

Political journalists, 'leaks' and Freedom of Information

Helen Ester

Abstract

This paper examines "leaks" from the perspective of political journalists, in particular, those working in the parliamentary round. This work draws on interviews with journalists in 25 of the 33 mainstream bureaux in the Federal Parliamentary Press Gallery. It is based on a view that parliamentary democracy and the parliamentary journalism round share a co-genesis – that mature representative democracies and principles of press freedoms are twin outcomes of the same gestation that binds parliamentary reporters and parliamentarians in a never-ending contest over information. Further, it is argued the health of this interdependent relationship can be seen as a bellwether for the key tradition of transparency in Westminster-derived democracies. The topic of leaks highlights an important aspect of the contemporary state of play in this many-faceted struggle.

Introduction

In the parliamentary round, journalists' efforts to access sources of news and information have always extended beyond the houses of parliament to the less-contained sprawl of the public service. The objects of what are generally described as "leaks" range from documents that would inform the public about issues of significance to them to "whistle-blowing" – the exposure of illegal or criminal activities by governments or their agencies (Bryan, 2005). From a journalistic point of view, the need to protect a source occurs regardless of the lines drawn between the criminality of leaking unauthorised policy information and the sometimes semi-sanctioned act of "whistle-blowing".

In late 2005, leaking to press gallery journalists became a national issue after Gerard McManus and Michael Harvey from the *Herald-Sun* faced up to two years in jail for contempt of court. They were charged during the pre-trial proceedings of a senior public servant accused of breaching Section 70 of the

Political journalists and Freedom of Information, *AJR* 28(1), pp. 157-166 157

Commonwealth Crimes Act 1914 for the “unauthorised communication” of government documents. The case involved a story detailing a Cabinet decision not to increase war veterans’ pension entitlements by a recommended \$500 million. The prosecution called Harvey and McManus as witnesses to identify the “leaker” but, in spite of an offer of indemnity, they refused to do so. Their defence that the journalists’ Code of Ethics required them to protect the identity of confidential sources was not accepted and they were charged with contempt and scheduled for trial in October 2005. It was the first such contempt charge since the 1993 case in which *Sydney Morning Herald* journalist Deborah Cornwall refused to reveal a police source to the NSW Independent Commission Against Corruption. Cornwall was charged, convicted and sentenced to 100 hours’ community service. Other precedents include the 14-day jail sentence served by Joe Budd of Brisbane’s *The Courier-Mail* in 1992 for not identifying a “high-ranking public servant” during a defamation case and the jailing of West Australian journalist Tony Barrass, who endured a seven-day jail sentence for refusing to name a source in 1989 during litigation involving the tax office (Tanner, 2003).

Significance of the McManus and Harvey case

The McManus and Harvey case is significant for the fact the prosecution used mobile phone records of calls made by the accused to McManus in evidence and, even without the journalists’ cooperation, in January 2006 the jury found the public servant guilty. Given a possible maximum of two years’ jail, he received a 12-month good behaviour bond – a criminal conviction and a shattered career seem a heavy price for leaking policy information about pension entitlements. The case also has significance because it tells us much about the intensity of the Government’s anti-leaking campaign that has flourished in the past decade and created a climate of fear in the contested ground between politicians and journalists.

The claim that Harvey and McManus were accidental “collateral damage” carries weight. It is backed by federal secretary of the Media Entertainment Arts and Alliance Chris Warren, who described the charging of McManus and Harvey as “a train wreck that was waiting to happen” and said that the Howard Government “had clearly decided to crack down on leaked information” but failed to foresee “the inevitable consequence of this is that journalists will go to jail” (Warren, 2005). The actions of Attorney-General Phillip Ruddock also suggest a government in damage-control mode. On October 14, 2005, the week the McManus and Harvey trial was scheduled, Ruddock intervened, asking the County Court of Victoria to reconsider and exercise its discretion to dismiss contempt of court charges against the *Herald Sun* journalists. His submission “expressed the Government’s view that imprisonment would not be an appropriate penalty for the journalists” (*Lawyer’s Weekly*, 2005).

Howard's 'leak squad'

The Australian Government has made no secret of its determination to hunt down and prosecute leakers. The secretary of the Prime Minister's department, Peter Shergold, spelt out the seriousness of the Government's intent when he declared in late 2004 that "if some people seem surprised that I have called in the police to deal with leaks, they shouldn't be – I always have and I always will" (Shergold, 2004). An example of the seriousness of the Government's intent was demonstrated by the 2004 Australian Federal Police (AFP) raid on the *National Indigenous Times* in a search for incriminating evidence about the leaker of "unauthorised" information about the future of the Aboriginal and Torres Strait Islander Commission (ATSIC):

Police spent around two hours at the paper's office, and also searched the editor's house and car and removed six documents including a Cabinet submission. (AM, ABC Radio, November 12, 2004)

Both the *Herald Sun* and *National Indigenous Times* cases involve administrative policy matters on topics of direct relevance to each publication's audiences. It is hard to fathom what sort of guidelines could justify a direct assault on the *National Indigenous Times*' editor, but not on the home, car and office of the editor of the *Herald Sun*, or explain why only the *Herald Sun*'s journalists ended up facing contempt of court charges.

Cost and cost-effectiveness do not appear to be a major concern. In a Senate debate in June 2005, Opposition Senator Kim Carr revealed there had been "close to 120 separate references to the Federal Police" for unauthorised disclosures by public servants, and that the Australian Federal Police's (AFP) so-called "leak squad" spent 32,000 staff hours, costing nearly \$200,000 (Carr, 2005). The results are hardly value for money. The AFP told *The Age* newspaper's Michelle Grattan that as of the end of May 2005, from well over 100 referred cases, there were six investigations, and that from June 2000 to June 2005, "eight people were charged, six convicted, and two cases were still on foot". Neither journalists nor public servants can have telephone discussions without permission through a chain of media officers to the Prime Minister's press office. Chief political correspondent in the FFPG *Sun Herald* bureau, Kerry Anne-Walsh, describes this command and control system as "an octopus" that reaches over "the gallery, the parliament and the public sector" (Walsh, 2004). In some cases, it might not be safe to communicate with journalists from non-government or private devices.

In addition, there are legislative proposals to bolster the anti-leak campaign. They are contained in the Public Service Amendment Regulations 2004 (temporarily disallowed in June 2005 before the Government majority was in place). The amendments appear designed to create open-ended catch-all sanc-

tions. For example, the then Minister for State, Senator Eric Abetz, explained the Federal Government had decided against "defining in detail by reference to subject matter, the types of information that should be protected" but to focus "on the consequences ... the disclosure *might* cause" (my emphasis). And should an employee want to get unauthorised policy information out into the public arena, he or she would have what seems like a Hobson's choice of reporting this to their employer, "or indeed to the Public Service Commissioner" (Abetz, 2005).

Degrees of concern

There is a high level of concern about the capacity for a climate of intimidation to undermine principles of open government and robust public discourse. In the landmark Bennett case, Justice Finn warned that unqualified sanctions on public service employees contravened the implied constitutional freedom of political communication (Holland & Prince, 2004). Bennett v President, Human Rights and Equal Opportunity Commission involved a public servant with the Australian Customs Service who, as president of the Customs Employees' Association, made comments in the media about matters such as a single Border Protection Agency. Bennett refused an order to stop talking to the media, even after he was charged under Public Service Regulations and suffered a salary cut and change in duties. When the Human Rights and Equal Opportunity Commission (HREOC) declined to investigate, Bennett went to the Federal Court, where Justice Finn described Reg 7(13) as "draconian", noting that such regulations were designed for a colonial era and were out of place in modern democracies. In Justice Finn's view, Reg 7(13):

... impedes quite unreasonably the possible flow of information to the community – information which, without possibly prejudicing the interests of the Commonwealth, could only serve to enlarge the public's knowledge and understanding of the operation, practices and policies of executive government. (Federal Court of Australia, 2003)

Long-serving press gallery journalist Laurie Oakes of the Nine Network and *The Bulletin* magazine has expressed similar concerns:

Democracy cannot work if journalists only report what governments want them to report. It is the threat of leaks that keeps politicians honest. Well, relatively honest. They are much more reluctant to lie or act improperly if they know they could be found out – that there is a risk some whistleblower will disclose it to the media. A society where government has tight control of the flow of information – that is, control of what the public is allowed to know – is not a democratic society. Leaks, and

whistleblowers, are essential to a proper democratic system.
(Oakes, 2005)

Commonwealth Public Service Commissioner Andrew Podger's parting remarks in August 2005 expressed concern about a downward spiral in the public service-journalist interrelationship:

Communications are at the heart of politics, and the enormous increase in the power of the media has required a sophisticated response by politicians and particularly by those in government. This includes careful control to ensure consistency and to influence the agenda, as well as to present the government and the key politicians in the best possible light. (Podger, 2005)

Controlling the gallery

New media technologies have created new tools for both politicians and journalists in their struggle over the public information agenda. Interviews with Federal Parliamentary Press Gallery journalists in 2003-2004 contained a constant theme about the capacity of new media technologies to generate an avalanche of sources of information, usher in the 24-hour news cycle and escalate pressures on the politician-journalist relationship in two significant ways. One is that they have increased the rate at which news content must be garnered. Given that each news day generates a fixed amount of information, news is now spread more thinly over a greater multiplicity of information platforms. A second is that these technologies encourage and facilitate control mechanisms to "manage" information flows in an increasingly anarchic mediascape. Geoff Kitney, who worked in the Federal Parliamentary Press Gallery for more than 20 years, stated that the "increased efforts by governments to control the political news agenda stem from a fear of the greater danger of not being in control" (Kitney, 2003). Other responses included the following:

The Government is the most controlling I've ever come across. Hawke ran a pretty tight ship and set up the National Media Liaison Service and PM Keating continued it – their job was to get the government's spin throughout the media. But the present Government not only has totally unhelpful press secretaries, they have got people to watch press secretaries to make sure that the same message is being put out by everyone, every minister, every back bencher. (Wright, 2004)

... the Gallery (must) work harder at getting access, getting the confidence of people who aren't part of the Government information control mechanism... to find out what's really going on. (Kitney, 2003)

... Governments (not just the present one) cottoned on to the way you can drown people with information to make it hard to sort out what is real information and what is just rubbish. That's certainly done quite deliberately and strategically. Not all the time, but when we are likely to be distracted by dealing with some big issue ... the more means there are for transmitting information, the more they enjoy using them to try to pull the wool over our eyes. (Middleton, 2003)

Under previous governments you would get briefings by senior staff members who would tell you, off the record information. (Atkins, 2003)

The major issue is lack of access, lack of good useable access, ranging from insufficient press conferences to difficulty getting access to good information from the public service or even ministerial advisers... (Dodson, 2003)

... a (major) issue is deliberate disinformation such as the "children overboard" incident. We have to totally re-examine what officials say to us and put it through a different filter. (Peake, 2003)

Relations between government and media were described by *Age* chief political correspondent Michelle Grattan in her 2005 Deakin lecture as "particularly hard-edged and distrustful". Further, she said, "today the media regard the politicians as quarry to be hunted and government views the media as cattle to be herded" (Grattan, 2005).

Freedom of Information

One consequence of ineffective or non-existent Freedom of Information (FoI) laws is to force political journalists to depend on oral and/or "brown-envelope" leaks. The work of Lidberg and McHoul on Freedom of Information and journalistic content in Western Australia and Sweden indicates the presence of effective, workable FoI laws in Sweden gives "journalistic tools, to a much larger extent than their Western Australian colleagues ... [the Swedish laws] allow them to independently seek and obtain information that can verify or contradict official versions on most levels of society, from politics to the private sector":

The most important conclusion of this study is that it shows the Swedish journalists to be less dependent on what Ericson et al define as the "deviance defining elite" (1987, pp. 345-367). This is illustrated in the study by the WA journalists' greater dependence on oral sources for their information. (Lidberg & McHoul, 2002)

The parliamentary round is in many ways no more demanding than any other journalistic round – police, business, local council, sport and so on all demand high levels of insider knowledge, sources/contacts and trustworthiness. But the stakes are much higher for journalists tracking the genesis of laws that govern the public and private sectors of the nation. It also requires in-depth critical expertise across a number of portfolio areas, and navigation tools for the labyrinth of party politics. If FoI laws are not effective tools for journalists in this round, then it follows there will be high levels of “leak-dependent” journalism.

There is a deep-seated concern among many Federal Parliamentary Press Gallery journalists about the hollowing-out in age and experience in the press gallery. Journalists with more than five years’ experience make frequent reference to a trend toward “event reporting” and away from analysis by younger journalists sent to Canberra for periods of one or two years. Interviewees also refer to the development of a professional culture in the parliamentary round where the gallery is no longer regarded as a peak job, but as a stepping-stone in a career to somewhere else. It’s a process that devalues the traditions of the Fourth Estate, and the reasons for political journalism. Tony Wright, of *The Bulletin*, summed up this common concern thus:

When I first came here in 1989 it was probably the end of that era where journalists would have killed to come to Canberra to report the big picture – to report federal politics. These days there are a small group of people who have been here for a very long time. They have the corporate memory that was once held by quite a lot more people, or a higher proportion of people. This is followed by a slightly smaller group, who have been here as long as I have, or a bit longer – then there is a great gap to the majority of people who come here as young journalists ... They will spend a year or two or even less here and then head off and be replaced. (Wright, 2004)

Conclusion

Policies directed against leaks and whistleblowers and ineffective Freedom of Information laws present a direct challenge to the healthy operation of political journalism. The link between levels of journalistic critical expertise and an informed public has long been highly contested. However, events in recent years illustrate a serious deterioration in the interrelationship between parliamentarians, public servants and press gallery journalists. A major new element is the advent of digital technologies which, when combined with a conservative agenda, move the contest away from transparency and accountability.

References

- Abetz, E. (2005, June 16). Public service amendment regulations 2004. *Senate official Hansard No. 8*, p. 38. Retrieved February 2006 from <http://www.aph.gov.au/hansard/senate/dailys/ds160605.pdf>.
- Atkins, D. (2003). In H. Ester, unpublished transcripts of Federal Parliamentary Press Gallery interviews.
- Australian Senate. (2005). Finance and administration portfolio. *Estimates 15 February 2005 Sections 4.1 and 4.29*. Retrieved September 7, 2005, from http://www.aph.gov.au/senate/committee/fapa_ctte/estimates/reports/2005/add_0405/c04.htm.
- Bryan. (2005, August 29). *Gerard McManus and Michael Harvey*. Retrieved February 2006 from <http://www.ozpolitics.info/blog/?p=182>.
- Carr, K. (2005, June 16). Public service amendment regulations 2004. *Senate official Hansard No. 8*, p. 38. Retrieved February 2006 from <http://www.aph.gov.au/hansard/senate/dailys/ds160605.pdf>.
- Dodson, L. (2003). In H. Ester, unpublished transcripts of Federal Parliamentary Press Gallery interviews.
- Federal Court of Australia. (2003, December). *Bennett v President, Human Rights and Equal Opportunity Commission* [s003]. Federal Court of Australia 1433.
- Grattan, M. (2005a, May). *Gatekeepers and gatecrashers*. Unpublished transcript, 2005 Deakin lecture series.
- Grattan, M. (2005b, August 31). Government crackdown on leaks bad for democracy. *The Age*.
- Holland, I., & Prince, P. (2004). Public servants speaking publicly. *The Bennett case, research note*. Canberra: Federal Parliamentary Library Information and Research Services.
- Kitney, G. (2003). In H. Ester, unpublished transcripts of Federal Parliamentary Press Gallery interviews.
- Lawyer's Weekly*. (2005, November 11). Ruddock goes in to bat for journalists. Retrieved February 2006 from <http://www.lawyersweekly.com.au/articles/86/0C038486.asp?Type=53&Category=853>.
- Lidberg, J. (2005). *Freedom of information, banana republics and the freedom of information index*. Unpublished paper presented to Journalism Education Association conference, Gold Coast, Queensland.
- Lidberg, J., & McHoul, A. (2002). *Freedom of information and journalistic content in Western Australia and Sweden*. Unpublished paper presented to 2002 Public Right to Know (PRK2) conference, Sydney.

Middleton, K. (2003). In H. Ester, unpublished transcripts of Federal Parliamentary Press Gallery interviews.

Oakes, L. (2005, August 29). *Gerard McManus and Michael Harvey*. Network Nine website link filed by Bryan. Retrieved February 2006 from <http://www.ozpolitics.info/blog/?p=182>.

Peake, R. (2003). In H. Ester, unpublished transcripts of Federal Parliamentary Press Gallery interviews.

Podger, A. (2005). FoI and leak link. *New Matilda*. Retrieved November 2005 from <http://www.newmatilda.com/policytoolkit/policydetail.asp?Policy-ID=148> and www.newmatilda.com.

Shergold, P. (2005, August 31). In M. Grattan, Government crackdown on leaks bad for democracy, *The Age*.

Simons, M. (1999). *Fit to print – inside the Canberra press gallery*. Sydney: UNSW Press.

Tanner, S. (2003). *Report No. 7, 36th Parliament 2003, Appendix Eight*. Paper delivered by S. Tanner (pp. 53-62). Report of the National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies 2003. Retrieved February 2006 from <http://parliament.wa.gov.au/web/newweb-parl.nsf/iframewebpages/Committees+-+Reports>.

Tiffen, R. (2004, October 21). The media: under (spin) doctors' orders. *Australia Policy Online*. Retrieved August 2005 from <http://www.apo.org.au/>.

Van Onselen, P. (2005, January 23). Keeping track of voters. Interview by Terry Lane, *The national interest*. Sydney: Australian Broadcasting Corporation. Retrieved May 2005 from <http://www.abc.net.au/rn/talks/natint/about.htm>.

Van Onselen, P., & Errington, W. (2004). *Voter tracking software: the dark side of technology and democracy*. Paper prepared for Australian Electronic Governance Conference. Melbourne: Centre for Public Policy, University of Melbourne.

Walshe, K. A. (2004). In H. Ester, unpublished transcripts of Federal Parliamentary Press Gallery interviews.

Warren, C. (August 25, 2005). Cited in C. Merritt, Jail the price for keeping a pledge, *The Australian*, Media. Retrieved August 2005 from <http://www.theaustralian.news.com.au/printpage/0,5942,16373319,00.html>.

Waters, N. (1999). *Print media use of freedom of information laws in Australia*. Australian Centre for Independent Journalism. University of Technology Sydney.

Wright, T. (2004). In H. Ester, unpublished transcripts of Federal Parliamentary Press Gallery interviews.

Author

Helen Ester is a lecturer in journalism at Central Queensland University, Rockhampton. An earlier version of this paper was presented to the Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies Conference in Sydney in February 2006.