

# **Until there is an overhaul of the law, the threat of criminal proceedings hangs over public interest journalism and threatens the state of democracy in Australia**

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**By Sarah Liversidge**

Dan Oakes does not want sympathy for what has happened.

After three long years, the ABC investigative journalist will not be prosecuted over a series of stories he and fellow ABC journalist, Sam Clark, wrote in 2017 titled the "Afghan Files". The stories were based on hundreds of pages of leaked documents that exposed alleged war crimes carried out by Australian soldiers in Afghanistan.

Speaking on [ABC News](#) on October 16, Oakes said he felt "considerable relief" after the Commonwealth Director of Public Prosecutions decided on October 16 that pursuing charges against him relating to obtaining classified information was "not in the public interest".

But Oakes said he would "personally feel a little bit uncomfortable receiving sympathy and congratulations".

On June 5 2019, the Australian Federal Police executed a search warrant at the ABC's headquarters in Sydney. The warrant named Oakes, Clark and ABC news director, Gaven Morris.

The raid came less than 24 hours after *Daily Telegraph* journalist Annika Smethurst had her Canberra home raided for seven hours by federal police for reporting on classified documents. On the same day, 2GB radio host Ben Fordham received pressure from the Department of Home Affairs to reveal a source he had used for story on boats carrying asylum seekers.

The raids were justified under the pretext of Australian national security laws, and highlight the conflict between the government, the law and the role of journalists to disclose information that is in the public interest.

Speaking to [ABC News on June 5 2019](#), Media, Entertainment & Arts Alliance president Marcus Strom described the ABC raids as "disturbing".

"It should chill the public as well as journalists," he said.

In the MEAA's *report into the state of press freedom in Australia in 2020*, Chief Executive Paul Murphy said the events marked "the lowest point for the state of press freedom in Australia".

Head of investigative journalism at the ABC, John Lyons, live tweeted the AFP's "every move" on the day of the ABC raids. "I thought it was important for ABC journalists...to know in real time what was going on," he wrote for [ABC News on June 8 2019](#).



John Lyons   
@TheLyonsDen



HAPPENING NOW: AFP raid ABC headquarters in Sydney over a 2017 story on 7.30.  
[@annikasmethurst](#) yesterday, then [@BenFordham](#) asked by Home Affairs for a source, now the ABC. Is this the new normal?

11:31 am · 5/6/19 · [Twitter for iPhone](#)

Lyons said the event was a “complete violation” of journalists’ and citizens’ rights. “It was in that moment I felt there was something sick about modern Australia – that an institution as important as the media had come to this,” he said.

So how *did* it come to this?

There has been a significant increase in the creation and amendment of Australia’s national security laws since the 9-11 terror attacks in 2001.

Writing in [The Australian](#) on October 21 2019, Dean of Law at the University of New South Wales, George Williams, said the Australian parliament had passed “at least 82 national security laws” since 9-11.

According to Pearson & Polden in *The Journalist’s Guide to Media Law*, these laws and amendments include: the National Security Information (Criminal and Civil Proceedings) Act (2004), Australian Security Intelligence Organisation Act (1979), and The Telecommunications (Interception and Access) Act (1979).

Williams said Australia has surpassed other nations in terms of national security laws infringing on free speech. “Other nations have reacted with surprise and alarm at our raids on media offices, and that our parliament has passed so many laws that stifle freedom of speech and of the press. We have developed a reputation for enacting security laws more suited to an authoritarian state than a liberal democracy,” he said.

Williams said the laws were passed by parliament with “convenient bipartisanship”.

But the conflict between national security laws and media freedom goes further back than 9-11.

Writing in [The Conversation on October 23 2019](#), Senior Research Fellow at the Centre for Advancing Journalism at Melbourne University, Denis Muller, said “government suppression of the media goes back at least as far as the earliest days of The Cold War”.

The D-Notice system that was in place from 1953 to 1982 was an agreement between the Australian government and the media, whereby the media agreed not to publish sensitive information on grounds of it being a threat to national security.

Government suppression of the media can even be traced back to Australia's first newspapers.

Writing for the *Australian Parliamentary Library* in 2016, Dr Rhonda Jolly said until 1824, any newspapers published in Australia were "subject to strict government control".

This began to change with the publication of *The Australian* in 1824. The newspaper was declared to be published "without prior constraint" by its editors, William Wentworth and Robert Wardell.

Wentworth and Wardell were able to do this because Australia's legislative council was not yet functioning and there were no legal processes in place by which they could be held accountable. In short, this is how freedom of the media began in Australia.

However, there has never been any constitutional protection of freedom of speech or the media in Australia.

Writing in [The Conversation on June 7 2019](#), Misha Ketchell said it was "weak" that "the closest we have come to any positive protection of free speech is a series of High Court decisions which say our Constitution creates an 'implied freedom' to communicate".

Williams said Australian governments over time had shown little interest in providing protection of freedom of expression and instead "have been ready to invoke national security and other interests to undermine the work of the media and the free speech of citizens".

There has been widespread talk of law reform to protect free speech and to curb the ongoing criminalisation of Australian journalists.

Speaking on [Media Watch](#) on July 6 2020, Professor of Public Policy at Griffith University AJ Brown said "a complete overhaul of the law" was needed. "Both on the media freedom side, or journalism shield law side, and on the whistle blower protection side," he said.

Writing in [Crikey on October 12 2020](#), Bernard Keane said a bill of rights could provide a "real chance of curbing the police state that we have developed in Australia".

Oakes said his case highlights the need for better protection of journalists disclosing stories that are in the public interest.

"I don't think anybody could argue that what we were reporting was not in public interest," he said.

These issues evoke a questioning of the state democracy in Australia. [A 2020 survey](#) by the MEAA found 85 per cent of respondents believed press freedom in Australia had worsened over the past decade.

Murphy said, "these are the sort of numbers you would expect to see in a despotic police state".

Oakes may be safe for now, but until there is an overhaul of the law, the threat of criminal proceedings hangs over public interest journalism and threatens the state of democracy in Australia.

