AUSTRALASIAN STUDY OF PARLIAMENT GROUP (Queensland Chapter)

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

next Monday week. You come very highly recommended. We have explained to our client that we feel that he should be represented by someone young and enthusiastic who will put in a lot of work and research the case thoroughly. We are very anxious to brief you on this one." The young barrister checks his diary and responds, "Look, I would be very pleased to help you, but I am afraid I have already made a commitment for that day." "Oh damn", or words to that effect, says the solicitor, "Do you happen to know any other barrister who is available that day? I have spent the whole morning on the phone trying to find someone to take this wretched case and, quite frankly, I'm down to scraping the bottom of the barrel."

Ladies and gentlemen, in the time available this evening, I had intended to focus on the question of liability and defamation for the republication outside Parliament of statements made under parliamentary privilege. But before moving to that subject, it has been suggested to me—and I think it's a very valuable suggestion—that I should touch briefly on the topic which Anne Lynch also mentioned towards the end of her speech. I refer to the notion that parliamentary privilege is under threat because it infringes the guaranteed freedom of communication which the High Court of Australia discovered—or as some might say "invented"—in the well-known cases of Nationwide News, Australian Capital Television and Theophanous. Whilst I understand that this question has been argued and is likely to be the subject of possibly a definitive judicial decision in the near future, I am quite willing to put my cards on the table here and now and say that I regard it as extremely unlikely that the courts will countenance any attempt to whittle down parliamentary privilege by reference to the implied constitutional freedom of communication.

I say that in substance for four reasons. First, the High Court, as presently constituted, is already showing signs that it repents the decisions which established this implied freedom. I refer to the High Court's most recent pronouncement on this subject, the decision in Langer v. The Commonwealth. I am always reluctant to say "most recent" with David Solomon present, because he is going to say, "No, there was another one handed down yesterday." And I see him nodding. In any event, the High Court's decision in Langer v. The Commonwealth, handed down as long ago as 20 February, might fairly be characterised as a solemn judicial exercise in backpedalling. I don't necessarily suggest that the court will resile ultimately from the decisions in Nationwide News, Australian Capital Television and Theophanous and the other cases which have applied directly the principle which emerges from that decision, but in my humble and respectful view, it is unlikely that, at least in the foreseeable future, the High Court will be anxious to extend the boundaries of that principle any further.

The second reason for which I doubt that the courts will interfere with parliamentary privilege is that, in my view, it's difficult to see how it can sensibly be maintained that parliamentary privilege inhibits rather than encourages freedom of communication. It is true that Article 9 of the Bill of Rights of 1689 provides that—and I am sure you are all familiar with the words—the "freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament". It is also true, as Phil Dickie mentioned, that there was a time when it was believed that parliamentary privilege extended to the privilege of being able to operate in complete secrecy. But at least in modern times it is never suggested that Article 9 prevents free public discussion of matters which have been raised in Parliament. No doubt when Article 9 was drafted and referred to "any court or place out of Parliament", the draftsmen—and I assume they were men in those cases so I can use language which isn't gender neutral—didn't contemplate that the words "place out of Parliament" might include the *7.30 Report*, *A Current Affair* or *60 Minutes*, places in which speeches, debates and proceedings in Parliament are regularly impeached and questioned.

In my view, there is a very fundamental argument that parliamentary privilege promotes rather than inhibits freedom of communication. Indeed, the very reason why members of Parliament are immune from liability and defamation in respect of parliamentary speeches and debates is to ensure that they have the opportunity to raise matters of genuine public interest and concern without the fear that they might be brought personally to account for what they say within the Chamber. Of course, as the Speaker of the Queensland Legislative Assembly, and patron of this organisation, Mr Turner, remarked to me just a few hours ago when we coincidentally met in the dining room, that privilege carries with it a huge responsibility. There is a responsibility on the part of members to ensure that they do not use the privilege which has been given to them to promote the public interest merely to bucket their political opponents or others. But the bottom line, I suggest to you, is that parliamentary privilege exists to facilitate freedom of communication by ensuring that the people's elected representatives in the Parliament are able

to communicate the views, aspirations and concerns of their electorate to which they are responsible without fear or favour.

The third reason why I don't anticipate any judicial whittling down of parliamentary privilege is that, even if it could be regarded as somehow restricting freedom of communication, the decision in cases such as Nationwide News, Australian Capital Television and Theophanous make it clear that the constitutionally implied freedom of communication is not unlimited. There are very many instances where the public interest plainly requires that there be some qualification on freedom of communication. I am sure that you will be able to think of many more examples than I am about to mention. For example, I refer to the censorship of pornography, especially extreme forms of pornography, such as paedophilia. We can talk about laws relating to fraudulent or misleading and deceptive conduct in the context of business transactions. We can talk about laws dealing with malicious defamations, laws relating to contempt of court, laws covering matters such as treason, sedition and official secrets, particularly where the nation's welfare in time of war or the effective conduct of criminal investigations is at stake. In every one of those situations the High Court has said, or in my view would undoubtedly say, "Here is a public interest which overrides the freedom of communication." I refer to the national interest in security cases, the interests of children and vulnerable members of the community in the case pornography, and the interests of honest business transactions in the case of laws such as the Trade Practices Act. In each of those cases the public interest overrides an absolute freedom to communicate.

What I suggest to you, ladies and gentlemen, is that when one starts looking at freedom of information and contrasting with it situations where there is an overriding public interest, there is no greater public interest than the effective governance of a State or country. A great English judge once described the English Parliament as the grand inquest of the nation. I rather like that expression. In this country and in this State we have lots of minor inquests. We have things like the Criminal Justice Commission and the National Crime Authority. We have the ordinary courts of law. We have royal commissions and commissions of inquiry. All of them are given privileges so they can carry on their duties. How can it possibly be suggested that the grand inquest of the nation—the greatest of them all—doesn't deserve to have precisely the same privileges and protections when it is carrying out the most fundamental responsibility in our society?

Fourthly—and, you will be pleased to hear, finally—speaking purely as a lawyer, I find it very strange that it could even be suggested that an implication in the Constitution overrides the written word. I know that a lot of things in the law have changed since I went to university, but I still believe it is fairly fundamental that when you are construing a document, whether it is an IOU or an ordinary contract, whether it is a transfer of land, a regulation, an Act of Parliament or even the nation's Constitution, what gets precedence is the written word, and it is only when the written word is incomplete or unclear that you have to look for implications.

It is well known that in our Federal Constitution section 49 confers on each of the Federal Houses and their members and committees the same powers, privileges and immunities as what is quaintly described as the Commons House of Parliament of the United Kingdom and its members and committees as at the establishment of the Commonwealth. We also have sections 106, 107 and 108, which expressly protect the Constitutions of the States, the powers of State Parliaments and the existing laws of the States. Whilst I express the deepest admiration for the ingenuity of learned counsel who argued the Katter case, I am quite mystified as to how anyone could rationally support the proposition that the express words of those provisions in the Federal Constitution are to be read down by reference to an implication which the High Court merely dreamed up.

I turn now to the principal subject on which I intended to speak, and that is liability for republication outside Parliament of matters which when originally published were published under privilege. I should say I am not presently concerned with authorised publications such as *Hansard* reports, I am concerned with the situation where a stranger to the House, more often than not a journalist, republishes what was said under the protection of parliamentary privilege. There seems, ladies and gentlemen, to be a perception in many parts of the community—and even, I regret to say, amongst a few journalists—that once something has been said in Parliament it is open slather and no liability can ever attach to any form of republication. That is plainly wrong.

The relevant provision in Queensland's Criminal Code—and I use Queensland's Criminal Code as an example because it is the most familiar and relevant so far as most of us here are concerned, but it's also very similar to the common law provisions which operate in other jurisdictions—is section 374(1), which is short and to the point. The great draftsman of that

instrument, Sir Samuel Griffith, knew all about plain English before the modern trend to plain English came along. He wrote—

> "It is lawful . . . to publish in good faith for the information of the public a fair report of the proceedings of either House of Parliament, or of any Committee of either House, or of any Joint Committee of both Houses;".

I interpose there to point out that the efficiency of our administration in this State is such that in the last 70 years no-one has actually noticed that we don't have a Legislative Council. Perhaps it's about time to update the Criminal Code! But putting that to one side—section 374 contains also a very useful explanatory provision. Again, Sir Samuel Griffith was way ahead of his time. Now we have explanatory memoranda that accompany Acts of Parliament, but he put the explanatory provision in the actual section. It reads—

> "A publication is said to be made in good faith for the information of the public if the person by whom it is made is not actuated in making it by ill-will to the person defamed, or by any other improper motive, and if the manner of the publication is such as is ordinarily and fairly used in the case of the publication of news."

What it comes down to, ladies and gentlemen, is that to be protected in respect of republication, you must satisfy three criteria. First, the publication must be made in good faith. Second, it must be for the information of the public. Third, what you publish must constitute a fair report. Let me deal briefly with each of those three criteria in turn. The expression "good faith" is one of those expressions which defies further definition; you can explain it or illustrate it, but you can't really say what it means. Whether or not a person is acting in good faith is in fact a totally subjective question. The inquiry is: what is actually going on in that person's mind? But our courts have not yet worked out a way to find out what goes on in people's minds and so the courts have to look at objective evidence—the way in which people act or admissions which they have made—in order to find out what their subjective intentions were. Then the inquiry is really a twofold inquiry. Firstly, the court has to decide whether the person who committed the republication—as I say, more often than not a journalist—was acting honestly; that is to say that the journalist at least didn't know that the matter that was republished was untrue or didn't believe that it was untrue. Secondly, if the journalist or other person concerned was acting honestly, there is a further question whether that person was acting out of some ulterior or improper motive, such as spite or vengeance or the opportunity of achieving some collateral advantage such as a political or commercial advantage from the republication.

The first criterion is good faith. The second criterion is contained in the words "for the information of the public". What does that mean? I suppose that most of what is said in Parliament should ordinarily be of sufficient interest to the public generally that its republication could be said to be for the information of the public. But that, ladies and gentlemen, isn't the test. It is not whether the public is interested in the matter that is republished; the test is whether that is the intention with which it is republished. If the republication occurs in the media—the newspapers or the electronic media—in most cases one could infer that the intention of that publication is to provide information to the public. But let me give you a simple illustration of a situation where it could very definitely be said that the republication is not for the information of the public.

Let us say, for example, that a person applies for a job and some interfering busybody—or, worse still, someone else who is also a candidate for the same job—writes to the employer and says, "You better not hire that character because he was named adversely in Parliament", and he goes on and explains the nature of the allegation. That wouldn't be for the information of the public and therefore wouldn't attract the protection of parliamentary privilege in the form in which it applies to republications outside Parliament. That is absolutely critical because, as I say, so many people outside this House, and even journalists, don't realise that the protection is confined in the way in which I have mentioned. In the illustration I have given you of the person writing to the potential employer, it may be that there are other provisions which would protect that publication. It might be a matter of qualified privilege or something of that sort, but the point is that the fact that you are repeating something that was said in Parliament gives you no extra protection whatsoever.

That brings me to the third element of the statutory defence, and this is perhaps the hardest of them all. The report must be a fair report. What's a fair report? To take a very simple example, if it was said under parliamentary privilege that a person is suspected of having committed a criminal offence or that a person is under investigation for having committed a criminal offence, it obviously wouldn't be a fair report simply to write a newspaper article saying

that that person was guilty of committing the criminal offence. So the first step towards making a fair report is to be accurate—to report the facts as they were stated to the Parliament, rather than putting some sort of gloss on the facts. A fair report requires something more than literal accuracy. The report must also be put properly in context. I won't take Mr Turner as an example, because as Speaker he doesn't make speeches any more. However, if Mr FitzGerald stood up in the Parliament and said, "I have read reports suggesting that Tony Morris is an adulterer."

Mr SPEAKER (Hon. Neil Turner): I'd sit him down.

Mr MORRIS: Curiously, Mr Speaker, you chose the wrong moment to sit him down, because what he was going on to say was, "I have read reports suggesting that Tony Morris is an adulterer, but let me say at once that these reports have been thoroughly checked and it has been found that there is no substance in them." If Mr FitzGerald had said that in the Parliament and the next day a local newspaper—by way of illustration, let's call is the *Curious-Mail*—printed an article which reads, "It was revealed in Parliament today that there were reports alleging that Tony Morris is an adulterer", that wouldn't be a fair report. A fair report is one that puts things in their proper context.

The difficulty of course as in so many legal problems is knowing where to draw the line. Obviously, if there is a small passage out of a long speech that is critical of a particular person, a journalist acting responsibly doesn't have to republish the entire speech to put that small extract in its context. The law ultimately expects and requires journalists to exercise a sense of balance. The word "fair" in section 374 bears its ordinary community meaning. It bears its ordinary community meaning because ordinary members of the community are the people who decide what it means—members of a jury. So whether or not a report is a fair one ultimately depends on whether the members of a jury, the representatives of the great mass of ordinary people out in the community, would consider that the report is a fair one having regard to what was actually said in the Parliament as compared with what the journalist chose to publish.

In the final analysis, I suggest to you—contrary, I regret to say, to Phil Dickie's remarks earlier—that at least in this context the law does offer journalists a privilege which doesn't exist for other members of the community. It is not confined to journalists; it extends to other people who take part in public debate—for example, lobbyists as they are popularly called these days. It's a privilege which is exercisable only by a limited group of people in society, namely, the people who are there to inform the public. If you are a journalist, lobbyist or someone else involved in a public debate, you are safe to republish what is said in Parliament as long as you satisfy those three criteria I have mentioned. What they come down to is this: firstly, you should not republish matter out of *Hansard* or out of the Parliament simply for vindictive or spiteful motives to get at someone you don't like; secondly, you have to be reasonably competent in the sense of making an accurate report of what is said; and, thirdly, you have to be reasonably diligent, and that is to look at the context in which the words were used rather than taking a small passage out of context. I am sure that David Solomon and Phil Dickie will vouch for the fact that all journalists are competent and hard-working and that no journalists bear a grudge. If that is the case, they are perfectly safe. The interesting thing is that no protection is really offered under this provision for any ordinary citizen, that is, for anyone who simply says to a friend down the pub or mentions in the course of business negotiations, "That's that David Solomon. Some wicked things were said about him in Parliament the other day." There is no protection in that situation.

The other interesting area of republication that I wanted to touch on briefly is republication in one State of things said under parliamentary privilege in another State. The extraordinary thing is that in the 96 years since our Commonwealth was federated this question has never arisen in any reported case, yet one sees it happen all the time. One reads each day in the *Courier-Mail* of things said in the Parliament of New South Wales or the Parliament of Victoria that were no doubt published in the belief that because the comments were originally said under parliamentary privilege they are protected. I regret to inform the contributing editor of the *Courier-Mail* that that simply isn't the case. There is no provision of Queensland law which protects the republication of things said in any other State Parliament. So far as Queensland law is concerned, the Parliament of New South Wales couldn't be elevated any higher than what is referred to in the Criminal Code as a public meeting. So republishing what was said in the New South Wales Parliament attracts no greater protection than republishing what was said at a meeting of the Nanango RSL.

After those rather mundane remarks, there is one final thing that I wanted to say. I would like to address this specifically to those of you here today who are members of Parliament or to anybody who aspires to be a member of Parliament. Anne Lynch mentioned the expression

"coward's castle". That expression has a lot of currency amongst the community. What I urge all of you to remember, ladies and gentlemen, is that Parliament is a coward's castle only so long as members of the Parliament forget or ignore the fact that they are here to represent the community. Whilst members of the Parliament remember that they are here as representatives of the community, the privileges that they exercise are our privileges, that is, they are the people's privileges. They exist to raise issues, to express concerns, and to voice anxieties which we the voters have. And viewed in that way there is no question of Parliament being a coward's castle. I would prefer to describe it as "castle courageous", because it's the place where people come to represent fearlessly and faithfully the interests of their electorates.

Before I sit down, I should explain to you, ladies and gentlemen, that if you feel any concern about the political aspects of the speech I have made, you know who to blame, that is, Dr Reynolds, who lectured me in politics at Queensland University. If you have any concerns about the grammatical content of my speech, you can blame Senator Cheryl Kernot, who taught me Senior English. I am afraid I have to take sole responsibility for the legal views I have expressed.

Dr REYNOLDS: A curse of doing GT100 for 20 years is that your students come back to haunt you. Thank you, Tony, Phil and Anne. We have had a very interesting discourse on a variety of viewpoints, which is something the Queensland Australian Study of Parliament Group and others around the country in other jurisdictions have felt to be very important. It falls to question time. Would you be so kind as to address your questions or comments to a specific speaker. I would ask that questioners give our speakers a pithy question or comment so that they can respond. The floor is yours, ladies and gentlemen. Thank you for your attention.

Mr Thornton: My name is Harold Thornton. I am from the Premiers Department. I have a question for Tony. I refer to the recent Scott report in the United Kingdom. I have not read the report itself, but it has been reported that Lord Justice Scott referred to Ministers having knowingly deceived Parliament and having lied under oath. However, he said that because they had done so in good faith it was all right. In that context, what do the words "good faith" mean?

Mr MORRIS: I am happy to say that I don't have the slightest idea what Lord Justice Scott meant. A solicitor in London faxed me a copy of newspaper reports of that report. I haven't seen the actual report itself. It seems bizarre. I can assure all of you here that it is unlikely that an Australian court will adopt the same views as to what constitutes good faith as Lord Justice Scott did. I am pleased to say that, since the great majority of defamation cases are heard by juries, even if a judge went so far over the deep end as to express such a bizarre view, I think we could trust the commonsense of the jury to bring things back to ground again. Things are said either honestly or dishonestly; there is no middle ground.

Ms LYNCH: This sort of thing happens often enough in our environment for me to feel quite strongly about it. The Scott report is actually rather more damning than we would be led to believe from the newspaper reports, because it was very carefully stage managed in an issue of a press release with a bit of mea culpa admission—that is, "We didn't do very well sometimes, but we really weren't as bad as everyone thought we were initially, and Lord Justice Scott said we were really pretty good." It was only when people came to look at the nuts and bolts of the actual report that it was discovered that the report wasn't really terrific after all. Even though that comment still stands—and Tony is quite right—the fact is that if you read not even between the lines you would see that the media didn't do a very good report on what was actually there as distinct from what was claimed by the media managers to be there.

The directly comparable analogy I would make is the Codd report into the Alan Griffiths affair. That was quintessentially managed news. There was a very demure press release saying, "Mr Alan Griffiths has been exonerated. There is absolutely no problem at all." It was fed to the media and reported in that way. If you read the Codd reports, you see the most astonishing indictment of ministerial and other impropriety within office. But do we know about that? No. I think that is the real problem. I was talking before about the media blockade. As a parliamentary officer, the single most frustrating thing I find is the failure of investigative journalism. That is where Phil Dickie can really take a very profound bow. The number of things that are done in the Parliament and in committees that simply get lost in the maelstrom because the media is managed by a deluge of misinformation, primed information, managed information, or whatever you call it, and that no-one ever goes behind media reports into things such as the Codd report, which is really quite a slim document, is terrifying. While we are saying how badly performed members of Parliament are and so on, we really have to start thinking about why Parliament isn't

reported anymore. You might be right, Phil; maybe it's as boring as hell. However, there's an awful lot that isn't boring and it never sees the light of day.

Dr REYNOLDS: Thank you, Anne. I will ask Phil to reply to that from a journalist's perspective.

Mr DICKIE: I wish to pick up on a few issues, and one is fairly provocative, perhaps especially from where Tony sits. Having watched for a long time the people who were named adversely in Parliament and having also had a lot of personal and other experience with those who sue for defamation, I believe that a lot of people sue newspapers and get settlements because the newspapers have been quite blatantly careless and have made a foolish mistake. Someone sees the chance to make a quick buck, jumps in and a settlement is reached quickly. In seriously defended cases in which the newspaper has sometimes quite deliberately engaged in conduct that is undoubtedly defamatory of someone, the defamation is almost entirely, in my experience, justified. These people are cads, bounders and villains, and the newspaper has been doing its public duty, in spite of considerable legal impediments, in telling the punters what's going on. The same applies to people who have been seriously brushed over under parliamentary privilege. In my experience, from the cases I have known about—and there have been quite a few—the people defamed under the privilege of Parliament have in the most part been quite justifiably defamed. These people are not the sorts of people you would write home to your cousins overseas about as being ideal exemplars of Australian citizenship.

To pick up on your point, Anne, about why Parliament is not reported—that is not so much because Parliament is boring. I never find Parliament boring. I think it's in many ways the fault of the media and of Parliament. Parliament has given up far too much of its power to the Executive arm of Government. That's where the action is, and that's what the media tends to follow. You will probably find the Senate gets a disproportionate share of reporting anyway because it is a Parliament where things happen. The things that senators do in Australia make a difference. As to the things that the House of Representatives does—very little different happens as a result of anything that happens in the House of Representatives. In the Queensland Parliament in recent days there is for the first time an air of uncertainty about how things will be voted on and whether they will be passed. That adds a lot of interest to what happens in the Queensland Parliament. It is no longer a rubber stamp or a sausage machine.

Dr REYNOLDS: I introduce Bill Hewitt, a former member and Minister of the Parliament.

Mr HEWITT: I refer to the royal commission into what is referred to as the "Carmen Lawrence affair". My understanding is that a good deal of the evidence related to parliamentary proceedings. I understand that the implications of that royal commission are feared. I understand there is a possibility that every Legislature may have to legislate to protect its own privilege. I would like any or all of the panel to comment on that, because I think it's a matter of very great significance.

Ms LYNCH: I agree with you. It did raise a problem, which I actually touched on in my paper when I spoke about how far "proceedings in Parliament" extend. The Commonwealth legislation is quite broad and it includes the element "matters to or incidental to proceedings in Parliament". I wish the Clerk were here to answer this question more articulately than I can. He gave two separate written advices to the President of the Senate, who tabled them on one of our last days of sitting. Again, unsurprisingly, that particular case slipped the attention of the media. No, I'm sorry. There is an absolutely wonderfully honourable exception. David Solomon wrote a most perceptive article. I think I should probably turn over to him quoting Harry's advice bluntly, "We think they got it wrong."

The High Court itself was very distancing in its judgment on the matter. The Supreme Court of Western Australia said, "Because it's parliamentary, we're not going to touch that." The High Court said, "Look, we're not going to grant the injunction but, by the way, we're not saying that the Supreme Court of Western Australia was okay in allowing all of this to go on." Clearly, the commissioner himself, in my opinion, should have been much more circumspect in the use to which he put the material. The interesting thing that I found in watching the case, as we were obviously doing for every imaginable reason, is that in the actual proceedings themselves the claim of privilege wasn't made constantly. I have to say that had I been called as a witness, as Deputy Clerk of the Senate, I would have claimed privilege—I really would have—saying that my dealings with the Senator were covered by the "to or incidental to" power. I would have claimed a privilege and had it challenged. Who knows, like Phil I might have landed myself almost in gaol without the same protections the media have.

Mr MORRIS: I wish to make a brief comment about the Carmen Lawrence inquiry. Leaving aside the matter I dealt with in my address—that is, the legal challenge to parliamentary privilege, which I think is fairly hopeless for the reasons that I mentioned—there is no doubt that parliamentary privilege is under challenge in all sorts of ways all over the country. Here in Queensland it is under desperate and grave challenge from the Criminal Justice Commission, which sees itself as being superior to the Parliament. In other parts of the country, it's under similar forms of challenge. There is only one answer to those challenges, and that is for parliamentarians, irrespective of their political persuasion, to fight for their own rights. The privileges which exist today exist because of the courage of men of great integrity and courage who in the reign of Charles I and subsequent reigns were prepared literally to lay their lives on the line to protect the privileges of their Parliament.

We see in journalists men of very great courage, such as Joe Budd, who are prepared to go to gaol to stand up for the principles that they believe in as journalists. I'm not saying that I necessarily share those beliefs, but I admire and respect the courage of those who have made sacrifices to stand up for them. Parliaments throughout this country need to stand up for their own rights, even if it requires in an extreme case the House resolving to deal with a royal commissioner or a commission of inquiry for contempt and, if necessary, sending the Sergeant-at-Arms or the Usher of the Black Rod to arrest that royal commissioner and bring him before the House. Until Parliaments take matters into their own hands and start exerting the privileges which undoubtedly exist, those privileges will continue to be whittled away.

Dr REYNOLDS: It so happens that my birthday coincides with the death of Oliver Cromwell—3 September—though I was born in 1944, not in 1658. Cromwell is a hero of mine. We have time for one more question or comment that the panel could address before we wind up. David Solomon, the floor is yours. He is actually our national president, so he gets to talk as well.

Mr SOLOMON: No, I used to be. I was going to ask for a right of reply actually, instead of which I shall ask Phil Dickie a question. Phil, unlike most dorothy dix questions, this one hasn't actually been given to the person who is going to reply. In fact, I haven't written it out. There are just two points that I wanted to raise. The first might sound like a dorothy dixer. What would you care to say about the privilege that the courts and those who operate in them have to defame whoever they wish provided that the barristers or whoever say they are acting on instructions? That's a serious question about the way defamation takes place in the courts. You mentioned that the reporting of Parliament was declining. There are probably more court reports than parliamentary reports. Therefore, one might expect more cases of defamation in that area. Secondly—and this is just a thought—if journalists under the Griffith defamation Act are required to demonstrate good faith, shouldn't parliamentarians who make speeches defaming left, right and centre have some requirement also of good faith?

Mr DICKIE: That's no dorothy dix question. In all of these things I tend to come out in favour of the maximum public disclosure. It doesn't really offend me that parliamentarians aren't required to demonstrate good faith when they cast loose in Parliament. As I said before, I think in most cases when they cast loose, they are fairly justified. In most of the instances I can think of recently the number of people who have been defamed totally without foundation by parliamentarians is fairly limited. I am thinking of people such as Graham Richardson; people who doth protest too much with subsequent events revealing that there was a lot in what was said.

In relation to the courts, I do not think you can start trammelling down for the courts to operate properly. I don't think Australia's courts operate properly at all. I don't think our courts are an exercise in finding the truth about anything. It is a sort of trial by combat elevated to a twentieth century context. You select your champion. You might choose Tony or you might choose someone else. You send your champion in to combat. In many cases, it is pure coincidence if what comes out has any relation to what actually happened. That aspect gave me some trouble before in respect of some of the comments about royal commissions. We usually call a royal commission or an inquiry together—I will leave the special example of the CJC out of it for the moment—because of the abject failure of other institutions, notably our Parliaments, our courts and often our media. You have to remember that the media has been the institution that's been responsible for more royal commissions being called than any other institution in society. We are far from perfect in the media. But when Parliaments are failing us, which they do often, it is probably for reasons that they are controlled by party cabals and they are not really seeking to govern in the public interest.