

# THE COST OF LOSING THE CODE: HISTORICAL PROTECTION OF PUBLIC DEBATE IN AUSTRALIAN DEFAMATION LAW

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*Defamation law in some Australian jurisdictions formerly provided strong protection for media publication on matters of public interest. In particular, the qualified protection defence in the Queensland defamation Code, introduced in the late 19<sup>th</sup> century, protected robust political debate. This article explores the common law origins of the Code defence, before considering its adoption elsewhere in Australia and its strength in operation. Notable judgments emphasised the defence's protection of widely published and forthright political speech. New South Wales removed the Code defence in the 1970s without any intention to weaken such protection. Soon afterwards, the defence was excluded from operation in Western Australia by what has been called a drafter's foible. The litigation involved speech as political as could be imagined, but that context was not addressed by courts. More recently, Australia's uniform defamation laws ended the Code defence as an express element in the doctrine. Understanding the history of its introduction, operation and loss suggests defamation law could offer a stronger defence for public speech. Indeed, the history may suggest the uniform laws' statutory privilege defence warrants a far stronger interpretation. Losing the Code has had underappreciated costs to public speech; understanding the history suggests ways in which they could be addressed.*

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## I INTRODUCTION

Defamation law is said to protect publications on matters of public interest through a range of defences. Under Australia's uniform defamation laws,<sup>1</sup> there are defences, for example, related to a publication's truth, the speaker's honest opinion, and fair reports of proceedings such as parliamentary debates or court hearings.<sup>2</sup> Instances of public interest speech can be protected by one or more of these defences, but the technical complexities of the law can make them less available than initially apparent. For example, the availability of truth and opinion defences in Australian law became markedly limited in comparison to the English position due to the imputation-based approach that developed in New South Wales under the *Defamation Act 1974* (NSW).<sup>3</sup> This required truth and comment defences to meet precisely the plaintiff's imputation. The effect was to increase the power of plaintiff lawyers to shape disputes through careful pleading. Defence arguments about truth or opinion that could well succeed under English law could not even be advanced in Australia due to this approach. Important aspects of the approach have continued under the uniform laws despite those laws formally ending the imputation-based approach to the cause of action. All this makes Australian law notably more favourable to plaintiffs, at least where those plaintiffs have the necessary resources to sue.<sup>4</sup>

<sup>1</sup> Largely uniform laws came into force in 2006: see *Civil Law (Wrongs) Amendment Act 2006* (ACT), amending *Civil Law (Wrongs) Act 2002* (ACT); *Defamation Act 2005* (NSW); *Defamation Act 2006* (NT); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA). These are collectively referred to as 'uniform Defamation Acts' or 'uniform defamation laws'. The states' legislation commenced on 1 January 2006; the Australian Capital Territory legislation on 23 February 2006; and the Northern Territory legislation on 26 April 2006.

<sup>2</sup> See, eg, *Defamation Act 2005* (NSW) ss 25 (justification), 29 (fair reports of proceedings of public concern), 31 (honest opinion).

<sup>3</sup> See *Defamation Act 1974* (NSW) s 9. A similar position was taken in Queensland law: see, eg, *Robinson v Laws* [2003] 1 Qd R 81. See generally Andrew T Kenyon, 'Imputation or Publication: The Cause of Action in Defamation Law' (2004) 27 *University of New South Wales Law Journal* 100.

<sup>4</sup> The process began under common law decisions, notably *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 and *David Syme & Co Ltd v Hore-Lacy* (2000) 1 VR 667, and

None of the defences concerning truth, opinion or fair reports are particularly well suited to accommodating ordinary public debate. Such debate includes more than material capable of being proven true in court.<sup>5</sup> Nor is debate necessarily polite and carefully measured. This is well recognised elsewhere in Australian law in relation to political speech. For example, in *Coleman v Power* it was noted that, while some may desire political debate to contain less superficiality, less invective, more logic and more persuasion, ‘insult and emotion’ are central to ‘the struggle of ideas’.<sup>6</sup> Law ‘does not protect only the whispered civilities of intellectual discourse’.<sup>7</sup> This approach was endorsed more recently in *Monis v The Queen*:

Political debate and discourse is not, and cannot be, free from passion. It is not, and cannot be, free from appeals to the emotions as well as to reason. It is not, and cannot be, free from insult and invective. Giving and taking offence are inevitable consequences of political debate and discourse.<sup>8</sup>

Although in *Monis v The Queen* the protection of reputation was noted as a legitimate constitutional end,<sup>9</sup> the robust qualities of debate endorsed there and in *Coleman v Power* remain striking when compared with much of current defamation law.

The defences of truth, opinion and fair report privilege offer limited protection to public debate, particularly when compared with some forms of qualified privilege defence under the Codes. This article does not seek to establish that stronger protection is necessarily warranted, although much

has become more widespread under the uniform laws: see Andrew T Kenyon, ‘Six Years of Australian Uniform Defamation Law: Damages, Opinion and Defence Meanings’ (2012) 35 *University of New South Wales Law Journal* 31.

<sup>5</sup> See, eg, above n 4 and accompanying text.

<sup>6</sup> (2004) 220 CLR 1, 91 [239] (Kirby J).

<sup>7</sup> *Ibid*; see also at 54 [105] (McHugh J), 78 [197] (Gummow and Hayne JJ).

<sup>8</sup> (2013) 249 CLR 92, 174 [220] (Hayne J). In an approach that was not inconsistent with this idea (although differing in its result on the facts of the case), the joint judgment of Crennan, Kiefel and Bell JJ read down the statutory provision at issue so that it applied only to the intrusion of seriously offensive communications into a home or workplace: at 216 [352].

<sup>9</sup> Defamation law is commonly said to balance the protection of reputation and free speech: see, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 568 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ): the purpose of defamation law ‘is to strike a balance between the right to reputation and freedom of speech’; Des Butler and Sharon Rodrick, *Australian Media Law* (Lawbook, 3<sup>rd</sup> ed, 2007) 27 [3.10]; David Rolph, Matt Vitins and Judith Bannister, *Media Law: Cases, Materials and Commentary* (Oxford University Press, 2010) 203.

existing literature suggests that it is needed,<sup>10</sup> and our own work — doctrinal and empirical, individual and joint, across a wide range of jurisdictions — would support greater protection of public interest speech. In addition, the law in some comparable jurisdictions, notably England and Wales, has undergone successive reform to strengthen qualified privilege-style defences. The ‘*Reynolds* defence’ in England,<sup>11</sup> while recognised as having weaknesses in practice, was markedly more effective at protecting some forms of public interest speech than Australian law whether using *Lange v Australian Broadcasting Corporation* (‘*Lange*’),<sup>12</sup> the statutory defence under s 22 of the *Defamation Act 1974* (NSW), or s 30 of the uniform Defamation Acts.<sup>13</sup> The principles from *Lange*, for example, appear to have provided ‘a barely usable defence’.<sup>14</sup> Even though English law was already more effective in this aspect of protecting public speech, concerns with the *weakness* of the English approach have recently seen the *Reynolds* defence replaced by a statutory defence for publication on matters of public interest.<sup>15</sup> Rather than consider these points more closely, here we examine the stronger protection that has existed historically within Australia, ask how it has been lost and consider what that suggests for possible reform.

Considerable protection for public debate existed under past defamation Codes in Australia. Queensland gained a defamation Code late in the 19<sup>th</sup> century.<sup>16</sup> The model provided by the *Defamation Act 1889* (Qld) in

<sup>10</sup> See, eg, Kim Gould, ‘Statutory Qualified Privilege Succeeds, but Too Early for the Media to Go “Dancing in the Streets”’ (2011) 16 *Media and Arts Law Review* 241.

<sup>11</sup> Named after *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

<sup>12</sup> (1997) 189 CLR 520.

<sup>13</sup> See, eg, David Rolph, ‘Qualified Privilege: A Question of Judicial Attitude’, *Gazette of Law and Journalism* (online), 3 December 2008 <<http://www.glj.com.au/1267-article>> (discussing ‘a world of difference’ between Australian approaches under s 22 and *Reynolds*); David Rolph, ‘A Critique of the National, Uniform Defamation Laws’ (2008) 16 *Torts Law Journal* 207, 232–5. See below nn 124–6 and accompanying text.

<sup>14</sup> Andrew T Kenyon, *Defamation: Comparative Law and Practice* (UCL Press, 2006) 197, 231–6.

<sup>15</sup> See *Defamation Act 2013* (UK) c 26, s 4. See, eg, James Price and Felicity McMahon (eds), *Blackstone’s Guide to the Defamation Act 2013* (Oxford University Press, 2013) 61–2 [5.01], 66 [5.20]–[5.24]; Andrew T Kenyon, ‘Protecting Speech in Defamation Law: Beyond *Reynolds*-Style Defences’ (2014) 6 *Journal of Media Law* 21, 24–6.

<sup>16</sup> *Defamation Act 1889* (Qld). The schedule to the *Criminal Code Act 1899* (Qld) placed the provisions in the *Criminal Code* (Qld) ss 365–89. In 1995, most provisions returned to the *Defamation Act 1889* (Qld), under the *Criminal Code Act 1995* (Qld) sch 3. During all this period the Queensland Code defence applied to civil defamation. On the interaction of the *Defamation Act 1889* (Qld) and the *Criminal Code* (Qld), see Peter Brett, ‘Civil and Criminal

Queensland was quickly adopted in Tasmania.<sup>17</sup> It was also adopted in New South Wales under the *Defamation Act 1958* (NSW) until being replaced by the *Defamation Act 1974* (NSW). A similar Code was enacted in Western Australia, but only some of its defences were held to apply to civil defamation actions.<sup>18</sup> The term 'Code' is used here in accordance with the case law and literature although the various pieces of legislation were not all strictly codes, with certain aspects of common law defamation continuing to operate.<sup>19</sup> One of the more interesting aspects of the Code was the form of qualified privilege it provided. Called a qualified 'protection' rather than 'privilege', it is identified here simply as the Code defence by way of shorthand. It is not clear that the value of the Code defence was widely recognised, and its demise is an ironic loss to the protection of public speech under the uniform Defamation Acts. The uniform laws, which have generally been seen as strengthening free speech,<sup>20</sup> have at the same time undermined one strong protection for speech by removing the Code defence.

Part II examines common law qualified privilege before the Code's creation. Broader aspects of the common law defence were supported in the Code's enactment, as summarised in Part III. The Code's operation is outlined in Part IV, especially the way in which it offered strong protection for media publications. The replacement of the Code in New South Wales and the judicial exclusion of the Code defence from civil actions in Western Australia are considered in Parts V and VI. It is striking that the New South Wales changes were *not* made to reduce, in any substantial sense, the protection offered by the Code defence. Indeed, the replacement statutory provision in s 22 of the *Defamation Act 1974* (NSW) was intended to offer largely equivalent protection to the Code defence. Equally striking, in the Western Australian context, the formal legal question addressed in the central Full Court and High Court decisions completely obscured the political quality of the speech in question. The publication in issue involved the type of speech that the High Court had recently said was of central importance for protection by the Code defence. Understanding the history underlying the Code defence's introduc-

Defamation in Western Australia' (1951) 2 *University of Western Australia Annual Law Review* 43, 44.

<sup>17</sup> See *Defamation Act 1895* (Tas); *Defamation Act 1957* (Tas).

<sup>18</sup> See *Criminal Code Act 1902* (WA); *Criminal Code Act 1913* (WA); *The West Australian Newspapers Ltd v Bridge* (1979) 141 CLR 535.

<sup>19</sup> See, eg, Justice Cyril Walsh, *The Defamation Act, 1958 and the Common Law* (Council for Advanced Legal Studies, New South Wales Bar Association) 5.

<sup>20</sup> See, eg, Matt Collins, 'Five Years On: A Report Card on Australia's National Scheme Defamation Laws' (2011) 16 *Media and Arts Law Review* 317.

tion, operation and loss could suggest that the current statutory defence under the uniform defamation laws warrants a far stronger interpretation which would bring it into line with most aspects of the Code defence.<sup>21</sup> It appears that losing the Code has had underappreciated costs, and the history of the defence suggests ways in which they could be addressed.

## II PRIOR COMMON LAW DECISIONS

Various categories of qualified privilege have been recognised for the ‘common convenience and welfare of society’.<sup>22</sup> The defence came to require publishers to be under a legal, social, or moral duty, or to be acting to protect an interest, and recipients to have a corresponding duty or interest.<sup>23</sup> This requirement of reciprocity meant that media defendants could generally not use the defence. The situation continues under Australian common law.<sup>24</sup> The requirement of reciprocity, however, was not always explicit in the cases.

The classic starting point in qualified privilege case law remains the 1834 decision in *Toogood v Spyring*.<sup>25</sup> In delivering the Court of Exchequer’s decision, Parke B stated that privilege arises where statements are

fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice ... and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare

<sup>21</sup> See, eg, *Defamation Act 2005* (NSW) s 30, which provides a qualified privilege for ‘reasonable’ publication. Alternatively, common law privilege could warrant strengthening, but the uniform laws may offer a more plausible avenue for drawing from the Code defence.

<sup>22</sup> *Toogood v Spyring* (1834) 1 Cr M & R 181, 193; 149 ER 1044, 1050 (Parke B).

<sup>23</sup> See, eg, *Adam v Ward* [1917] AC 309, 334 (Lord Atkinson).

<sup>24</sup> The required reciprocity may be found for some media-style publications, such as a specialist subscription newsletter about occupational health and safety: *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366. However, it has not been found for a magazine aimed at taxi drivers: *Lindholdt v Hyer* (2008) 251 ALR 514. Reciprocity can be found for letters sent by a doctor to patients: *Prince v Malouf* [2014] NSWCA 12 (12 February 2014), but not in relation to almost all mass media publications. One exception is some instances of defamatory reply to public attack: see, eg, *Harbour Radio Pty Ltd v Trad* (2012) 247 CLR 31, 75 [124], where Kiefel J notes comments by Dixon J to the effect that reciprocity may not always be required in common law qualified privilege: *Mowlds v Fergusson* (1940) 64 CLR 206, 215; *Guise v Kouvelis* (1947) 74 CLR 102, 125. The comments of Dixon J suggest a more flexible approach which might be linked to the 19<sup>th</sup> century decisions discussed here.

<sup>25</sup> (1834) 1 Cr M & R 181; 149 ER 1044.

of society; and the law has not restricted the right to make them within any narrow limits.<sup>26</sup>

While there is not an express requirement of reciprocity here — the focus is on the speaker alone — the concept appears to be implicit in the circumstances of the case. It concerned the tenant of a farm who, through an agent, asked the plaintiff to complete certain work. The work was done negligently and the tenant believed the plaintiff had broken into a cellar and become drunk. Reporting this to the agent would be privileged if done without malice. At the same time, however, the basis of protection — ‘the common convenience and welfare of society’ — is not restricted ‘within any narrow limits’. One could easily imagine broader or narrower approaches to such a defence.

Judgments of Erle J offer good illustrations of a more robust approach to qualified privilege, in which reciprocity was not necessarily required. In the 1846 decision in *Coxhead v Richards*, for example, Erle J stated:

Among such protected communications, there are some in which the protection is derived from the subject-matter alone, without regard to any relation in which the author may stand, such as criticism and public comments ...

There are others in which the protection is derived from the relation in which the giver of the information stands to the person who is the subject of it; as in the case of a communication by a party in the conduct of his affairs where his interest is concerned ...

There is also another class in which the protection appears to me to be derived from the relation in which the receiver of the information stands to the person who is the subject of it; as in the case of information given to prevent damage from misconduct; and for this class I think it is not essential that the giver of the information should stand in any relation to the other parties.<sup>27</sup>

Of the three examples given by Erle J, the latter two base a privileged occasion on the importance of the information to the speaker or to the recipient. As Erle J makes clear, reciprocity is not necessarily required. The first example relates more to the approach, common at that time, of classifying privilege along with fair comment as occasions which negated the presumption of malice that would otherwise exist when a defamatory publication occurred.<sup>28</sup>

<sup>26</sup> Ibid 193; 1049–50.

<sup>27</sup> (1846) 2 CB 569, 607–8; 135 ER 1069, 1084 (citations omitted).

<sup>28</sup> For discussion, see, eg, Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing, 2005) 170; Chris Dent, “The Privileged Few” and the Classification of *Henwood v Harrison*: Foucault, Comment and Qualified Privilege’ (2005) 14 *Griffith Law Review* 34.

Some 19<sup>th</sup> century cases, however, do require reciprocity in qualified privilege. In *Harrison v Bush*, for example, an elector sent a letter to the Home Secretary criticising the actions of a magistrate during recent elections.<sup>29</sup> Privilege was available against an action by the magistrate, with Lord Campbell CJ stating:

A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty ...<sup>30</sup>

Lord Campbell CJ continued:

'Duty,' in [this] canon, cannot be confined to legal duties ... but must include moral and social duties of imperfect obligation.<sup>31</sup>

The variations in approach continued, with *Harrison v Bush* itself being used to support a somewhat wider defence. In 1863 commentary, for example, the case was used to suggest:

In plain truth, it was mere stickling for the terms of an old, dead, abandoned definition to talk of either 'duty' or 'interest' in any sense, legal or moral, in that case. ...

The case, then, established that there may be a privilege in the publication of defamatory statements by a party who has no more than a mere public interest, that is, has no more interest in it than anyone else in the country ...<sup>32</sup>

The commentary then suggested that *media publications* of public interest would be privileged.

Consideration of the range of approaches to qualified privilege in the 19<sup>th</sup> century case law could be taken further. As Paul Mitchell has shown, however, the 'overall picture was one of confusion' during the period with 'at least four distinct and mutually incompatible approaches to the defence' in English cases.<sup>33</sup> For present purposes the point is that, while ideas of reciprocity can be seen in cases during the period, so can broader approaches. The Code defence appears to have picked up the broader approaches; the defence did not require reciprocity as it came to be required at common law.

<sup>29</sup> (1855) 5 E & B 342; 119 ER 509.

<sup>30</sup> Ibid 348; 512.

<sup>31</sup> Ibid 349; 512.

<sup>32</sup> 'The Law of Libel, as Applied to Public Discussion' (1863) 15 *Law Magazine and Law Review: Or, Quarterly Journal of Jurisprudence* 193, 217.

<sup>33</sup> Mitchell, *The Making of the Modern Law of Defamation*, above n 28, 162.

### III ENACTMENT OF THE CODE DEFENCE

The Code defence provided eight heads of protection, with each incorporating a requirement of good faith rather than being defeated by malice. The paragraphs overlapped and on occasions ‘each of them [would] provide a defence to the same publication’.<sup>34</sup> Three paragraphs of particular relevance are noted here:

#### **16 Qualified protection — excuse**

- (1) It is a lawful excuse for the publication of defamatory matter — ...
  - (c) if the publication is made in good faith for the protection of the interests of the person making the publication, or of some other person, or for the public good; ...
  - (e) if the publication is made in good faith for the purpose of giving information to the person to whom it is made with respect to some subject as to which that person has, or is believed, on reasonable grounds, by the person making the publication to have, such an interest in knowing the truth as to make the person’s conduct in making the publication reasonable under the circumstances; ...
  - (h) if the publication is made in good faith 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.<sup>35</sup>

Among other things, the Code defence protected publications made to protect an interest or made for the public good; publications made to a person with respect to some subject in which the person is reasonably believed to have an interest that makes the publication reasonable in the circumstances; and

<sup>34</sup> *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183, 225 (Dawson, McHugh and Gummow JJ).

<sup>35</sup> *Defamation Act 1889* (Qld) s 16. When the Queensland Code defence was contained in the *Criminal Code* (Qld) ss 365–89 (see above n 16) the provision appeared in ss 377(1)–(8) rather than paras (a)–(h). The defence existed in almost identical terms in *Defamation Act 1895* (Tas) s 17 and later *Defamation Act 1957* (Tas) s 16, as well as in *Defamation Act 1958* (NSW) s 17. The Tasmanian Code defence differed in that it omitted from the end of para (h) ‘and if, so far as the defamatory matter consists of comment, the comment is fair’. The relationship of fair comment and qualified privilege Code defences was considered in: *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183, 221 (Dawson, McHugh and Gummow JJ); *Pervan v North Queensland Newspaper Co Ltd* (1993) 178 CLR 309. The extension of para (h) to publication of comment is not considered expressly here; a useful outline is provided by Justice Walsh, above n 19, 20–2.

publications in the course of, or for the purposes of, the discussion of a subject of public interest where the public discussion was for the public benefit. Notably, these provisions did not entail the reciprocity of duty and interest that became a hallmark limitation of common law qualified privilege.<sup>36</sup>

It appears that the drafter of the Code defence, Sir Samuel Griffith, believed it largely reflected existing common law. The second reading speech provides more insight on this question than his later reference in *Dun v Macintosh* that the protection was 'a short statement of what was also the common law'.<sup>37</sup> While that judicial statement directly concerned para (d) of the Code defence,<sup>38</sup> it was not expressly limited to that paragraph. From the second reading speech, Griffith would have said substantially the same about the Code defence as a whole.

In the parliamentary speech, Griffith noted that, for 'the most part', the Bill 'introduces no changes, except those to which I will refer'.<sup>39</sup> The referenced changes to the common law included replacing libel and slander with a single cause of action in defamation and requiring public benefit rather than truth by itself in the defence of justification. These changes were not novel in Australia, with New South Wales having assimilated slander to libel and having required public benefit as part of the justification defence in its *Defamation Act 1847* (NSW).<sup>40</sup> Apart from the noted exceptions, Griffith regarded the Code as declaring the law 'as it now is' and defining points on which the common law position was 'doubtful'.<sup>41</sup>

While Griffith addressed various changes made by the Defamation Bill 1889 (Qld), he discussed relatively few in relation to the Code defence. Paragraph (c) was said to be 'clearly the present law'; (e) was 'also, I think, the law'; (f) was 'the present law, I think, but if it is not, it certainly ought to be'; (g) was 'probably the law, but it may be doubtful'; and (h) was 'substantially ... a statement of what the law is. On that point the law is uncertain, but I believe

<sup>36</sup> See, eg, *Adam v Ward* [1917] AC 309.

<sup>37</sup> *Dun v Macintosh* (1906) 3 CLR 1134, 1147 (Griffith CJ). In any event, the view of Griffith CJ was overruled by the Privy Council: *Macintosh v Dun* [1908] AC 390.

<sup>38</sup> Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (Federation Press, 1998) 210 n 280.

<sup>39</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 19 July 1889, 735.

<sup>40</sup> For an overview of its legislative history, see Paul Mitchell, 'The Foundations of Australian Defamation Law' (2006) 28 *Sydney Law Review* 477.

<sup>41</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 19 July 1889, 735.

that really is the law. At any rate, if it is not the law, it ought to be so'.<sup>42</sup> At the committee stage, he said simply that the Code defence 'did not introduce any change in the law, so far as he knew' and it passed in the Legislative Assembly with no discussion.<sup>43</sup>

Griffith's statements suggest that he understood the common law as sometimes difficult to discern in the conflicting 19<sup>th</sup> century decisions, but also as 'continually changing'.<sup>44</sup> To illustrate his view of changes in defamation law, he quoted Cockburn CJ in *Wason v Walter*.<sup>45</sup> It is the only case extract quoted in the second reading speech and its use suggests a wider import than the particular issue in that case. As Ian Loveland has noted, the 'dynamic and avowedly political' analysis by Cockburn CJ in *Wason v Walter* can be seen as carrying much more general implications than the protection for newspaper reports of parliamentary debates.<sup>46</sup> Griffith quoted this passage from *Wason v Walter*:

Our view of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. ... Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?<sup>47</sup>

<sup>42</sup> Ibid 737. Paragraphs (c), (e) and (h) are reproduced in the text accompanying above n 35. Paragraphs (f) and (g) of *Defamation Act 1889* (Qld) s 16 read:

- (f) if the publication is made in good faith on the invitation or challenge of the person defamed;
- (g) if the publication is made in good faith in order to answer or refute some other defamatory matter published by the person defamed concerning the person making the publication or some other person ...

<sup>43</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 5 September 1889, 1432.

<sup>44</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 19 July 1889, 734.

<sup>45</sup> (1868) LR 4 QB 73, 93–4, quoted in Queensland, *Parliamentary Debates*, Legislative Assembly, 19 July 1889, 734.

<sup>46</sup> Ian Loveland, *Political Libels: A Comparative Study* (Hart Publishing, 2000) 34; see generally at 26–30. In ch 3, Loveland then traces how these strong views about public speech were drawn on in United States decisions such as *Coleman v MacLennan*, 98 P 281 (Kan, 1908).

<sup>47</sup> (1868) LR 4 QB 73, 93–4. In the Legislative Assembly, the opening words were slightly misquoted as '[o]ur law of libel' rather than '[o]ur view of libel': see Queensland, *Parliamentary Debates*, Legislative Assembly, 19 July 1889, 734.

While the principles enunciated in *Wason v Walter* may have 'drifted into the realms of jurisprudential obscurity in England' by the turn of the century,<sup>48</sup> they had not done so in Queensland. It seems fair to suggest that Griffith took a similarly robust view of protecting public speech. Indeed, the idea of the common law *developing* in line with the principles set out by Cockburn CJ may explain, in part, the Code defence.<sup>49</sup>

The parliamentary debates did canvass whether other aspects of the Code changed existing law. The topic that received most attention was extending protection to fair reports of various matters of public interest, such as proceedings of local authorities and proceedings of public meetings.<sup>50</sup> Griffith referred to the similar protection provided in England under the *Law of Libel Amendment Act 1888*<sup>51</sup> and defended the Code provision, with Hansard reporting his view that 'the tendency of all modern law had been in the direction of freedom of discussion and report'.<sup>52</sup>

A similar history is seen in the Legislative Council. In relation to the Code defence, no departure from the common law was noted. Instead, passages from the leading text by Pollock were quoted that appear to extend beyond a strict requirement of reciprocity:

The occasions giving rise to privileged communications may be in matters of legal or social duty, as where a confidential report is made to an official superior, or in the common case of giving a character [reference] to a servant; or they may be in the way of self-defence; or the defence of an interest common to those between whom the words or writing pass; or they may be addressed to persons in public authority with a view to the exercise of their authority for the

<sup>48</sup> Loveland, above n 46, 34.

<sup>49</sup> In relation to absolute protection for reports of official inquiries in s 12, Griffith said it appeared to be the existing law 'and, if it is not the law now, I am quite sure that — applying the principle laid down by Lord Chief Justice Cockburn in the extract I read just now — it will before very long be the law in England': Queensland, *Parliamentary Debates*, Legislative Assembly, 19 July 1889, 735–6.

<sup>50</sup> See *Defamation Act 1889* (Qld) ss 13(1)(f)–(g). When introduced, para (f) referred to 'local authorities' which later became 'local government'.

<sup>51</sup> 51 & 52 Vict, c 64. Some protection had also existed under the *Newspaper Libel and Registration Act 1881*, 44 & 45 Vict, c 60, s 2. On the enactment of both, see, eg, Mitchell, *The Making of the Modern Law of Defamation*, above n 28, 259–70.

<sup>52</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 8 August 1889, 1046.

public good; they may also be matters published in the ordinary sense of the word for purposes of general information.<sup>53</sup>

Changes from the common law were expressly noted in relation to other clauses in the Bill.<sup>54</sup> At the committee stage in the Council, the Code defence passed with no debate.<sup>55</sup>

Tasmania largely adopted the Queensland Code in the *Defamation Act 1895* (Tas).<sup>56</sup> At the second reading, the government is reported to have stated that the Bill was 'very much required. It was a codification of the law of libel, founded on the English law, and modified by colonial experience'.<sup>57</sup> The parliamentary debates focused on a clause, unique to the Defamation Bill 1895 (Tas), which would have created a criminal offence for those who defamed sitting politicians with a penalty of up to two years imprisonment and a £500 fine.<sup>58</sup> Opponents expressed concern that it would hamper media reporting on corrupt politicians and impair 'honest public discussion'.<sup>59</sup> A media report of the Legislative Assembly debates commented that this 'unpleasant, but useful, work generally falls to the lot of newspapers to undertake, and they have often done it at great risk to themselves but very

<sup>53</sup> Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Stevens and Sons, 1887) 228–9, quoted in Queensland, *Parliamentary Debates*, Legislative Council, 17 September 1889, 193 (P MacPherson).

<sup>54</sup> For example, immediately after discussing the Code defence, cl 20 was noted to contain 'an alteration in the present law': Queensland, *Parliamentary Debates*, Legislative Council, 17 September 1889, 193 (P MacPherson). *Defamation Act 1889* (Qld) s 20 provided: 'In any case other than that of words intended to be read, it is a good defence to an action for defamation ... that the publication was made on an occasion and under circumstances when the person defamed was not likely to be injured thereby'.

<sup>55</sup> Queensland, *Parliamentary Debates*, Legislative Council, 26 September 1889, 220. Some other provisions in the Code related to criminal defamation were amended, to which the Legislative Assembly agreed: see Queensland, *Parliamentary Debates*, Legislative Assembly, 3 October 1889, 1962–3.

<sup>56</sup> See 'Preliminary Note: *Defamation Act 1895* (Tas)' in *The Public General Acts of Tasmania: 1826–1936, Classified and Annotated* (Butterworth & Co, 1936) vol 3, 637, 638. One difference was that the Code defence was truncated in Tasmania; it did not include in para (h) 'and if, so far as the defamatory matter consists of comment, the comment is fair': see above n 35.

<sup>57</sup> 'Parliament of Tasmania', *Supplement, The Mercury* (Hobart), 14 September 1895, 1.

<sup>58</sup> See, eg, 'Epitome of News', *The Mercury* (Hobart), 10 August 1895, 2.

<sup>59</sup> *Ibid.*

much to the gain of the public'.<sup>60</sup> The clause did not pass. No discussion of the Code defence was reported.<sup>61</sup>

Parliamentary debates in New South Wales about the Code's enactment in 1958 were notable for their long examination of the meaning of 'defamatory' under the Code and how it might constrain historical publications.<sup>62</sup> But in relation to the Code defence, it was simply noted at the Legislative Assembly second reading stage that 'specific provision is made for protection where public discussion is involved' with good faith providing a limit against 'excessive publication' as at common law.<sup>63</sup> In the Legislative Council, the Attorney-General provided somewhat fuller comments about absolute protection, fair reports and qualified protection.<sup>64</sup> However, the Code defence — including its protection for 'statements made in the course of discussion of some subject of public interest' — was expressly described as being 'no great departure from existing law'.<sup>65</sup> The defence did not receive attention at committee stage. Codification as a whole was defended by the government in terms of making defamation law easier to understand, updating certain parts of the law (for example, extending some defences beyond print media) and reflecting decades of positive experience under the Queensland, Tasmanian and Western Australian Codes.<sup>66</sup> As the Attorney-General commented at the Bill's second reading, the intention was 'to make use of a statutory code which has stood the test of time in three States of Australia'.<sup>67</sup>

<sup>60</sup> Ibid.

<sup>61</sup> The Code defence was not amended by the later *Defamation Act 1957* (Tas), which removed the distinction between libel and slander.

<sup>62</sup> See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 November 1958, 1934–7. For an analysis of the provision, and its earlier enactment in the Queensland Code, see W L Morison, 'The New Law of Verbal Injury: The *Defamation Act* (NSW) 1958' (1959) 3 *Sydney Law Review* 4, 20–4.

<sup>63</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 November 1958, 2034 (W Sheahan).

<sup>64</sup> See New South Wales, *Parliamentary Debates*, Legislative Council, 27 November 1958, 2134–5 (R R Downing).

<sup>65</sup> Ibid 2135 (R R Downing).

<sup>66</sup> Ibid 2030 (W Sheahan); New South Wales, *Parliamentary Debates*, Legislative Council, 2 December 1958, 2191 (H V Budd), 2193 (H D Ahern), 2220 (J J Maloney).

<sup>67</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 27 November 1958, 2129 (R R Downing).

#### IV THE CODE DEFENCE IN OPERATION

As Peter Brett observed in 1951, some of the ‘declaratory’ sections in the Code went further than the common law as by then understood.<sup>68</sup> He saw the Code defence as probably the most important change from common law, even though it was ‘probably intended to be declaratory only’ of qualified privilege.<sup>69</sup> Brett’s view of the declaratory intention is clearly borne out by the above parliamentary history.<sup>70</sup> When he wrote, Brett could observe the relatively restrictive case law on the Code defence and suggest that a newspaper was unlikely to succeed under para (c).<sup>71</sup> In the 1934 High Court decision in *The Telegraph Newspaper Co Ltd v Bedford* (‘Bedford’),<sup>72</sup> for example, it was clear that para (c) might be available to widespread publications but would more easily apply where publication was to a limited audience.<sup>73</sup> In *Bedford*, a letter to the editor alleged that a mining company was illegally depriving shareholders of gold. The company’s managing director sued and the defendant relied on para (e) and the ‘public good’ element of para (c). Both defences failed, in large part because of the extent of publication through the newspaper. Starke J observed:

It cannot ... be for the public good, in the particular circumstances proved in this case, to attack the management of the company and attribute to it illegal, corrupt or improper practices, much less dishonesty or crime, and publish the statement to the world at large.<sup>74</sup>

Evatt J (with whom Rich J and McTiernan J agreed) considered what he called the ‘closely analogous claims of qualified privilege at common law’<sup>75</sup> — not surprising given Griffith’s statements.<sup>76</sup> In *Bedford*, Evatt J followed an orthodox approach for that time, noting the defence’s basis in the ‘common

<sup>68</sup> Brett, above n 16, 45. For another discussion suggesting that reciprocity is not essential, see Edward I Sykes, ‘Some Aspects of the Queensland Civil Defamation Law’ (1948–51) 1(3) *University of Queensland Law Journal* 19, 21–2.

<sup>69</sup> Brett, above n 16, 52.

<sup>70</sup> See, eg, above nn 37–43 and accompanying text.

<sup>71</sup> Brett, above n 16, 54.

<sup>72</sup> (1934) 50 CLR 632.

<sup>73</sup> The defence did succeed soon after this decision where the publication involved was a letter, not a mass media publication: see *Musgrave v Commonwealth* (1937) 57 CLR 514.

<sup>74</sup> *Bedford* (1934) 50 CLR 632, 648.

<sup>75</sup> Ibid 653.

<sup>76</sup> However, the approach could be criticised for failing to start with the words of the defence as a Code: see, eg, Gillooly, *The Law of Defamation*, above n 38, 209.

convenience and welfare of society' and the need for the publisher to act in accordance with a duty or interest, as set out in *Toogood v Spyring*.<sup>77</sup> The 'public good' element in para (c) was seen as making available 'the main considerations and the general principles' which had guided courts 'in determining whether or not to accede to a new claim of privilege' at common law.<sup>78</sup> In *Bedford* itself, public good was not established. While narrower publication might have been privileged, for Evatt J newspaper publication to the general public was not. Such an extent of publication would rarely meet the common law requirements.<sup>79</sup> The newspaper, having made no inquiries about the letter's allegations, was 'in a hopeless position'.<sup>80</sup>

The claim of the newspaper is that it became entitled to publish untrue and defamatory imputations against the plaintiff, merely because the company of which he was managing director had used this newspaper (and many others) as a means of circulating mining reports. ... Such a claim is *not* 'in the interest of the community' is *not* 'for the welfare of society', is *not* 'for the good of society in general', is *not* 'for the common convenience and welfare of society'. ... [T]he publication was *not* 'for the public good' within the meaning of [the Code defence].<sup>81</sup>

However, other paragraphs in the Code defence certainly went further than the common law as it was then understood, with Brett noting paras (e) and (h).<sup>82</sup> In addition, not long after Brett's analysis, the Code defence was recognised in stronger terms. In *Clines v Australian Consolidated Press Ltd*, Jacobs JA stated:

It would be difficult to import into the concept of 'the public good' or 'the public benefit' some requirement that there be a reciprocity of interest. Let it be assumed that it is for the public good that a certain situation be made known or that a public discussion of it is for the public benefit. I do not see why the making of it known or the discussion of it should be only by those who are in the particular class of the public who may be directly concerned. ... A limitation by

<sup>77</sup> (1834) 1 Cr M & R 181, 193; 149 ER 1044, 1050 (Parke B), quoted in *Bedford* (1934) 50 CLR 632, 654 (Evatt J).

<sup>78</sup> *Bedford* (1934) 50 CLR 632, 658 (Evatt J).

<sup>79</sup> Evatt J offered the situation in *Adam v Ward* [1917] AC 309 as an example of when newspaper publication of such matter might exceptionally be privileged: see *Bedford* (1934) 50 CLR 632, 658–9.

<sup>80</sup> *Bedford* (1934) 50 CLR 632, 661 (Evatt J).

<sup>81</sup> *Ibid* 662 (emphasis in original).

<sup>82</sup> Brett, above n 16, 53–4.

the introduction of some doctrine of reciprocity of interest could hardly be other than a reflection of one's own views on the desirability of curbing or limiting the wide protection apparently given by the section ... I see no reason to introduce unexpressed limitations on the basis that some limitations must have been intended by the legislature. On the contrary, I would more readily infer the opposite.<sup>83</sup>

Under this approach, the publisher would still need to be acting to further an interest. However, that interest need not be particular to the publisher. Where 'the whole of the public is socially concerned', the Code defence could protect media publication.<sup>84</sup>

Not only was the *possibility* of protecting widespread public interest speech recognised, the Code defence did protect media publication of the type of harsh words often used in public debate. The mid-1970s High Court decision, *Calwell v IPEC Australia Ltd* ('*Calwell*'),<sup>85</sup> is a classic example. The case arose after the former leader of the Australian Labor Party sued in New South Wales over a newspaper article accusing him of party disloyalty.<sup>86</sup> The publication's tone and content is a useful illustration of what the Code defence protected. The article criticised Calwell and some other older party members in these terms:

One of their younger colleagues calls them 'the counter lunch left' because they spend a lot of their time at the bar murmuring about the need to man the barricades. But even this is a misnomer: in no terms except their own (viz those of the 1930s) could they possibly be described as Left. ... [O]n any social issues ... they are implacably conservative. They have also developed an increasing tendency towards a total elitism, in which they apparently feel they are above the law — in this case the law of the party.

... In the last year and a half [*Calwell*] has rarely been seen in parliament but, when he is there, his contributions have been devoted mainly to increasingly overt attacks on Whitlam. ...

<sup>83</sup> (1966) 67 SR (NSW) 364, 384.

<sup>84</sup> *Ibid*; see also at 376 (Wallace P).

<sup>85</sup> (1975) 135 CLR 321.

<sup>86</sup> The publication is reproduced in the New South Wales Court of Appeal judgment: *Calwell v IPEC Australia Ltd* [1973] 1 NSWLR 550, 554–5 (Reynolds JA). The publication was said to have been distributed nationally, but judgments do not extend beyond New South Wales law, presumably because the plaintiff's action was brought only in respect of New South Wales publication. Such contained suits were not unknown, in part to contain legal costs.

Outside parliament, he has supported Daly against Whitlam, both publicly and privately, apparently on the grounds that he (Arthur) has been in the ... party longer than (sic) Whitlam, and therefore knows more about everything.<sup>87</sup>

In the High Court, paras (c) and (e) of the Code defence were argued. Mason J, with whom all the Justices agreed, held the publication was clearly within para (e). That paragraph protects publications made to a person with respect to some subject in which the person is believed to have an interest that makes the publication reasonable in the circumstances. Notably, it is not the defendant's conduct or belief that needs to be reasonable. Rather, the recipient's interest must be of a sort that makes publication reasonable. As occurred in *Calwell*, the recipient could be the general public and reasonableness could be established by the publication's subject matter. Mason J stated:

The purpose of the respondent in publishing the article, as appears from its terms and from its presence in the newspaper, was to give information to its readers as members of the public. The subject in question was the attitude of the plaintiff ... to the party leader and ... policies ... It is beyond question, having regard to the national importance of the subject, including as it did the attitude of a former party leader to the then party leader and the policies of his party, that the readers of the newspaper had such an interest in knowing the truth as to make the respondent's conduct in making the publication reasonable in the circumstances.<sup>88</sup>

There was no evidence of a lack of good faith in this 'typical exercise in political journalism, written in a fashion intended to attract the attention of the reader, blunt rather than subtle in style'.<sup>89</sup>

In addition to protection under para (e), Jacobs J (with whom Stephen J agreed) held that para (c) was satisfied because the publication was 'for the public good':

I find it hard to imagine a subject matter which should in our democracy more freely be able to be discussed, in writing or by word of mouth. It is for the greatest public good that views on the political attitudes, including party loyalty, of members of the Houses of Parliament should be able to be expressed without inhibition. The public are entitled to the views on such a subject of political commentators, expert or inexpert. The views expressed ... may be correct

<sup>87</sup> Ibid.

<sup>88</sup> *Calwell* (1975) 135 CLR 321, 331.

<sup>89</sup> Ibid 333.

or incorrect, but the public has an interest in hearing them whatever they may be and it is for the public good that interest should not be stultified.<sup>90</sup>

Similarly strong words were used in the preceding New South Wales Court of Appeal decision, where Reynolds JA delivered the leading judgment and held that para (e) provided a defence to the publication.<sup>91</sup> Reynolds JA said the article, all of which was sued on, ‘undoubtedly contains matter capable of being construed as statements of fact as well as matter capable of being construed as comment’.<sup>92</sup> Defamatory factual material, extending beyond comment, was at stake in the dispute. Reynolds JA also stated that, if the law provided no defence, ‘[n]o one would dare henceforth to criticize forcefully the public conduct of a public man and the community would be the poorer for it’.<sup>93</sup>

As well as providing a broad area of protection, the Code defence differed from the common law in terms of how the defence could be lost. The Code defence required ‘good faith’, with the burden of showing its absence lying on the plaintiff.<sup>94</sup> The Queensland Code provided:

a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue.<sup>95</sup>

Griffith CJ observed that the requirements were ‘perhaps a little harder on the publisher’ than common law malice.<sup>96</sup> Proof of any of the elements listed above, such as lack of relevance or excess of publication, nullified good faith. Such matters would be relevant to questions of common law malice, but not determinative. However, at common law such matters would be considered both in relation to whether an occasion of privilege existed and in relation to

<sup>90</sup> *Ibid* 335–6.

<sup>91</sup> Kerr CJ and Hope JA agreed with Reynolds JA: *Calwell v IPEC Australia Ltd* [1973] 1 NSWLR 550, 553.

<sup>92</sup> *Ibid* 553 (Reynolds JA).

<sup>93</sup> *Ibid*.

<sup>94</sup> See, eg, *Defamation Act 1889* (Qld) s 17.

<sup>95</sup> *Ibid* s 16(2).

<sup>96</sup> *Dun v Macintosh* (1906) 3 CLR 1134, 1147.

malice; under the Code, they were only relevant to good faith.<sup>97</sup> In practice, the good faith requirement does not appear to have been notably more restrictive than common law malice.

The above history of the Code defence is not to suggest that it lacked difficulties. But those challenges are distinct from the strength of protection it offered.<sup>98</sup> The Code defence certainly had technical aspects. For example, there was a degree of duplication with similar matters being relevant to a judge in determining the purpose of the publication and whether it came within an occasion of privilege, as were relevant to a jury in determining whether there was an absence of good faith.<sup>99</sup> The difficulties that emerged were, to some extent, clarified through appellate decisions and perhaps too much should not be made of the defence's trial difficulties. The 12 year long litigation in *Bellino v Australian Broadcasting Corporation* ('Bellino')<sup>100</sup> illustrated the difficulties, but it did not necessarily reflect the defence's ordinary operation. *Bellino* was of undoubted public importance, leading to an inquiry into police corruption in Queensland, substantial efforts to reform the police force and the jailing of the State's most senior police officer.<sup>101</sup> The

<sup>97</sup> See, eg, Gillooly, *The Law of Defamation*, above n 38, 216; Sykes, above n 68, 22–3. The Code defence also provided that not believing the publication true would negative good faith, while at common law there could be rare occasions on which a duty to publish existed even in that situation.

<sup>98</sup> It also is notable that, in New South Wales, a stricter approach was taken subsequently to aspects of the Code defence, although that may have been done without full consideration of relevant precedents. The Code defence, by then only an interstate defence, appears to have been approached very much as a subsidiary issue. The New South Wales Court of Appeal judgment in *Amalgamated Television Services v Marsden* [2002] NSWCA 419 (24 December 2002) [1286] (Beazley, Giles and Santow JJA) ('Marsden') held that para (e) was inapplicable to a television broadcast because 'reasonableness' in para (e) was not limited to the nature of the interest of the recipient in the information; reasonableness was, in effect, broadened to include ideas equivalent to those under s 22 of the *Defamation Act 1974* (NSW) and its focus on the publisher's conduct and beliefs. The analysis did not demonstrate great affinity with the Code defence and there was no consideration of judgments such as *Calwell*, in which all judges had endorsed a stronger interpretation of para (e) in an approach that is difficult to reconcile with *Marsden*.

<sup>99</sup> New South Wales Law Reform Commission, *Working Paper on Defamation*, Working Paper No 1 (1968) 125–6 [189]; New South Wales Law Reform Commission, *Defamation*, Report No 11 (1971) Appendix D [89].

<sup>100</sup> (1996) 185 CLR 183. See also *Bellino v Australian Broadcasting Corporation* [1998] Aust Torts Reports ¶81–479.

<sup>101</sup> See Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report of Commission of Inquiry* (1989) (commonly known as the Fitzgerald Inquiry); Criminal Justice Commission (Qld), *Integrity in the Queensland Police Service:*

Code defence was used successfully at almost every stage of *Bellino*, yet complexities in the law and resulting appeal points saw the litigation continue. However, the general effects of the Code defence may not have been so problematic. More recently, lawyers experienced with the defence gave 'supportive interpretations' about the Code defence's scope, strength and operation, describing it as 'very strong', 'robust' and the media's 'bread and butter'.<sup>102</sup>

*Bellino* is also significant because it narrowed the scope of para (h) of the Code defence. But even once narrowed, para (h) continued to offer substantial protection. Paragraph (h) protected publications made in the course of, or for the purposes of, the discussion of a subject of public interest where the public discussion was for the public benefit. The term 'subject of public interest' had been treated broadly in earlier cases: for example, 'the world-wide conflict between Communism and non-Communism'<sup>103</sup> and 'the policies of the government concerning measures that should be taken for the military defence of Australia' were held to fall within the defence.<sup>104</sup> The High Court in *Bellino* restricted the concept to 'the conduct of any person whose conduct, inherently, expressly or inferentially, invites public criticism or discussion'.<sup>105</sup> Even so, the defence remained powerful and was successfully used in later stages of *Bellino* to protect discussion about corrupt police activities related to illegal prostitution, gambling and drugs and the government's sanctioning or non-interference with those activities.<sup>106</sup>

Overall, the Code defence offered strong protection for public debate, stronger than s 22 of the *Defamation Act 1974* (NSW) as it came to be judicially interpreted. As well as the 'robust, even spiteful, attacks on political figures' defended in *Calwell*, the Code defence protected publications involv-

*Implementation and Impact of the Fitzgerald Inquiry Reform* (1997); Richard Ackland, 'End of a Moonlight Nightmare', *Sydney Morning Herald* (Sydney), 9 July 1999, 15.

<sup>102</sup> Kenyon, *Defamation: Comparative Law and Practice*, above n 14, 201. See also P D T Applegarth, 'When Reasonableness Is Unreasonable', *Gazette of Law and Journalism* (online), 8 June 2005 <<http://www.glj.com.au/795-article>>; Doug Spence, 'Section 22 Should Not Be the Law of the Land', *Gazette of Law and Journalism* (online), 27 July 2005 <<http://www.glj.com.au/794-article>>.

<sup>103</sup> *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185, 213 (Windeyer J).

<sup>104</sup> Ibid 212–13.

<sup>105</sup> (1996) 185 CLR 183, 221 (Dawson, McHugh and Gummow JJ).

<sup>106</sup> *Bellino v Australian Broadcasting Corporation* [1998] Aust Torts Reports ¶81–479.

ing the media containing ‘virulent attacks on abortionists’ or making ‘allegations of crime and corruption against private citizens’.<sup>107</sup>

## V REPLACING THE CODE DEFENCE IN NEW SOUTH WALES

By the time the High Court determined *Calwell*, the Code defence no longer applied in New South Wales due to the enactment of the *Defamation Act 1974* (NSW). The Code defence was criticised in the earlier report of the New South Wales Law Reform Commission ('Commission'), in part due to complexities in the roles of judge and jury, and it was abolished and replaced with s 22 of the *Defamation Act 1974* (NSW). For present purposes, two points are notable about the reforms.

First, the 1971 report of the Commission generally preferred common law qualified privilege to the Code defence because the Commission believed it would be simpler to use.<sup>108</sup> The Code was seen to have posed ‘needless procedural traps’ and ‘increased unpredictability’ in practice.<sup>109</sup> The Commission found the Code defence overly protective of public speech *in only one respect* (if its other recommended reforms were enacted). That was para (h), which protected publications in the course of, or for the purpose of, discussing a subject of public interest.<sup>110</sup> This paragraph was important in the Code defence subsequently,<sup>111</sup> and one might argue against the Commission that such a defence is warranted. But more notable in light of the utility of para (e) is the lack of any general criticism by the Commission of its scope and strength. The Commission stated simply ‘there should be a qualified privilege’ equivalent to para (e)<sup>112</sup> and the defence in s 22 of the *Defamation Act 1974* (NSW) was intended to preserve the protection offered by para (e). Thus,

<sup>107</sup> Justice Peter Applegarth, ‘Distorting the Law of Defamation’ (2011) 30 *University of Queensland Law Journal* 99, 101, citing *Sinclair v Bjelke-Petersen* [1984] 1 Qd R 484, *Grundmann v Georgeson* [1996] Aust Torts Reports ¶81-396 and *Bellino v Australian Broadcasting Corporation* [1998] Aust Torts Reports ¶81-479.

<sup>108</sup> However, the Commission did recommend specific provisions related to ‘multiple publication’ and ‘mistaken character of recipient’ to improve on the approach at common law: New South Wales Law Reform Commission, *Defamation*, above n 99, Appendix D [97]–[100]. See *Defamation Act 1974* (NSW) ss 20–1.

<sup>109</sup> John G Fleming, *The Law of Torts* (Law Book, 4<sup>th</sup> ed, 1971) 502.

<sup>110</sup> New South Wales Law Reform Commission, *Defamation*, above n 99, Appendix D [92]–[95].

<sup>111</sup> See, eg, *Grundmann v Georgeson* [1996] Aust Torts Reports ¶81-396; *Bellino v Australian Broadcasting Corporation* [1998] Aust Torts Reports ¶81-479.

<sup>112</sup> New South Wales Law Reform Commission, *Defamation*, above n 99, Appendix D [103].

one aim underlying the *Defamation Act 1974* (NSW) was to have a strong defence that was easier to deal with in litigation.

Second, the reforms occurred in a context in which the perceived failures of the *Defamation Act 1958* (NSW) were not limited to difficulties in litigation. Notably, the Code was seen to be *too restrictive of speech*. In parliamentary debates there was strong criticism of the ways in which the Code had proven detrimental to free speech. The Code had been ‘monstrous and archaic’,<sup>113</sup> ‘imbalance[d]’<sup>114</sup> and ‘reactionary’.<sup>115</sup> It was seen as ‘dragging the law … backwards’,<sup>116</sup> as having ‘stifled free expression’,<sup>117</sup> ‘favoured plaintiffs’ and ‘prevented important statements being made on vital public issues’.<sup>118</sup> Criticism was explicitly made of politicians suing the media, the very thing that *Calwell* showed was actually relatively difficult under the Code for speech of public interest. It is also notable that experience of the Code elsewhere in Australia was not criticised as in New South Wales, and technicalities and complexities *continued* in New South Wales under the *Defamation Act 1974* (NSW). Each of these factors suggests the parliamentary criticisms may have been misconceived: the Code actually protected the sort of speech sought to be protected in the parliamentary debates, and complexities in its operation may have reflected New South Wales legal cultures rather than just its doctrine.<sup>119</sup> In any event, another aim of the reform was to provide stronger protection to public speech.

Thus, the New South Wales reforms aimed to provide a workable and strong defence for public speech. The scope and strength of the Code defence was supported. The one exception was the Commission’s view of para (h), noted above, an issue which received no specific mention in parliamentary debates. That point aside, the *Defamation Act 1974* (NSW) was meant to *strengthen* the protection of free speech. For the Commission, s 22 was aimed at simplifying but not weakening defences such as para (e) of the Code

<sup>113</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 February 1974, 829 (Thomas Mead).

<sup>114</sup> *Ibid* 838 (Peter Coleman).

<sup>115</sup> New South Wales, *Parliamentary Debates*, Legislative Council, 20 March 1974, 1601 (Sir Asher Joel).

<sup>116</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 February 1974, 823 (F J Walker).

<sup>117</sup> *Ibid* 829 (T Mead).

<sup>118</sup> *Ibid* 823 (M Ruddock).

<sup>119</sup> Empirical research suggests that New South Wales defamation litigation was later far more technical (without any apparent public benefit) than in both Victoria and England: see generally Kenyon, *Defamation: Comparative Law and Practice*, above n 14, chs 9–10.

defence. That paragraph was directly linked to s 22 by the Commission.<sup>120</sup> The parliamentary opposition proposed amendments to s 22 in the Legislative Assembly and Legislative Council that would have explicitly restricted protection to where a reasonable investigation had occurred.<sup>121</sup> The amendments were defeated.<sup>122</sup> The very offering of the amendments suggests the defence, as enacted, was not regarded as weaker than the Code. Prophetically, however, it was observed that s 22 was 'so amorphous' in its drafting that its future interpretation would either provide 'a licence for libel or be so highly restrictive that it will be almost impossible to publish anything with its protection'.<sup>123</sup> The second of these two options is closer to what transpired. Defendants' lack of success in arguing s 22 was 'spectacular'<sup>124</sup> and 'infamous',<sup>125</sup> with the defence being 'effectively negat[e]d' by its restrictive judicial interpretation.<sup>126</sup> After *Morgan v John Fairfax and Sons Ltd [No 2]* ('Morgan'), most defendants had to establish their honest belief in the publication's truth; that the 'manner and extent of publication did not exceed what was reasonably required'; that reasonable inquiries to check sources were made; and that the conclusions 'followed logically, fairly and reasonably' from what the inquiries revealed.<sup>127</sup> This is a long way from the Code defence's protection of

<sup>120</sup> New South Wales Law Reform Commission, *Defamation*, above n 99, Appendix D [103]–[104].

<sup>121</sup> The proposed wording was:

conduct is reasonable if and only if, before publication reasonable enquiries were made as to the truth of the matter and there were reasonable grounds by the person making the publication to hold a reasonable belief as to the truth of the subject matter of the publication.

New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 February 1974, 854 (R Mulock).

<sup>122</sup> Ibid; New South Wales, *Parliamentary Debates*, Legislative Council, 20 March 1974, 1636–8.

<sup>123</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 February 1974, 854 (N Wran).

<sup>124</sup> Michael Gillooly, *The Third Man: Reform of the Australasian Defamation Defences* (Federation Press, 2004) 158.

<sup>125</sup> Kim Gould, 'The More Things Change, the More They Stay the Same ... Or Do They?' (2007) 12 *Media and Arts Law Review* 29, 30.

<sup>126</sup> Steven Rares, 'Can I Say That?' (2004) 25 *Australian Bar Review* 45, 47. See also Kenyon, *Defamation: Comparative Law and Practice*, above n 14, 218.

<sup>127</sup> (1991) 23 NSWLR 374, 388 (Hunt AJA).

vigorous, sarcastic language or invective,<sup>128</sup> and far from its concern not to stultify public debate.<sup>129</sup>

## VI WESTERN AUSTRALIA: FOIBLES OF DRAFTING AND IGNORING POLITICAL SPEECH

Early in the 20<sup>th</sup> century, Western Australia adapted Griffith's approach. There was uncertainty whether all of the defamation provisions in the Western Australian Code applied to civil defamation. The issue arose because s 5 of the *Criminal Code Act 1902* (WA) (and later s 5 of the *Criminal Code Act 1913* (WA)) provided that when an act was 'declared to be lawful' by the Code it could not form the basis of any action. This meant defences in civil defamation existed for all acts the Code declared lawful. The Western Australian Code used slightly different wording in different sections. Did all forms of wording amount to 'declared to be lawful'? For example, defences related to fair reports,<sup>130</sup> fair comment<sup>131</sup> and truth<sup>132</sup> each began with the words '[i]t is lawful', while the Code defence of qualified protection began with '[i]t is a lawful excuse for the publication of defamatory matter'.<sup>133</sup> Three defences used 'lawful', while one used 'lawful excuse'.<sup>134</sup> When Brett analysed the situation in 1951, he concluded the Code defence should apply in Western Australia: 'I doubt whether it could be successfully argued that this wording — that is, lawful excuse — 'does not link up with section 5. It would seem that the changed wording is no more than a draftsman's foible'.<sup>135</sup>

The issue came before the Full Court of the Western Australian Supreme Court in the 1978 case of *Bridge v Tozer* ('Tozer') in the form of a question reserved for it by the trial judge: was the Code defence available in a civil defamation action?<sup>136</sup> *Tozer* was then appealed to the High Court and its

<sup>128</sup> See *Calwell v IPEC Australia Ltd* [1973] 1 NSWLR 550, 559 (Reynolds JA), quoting *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185, 210 (Windeyer J).

<sup>129</sup> See, eg, *Calwell v IPEC Australia Ltd* (1975) 135 CLR 321, 335–6 (Jacobs J).

<sup>130</sup> *Criminal Code Act 1913* (WA) sch ('*Criminal Code* (WA)') s 354.

<sup>131</sup> *Ibid* s 355.

<sup>132</sup> *Ibid* s 356. The justification defence required public benefit as well as truth.

<sup>133</sup> *Ibid* s 357.

<sup>134</sup> Further defences could also be considered; the wording for absolute protection or privilege differed again. For the range of wording, see, eg, *West Australian Newspapers Ltd v Bridge* (1979) 141 CLR 535, 549 (Aickin J).

<sup>135</sup> Brett, above n 16, 51.

<sup>136</sup> [1978] WAR 177.

judgment appeared in 1979 as *West Australian Newspapers Ltd v Bridge* ('Bridge').<sup>137</sup> Here, the judgments are outlined before considering something that is not addressed in them; namely, the political quality of the speech in question. This omission is striking when it is recalled that *Calwell*, which emphasised the Code defence's importance for political speech, was decided by the High Court only four years earlier.

Two broad approaches could be taken to the availability of the Code defence. The defence might fall outside s 5 because of its 'lawful excuse' wording, unlike the 'lawful' wording used in some other Western Australian Code provisions. On this approach, lesser or greater reliance could also be placed on wider factors; for example, the position of the provisions within a *criminal* Code, or Queensland's underlying statutory cause of action in civil defamation when its Code was enacted<sup>138</sup> compared with the common law action in Western Australia when it enacted its Code. This approach, more literal and more restrictive, gained majority support in the Western Australian Full Court and the High Court.<sup>139</sup> In the Full Court, for example, Burt CJ held that the specific wording in s 5 was required to affect civil law. An act had to be 'declared to be lawful' for it to affect civil defamation law. Stating that something was 'a lawful excuse' was not the same thing.<sup>140</sup> Similarly, in the High Court Barwick CJ stated: 'It is plain to my mind from the terms of s 5' that an act must be 'specifically declared, by the Code to be lawful'.<sup>141</sup>

Alternatively, the Code defence would be available in Western Australia civil defamation cases if its wording was understood to fall within s 5. The words 'lawful' and 'lawful excuse' do not differ greatly and, as Brett concluded earlier, no particular formula of words might be required to come within s 5. In the Full Court, Wallace J analysed the different exculpatory wording used in various defences under the Western Australian Code and concluded:

A detailed reading of the section coupled with the knowledge that the main principles of the law of libel are applicable alike to civil actions and criminal prosecutions has led me to the conclusion that it was intended to protect de-

<sup>137</sup> (1979) 141 CLR 535.

<sup>138</sup> Under the *Defamation Act 1889* (Qld).

<sup>139</sup> See *Tozer* [1978] WAR 177, 177–81 (Burt CJ), 184–6 (Brinsden J); *Bridge* (1979) 141 CLR 535, 538–42 (Barwick CJ), 542 (Stephen J), 542–5 (Jacobs J).

<sup>140</sup> *Tozer* [1978] WAR 177, 180.

<sup>141</sup> *Bridge* (1979) 141 CLR 535, 540.

fendants in civil actions. ... I do not consider that there is any formal magic attached to the use of the words 'declared to be lawful'.<sup>142</sup>

Under this approach, reliance could be placed on s 350 of the Western Australian Code.<sup>143</sup> Section 350 stated that it was 'unlawful to publish defamatory matter unless such publication is protected, or justified, or excused by law'. This suggested the Code defence fell within s 5 through the combination of the 'lawful excuse' wording in the defence itself and the provision in s 350 that it was not unlawful to publish material excused by law.

This broader approach to s 5 was supported by two judgments in the High Court. Aickin J stated:

In the context of s 5 ... , which indicates that the Code is to have some effect outside the criminal law, and of the use throughout the Code of the expressions to which I have referred above ['does not incur any liability', 'it is lawful', 'it is a lawful excuse', and so on], I am unable to discern any material difference in meaning or operation between the expressions 'it is lawful' and 'it is a lawful excuse'.<sup>144</sup>

Aickin J also considered s 350 and held: 'the word "excused" in that section conveys that what would, without more, be an unlawful publication of defamatory matter, is rendered lawful by the presence of some additional circumstance'.<sup>145</sup> All of this meant the Code defence should be available in civil defamation. Gibbs J agreed with the reasoning of Aickin J, holding 'no formula is required'.<sup>146</sup> The majority approach, however, did require just such a formula of words.

As the above extracts illustrate, the analysis in *Bridge* was entirely formal. The political quality of the speech at issue in *Bridge*, however, is remarkable. The dispute involved matters of contemporary public debate intimately related to state politics, which gained national media coverage.<sup>147</sup> It was connected

<sup>142</sup> *Tozer* [1978] WAR 177, 184.

<sup>143</sup> This section was numbered 350 in the schedule to the *Criminal Code Act 1913* (WA). The numbering differed slightly under the earlier *Criminal Code Act 1902* (WA) sch 1 s 348.

<sup>144</sup> *Bridge* (1979) 141 CLR 535, 550.

<sup>145</sup> *Ibid* 551.

<sup>146</sup> *Ibid* 542.

<sup>147</sup> See, eg, Western Australia, *Parliamentary Debates*, Legislative Council, 8 November 1977, 3106, where John Tozer notes that the issue was covered on 3 November 1977 by the Australian Broadcasting Commission in the national television news and the current affairs program, *This Day Tonight*. See also 'Aboriginal Votes Disputed', *The Age* (Melbourne), 20 July 1977, 15; 'Judge Orders New Poll Over Blacks', *The Age* (Melbourne), 8 November 1977, 1.

with what has been called ‘about as ugly a piece of skulduggery as has occurred in Australia’s electoral history’.<sup>148</sup> One could well think that public debate about it deserved protection for society’s ‘common convenience and welfare’ just as much as the speech in *Calwell*. Without such protection, no one would dare to criticise public conduct forcefully ‘and the community would be the poorer for it’.<sup>149</sup> The publication at issue and its background are discussed at some length here, as they appear to be entirely absent from the legal literature and information about them is not readily accessible. Given the focus of the *Tozer* and *Bridge* judgments, the absence of the issues from legal literature may not be so surprising.

For some years before the 1977 state election, there was public and parliamentary comment about Indigenous voting, particularly in the northern Kimberley region.<sup>150</sup> It was not obligatory at that time for Indigenous people to enrol to vote in Western Australia, and the state electoral office appears to have made little attempt to tell Indigenous people about enrolling. It had ‘largely been left to people closely associated with Aborigines to inform them of their rights’.<sup>151</sup> Following the 1974 state election ‘it became increasingly apparent that Aboriginal voters could play a decisive part in the next election’ in the Kimberley electorate.<sup>152</sup> Not all of these electors could read or write English, and in many polling places illiterate voters were thought to constitute the vast majority of electors.<sup>153</sup>

The conservative Coalition government was returned in the February 1977 election. In the lower house Kimberley district, the Australian Labor Party

<sup>148</sup> Colin Tatz, ‘Aborigines, Law and Race Relations’ (1980) 3 *Ethnic and Racial Studies* 281, 297.

<sup>149</sup> *Calwell v IPEC Australia Ltd* [1973] 1 NSWLR 550, 553 (Reynolds JA); see also the short, concurring judgments of Kerr CJ and Hope JA.

<sup>150</sup> See, eg, A Bolger and H Rumley, ‘Political Developments among Kimberley Aborigines, 1977–1980’ in Elizabeth J Harman and Brian W Head (eds), *State, Capital and Resources in the North and West of Australia* (University of Western Australia Press, 1982) 299, 325 n 5, which reports accusations by a Liberal Party spokesperson in March 1974 that Labor Party supporters were ‘regimenting’ Indigenous votes, and the denial of that allegation by the Labor candidate.

<sup>151</sup> Audrey Bolger and Hilary Rumley, ‘The Kimberley Voting Scandal: Voting Rights for Black Australians’ (1978) 3 *Legal Service Bulletin* 221, 221.

<sup>152</sup> Ibid.

<sup>153</sup> See, eg, Western Australia, *Parliamentary Debates*, Legislative Council, 8 November 1977, 3112 (J C Tozer): ‘It has to be remembered that in many polling places in the Kimberley illiterate voters will outnumber the literate voters by four to one and possibly five to one.’ Bolger and Rumley note that Halls Creek (a polling place considered further below) had an Aboriginal population of at least 66 per cent in this period: Bolger and Rumley, ‘Political Developments among Kimberley Aborigines’, above n 150, 306.

candidate lost to the sitting Liberal Party member and government minister by only 93 votes. Ernie Bridge was the losing candidate, Alan Ridge the returned member. Bridge, a business figure and pastoralist, was the first Indigenous candidate in a Western Australia state election. Bridge's complaints to the Court of Disputed Returns were substantially upheld by Smith J, who ordered a new election.<sup>154</sup> Bridge was found to have lost more than 97 votes, largely from the effects of a confusing telegram and the misconduct of scrutineers. The telegram was sent on the eve of the election by the Chief Electoral Officer on the order of the Minister for Justice. It made electoral officials doubt that illiterate voters could indicate their preference with the aid of how-to-vote cards. The Chief Electoral Officer had long resisted sending 'advice' of the sort contained in the telegram because he correctly believed that it would disenfranchise Indigenous voters. Smith J found, contrary to the effect of the telegram, that the use of how-to-vote cards was entirely appropriate: 'The ability to read or indeed a full and complete knowledge of the preferential voting system, are not among the [required] qualifications of electors'.<sup>155</sup>

The judgment criticised other aspects of the Liberal campaign. As well as the telegram, Smith J found the Liberal Party had created and enacted a plan to send legally qualified scrutineers to remote polling stations to engage in

<sup>154</sup> *Bridge v Ridge* (Unreported, Court of Disputed Returns of Western Australia, Smith J, 7 November 1977). Bridge lost the subsequent by-election by a small margin, in a campaign without complaints unlike the 'bitter' earlier one: Bolger and Rumley, 'The Kimberley Voting Scandal', above n 151, 221. He then defeated Ridge at the 1980 election, became Australia's first Aboriginal member of Cabinet, and held the seat until 2001 (as an independent from 1986). Bridge received a state funeral in 2013, and far more complimentary statements about him were made then in parliamentary debates: see Western Australia, *Parliamentary Debates*, Legislative Assembly, 7 May 2013, 207–18.

<sup>155</sup> *Bridge v Ridge* (Unreported, Court of Disputed Returns of Western Australia, Smith J, 7 November 1977) 48. The election also involved a third candidate, Allan Rees, who stood as an independent but was a Liberal Party member when he nominated. He won 118 votes and did not seek to take part in the Court of Disputed Returns. However, in a personal letter, Ridge later thanked Rees for his role and the confusion he helped create among Indigenous voters: Letter from Alan Ridge to Allan Rees, quoted in Western Australia, *Parliamentary Debates*, Legislative Assembly, 9 November 1977, 3271 (M Bryce). Rees also provided written authorisation for two legal scrutineers that Ridge admitted were acting as his agents in the plan: *Bridge v Ridge* (Unreported, Court of Disputed Returns of Western Australia, Smith J, 7 November 1977) 5. All this suggests Rees' independence could be doubted.

'blanket questioning' of Indigenous electors with the aim of denying qualified electors their votes.<sup>156</sup> Colin Tatz later summarised the plan:

The Liberals sent five solicitors to polling booths to act as scrutineers, with instructions to do whatever was necessary to invalidate Aboriginal votes 'if in your mind there is any reason' to invalidate. They went beyond the letter of the *Electoral Act* procedures: their intimidatory questions frightened off some Aboriginal voters; their bullying caused some presiding officers to refuse illiterate Aborigines use of 'how-to-vote-cards'.<sup>157</sup>

Consistent with this summary, Smith J found the plan aimed 'to stultify' the use of how-to-vote cards by illiterate voters where there were known to be many and where it was believed they would be unlikely to support the Liberal candidate.<sup>158</sup>

Given the *Bridge* defamation case, it is worth noting another matter addressed by Smith J. The instructions to Liberal scrutineers included allegations of Labor misconduct for which no evidence emerged in the Court of Disputed Returns.<sup>159</sup> Throughout its lengthy proceedings — sittings extended over 42 days and involved more than 150 witnesses in the remote locations of Kununurra, Turkey Creek, Halls Creek, Fitzroy Crossing and Derby as well as in Perth<sup>160</sup> — no evidence came to light of any misconduct by opposition officials, scrutineers or supporters. Such evidence would have been significant if it reduced the votes lost by Bridge to less than Ridge's advantage. Instead, Smith J found that there had been 'the effective disfranchisement of a large number of illiterate voters' who wished to vote for Bridge.<sup>161</sup>

Further matters addressed by Smith J related more directly to the later defamation case. John Tozer was a scrutineer at Halls Creek, one of the Kimberley polling stations. Tozer was also a government member and Legislative Councillor for North Province, who was not required to stand for re-election in 1977 due to the longer upper house terms. His electorate included the lower house seat that Bridge contested. Bridge's defamation suit

<sup>156</sup> *Bridge v Ridge* (Unreported, Court of Disputed Returns of Western Australia, Smith J, 7 November 1977) 24. This was the first time such a style of questioning had ever occurred, to the knowledge of Western Australian electoral officials.

<sup>157</sup> Tatz, above n 148, 297.

<sup>158</sup> *Bridge v Ridge* (Unreported, Court of Disputed Returns of Western Australia, Smith J, 7 November 1977) 47.

<sup>159</sup> Ibid 45.

<sup>160</sup> Ibid 4.

<sup>161</sup> Ibid 48.

concerned statements by Tozer about polling day events at Halls Creek. That is, the publication at issue was a sitting politician's statement about the conduct of an opposing party candidate on polling day: it was as central an example of political public speech as could be imagined.

Soon after the election, *The West Australian* published a letter to the editor from Tozer. Headed “A Sad and Degrading Day” at Halls Creek,<sup>162</sup> the letter included:

in my whole life, I doubt if I ever have been as despondent and sickened as I was by the time voting ended at 8pm after I had spent the best part of 12 hours at the polling place as the authorised scrutineer on behalf of candidate Alan Ridge. ...

If an election in a democratic country is the free expression of the collective will of the individual persons — that is not what we saw in Halls Creek on February 19.

The total vote of the Aboriginal community was manipulated, in an outrageous manner, to favour the ALP candidate, Mr Bridge. The degree of coercion had to be seen to be believed; unattainable promises were given, threats — not excluding physical violence — were made ... This programme of brain-washing could only have had any impact on an unsophisticated and illiterate community.<sup>163</sup>

In light of the judgment of the Court of Disputed Returns, the letter would be difficult to defend as being true and no attempt was made to do so at the defamation trial. In the Court of Disputed Returns, Smith J outlined the ‘tense atmosphere’ at the Halls Creek polling station and the ‘repeated interruptions’ faced by electoral officials from multiple scrutineers.<sup>164</sup> He found the ‘constant wrangling’ between scrutineers and ‘repeated interruptions’ made it unsurprising that irregularities occurred.<sup>165</sup> Tozer’s own statements show that he

<sup>162</sup> John Tozer, “A Sad and Degrading Day” at Halls Creek, *The West Australian* (Perth), 10 March 1977, 6. The letter was written responding to an earlier one from Kerry Leggett who had also been in Halls Creek on polling day. Leggett was secretary of the Halls Creek branch of the Australian Labor Party. Her letter recounted events in similar terms to the later findings of the Court of Disputed Returns: Kerry Leggett, ‘Poll Experiences of Aborigines’, *The West Australian* (Perth), 4 March 1977, 6. An ‘unreserved apology’ from Tozer to Leggett was later published: John Tozer, ‘Apology by MLC’, *The West Australian* (Perth), 18 September 1978, 6.

<sup>163</sup> Tozer, ‘A Sad and Degrading Day’, above n 162, 6.

<sup>164</sup> *Bridge v Ridge* (Unreported, Court of Disputed Returns of Western Australia, Smith J, 7 November 1977) 58.

<sup>165</sup> Ibid 55–6.

was present during the day and suggest he was an active participant.<sup>166</sup> Only one day after the judgment of Smith J, Tozer contradicted it under the protection of parliamentary privilege:

The basis of the votes cast in Halls Creek on that day was that how-to-vote cards proffered by illiterates could be accepted by the presiding officer — quite improperly. I have said previously and I say again that on that day in the Halls Creek polling place a handful of dedicated ALP workers effectively cast something like 200 valid votes. ...

It made a complete farce of the whole concept of a freely expressed democratic vote.<sup>167</sup>

To recap, a defamatory letter to the editor from a politician alleged serious misconduct in a state election, its publication preceded a high-profile and widely reported case in the Court of Disputed Returns about serious misconduct by politicians and party supporters in that election, the judgment contradicted the letter's allegations, but the politician maintained the allegations made in the earlier letter to the editor.

Just a few weeks later, Bridge's defamation action was tried. The result would see Bridge awarded \$20 000 in damages, but only if the Code defence was not available.<sup>168</sup> The letter was certainly strongly worded and made serious allegations about which evidence of truth was not offered. However, the plaintiff conceded that the defendants acted in good faith, satisfying that element of the Code defence. And the speech at issue was centrally connected with the political process; there would be as strong a claim to protection for it as there was for the speech protected by the Code defence in *Calwell*.

It is a sad irony that the deeply political quality of the publication in *Bridge* did not register at all in the judgments. The two divided courts show that it was quite arguable the Code defence applied in Western Australia, but it was

<sup>166</sup> See, eg, Western Australia, *Parliamentary Debates*, Legislative Council, 8 November 1977, 3107 (J C Tozer): 'I was a scrutineer appointed by candidate Ridge and I spent 11½ hours in the polling place in Halls Creek. It is unclear on what basis he was present as well as the lawyer acting for Ridge under the Liberal Party plan. The *Electoral Act 1907* (WA) s 114 limited scrutineers to one per candidate (unless the polling place was divided), but as well as Tozer's parliamentary statements and his letter to the editor, the judgment of Smith J reads as if multiple scrutineers were present rather than only one per candidate.'

<sup>167</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 8 November 1977, 3108. Tozer also made it clear that he thought 'unsophisticated' Indigenous voters should not be enrolled to vote as they 'clearly will never be able to have sufficient understanding to know in fact what they will be doing in the polling place': at 3110.

<sup>168</sup> The quantum of damages is noted in E D W, 'Western Australia' (1978) 24 *Australian Journal of Politics and History* 107, 110.

ruled out, by majority, without consideration of this aspect.<sup>169</sup> A different result in *Bridge*, applying the Code defence in Western Australia civil defamation, would have changed the national context when moves towards uniformity gained traction in 2004 and 2005. If more jurisdictions had retained the Code defence until then, its influence may well have been greater in the political compromises made when developing the uniform laws' statutory defence. Then, even if the defence in the uniform law differed from the Code defence, it might have better captured the strength of protection offered by the Code defence.

## VII CONCLUSION

In a 1965 presentation, Justice Walsh observed of the New South Wales Code: 'What concerns the practising lawyer is the law which is now in force'.<sup>170</sup> While true for the practitioners being addressed then, it is also valuable for practitioners, and all the more so for academic understanding, to recognise how the law differs from comparable and historical situations. In the case of the Code defence, it is important to see what has been lost and the haphazard way in which that occurred. It may not simplify matters too much to describe the history in these terms.

In 1889, Queensland set out a statutory version of qualified privilege. The Code defence incorporated robust ideas about protecting public speech. The ideas were seen at the time of enactment as substantially reflecting the common law. Subsequently, a more restrictive approach became orthodox at common law and, for almost all of the 20<sup>th</sup> century, defamatory media publications could rarely succeed in a general qualified privilege defence. Over the same period, it became clear that the Code defence could protect robust defamatory speech in mass media publications. Strong judicial statements were made in support of the Code defence, especially in cases of political speech and other speech of public importance. The Code defence offered more protection than was available under s 22 of the *Defamation Act 1974* (NSW), as judicially interpreted, and under the High Court decision in *Lange*. Griffith's statements that the Code largely replicated the common law are ironic in retrospect because the Code defence ended up providing far stronger protection than the common law did in 2005 when the uniform laws

<sup>169</sup> Mason J, who wrote the leading judgment in *Calwell* confirming the strength of the Code defence's para (e) and its importance for political speech, did not sit in *Bridge*.

<sup>170</sup> Justice Walsh, above n 19, 1.

were enacted. The Code defence could protect much robust public debate, probably more than any other aspect of Australian defamation law.

Beyond the Code defence's enactment and aspects of its operation, its removal is equally notable. In New South Wales, the defence was replaced through legislative reform without any aim of weakening the defence. Indeed, s 22 of the *Defamation Act 1974* (NSW) was meant to replicate much of the Code defence and even strengthen its protection for public speech. Judicial interpretation meant the section failed to meet those aims. In Western Australia, the Code defence was ruled inapplicable in civil defamation actions in *Bridge*, a dispute centrally involving political speech. A contrary approach was clearly possible (as the dissenting judgments show) and a contrary approach would appear preferable given the speech at issue. *Bridge* involved just the sort of speech for which the Code defence was championed as 'an essential of parliamentary democracy'.<sup>171</sup> Finally, with the introduction of uniform defamation laws the Code defence disappeared as an express element of law. Its value to public debate, however, would appear to remain.

It is surprising how little debate arose about the removal of the Code defence in Queensland by the uniform defamation laws. The situation was quite different in the early 1990s when attempts to achieve uniformity between some Australian jurisdictions failed. At that time, the Australian Capital Territory, New South Wales, Queensland and Victoria prepared Defamation Bills. All four jurisdictions would have provided a defence for 'publication in the public interest, in good faith and after appropriate inquiries'.<sup>172</sup> The way in which the new defence would have required a 'responsible approach' to be taken by the media was explained at some length in Queensland parliamentary debates.<sup>173</sup> However, the Defamation Bill 1992 (Qld) — unlike the other jurisdictions — also contained the Code defence. On that point, it was simply noted that the defence had 'worked well in Queensland for many years' and would continue.<sup>174</sup> If those reforms had been passed, the Code defence would have survived in Queensland and offered the possibility of repeated reminders of its value.

The situation was different with the uniform laws. Then, Queensland parliamentary debates did not engage in any detail with how the cl 30 qualified privilege defence under the Defamation Bill 2005 (Qld) compared with the

<sup>171</sup> *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185, 210 (Windeyer J).

<sup>172</sup> See, eg, Defamation Bill 1991 (Vic) cl 24.

<sup>173</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 10 March 1992, 4017 (D M Wells).

<sup>174</sup> Ibid. Given the breadth of the Code defence, it is unclear when the proposed new defence would have been used in Queensland.

Code defence. It was merely noted that the new defence and common law privilege 'replace[] the current Queensland statutory defence which sets out eight specific circumstances, based on the common law but wider, where qualified privilege applies'.<sup>175</sup> The personnel involved were different than in the early 1990s and there was greater political pressure towards uniformity in 2005.<sup>176</sup> But other matters in the 2005 reforms — such as whether justification would require proving public interest or public benefit as well as substantial truth, and whether corporations would be able to sue — were subject to vigorous debate.<sup>177</sup>

In addition, the removal of the Code defence should not be seen as a continuation of its New South Wales history. Instead, that history offers one of the key lessons about the defence. Much of the strong protection offered by the Code defence could still be found now through more robust interpretation of s 30 under the uniform laws. It is not the terms of the defence so much as the judicial application of it that has undermined such statutory qualified privilege defences in Australia.<sup>178</sup> The New South Wales experience with s 22 of the *Defamation Act 1974* (NSW) did not reflect the aims held for it by the preceding Commission report; nor did it reflect parliamentary debates when the legislation was enacted. The experience with s 22 has, however, influenced s 30 of the uniform laws. A better reference point for s 30 than the restrictive rules in *Morgan*<sup>179</sup> could be *Calwell*.<sup>180</sup> *Calwell* shows that widespread publication on a subject of general public interest was protected under the Code defence, with the judgments emphasising the value in that strong protection. Such publication would be protected under the uniform laws if s 30 was traced to its origins. While s 30 may offer more workable judge and jury roles than was sometimes offered by the Code defence, it need not be any weaker in protecting public speech. Section 30 need not be as weak as s 22 was held to be. It is s 22 rather than the Code defence that has a poor connection to the history.

<sup>175</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 25 October 2005, 3426 (L D Lavarch).

<sup>176</sup> See, eg, Kenyon, *Defamation: Comparative Law and Practice*, above n 14, 362–8.

<sup>177</sup> See, eg, Rolph, 'A Critique of the National, Uniform Defamation Laws', above n 13.

<sup>178</sup> Rolph, 'Qualified Privilege: A Question of Judicial Attitude', above n 13.

<sup>179</sup> (1991) 23 NSWLR 374, 388 (Hunt AJA). See also above n 127 and accompanying text.

<sup>180</sup> (1975) 135 CLR 321. See also above nn 85–93 and accompanying text.

The statutory review of the uniform defamation laws — a review which remains incomplete years after its statutory deadline<sup>181</sup> — might consider reform of s 30.<sup>182</sup> However, even if a review appears, achieving national statutory reform may be practically impossible. This difficulty only adds to the value there would be in case law considering more carefully just what should be required under the existing s 30. In that task, the Code defence should not be forgotten. If free speech is to be given meaningful weight in Australian law,<sup>183</sup> aspects of defamation law might well be thought to warrant development. One of the obvious ways in which that could happen is through a stronger privilege defence. Important sources for such a development lie in the lessons of the Code defence. It offered strong protection for public interest speech; it provided defamation law with ‘an essential of parliamentary democracy’.<sup>184</sup> The lessons of its history need not be lost.

<sup>181</sup> *Defamation Act 2005* (NSW) s 49 provides that a review is to be conducted as soon as possible five years after the assent and that reports are to be tabled in both Houses of Parliament within six years assent. At the time of writing, consultation has occurred, but no report has been released or tabled.

<sup>182</sup> See Gould, ‘Statutory Qualified Privilege Succeeds’, above n 10. However, the history of the uniform laws’ enactment suggests that any substantive reform would be difficult to achieve nationally.

<sup>183</sup> Cf judicial doubts about the implied protection for political communication which continue to be seen as a minority position in the High Court: see, eg, *Monis v The Queen* (2013) 249 CLR 92, 178–84 [243]–[251] (Heydon J).

<sup>184</sup> *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185, 210 (Windeyer J).