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DEFAMATION AND PRIVILEGE

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Mr DICKIE: I thank you for the invitation to speak tonight on the topics of defamation and privilege. When you get an invitation to speak anywhere, the first thing to cross your mind is "Why me?". In this instance, I thought it might have something to do with the 20-something writs for defamation lobbed at me over the years. I guess, by necessity, I have acquired some expertise in defamation—the sort of expertise which runs more to how to get away with committing defamation than how to avoid it. But privilege? My personal experiences of parliamentary privilege are basically of being abused under it, or of having some amenable politician abuse it on my behalf. I have also had the useful experience of confronting a hostile parliamentary committee.

To take a slightly broader view, unlike our parliamentary colleagues, doctors, lawyers or priests, journalists have no statutory protections of privilege. This lends a certain inevitability to any parliamentary or legal proceedings involving journalists. The interrogator is inevitably armed with long lists of questions which the journalist, ethically, cannot answer. The interrogator asks the questions, the journalist refuses to answer and is thereby in contempt of the proceedings and can be dealt with accordingly. In my case, I am glad to say that persons of the ilk of Tony Fitzgerald QC and Judge McGuire decided that the public interest would not be served by having me languish indefinitely in gaol.

A Mr Ken Davies, formerly of this House, was at one stage anxious to demonstrate that his privileges extended to requiring my presence before him on any terms that his committee felt like, while my privileges did not extend to having any knowledge of what I was to be asked about or what material was to be relied upon during the cross-examination, let alone having the right to legal representation. I responded by placing myself in deliberate and repeated contempt of the committee. Mr Davies could have commenced moves to send me away to languish indefinitely, but his most severe admonishment was to order me to, "Resume your seat and leave the room." I tried to carry the seat out, but it was a bit on the heavy side.

On a more positive side, on occasion I have been able to inveigle a politician to say something in Parliament which, when used in an article, reduced my risk of being successfully sued for defamation. It has also been possible to get a parliamentarian to ask a question and get an answer in circumstances where a direct question from me would have been ignored or quite differently answered.

I could, I suppose, stand here as a representative of the media interest. I could say something like, "Politicians should be free to say whatever they want and the media should be totally free to report it, unless it is abusing the media in which case we simply will not report it. Furthermore, all the laws of defamation could be totally repealed and journalists should have absolute protection from ever having to reveal their sources, even if they have no sources."

I would prefer to look at the issue from the perspective of the public interest, which is where the media stands when it is pursuing its highest, rather than its lowest, purpose. From a public interest viewpoint, privilege means exactly what it says. Historically, those who rule or those who have special powers of life, death, liberty or even salvation have gathered certain privileges unto themselves that are unavailable to others. Indeed, there is a whole class of privileges which was intended, from times long ago, to protect the privileged from undue scrutiny or examination. The laws of libel fall quite definitely into that category.

We should be holding this function in the other building, because there, amongst the wood panelling and the brass, you would have a sense of the hallowed traditions that underlie what we are really talking about tonight. I am not saying that all special privileges for all occupational groups are totally unjustified; I am saying that we should perhaps be a bit more aware of where they come from, and a bit more ready to examine how relevant they are to the modern world.

Most of you are probably aware of a cartoon strip, the Wizard of Id. There is a long-running gag in that cartoon strip where the king visits cruel and unusual punishment on any citizen who says that the king is a fink. The gag, of course, is that the king is a fink and everyone knows it; you are just not allowed to say it. From ancient times, rulers have preserved precisely similar rights to protect themselves from criticism or, sometimes more pertinently, ridicule. It has not been uncommon that the prohibition on pointing out that the king is a fink has been formalised in one sense or another. In this temple to the Westminster system, I should draw your attention to something called the Westminster statute of 1275, which had a provision called the Scandalum Magnatum. Forgive my pronunciation, my Latin is not that good, but I think that is how it goes. It sets out the offence of publishing false news or scandal about the king. Offenders

were to be locked up until they produced the originators of the tale, who would, one suspects, be dealt with in a more terminal manner. Although the law purported to deal with only false allegations, the truth—some assertion that the king habitually behaved in a fink like manner, for instance—was no defence.

In the early Middle Ages, defamation must have been a fairly labour-intensive process. You had to find yourself an amenable monk, bribe him to write "The king is a fink" 50 times on pieces of parchment or scraps of leather, and then go out and distribute them yourself. It must have been of some concern, because in 1559 "Good Queen Bess" gave justices of the peace the power to remove the ears of those who uttered seditious words and the right hands of those who wrote them down. In those days, the profession of journalism was probably carried out in absolute silence and only by left-handed persons. The imagery is fairly enticing, but it is a little misleading. In those days, the profession of journalism was awaiting advances in technology—in this case, the invention of the printing press. Technologies took a long time to disseminate, which meant that they tended to remake society slowly over a couple of centuries or so, rather than overnight as new technologies do now.

Serious Parliaments originate from the same period, and it is probably no coincidence. In the seventeenth century, Parliament was experimenting with beheading monarchs as a way of curbing the excesses of Executive Government. A Mr Guy Fawkes was exploring whether a censure motion could be successfully advanced with the strategic application of gun powder. The printing press, by contrast, was fairly easy to deal with. Unlicensed use of printing presses was simply defined as statutory treason. The printing of anything much other than bibles being fairly uncommon at the time, there was not a great deal of need for special laws to prohibit defamation. However, the licensing system came under strain when there were too many printing presses churning out too many pamphlets requiring licensing. Some of the pamphleteering at least bordered on sedition. John Milton, who later became much better known as a poet, for instance, published himself in criticism of the licensing laws. This may or may not have had a bearing on the Dutchman, William of Orange, letting the law lapse when he became King of England.

The revoking of those laws allowed a new institution, the daily newspaper, to develop in the first decade of the eighteenth century. Having abandoned overt censorship, the trade of authority resorted to less obvious forms of censorship. It might surprise you to know that, in those days, parliamentary privilege extended to cover the privilege of not being reported. Reporting proceedings of Parliament was a criminal offence until 1771, and that was only because the ban on it was fairly vigorously enforced to that date. This was a fairly ludicrous situation and it only came to an end after a member of Parliament, John Wilkes, who was actually also a newspaper proprietor, was charged. There was a monumental clash of privileges: whether his privilege as a parliamentarian not to be arrested in the course of his duties conflicted with the obligation to arrest him as a newspaper proprietor.

As an aside, we seem to have come full circle. First, the institution of Parliament acquired real power, enough to behead kings, but it was illegal to report it. Then there was a golden age when newspapers resembled Hansards, with almost entire parliamentary debates running down the front page. Now, Parliament has thrown itself wide open to the media; you can take cameras virtually anywhere you like and no-one is much interested. The debates themselves are not reported. The cameras sit there for question time and that is about the majority of what they are after.

This is one example of censorship by secrecy—the public is either totally insulated from significant knowledge or laws make it impermissible to tell them. Other techniques also kept newspapers in line in those days—the techniques of bribery of newspaper proprietors, or ruinous taxation when bribery was not effective enough against newspaper proprietors. There was a suggestion then, too, that coffee be banned, not so much because coffee was a dangerous drug but because those who congregated to drink coffee also congregated to read newspapers. If all else failed, there were those libel laws that effectively defined as sedition any adverse comment on any public figure, any law or any institution. The Lord Chief Justice of the time, Sir John Holt, ruled that the content of newspapers should consist virtually only of unalloyed praise of the Government. I know members of the Government might like that idea, but it would make for very, very dull newspapers at the very least. This, it should be remembered, was happening in a day when the country really did have the best Government that money could buy. You bought your seat in Parliament precisely so that you could sell your vote on each and every Bill that came along.

Following the letter of the law, as I said, would have made for terminally dull newspapers and it would have allowed corruption to continue indefinitely. Fortunately, there are always a few countervailing tendencies where corruption is concerned. One is that corrupt Governments are terminally inefficient Governments and terminally incompetent Governments. The British Governments of the eighteenth century were so corrupt and so incompetent that they lost America. They are probably only surpassed for incompetence by the French Governments, which lost their heads.

An Audience Member: And Canada.

Mr DICKIE: And Canada, that is right. Secondly, some of the journalists of the day did do the right thing: they kept up the pressure on the corrupt until something gave way. They were nothing if not creative. For example, Samuel Johnson was employed for a time as a rewrite man, writing fictional debates from the Senate of Lilliput, of all places. He gave up the job, apparently, when he discovered his efforts were giving some of the real members of Parliament a good name, accrediting them with parliamentary debating talents that they did not have. Wilkes discovered how draconian the laws could be. He got away with reporting parliamentary proceedings, but he went down for nearly two years on seditious libel.

Ironically, it was in America that they first pioneered the principle that an allegation that was true was not necessarily an automatic libel. That was obviously a great advance. It was not followed up with any similar advance in the United Kingdom until 1792, when judges were removed from their privileged position of deciding defamation cases alone, in which case they tended to act almost solely as the agents of the Government. They were forced to accept that juries would effectively be able to determine at least some of the questions of guilt or innocence.

I suggest that we have not advanced as far from the eighteenth century as we would sometimes like to think we have. I will speak briefly on the media, because in my experience we tend to get most questions about the media. I think the media has faults in that we are the slaves of our technologies and we do not perceive how the world viewed through a television camera lens, for instance, is a different world to what is out there. In a related way, I think the media has participated in a massive trivialisation of all serious political discourse. I am sure that in Paul's classroom at the University of Queensland, serious political discourse still goes on. My complaint is that not much of it goes on in this building.

For its part, Parliament has been far too precious about some of its privileges and insufficiently precious about others. "Captain Ken and his Kangaroo Court", for instance, otherwise known as the Parliamentary Criminal Justice Committee, effectively spent a week making inquiries into a document of outstanding triviality and unimportance to anything and anyone. However, at the time that was happening, the Goss Government was pioneering an entirely new legislative technique—bringing the legislation to Parliament, sending out the press releases, receiving the accolades for taking the tough decisions and then neglecting to have any of the contentious bits of Bills proclaimed. When you look at what the Parliamentary Committee was concerning itself with and how the Government was treating Parliament, which is the greater contempt? I am not suggesting that Parliament should go back to beheading as an appropriate response to the excesses of Executive Government; I am suggesting that Parliament is in much more danger of being treated with contempt by princes, premiers and prime ministers than it ever will be from the disrespectful scribblings of a few reptiles of the press. Thank you.

Dr REYNOLDS: That was from Phil Dickie not only a very good exposition of the craft that has involved him but also an insightful twist as to where he thinks it should be going. There should be more journalists in Queensland, and even in Australia, like Phil Dickie.

Anne Lynch is the Deputy Clerk of the Senate. Although the initial invitation was extended to the Clerk of the Senate, she is here in her own right. I would not want people to believe that Anne is appearing in any way as a proxy for the Clerk. She is a woman who has achieved and she has a story to tell in terms of the Senate and the way in which the Senate has advanced its position in the constitutional framework over the last 20 to 30 years. Anne, may I welcome you to the podium.

Ms LYNCH: Thank you very much for the welcome to the stranger in your midst. On behalf of Harry, I apologise to everyone that he could not attend. He was very anxious to speak in this forum on this particular topic. Paul is quite right: I am here with my own particular views on things and my own particular barrow to push. Phil has very happily led me into my two loves. One is the question of a media blockade. I think that there is quite a problem, which he well and truly touched on, about the triviality not merely of the proceedings but of the reporting of those

proceedings. The proceedings that he mentioned were there to be reported. In fact, I am delighted to acknowledge the presence tonight of Dr Michael Macklin, who was singularly responsible for ensuring that the Senate and the Commonwealth of Australia Parliament do not have the difficulty to which you referred about proclamations of Acts. What Phil rightly identified as the problem for the Parliament caused by the Executive has been assuaged in the Commonwealth Parliament by dint of a Senator picking up an idea and running with it. So the problem was solved legislatively. But I would have to say that I have never seen any headlines about it. Occasionally, a journalist will discover this great new thing that proclamations of Acts can extend the Executive power indefinitely, but suddenly, it disappears again. I think that the media blockade of parliamentary reporting is one reason why the Parliaments are held in such disdain.

In fact, Parliaments do quite a lot. May I suggest that Parliaments, and generally the Senate in particular, have given some pathway for others to follow. That is a nice way of turning to my address tonight. Defamation and parliamentary privilege has been one of the bete noires of existence. I suggest that one of the myths associated with parliamentary privilege, and perpetrated as much by the media as anyone else, is that parliamentary privilege enables to exist a coward's castle from which there is no redress. Of course, I am the first to acknowledge that parliamentary abuse occurs; it would be quite ridiculous of me not to. But I suggest that the idea that parliamentary privilege is there to get an innocent person or to deluge a person with personal abuse is actually not as common as one would think. In any case, the basic abuses of each other that occur are to the individual combatants who have the same forum in which to respond to any accusations made.

In any case, for those who have had difficulty with the parliamentary abuse of themselves as individuals, or their actions as citizens, the best way to overcome that difficulty is to enable those people to address the same forum in which the Senator or member actually made the comments. That is what the Senate has adopted, and has done so since 1988. At the time the proposal was adopted, the Joint Select Committee on Parliamentary Privilege had great concerns about the coward's castle. I think that it is fair to comment that, in the late '70s and early '80s, there was quite a lot of individual abuse going on. I also think that it is fair comment that there was a sense of helplessness in the community. This is where the media had a very constructive role. It was saying, "This is not fair. It is not appropriate that someone can say something in a forum and it cannot be answered by the person concerned."

As a result, for the first time in any parliamentary system in the world, the select committee of privileges, and of which Dr Macklin again was an active member, recommended that a right of reply should be given to persons who had been named. The Department of the Senate actually put up a submission suggesting a form in which the right of reply could be exercised. That is, in fact, the process that is now followed in the Senate. I am delighted to acknowledge that it is now available through the Queensland Parliament, the New Zealand Parliament in a modified form, and also in the ACT Legislature. It is like a stone being dropped in a pond—it is gradually spilling out.

It enables the person to write to the President of the Senate, who refers the person's proposed response to the Committee of Privileges, which is concerned to allow a response. It is an automatic assumption when a matter reaches the Committee of Privileges that the person should be permitted a response. It would be under only the most extraordinary circumstances that the person would not be permitted a response. So far, in the 22 cases that we have reported to the Senate, the committee has never knocked back a right of reply. Some people have not chosen to go ahead with it but that has not been from the committee's doing; it has always been that the person has withdrawn for one reason for another.

The committee is concerned not to censor. The committee's rule of thumb is that it permits the person to say at least as much as a Senator can say about another Senator without transgressing the Senate's own rules. In other words, if a Senator cannot call another Senator a lying thief, nor can the person who is making the response.

Dr Reynolds interjected.

Ms LYNCH: Perhaps so, but then you have to prove it and therein lies the problem. In fact, that leads me to the most important feature of the whole process: the question of truth does not enter into it. The whole purpose of the right of reply to procedure is to permit the person to have the same opportunity and the same forum in which to place his or her side of the story on the record. As a matter of fact, I think that is where I would like to head in defamation law. If a person claims that he or she is destroyed in reputation or has had no opportunity to place his or

her side of the story in the same forum, surely that is the damage; it is not the financial bonus that might be gained from taking defamation action. If a person is concerned about having the side of the story told in the same medium, I suggest that the laws of defamation might well be modified to enable that to happen.

At the moment, the laws can put something down for years ahead and people spend half their time trying to work out who was right and who was wrong. As most of us know, it is very difficult to establish absolute truth in any forum. If the purpose is to allow a response, surely any reform of defamation law should be about actually reforming it so that the forum is available to the person without judgment as to right or wrong. Surely, it is for a reader of a newspaper, or a viewer of a television screen to say, "I have heard reporter X or spokesperson Y say this about a person. This person has responded in this way", and allow the individual to make the judgment as to who may or may not be right or wrong. I have a sneaking and cynical feeling that, if this approach were taken, the number of defamation proceedings would diminish quickly. I suspect that that would put an awful lot of people out of work but, in those circumstances, that would not be bad thing.

Mr Morris: Speak for yourself.

Ms LYNCH: Point made beautifully. I was not going to be terribly blatant about it, but there you go. I say, too, that sometimes it is the media as much as anyone else who likes the protection of defamation law. If someone wants to be lazy or, more particularly, does not want to have some certain nasty things turn out, it is always very easy to use the defamation law as a shield against publication—"We dare not follow up this story because if we do the defamation laws will be upon us." Therefore, I think that it is quite difficult to imagine that my idealistic law-change proposal is likely to come about.

I note that there is a proposal being put forward in New South Wales about the right of reply. I think it has probably caught the worst of both worlds, because the only way you get redress is to prove that you were actually defamed; whereas my point is: let us leave aside truth for the moment, let us concentrate on what this whole question of defamation is all about. It is to give a person a right to respond to comments made in the same forum and with the same prominence as the original comments were made.

I would actually like to suggest that our process is more conspicuous for the person concerned than often the original comments. Quite frequently, Senators have made a plea on behalf of some of their constituents in the Adjournment debate and the person concerned, who has been affected by their comments, has come to the Committee of Privileges. They have a report to show for it; they have an incorporation in *Hansard*. In fact, there is probably a greater prominence in that forum. Of course, the problem with all of these things is that no free Parliament can make a free press report the response. Often, the allegation is reported but the response never is. Unfortunately, that is a problem but it is not the problem of the Parliament. It is not the problem of the Senate not doing the right thing, it is the problem of the dissemination of the Senate's action. As I said, there is nothing that the Senate can do about that.

Having declared what I think might be the most appropriate method of solving this ultimate problem of crushing defamation laws and lack of right of redress, I was quite obviously pleased to discover that a High Court judge in England shares my views. The litigant concerned was one of the most prominent litigants in England. According to the *Times*, over the years he had amassed a fortune from going to court to protect his name both as a parliamentary backbencher and also as an expert on the British intelligence service.

Dr Reynolds: What is his name? Where can we get his address?

Ms LYNCH: I do not think you will want to get his address when you hear what happened. I am just astonished at this outcome. The wise judge—note my deliberate adjective—ruled that the story complained of had been false, had been published with malice, but concluded that the action must fail because the member of Parliament concerned had failed to show that he had suffered financial damage. The judge was satisfied that any claim arising out of publication had been settled in full by an apology and correction in the newspaper concerned. There was a lovely little twist to this. The member found himself up for 250,000 pounds worth of court costs, which almost precisely mirrored, with a bit of interest added, I think, the damages that he got from the same newspaper some years earlier. So I am delighted to discover that, at least in England, the judiciary is taking the lead. But I really do worry that if someone from that arena does not take the running on it, there is very little chance of the laws being changed. As I said

earlier—and as was reinforced by Mr Morris—I have to say that there are too many people who are interested in retaining the present system.

The second and very brief part of my address concerns a problem that again would be at least in part solved if the course of action I am putting forward tonight were adopted, and that is the proper balancing between the rights of the citizen at law versus the rights of Parliament. At present, the Committee of Privileges, of which I am secretary, is grappling with a very difficult issue. Clearly, I cannot comment on the specific case before the committee, but the committee is trying to determine what to do with the capacity of a person to threaten legal action to a person who has provided information to a member of Parliament for use in proceedings of the Parliament. Clearly, the provision of information is the lifeblood of the operations of a member of Parliament, as it is the lifeblood of the operations of a journalist. If the member of Parliament's privilege can be attenuated by getting at or to the informant rather than the member himself or herself, there is a real problem involved in where the extension of privilege should lie. As I said, that is something that the committee is grappling with at the moment and, quite clearly, I cannot go into the particulars that have led it to consider this.

Also, is it fair that a person should be deprived of a right of action if the information is malicious, badly intended or whatever? My answer to that particular element of it is that the Parliament itself has the processes whereby the giving of any false evidence can be itself punished and there is a sanction. What I am concerned about is twofold: if, for example, the person is disclosed only by the publication of that person's information in Parliament, clearly that person has a defence of privilege. But in order to put that defence into a court system, the person has a couple of thousands of dollars at least of very basic expenses, if he is lucky. Furthermore, if the person can be sued because the knowledge of his provision of information has come to the person seeking action by another method but it has been used in the Parliament, the person is still up for an awful lot of initial costs and may not be able to claim the privilege that there may be an entitlement to claim.

As I said, whatever the outcome of all of this, I think the problem would be solved if costly defamation actions and punishments for those actions were diminished. In the meantime this is a problem that a Committee of Privileges has to really grapple with in order to protect the information given to the Parliament in order for the Parliament to perform its functions. As I said, I just have to touch on that for the moment because I cannot divulge the detail of it, but it is something that I would be happy to report on at some future time.

Finally, I just mention in passing a question with which our minds are grappling at the moment, or primarily the mind of the Clerk of the Senate, who is going to write an analysis of the matter, and that is whether parliamentary privilege may be constitutionally invalid in that it impinges on the implied constitutional right to freedom of speech as expounded in the political disclosures. For my part, I have no expertise in that element of the law but I find that there is some incongruity in suggesting that the privilege that actually does give rise to the greatest freedom of speech that we have in this country should be impugned or challenge in that way. As I said, I touch on that, but I also foreshadow that Harry Evans is writing an analysis on this subject, which I for one would assuredly welcome. Thank you very much for your attention.

Dr REYNOLDS: There are two reasons to thank Anne: firstly, she was prepared to stand in for Harry Evans; and, secondly, she gave us a most informative and intellectually challenging address. Her last point, that is that the High Court of Australia has unilaterally decided that there may well be those types of issues in respect of the Constitution that she has identified, is something which will occupy us for quite some time. I am conscious of saying that in the presence of David Solomon. Anne, thank you so much for a very provocative, important and landmark speech.

It now falls to me to ask Tony Morris, QC, if he would be so kind as to address us from a legal perspective. We have had a journalist's and a parliamentary officer's perspective; Tony, if you would be so kind as to address us on a legal perspective, I think we will have closed the circle.

Mr MORRIS: Thank you, Mr President. Mr Speaker, honourable members of the House, officers of the parliamentary service, distinguished guests, ladies and gentlemen: when I was recently contacted by telephone to speak on this occasion, I can tell you that I felt rather like the young barrister who once received a telephone call from the senior partner in one of the city's largest legal firms. "I know we haven't briefed you before", said the solicitor, "but we were wondering whether you could assist us with a very important case which has been set down for