

Criminalising Journalism: Australia's National Security Craze

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Asia-Pacific Research, July 03, 2020

Region: [Oceania](#)

Theme: [Media](#)

There has been a lot of noise made in Australia about the need for broader protections when it comes to the fourth estate and the way it covers national security matters. In a country lacking a backbone in terms of constitutional free speech, journalists are left at the mercy of authorities when it comes to exposing egregious abuses of power. Consider, for instance, the exposure of war crimes committed by Australian forces via what has come to be known as the [Afghan Files](#).

As Dan Oakes and Sam Clark, the two ABC journalists involved in putting together the file material [wrote](#) in July 2017,

“Hundreds of pages of secret defence force documents leaked to the ABC give an unprecedented insight into the clandestine operations in Australia’s elite special forces in Afghanistan, including incidents of troops killing unarmed men and children.”

The material, published in seven parts, should not surprise students of war. In the brutality of the Afghan conflict, the killing of civilians became a casual, cruel matter. In September 2013, a man and his six-year-old child were killed during the raid on a house. This incident, along with another involving the killing of a detainee who had allegedly attempted to seize the weapon of an Australian soldier whilst in his custody, formed part of an investigation by the Inspector General of the Australian Defence Force.

In 2013, an Afghan man was slain by Australian troops while riding his motorcycle. The female passenger was injured. The report in question noted the increasingly parlous state of Afghan-Australian relations in light of such incidents, involving the wanton killing of civilians by special forces. Much of this stemmed from the sloppiness of Australian military protocol on the battlefield, shown to be hopelessly, and lethally inadequate. The nomenclature of the defence establishment spoke to the need of only targeting Afghans “directly participating in hostilities”, a distinction that was lazily made if and when it was made at all.

These are but a few highlights that this cache of files revealed. But at the core of these revelations was a failed pseudo-colonial mission that was ignoble, misguided and, for all the fanfare of salvation, a dismal failure. It did little in terms of shoring up either Australian security or those of the Afghan population. It failed in defeating the insurgent Taliban forces. It had taken place on impulse, to assist a grieving US still licking its wounds after the terror attacks of September 11, 2001. As with other empires, Afghanistan was reaffirmed as

a graveyard for failed powers. The Taliban, far from being defeated, showed their resoluteness and staying power.

The exposure of such defence documents should have sent policy makers and reformers into the corridors of the ADF. Oakes and Clark deserved, at the very least, a modest acknowledgment of merit. Instead, they and the ABC attracted the keen eye of the Australian Federal Police. On June 5, 2019, AFP officers swanned in and cheerfully [raided the offices](#) of the national broadcaster in Sydney. The home of News Corp journalist Annika Smethurst [was also raided](#) for reporting on a separate matter touching on a proposed expansion of surveillance powers held by the Australian Signals Directorate. Both raids were motivated by alleged breaches of official secrecy under the old version of the *Crimes Act 1914* (Cth).

These furnished the Australian public a chilling spectacle, and did something nothing else could have done: bring unity to a fractious field. Journalists from Fairfax, News Corp and The Guardian Australia chorused in concern and consternation. The [Right to Know campaign](#) was born, though remains, to date, an incipient venture. In the [words of the coalition](#),

“You have a right to know what the government you elect are doing in your name. But in Australia today, the media is prevented from informing you, people who speak out are penalised and journalism that shines a light on matters you deserve to know about is criminalised.”

The reason why the campaign has failed to yield rewards can be gathered by the continued investigation of Oakes and Clark and the mixed results of the campaign in the courts. The ABC failed to invalidate the warrants executed to search their Sydney offices, with Federal Court Justice Wendy Abraham [issuing a pointed reminder](#) in February that the implied constitutional right to political subjects is not a personal right but one designed to restrict power.

Smethurst and News Corp did modestly better in the High Court on April 15, but only in terms of result. In invalidating the search AFP search warrant, [the judges found](#) against the police purely on the basis of vague drafting. The warrant in question failed “to identify any offence under section 79(3)[of the *Crimes Act*]” and substantially misstated “the nature of an offence arising under it.” Had the warrant been prescribed with greater clarity, they would still have stood as valid exercises of state power. Smethurst and her colleagues probably kept the champagne on ice.

In September 2019, Attorney-General Christian Porter [issued a direction](#) under the *Commonwealth Director of Public Prosecutions Act* requiring the Director of Public Prosecutions to seek the approval of the AG in instances where a journalist is to be prosecuted. When it was issued, [weak pronouncements were made](#) that this was a warning to the AFP not to pursue the scribblers of the fourth estate. Porter brandished his credentials as a democrat, arguing that a free press was significant “as a principle of democracy”. Given Porter’s [insistence on prosecuting](#) former ASIS officer Witness K and his lawyer, Bernard Collaery, for exposing a blatant wrong against a friendly country, such credentials can be dismissed as surplus baubles.

Little wonder, then, that the AFP [has now confirmed](#) submitting a brief of evidence to the

Commonwealth Director of Public Prosecutions, acting on the July 11, 2017 referral received from the Chief of the Defence Force and then acting-secretary of defence. Charges are recommended. Oddly enough, the police have decided to single out Oakes and spare Clark. Power, in the absence of restraint, is coldly arbitrary.

The final say on whether such charges will be laid resides with Porter, and we have every reason to be troubled by a discretion that is executive, political and non-judicial. Oakes [sees the higher principle at stake](#). "Whether or not we are ever charged or convicted over our stories, the most important thing is that those who broke our laws and the laws of armed conflict are held to account."

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