

## **The Minister and His Private Office\***

*Jack Waterford*

I should like especially to welcome here today all of my Labor friends; the more welcome, perhaps, for their presence after their brush with that ultimate form of ministerial accountability two months ago. I say this not to disclose any secret sympathies but because it is my experience that the keenest interest in questions about accountability and openness in government is usually displayed by those in opposition, while sometimes those on record, when in opposition, as supporting stringent tests, show rather less interest in the field, once translated to the other side of the Chamber.

About thirteen years ago, I recall that Gareth Evans, who with the late Senator Alan Missen was one of the great fathers of freedom of information legislation, found himself in just such a translation and announced that he proposed immediately to legislate into the Freedom of Information Act those amendments that he had tried unsuccessfully to get into the Act while in opposition. He commented cynically at the time that he knew he would have to move fast before the bureaucrats got at his colleagues. Alas, as he was the first to admit, he was not fast enough.

In the nature of things, indeed, new and inexperienced governments often make mistakes quickly. The difficulty is of the other side quoting one's own words about what the standards are. The media, as a more permanent opposition, usually is embarrassed less and worries less about its own self-contradiction over time, and can look forward with delight, say, to insisting what the real standard is as Senator Alston put it in the Pay Television affair or as Peter Costello did in the Whiteboard affair. In due course, no doubt, we will be thinking that what Senator Bob Collins said, not in his own defence over the Pay Television affair but what he said in attack over some fault of the Howard government, has got the ingredients about right.

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Ministerial responsibility is a wide subject, of continuing interest, not only because of visibly changing standards but also because no limit has yet been found to the categories of ministerial foolishness or ineptitude.

I do not want today to talk about the whole field of it, but about an area of executive administration in which the rules are not yet settled. That area is, of course, the ministerial office, a relatively recent creature of politics. The still most vexed areas of ministerial responsibility involve the minister's vicarious responsibility for what is done in his or her administration. Many of the ground rules were evolved when a minister's private office consisted of not much more than a secretary and some departmental liaison officers, and the questions were about what public servants did and how much the minister could be called to account for failures in administration.

The answers devised to those questions are not necessarily the same when mistakes are made, or contributed to, by an overtly political staff working intimately with the minister and hireable or fireable more or less at the ministerial whim.

Before I go much further, I should perhaps explain a few bits of the terminology I will use. I will try to use properly here two words which are often wrongly used interchangeably in debates about ministerial performance and so avoid at least some of the confusions that Sir Geoffrey Yeend pointed out in a celebrated letter to the *Canberra Times* at the height of the Pay Television affair.<sup>1</sup> The words are 'accountability' and 'responsibility'.

Ministerial **accountability** is the obligation of a minister to give Parliament a truthful account of matters that fall within his or her executive responsibilities. The principle of it has existed for centuries, although we are forever inventing fresh forms and opportunities for ministers, or those who work for them, to be called to give such account. Ministerial **responsibility** is something somewhat different: it is about the extent to which ministers must accept the blame for mistakes which occur in that administration. Strictly, I suppose, it is also about how much credit they can take for successes, but there has never been much problem with that. The ultimate form of that responsibility is, of course, resignation, but there are many sanctions for bad performance which fall short of that.

Strictly, the accountability obligation is to Parliament and the responsibility obligation is to the Prime Minister, at least since Parliament stopped impeaching and beheading those ministers whose performance displeased them. But parliaments are political, and their exercise of their rights to call ministers to account will inevitably be in part focused at finding fault and raising questions about whether performance has been such as to invite sanctions by a Prime Minister against, perhaps, some ultimate threat that a Prime Minister who will not shed bad performers can lose the confidence of one or both Chambers and find it impossible to govern.

I suppose I should also briefly explain my shorthand term 'vicarious liability' since a study I have made of would-be cadet journalists, who might be presumed to be literate, shows that only about one-third of them know the word 'vicarious' at all and about a third of them cannot distinguish between it and 'vivacious'. 'Vicarious' means through another, and a 'vicarious liability' is a responsibility which one must accept for something that has been

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<sup>1</sup> *Canberra Times*, 2 June 1993, p. 12.

done by someone else: say, a company for the bad driving of one of its employees. Sometimes, of course, liability is partly direct and partly vicarious. As ministers have increasingly denied vicarious responsibility, the focus has been on attempting to show a direct responsibility: say, some direct involvement in a decision, some failure to act when aware that things were awry, or some culpable ignorance of facts which were staring one in the face.

In a golden age, some think, a minister of the Crown took absolute responsibility for everything which occurred under his administration, and, if some mistake or malfeasance occurred, then the minister bravely took responsibility for the error, no matter how remote his own personal responsibility was, and submitted his resignation to the Prime Minister. But in that golden age, it is said, the reach of the state into the lives of the community, and the size and level of complexity of executive government, was much smaller than now. One hundred years ago, say, a United Kingdom could maintain the largest navy afloat with a War Office of perhaps forty people, probably gathered in a single building. It was not, it might be said, unreasonable that the person who had been put in overall charge of a department of state should be able to be personally held to account for everything which that department did.

Since this golden age, if ever it existed, much has changed. Government has moved into the social welfare field. It intervenes far more actively in the economy, has acquired a much more centralised role in law and order, and regulates almost every area of human life. Vast armies of bureaucrats are now necessary.

It would be beyond the wit of any mortal to be across the details of each individual piece of administration in which, probably, several million decisions a day are made touching the rights or the property of citizens. Any such decision might be made routinely in an office several thousand kilometres from where the minister works, by a clerk whom the minister would never, in the course of ordinary business, be expected to see.

In law that clerk, in making such a decision, might be acting as some remote delegate of the minister, but it became increasingly difficult to be able to say that the minister ought to resign if the clerk got it wrong. Of course it could be sometimes seen that the clerk got it wrong, not because of some personal misfeasance or incompetence, but because he or she was faithfully carrying out policy which had been handed down by the minister—in which case responsibility might be able to be pushed up the hierarchical ladder, but it was unreasonable to hold that a minister must go for any mistake in routine administration. We develop, thus, a notion of some separation between administration and policy, some allowance for the level of remoteness of the incident in question from the minister, perhaps with some saving caveat that the level of a minister's accountability might increase if there seemed to be some sort of systematic problem in administration of a sort of which the minister was aware or ought, if he or she was halfway competent, to have known about.

On top of the ever expanding and ever more complicated nature of policy and administration has been the development of other regimes of accountability and responsibility which have had some capacity to muddy the waters. In the golden age, whenever it was, the power and duties of the public servant came from delegation from the minister. The public servant was anonymous, and a hierarchy of organisational control was clear.

In part because of the complexity of administration, and difficulties, for the citizen, in securing redress for grievances through political channels, new systems have been devised for calling administrative decision-makers to account and, if necessary, reversing their decisions.

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Some government is performed by bodies having various degrees of statutory independence of the minister. Some matters of departmental organisation or discipline are the legal responsibility of secretaries, not ministers. Many public servants exercise powers that are given to them by virtue of their position, by statute, in situations whereby it is clear that they are personally accountable, and not biddable, for the exercise of any discretions they are given. Administrative law, codes that are written into various statutes, and various organisational systems influence decision-making, hold individuals to account for what they have done and provide various forms of check and balance against maladministration.

The idea that there has been a diminution of public control over the executive because of a narrowing ministerial responsibility—some vacuum which has been created in which **no-one** can be held responsible—is not necessarily true.

In any event, vicarious liability in ministerial responsibility has tended to decline, though accountability has not, while other fields of ministerial responsibility have tended to remain much the same. We still think a minister must resign for failure to account, particularly for wilfully telling a lie. We still think a minister who engages in personal misconduct of a sort raising questions of fitness or suitability for office should go. A minister who is closely and personally involved in a policy or program which turns out to be disastrous, or who allows such a situation to continue when it is obvious, will be invited, at least by the Opposition, to resign.

Some evidence of the changing standards can be seen over a period. Fifteen years ago, an Attorney-General maintained the confidence of his Prime Minister when there had been poor departmental performance in which the minister was not implicated, but any number of management reports of which the minister was aware drew attention to systematic management problems upon which he had not acted. A decade earlier, I think he might have gone.

Three years ago, a minister signed a statutory instrument which he had not really read and which he did not really understand. An outside report—which did not purport to rule in ministerial responsibility issues—thought that the real failure was on the part of the bureaucratic advisers who failed to draw to his attention the significance of a detail; a busy minister, Professor Dennis Pearce thought, could not have been expected to notice a technical detail such as the one involved.<sup>2</sup> Two decades earlier, a minister who had signed correspondence without reading it had been compelled to resign by his Prime Minister.

Be that as it may, I think that there are very good arguments in favour of more relaxed standards, when the issue is vicarious liability for public service action. There probably ought, at the least, to have to be some contributory negligence by the minister. The question is whether one ought to have a similar principle in operation when it comes to ministerial staff and consultants. And my argument is that one should not, or, should there be any attempt to establish such a system, it must be accompanied by protections and a transparency of operation of the minister's office far greater than we now currently have, or, I would suspect, that ministers are yet prepared to allow.

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<sup>2</sup> 'Independent Inquiry into the Circumstances Surrounding the Non-requirement of a Deposit for Satellite Pay-TV Licences, and Related Matters' (Pearce Report), tabled in the Senate, 20 May 1993.

The modern nature of the ministerial office is a development which is somewhat less than two decades old. This is not to say that ministers have not for longer had external sources of political advice, even as a filter of bureaucratic advice, or that ministers did not previously have their own staffs.

From about the time of the advent of the Whitlam government, the size of such staffs has tended to multiply. Their functions have become much more specifically political rather than focused on liaison. They are increasingly evident as an extra political layer of executive decision-making standing above the public administration. They vet departmental submissions and they give their own advice about them to the minister. Indeed, in some cases, all of the advice from the department filters through the political staff, which can put its own gloss upon it.

In some cases and in some offices, they appear to make some decisions themselves, without direct reference to the minister. If they have an implicit authority to do so, it is not always clear, and certainly the basis or limits of their authority are not always known and sometimes not necessarily understood even as between the minister and the staffer. When they have purported to speak on behalf of their minister, there have sometimes been confusions and misunderstandings about whether or not consultation has meant that their minister has been or will be informed.

One might remember, for example, an incident of the Marshall Islands affair where the Department of Foreign Affairs had passed on a cable to its Minister, Senator Gareth Evans, but the private secretary, in his wisdom, decided that it was not important enough to draw to his minister's attention. Later, in the Senate, the minister denied having seen the document—one which his department believed he had seen.

One chapter of the Westlands affair in Great Britain turned upon a discussion—about how a document which might damage Michael Heseltine might most conveniently be leaked to the press—between departmental officials and Margaret Thatcher's ministerial staff. Margaret Thatcher claimed her officials had thought they were being consulted only about the best way of leaking the memorandum, not about whether it should be leaked at all. They had not thought they had been approached to give her authority to the decision to leak, and they did not think they had given it. The departmental officials, on the other hand, told the relevant inquiry that they regarded the purpose of their visit as being to seek agreement to the leak as well as to the method.<sup>3</sup> They had believed they got authority. Mrs Thatcher said later that 'although clearly neither side realised it at the time, there was a genuine difference in understanding as to exactly what was being sought and what was being given'. No doubt we can be thankful that no such misunderstanding could ever arise in Australia.

The increased role of the ministerial office means that there has emerged over time a process by which a great deal of what once might have been called the Cabinet coordination role—of cross-checking Cabinet submissions for wider impacts in different areas of government—has been carried out by cross-consultation between different ministerial offices rather than at departmental level. In some cases, the formal administration is actually excluded from the

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<sup>3</sup> 'Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions', House of Commons, February 1996.

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Cabinet process, departmental submissions forming merely the base metal which ministerial officers turn into gold.

One reason why some modern prime ministers have had large departments with divisions and branches covering almost every field of government activity has been as a check, or at least as a second-guesser, on the idiocies of departments, ministerial staffs and ministers. In some cases as well, ministerial office consultation short-circuits formal Cabinet processes, with decisions emerging from such discussions being promulgated, though not necessarily recorded or communicated in the conventional ways. Indeed, in some cases, the decision is not recorded at all or what has been decided is not clear, at best being decipherable from notes for file in different departments written by public servants to whom the decision, or parts of it, have been informally imparted. Sometimes the presence of departmental liaison officers, who are not really ministerial staff, can keep things in order, but sometimes it does not.

Some offices have chains of command; in some others, everybody seems to be responsible directly to the minister, who himself or herself seems to do the coordination.

In the Howard Government there is now to be a formal political Cabinet office which, whether fully staffed with political appointees or supported by professional public servants, is now probably to be regarded as more a super-ministerial office than a department of state. Such an office can, of course, give stronger political and strategic direction to a government with an agenda, and it can serve some purpose in helping to insulate the civil service from politicisation. Some fancy such offices can serve as political think-tanks. I think that they are structurally incapable of that because that interferes with and inevitably compromises their central role, of managing the information flow at the highest levels of government.

Be that as it may, the fact is that this extra layer, particularly if it works in closely with the ministerial office rather than a bureaucracy, may not be so far subjected to the sorts of checks and balances which are inherent in the public administrative framework. It works in secrecy and it may fail to meet standards of record keeping which the public service would regard as essential. Yet it has certain institutional protections, not least (so far as Cabinet government is concerned) some immunity from the Freedom of Information Act and other administrative and judicial review accountability mechanisms.

In a more traditional public service framework, one might have certain comforts arising from an ultimate confidence in professionalism, but the modern focus on responsiveness, and the nature of the contract society in which they now operate, greatly diminishes confidence in this. We are moving, in short, towards an American system of an overtly political executive administration, but without necessarily having its checks and balances.

I am not to be taken as bemoaning some loss of public service pride of place as the sole or the primary source of policy advice to ministers and the Cabinet. I am confident enough that public service advice can compete in a free market place. Instead, what I am emphasising is the potential for such a system to create an atmosphere in which the public administration is seen primarily as doing the doing, but is left out of the thinking, and is not necessarily intimately familiar with the thinking processes involved in formulating the policies which they must put into practice. When that occurs, many of the modern accountability regimes fail.

The minister may retort that the ministerial staffer is a person dismissible at will and equipped only with the powers that the minister has given. The reason, the minister might say, why such an officer should be incapable of being summonsed to give evidence before a parliamentary committee, or why the Ombudsman or the administrative or judicial review mechanisms should be largely precluded from examining their role, is that they speak only for the ministerial mind, and that the minister himself or herself remains accountable and responsible in all of the old ways for what happens. In this sort of formulation, the staffer is argued to be not much more than an executive assistant or liaison officer, with no independent role. It is to the organ-grinder rather than the monkey that one should look.

This might be true if the routine of government administration was determined by the minister and his advisers—broad policies that were then carried out by the public administration, but modern government is much more complex than that. Government is not merely, for example, about implementing a social security scheme or some code of priority in immigration entry. Many government decisions are completed by executive fiat. Ministers, and their officers, make choices not only about policy options but about the disposition of money, the economy, and foreign relations and defence, about the letting of contracts and the awards of rights, and about relative rights. They exercise discretions and they ration scarce resources.

Many decisions do not need to be promulgated or implemented downwards and are not being accessibly recorded, if at all. It is not always obvious what they have done and, if one does not know, it is much more difficult to ask why.

The decision-taking in a minister's office is not only on the highest matters of state, where the need for some shroud over the process might be arguable, but on hundreds of often mundane matters, affecting individual rights but not the survival of the government or the state, and in many cases, not easily accountable by the forums at which a minister can be called to explain. There is thus the possibility of a major vacuum in accountability and, in its train, in ministerial responsibility.

One may believe that such accountability is essential not only for the ethical administration of a public trust but also for ultimate effectiveness and efficiency. It does not necessarily follow that one must institute mechanisms which hold the political adviser to account or which threaten to directly interfere with his or her confidential and candid relationship with the minister.

It may be possible to find solutions which maintain the fiction that everything done in a minister's office is done by the minister personally, but which nonetheless increase the extent to which the minister can be held to account; to be required rather more routinely to say what and when and how and where and even why. But almost necessarily this involves the minister doing rather more than being at risk of the odd parliamentary question. It may even involve a wholesale extension of administrative and judicial review into the minister's office. It may involve full vicarious ministerial responsibility for what occurs in that office, even if the minister did not know what occurred and possibly even if the minister could not reasonably have been expected to know.

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One might note that the modern nature of a minister's office is rather like the civil service of that fabled golden age: it is small. Indeed, even prime ministerial private offices, which have in recent times been much admired for size, are still smaller than the average British department of state of, say, the 1850s. They may still have a paper flow beyond the physical capacity of the minister to be personally across, but the minister, if competent in the selection of staff, ought to be well able to so organise the office as to be well briefed on the things that matter and confident that there are processes that bring details to notice when they are significant.

The staffs are, of course, personal staff engaged on the minister's whim so that, if there is poor performance or if embarrassing mistakes are made, the minister can choose to take instant action. The officers are subject to no discipline or external review mechanism able to be invoked by a member of the public, apart from direct appeal to the minister. If vicarious responsibility was once the reasonable rule about the whole of a minister's administration, but has collapsed as administration has become impossibly bigger, it might nonetheless be appropriate in the minister's own office.

Yet there is not only an emerging, if still mixed, record of ministers attempting to evade responsibility for what has happened in their offices, but every reason to expect that future ministers, even under new regimes, will ever quote any excuse that has been given before, indeed that they will do so with extra relish if it has been invoked by a minister on the other side.

There are a gallery of cases, some of which ultimately led to resignation, but usually not without a fight. In some of the cases, there were calls for resignation or actual resignations. During the days of the Whitlam government, there were allegations made that a number of ministerial staff had used their positions to further their own private interests. In one case, involving the stepson and electoral secretary of the Treasurer, Jim Cairns, the issue was never quite resolved, since the Minister was sacked on other grounds, though not before the Prime Minister made a statement saying that it was improper for ministerial staff to put themselves, or to allow themselves to be put in a position where they could make a private profit from their position on a minister's staff.

The actual Cairns sacking was over his misleading Parliament over his signing of a letter giving a person authority to negotiate a loan on behalf of the Commonwealth. Cairns said he could not recall signing the letter—indeed he claimed to have a clear recollection of having rejected it. The chaos and the controversy of his personal office may have been a factor in what was, if not an advertent misleading, a colossal incompetence.

This case, incidentally, presents an interesting example of where something done in the minister's office was not known to his department, though it was of major significance and intimately affected its operations. At the time, Gough Whitlam strongly attacked the Treasury, and called it unethical, for seeking legal advice about the import of the letter once it became aware of it.

When Robert Ellicott resigned as Attorney-General in 1977, one of the items in his bill of indictment of the Prime Minister was that the Prime Minister's press officer had briefed a journalist, as it happens me, about a difference of view between Ellicott and the Cabinet. There were calls for the press officer to be sacked, and also for him to be put before a



parliamentary committee for cross-examination about the contents of the briefing, but the Prime Minister, Malcolm Fraser, rejected this and accepted full responsibility for the press officer's actions.

Michael MacKellar and John Moore were forced to resign after an incident involving the bringing into Australia of a television set by MacKellar without the payment of customs duty. The precipitating incident was the submission of an incorrect custom declaration form by a ministerial staffer, probably without reference to him. Moore was forced to resign after he and his staff were argued to have been attempting to cover up the incident after it had been brought to attention by a disgruntled Customs officer. In this case at least, MacKellar accepted full responsibility for what had been done, in his name, by one of his staff, and so, implicitly, did Mr Moore over his own and his own staff's conduct. The record is not so good after that.

Ros Kelly deserves several mentions. Acting on staff advice, she signed a foreword to a piece of departmental propaganda she had not read, and even personally promoted it until it emerged that the publication contained politically embarrassing statements. Whereupon she disclaimed it, blaming the Department, though her personal staff had been involved in the production and the exploitation of it.

The Sports Rorts affair focused on allegations about the dispersal of funds given for developing sporting grounds. After some minimal processing of applications by the Department, the allocations were decided in the Minister's office with very strong evidence that it had been focused on marginal Labor electorates. The system of documenting decisions and the decision-making criteria were stringently criticised by the Auditor-General, who said words that still ring:

Accurate and relevant information explaining the reasons for decisions is the key to effective accountability because it enables the public, and those acting on behalf of the public, to make decisions about the performance of officials.<sup>4</sup>

I might say that I know of no authority for the proposition that ministerial officers, paid for by the taxpayer, are under a lower standard of duty than public servants to record and document decisions, including generally with reference to the facts of the case and the reasons for them. The argument for just such documentation is the greater, not the lesser, for the veil under which they are allowed to operate.

Ms Kelly was ultimately embarrassed into resignation, and her own degree of involvement was such that the question of taking responsibility for staffers did not arise, but there are any number of useful lessons about ministerial offices, their powers and pretensions, and, of course, the documentation issue, coming out of the affair.

It is however, far from clear that the government, which had supported her to the end, accepted the lessons about the need for an accountability process with ministerial decisions of this ilk. And, indeed, pure grace and favour patronage with appointments and grants

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<sup>4</sup> Auditor-General. *Audit Report No. 9, 1993–94. Efficiency Audit, Community Cultural, Recreational and Sporting Facilities Program*, AGPS, Canberra, p. 14.

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distinguished a number of ministerial offices up to the end of the Labor government, often without the faintest pretence of accountability.

One might add that over the same period it was commonly remarked and occasionally reported of several ministers with powers over the ACT before self-government that virtually all decisions were made by staffers, in many cases without reference to the ministers. No occasion arose in which this led to political embarrassment of the minister involved but one obstacle to this happening was the very limited accountability or responsibility focus federal Parliament then had on ACT matters. Decisions which may have been open to question were probably too small beer for Parliament.

In another area, the style of administration of the last Prime Minister's office was freely criticised, particularly over bottlenecking of decisions within it. Mr Keating preferred the oral briefing to the submission and governed more personally or through informal committee than through Cabinet. The liaison role of ministerial officers became more significant, with bureaucrats often entirely frozen out of the information flow. The system was not without complaints, even by staffers in other ministerial offices, that it was not enough to square something through anyone in the Keating office. A deal would stick only with the assent of the principal adviser of the day.

The Pay Television affair has many interesting aspects. The Minister for Transport and Communications, Senator Bob Collins, signed a document he later admitted he had not really read or understood, even though the letter was a significant statutory instrument involving an exercise of a discretion requiring his personally being satisfied of various antecedent facts. He claimed that he and other ministers commonly signed correspondence they had not read. No doubt many do, but why they should be relieved of responsibility for their imprudence is not so clear.

To be fair to him, the fault with the letter, which had been drafted by his Department, was not obvious, and an independent inquiry held, reasonably, that the Department was at fault in not drawing to attention the significance of an omission in it.<sup>5</sup> Yet Bob Collins had political staffers to advise him on policy in the area who had at least some grounding in the base factual issues and who indeed claimed expertise. And just these advisers had been involved in the policy formulation processes.

It had not been a matter of deficient submission finally surfacing in the Minister's office, with an omission that no one could have been expected to notice. Ministerial staff had sat in Departmental committees while facts were being established, while various forms of legal advice were being taken, and had been involved in the process of drawing up the Department's submission to the minister. And they had vetted the submission and recommended to their Minister that he sign it. The matter in question may have been somewhat technical, but it was at the very heart of a very significant and highly controversial area of policy.

The role of ministerial staff was never really analysed in the course of the inquiry conducted by Professor Pearce, and the Minister successfully resisted any attempt to have them questioned. The majority report of the committee which looked at broad issues of ministerial

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<sup>5</sup> Pearce Report, op.cit.

responsibility as a result of the inquiry made some anodyne comments about the role of staffers, which I will quote in full:

The issue of ministerial responsibility includes the matter of a minister's responsibility for staff in his or her private office. The staff in such an office play a vital role, among other things, in advising the minister in his or her conduct of affairs and in representing his or her interests at appropriate forums. Their role is largely a political one and they do not usurp the functions of the relevant department.

Whilst a minister is directly responsible for the employment of personal staff, his or her responsibility for their activities could usefully be compared to that which he or she has for departmental officers. If an action was at the specific direction of the minister or undertaken with the minister's knowledge, the level of culpability would be greater than that applying to an action undertaken without the minister's knowledge. In any event in all cases the minister can be called on by parliament to give an account of his or her conduct.<sup>6</sup>

Senator Collins was assisted in his defence of his conduct by a fairly pragmatic report from a leading administrative lawyer, Professor Dennis Pearce, who put most of the blame on the department. But that report made a number of relevant eyebrow-raising statements. One was that:

The minister signs a large number of documents of different kinds. He cannot be expected to peruse each of these carefully.<sup>7</sup>

That might be a standard which would be fair as applied to, say, the correspondence on my desk, but it seems generous for a person in a high position of public trust.

Another was a reflection that in a perfect world the advisers would have noted the important omission and brought it to the minister's attention. But Professor Pearce acknowledged that the world was not perfect. There were reasons why the mind was not on the ball, but they were not great excuses. Pearce would clearly allow some scope for something falling short of perfection, but it is not yet clear where he would draw the line.

We can be thankful, I suppose, that the current incumbent of this important portfolio, Senator Alston, who wrote a strident dissenting report, would set much more searching standards.<sup>8</sup> He wanted the staff gutted and filleted and then laid to rest on the carcass of the Minister. I look forward to his standards in operation in his administration.

Getting back to Senator Collins, he did not in the event resign, but the embarrassments and humiliations he endured might well be regarded, as Sir Geoffrey Yeend commented in his letter to the *Canberra Times*, as an instance of ministerial responsibility in practice.

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<sup>6</sup> Senate Select Committee on Matters Arising from Pay Television Tendering Processes. *First Report*, p. 16–17. Tabled in the Senate, September 1993.

<sup>7</sup> Pearce Report, op.cit.

<sup>8</sup> Senate Select Committee on Matters Arising from Pay Television Tendering Processes, op.cit.

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It might be noted, however, the public servants were actually held accountable and responsible for their part in the debacle; there was no evidence that the ministerial office suffered, except in esteem.

During the Marshall Islands affair, the Minister for Foreign Affairs, Gareth Evans, denied that a Departmental communication to his office amounted to his being informed of something he denied knowing about. He would not take responsibility for what his staff had done. Possibly, the staff was seeking to protect the Minister from knowledge which might have embarrassed him—a worthy aim, perhaps, but one which might underline the fact that such embarrassment as he was spared was no doubt minor compared with the embarrassment he suffered, and deserved, for having to correct a *Hansard* answer and for the abdication of responsibility that the process involved. No-one could have suggested that the staff failure was a hanging offence for the staffer or for Senator Evans, or that Senator Evans, had he accepted responsibility for the mistake, ought to have resigned, which might have produced a more sensible approach but did not.

The Sandwich Shop affair, the extensive report into which, by Mike Codd, was too little noticed by the commentators since it arrived after Alan Griffiths' demise, and because much of the media was happy to read a not disinterested summary of it prepared by the Prime Minister's office rather than the report itself. It is a catalogue of problems of the ministerial office, including of actual impropriety as well as misjudgment.<sup>9</sup>

A staffer forged the Minister's signature on a return to the electoral office. The Minister said that he did not know and could not have been expected to know although, at law, the obligation was upon the Minister personally to file the return. The same staffer put Mr Griffiths' Sandwich Shop partner on the Minister's electoral office payroll by way of squaring her off over a collapsing business. He also paid her \$5,000 from a highly irregular campaign account, the mere existence of which invites a whole lot of questions which have never been asked, let alone answered.

Mr Codd's findings were sufficiently embarrassing to have taken Alan Griffiths out on vicarious liability grounds had he not already chosen to go. It was one of the modern triumphs of public relations that the Prime Minister could get away with a bland claim that the report had essentially cleared Mr Griffiths. Even so, there were tantalising questions of whether a personal liability might not have arisen as well. Mr Codd, one might note, had no cooperation whatever from the staffer. The staffer who had by then already resigned, had, in criminal proceedings, nobly taken every skerrick of the blame upon himself, and had put various statements of his on the record which were very helpful to his former employer.

Mr Griffiths, of course, answered questions and was amply assisted from public funds to put his case. On the vital points, the inquiry was prepared to accept that he was unaware of what his staffer had done. That did not, of course, exonerate him from a fairly proximate vicarious liability on several grounds, not least that Mr Griffiths had delegated his own personal responsibilities to his staffer.

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<sup>9</sup> Mike Codd, *Report of Inquiry into the Conduct of a Minister*, Department of Prime Minister and Cabinet, Canberra, July 1995.

The situation might have been far more interesting had there been any contest of facts between the two. What particularly distinguishes the case is that each and every action taken by the staffer was done in the Minister's interests and not the staffer's. Accepting that the Minister did not know and would not have approved what had been done—the Minister might well have correctly perceived that the staffer had fatally confused the Minister's short and long term interests—the staffer's improper and illegal acts had been focused at getting the Minister out of an immediate spot. Greater love has no man than that he will break the law to keep you out of trouble.

One need not scoff at the idea that a staffer might do something so irregular in a minister's interests but not burden the minister about the details or even the fact of such an intervention. A culture can be at work. There is always the odd ministerial office in which staffers regard themselves as hard men—they are nearly always men—who are not too squeamish to get in and sort out a problem; are able to keep their mouths shut and are very much focused on keeping the minister out of trouble. I recall one such staffer once lamenting to me: 'I know my job is to put out the minister's bushfires. But why does he have to stand on the back of an open truck flinging out lighted matches?'

Some of the cultures of political toughness involve people being willing to do things in politics—with petty blackmail, traded favours, outright lying, or by the exercise of their powers of reward and punishment—that they would not dream of doing in their personal affairs or relationships. No doubt the work of a minister's office is sufficiently busy that there are things about which a minister could not know or could not reasonably be expected to know. But perhaps the first question ought not to be about ignorance but about interest. A person might misuse a position in a ministerial office for his or her own private benefit in a way that a minister could not possibly be expected to know about. Assuming that the minister discovered it—or had it brought to attention—and responded appropriately, say with a dismissal, one might not be too critical of the minister or necessarily accuse the minister of a cover-up if the affair was sought to be handled with discretion. Or, if one were critical, one might be drawing a longer bow at the minister's controls, selection processes and so on.

But what if the misconduct was intended to benefit the minister? Suppose that even the minister genuinely did not know and genuinely did not approve. The minister who discovers this is not in the position of some ordinary employer considering what to do about somebody responsible for misfeasance. The minister is necessarily implicated and is unlikely to be a good judge in his or her own cause unless the threat of disclosure looms.

This is to say, not that the minister must resign when a staffer abuses that position, but that how one judges the minister will depend on the minister's own response to events, and what has been done to redress any injury which has been done, either to individuals or to the public interest, as a consequence of the misfeasance. That might not have to involve the minister issuing a press release detailing every unfortunate thing which had occurred. But it might reasonably have to involve the disclosure of the irregularity of the Prime Minister and any other minister capable of being drawn into the web of compromise, and some clean breast to parties, including possibly public agencies, whose conduct was affected by the irregularity. All too often, alas, the instinct is to retreat, to cover up, and hope like hell that nothing comes out.

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In such a situation, the fact that a minister had disciplined a staffer would probably never be enough. In the long run, the minister who treats the matter as an accountable one will have less difficulty in getting out of the responsibility mess. Indeed, a clever government might think it well to have some formal and accountable mechanism—a wise but worldly retired judge or senior public servant for instance—as some sort of father-confessor figure on whose discreet mercies a minister might throw himself or herself confident that, if he or she followed advice and did the penance that was meted out, he or she would not be too criticised should things subsequently come out into the open. One might retort that prime ministers are supposed to fill that role; the problem is that the outsider will sometimes worry about how disinterested advice from such a source will be.

At the other end of the spectrum is the case of the staffer's purely advisory role. Let us say that a submission comes up to the Minister from the Department that canvasses various options and makes some recommendations. The staffer reads the submission, perhaps does some research or listens to some lobbies of his or her own initiative, and makes recommendations to the Minister about the appropriate option to adopt. These recommendations, as we know, may well have, for the Minister, the advantage of having political considerations brought into the argument, so that the Minister, in deciding what is best to do, has a more frank assessment of the political advantages and disadvantages of going this way or that.

Let us suppose for the moment that the advice the staffer gives is in writing. There is no issue of impropriety, but, in due course, the decision ultimately taken by the Minister becomes controversial and Senate committees begin asking questions about the decision-making process. Should the advice be surrendered or the adviser be allowed to be called before the committee?

The Minister will say 'no' and his or her argument will be that it was the Minister who ultimately made the decision, who takes responsibility for it and who will answer the questions about the considerations that were operating in his or her own mind at the time. It is not the advice that was relevant, but the arguments that were ultimately adopted by the minister, it will be said. And it will be said that, if any system should develop of exposing the close-in advisory process, it will produce worse, not better, government, because the candour and frankness necessary for such discussions will disappear. A minister will be afraid to canvass the advantages or disadvantages of options since subsequent disclosure of alternatives canvassed might be embarrassing.

The problem is probably accentuated by an Australian system of closed debate in which ministers like to pretend that the logic is wholly in one direction and that any other decision would be madness, and by a media-imposed discipline which tends to punish any signs of ministerial deviance from the official line, even a sign of an open mind.

There is ample scope for commenting that the courts these days are massively unconvinced by candour arguments and that a well-recognised system of putting a veil over what is actually said in Cabinet debate does not yet extend to what is said in the ministerial office. But I am not here so concerned about the accountability question. Here, at least, the Minister is accepting responsibility and what has happened in the example I mentioned is that the Minister has made the decision. Most of the materials that he or she used will have been

accessible and there are ways of getting those materials, or some of them, on the public record.

That sketch of the office role is now rarely so simple. The modern staffer is often far more activist. He or she does not sit passively in the office waiting for submissions to come into the in-tray. Rather, the staffer is in and out of the Department; is an active participant in the discussion processes in the Department which produces the decision and the recommendations; and may, in fact, help shape the submission so that it presented choices which the Minister found palatable. Some of that may have involved the actual giving of directions and the taking of an executive role in decisions along the way.

Modern ministers are not at all embarrassed in proclaiming that they run governments and that they are not secretly run by the public service. Thus the picture of a minister as a sort of a judge, choosing in a detached way, with the help of a few trusted advisers, which of various recommendations should be followed, is no longer real.

If we are to retain an accountability process, let alone a responsibility one, it is going to be much harder to avoid recording the various levels of intervention, whether by the minister or by people purporting to act on his or her behalf. This is the primary field where the rules of responsibility are urgently needed. They depend on rules of accountability which have not been sufficiently modified for current practice.

There is another field that one almost shudders to mention. It goes without saying that the staffer's role is political. No-one has or should have any problem with that, or at least they should not when the political activity is focused on departmental administration or, perhaps, at the higher reaches of government, in opening and maintaining lines of communication between the government and the world.

But what about when the political activity is purely political? It is not unknown for some members of some minister's staff listed as being advisers, private secretaries or press secretaries, or whatever, who have nothing whatever to do with the minister's constitutional responsibilities, but who are engaged full time in organisational party politics. Some are secreted on a minister's staff but only so that it is the public rather than the party which is subsidising the work involved, often not even pretending to work from a minister's office. Others are not so much engaged in the broader party's interests as at work on their minister's or their faction's behalf—stacking branches, running political intelligence services, monitoring trade union elections and so on.

The rot is not confined to one party, so there is some natural tendency to silence within the club. The criticism of journalists about the appropriateness of such appointments is often muted too, in their case because it is often just such people who are their most useful contacts. Of course, the activities of such people may be of somewhat lesser interest because they are not unaccountable cogs in the business of public administration. But their existence does raise legitimate, if fairly conventional, ministerial responsibility questions because of the fraud upon public moneys, sanctioned by their ministers, which their employment involves.

What ought to be the general principles? It would be nice to say that they could be distilled from the cases, but they cannot. It does seem to me that one ought to be able to insist that we need both higher standards of accountability and defined standards of responsibility for what occurs in a minister's office.

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My first principle is that a minister should accept full vicarious liability for everything that is said or done in the minister's name, either to his department or to members of the public, by a member of his or her personal staff, regardless of whether the minister was aware of what was occurring or not. A minister pro-actively seeking to mitigate that responsibility before it has been otherwise disclosed should either publicly draw the problem to attention or should refer the conduct in question to some person of independent judgment and follow the advice received, particularly advice about redressing any damage. A minister caught by surprise by the unauthorised or unintended act of the staffer may escape liability if the record demonstrates that the problem has been dealt with by the undoing of the situation, with frank disclosure to interested parties, and by system changes that will prevent the problem recurring.

Second, even where a minister cannot reasonably be held responsible for an improper or incompetent act by a staffer, the minister should be accountable and capable of being held responsible for the judgment which led to the employment.

Third, a minister can and should be held to account for the way in which his or her office is organised and for the effectiveness and efficiency of the office and should be responsible for failures which occur as a result of the failure of any system. The minister, for example, defines what must go by him or her and what can be dealt with routinely. If staffers choose not to bother to brief him or her, they must bear the consequences if this leads to disaster.

Fourth, the minister's office faces obligations in no way different from the obligation of the ordinary public servant to record significant acts and decisions, including, in cases where adherence to process is significant, records of compliance with requirements and processes. Such record keeping should generally disclose reasons for decisions.

Finally, there should be unfettered access to such records for people such as the Auditor-General, and the activities and effectiveness of ministerial offices should be subject to audit, including audit focused on performance and value for money. Just what public access there ought to be to such records, and whether and to what extent decisions made in a minister's office should be subject to administrative or judicial review, may be a matter for argument. But, certainly, there is no justification for lowering the present standards and ample room for arguing that changes in the style of public administration since the administrative reform regime was implemented justify further extension focused on increasing transparency.

In any event, I think the interplay between accountability and responsibility is the crucial thing. The more the actions of the minister's staff are open to the public gaze and scrutiny, the more justification the minister has for disavowing responsibility for every misfeasance or maladministration. And the converse is true. The present state of play is such that a very high, and possibly on occasions unfair, standard of responsibility should be set, because accountability is low.

**Questioner**—You spoke of the growth of ministerial private offices and the practice of comments being made by ministerial spokesmen of which the minister may not be aware and may not approve. Thirty-eight years ago, I was a minister's private secretary. In those days, we ran a minister's office where the minister had responsibility for two departments, with a staff of four. The Prime Minister of the day had a staff of seven, which later increased to nine.



**Mr Waterford**—They would have been bureaucrats as well.

**Questioner**—Yes. These days I think the previous Prime Minister had thirty-two staff and the present Prime Minister has twenty-eight staff. We frequently see the press reporting statements made by spokespersons for a minister. Would the *Canberra Times* be prepared to strike a blow for ministerial responsibility by declaring that in future it will not report a statement by a spokesperson for a minister unless it has an assurance that the minister knows of the statement being made and approves of it?

**Mr Waterford**—If one wanted to be Machiavellian about it, it might be better actually to record them as statements which one assumes to be those made by the minister. That way one at least lumbers the minister with the responsibility for what occurs. The major problem in this field, however, is not the cited spokesman, it is ‘government sources said’, and so forth, where a large quantity of the information which comes out has been leaked on undertakings that it not be sourced to particular areas or has been leaked by people who are playing some interdepartmental game so as to undermine some minister or promote some other. In this Byzantine sort of world, the role of a ministerial staffer is quite critical, but it is quite often not commented upon by the media because of understandings they have about confidentiality.

**Questioner**—If we could go back in history a little, in 1910 and 1911 my father was secretary to ministers in the Senate when ministers—and there were three of them—had a total staff of one. What is your opinion of the effect on the archives of this country of the use of the shredder—post a defeated government?

**Mr Waterford**—I think it is quite alarming. Before I get to that point, the quality of record-keeping, including that formal record-keeping which is actually essential for the legal purposes of government in ministerial offices, is often very poor. There also tends to be a habit of ministers believing that all of the papers in their offices are their own personally to dispose of. Increasingly, ministers make decisions within their offices which are not passed down for implementation but which have effect immediately the decisions are made—appointments and so forth—and the quality of the record-keeping is often amazingly poor.

The use of the shredder and the habit of ministers of removing and abstracting the official records of the government is much to be deplored. There has not been, in practice, even post Freedom of Information Act—which poses some interesting questions in relation to old ministerial conventions about access to the records of the previous government—a problem with that.

I personally think that we ought to have a much more activist role in looking to and securing those sorts of records. I think that people such as the Auditor-General and some of the people vested with statutory responsibilities under the Archives Act ought to be taking a more activist role in relation to it.

**Questioner**—Do you foresee any developments in the control, legislative or otherwise, of the appointment and role of advisers and other ministerial staff?

**Mr Waterford**—It was only in the past decade that we had any legislation in the field at all, and most of that was employment focused. I think there will be an increasing demand for

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such controls, but I cannot see it immediately upon the horizon. I think the controls are likely to emerge out of the normal processes which occur with encounters with ministerial responsibility, particularly in the Senate where governments lack majorities and in Senate committees, which can be insistent about access to records and so on.

The Senate, in recent times, has fired a few salvos over bows about its right of access to records, standing at the end of the day on its dignity and not insisting on its rights or on a test of them. But I would predict that within the next few years we are going to have some crisis of a senior officer of the government, possibly from the public administration, being required to answer questions that the government does not want that person to answer, and possibly the High Court or some other body being called to adjudicate on it. My own sympathies, in most of the debates we have had so far, are with the Senate's powers.

**Questioner**—You don't appear to make any distinction between the minister's role as the minister and that away from his electorate office. In one of the instances you illustrated in your paper, no distinction was made about matters that happen in the electorate office. What is your opinion in relation to a number of people who have come here from their electorate offices in Queensland, for example, who cannot be in their electorates to keep an eye on what is going on in their electorate offices?

**Mr Waterford**—It is true that in the so-called Sandwich Shop affair the person involved was an electorate officer rather than a ministerial staffer—although I think if anybody practically examined their role they would find that this person played quite a major advisory role to the minister concerned. I suppose, as a general principle, the rules that ought to apply to a minister and his ministerial staff should not be greatly different from those responsibilities that an ordinary Member of Parliament has in relation to the acts of his or her electorate staff.

But normally the sorts of misfeasances which occur in electorate offices are not of a level of public seriousness comparable with the damage or mischief that can be done by the abuse of power in the ministerial office. Of course, rules of accountability are much stronger in relation to the minister, so I do not think there is a great deal of difference between electorate/ministerial offices when it comes to a minister. I think the same general principles ought to apply.

**Questioner**—What is your level of confidence in the security of computer systems here? It is quite easy to shred paper, but access to altering records in computer systems is a worry to me. What is your level of confidence in systems security?

**Mr Waterford**—I am awfully worried about it. We are now developing systems so fast that, even when people are doing the job that they are supposed to do, the records they have created are not necessarily accessible by a later generation. I can describe this happening in my own newspaper. We have had three major processing systems for copy and for turning it into typed print on the page. Every advance that we have made has been a significant one and much welcomed by the people called upon to manipulate it.

Even though we still retain all the magnetic tapes of newspapers published by Federal Capital Press since about 1978, we no longer have the means to access any paper that was printed more than about five years ago. We would have to completely redo it because the computers that we used to do it with no longer exist. That is a major problem in government

departments. It appears that there are some question marks about whether some of the record keeping systems that we were once assured were permanent are in fact permanent: whether the CD—compact disc—for example, will survive more than about five or six years.

We have to take much more pro-active steps to make sure that we are securing these records and that they are accessible. I can say, however, that, while you cannot be confident that the problem is being solved, you can be reasonably sure that archives administrators have been looking very carefully at this question for quite some time and have been expressing their alarm to government about it.

**Questioner**—I am interested in your views on the differences between the American system and the system we have in Australia, and whether Australia is moving more towards the American system but without the checks and balances that the Americans have. I refer here in particular to the role of Oliver North as a personal adviser and the Iran Contra affair.

**Mr Waterford**—There are a couple of differences with the American situation. One might note first that the American system operates within a framework in which it is possible for ministerial officers of the government to have open differences of view with the President or with each other. There can be an active public discussion of policy options or choices without newspapers running headlines such as ‘Cabinet split looms’. I think it would be much healthier if Australian ministers could speak their minds occasionally and canvass options without being necessarily and immediately seen as being disloyal to their colleagues.

At the end of the day, obviously our system of ministerial responsibility and the collective will of Cabinet might require that they fit in with an agreed policy. But it does not seem to me that it requires them to deny that there were other attractive options that were rejected or that perhaps the time might now be right to review the policy and so forth.

The second thing about the American system is that there is a much more active level of interchange between the executive and the legislature. Executive appointments at the political level are reviewable by the American parliamentary system and executive officials are regularly called before Congress, including the Senate, to explain their activities, to account for what they have done. These activities can be sheeted home with a much more personal level of responsibility. Given the size of the American government, it might perhaps be much more reasonable to say that you cannot fix the President with some decision that was made in the Post Office. But in the American system, you can fix the official in the Post Office who made that decision. We still lack some of the mechanisms that can properly hold to account the person who made the wrong decision.

**Questioner**—You will be aware that some years ago, the Cain government had a media unit which handled all press relations for all the ministers. It was known as the ‘Ministry of Truth’. One brave soul working in the gallery in Victoria said that he was not going to accept any information through government media people, that he would go and seek his own information in his own way. He disappeared without trace. I have never heard of him again. On this question of anonymity of government sources and getting to the actual source of information—information that all media seek so eagerly—have you any thoughts on how you would set about avoiding that and establishing more direct, open and named sources of information?

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**Mr Waterford**—I do not think very much of public relations apparatuses as more effective communicators of the news, the facts, or that which we must know. They are often, from the point of view of the journalist, a great nuisance if they are a necessary barrier before you can get any form of access to a public official. In practice, public officials in Australia are reasonably accessible and will answer questions within their responsibilities and do so quite helpfully. It is no longer suggested that they are committing some sort of a breach of the Crimes Act if they do so. One can understand either some sort of instinct on the part of ministers to want to centralise the release of information about what is going on, or the demands of some people for a degree of insulation; that is, an ‘I do not want to be rung up by every Tom, Dick and Harry about it; can you handle it and get it out?’ style of thing.

There is a lot of American journalism of which I do not have a particularly high opinion, but one thing that you notice if you read, say, the *New York Times* or the *Washington Post*, which I think Australian newspapers could do well to emulate, is a far higher degree of attribution to sources. Certainly, 99 per cent of the time, when you say ‘a spokesman’, there is no particular reason for failing to disclose the name of that particular spokesman or spokesperson. As far as government sources are concerned, or various things like that, one must frankly admit there are times that you suspect, when you are reading the contributions made by others—not oneself of course—that the source was a cleaner in the corridor, or something like that, rather than the consequence of some undertaking made that highly confidential information would be disclosed only on condition that the source not be revealed.

I think that editors probably ought to have a rather more searching attitude to protecting confidentiality only when it is necessary. But that said, nonetheless, there will always be times when people will want to say things but not want to have them sheeted too close to home; when politicians will want to float trial balloons or tell you very interesting and scurrilous stories about their colleagues, and sometimes occasionally about their political adversities. There is always going to be a degree of it, but I think that we could be a little less sloppy than we are at the moment.

**Questioner**—I was just wondering about your views on Jeff Kennett refusing to deal with media outlets who write ‘not nice things’ about him? Secondly, what is your view on the *Australian* doctoring the photo of the alleged killer in Tasmania and do you think any of these things might happen in Canberra?

**Mr Waterford**—I will deal with the second bit first. I think what happened with the *Australian* was absolutely appalling. I think that even the editor of the *Australian* would ultimately agree about that. I accept their explanation that the photograph in question was doctored not as a result of a conscious editorial decision, but further down the line. But that invites questions about who is ultimately responsible for what appears and I think that, in ministerial responsibility terms, an editor must accept that sort of responsibility.

Would this happen in Canberra? Well it could, but it is not a problem which was invented on Wednesday with the publication of that photograph. The *Canberra Times*, for example, has something like four pages of written instructions and guidelines about the treatment of photographs, particularly in the modern environment, where it is possible to seamlessly alter things so that you would never know. Back in the olden days of hot metal, if somebody got the white-out out, it was usually fairly obvious to the eye. It no longer is. As it happens, we will be publishing some of those guidelines in the paper tomorrow.

**Questioner**—I just want to point out that if the Hobart *Mercury* had not run the original photo of the alleged killer, we never would have known what the *Australian* had done.

**Mr Waterford**—Yes. I believe, although I do not really know, that there is a secondary question involved about how the photograph came into the possession of the newspaper. I have no particular facts about that, but I understand it may raise ethical issues just as profound.

On the other topic, to what extent can premiers, ministers and whatnot just flatly refuse to deal with those they do not want to deal with? I suppose, much as the fourth estate would have it otherwise, the obligation of a minister to account is to Parliament and you cannot actually hold them down and force them to answer questions. The performances of politicians who refuse to submit themselves to questioning are freely commented upon. They suffer in various ways for it, including in the direct accountability framework of Parliament. One likes to persuade them or bludgeon them otherwise, but at the end of the day you cannot actually make them answer questions from the press. You can insist that they answer questions before the Parliament.