ARTICLES

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PRIVILEGES AND FREEDOMS FOR DEFAMATORY POLITICAL SPEECH

INTRODUCTION

The joint judgment of all seven Justices of the High Court in *Lange v Australian Broadcasting Corporation*,[1] handed down on 8 July 1997, made the interaction between defamation law and the implied constitutional freedom of political communication[2] a good deal clearer. Uncertainties on this issue had seemed highly likely in the wake of the Court's path-breaking ruling in the 1992 cases of *Nationwide News Pty Ltd v Wills*[3] and *Australian Capital Television Pty Ltd v Commonwealth (No 2)*[4] that a freedom of political communication was implicit within the Commonwealth Constitution. This ruling seemed inevitably to require judicial

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1 (1997) 145 ALR 96; 71 ALJR 818.

2 The *Lange* judgment adopts the term "political communication". In the earlier High Court cases, shortly to be mentioned, the terms "political discourse" (in the 1992 cases) and "political discussion" (in the 1994 cases) were more commonly used.

3 (1992) 177 CLR 1.

4 (1992) 177 CLR 106.

reconsideration of the many principles of common law and statute law, including those of defamation law, which inhibit the freedom of citizens to discuss political matters. The uncertainties reached major proportions when, in the 1994 cases of *Theophanous v Herald & Weekly Times Ltd*[5] and *Stephens v West Australian Newspapers Ltd,*[6] the Court directly addressed the issue of interaction between the constitutional freedom and defamation law. This was chiefly due to a sharp division of opinion within the Court and to difficulties in interpreting the judgment of greatest significance in the two cases, that of Mason CJ, Toohey and Gaudron JJ in *Theophanous.*

By contrast, one of the most important results of the unanimous judgment in *Lange* is that a set of principles to which all members of the Court subscribe now determines how defamation law, in its application to the public discussion of political matters, relates to the constitutional freedom. For the time being, at least, changes in the composition of the Court will not give rise to speculation as to how this relationship might also change in consequence.

Another result, being a feature of the *Lange* decision with which this article is particularly concerned, is that the ruling concept in this relationship is henceforth to be "conformity". Conformity, said the Court, exists and should continue to exist between the implied constitutional freedom and the substantive common law principles of defamation, which are to be developed independently of the freedom but with due regard to its requirements.

The Court in *Lange* also redefined, in narrower terms, the implied freedom of political communication and reformulated the principles underpinning it. In *Levy v Victoria,*[7] decided about three weeks later, the concurring judgments of all seven Justices further elaborated this new definition. This redefinition is outlined below.[8]

A further highly significant outcome of *Lange* was that the Court, in pursuit of this aim of conformity, effected a major change to the common law of defamation. It radically enhanced the sphere of operation of an important and long-standing ground of defence in defamation law - that of common law qualified privilege. The nature and implications of this expansion of qualified privilege are explored below.[9]

The main purpose of this article, much of which was prepared before the decision in *Lange* was handed down, is to investigate how far some major defences in Australian defamation law, including the enhanced defence of qualified privilege, genuinely do "conform" with the constitutional principle of freedom of political communication. In addition, the article will consider briefly the impact of the constitutional freedom on statutory amendments to

5 (1994) 182 CLR 104.
6 (1994) 182 CLR 211.
7 (1997) 146 ALR 248; 71 ALJR 837.
8 At pp161-166.
9 At pp175-181.

defamation law, with particular reference to some of the changes envisaged in the Defamation Bill 1996 (NSW).

PRIVILEGES, FREEDOMS AND THEIR INTERACTION

The legal concept of privilege is very versatile. It is used with different shades of meaning in a wide variety of contexts relating to communication. An important basic distinction is between the privilege to speak, write or otherwise communicate and the privilege to remain silent, in each case with impunity. The latter privilege typically arises in courtroom situations, as with the privilege against self-incrimination and legal professional privilege. Privilege in defamation law belongs in the former category.

Generally speaking, a defence of privilege in defamation law attaches to the specific *occasion* on which the relevant defamatory publication is made. Thus, in marked contrast to the well-known "public figure" test operating in American defamation law, no account is specifically taken of the characteristics of the plaintiff - for example, of whether the plaintiff is a public official, a public figure or, to cite a category invoked by Deane J in *Theophanous*,[10] a holder of "high public office". More commonly, it is the relationship between the defendant and the person or persons to whom the defamatory matter is published that establishes the "occasion" of the publication as a privileged one.

When a defence of privilege applies, there is accordingly a limited enclave of free speech. This may produce the further consequence that particular categories of defendant, because they frequently play the role of speaker - or, in terms of defamation law, "publisher" - within an established occasion of privilege become, in effect, "privileged publishers". Here, the contrast with the American "public figure" test becomes even more striking. In determinations as to privilege, it is defendants, not plaintiffs, who are put into categories.

Sometimes, in ways and for reasons that this article briefly explores, the speech occurring within an occasion of privilege can fairly be described as "especially free". This is because the speaker not only enjoys immunity from civil liability for defamation (and from other legal liabilities, such as a prosecution for criminal libel), but is also protected by rules prohibiting and inhibiting the speech from being questioned or criticised in other forums. These rules, which frequently also bear the name "privilege", provide special support for freedom of speech within the privileged occasion, at the expense of freedom of speech outside it. The prime example of this notion of "especially free" speech is speech in parliamentary debates or other parliamentary proceedings.

The defamation defences establishing enclaves of free speech through use of the notion of privilege did not spring, fully formed, from an articulated set of principles about the

10 (1994) 182 CLR 104 at 184-186. Deane J's view was that such a person should have no right of action for damages against a publisher of defamatory imputations relating to his or her official conduct.

structure and process of government. Their evolution did, however, reflect broad assumptions, usually implicit rather than explicit, of a social and political nature. These assumptions were operative in England rather than Australia and in some instances crystallised many centuries ago. It follows that these defences originated and were developed against very different political, social and constitutional backgrounds to that of present-day Australia.

On the other hand, a noteworthy feature of the recent discussions of defamation law in the High Court is that, for the first time in the history of this law, they have formed part of broad debates about the fundamental principles of democratic government in present times.[11] Conclusions on major issues of constitutional law and theory, notably the formulation of a constitutional implication of freedom of political communication, have been highly influential in the formulation of major changes to defamation law.

In addition, one of the terms frequently employed within this process has been "freedom". Unlike "privilege", this term has connotations of general applicability to all citizens, notably because of its use in Bills of Rights and other general constitutional guarantees. The most famous and most broad-ranging guarantee of freedom of speech in the common law world, the First Amendment to the United States Constitution, has not in any sense been transplanted to Australia. But some of its underlying political assumptions have been very influential in the High Court's discussions of the implied freedom of political communication.

In the outcome, both the idea of a general freedom (in the legal sense) of political communication and the political concept of freedom of speech - "freedom", here, in a non-legal sense - have formed part of the currency of the debates about how defamation law should develop in Australia.

These comments about the background to *Lange v ABC* draw attention to an important aspect of the role which this case has played in a process of transformation of defamation law. A striking feature of the *Lange* judgment is its return to the common law of defamation and its traditional concepts, notably that of "privilege". Yet it seeks to develop these concepts in a fashion that will accommodate broader, newer ones, notably that of a universal "freedom" of communication arising out of the text and structure of Australia's constitution, interpreted in the light of modern notions of representative and responsible government. In considering how far the Court's avowed aim of "conformity" is achieved, or at least achievable, a basic question is whether this interaction of old and new concepts can occur with some degree of harmony.

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11 In Loveland, "Reforming Libel Law: The Public Law Dimension" (1997) 46 *Int'l & Comp LQ* 561 at 571, this aspect of the High Court decisions is contrasted with the relative failure of English courts, and of the European Court of Human Rights, to consider the "public law dimension" in some recent leading defamation cases.

The ensuing discussion of the interaction between constitutional principles and defamation law in the wake of *Lange* proceeds as follows. After some brief comments on the similarities and differences between the Australian response to these issues of interaction and that of American law, the nature of the constitutional implication and the political theory which underpins it will be described. The article then deals with the existing defences of privilege and, briefly, with the defence of fair comment, outlining in each case (a) the nature of the defence; (b) its origins and development, with particular attention to the political assumptions explicitly or implicitly associated with it; and (c) the extent to which the defence and these assumptions seem to conform with the constitutional freedom and its political orientations. The article concludes, as already mentioned, with some comments on how the implied constitutional freedom bears upon statutory reform of defamation law.

The species of privilege which form the principal subject-matter are: (a) qualified privilege at common law; (b) the absolute privilege attaching to statements made in parliamentary or court proceedings and in other analogous contexts, along with other legal principles giving special protection to the speech occurring in parliamentary and courtroom proceedings; (c) the qualified "fair report" privilege attaching to fair and accurate reports of such proceedings or of various other official or semi-official proceedings, documents and statements; and (d) statutory qualified privilege under provisions such as s16 of the *Defamation Act* 1889 (Qld) and s22 of the *Defamation Act* 1974 (NSW). Where appropriate, comparisons are made with the American counterparts of these species of privilege.

DIFFERENT METHODOLOGIES IN AMERICA AND AUSTRALIA

These present-day questions as to how, in Australia, defamation law may best interact with a constitutional free speech principle confronted American defamation law about thirty years ago. They arose after the US Supreme Court had decided in 1964, in the case of *New York Times v Sullivan*,[12] that defamation should be subject to the principles of the First Amendment. The High Court of Australia's rulings in *Theophanous* and *Stephens* that the implied constitutional freedom mandated a significant change to the content of defamation law in cases arising within political discussion constitute the Australian equivalent, broadly speaking, of *Sullivan*.

The choices made in America since 1964 have been relatively clear-cut. Many pre-existing common law and statutory rules of defamation law have been wholly or partly superseded through a process of "constitutionalisation".[13] The rules chiefly affected by the

12 376 US 254 (1964).

13 See generally Eaton, "The American Law of Defamation through *Gertz v Robert Welch, Inc* and Beyond: An Analytical Primer" (1975) 61 *Va L Rev* 1349; Watkins & Schwartz, "*Gertz* and the Common Law of Defamation: Of Fault, Nonmedia Defendants and Conditional Privileges" (1984) 15 *Tex Tech L Rev* 824 at 864-885.

body of constitutional rules known collectively as the "public figure test" have been the defences of justification, fair comment and privilege. In many situations, the first of these defences has become irrelevant and the second and third largely irrelevant, because of requirements imposed on the plaintiff by the *Sullivan* decision and the line of Supreme Court authority following it.

By contrast, even before the decision in *Lange*, it seemed unlikely that Australian defamation law would be "constitutionalised" to anything like the same extent as its American counterpart. This is attributable to the High Court's comparative caution in introducing free speech considerations into defamation law. The *Theophanous* and *Stephens* cases did not tilt the balance towards freedom of speech nearly so far as the decision in *Sullivan* had done. In *Theophanous*, the joint judgment of Mason CJ, Toohey and Gaudron JJ, who comprised three of the four majority justices, stated that the "public figure" test "gives inadequate protection to reputation"[14] by virtue of the requirement of proof of "actual malice" on the part of the defendant. They favoured instead a test of "reasonableness", imposing a distinctly greater obligation on publishers to try to achieve accuracy.[15]

The methodology adopted in *Theophanous* was however similar to that of *Sullivan*, in so far as the decision imposed upon the common law and statutory rules of defamation an overriding principle of constitutional law. The majority Justices held that where defamatory statements were published in the course of "political discussion", a concept to which they gave a broad meaning,[16] a "constitutional defence", embodying this concept of reasonableness, should apply.[17] The new constitutional defence did not supersede existing defences, but existed alongside them.

In *Lange*, however, the High Court retraced its steps. It abandoned this process of partial constitutionalisation, in favour (as has already been said) of a methodology of achieving

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14 (1994) 182 CLR 104 at 135. The fourth member of the majority, Deane J, took the view, comparable to that of Black, Douglas and Goldberg JJ in *Sullivan,* that members of Parliament, other holders of "high public office" and candidates for such positions should have no right at all to sue in respect of defamatory statements about the "official conduct or suitability of a member of the Parliament or other holder of high Commonwealth office": at 185. He concurred with the result reached by the other three majority Justices in order to reach a decision on the facts.

15 For discussion of these aspects of *Theophanous*, see Walker, "The Impact of the High Court's Free Speech Cases on Defamation Law" (1995) 17 *Syd LR* 43. In Canada, the Supreme Court has been similarly unsympathetic to the "public figure" test, despite the presence of a guarantee of freedom of expression in Article 2(b) of the Canadian Charter of Rights and Freedoms: see *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129.

16 (1994) 182 CLR 104 at 123-125. Their approach to defining "political discussion" is outlined at p162 below.

17 At 137.

and maintaining "conformity" between the common law and the implied constitutional freedom.

The Court in *Lange* gave one major reason for not continuing down the American path. The judgment explains that in America, the common law is "fragmented into different systems of jurisprudence",[18] so that any uniform constitutional standard, such as the guarantee of freedom of speech and of the press prescribed by the First Amendment, must be superimposed upon the common laws of the States. It may produce a "constitutional privilege" against the enforcement of such laws or may in some circumstances give rise to a federal cause of action.[19] By contrast, a single, uniform common law, "declared by this court as the final court of appeal",[20] exists in Australia. It is both subject to the Constitution and "informs" the Constitution, in the sense that the Constitution's provisions "are framed in the language of the English common law, and are to be read in the light of the common law's history".[21]

MAIN FEATURES OF THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION

For the purposes of this article, the important features of the implied constitutional freedom of political communication, as redefined in *Lange*, are as follows:

1. The freedom does not protect freedom of speech generally,[22] but only communication on "political or government matters" within a political and social structure of a specific type: viz, representative and responsible government, as provided for within the Commonwealth Constitution. It can no longer be said to be based on broad propositions, to be found particularly in *Theophanous*,[23] to the effect that such a freedom is a necessary concomitant of a general principle of representative democracy permeating the Constitution. Instead, the judgment in *Lange* derives it directly from the "text and

18 (1997) 145 ALR 96 at 108.

19 At 108-109. The judgment draws attention to the role of the Fourteenth Amendment in achieving this result.

20 At 108.

21 At 110, citing *Cheatle v R* (1993) 177 CLR 541 at 552. In explaining this idea that the common law "informs" the Constitution, the Court relies expressly on the thinking of Sir Owen Dixon in "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *ALJ* 240 and in "Sources of Legal Authority", reprinted in Dixon, *Jesting Pilate* (Law Book Co, Melbourne 1965) pp198-202.

22 Although some dicta have implied that it might in due course be held to do so: see eg *Australian Capital Television v Commonwealth (No 2)* (1992) 177 CLR 106 at 141 per Mason CJ, at 212 per Gaudron J. These are of doubtful authority following *Lange*.

23 (1994) 182 CLR 104 at 121 per Mason CJ, Toohey and Gaudron JJ; see too *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 298-299 per Mason CJ. The principal dissentient at this stage was McHugh J; see eg his judgments in *Australian Capital Television* (1992) 177 CLR 106 at 227-235, and in *McGinty v Western Australia* (1996) 186 CLR 140 at 230-236.

structure"[24] of the Constitution, on the basis, as Dawson J said subsequently in *Levy*, that "the Constitution does not incorporate any concept of representative government other than can be identified in the provisions of the document itself".[25] The *Lange* judgment asserts that a number of sections of the Constitution - notably ss7 and 24, requiring that members of the Commonwealth Parliament must be "directly chosen by the people", and s128, providing for referenda to amend the Constitution - "give effect to the purpose of self-government by providing for the fundamental features of representative government".[26] It goes on to define the freedom as covering communication on "government or political matters" which are or might be relevant to the making of informed electoral choices at Commonwealth level.[27]

2. For two reasons, the freedom, as so defined, is broader than might appear at first sight. First, by virtue of the principle that the executive branch of government is responsible to the legislature (as indicated particularly in s64), the range of matters to which it applies is not confined to the conduct of Houses of Parliament and their actual and would-be members, but includes also the conduct of government ministers and departments, public servants, public utilities and statutory authorities.[28] Secondly, discussion of a matter which at first sight seems only to be a "discrete State issue"[29] or a matter of relevance only to a Territory may nonetheless be protected by the Commonwealth freedom because of "the increasing integration of social, economic and political matters in Australia".[30] This factor may possibly extend the freedom even to issues of local government.[31] But except where the Constitution of a State includes provisions similar to those from which the Commonwealth freedom is derived,[32] the question whether any implied freedom exists within State constitutional law has not yet been resolved. It did not arise in *Lange* and was expressly left open by all the Justices in *Levy*.

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24 *Lange v ABC* (1997) 145 ALR 96 at 112, citing *McGinty v Western Australia* (1996) 186 CLR 140 at 168, 182-3, 231, 284-5.

25 *Levy v Victoria* (1997) 146 ALR 248 at 261.

26 *Lange* (1997) 145 ALR 96 at 104. The Court (at 104-105) also draws attention to ss1, 8, 13, 25, 28 and 30 of the Constitution.

27 At 106-107, 112.

28 At 105-107, 112. The Court also draws attention to ss6, 49, 62 and 83 of the Constitution.

29 *Levy* (1997) 146 ALR 248 at 253 per Brennan CJ.

30 *Lange* (1997) 145 ALR 96 at 116. See too discussion in *Levy* at 252-253 per Brennan CJ, at 289-291 per Kirby J.

31 In *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, the NSW Court of Appeal, in ruling by majority that local authorities could not sue in their corporate capacity for defamation, gave considerable weight to the fact that local councillors are chosen in democratic elections. Cf the decision of the House of Lords to the same effect in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.

32 As is the case, broadly speaking, in WA, by virtue of s73(2)(c) of the *Constitution Act* 1989 (WA): see *Stephens v West Australian Newspapers* (1994) 182 CLR 211 at 232-234 per Mason CJ, Toohey and Gaudron JJ, at 236 per Brennan J.

3. It is not clear how far this redefinition in *Lange* leaves scope for the idea, put forward particularly in *Theophanous*, that because it is not possible to define in advance the matters with which government may become concerned, the scope of "political or government matters" must be left open-ended. "Political discussion" was in fact said in *Theophanous* to embrace "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about".[33]

4. The conception of freedom of speech[34] that specifically supports the implied freedom is an instrumental one.[35] Freedom of communication on political or government matters is a means to an end, that of enabling the people of Australia "to exercise a free and informed choice as electors".[36] This is an "indispensable incident of that system of representative government which the Constitution creates".[37] It follows that the separate theory that freedom of speech is essential to the pursuit of truth through the competition of viewpoints in a free "marketplace of ideas" is not directly relevant. This theory seeks to justify a freedom of a wider scope than "political communication".

5. A fundamental premise of the High Court's concept of representative government is that "all powers of government ultimately belong to, and are derived from, the governed".[38] They do not, as earlier in Australia's history, reside in a sovereign monarch. This does not mean, however, that a theoretical model of direct self-government, by way of

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33 (1994) 182 CLR 104 at 124, quoting from Barendt, *Freedom of Speech* (Clarendon Press, Oxford 1985) p152. See too *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 298-299, 336, 379.

34 For accounts of the three "justifications" of freedom of speech referred to in this brief discussion of the implied constitutional guarantee, see Campbell, "Rationales for Freedom of Communication" in Campbell & Sadurski (eds), *Freedom of Communication* (Dartmouth, Aldershot 1994) pp17-44; Emerson, "Toward a General Theory of the First Amendment" (1963) 72 *Yale LJ* 877; Smolla, *Free Speech in an Open Society* (Knopff, New York 1992) ch1.

35 Cf the distinction between "instrumental" and "constitutive" theories of freedom of speech drawn, for example, in Dworkin, "The Coming Battles Over Free Speech", *Civil Liberty*, January 1993, p11.

36 *Lange* (1997) 145 ALR 96 at 107.

37 At 106. In *Theophanous,* the "efficacious" operation of representative democracy was a recurring theme in the judgment of Mason CJ, Toohey and Gaudron JJ: (1994) 182 CLR 104 at 123-125, 128, 130, 133, 134.

38 *Nationwide News v Wills* (1992) 177 CLR 1 at 70 per Deane and Toohey JJ; see too the statement in *Lange* (at 104) that the sections of the Constitution which establish the "fundamental features" of representative government "give effect to the purpose of self-government". This does not, however, imply that each citizen entitled to vote must have equal voting power: see *McGinty*. For a recent analysis of the relationship between government by consent and freedom of speech, see Allan, "Citizen and Obligation: Civil Disobedience and Civil Dissent" (1996) 55 *Cambridge LJ* 89.

metaphorical "town meetings", is invoked.[39] As point 8 in this list makes clear, the division between "the represented" and their elected representatives is consistently maintained.

6. A theme of primary importance in the High Court's conception of representative government is that electors must have freedom to receive information about government matters, so that they can make informed political choices.[40] This notion of public access to information is particularly pervasive in the *Lange* judgment. In a passage of five paragraphs,[41] starting with the heading "Freedom of communication", where the Court explains how the implied freedom is a necessary element of representative government, there are no less than eight separate references to it. The passage also quotes the statement of Dawson J in *Australian Capital Television*[42] that "legislative power cannot support an absolute denial of access by the people to relevant information about the functioning of government in Australia and about the policies of political parties and candidates for election".[43] As outlined in *Lange*, the implied freedom seems more closely related to the policy underlying freedom of information legislation than to any other aspect of free speech.

7. An accompanying theme in the Court's conception of representative government is that electors must have freedom to indulge, without undue fear of legal repercussions, in public criticism of the official conduct of their representatives, with a view to ensuring that these people carry out their duties satisfactorily.[44] This element is implicit in *Lange*, in so far as the decision treats defamatory statements about the conduct of people engaged in politics or government as a form of speech protected by the implied freedom. It is more clearly apparent in *Levy*, where the Court makes it clear that demonstrations and other forms of political protest are protected by the freedom, even when at first sight they may not seem

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39 Contrast the use of this metaphor by Alexander Meiklejohn, the American theorist most commonly associated with democratic theories of free speech: see eg Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Harper, New York 1960) pp24-28.

40 For instances prior to *Lange*, see *Nationwide News* (1992) 177 CLR 1 at 72 per Deane and Toohey JJ; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106 at 159 per Brennan J, at 231 per McHugh J. For an American opinion that this ascribes an unduly passive role to citizens in a democratic society, see Post, "Equality and Autonomy in First Amendment Jurisprudence" (1997) 95 *Mich L Rev* 1517 at 1522-1525.

41 *Lange* (1997) 145 ALR 96 at 106-107.

42 (1992) 177 CLR 106 at 187.

43 *Lange* (1997) 145 ALR 96 at 106.

44 For instances prior to *Lange*, see *Nationwide News* (1992) 177 CLR 1 at 74-75 per Deane and Toohey JJ; *Australian Capital Television* (1992) 177 CLR 106 at 138-139 per Mason CJ, at 159 per Brennan J; *Theophanous* (1994) 182 CLR 104 at 129-130 per Mason CJ, Toohey and Gaudron JJ. In this last passage, the implied freedom is linked with the recent decisions, referred to in fn31 above, that local authorities may not sue for defamation.

to involve speech strictly so-called.[45] This idea is very prominent in First Amendment thinking, to the extent that any law repressing criticism of government policy, for example the law of sedition, is seen as fundamentally hostile to free speech.[46]

8. Accordingly, the communication protected is not just between the represented and their representatives - that is, between the people on the one hand and the Parliaments, their members and other government instrumentalities and agencies on the other[47] - but also among the represented. This is indeed supported by the Court's decision in *Australian Capital Television* that Commonwealth laws restricting political advertising by any person or organisation through the broadcasting media infringed the freedom. Citing this decision, McHugh J, discussing the importance of the print and electronic media in giving publicity to citizens' views on political or government matters, confirmed in *Levy* that "a law that prevents citizens from having access to the media may infringe the constitutional zone of freedom".[48]

9. The implied freedom does not confer private legal rights of freedom of political communication on individual members of the Australian community.[49] Instead, these rights derive from the common law. The High Court expressed this idea in *Lange* as follows:

> Under a legal system based on the common law, "everybody is free to do anything, subject only to the provisions of the law", so that one proceeds "upon an assumption of freedom of speech" and turns to the law "to discover the established exceptions to it".[50]

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45 *Levy* (1997) 146 ALR 248 at 251-252 per Brennan CJ, at 269-270 per Gaudron J (who also states that freedom of movement is protected where this is necessary to protect freedom of political communication), at 274-276 per McHugh J, at 286-289 per Kirby J.

46 See eg Kalven, "The New York Times Case: A Note on 'The Central Meaning of the First Amendment'" [1964] *Sup Ct Rev* 191; Blasi, "The Checking Value in First Amendment Theory" [1977] *Am B Found Res J* 521.

47 This formulation is adapted from the judgment of Deane J in *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 335. See too *Nationwide News* (1992) 177 CLR 1 at 73-75 per Deane and Toohey JJ.

48 *Levy*(1997) 146 ALR 248 at 274; see too at 252 per Brennan CJ.

49 Prior to *Lange*, this aspect was most strongly emphasised by Brennan J: see eg his judgments in *Australian Capital Television* (1992) 177 CLR 106 at 150 and *Cunliffe* (1994) 182 CLR 272 at 326-327. In the judgment of Mason CJ, Toohey and Gaudron JJ in *Theophanous*, the freedom was expressly labelled an "implication", in preference to the term "guarantee", in order to illustrate that the Court had not yet decided whether it constituted "a source of positive rights": (1994) 182 CLR 104 at 125-126. For a comparison of this approach with other recent High Court cases seeming, by contrast, to create individual rights, see Bailey, "Australia - How Are You Going, Mate, Without a Bill of Rights? *or* Righting the Constitution" (1993) 5 *Canterbury L Rev* 251.

50 *Lange* (1997) 145 ALR 96 at 110. The quoted words are from *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at 283.

10. This view of the constitutional implication confirms, along with points 1 and 4 in this list, that the implication is not directly supported by the philosophical "self-fulfilment" argument for freedom of speech, ie the argument that this freedom is a fundamental personal right, directly attributable to the fact that all people are independently endowed with their own separate capacity for self-expression.

11. The implied freedom is not absolute, but leaves scope for inhibitions on political communication to be imposed by rules of common law or statute in furtherance of a legitimate countervailing interest.[51] Since, as already stated,[52] the freedom operates in conformity with, rather than overriding, the common law, it will not invalidate those "established exceptions" to freedom of speech which arise under the common law. It may however render invalid legal restraints on such communication imposed by statute law, whether enacted by the Commonwealth or by a State or Territory Parliament.[53] Accordingly where such restraints, in an area such as defamation, have a "chilling effect" on freedom of political communication, amendment of the relevant statutory rules may be constitutionally necessary. The precise criteria to be employed in determining, since *Lange*, whether or not a statutory provision which restricts political communication (as defined in that case) is struck down by the implied freedom are explored below.[54]

12. The freedom appears to confer no special status on the press, ie the print and broadcasting media, as compared with other members of the Australian community. But, as mentioned in point 8 of this list, the important role of the media - notably television, on account of its "unique communicative powers"[55] - in conveying the views of citizens on political or government matters to the community at large was acknowledged in *Levy*.

On two important points in this list, numbers 1 and 9, as also on other matters, such as the presence or absence of an express provision, the implied freedom differs significantly from the First Amendment to the American Constitution. On points 4, 10 and 12 there is a difference of emphasis at least.[56] The High Court has stressed more than once that the implied freedom and the First Amendment are in no way to be equated with each other.[57]

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51 Thus a legislature may, for example, protect a prescribed method of voting at elections by prohibiting the advocating of informal voting: *Langer v Commonwealth* (1996) 186 CLR 302; *Muldowney v South Australia* (1996) 186 CLR 352.

52 At p156.

53 See eg *Theophanous* (1994) 182 CLR 104 at 125-129 per Mason CJ, Toohey and Gaudron JJ, at 164-167, 178-180 per Deane J.

54 At pp211-215.

55 *Levy* (1997) 146 ALR 248 at 275 per McHugh J.

56 Some American scholars might deny any significant differences on points 4 and 10 by characterising the First Amendment as principally based on a concept of public discourse: see eg Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and *Hustler Magazine v Falwell*" (1990) 103 *Harv L Rev* 601 at 626-646. But others advocate continued adherence to the "marketplace" justification (see eg Coase, "The Market for Goods and the Market for Ideas" (1974) 64 *Am Econ Rev* 384),

COMMON LAW QUALIFIED PRIVILEGE

General Nature

The occasions on which qualified privilege arises at common law are authoritatively defined as those in which a person has a legal, social or moral duty to make a communication on some topic, or an interest in making such a communication, to a person or persons with a corresponding interest or duty to receive the communication.[58] There must in this sense be a "reciprocity of interest or duty".[59] The privilege may be claimed in respect of any defamatory statement made in legitimate pursuit of the relevant duty or interest. A wider policy justification for the privilege that is frequently put forward in the cases is that it promotes "the common convenience and welfare of society".[60]

As is more fully explained below,[61] the defence has, until recently, been generally only available in respect of publications made to a limited range of people. But as a result of the decision of the High Court in *Lange*, it is now also available to any publication on "government and political matters" to the public at large, or some other "large audience",[62] provided that the defendant can establish that the publication was "reasonable".

Qualified privilege will not be available if the statement is found to exceed the limits of the privileged occasion. In other words, the statement must be "referable and appropriate to" the relevant duty or interest.[63] Furthermore, the defamed plaintiff can defeat the privilege by showing that the statement was made without an honest belief in its truth[64] or out of spite or ill-will towards the plaintiff. In each of these situations of common law "malice" the statement cannot be said to have been made in legitimate pursuit of the duty or interest which gave rise to the privilege.[65] In the succinct language of Jordan CJ, the statement

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or to the notion that a basic human right to self-expression underpins the First Amendment (see eg Redish, "The Value of Free Speech" (1982) 130 *U Pa L Rev* 591).

57 See eg *Theophanous* (1994) 182 CLR 104 at 125 per Mason CJ, Toohey and Gaudron JJ; *Lange* (1997) 145 ALR 96 at 108-109; *Levy* (1997) 146 ALR 248 at 251-252 per Brennan CJ, at 274 per McHugh J, at 286-287 per Kirby J.

58 *Toogood v Spyring* (1834) 1 CM & R 181 at 193 .

59 See eg *Lange* (1997) 145 ALR 96 at 114, citing *Adam v Ward* [1917] AC 309 at 334.

60 *Toogood v Spyring* (1834) 1 CM & R 181 at 193, cited in *Lange* at 114.

61 At pp174-175.

62 *Lange* (1997) 145 ALR 96 at 116.

63 *Adam v Ward* [1917] AC 309 at 329.

64 It may be that this form of malice has been jettisoned in the expanded form of qualified privilege established in *Lange*. See pp176-177 below.

65 See eg *Clark v Molyneux* (1877) 3 QBD 237 at 246; and the judgment of Hunt J in *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58, comparing common law malice to the "good faith" requirement for statutory fair report privileges contained in s26 of the *Defamation Act* 1974 (NSW).

must therefore be "a communication which is capable of serving the purpose of the occasion and is made with no other object than that of serving that purpose".[66]

A notable difference between common law qualified privilege in Anglo-Australian law and its counterpart in the USA prior to the Supreme Court decision in *Gertz v Robert Welch Inc*[67] is that, in some US jurisdictions at least, proof of unreasonableness on the part of the defendant was recognised as a form of malice, sufficient to defeat the privilege.[68] This was however a different way of using the notion of reasonableness in making the defamatory publication than is to be found in *Lange*, because it placed the onus to disprove reasonableness on the plaintiff. A consequence of the ruling in *Gertz* that even private plaintiffs must prove fault in order to succeed (at least where the matter is of public concern or a media defendant is being sued) is that this ground of defeasance has become largely superfluous in the USA.[69]

Origins and Early Development

The origins of common law qualified privilege in English defamation law are obscure and intriguing. The earliest case noted by Holdsworth[70] is *Vanspyke v Cloyson*,[71] in which the defendant suggested to Dudley, a merchant, that the plaintiff, also a merchant and a debtor to Dudley, was not financially trustworthy. The plaintiff's action for slander failed, the report stating cryptically that "it is not any slander to the plaintiff, but good counsel to Dudley".

In a subtle and detailed account of the development of common law qualified privilege, MM Slaughter[72] locates this type of justification for denying a remedy to the defamed plaintiff within a major process of transition within defamation law. According to her analysis, which takes as its starting-point Robert Post's three-way classification of types of reputation into "honour", "dignity" and "property",[73] defamation law in pre-capitalist,

66 *Mowlds v Fergusson* (1939) 40 SR(NSW) 311 at 318, quoted by McHugh J (dissenting) in *Stephens* (1994) 182 CLR 211 at 261.

67 418 US 323 (1974).

68 See American Law Institute, *Restatement of the Law of Torts* (American Law Institute, St Paul, Minn 1938) paras 600-601; Tieffer, "Qualified Privilege to Defame Employees and Credit Applicants" (1977) 12 *Harv CR-CL L Rev* 143 at 153-168.

69 See American Law Institute, *Restatement of the Law (Second): Torts* (American Law Institute, St Paul, Minn 1977) para 600, comment b; Watkins & Schwartz, "*Gertz* and the Common Law of Defamation: Of Fault, Nonmedia Defendants and Conditional Privileges" (1984) 15 *Tex Tech L Rev* 824 at 869.

70 Holdsworth, "Defamation in the Sixteenth and Seventeenth Centuries" (1925) 41 *LQR* 13 at 29-30.

71 (1597) Cro Eliz 541.

72 Slaughter, "The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society" (1992) 14 *Cardozo L Rev* 351.

73 Post, "The Social Foundations of Defamation Law: Reputation and the Constitution" (1986) 74 *Cal L Rev* 691.

"communitarian" societies chiefly treated reputation as a form of "honour" or "dignity". It primarily focussed on the status of the defamed person within society and was strongly concerned to protect the social values within which that status resided as well as the defamed person's private interest in reputation. Because its role, in part, was therefore to punish the defamer for improperly violating social standards by making an unjustified attack on the honour or dignity of one of its members, it required proof of actual malice, in the sense of ill-will, on the defamer's part.[74] It follows that a remark such as occurred in *Vanspyke v Cloyson* would not attract liability, on the ground that it was not maliciously defamatory of the plaintiff but was merely "good counsel" to the merchant Dudley. To modern eyes, the case seems to be one of qualified privilege: indeed, transmitting information about the creditworthiness of a would-be borrower in response to a request by the potential lender was recognised relatively early as a privileged occasion.[75]

Slaughter explains the evolution of common law qualified privilege as part of defamation law's reaction to the development, from the eighteenth century onwards, of a predominantly capitalist, market-oriented society. In such a society, reputation was primarily viewed as an asset of the individual concerned. An injury to a person's reputation was in essence an injury only to that item of private property. In becoming increasingly concerned to furnish monetary compensation for that injury, defamation law abandoned its requirement that the plaintiff prove fault, in the form of malice, on the defendant's part. While malice had still to be pleaded, it was presumed by operation of law simply from the fact that the statement was defamatory of the plaintiff.

Concurrently, however, the courts also framed rules for determining when a plaintiff's interest in obtaining compensation for injury to his or her reputation should yield to some notion of public good, defined along broadly utilitarian lines. These crystallised as situations of qualified privilege, ie as occasions where the law's presumption of malice did not apply and where the plaintiff, in order to succeed, was therefore obliged to prove malice in fact.

For the purposes of this article, three elements of Slaughter's account are of special interest.

First, the changes to defamation law that she describes had the effect, inter alia, of bringing an important dimension of this law under judicial control. Whereas under the prior law malice, an issue for the jury to determine, had always to be proved by the plaintiff, it was now for the judge to say whether the occasion was a privileged one. Only when the

74 This part of Slaughter's analysis is expressly dependent on the findings of research described in Helmholz, "Civil Trials and the Limits of Responsible Speech" in Helmholz & Green (eds), *Juries, Libel and Justice: The Role of English Juries in Seventeenth- and Eighteenth-Century Trials for Libel and Slander* (Clark Memorial Library, University of California, Los Angeles 1984) pp3-36.

75 See eg *Herver v Dawson* (1765) 5 G 3.

plaintiff sought to plead and prove malice to defeat the privilege would the jury be brought back into the picture.

Secondly, at least in its early stages of development, privilege was often associated with confidentiality. Private and confidential communications on matters of mutual interest between businessmen who trusted each other (as in *Vanspyke v Cloyson*), or indeed between friends or relatives, were the chief instances of occasions held to be privileged. When the principal categories of privilege crystallised (more or less) in the nineteenth century, the communications held to be privileged were still, in the main, private ones, even though confidentiality or mutual trust between defamer and recipient was no longer specifically required.

Thirdly, the range of relationships within which privilege might be recognised broadened in the nineteenth century so as to serve new elite groups and institutions of power within newly developing social structures based on a capitalist economy. This occurred because, in Slaughter's words, the basis of privilege doctrine "shifted to relationships that were individualistic, impersonal and contractual - more characteristic of market society than community", with the result that privilege "served a contractarian ideology of private ordering".[76] Slaughter describes the scope of the defence in the nineteenth century as follows:

> The overwhelming number of cases of private privilege[77] involve property interests. The defamed person is a creditor [sic],[78] trader, servant, local officer, minister, employee, or public beneficiary. He claims he has suffered injury to his property, pocketbook, credit, or calling. ... The defamer's interest is also frequently economic; namely, the protection of his or the interlocutor's property, employees, money, or investments.[79]

She comments that the sweeping policy justifications offered by nineteenth century English judges[80] for the existence of qualified privilege as a defence - ie that it serves "the convenience of mankind"[81], "the general interest of society"[82] and so on - are based on an economic theory "like Adam Smith's invisible hand, where self-interested transactions

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76 Slaughter, "The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society" (1992) 14 *Cardozo L Rev* 351 at 375.

77 This term, as used by Slaughter, corresponds with common law qualified privilege as used by Australian lawyers. She uses "public privilege" to describe the defence of fair comment, with which her article is not explicitly concerned (see at 375 fn92).

78 A reading of the surrounding text (see especially at 389-396) suggests that the word "debtor" might have been intended here. It certainly could belong in the list, given that credit references were frequently recognised to be privileged communications.

79 At 376.

80 And echoed in the late twentieth century by Australian judges: see p176 below.

81 *Hodgson v Scarlett* (1818) 1 B & Ald 232 at 239-240.

82 *Whiteley v Adams* (1863) 15 CB(NS) 393 at 418.

ultimately ensure the betterment of all".[83] But there is an important inference which Slaughter fails to draw. Just as Adam Smith's account of laisser faire economics concealed the fact that it was not "all" within society who actually attained "betterment" from "self-interested transactions", but those who achieved success within individualist, competitive market systems, the judicial ideology that privilege exists "for the general interest of society" conceals the fact that it primarily operated to protect the rich and/or powerful. It may, for instance, have conferred some benefit on capable and honest would-be employees to know that the references being written both about them and about anyone else competing with them for a job could provide frank assessments rather than bland or wholly favourable ones because of the privilege conferred on the writers,[84] but clearly the principal beneficiaries of this privilege were the employers themselves. They not only received frank assessments of individual applicants (which the applicants themselves could not scrutinise in order to reply to any false allegations), but they knew that their freedom to write references under the protection of privilege was a very useful deterrent against employee misconduct.[85]

A brief glance at the nineteenth century case-law, as summarised in Slaughter's account, demonstrates this proposition that typically the plaintiff whose defamation action was amenable to the defence of privilege was in a weak or disadvantaged position vis-à-vis one or more of the "players" amongst whom the privileged communication was made. In the present century, the position is much the same.[86] The plaintiff is commonly an actual or would-be servant, public officer or debtor, or is a person who is or seeks to be subject to the formal or informal authority of a recognised association or institution, such as a domestic tribunal or a professional disciplinary body. The defendant and/or the person to whom the defamatory communication is made is an actual or potential master, superior officer or creditor, or is a member of the association or institution which actually or potentially exercises authority over the plaintiff. Also, as Slaughter points out, the distinctly malleable concept of "legal, moral or social duty" was extended during the

83 Slaughter, "The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society" (1992) 14 *Cardozo L Rev* 351 at 377.

84 See eg *Rogers v Clifton* (1803) 3 Bos & Pul 587 at 591. For discussion of this topic in the light of modern American developments, see Shore, "Defamation and Employment Relationships: The New Meanings of Private Speech, Publication, and Privilege" (1989) 38 *Emory LJ* 871.

85 See Tieffer, "Qualified Privilege to Defame Employees and Credit Applicants" (1977) 12 *Harv CR-CL L Rev* 143. The balance of power in this situation has recently been shifted in the employee's favour by the House of Lords' ruling in *Spring v Guardian Assurance Plc* [1995] 2 AC 296 that an employer who writes an employment reference for a former or present employee may be subject to a duty under the law of negligence to use reasonable skill and care in preparing it, even though under defamation law the reference is protected by qualified privilege.

86 For an outline of US and English categories of privileged occasion in the 1920s, see Jones, "Interest and Duty in Relation to Qualified Privilege" (1924) 22 *Mich L Rev* 437. For a comprehensive description of present-day categories, see Brown, *The Law of Defamation in Canada* (Carswell, Toronto, 1987) ch13.

nineteenth century to protect public-spirited citizens who made defamatory communications voluntarily to such a person (master, superior officer etc) without having been specifically requested to do so.[87]

Application to Material Disseminated to the Public

The Law Prior to Theophanous and Stephens

Significant changes to common law qualified privilege, in its application to material disseminated by the media or through other means to the public, were suggested in 1994 in the High Court's judgments in *Theophanous* and *Stephens*. Further changes resulting from *Lange* brought the law to its present position, as outlined above.[88] To put these two sets of changes into context, a review of the law just prior to *Theophanous* and *Stephens* is necessary.

As just explained, qualified privilege in its early development was confined to private and sometimes confidential communications, or to communications made to defined groups of people, such as shareholders in a company,[89] who shared the specified interest on which the privilege was based. During the nineteenth century, extension of the defence to newspaper publications was canvassed.[90] Newspapers argued that they had a duty to convey material on matters of public interest to the public, which had a reciprocal interest in receiving such material. Generally, however, while defamatory *comments* by newspapers (and others) on matters of public interest obtained protection under the separate defence of fair comment,[91] the protection afforded by common law qualified privilege to defamatory allegations of *fact* was not extended to newspaper publications.

A striking instance was the case of *Duncombe v Daniell*.[92] Here, while defamatory allegations made by an elector about a candidate for election to Parliament were said to be privileged so long as they were communicated only to other electors, a publication to "all the world" in a newspaper was held to have exceeded the boundaries of the privilege.

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87 Slaughter, "The Development of Common Law Defamation Privileges: From Communitarian Society to Market Society" (1992) 14 *Cardozo L Rev* 351 at 380-382, citing *Coxhead v Richards* (1846) 2 CB 569; *Davies v Snead* (1870) 5 LR 4 QB 608.

88 At pp161-166.

89 See eg *Lawless v Anglo-Egyptian Cotton & Oil Co* (1869) LR 4 QB 262. Contrast *Gilpin v Fowler* (1854) 9 Ex 615, where the range of publication was too wide.

90 See eg notes on this topic in (1869) 47 *Law Times* 63 and 102; (1870) 50 *Law Times* 131; (1878) 42 *JP* 291; (1886) 81 *Law Times* 308 (in which the press, sardonically labelled "the watchdog of civilisation", is said to believe that "the public like incessant howling at the moon" and to resent deeply the occasional flying of a "boot-jack" by the law, that "crusty old-fashioned fogey").

91 See eg *Henwood v Harrison* (1872) 7 CPLR 606; *Davis v Duncan* (1874) 9 CPLR 396; see pp207-208 below.

92 (1837) 3 Car & P 223; see too *Brown v Croome* (1817) 2 Stark 297.

During the twentieth century, this duty-interest argument was again raised by the media in a number of common law jurisdictions. It sometimes received a sympathetic hearing,[93] particularly in the USA.[94] But generally the response of the courts was that, except in some limited situations, the media could not claim to be subject to a "legal, moral or social duty" to publish material of public interest.[95] The public might well have an interest in receiving such material, but the necessary reciprocity of duty and interest was lacking because no corresponding duty bound either the media or media employees. It was said that they should in this context be equated with ordinary citizens.[96]

By the same token, and again with some exceptions,[97] most individuals communicating defamatory publications via the media to the world at large, even when they had been major figures in government or in some other aspect of public life, were held to lack the necessary duty.[98] On the other hand, where a newspaper was disseminated only to a restricted group of people who share a special interest in some subject-matter, defamatory material published on that subject in the newspaper might attract qualified privilege.[99]

Accordingly, before 1994 the exceptional situations where a media publication to the world at large might be protected by qualified privilege were determined in the following way. If some third person had a recognised duty to communicate material to the public or had an interest in so doing, and that duty or interest was matched by a corresponding

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93 In Canada, in particular: see eg *Dennison v Sanderson* [1946] 4 DLR 314 and the judgment at first instance in *Drew v Toronto Star Ltd* [1947] 4 DLR 221. These cases and the circumstances of their overruling are discussed in Weiler, "Defamation, Enterprise Liability and Freedom of Speech" (1967) 17 *U Toronto LJ* 278 at 282-289; see too Brown, *The Law of Defamation In Canada* pp583-589. In Australia, see the dissenting judgment of Smithers J in *Australian Broadcasting Corporation v Comalco Ltd* (1986) 68 ALR 259.

94 The best-known of the US cases is probably *Coleman v MacLennan* 78 Kan 711, 98 P 281 (1908), which was cited with approval in the judgment of the Supreme Court in *Sullivan* 376 US 254 at 280-282 (1964). For a useful review of these cases, see Loveland, "Qualified Privilege as a Defence for Political Libels Against Elected Politicians: Going Back to Derbyshire's American Roots" (1997) 26 *Anglo-Am L Rev* 175.

95 For leading judgments to this effect, see *Telegraph Newspaper Co v Bedford* (1934) 50 CLR 632; *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 (Australia); *Blackshaw v Lord* [1984] 1 QB 1 (UK); *Banks v Globe & Mail Ltd* (1961) 28 DLR (2d) 343 (Canada); *Templeton v Jones* [1984] 1 NZLR 448 (NZ); *Post Publishing Co v Hallam* 59 F 30 (6th Cir 1893) (USA).

96 In Australia and England, this view of the role of the media and of journalists is frequently supported by reference to a statement to this effect in the judgment of Lord Shaw in *Arnold v King Emperor* (1914) 30 TLR 462 at 468.

97 Eg *Toyne v Everingham* (1993) 91 NTR 1.

98 For example, in *Lang v Willis* (1934) 52 CLR 637, the High Court of Australia followed *Duncombe v Daniell* (1837) 3 Car & P 223 in holding that election speeches made to large audiences were not necessarily privileged even if they dealt with issues of interest to electors.

99 See eg *Chapman v Ellesmere (Lord)* [1932] 2 KB 431; *Andreyevich v Kosovich* (1947) 47 SR(NSW) 357.

interest in the public to receive the communication, media reports of any defamatory communication actually made shared any privilege to which the maker was entitled. Significantly, the media defendant was in these situations acting as a conduit-pipe only, relaying to the public someone else's statement about an issue of public interest. In accordance with this approach, qualified privilege was accorded to media reports of a government minister correcting a prior public statement which was misleading,[100] of a medical tribunal spokesperson's notification to the public that a named medical practitioner had been disqualified from practice[101] and of a defamatory utterance of a person who was seeking to repair his reputation after having been defamed in parliamentary proceedings which were reported to the public (exercising, in a loose sense, a public "right of reply").[102] This line of reasoning was also sometimes sufficient to bring within common law qualified privilege media reports of proceedings of administrative tribunals and other public bodies which were not specifically covered by fair report privilege.[103]

The Effect of Theophanous and Stephens

Two aspects of the High Court's judgments in *Theophanous* and *Stephens* directly bore on the availability of common law qualified privilege in cases where the defamatory material had been disseminated to the public.

First, the dissenting judgments of Brennan and McHugh JJ in *Stephens* contained proposals to make the defence available to any person who with "special knowledge" on government or political matters conveyed factual information on such matters to the public, and to any media or other defendant which, in effect, acted as the conduit-pipe for transmitting this information to the public.[104] In the opinion of McHugh J[105] (but not Brennan J[106]), this privilege for the media would be "ancillary" only; hence it would fail if that of the primary privilege-holder were defeasible on the ground of malice. Brennan J considered that, in

100 *Dunford Publicity Studios Ltd v News Media Ownership Ltd* [1971] NZLR 961.

101 *Allbutt v General Council of Medical Education and Registration* (1889) 23 QBD 400. In so far as considerations of public safety arise in this situation, it has parallels with a recent decision that a consumer magazine's warning to the public about allegedly dangerous gas heaters should be protected by qualified privilege: see *Bowin Designs Pty Ltd v Australian Consumers Association* (Unreported, Federal Court, Lindgren J, 6 December 1996).

102 *Adam v Ward* [1917] AC 309; see too *Watts v Times Newspapers Ltd* [1996] 2 WLR 427; [1996] 1 All ER 152. The response must, however, be commensurate with the occasion: see *Penton v Calwell* (1945) 70 CLR 219; *Marks v Construction Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia (WA Branch)* (1995) 14 WAR 360, a case involving a trade union journal.

103 For a recent instance, see *Homestead Award Winning Homes Pty Ltd v South Australia* (Unreported, SA Supreme Court, Prior J, 15 July 1997).

104 *Stephens* (1994) 182 CLR 211 at 246-255 per Brennan J, at 264-266 per McHugh J.

105 At 266, drawing on dicta in *Loveday v Sun Newspapers Ltd* (1938) 59 CLR 503 at 519 per Dixon J.

106 At 253-255.

contrast to the normal definition of common law malice in the context of qualified privilege, a defendant reporting the defamatory statement of a person with special knowledge should not be deemed malicious merely because he or she "had no personal knowledge of (and hence no belief in)" the truth of the defamatory statement.[107] But he suggested also that the defamed person should be "fairly given" an opportunity to make a "reasonable response" to the defamatory matter.[108] This last suggestion was carried forward to form part of the criterion of "reasonableness" in *Lange*.[109]

Secondly, a short passage in the majority judgment of Mason CJ, Toohey J and Gaudron J in *Theophanous* contained the dramatic suggestion that all defamatory communications made in the course of "political discussion" (as defined in that case), whether to the public at large or to a small audience, and whether or not by a media organisation, should be protected by qualified privilege.[110] This was put forward as a natural offshoot of the implied constitutional freedom, though the detailed grounds for such a massive expansion of the privilege were not spelled out at all.

In decisions following *Theophanous* and *Stephens*, lower courts responded in very different ways to these diverging judicial opinions on the scope of qualified privilege.[111] It was a period of considerable confusion.

The Effect of Lange

The unanimous joint judgment in *Lange* substantially resolved these uncertainties. It expanded the operation of common law qualified privilege to include publications made by the media or any other publishers to any wide audience on "government and political matters". It stated that the fundamental requirement of reciprocity of duty or interest in qualified privilege[112] was satisfied by virtue of the following reasoning:

> each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The

107 At 253. The ingredients of common law malice are outlined at p167 above.
108 At 252-253.
109 See *Lange* (1997)145 ALR 96 at 118, and the discussion at p176 below.
110 *Theophanous* (1994) 182 CLR 104 at 140.
111 See eg *Hart v Wrenn* (Unreported, NT Supreme Court, Mildren J, 19 January 1995) (noted in (1995) 2 *Media L Rep* 158); *Sporting Shooter's Association of Australia (Vic) v Gun Control Australia* (Unreported, County Court of Victoria, Judge Shelton, 2 March 1995); *Peterson v Advertiser Newspapers Ltd* (1995) 64 SASR 152. For academic discussion, see Dreyfus & Neal, "First Victory on Political Qualified Privilege" (1995) 2 *Media L Rep* 82; Cassimatis, "*Theophanous* - A Review of Recent Defamation Decisions" (1997) 5 *Torts LJ* 102. In New Zealand, the notion of extending common law qualified privilege to situations of "political expression" was sanctioned in *Lange v Atkinson* [1997] 2 NZLR 22.
112 See p167 above.

> duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion - the giving and receiving of information - about government and political matters.[113]

The Court referred to "changing conditions" during the present century as calling for this extension of qualified privilege, notably "[t]he expansion of the franchise, the increase in literacy, the growth of modern political structures operating at both federal and State levels and the modern developments in mass communications, especially the electronic media".[114] It stated that these changes also affected the scope of the implied constitutional freedom.[115]

In this newly-enhanced sphere of operation of qualified privilege (though not in any situation where prior to *Lange* the defence was available)[116] the defendant must satisfy an additional new requirement of "reasonableness of conduct" in making the publication. The Court justified this in terms of the much greater harm that can be done to reputation by a publication made to "tens of thousands, or more, of readers, listeners or viewers".[117] It entails proving, "as a general rule", that the defendant "had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue".[118] An account of "reasonableness" in these terms has close parallels with its operation in the defence of statutory qualified privilege under s22 of the *Defamation Act* 1974 (NSW),[119] to which the judgment in *Lange* refers on several occasions. But the Court added an extra requirement, that the defendant must also, generally speaking, have "sought a response from the person defamed and published the response made (if any)".[120]

In *Lange*, the High Court also discussed defeat of the defence on grounds of malice, with particular reference to this expanded operation of the defence. It endorsed the traditional definition of malice as publication for an improper motive,[121] but emphasised that the plaintiff must prove the publication to have been "actuated" by malice, not merely that ill-will or some other improper motive existed. It added that neither the motive of causing political damage nor the "vigour of an attack or the pungency of a defamatory statement" would be enough of itself to constitute malice.[122] It did not mention the alternative form of malice, namely that the defendant did not have a positive belief in the truth of the

113 (1997) 145 ALR 96 at 115.
114 At 110-111.
115 At 111.
116 This is made clear at 117.
117 At 116.
118 At 118.
119 See discussion at pp205-206 below.
120 At 118.
121 See p167 above.
122 At 118.

imputation. This may mean that this form of malice does not apply to the defence in its expanded field of operation,[123] but this issue cannot be regarded as settled.

Conformity with Implied Constitutional Freedom

In simple legalistic terms, appropriate "conformity" between the expanded version of common law qualified privilege and the implied freedom of political communication must be taken to exist because a unanimous High Court has so pronounced, in a judgment in which it substantially redefined both the freedom and the privilege.

The Court suggests, however, that conformity does not mean complete equivalence.[124] The privilege, in its expanded sphere of operation, covers communications on "government and political matters". The freedom covers only communications relevant to the making of free and informed choices by Commonwealth electors. The Court illustrated this distinction by reference to "discussion of matters concerning the United Nations or other countries", which "may be protected by the extended defence of qualified privilege, even if those discussions cannot illuminate the choice for electors at federal elections or in amending the Constitution or cannot throw light on the administration of federal government".[125]

This concession leaves some leeway for the range of communications protected by qualified privilege to expand further without having to be linked to the making of electoral choices. For example, the broad notion of "government and political matters" might include the activities of large companies, at least when they directly affect a large section of the public. But this is by no means certain. There is a strong case for saying that in any event the expanded privilege should be recognised as covering this aspect of public life, given that the dividing line between "public" and "private" in a context such as this is anything but clear.[126] It should, for instance, cover defamatory material published in relation to BHP's recent decision to close down its operations in Newcastle. Such an extension would not, however, be possible if the notion of "conformity" implied that the expanded qualified privilege must always be defined with reference to the making of electoral choices at Commonwealth level.

The "conformity" that emerges from *Lange* has only been possible because the High Court has made fundamental changes to the conceptual foundations of common law qualified privilege. The above outline[127] of the origins and development of this defence shows that

123 This view is taken in Walker, "Proving Belief" (1997) 44 *Gaz L & J* 12.

124 Though a passing comment at 111 does suggest equivalence.

125 At 115-116.

126 For articulation of this view, see Edgeworth & Newcity, "Politicians, Defamation Law and the 'Public Figure' Defence" (1992) 10 *Law in Context* 39 at 60-61; Chesterman, "The Money or the Truth: Defamation Reform in Australia and the USA" (1995) 17 *UNSW LJ* 300 at 304; Groves, "A Constrained Defence" (1997) 44 *Gaz L & J* 3 at 5.

127 At pp168-172.

it was initially confined to private or even confidential communications, and that in its de facto operations it chiefly promoted the interests of individuals or institutions possessing power or authority, such as employers or creditors in their dealings with actual or would-be employees or debtors, or professional regulatory bodies in their dealings with actual or would-be members of the relevant profession. In the words of Bowen LJ in *Merivale v Carson*,[128] "privileged occasion" was used "in a legal sense... with reference to a case in which one or more members of the public are clothed with a greater immunity than the rest". If the established methodology of the defence had been maintained in its extension to communications made to the public on "government and political matters", there would have been a real risk of creating further categories of "privileged publishers", rather than a "level playing field"[129] for the making of such communications by all people within the community.

Media organisations and journalists could, for instance, form one such category. This would have happened if they had been successful in persuading Australian courts (as they have sought to do on many occasions in the past)[130] that by virtue of their long-standing role within society they collectively have a general "legal, moral or social duty" to make communications to the public on all matters of public interest and that the public has a reciprocal interest in receiving such communications.

The dangers of this have been pointed out even in the United States, notwithstanding that the First Amendment expressly protects freedom of the press as well as of speech and the press has always been recognised as playing a very special role (indeed, in the words of one commentator, it has been placed on a "structural and historical pedestal"[131]). During the 1970s, observations in Supreme Court judgments, notably in *Gertz v Robert Welch*,[132] suggesting that media defendants might therefore enjoy greater constitutional protection against defamation liability than non-media defendants, at least in actions brought by private plaintiffs, provoked strong objections to the prospect of a "mediaocracy" being "grafted on to the First Amendment".[133] Later Supreme Court decisions[134] did in fact

128 (1887) 20 QBD 275 at 282. This dictum is disputed in Radcliffe, "The Defence of 'Fair Comment' in Actions for Defamation" (1907) 23 *LQR* 97. But Radcliffe's argument, at 99, that "[e]veryone has an equal right to use defamatory language in giving the character of a servant, in making complaint of a subordinate to his superior, and the like" tends chiefly to confirm the potential of qualified privilege to favour elite groups.

129 The phrase is borrowed (deliberately) from *Australian Capital Television* (1992) 177 CLR 106: see the discussion of this issue in that case at 144-147, 175, 219-221, 238-241.

130 See pp172-173 above.

131 Schauer, "Social Foundations of the Law of Defamation: A Comparative Analysis" (1980) 1 *J Media L & Practice* 3 at 19.

132 418 US 323 (1974); see eg the Court's formulation of the issue to be determined, at 332.

133 Shifrin, "Defamatory Non-Media Speech and First Amendment Methodology" (1978) 25 *UCLA L Rev* 915 at 934-935; see too Karst, "Equality as a Central Principle in the First Amendment" (1975) 43 *U Chi L Rev* 20; Eaton, "The American Law of Defamation through *Gertz v Robert Welch, Inc* and Beyond: An Analytical Primer" (1975) 61 *Va L Rev* 1349 at 1403-1408, 1416-1418; Watkins & Schwartz, "*Gertz* and the Common Law of

appear to eliminate, though not entirely conclusively, this spectre of a "mediaocracy", though, to the extent that the First Amendment is interpreted as primarily concerned with public discourse, the media has a strong claim to its protection because prima facie at least its publications form part of this discourse.[135]

Another category of "privileged publishers" would have arisen if the extension of common law privilege had been to statements by persons with "special knowledge", in the manner suggested by Brennan and McHugh JJ, dissenting, in *Stephens*.[136] McHugh J suggested the following as examples of such persons:

> The scientist who discovers that lack of governmental action is threatening the environment, the "whistleblower" who observes the bureaucratic or ministerial "cover up", and the investigative journalist who finds that grants of public money have been distributed contrary to the public interest.[137]

A definition of "special knowledge" and the mode of resolving any claim by a defendant to possess it would have been determined by judges (it is to judges, not juries, that the determination of occasions of qualified privilege is generally entrusted).[138] They could well have displayed undue respect for orthodox, conservative expertise and/or experience and insufficient respect for the insights of those who have acquired unconventional, potentially ground-breaking knowledge by unorthodox means. Such people might have laboured long and hard to find out what they could about all the relevant issues, but have been denied access to what really would be useful information, with the result that it would be very easy for a defamation plaintiff to point to defects in the factual basis for their assertions.[139]

On the other hand, if having "special knowledge" were defined more eclectically and loosely as having made some plausible attempt to be informed about the relevant issues,

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Defamation: Of Fault, Nonmedia Defendants and Conditional Privileges" (1984) 15 *Tex Tech L Rev* 824 at 831-864.

134 Eg *Dun & Bradstreet Inc v Greenmoss Builders Inc* 472 US 749 (1985). For commentary on the current law, see Sack & Baron, *Libel, Slander and Related Problems* (Practising Law Institute, New York, 2nd ed 1994) pp352-358; Smolla, *Law of Defamation* (Clark Boardman, New York 1995) para 3.02[4].

135 See eg Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and *Hustler Magazine v Falwell*" (1990) 103 *Harv L Rev* 601 at 677-678. In the New Zealand case of *Lange v Atkinson* [1997] 2 NZLR 22 at 47, Elias J expressed concern that, due to anxieties about the power and influence of modern media organisations, extensions of qualified privilege might be fashioned in such a way as to discriminate *against* them.

136 See pp174-175 above.

137 (1994) 182 CLR 211 at 265.

138 See p169 above as to how this came about.

139 Cf criticism along similar lines in *Lange v Atkinson* [1997] 2 NZLR 22 at 50-51 per Elias J.

one is starting to inch towards a criterion of "responsibleness" or even "reasonableness". Indeed, McHugh J acknowledged during argument in *Lange* and *Levy* that he was "not wedded" to a criterion based on "special knowledge" and that "reasonableness" - the test ultimately agreed on by all members of the High Court - may have better expressed the idea that he had in mind in *Stephens*.[140]

Media representatives and other commentators have argued that this test, as explained by the Court in *Lange*, places unduly heavy burdens on the media. These concerns are based particularly on the media's relative lack of success with the test of reasonableness under s22 of the *Defamation Act* 1974 (NSW) and on the fact that the definition of "reasonableness" in *Theophanous* for the purposes of the constitutional defence was more favourable to them. They have been outlined elsewhere[141] and need not be re-examined in detail here.

The important point for the analysis in this article is however that common law qualified privilege, in its expanded field of operation, has been fundamentally transformed by the High Court. Relying on broad (and virtually meaningless) concepts such as "the common convenience and welfare of mankind", the Court has brought the defence in line with its relatively egalitarian version of political communication within a representative democracy. It now promotes a form of "free" discussion, both between the "representatives" and the "represented" and amongst the "represented", in which all citizens, so long as they act "reasonably", may participate on equal terms, rather than with some enjoying the status of "privileged publishers". It reflects the fact, as noted above,[142] that the implied constitutional freedom is one of communication or discussion, not specifically or preferentially of the press or of the media. While this "egalitarian" conception of political communication is most prominent in the 1992 and 1994 cases on the implied freedom, it receives clear support from the treatment of political protest in *Levy* and it is in no way contradicted by *Lange*.

To refer back to a comparison outlined above,[143] the Court has, in short, converted common law qualified privilege (in its new sphere of operation) from a "privilege" into a "freedom". Instead of tending to "privilege" particular classes of publishers who convey defamatory material within a generally familiar range of "privileged occasions", the defence now exists as a "freedom" which applies relatively indiscriminately within the sphere of debate on government and political matters.

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140 *Lange v ABC*; *Levy v Victoria,* transcript of argument p351.

141 See eg the following short comments on *Lange* in (1997) 44 *Gaz L & J*: Chesterman, "Clarity and Loose Ends" (at 5); Applegarth, "What is a Mass Communication?" (at 6); Nicholas, "Regrets of the Deadline" (at 7); Hattam, "Pressure on Sources" (at 9); Evatt, "Back to Earth" (at 10); Coleman, "Tortured Inquisition" (at 10).

142 At p166 above. See too comments on the impact of the media on modern society by Mahoney JA, dissenting, in *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 723-725.

143 At pp157-158.

ABSOLUTE PRIVILEGE AND OTHER FORMS OF PROTECTION FOR SPEECH IN PARLIAMENTS AND COURTS

General Nature

The primary instances of absolute privilege in defamation law are the privileges attaching at common law to statements, whether oral or in written form, made in the course of parliamentary proceedings (including the proceedings of committees)[144] and in the course of proceedings in a court,[145] or a tribunal which is exercising the functions of a court.[146] These instances of common law privilege are in many jurisdictions confirmed by statutory provisions.[147]

In addition, as explored in the next section,[148] the proceedings of parliaments and courts receive further protection, of a most unusual kind, respectively from other branches of parliamentary privilege (for which the sanction of punishment for contempt of parliament may, in theory at least, be invoked) and from the law of contempt of court.

Returning to defamation law, an additional occasion of absolute privilege at common law is a communication between "high officers of state" in relation to an "act of state".[149] Absolute privilege is also conferred by statute on (a) broadcasts of parliamentary proceedings;[150] (b) official reports, papers, proceedings etc published by authority of a

144 The privilege does not apply when an MP, while outside parliament, repeats or simply claims to "stand by" a defamatory statement initially made by him or her in the course of a parliamentary proceeding: *Beitzel v Crabb* [1992] 2 VR 121. According to McHugh J, dissenting, in *Stephens*, qualified privilege should apply instead: (1994) 182 CLR 211 at 268-269. In the latter situation, the defamed person may in any event be precluded by parliamentary privilege from proving the contents of the defamatory statement: see *Beitzel* at 128 and p186 below.

145 The privilege covers matter published in the course of taking any step in the relevant judicial or quasi-judicial proceedings, such as the making of a complaint pursuant to an established procedure (*Hercules v Phease* [1994] 2 VR 411), but not the making of a complaint to an investigating or prosecuting authority: *Mann v O'Neill* (1997) 145 ALR 682; 71 ALJR 903. It extends to appellate or review proceedings and may cover a statement made outside the relevant court or tribunal provided that it forms "an integral and necessary part of the preparation for and pursuit of the litigation": *Mann* at 710 per Gummow J.

146 See eg *Oliver v Bryant Strata Management Pty Ltd* (1995) 41 NSWLR 514. The proceedings of some disciplinary tribunals, including tribunals regulating legal practitioners, are covered: see *Hercules*, *Mann*.

147 See eg *Parliamentary Privileges Act* 1987 (Cth) s5; *Defamation Act* 1974 (NSW) s17.

148 At pp182-186.

149 See *Gibbons v Duffell* (1932) 47 CLR 520, where the High Court emphasised that the "officers of state" must be of the highest rank.

150 See eg *Parliamentary Proceedings Broadcasting Act* 1946 (Cth) s15.

House of Parliament;[151] and (c) proceedings before, reports of and statements to or by specified institutions or officials of government, chiefly when the exercise of quasi-judicial or investigative functions is involved.[152]

Absolute privilege is exceptional among forms of privilege in one important respect, namely that it allows no comeback for the plaintiff once its applicability to a defamatory publication is proved. This is a striking feature, given that every situation to which it relates would also fall within established principles of qualified privilege, where the plaintiff would have scope to defeat the privilege by proving malice. The only significant mitigation of the "absoluteness" of the privilege is that in some Houses of Parliament, such as the Senate, a defamed person may claim the right to make a reply within the same forum, also under absolute privilege.[153] In addition, such a person, along with any media organisations which report the defamatory material, may generally invoke qualified privilege if his or her reply to it defames the maker of it.[154]

Origins and Development

Speech in Parliamentary Proceedings

In its absolute form in defamation law, privilege stems initially from the endeavours of English peers in medieval times to obtain freedom to criticise their monarch within Parliament.[155] By the time of the Tudors, the Speaker of the House of Commons regularly presented a petition, which was regularly granted, that there should be freedom of speech in parliamentary debate. One of the issues resolved in Parliament's favour during the long

151 See eg *Parliamentary Papers Act* 1908 (Cth) s4; *Parliamentary Privileges Act* 1987 (Cth) s11; *Wrongs Act* 1936 (SA) s12(1) (considered recently in *Rowan v Cornwall* (1997) 68 SASR 253).

152 See eg *Royal Commissions Act* 1902 (Cth) s7; *Defamation Act* 1974 (NSW) ss17A-17R, 18, 19.

153 On the operation of this procedure in the Senate, see Aust, Parl, House of Representatives Standing Committee on Procedure, *A Citizen's Right of Reply: Report* (1991). On 20 October 1997, the NSW Premier announced that a similar procedure would soon be adopted in the NSW Parliament.

154 *Adam v Ward* [1917] AC 309; see pp173-174 above.

155 On the evolution of the parliamentary privilege of freedom of speech, see eg Wittke, *The History of English Parliamentary Privilege* (Da Capo, New York 1970) pp23-32; Mummery, "The Privilege of Freedom of Speech in Parliament" (1978) 94 *LQR* 276; Bogen, "The Origins of Freedom of Speech and Press" (1983) 42 *Md L Rev* 429 at 429-435; Lock, "Parliamentary Privilege and the Courts: The Avoidance of Conflict" (with an appendix by Lord Denning) [1985] *Pub L* 64; Boulton, *Erskine May's Treatise on the Laws, Privileges, Proceedings and Usages of Parliament* (Butterworths, London, 21st ed 1989) pp70-74; Oliver, "Parliament and the Press: A Right to be Reported?" in Kingsford-Smith & Oliver (eds), *Economical with the Truth: The Law and the Media in a Democratic Society* (Esc Publishers, London 1990) pp43-55; Harders, "Parliamentary Privilege - Parliament versus the Courts: Cross-examination of Committee Witnesses" (1993) 67 *ALJ* 109 at 112-118.

conflict between King and Parliament during the Jacobean period was whether this privilege was truly a right, as Parliament claimed, or merely a favour which the King could withdraw if he so wished. In 1684, the conflict reached its height when the Speaker of the House of Commons was convicted and fined for having signed an order, under the direction of the House, authorising the publication of a paper containing libels against the future James II. But the defeat of absolutist monarchical aspirations in relation to parliamentary privilege was sealed, following the "Bloodless Revolution", in Article 9 of the *Bill of Rights* 1688, which declared that "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".

During its period of development, parliamentary privilege became recognised as a defence to all civil or criminal defamation claims, not merely prosecutions instigated by the monarch. A key decision was *Lake v King*,[156] where it was held that documents circulated for official purposes to members of a committee of the House of Commons were privileged for the purposes of defamation law. This extension was justified primarily on the basis that the members of a body charged with supreme legislative responsibilities needed to have absolute freedom of speech in the course of their deliberations.

Significantly, this establishment of a privileged enclave of free speech was accompanied by the assumption of power to repress the freedom of speech of those both inside and outside the enclave who were minded to publish critical views about its operations.[157] Such people could be punished by the relevant house of parliament for contempt of parliament or breach of privilege.[158] At the present day in Australia, however, this species of contempt of parliament, so-called "defamatory contempt", has virtually, though not completely, died out.[159] In relation to the Commonwealth Parliament, it was abolished by s6 of the *Parliamentary Privileges Act* 1987 (Cth).

The law of parliamentary privilege also developed rules, based on Article 9 of the *Bill of Rights*, that without the consent of the relevant house of parliament (a) the record of a

156 (1668) 85 ER 137; see Holdsworth, "Defamation in the Sixteenth and Seventeenth Centuries" (1925) 41 *LQR* 13 at 29.

157 See generally Goldfarb, *The Contempt Power* (Columbia Univ Press, New York 1963) ch1.

158 For a discussion of the early history of this branch of parliamentary privilege, see Wittke, *The History of English Parliamentary Privilege* pp49-52; Siebert, *Freedom of the Press in England, 1476-1770* (Illinois Univ Press, Urbana 1952) pp112-116, 275-279, 368-374. As to contempt of parliament and its relationship to breach of parliamentary privilege, see Boulton, *Erskine May's Treatise on the Laws, Privileges, Proceedings and Usages of Parliament* pp69-70, 103-104; Walker, *Contempt of Parliament and the Media* (Adelaide Law Rev, Adelaide 1984).

159 For a discussion of a very recent instance of imprisonment for parliamentary contempt (the ground being the refusal of a petitioner to apologise for having, in the Parliament's view, abused the right of "commoner's" petition), see Goodwin, Stewart & Thomas, "Imprisonment for Contempt of the Western Australian Parliament" (1995) 25 *UWA LR* 187.

parliamentary debate should not be tendered in evidence in a court or any other body and (b) no statement made in a parliamentary debate, or by any person to a parliamentary committee, should be subjected to "questioning" or "impeaching" in "any court or place out of Parliament".[160]

The scope of this last prohibition requires elaboration, not least because its effect has, it would seem, been significantly enhanced in relation to the Commonwealth Parliament by the enactment of s16(3) of the *Parliamentary Privileges Act* 1987 (Cth). In Australia (both at common law and under this Act), England and New Zealand its impact on defamation claims has recently provoked some important and controversial decisions.

At common law, it is clear that where a Member of Parliament whose statement in a debate or other proceeding might be questioned or impeached in court is the defendant in a defamation action, the prohibition applies, generally to the detriment of the plaintiff's case. The point at issue here is not that the plaintiff is disabled by this prohibition from suing on the statement. As just explained, the reason why his or her suit will fail is that under a separate principle of defamation law the statement will enjoy absolute privilege. The significance of the prohibition on "questioning" or "impeaching" is that evidence of the statement made in the parliamentary proceeding cannot be introduced for any other purpose, for example, to show that the defendant did not genuinely believe in the truth of a defamatory statement made outside parliament.

The position when a Member of Parliament is a defamation plaintiff is less clear. According to a South Australian decision in 1990, *Wright and Advertiser Newspapers Ltd v Lewis*,[161] the prohibition cannot be invoked in this situation in order to prevent the defendant from pleading and proving a potentially successful defence of justification, qualified privilege or fair comment. This is the case even though doing so would impugn the integrity of a statement made by the plaintiff in a parliamentary proceeding.

In *Prebble v Television New Zealand*,[162] however, the Privy Council, on appeal from the Court of Appeal of New Zealand, disagreed with this conclusion. Lord Browne-

160 See eg Boulton, *Erskine May's Treatise on the Laws, Privileges, Proceedings and Usages of Parliament* pp90-92, 145-160; Lock, "Parliamentary Privilege and the Courts: The Avoidance of Conflict" (with an appendix by Lord Denning) [1985] *Pub L* 64. For discussion of Australian instances, see Campbell, *Parliamentary Privilege in Australia* (Melbourne Univ, Melbourne 1966) pp34-38; Walker, *Contempt of Parliament and the Media*. The significance of the privilege's operation in relation to statements made by witnesses who are not MPs to parliamentary committees is critically discussed in Harders, "Parliamentary Privilege - Parliament versus the Courts: Cross-examination of Committee Witnesses" (1993) 67 *ALJ* 109.

161 (1990) 53 SASR 416.

162 [1995] 1 AC 321. This decision is criticised in Best, "Freedom of Speech in Parliament: Constitutional Safeguard or Sword of Oppression?" (1994) 24 *VUW LR* 91; Marshall, "Impugning Parliamentary Immunity" [1994] *Pub L* 509; Leopold, "Free Speech in

Wilkinson, delivering the Privy Council's advice, held that the prohibition applied to this form of challenge to a statement made in parliament, though it would not preclude tendering evidence to prove no more than the content of such a statement. Furthermore, since it is a privilege belonging to the relevant House of Parliament, a member could not waive it, either implicitly (eg through the act of suing) or by express words. He went on to say that in an extreme case, where, for instance, "the whole subject-matter of the alleged libel relates to the member's conduct in the House",[163] the resultant injustice to the non-member defendant might be so great that the member's defamation proceedings would have to be permanently stayed.

This ruling was perceived by members of the United Kingdom Parliament to be potentially unfair to them. It led to the staying of a high-profile defamation suit brought by Neil Hamilton, a member of the House of Commons, against *The Guardian* newspaper. In consequence, a statutory right for individual members to waive the privilege was introduced, as a last-minute amendment, into United Kingdom defamation legislation passed in 1996.[164] Ironically, after Mr Hamilton had supplied the necessary waiver and the stay order had been lifted, his case collapsed.

The enactment of s16 of the *Parliamentary Privileges Act* 1987 (Cth) has produced further complications where proceedings in the Commonwealth Parliament are involved. Section 16 confirms that Article 9 of the *Bill of Rights* applies to the Commonwealth, in addition to the other newly-enacted provisions of the section. Section 16(3) is as follows:

> (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
>
> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
>
> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

Parliament and the Courts" (1995) 15 *Legal Stud* 204; Harris, "Sharing the Privilege: Parliamentarians, Defamation and Bills of Rights" (1996) 8 *Auckland U L Rev* 45.

163 *Prebble* [1995] 1 AC 321 at 338.

164 *Defamation Act* 1996 (UK) s13. The section also permits waiver when the MP is a defendant. For critical comments, see Williams, "'Only Flattery is Safe': Political Speech and the Defamation Act 1996" (1997) 60 *Mod L Rev* 388.

It has been suggested that this provision merely restates Article 9 of the *Bill of Rights*,[165] having been enacted because a prior judicial interpretation of this Article[166] limited its operation to situations where a person might otherwise suffer criminal or civil liability on account of a statement made in parliament. But this view has been disputed,[167] on the footing that the language of the provision, particularly paragraph (c), appears wider than the phrase "questioning or impeaching" in Article 9, and that in any event s16(3), unlike the privilege emanating from Article 9,[168] leaves no room for waiver by the Commonwealth Parliament.

In the recent case of *Laurance v Katter*,[169] the Queensland Court of Appeal considered how s16(3) should operate when a member of the Commonwealth Parliament, having made defamatory statements in the Parliament about a non-member, said outside the Parliament that he had evidence to substantiate those statements. Pincus JA, treating the provision as broader than Article 9, held that, on account of the implied constitutional freedom (as set out in *Theophanous* and the other cases of 1994, ie prior to *Lange*), it could not apply to defamation cases because of its capacity to prevent non-members from properly pursuing or defending defamation claims involving members.[170] Davies JA held that it did not apply to the facts alleged because the publication by the defendant member which was sued upon had occurred outside Parliament, and allowing evidence to be tendered as to what he previously said in Parliament would not in any way impinge on his freedom to speak within Parliament.[171] Fitzgerald P, dissenting, held s16(3) to be valid and applicable according to its terms.[172] The High Court has granted special leave to appeal.

Speech in Proceedings of Courts and Tribunals

In a similar fashion to privilege in parliamentary proceedings, the royal courts in England established for judges, counsel, litigants and witnesses an immunity covering anything said in court proceedings or in documents filed with relation to a court case. This form of privilege had none of the profound constitutional resonances associated with parliamentary privilege, which probably helps to explain why it crystallised sooner, being settled in the

165 *Ammann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223 at 231; *Prebble* [1995] 1 AC 321 at 333.
166 In *R v Murphy* (1986) 5 NSWLR 18.
167 See eg *Laurance v Katter* (1996) 141 ALR 447 at 482-485 per Pincus JA, at 488 per Davies JA; Harders, "Parliamentary Privilege - Parliament versus the Courts: Cross-examination of Committee Witnesses" (1993) 67 *ALJ* 109 at 135, 138.
168 *Prebble* [1995] 1 AC 321 at 335; Harders, "Parliamentary Privilege - Parliament versus the Courts: Cross-examination of Committee Witnesses" (1993) 67 *ALJ* 109 at 133-135.
169 (1996) 141 ALR 447.
170 At 482-486.
171 At 488-491.
172 At 451-453, 479-481.

common law early in the seventeenth century.[173] Once again, it was justified as being necessary for the efficient workings of vital organs of government. By the end of the nineteenth century, it had been extended at common law to cover tribunals which exercised the functions of a court.[174]

As in the case of parliamentary privilege, this establishment of a privileged enclave of free speech was again accompanied by the assumption of power to repress the freedom of speech of those who were minded to publish critical views about its operations.[175] Such people could and, within limits, still can be punished by an appropriate court (sometimes the same court as had been criticised) for contempt of court.[176] Similarly, from the early 1800s onwards, the sub judice doctrine that became established within the law of contempt has produced the effect that, at least while proceedings are "pending", publications which cast doubt on the case presented by parties and their witnesses, or indeed their general credibility, might be liable to penal sanctions.[177]

Conformity with the Implied Constitutional Freedom

The speech that occurs in parliamentary or court proceedings is thus protected not only by absolute privilege in defamation law, but also under accompanying privileges of parliament and under the law of contempt of court. It is not an overstatement to characterise such speech as not merely free speech but "especially free speech".

As outlined above,[178] however, the political theory underlying the implied constitutional freedom of political communication, harnessing notions of representative and responsible government, suggests that elected representatives should be genuinely responsible to those

173 See Holdsworth, "Defamation in the Sixteenth and Seventeenth Centuries" (1925) 41 *LQR* 13 at 29, citing *Brooks v Montague* (1606) Cro Jac 90 and subsequent cases.

174 See *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431.

175 See generally Goldfarb, *The Contempt Power* ch1.

176 For brief discussions of the early origins of contempt of court, see Arlidge & Eady, *The Law of Contempt* (Sweet and Maxwell, London 1982) paras 1.01-1.02; Australian Law Reform Commission, *Contempt* (Report No 35, 1987) paras 20-22. The important eighteenth century developments which established a summary mode of trial for contempt by "scandalising" (ie criticising courts or judges) are described in Hay, "Contempt by Scandalising the Court: A Political History of the First Hundred Years" (1987) 25 *Osgoode Hall LJ* 431. The leading authorities in present-day Australian law are *Gallagher v Durack* (1983) 152 CLR 238 and *Nationwide News Ltd v Wills* (1992) 177 CLR 1. The latest reported Australian instance of a conviction for contempt by scandalising is *In the Marriage of Schwarzkopff* (1992) 16 Fam LR 539.

177 The early history of the sub judice doctrine is outlined in Arlidge & Eady, *The Law of Contempt* paras 1.29-1.30. For a recent illustration of its operation in protecting litigants from public abuse, see *Harkianakis v Skalkos* (Unreported, NSW Court of Appeal, 25 June 1997).

178 At pp161-166.

whom they represent and that citizens should therefore be free to engage in public criticism of public officials, including, but not limited to, Members of Parliament. Bearing this in mind, does this special "privileging" of two relatively narrow categories of speech under long-standing principles of law genuinely "conform with" the implied constitutional freedom?

Speech in Parliamentary Proceedings

i) Absolute Privilege in Defamation

The principal argument initially justifying absolute privilege for parliamentary speech in England was that, if it were not free to the extent that Members of Parliament were immune from prosecution for seditious or criminal libel when they criticised the monarch, Parliament would inevitably be subservient to the Crown. The dangers of royal retaliation against members who expressed opinions which the monarch did not like were particularly acute during any periods, such as those of the Jacobite kings, where the judiciary was not independent from royal influence. Crystallisation of this form of parliamentary privilege in Article 9 of the *Bill of Rights* was thus an important political victory for the English Parliament, marking a major step in the long transition from an absolute to a constitutional monarchy. Its significance in this regard has given it a special symbolic strength.

Nowadays, the availability of absolute privilege in a wide range of contexts, including but not limited to parliament, is justified on broader and more overtly functionalist grounds than that of confirming the supreme authority of parliament as against the executive. Put briefly, absolute privilege is said to be a matter of "inherent necessity",[179] essential to enable parliaments, as also the courts and other high-ranking officials and institutions of government within a narrow range, to function effectively. Without it, discussion and debate would be unacceptably inhibited.[180]

It is argued at times that parliamentary privilege in defamation law acts in aid of the democratic principles underlying the implied freedom of political communication in so far as it provides absolute immunity for individual members to use parliament as a forum in which to raise allegations of corruption, inefficiency etc against government ministers or bureaucrats.[181] This line of reasoning was indeed endorsed by the High Court in *Lange*. The Court's judgment identifies s49 of the Constitution, whereby the parliamentary privileges enjoyed by the English House of Commons are conferred on the Commonwealth

179 This phrase is used, for instance, by Zelling CJ in *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1 at 18.

180 See eg *Gibbons v Duffell* (1932) 47 CLR 520 at 528 per Gavan Duffy CJ, Rich and Dixon JJ; *Mann v O'Neill* (1997) 145 ALR 682 at 686 per Brennan CJ, Dawson, Toohey and Gaudron JJ, at 692-694 per McHugh J (dissenting), at 706-707 per Gummow J, at 721-722 per Kirby J.

181 See eg Edgeworth & Newcity, "Politicians, Defamation Law and the 'Public Figure' Defence" (1992) 10 *Law in Context* 39 at 52.

Parliament until the Parliament declares otherwise, as one of the constitutional provisions which "provide for a system of responsible ministerial government".[182]

It is less clear, however, whether an absolute right for individual Members of Parliament during parliamentary proceedings to make defamatory statements, even with evident malice, about any person at all sits comfortably with the notions of popular sovereignty and the responsibility of parliaments to the people. In this respect, members seem to occupy a privileged position vis-à-vis any citizens whom they attack in parliamentary debate, rather than being accountable to them and their fellow-citizens.

This special favouring of Members of Parliament is, however, weakened by three factors. First, as already mentioned,[183] some Houses of Parliament permit any citizen whose reputation is attacked by a member in a parliamentary debate to make a reply within the same House of Parliament. Secondly, a citizen so defamed, along with any media organisations that report the attack, may claim qualified privilege if the member is defamed in any published reply. Thirdly, members who overtly abuse the privilege can be disciplined by the Speaker or their party leader,[184] or can be voted out by the electors at the next election. The possibility of repercussions such as these, even if they do not always eventuate in practice, provides some measure of accountability.

When all these factors are taken into account, absolute privilege for defamatory statements in parliamentary proceedings, when considered alone, appears compatible with, and in some respects to promote, the objectives of the implied constitutional freedom. The fact that it grants to Members of Parliament a distinctly greater leeway to defame than other defendants may claim seems warranted by virtue of the argument that parliament needs uninhibited freedom of speech to function effectively. But it is important that Australian parliaments should mitigate the potential injustice inflicted by absolute privilege on ordinary citizens through extending the practice of giving any person defamed during parliamentary proceedings a right of reply in those proceedings or in the parliamentary record.[185]

182 *Lange* (1997) 145 ALR 96 at 105.

183 At p182.

184 In 1995, the current Premier of NSW, when Opposition Leader, removed a Member of the Legislative Council from his Shadow Cabinet because he believed that in the course of a speech in the Council she had abused parliamentary privilege by accusing a member of the public of serious criminal offences. Late in 1997, an MLC's allegation of a "paedophilia cover-up" provoked the establishment of a special commission of inquiry and her own expulsion from her party.

185 As recommended by the NSW Law Reform Commission in *Defamation* (Report No 75, 1995) para 11.27.

ii) "Defamatory Contempts" of Parliament

The accompanying privilege empowering parliaments to treat public criticism of their activities or their members as contempt of parliament has, however, a very different starting-point. This is the distinctly absolutist notion that public respect for, indeed deference to, individuals and institutions wielding state power should be compelled by law. Just as medieval monarchs in England, in the days before parliamentary free speech was recognised, sought to protect their elevated status as absolute rulers by punishing any members of the nascent English Parliament who criticised them, Parliament created its own privileges in order to protect its authoritative status by punishing any person who criticised it or questioned what was said in its debates. Paradoxically, it did so in the name of free speech. While this absolutist view of the relationship of rulers to subjects is no longer political orthodoxy, relics of its several centuries of dominance still remain.[186]

They are discernible in the power, still theoretically available to some Australian parliaments,[187] to punish as "defamatory contempt" the publication of material "reflecting on" a House of Parliament. As was emphasised in 1984 in the Report of a Joint Select Committee of the Commonwealth Parliament,[188] this is in direct conflict with democratic principles of free speech, particularly in view of the protection given to members by the defence of absolute privilege. Undoubtedly, it is not in conformity with the implied constitutional freedom of political communication. A law subjecting critics of a state authority to criminal punishment is, in substance, a law of seditious libel. The American notion that the protection of citizens from any such law is a "central" function of the First Amendment has clear parallels in the High Court's exposition of this freedom in Australia.[189]

The Commonwealth Parliament has got rid of the notion of defamatory contempts by enacting s6 of the *Parliamentary Privileges Act* 1987. In view of the High Court's recognition, in *Lange*, of the "integration" of Commonwealth, State and Territory political matters, it is at least arguable that the "chilling" of public criticism of some State and Territory Parliaments and politicians caused by retention of this branch of contempt of

186 See eg Goldfarb, *The Contempt Power* pp280-308; Edgeworth, "Beneath Contempt" (1983) 8 *Leg Serv Bull* 171.

187 The Parliaments of Queensland, South Australia, Victoria, Western Australia and the Northern Territory retain this power because they have broadly the same contempt powers as the English House of Commons. Before 1987, this was the position for the Commonwealth Parliament, by virtue of s49 of the Constitution, but s6 of the *Parliamentary Privileges Act* 1987 (Cth) specifically abolished the category of "defamatory contempt". The Parliaments of New South Wales and Tasmania have only ever had the contempt powers attributable to "subordinate" parliaments, which do not extend to punishing this form of contempt. See generally Walker, *Law of Journalism in Australia* (Law Book Co, Sydney 1989) paras 2.5.04 - 2.5.05, 2.5.10.

188 Aust, Parl, Joint Select Committee on Parliamentary Privilege, *Final Report*, (PP 219, 1984) para 6.15.

189 See p164 above.

parliament is incompatible with the implied freedom. The High Court might not, however, accept this argument, because it acknowledges the constitutional independence of parliaments in such matters[190] and it might well deem the operation of principles of contempt of parliament in relation to State parliaments to be a "discrete State issue", beyond the reach of the implied freedom.[191] The appropriate bodies to do away with the archaism of "defamatory contempts of parliament" are the relevant parliaments themselves.

iii) Privilege Prohibiting "Questioning" or "Impeaching"

As illustrated above,[192] the parliamentary privilege, deriving from Article 9 of the *Bill of Rights* 1689, which purports to prevent anything said during proceedings from being "questioned" or "impeached" in "any court or place out of Parliament" may seriously affect the conduct of defamation proceedings between a Member of Parliament and a non-member. It may disadvantage a plaintiff non-member, by precluding evidence of things said by the Member in parliamentary proceedings being tendered in court for the purpose of establishing a cause of action based on a publication outside Parliament, or of rebutting a defence (for example, through proving malice). It may similarly disadvantage a non-member who is defending proceedings brought by a Member, where the material in question is necessary to mount a defence. If the disadvantage in the latter situation is excessive, it may give grounds for a stay of the proceedings, thereby producing an unfair result for the member. The latter two situations will not occur if, as held in *Wright and Advertiser Newspapers Ltd v Lewis*,[193] the privilege must be taken to have been waived by the Member initiating proceedings, or if, as is now the case in the United Kingdom, legislation has been passed permitting such waiver.[194] But on any view of the overall position, the potential for conflict between the privilege and the principles of freedom of speech on political matters is obvious. The potential is enhanced in cases involving the Commonwealth Parliament if s16(3) of the *Parliamentary Privileges Act* 1987 (Cth) does indeed have a wider field of operation than Article 9.

In the Privy Council's judgment in *Prebble*, Lord Browne-Wilkinson conceded that this conflict existed:

> Their Lordships are acutely conscious (as were the courts below) that to preclude reliance on things said and done in the House in defence of libel proceedings brought by a member of the House could have a serious impact on a most important aspect of freedom of speech, viz, the right of the public to comment on and criticise the actions of those elected to

190 See eg *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.
191 The quotation is from *Levy* (1997) 146 ALR 248 at 253 per Brennan CJ. See p162 above.
192 At pp184-186.
193 (1990) 53 SASR 416.
194 *Defamation Act* 1996 (UK) s13.

> power in a democratic society: see *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534. If the media and others are unable to establish the truth of fair criticisms of the conduct of their elected members in the very performance of their legislative duties in the House, the results could indeed be chilling to the proper monitoring of members' behaviour. But the present case and *Wright's* case, 53 SASR 416 illustrate how public policy, or human rights, issues can conflict. There are three such issues in play in these cases: first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the courts. Their Lordships are of the view that the law has long been settled that, of these three public interests, the first must prevail.[195]

The judgment asserts that this ordering of priorities is justifiable on two main grounds. First, Members of Parliament and witnesses appearing before parliamentary committees must have no inhibitions whatsoever against speaking fully and freely.[196] Secondly, there is a broader principle of separation of the two branches of government.[197] The judiciary and the legislature must carefully refrain from examining and passing judgment on each other's affairs.

In determining the appeal in *Laurance* (for which it has granted special leave), the High Court will have an opportunity to pronounce on these issues. One of the fundamental questions before the Court will be whether the two broad grounds of justification put forward by Lord Browne-Wilkinson for a broad interpretation of the privilege are appropriate in Australian jurisdictions, given that implications from the "text and structure" of the Commonwealth Constitution create a competing constitutional principle of freedom of political communication. This broad interpretation does seem unduly to threaten the leeway given to citizens, under the implied freedom, to criticise their elected representatives in order that electoral choices should be genuinely free, as required by ss7 and 24 of the Constitution.

So far as the Commonwealth Parliament is concerned, the Court cannot ignore the direct support given to parliamentary privileges of all kinds by s49 of the Constitution. But in view of the uncertainties that have developed in judicial interpretation of the scope of the privilege against "questioning" or "impeaching", both in its *Bill of Rights* form and under s16(3) of the *Parliamentary Privileges Act*, the Court can legitimately make rulings which accommodate this parliamentary privilege with freedom of speech on political matters in a more sympathetic way than the *Prebble* rulings did. Three specific rulings would

195 [1995] 1 AC 321 at 336.
196 At 334.
197 At 332.

significantly promote conformity between this branch of parliamentary privilege and the implied freedom.

The first would be a ruling confirming, in opposition to *Prebble*, the correctness of the South Australian Supreme Court's decision in *Wright v Lewis* that a Member of Parliament who sues a non-member for defamation cannot claim the benefit of the privilege against "questioning" or "impeaching". In line with the methodology favoured in *Lange*, this determination is best reached as a matter of common law and simultaneously designated as being in conformity with the implied constitutional freedom.

The second would be an endorsement of the conclusion of Davies JA in *Laurance* that the privilege does not preclude a non-member plaintiff from adducing evidence of the content of a member's defamatory statement in Parliament where the cause of action is based on a publication adopting it outside Parliament.

A third ruling which would promote "conformity" would be that s16(3) of the *Parliamentary Privileges Act* 1987 should be interpreted as narrowly as possible, at least in its application to defamation proceedings. It should not make things more difficult for non-members who are parties to such proceedings than Article 9 of the *Bill of Rights* does.

Speech in Proceedings of Courts and Tribunals

The reconciliation of absolute privilege in court proceedings with freedom of political discussion is more straightforward. The need for all participants, operating within a framework of adversary trial procedures, to perform their roles without any fear of defamation claims can be fairly readily established.[198] It is also important to avoid the "re-agitation by discontented parties of decided cases after the entry of final judgment",[199] other than by the established procedures for appeal or other review. The very fact that these procedures are adversary creates a likelihood that a response to any defamatory allegation will be forthcoming from the defamed person, or someone on his/her behalf, within the same proceedings. The capacity of a judge or magistrate to control the course of proceedings is distinctly greater than that of a parliamentary Speaker.[200] Furthermore, in contrast to the situation with parliamentary privilege, permitting the imperatives of courtroom proceedings to take precedence over individual reputations does not seem to infringe any general principle of political accountability.

198 For judicial assertions to this effect, see *Henderson v Bromhead* (1959) 4 H & N 569; *Dawson v Lord Rokeby* (1873) 8 LR 4 QB 255; *Mann v O'Neill* (1997) 145 ALR 682 at 686 per Brennan CJ, Dawson, Toohey and Gaudron JJ, at 707 per Gummow J, at 715, 722 per Kirby J.

199 *Mann* (1997) 145 ALR 682 at 707 per Gummow J.

200 For a judicial assertion to this effect, see *Roy v Prior* [1971] AC 470 at 480 per Lord Wilberforce, cited in *Mann* (1997) 145 ALR 682 at 722 per Kirby J.

The additional protection given to judges, courts and courtroom speech by the common law of contempt by scandalising raises different issues. The first issue to consider is whether publications which constitute contempt by scandalising might fall within the scope of the implied freedom of political communication. As outlined above,[201] the *Lange* judgment invokes principles of representative and responsible government, as embodied in key sections of the Constitution, to reach the conclusion that the implied freedom covers communication about matters which are or might be relevant to the operations of the legislature and the executive branch of government. Nothing is said, however, about the judiciary. There is of course significant executive involvement in such matters as the operation of courts, the appointment of judicial officers and the hearing of complaints against them. This is indeed illustrated in the very recent decision of the High Court in *Mann*. But there exists also a principle of judicial independence, preventing judicial officers from being directly responsible to either the executive or the legislature. In the light of these considerations, it is at least arguable that publications which impugn the performance of courts or judges might not be protected by the implied freedom, particularly if the courts or judges of a State were involved.

If however it were subsequently held by the High Court, as was almost certainly the law before *Lange*, that such publications were after all within the scope of the implied freedom, the Court would still probably rule that the common law of contempt by scandalising was constitutionally valid. There are strong hints to this effect in the High Court's judgments in *Nationwide News Pty Ltd v Wills*,[202] and the deference paid in *Lange* to traditional common law restrictions on freedom of speech reinforce this conclusion.[203]

Yet this aspect of the protection of courts and courtroom speech seems at odds with the basic democratic values underpinning the freedom.[204] The law of contempt by scandalising has in fact been held by the High Court of Ontario to contravene the guarantee of freedom of expression contained in Article 2(b) of the Canadian Charter of Rights and Freedoms.[205] There is an unhappy contradiction between the High Court's apparent endorsement of the law of scandalising despite the existence of the constitutional freedom and its apparent endorsement, as being in line with this freedom, of the recent decisions in

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201 At pp161-162.

202 (1992) 177 CLR 1; see too *Theophanous* (1994) 182 CLR 104 at 187 per Deane J.

203 In *Mann*, however, Kirby J used the desirability of limiting the use of contempt by scandalising as a reason for not extending the scope of absolute privilege in cases involving defamatory criticism of judges: (1997) 145 ALR 682 at 717.

204 See eg Chesterman, *Public Criticism of Judges* (Australian Law Reform Commission, Contempt Research Paper No 5, Sydney 1984); Walker, "Scandalising in the Eighties" (1985) 101 *LQR* 359.

205 *R v Kopyto* (1987) 47 DLR (4th) 213. By contrast, the European Court of Human Rights held in *Barford v Denmark* (1989) 13 EHHR 493 that the publication of criticism of the High Court of Greenland, of a type that might well constitute "scandalising" under contempt law, could be punished despite the guarantee of freedom of expression in Article 10 of the *European Convention on Human Rights*.

New South Wales and the United Kingdom that elected local authorities may not in any circumstances sue for defamation.[206] The contradiction cannot entirely be resolved by saying that contempt law protects an institution (the courts) while defamation law protects individuals,[207] or that local authorities can be distinguished from courts because their members are elected by popular vote.[208]

The High Court in *Nationwide News* took pains to indicate that criticism which is true or which constitutes fair comment does not amount to contempt.[209] But a would-be critic, facing the onus of establishing these defences, may well be deterred into silence. Accordingly if, as suggested above,[210] an underlying tenet of the implied freedom is that laws (such as the law of seditious libel) which repress free public criticism of state institutions are not compatible with the making of free electoral choices, abolition of the law of contempt of court by scandalising, even if not formally mandated by constitutional considerations, would certainly promote the basic philosophy underlying the implied freedom of political communication.

Other Speech Protected by Absolute Privilege

Arguments on grounds of effectiveness can be raised in support of the remaining statutory categories of absolute privilege, particularly in so far as they protect statements made during proceedings in tribunals and other bodies analogous to courts. The privilege for communications between "high officers of state" relating to "acts of state" is perhaps difficult to justify as an absolute rather than a qualified privilege, but it seems scarcely ever to be invoked.[211]

An important feature of the High Court's treatment of absolute privilege in *Mann*[212] is its insistence that this category of privilege should not be extended at common law. The same view has recently been urged in relation to extensions by statute.[213] The foregoing review of the origins and impact of absolute privilege suggests that this view is entirely compatible with the aspirations of the implied freedom of political communication.

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206 *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534. See fn31 above.

207 See eg *Theophanous* (1994) 182 CLR 104 at 187 per Deane J.

208 This was seen as important by Gleeson CJ, one of the two majority judges in *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 at 691.

209 (1992) 177 CLR 1 at 31-33 per Mason CJ, 38-39 per Brennan J, 90-91 per Dawson J.

210 At p164.

211 See NSW Law Reform Commission, *Defamation* (Report No 75, 1995) paras 11.11- 11.13.

212 (1997) 145 ALR 682 at 686-687 per Brennan CJ, Dawson, Toohey and Gaudron JJ, at 706-707 per Gummow J, at 725-727 per Kirby J. All these judges cited strong statements to the same effect in *Gibbons v Duffell* (1932) 47 CLR 520 at 528 per Gavan Duffy CJ, Rich and Dixon JJ, and at 734 per Evatt J.

213 NSW Law Reform Commission, *Defamation* (Report No 75, 1995) para 11.9.

FAIR REPORT PRIVILEGE

General Nature

At common law, "fair report privilege" is the privilege attaching to fair and accurate reports of parliamentary[214] and judicial proceedings which are open to the public[215] and of the contents of public documents which are kept on a public register pursuant to statute and open to public inspection.[216] The privilege covers any document which is used or "deployed" in open court proceedings, unless the court has ordered that it not be available for publication. It does not extend to documents which are filed but not so "deployed" unless, possibly, members of the public are permitted to inspect the court file.[217]

Numerous statutory elaborations extend this privilege to reports of the public proceedings of, and documents and reports issued by, commissions, tribunals and a host of other public agencies.[218] There is also scope for judges to invoke the basic doctrines of common law qualified privilege so as to enlarge the range of official and semi-official proceedings which may be reported under privilege, either to the general public or to specified interest-groups.[219]

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214 For a recent discussion of the scope of parliamentary documents covered by this privilege, see *Bruton v Estate Agents Licensing Authority* [1996] 2 VR 274 at 300-307.

215 If the parliamentary body or court is closed to the public, or (it would seem) if reporting has been prohibited by a valid order, the privilege does not apply. If the relevant statutory power is broad enough, such an order may on occasions be made with a view to protecting the reputation of someone involved in the proceedings: see eg *Mirror Newspapers Ltd v Waller* [1985] 1 NSWLR 1. Such common law powers as exist are not sufficiently broad: *Raybos Australia Pty Ltd v Jones* [1985] 2 NSWLR 47.

216 *Searles v Scarlett* [1892] 2 QB 56, as interpreted in *Gobbart v West Australian Newspapers Ltd* [1968] WAR 113 at 120. See too *Little v Law Institute of Victoria (No 3)* [1990] VR 257 at 287-288; *Smith v Harris* [1996] 2 VR 335 at 348-351.

217 *Smith v Harris* [1996] 2 VR 335; see too *Little v Law Institute of Victoria (No 3)* [1990] VR 257 at 287-288.

218 See eg *Parliamentary Privileges Act* 1987 (Cth) s10; *Defamation Act* 1974 (NSW) ss24-26 and Schedule 2, paras 2, 3; *Constitution Act* 1975 (Vic) s74; *Wrongs Act* 1958 (Vic) s3A.

219 For recent examples, see *Bruton v Estate Agents Licensing Authority* [1996] 2 VR 274 (reports of disciplinary proceedings included in Annual Report of Estate Agents Board held privileged so long as only published to specified groups having a special interest in their contents); *Homestead Award Winning Homes Pty Ltd v South Australia* (Unreported, SA Supreme Court, Prior J, 15 July 1997) (reports of proceedings of Commercial Tribunal held privileged). See further discussion at pp203-204 below. In the USA, the numerous instances of additional fair report categories being established by case law (as to which see eg Elder, *The Fair Report Privilege* (Butterworths, Stoneham 1988) pp21-146) are expansions of the privilege in its own right rather than applications of the general principles of common law qualified privilege. See eg the comparative discussion in Kyu Ho Youm, "Fair Report Privilege *versus* Foreign Government Statements: United States and English Judicial Interpretations Compared" (1991) 40 *Int'l & Comp LQ* 124 at 131-135.

To attract fair report privilege, the report must be made in good faith. This requirement does not imply that the publisher should believe the relevant defamatory imputations to be true. They may indeed be thought or even known to be untrue. It is the motive for publication only that must be legitimate.[220] The position taken by the law is that the relevant public policy considerations justify dissemination of *the fact that the imputations were made within the specified official proceedings or document*, which in this context is deemed not to be the same as an outright conveying of the defamatory imputation itself,[221] despite the resultant damage to the plaintiff's reputation.

There is however a requirement in Australian and English law that the report be in fact substantially accurate, at least as a summary. It is not enough that the publisher believed, even if on reasonable grounds, that substantial accuracy had been achieved.[222] In America, the common law rule to this effect has been substantially diluted by the constitutional requirement, stemming from *Sullivan* and *Gertz*, that both public and private plaintiffs must show the defendant to have been, in some sense, at fault.[223]

Origins and Development

Nowadays, the idea that the media and other reporters of parliamentary or court proceedings should not encounter liability through performing this reporting function is more or less treated as self-evident. But this has not always been the case.

The right to report parliamentary proceedings without legal repercussions is in fact of comparatively recent origin. Not until late in the eighteenth century did it become safe for anyone without specific statutory authority to report the proceedings of the Parliament at Westminster.[224] Unauthorised reports could be deemed breaches of parliamentary privilege and punished accordingly. In 1834, two years after the first Reform Bill, it was held in the leading case of *Stockdale v Hansard*[225] that a resolution by the House of Commons that an official report which had been presented to it (but which did not relate to or form part of its own proceedings) should be published did not protect the publisher from

220 See eg *Salmon v Isaac* (1869) 20 LT 885; *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58.

221 For an early English instance of this kind of distinction being drawn, see *Bell v Byrne* (1811) 13 East 554.

222 See eg *Bruton v Estate Agents Licensing Authority* [1996] 2 VR 274 at 309; *Chakravati v Advertiser Newspapers Ltd* (1996) 65 SASR 527. For an illustration in the analogous field of sub judice contempt, see *R v Pearce* (1992) 7 WAR 395.

223 See generally Elder, *The Fair Report Privilege* pp221-280, 333-358; Oliver, "Parliament and the Press: A Right to be Reported?" in Kingsford-Smith & Oliver (eds), *Economical with the Truth: The Law and the Media in a Democratic Society* pp43-55.

224 See eg Siebert, *Freedom of the Press in England, 1476-1770* ch17; Boulton, *Erskine May's Treatise on the Laws, Privileges, Proceedings and Usages of Parliament* pp86-89; Kyu Ho Youm, "Fair Report Privilege *versus* Foreign Government Statements: United States and English Judicial Interpretations Compared" (1991) 40 *Int'l & Comp LQ* 124 at 126-130.

225 (1834) 9 Ad & E 1.

liability for defamation, because the resolution was legally ineffective.[226] Journalists were not officially given a place in the parliamentary gallery until 1803, and a special stand was not built for them until 1834. Habermas treats the gradual acceptance of reporting and public criticism of parliamentary proceedings as a key element of the growth of a public sphere in Britain that "functioned in the political realm".[227]

The wheel turned full circle in the course of the Spycatcher saga in Britain in the late 1980s. When the Attorney-General instigated proceedings to restrain, on grounds of national security, the publication of material which included accounts of parliamentary debates, some Members of Parliament asserted that this would be a breach of parliamentary privilege because Parliament had a positive right to be reported.[228]

Specifically in relation to defamation, the case of *R v Wright*[229] was significant for deciding that a prosecution for criminal libel relating to material in a published account of a House of Commons report could be defended on grounds of privilege. But the important ruling that fair and accurate reports of parliamentary proceedings enjoyed qualified privilege in the law of civil defamation did not occur until *Wason v Walter*[230] in 1868. This was a major step in the development of a democratic tradition of public scrutiny of an elected parliament.

As with absolute privilege for the speakers themselves, the development of qualified privilege for reports of what was said in court proceedings was more rapid than in the case of parliamentary proceedings. The principle that "justice should be open" has its roots in medieval times,[231] no doubt partly because the king's justices on circuit were the most visible sign of royal authority in local communities and if they functioned behind closed doors they would leave a weaker impression of power and authority.[232] It would seem that by the end of the eighteenth century, in the case of *Curry v Walter*,[233] the notion of a

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226 This situation is now covered by absolute privilege under statute: see p181 above.

227 Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity Press, Cambridge 1989) pp58-67. For an elaboration of the concept in an American context, see eg Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and *Hustler Magazine v Falwell*" 103 *Harv Law Rev* 601 (1990) at 626-646.

228 See Oliver, "Parliament and the Press: A Right to be Reported?" in Kingsford-Smith & Oliver (eds), *Economical with the Truth: The Law and the Media in a Democratic Society* pp43-55.

229 (1799) 8 D & E 293.

230 (1868) LR 4 QB 73.

231 For a brief historical discussion, see *Raybos Australia Pty Ltd v Jones* [1985] 2 NSWLR 47 at 50-55 per Kirby P.

232 See eg Anderson, *Passages from Antiquity to Feudalism* (Verso, London 1974) pp147-153.

233 (1796) 1 Bos & Pul 525. For brief accounts of the development of the privilege to report court proceedings in England and the USA, see Fraser, "The Privileges of the Press in Relation to the Law of Libel" (1891) 7 *LQR* 158; Elder, *The Fair Report Privilege* pp15-19; Kyu Ho Youm, "Fair Report Privilege *versus* Foreign Government Statements: United

qualified privilege for reports of court proceedings was established. In the view of the legal historian Sir William Holdsworth, this might have happened earlier if the concept of a qualified privilege, a privilege defeasible on proof of malice, had been quicker to crystallise.[234]

At first sight, fair report privilege seems to be a derivative or ancillary privilege. The qualified privilege, for instance, to publish fair and accurate reports of proceedings in parliament or in a court would seem to have been derived from, or at least to be "related to",[235] the absolute privilege enjoyed by the participants (eg Members of Parliament, witnesses) in those proceedings. This line of thinking does not, however, adequately explain why the presence of malice, or lack of good faith, should destroy the fair report privilege. If it were merely an extension of the "primary" privilege, this qualification on its operation would seem illogical.[236] Furthermore, there are or have been situations, for example an important English statutory extension of fair report privilege for newspapers in the late nineteenth century,[237] where a fair report enjoys privilege but the speakers being reported do not.

Fair report privilege in fact rests on distinctly different policy grounds than its relationship to recognised categories of absolute privilege. These are particularly significant for the present discussion. In the literature on fair report privilege in America,[238] where the underlying policy issues have been more fully discussed than in Australia or England,

States and English Judicial Interpretations Compared" (1991) 40 *Int'l & Comp LQ* 124 at 126-130; Saef, "Neutral Reportage: The Case for a Statutory Privilege" (1992) 86 *Nw U L Rev* 417 at 422-425.

234 Holdsworth, "Defamation in the Sixteenth and Seventeenth Centuries" (1925) 41 *LQR* 13 at 29-30.

235 This is the rather guarded phrase used in Nelson, *Libel in News of Congressional Investigating Committees* (Univ of Minnesota, Minneapolis 1961) pp4-5.

236 This is in essence the view taken by Cockburn CJ in *Wason v Walter* (1868) LR 4 QB 73 at 84-85, commenting on dicta of Kenyon CJ, treating the two privileges as linked, in *R v Wright* (1799) 8 D & E 293 at 296.

237 Under s4 of the *Law of Libel Amendment Act* 1888 (UK) (replacing an earlier version, enacted in 1881, which reversed the decision in *Davison v Duncan* (1857) 7 El & Bl 229), a "fair and accurate report published in any newspaper of the proceedings of a public meeting" was entitled to privilege unless it was published maliciously, or it included blasphemous or indecent matter, or the newspaper, despite a request, failed or refused to publish a "reasonable letter or statement by way of contradiction or explanation of such report". There was however no general qualified privilege for the speakers at such meetings, as was confirmed by the High Court of Australia some 50 years later in *Lang v Willis* (1934) 52 CLR 637. See Fraser, "The Privileges of the Press in Relation to the Law of Libel" (1891) 7 *LQR* 158.

238 See eg Elder, *The Fair Report Privilege* pp3-14; Nelson, *Libel in News of Congressional Investigating Committees* pp3-16; Sowle, "Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report" (1979) 54 *NYU L Rev* 469 at 483-487; *Lee v Dong-A Ilbo* 849 F 2d 876 at 878-879 (1988).

three overlapping justifications for the privilege are put forward, known respectively as the "agency", "supervisory" and "informational" rationales.

First, it is argued that where a media publisher reports official proceedings, it is simply the agent of the public in disseminating material which members of the public could ascertain for themselves by attending the relevant proceedings.[239] This presupposes that the proceedings are open to the public. This is in general a prerequisite of the operation of the privilege in Australia,[240] though in some of the early English cases establishing the scope of the privilege[241] it was not a determinative factor. The agency argument has been criticised on the ground that the damage to reputation caused by widespread dissemination of the relevant defamatory matter greatly exceeds what can occur within the forum where it is first uttered.[242]

The second justification is that reporting of proceedings is essential to enable the public to supervise adequately the performance of the members of parliament, judges and other public officials in their official capacities. As exemplified in the following short quotation, the judgment of Cockburn CJ in *Wason v Walter* contains an eloquent exposition of this rationale:

> Where would be our confidence in the government of the country or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed, - where would be our attachment to the constitution under which we live, - if the proceedings of the great council of the realm were shrouded in secresy and concealed from the knowledge of the nation?[243]

The third justification seeks to meet the objection sometimes raised in relation to the second that much of what is reported from a courtroom, a parliamentary chamber or from other proceedings to which the privilege applies may not actually be necessary for the effective scrutiny of official action. It is to the effect that the public has a general interest in obtaining information going beyond what is needed for such scrutiny. The limits of the "public right to know" must not be defined too narrowly because, in the last resort, it is for the public, in whom sovereignty resides, to determine what are issues of public interest and

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239 This reason for maintaining the privilege was implicit in *Curry v Walter* (1796) 1 Bos & Pul 525 and was spelt out by the House of Lords in *Macdougall v Knight* (1889) 14 App Cas 194 at 200.

240 See eg the regular repetition of the word "public" in the *Defamation Act* 1974 (NSW) Schedule 2, para 2.

241 See eg *Purcell v Sowler* (1877) 2 CPD 215.

242 See eg *Venn v Tennessean Newspapers Inc* 201 F Supp 47 (M D Tenn 1962) at 57, cited in Sowle, "Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report" (1979) 54 *NYU L Rev* 469 at 484 fn77.

243 (1868) LR 4 QB 73 at 89.

concern. The reasons why an individual citizen may want to know what has gone on in official proceedings may lie entirely "outside the mainstream".[244]

In English case law, some other arguments in support of fair report privilege can be found: for example, that court proceedings are under the control of the presiding judge,[245] or that it may be beneficial to the defamed plaintiff to have the allegation made known to the public as one made in a courtroom rather than continuing to circulate as a rumour.[246] But, generally speaking, the three rationales just outlined constitute the law's justification for fair report privilege.

Conformity with Implied Constitutional Freedom

The requirement that, to attract fair report privilege, a report must be made in good faith is significantly more lenient to the defendant than the requirements of "reasonableness" and absence of malice in the context of common law qualified privilege, as reformulated in *Lange* so as to "conform with" the implied freedom The most significant feature of the "good faith" requirement is that the reporter need not believe that the defamatory imputations reported are true. He or she may indeed know or strongly suspect that they are false. This makes fair report privilege especially attractive to defendants.

The three rationales - "agency", "supervisory" and "informational" - put forward for this privilege conform closely, however, with the principles underlying the implied freedom. Their correlation with these principles can be demonstrated by drawing attention to the provenance of the following sentence in a judgment:

> How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing?

This sentence does not, as one might think, come from *Theophanous* or *Lange* or any of the other recent High Court cases establishing and applying the implied constitutional freedom. It is instead from the judgment of Cockburn CJ in *Wason v Walter*,[247] the leading English case of 1868 which held that fair report privilege should apply to parliamentary proceedings. Its emphasis on the importance of public being aware of government and political matters, as a necessary prerequisite of the operation of

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244 See Bech, "Isolating the Marketplace of Ideas from the World: *Lee v Dong-A Ilbo* and the Fair Report Privilege" (1989) 50 *U Pitt L Rev* 1153 at 1160-1161.

245 *Davison v Duncan* (1857) 7 El & Bl 229 at 231.

246 *Webb v Times Publishing Co Ltd* [1960] 2 QB 535 at 561.

247 (1868) LR 4 QB 73 at 89. This passage immediately follows the one quoted at p200 above.

representative government, mirrors the special prominence given to this consideration in *Lange*.[248]

In addition, the argument in the "informational" rationale that the subject-matters which the "public right to know" should embrace must not be rigidly defined has close parallels in the High Court's acknowledgment that the subject-matters which might belong within "political communication" cannot be categorically identified.[249]

These factors justify the absence of any requirement in fair report privilege that the defendant should believe the matter published to be true or that the publication should be "reasonable", even though qualified privilege, as redesigned to conform with the constitutional freedom, contains these requirements. The important point, as already stated,[250] is that the reporter's function in reporting a defamatory allegation is not to make the allegation on his or her own behalf, but solely to report the fact that it was made within the relevant official proceedings or document.

What adjustments, if any, to fair report privilege might seem appropriate, following the decision in *Lange*, to bring it into even closer conformity with the implied freedom of political communication? Three possibilities come to mind.

The first, in conformity with the concept of "reasonableness" outlined in *Lange*,[251] is that where defamatory allegations, made within proceedings or documents protected by absolute or qualified privilege and reported under fair report privilege, provoke a response from the defamed person within the same proceedings or document, this response should also be reported. A requirement to this effect would serve two interests: protecting reputation and maintaining the flow of information to the public about the proceedings of, or documents emanating from, the relevant official body. As just mentioned, the latter interest received strong emphasis in the High Court's exposition of the implied freedom of political communication in *Lange*. Where the response formed part of the same section of proceedings or the same document as the defamatory material, omission of it in the report could indeed violate the requirement of substantial accuracy in the fair report itself.[252]

The reasoning underlying fair report privilege is however that public policy considerations justify dissemination of the fact that the relevant defamatory imputations were made within the specified official proceedings or document. This is deemed not to be the same as an outright conveying of the defamatory imputation itself. The requirement that a defamed person be given an opportunity to respond may well be generally justifiable, as held in *Lange*, where the defendant was primarily responsible for the initial damage to reputation,

248 See pp163-164 above.
249 See p162 above.
250 At p197 above.
251 See p176 above.
252 See p197 above.

but not, it is submitted, where it did no more than report official proceedings or documents under fair report privilege.[253]

A second possibility would be to widen fair report privilege by treating it as sufficient for a defendant to prove that at the time of publication it entertained an honest and reasonable belief that it was fairly and accurately reporting a proceeding or document to which the privilege applied. This alternative to the existing requirement of actual fairness and accuracy has formed part of American defamation law for a significant period of time.[254] Its reliance on the concept of reasonableness is entirely within the spirit of both the implied freedom and the expanded version of qualified privilege.

The third possible change would be to bring specifically within fair report privilege, rather than common law qualified privilege, the publication of reports of statements on government and political matters by persons who possess relevant "special knowledge". In his dissenting judgment in *Stephens*, Brennan J in fact came close to doing this, even though he was making pronouncements with respect to common law qualified privilege.[255] This is because he proposed for this situation a significant modification of the test of common law malice, namely, that a media defendant would not be deemed malicious merely because it had no belief in the truth of the statement being reported. This limiting of the grounds for defeating the privilege to lack of good faith assimilated it closely to fair report privilege.[256]

It also came to resemble closely a form of privilege in American law called "neutral reportage". In 1977, the US Court of Appeals in *Edwards v National Audubon Society Inc* defined the contours of this privilege as follows:

> [W]hen a responsible, prominent organization ... makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of those charges, regardless of the reporter's private views regarding their validity. ... What is newsworthy about such accusations is that they were made. We do not believe that the press may be required under the First Amendment to suppress newsworthy

253 In conformity with this approach, the NSW Law Reform Commission has recommended that plaintiffs should be able to obtain judicial declarations of falsity, which the defendant must publicise, but that this remedy should not be available if (inter alia) the defendant raises an arguable defence of fair report privilege: *Defamation* (Report No 75, 1995) paras 6.2, 6.16-6.20, 6.22-6.24, 6.38-6.43. See further discussion at pp211-212 below. See also an earlier recommendation of the Australian Law Reform Commission for mandatory correction orders: *Unfair Publication: Defamation and Privacy* (Report No 11, 1979) ch11, Draft Bill, Part III).

254 See p197 above.

255 (1994) 182 CLR 211 at 246-253.

256 See discussion of the distinct concepts of malice and lack of good faith, at pp167, 197 above.

> statements merely because it has serious doubts regarding their truth. ... It is equally clear, however, that a publisher who in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage.[257]

Since the *Audubon* case, this privilege has been held to cover reports of charges made by public officials or public figures rather than just "prominent organisations", and in some decisions the requirement that the maker of the charge be "responsible" has not been insisted upon.[258] Although it was recently said to be "gaining slow but steady acceptance",[259] relatively few subsequent cases have in fact applied it.[260]

In one significant respect, namely, that the media defendant may entertain serious doubts about the truth of what is being reported, the defence of "neutral reportage" goes even further than the *Sullivan* "public figure" test in protecting the media against defamation claims by public officials or public figures. A fortiori, it confers more protection than common law qualified privilege in Australia, as redefined in *Lange*. It has, however, been criticised[261] as insufficiently promoting First Amendment interests because of (a) the requirement that the person defamed be a "public figure" and (b) the "chilling effect" that is created if a media defendant, in deciding whether or not to publish material, has to second-guess a court's decision as to whether the source is "prominent" and "responsible".

While this change in the direction of greater freedom of speech may not seem essential to achieve "conformity" between defamation law and the implied constitutional freedom of political communication, it is entirely in line with the latter's concern for a "free flow of information" on government and political matters.

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257 556 F 2d 113 at 120 (1977).

258 See Smolla, *The Law of Defamation* para 4.14[3].

259 At para. 4.14[4].

260 A notable example is *Price v Viking Penguin Inc* 881 F 2d 1426 (8th Cir 1989), *cert denied* 110 S Ct 757 (1990). See generally Sack and Baron, *Libel, Slander and Related Problems* pp391-410; Note, "The Developing Privilege of Neutral Reportage" (1983) 69 *Va L Rev* 853; Page, "*Price v Viking Penguin Inc*: The Neutral Reportage Privilege and Robust, Wide Open Debate" (1990) 75 *Minn L Rev* 157; Saef, "Neutral Reportage: The Case for a Statutory Privilege" (1992) 86 *Nw U L Rev* 417.

261 See Saef, "Neutral Reportage: The Case for a Statutory Privilege" (1992) 86 *Nw U L Rev* 417 at 442, citing *Barry v Time* 584 F Supp 1110 at 1126 (ND Cal 1984); Levin, "Constitutional Privilege to Republish Defamation" (1977) 77 *Colum L Rev* 1266.

STATUTORY QUALIFIED PRIVILEGE

General Nature, Origins and Development

Common law qualified privilege has been extended, supplemented or in some cases replaced by statutory provisions during the last 150 years. Generally, the pressure for statutory broadening has come from the media, due to their dissatisfaction with the limited scope of the common law defence, prior to 1994, in cases involving dissemination of defamatory material to the general public.

During the nineteenth century in England, newspapers made some headway in securing statutory qualified privilege. In particular, s2 of *Lord Campbell's Act* 1843, as amended in 1845, provided that a "public newspaper or other periodical publication" could defend a defamation action by (a) showing that the offending matter was "inserted without actual malice and without gross negligence", (b) making a payment into court "by way of amends" and (c) publishing an apology. Further defences or partial defences specific to the media, such as s4 of the *Law of Libel Amendment Act* 1888, noted above,[262] were enacted during the next fifty years. But, as demonstrated in Pat O'Malley's work on the subject,[263] the rise of the popular press was instrumental in undermining the legitimacy of claims by the "responsible press" to further privileged treatment of this nature.

In two Australian States, Queensland and Tasmania, statutory qualified privilege now both wholly replaces and significantly extends the common law defence. The *Defamation Codes* of these two States confer a defence of "lawful excuse" on publications in a number of categories. Those of direct relevance to public discussion of matters of public interest are publications made "in good faith":

> (i) to protect the interests of the person making the publication or of some other person; [264]
>
> (ii) for the public good; [265]
>
> (iii) to give information to a person on a subject on which that person is reasonably believed to have such an interest in knowing the truth as to make the publication reasonable in the circumstances;[266] and

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262 See fn237.

263 O'Malley, "Accomplishing Law: Structure and Negotiation in Legislative Process" (1980) 7 *Brit J Law & Soc* 22; O'Malley, "'The Invisible Censor': Civil Law and the State Delegation of Press Control, 1890-1952" (1982) 4 *Media, Culture & Society* 323.

264 *Defamation Act* 1889 (Qld) and *Defamation Act* 1957 (Tas) s16(1)(c).

265 *Defamation Act* 1889 (Qld) and *Defamation Act* 1957 (Tas) s16(1)(c).

266 *Defamation Act* 1889 (Qld) and *Defamation Act* 1957 (Tas) s16(1)(e).

> (iv) in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit, and if, so far as the defamatory matter consists of comment, the comment is fair.[267]

The statutory definition of "good faith" requires (i) that the defamatory matter be relevant to "the matters the existence of which may excuse the publication in good faith of defamatory matter", (ii) that the manner and extent of the publication be within reasonable limits and (iii) that the publisher should not have been actuated by ill will towards the plaintiff or by any other improper motive and should not have believed the matter to be untrue.[268]

During this century, common law qualified privilege has also been supplemented by statute. The best-known Australian instance is s22 of the *Defamation Act* 1974 (NSW). This establishes qualified privilege for matter published in the course of giving information to a person on a subject in which that person has an interest or apparent interest, provided that the making of the publication is reasonable in the circumstances. Because of the absence of any requirement of a reciprocal duty and interest, or a shared common interest, this privilege, when enacted, seemed far more valuable for the media than common law privilege. But their hopes in this regard have been disappointed by a series of judicial decisions making it difficult in practice to satisfy the requirement of "reasonableness".[269]

Conformity with the Implied Constitutional Freedom

These examples of statutory qualified privilege in Australia resemble the expanded defence of common law privilege by using the concept of reasonableness in some form. They also have sufficient breadth and universality of application to warrant being called "freedoms" rather than "privileges", in the sense in which these terms are distinguished at the commencement of this article.[270]

The presence of s22 in the NSW Act was in fact treated explicitly in *Lange*[271] as a reason why NSW defamation law conformed with the implied freedom. Its requirements are very close to those of common law qualified privilege, in the expanded version of this defence created in *Lange*.

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267 *Defamation Act* 1889 (Qld) and *Defamation Act* 1957 (Tas) s16(1)(h).

268 *Defamation Act* 1889 (Qld) and *Defamation Act* 1957 (Tas) s16(2).

269 Notably the Privy Council decision in *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299. See generally Walker, "Qualified Privilege under Section 22 of the Defamation Act 1974 (N.S.W.): *Morgan v John Fairfax & Sons Limited*" (1990) 18 *Aust Bus L Rev* 346; Henskens, "Defamation and Investigative Journalism in New South Wales: The Evolution of Statutory Qualified Privilege" (1990) 6 *Aust Bar Rev* 267.

270 At pp157-159 above.

271 (1997) 145 ALR 96 at 116, 118.

The defences in the two Code States[272] appear to leave more scope than common law privilege under *Lange* or s22 of the NSW Act for a defendant to argue that it may be reasonable to publish defamatory matter without having taken steps by way of verification and/or without a positive belief that it is true.[273] This is quite compatible with the implied freedom because, as stated in *Lange*, "a statute which diminishes the rights or remedies of persons defamed [i.e., as compared with the common law] and correspondingly enlarges the freedom to discuss government and political matters is not contrary to the constitutional freedom".[274]

Outside the domain of political communication, statutory versions of qualified privilege will retain their significance as provisions which, generally speaking, increase the range of situations where privilege can be established.

FAIR COMMENT ON A MATTER OF PUBLIC INTEREST

General Nature

The common law defence of fair comment[275] on a matter of public interest requires a defendant to prove four things. First, the relevant defamatory material must contain one or more "comments" or "opinions", as opposed to statements of fact. Secondly, there must exist expressly or impliedly identified matter (often called a "substratum"), to which the comment refers. Most commonly, this is a statement of a factual nature or the publication or public performance of an artistic, musical or literary composition. In the former case, the facts alleged as the "substratum" must be shown by the defendant to be true or to have been put forward as true in a statement (again identified expressly or impliedly) which was

272 *Defamation Act* 1889 (Qld) and *Defamation Act* 1957 (Tas) s16.

273 Relevant here are (a) the narrower sphere of operation given to the test of reasonableness in s16(2) of the Queensland Act as compared with s22 in New South Wales, and (b) the distinction between "honest belief in truth" (generally necessary to succeed under s22) and "being unaware of falsity" or "not believing to be untrue" (the requirement under s16(2)). For discussions of these aspects of the statutory defences, see *Calwell v Ipec Australia Ltd* (1975) 135 CLR 321 (dealing with an earlier NSW equivalent of the Queensland defence); *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299; *Morgan v John Fairfax & Sons Ltd (No 2)* (1991) 23 NSWLR 374 (NSW defence). See too Walker, "The Impact of the High Court's Free Speech Cases on Defamation Law" (1995) 17 *Syd LR* 43 at 51-53; NSW Law Reform Commission, *Defamation* (Report No 75, 1995) paras 10.9-10.16; Butler, "Lange v Australian Broadcasting Corporation: Its Impact on the Code States", Paper presented at Australasian Law Teachers Association Conference, University of Technology Sydney, 3 October 1997.

274 (1997) 145 ALR 96 at 111.

275 Australian statutory versions, replacing the common law, are the *Defamation Act* 1889 (Qld) s14, the *Defamation Act* 1957 (Tas) s14 (ie these two appear within fully codified statements of defamation law) and the *Defamation Act* 1974 (NSW) Part 3, Division 8.

published on a privileged occasion.[276] Thirdly, the matter commented on must be a matter of public interest. This means, according to a majority judgment in a recent High Court case,[277] that it must be the "conduct or work" of a person who was engaged in public activities which expressly or implicitly invited public criticism and discussion, rather than a broad abstraction such as "the administration of justice" or "political and state matters". Fourth and finally, the opinion expressed must be "fair", in the specific sense (a) that it is one that a person could honestly hold, even if it can also be characterised as "prejudiced", "obstinate" or "exaggerated",[278] and (b) that it was in fact the opinion held by the defendant.[279]

At common law, there is controversy as to whether proof of spite or ill will towards the plaintiff, ie one of the two strands of common law malice, is enough of itself to defeat the defence of fair comment. If it does not,[280] it is at least evidence that the requirement of "fairness", as just outlined, has not been met. If an improper motive of this sort actually motivates the comment, it is hard to see how it could be described as the honest opinion of the defendant.[281]

Origins and Development

To Anglo-Australian lawyers, including the common law defence of fair comment on a matter of public interest, or any of its statutory equivalents, within a discussion of privileges under defamation law seems quite wrong. But on one view of the historical development of fair comment,[282] it did in fact begin as a branch of qualified privilege. Like this form of privilege, it covered a broad species of occasions where the common law's presumption of the necessary ingredient of malice on the defendant's part was prima facie displaced, rendering it necessary for the plaintiff to establish by positive proof that

276 Such a comment may be on the alleged facts themselves: it need not relate solely to the fact that the allegations were made in the relevant privileged statement. See *Wason v Walter* (1868) LR 4 QB 73; *Pervan v North Queensland Newspapers* (1993) 178 CLR 309.

277 *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 214-219 per Dawson, McHugh, Gummow JJ.

278 These terms are used by Esher MR in *Merivale v Carson* (1887) 20 QBD 275 at 281; see too *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 SR(NSW) 171 at 174 per Jordan CJ ("A critic is entitled to dip his pen in gall for the purpose of legitimate criticism").

279 Where the initial maker of the statement is not the defendant (he or she may, for instance, be an employee of the defendant, or an independent third party), different rules apply.

280 For this view, see *Cawley v Australian Consolidated Press Ltd* [1981] 1 NSWLR 225.

281 For an eloquent articulation of this point of view, see the judgment of Collins MR in *Thomas v Bradbury Agnew & Co Ltd* [1906] 2 KB 627. Under the NSW Act and the Codes, it is clear that malice is not relevant.

282 See eg *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 215 per Dawson, McHugh, Gummow JJ; Radcliffe, "The Defence of 'Fair Comment' in Actions for Defamation" (1907) 23 *LQR* 97; Rowland, "Fair Comment and Qualified Privilege" (1907) 4 *Comm L Rev* 202.

malice was indeed present.[283] In the American *Restatement (Second) of Torts*[284] and in American defamation texts,[285] fair comment, which continues to play a role outside the categories of case covered by the *Sullivan* "public figure test", is still classified as a form of qualified privilege.

In some nineteenth century English cases, however, dicta are to be found distinguishing the two defences. This was either on the footing that if a comment was to be classified as truly "fair" (a requirement that at that time seems to have been closer to the vernacular meaning than it is now) it was not really libellous,[286] or that the two were to be distinguished because fair comment, unlike privilege, was a defence open to any defendant to maintain.[287]

The established modern distinction between the two defences arose chiefly because, as shown earlier in this article,[288] the protection for factual defamatory allegations made to the public which qualified privilege confers was held not to arise merely because an allegation related to a matter of public interest. The necessary reciprocity of duty and interest had to be proved. No such element was necessary for fair comment, though any factual substratum for the defamatory comment had be true (or privileged).[289] In relation to the common law versions of the two defences, this statement of principle still holds good, as does the distinction between them.[290]

Conformity with the Implied Constitutional Freedom

In terms of broad orientations, there seems to be considerable conformity between fair comment and the implied freedom. In numerous places in the High Court cases dealing with the implied freedom, the need for members of the public to have leeway to comment on and criticise the individual and collective actions of those exercising state power is cited

283 See eg Holdsworth, "Defamation in the Sixteenth and Seventeenth Centuries" (1925) 41 *LQR* 13 at 24-30; Helmholz, "Civil Trials and the Limits of Responsible Speech" in Helmholz and Green (ed), *Juries, Libel and Justice: The Role of English Juries in Seventeenth- and Eighteenth-Century Trials for Libel and Slander* 4. For supporting case-law, see *Wason v Walter* (1868) LR 4 QB 73 at 87; *Henwood v Harrison* (1872) 7 CPLR 606; *Davis v Duncan* (1874) 9 CPLR 396.

284 American Law Institute, *Restatement of the Law (Second): Torts* (American Law Institute, St Paul, Minn 1977) para 566 comment a.

285 See eg Smolla, *Law of Defamation* para 6.02; Eaton, "The American Law of Defamation through *Gertz v Robert Welch, Inc* and Beyond: An Analytical Primer" (1975) 61 *Va L Rev* 1349 at 1362-1363.

286 See eg *Campbell v Spottiswoode* (1863) 3 B & S 769, and the discussion of this point in Note, "Privileged Criticism" (1872) 53 *Law Times* 310.

287 See eg the judgment of Bowen LJ in *Merivale v Carson* (1887) 20 QBD 275 at 282.

288 See pp172-173 above.

289 *Davis v Shepstone* (1886) 11 App Cas 187.

290 For a recent instance of strong emphasis on this distinction at High Court level, see the judgment of McHugh J, dissenting, in *Stephens* (1994) 182 CLR 211 at 266-267.

as an essential ingredient.[291] This directly parallels one of the core purposes of the defence of fair comment. The following passage from a NSW Supreme Court decision in 1907 illustrates well how the courts view the defence as an important contribution to political debate:

> The right of every member of the community to comment either in the columns of the public press or otherwise on matters of public interest or general concern, provided that he does so fairly and honestly, is now well established. Every citizen is free to discuss the political schemes and aims of any public man or any political party, and to denounce those aims as mischievous or injurious to the well being of the community, provided that he keeps within the bounds of fair and legitimate criticism and does not either misrepresent facts or impute to those whom he attacks unworthy motives or dishonourable conduct.[292]

In modern formulations of the defence, a specific requirement that the criticism be "legitimate" or that it refrain from imputing unworthy motives or dishonourable conduct would not be appropriate.[293] But the broad grounds for permitting the defence would be very similar to these.

A further reason why conformity seems to exist is the lack of any established categories or "occasions" to which fair comment is restricted, and therefore of any tendency for "privileged publishers" to emerge. This aspect of the structure of fair comment marks it off from most forms of privilege.[294]

The most evident change that fair comment, both at common law and in statutory versions, might undergo in response to recent developments is a relaxation of the requirement that where the comment is based on a factual "substratum", the relevant facts, which are not necessarily defamatory, must be proved to be true or to have been asserted in a privileged statement. By contrast, qualified privilege, as newly defined, protects the publication of defamatory factual allegations on government and political matters if the defendant acted "reasonably" and without malice. It seems anomalous that the test should be stricter for the (sometimes non-defamatory) substratum of a defamatory comment than for a defamatory factual allegation.[295]

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291 See p164 above.

292 *Slatyer v Daily Telegraph Newspaper Co* (1907) 7 SR(NSW) 488 at 501 per Street J.

293 In the NSW statutory version, s30(4) of the *Defamation Act* 1974 expressly eliminates the latter requirement.

294 See discussion at pp178-180.

295 Though in *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309, McHugh J considered himself bound to interpret the Queensland Code so as to reach this result.

In *Pervan v North Queensland Newspaper Co Ltd*,[296] decided in 1993, a majority of the High Court interpreted the predecessor of s16(1)(h) of the Queensland *Defamation Act* 1889[297] as stating, amongst other things, that the factual substratum for any comment falling within the scope of the section did not have to be proved true. It was enough that the statutory requirement that the publication be made "in good faith", as defined in s16(2), was satisfied in relation to the substratum, along with the other relevant elements of the publication. This decision relates only to the Code version of fair comment, not to the common law defence itself.

A change of this nature would also bring the Australian defence in line with its American counterpart, though, as already indicated, the *Sullivan* "public figure" rule leaves little scope for the defence of fair comment in cases to which it applies.[298]

ASSESSING THE VALIDITY OF STATUTORY AMENDMENTS TO DEFAMATION LAW

In *Lange*, the High Court considered how the constitutional validity of any enactment which directly or indirectly restricts freedom of political communication should be determined. Two passages in the judgment are relevant. One states that the law will be valid if it is

> reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s128 for submitting a proposed amendment of the Constitution to the informed decision of the people.[299]

The key sentences in the other passage, which refers specifically to defamation law but would presumably apply also to other situations where existing rules of common law inhibit freedom of political communication, are as follows:

> The common law rights of persons defamed may be diminished by statute but they cannot be enlarged so as to restrict the freedom required by the Constitution. ... Laws made by ... parliaments or ... legislatures ... may therefore extend a head of privilege, but they cannot derogate from the common law to produce a result which diminishes the extent of the immunity conferred by the Constitution.[300]

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296 (1993) 178 CLR 309.
297 This provision is discussed at p205 above.
298 See p159 above; Sack and Baron, *Libel, Slander and Related Matters* pp199-217; Smolla, *Law of Defamation* paras 6.02, 6.03.
299 *Lange* (1997) 145 ALR 96 at 112.
300 At 111-112.

This second passage could mean that any statutory enlargement of the common law rights of defamed persons is automatically invalid. But this is not its necessary meaning. A preferable interpretation, more in line with the first passage, is that statutory "enlargements" of the common law rights of person defamed are not prohibited per se, but only if their effect overall is to restrict the freedom required by the Constitution.

This issue of interpretation would be brought into prominence if the Defamation Bill 1996 (NSW), which was promulgated for public discussion by the NSW Attorney-General in October 1996, were enacted and a challenge were mounted to the validity of Part 6. This Part establishes the remedy of a "judicial declaration of falsity" for a defamed plaintiff.[301] If such a declaration is granted, the defendant may be ordered to publicise it so as to reach a broadly similar audience as the defamatory imputation itself. An order for indemnity costs may be made against the defendant. The effect of Clause 55 of the Bill is that only absolute privilege and fair report privilege operate as defences to an action for such a declaration. However, the requirement in Clause 54 that the plaintiff prove the falsity of the imputation maintains the policy underlying the existing defences based on truth, doing so in a manner which gives greater protection to the defendant.

It is clearly arguable that, in cases falling within political communication, as redefined in *Lange*, Part 6 of the Bill is unconstitutional. It confers on defamation plaintiffs a right to claim a declaration of falsity in respect of any defamatory imputation, but excludes both common law qualified privilege and the defence under s22 from this cause of action. It would seem therefore to "enlarge" the common law rights of defamed persons and to "diminish the extent" of the constitutional immunity. This argument would be all the stronger if, as some commentators on the Bill have predicted,[302] the new form of action would be very popular and its existence would "chill" freedom of political communication.

A number of counter-arguments can, however, be formulated. Their implications are significant both for defamation reform and for the general issues explored in this article. They can be briefly outlined as follows.

First, the *Lange* judgment describes the common law of defamation as one which "requires electors and others to pay damages ... or leads to the grant of injunctions".[303] On this view of the scope of the common law, a plaintiff's right to a declaration could well be classified as a separate statutory right with its own separate remedy. It has indeed a wholly different emphasis from the primary common law remedy of damages. Its aim is essentially to

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301 For discussion of this law under the law prior to *Lange*, see NSW Law Reform Commission, *Defamation* (Report No 75, 1995) paras 6.48-6.52. The Bill is based on the draft legislation forming part of this Report.

302 See summary in Griffith, *Defamation Law Reform: Declarations of Falsity and Other Issues*, Briefing Paper No 24/96 (NSW Parliamentary Library Research Service, Sydney 1996) pp69-70.

303 (1997) 145 ALR 96 at 113.

ensure the public vindication of a wrongly defamed plaintiff's reputation, for the benefit of both the plaintiff and of either the community as a whole or that section of it which has an interest in the truth or falsity of the defamatory statement.[304]

On this view, the validity of Part 6 would not be determined by specific reference to its conformity with common law principles. The test instead would be whether, in terms of the first passage quoted above, it was "reasonably appropriate and adapted to serve a legitimate end ... compatible with the constitutionally prescribed system of representative and responsible government".[305] Both the purpose of public vindication of reputations and the means adopted would seem to satisfy this test.

A second counter-argument addresses the overall effect of the new rights and remedies created by Part 6 upon the balance between protection of reputation and freedom of political communication. It is to the effect that when all relevant factors are taken into account, this balance does not differ significantly from that achieved in the common law of defamation.

Two prominent features of the Bill are relevant here. One, affecting actions both for damages and for declarations, is that the Bill reverses the onus of proof regarding falsity. It requires that, in any case relating to a matter of public interest, a plaintiff must prove any factual defamatory imputation sued upon to be false, instead of the defendant having to prove truth if a defence of truth (as currently set out in ss15 and 16 of the *Defamation Act* 1974) is to be relied on. The other is that the particular dimension of freedom of communication that receives special emphasis in *Lange* - namely, that it provides to citizens the degree of access to information on government and political matters that will enable them to "exercise a free and informed choice as electors"[306] - is well served by the provision in Clause 54(2)(b) of the Bill that the court may order a declaration of falsity to be given publicity by the defendant. In addition, in so far as the defendant would be reporting a particular outcome of court proceedings, the "informational" purpose underlying fair report privilege[307] is promoted. A similar requirement of publicity for a voluntary correction made by a defendant, under a procedure introduced in Part 8 of the Bill, has a similar orientation.

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304 See NSW Law Reform Commission, *Defamation* (Report No 75, 1995) paras 6.5-6.6; Chesterman, "The Money or the Truth: Defamation Reform in Australia and the USA" (1995) 18 *UNSW LJ* 300 at 309-310.

305 *Lange* (1997) 145 ALR 96 at 112.

306 At 107.

307 See p200 above. This line of argument receives indirect support, with reference to the statutory declaration remedy provided by s24 of the *Defamation Act* 1992 (NZ), in *Lange v Atkinson* [1997] 2 NZLR 22 at 47-48 per Elias J. For further elaboration, see NSW Law Reform Commission, *Defamation* (Report No 75, 1995) paras 6.38-6.39; Chesterman, "The Money or the Truth: Defamation Reform in Australia and the USA" (1995) 18(2) *UNSW LJ* 300 at 312-316; Griffith, *Defamation Law Reform: Declarations of Falsity and Other Issues* pp65-68.

Provision for a court to order publication of a declaration of falsity may seem to contravene a well-known principle of freedom of speech that the editorial autonomy of the media should not be overridden by a mandatory order to publish made by a state agency.[308] However, it would seem that the only sanction for failure to publish contemplated in the Bill is that the defendant may be exposed, under Clause 8(3), to a follow-up action for damages. The defendant may, in effect, choose to divert the plaintiff towards an orthodox claim for damages.

A third counter-argument, linked closely with the second, is that this remedy of a publicised declaration of falsity, aimed at public vindication of a defamed person's reputation, has a similar orientation to an important feature of the new form of common law qualified privilege created in *Lange*. This is the requirement that a defendant wishing to satisfy the "reasonableness" test must normally give the defamed person an opportunity to have a response published along with the defamatory material or as soon as practicable thereafter. This does not involve any mandatory infringement of editorial autonomy by an order of a state agency, as the defendant is free to decide against providing this opportunity, at the risk of losing the benefit of the defence.

The significant common feature of a publicised declaration of falsity and this form of "right of reply" within common law qualified privilege, as now defined, is that both effectively substitute a non-monetary remedy, aimed at conveying the "plaintiff's side of the story" to the public, for an award of damages. In the case of the declaration, the plaintiff primarily chooses whether to accept this substitution, though the defendant, by refusing to publish, may effectively steer the remedy back to damages. On the other hand, the choice whether to reinforce the argument for the defence of qualified privilege by granting a "right of reply" lies with the defendant.

In conclusion, the constitutional validity of Part 6 of the NSW Defamation Bill 1996 emerges, on close examination, as easier to sustain than might appear at first sight.[309] Interestingly, however, it could be argued that the *Lange* judgment's insertion of a "right of reply" element into common law qualified privilege has weakened the case in favour of introducing into NSW defamation law another form of non-monetary relief (the declaration of falsity) through enacting Part 6. This argument would seem stronger if yet another form of non-monetary relief within the Bill, voluntary correction orders under Part 8, were also introduced. The declaration procedure might then seem superfluous.

This argument, however, is not necessarily compelling, for at least two reasons. First, the declaration of falsity is the only one of these remedies that the plaintiff can choose to pursue against the defendant's will, at least to the point where the declaration is made.

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308 As most strikingly illustrated in the US Supreme Court case of *Miami Herald Publishing v Tornillo* 418 US 241 (1974).

309 For this author's own "first sight" comments on this issue, see Chesterman, "Clarity and Loose Ends" (1997) 44 *Gaz L& J* 5.

Secondly, the vindicatory effect of a plaintiff's own response (ie one published in order to bolster the defence of qualified privilege) will generally not be as strong as a published declaration of falsity, which proclaims that the plaintiff has proved the imputation to be false in a court proceeding. Both these considerations also supply grounds for maintaining that the declaration remedy, if introduced, should continue not to be susceptible to the defence of qualified privilege.

It is noteworthy, finally, that the need for this reconsideration of the policy arguments for and against enactment of Part 6 of the Defamation Bill 1996 (NSW) is just one of the many results of the High Court's decision in *Lange v ABC*. The *Lange* case is indeed a "big" one, whose ripple-effects are bound to continue for many years.