slipping the entire building inside a self-sealing envelope and taking it away for fingerprinting.

The legal challenge will reportedly encompass technical defects in the warrant and the failure to enable the ABC to protect its confidential sources. Then there's the constitutional challenge: the argument that the warrant's issuance infringed the implied freedom of expression on government and political matters.

A short constitutional law lesson: we have no freedom of speech in Australia.

We do have the *implied* freedom, so-called because it isn't written in the Constitution but has been found to exist between the lines. The High Court says that, to preserve our democratic system of elected representative government, it is essential that we are able to freely discuss and debate issues relating to government. Practically, it means that Parliament cannot make laws that infringe the freedom, and the executive cannot use its powers to squash the freedom, except, except, except… well, it's a very big exception.

The court has developed a rule which is supposed to tell us when our freedom has been impermissibly infringed. First, you ask if the law or action in question "burdens" the implied freedom. If yes, then you ask if it has a valid purpose, and if it is appropriate and adapted to that purpose. Sure, fine. (If you want a headache, read the cases that have tried to apply this rule in practice.)

Anyway, let's do the High Court's job for it (this case is going there for sure). The background to the search warrant's issue is "The Afghan Files", a series run by the ABC back in 2017 exposing leaked information from inside the Defence Force regarding allegations that members of our special forces had committed unlawful killings during the Afghanistan conflict.

The AFP confirmed, post-raid, that the warrant related to "allegations of publishing classified material, contrary to provisions of the *Crimes Act 1914*". That will be either section 70 or 79. As I've written before, Section 70 creates a blanket criminal offence over any disclosure of government information by public servants. Section 79 throws an even thicker blanket over "official secrets", which are defined a lot more widely than you'd guess.

The constitutional challenge could be against the law that enabled the search warrant, or the act of granting it. Either way, the first legal question is easily answered: the ABC's freedom to communicate about the Afghan Files — a matter of high public importance — was burdened by the police raid.

Then it gets tricky. Obviously the government must be able to make laws that protect national security; we all accept that there has to be a balance struck between our

right to know what our government is doing, and its ability to act in the national interest. The Julian Assange case exemplifies this: it is appropriate that we find out when our government is doing bad things, but not okay to publish the identities of our spies.

Since 9/11, the Australian government's default has been to treat everything it does as synonymous with the national interest and of no legitimate interest to the public. Consequently, it sees things that embarrass it as necessarily contrary to the national interest, causing it to be surprised when actions like the ABC raid are not the subject of widespread applause.

The law doesn't give a crap about the government's blushes. It seeks the dividing line between appropriate intrusion in our freedom to speak (and be spoken to), and intrusion that is… well, too much.

It makes sense that there be a law that prohibits the sharing of military secrets — even embarrassing ones — that compromise our security, even in peacetime. In respect of a war no longer running, however, a law (or the exercise of power under that law) that prevents us from being informed about potential war crimes committed by our soldiers on civilians is difficult to justify.

The only real harm caused by the disclosure of the Afghan Files was to the accused soldiers themselves, and they have the absolute right to a fair trial. The government's preference that we never know anything, except what suits it to tell us, is irrelevant.

The balancing act in this case, therefore, is illusory. Of course the ABC was right to run its story; of course we were entitled to know what happened in Afghanistan.

That's not to say that the High Court will find that the Constitution protected that right — but it should.