I have heard some significant gossip about the Howard Government Attorney-General, Philip Ruddock. Or rather, since I heard it from two reliable and independent sources, I can elevate what I heard and call it a fact. This is how journalists, when we are working prudently, negotiate what is sayable and what is not. Fact, fact, fact, like bricks in a wall, each with its little footing of evidence. If an article is checked by a lawyer before publication then each fact, and the whole assemblage, will be scrutinised for unintended and unprovable meanings. Because sometimes, as we all know, a wall of bricks can be more than the sum of its parts. When you are sued for defamation you are called upon to prove the truth not of what you intended to say, but rather of any meanings the reader might have drawn. The issue is always what people thought you meant, not what you intended to say.

And so I should say at once that there was nothing improper in what I heard about Philip Ruddock - merely a collision between the personal and the institutional, between the Attorney-General and the man. Which is, of course, what makes it so fascinating.

Here is the gossip. In recent briefings on his proposed new national defamation law, Ruddock has revealed that he is being driven partly by memories of his father. Ruddock proposes making it possible for the dead to sue - or rather for their relatives to take action up to three years after their deaths. Asked why he was persisting with this idea, Ruddock talked about his father, Max Ruddock, and how awful it had been, many years ago, to tolerate attacks on his reputation when he was no longer around to defend himself.

Max Ruddock was a Liberal MP in the NSW Parliament, where he was on the backbench for years, not apparently favoured by the powerbrokers of the Askin Government. He was by all accounts, a talented, charismatic and sometimes fierce man. Former NSW Liberal MP Milton Morris remembers him as so dogmatic that by comparison his son seems malleable, "or at least better able to see the other point of view". Colleagues remember he lived for politics and for his family, in particular his son Philip.
In an interview late last year, Ruddock told me, "Dad was a person with very strong views. A person you either intensely liked or disliked. I had a strong bonding with him because he would take up issues with strength. He had high expectations, was proud of what had been achieved but wanted you to do better. I think I understood that." Of his own elevation to Attorney-General, Philip Ruddock said: 'I think if Dad was here today he’d be sitting there scratching his head and saying ‘I still wonder how he did it’.”

Philip Ruddock has long since surpassed his father’s achievements. Max Ruddock never quite got an even break. He was made a minister just months before his death. To top all this, he fought all his life against a degenerative muscle disease that, by the time he entered parliament, made walking difficult and, Morris remembers, gave him a waddling gait.

When I asked Ruddock whether his father was harsh to him as a boy, he denied it. "No. Not harsh … He would defend his kids with the utmost vigour but if you had done anything wrong he would take to you for having failed to observe the appropriate standards."

Physically or verbally?

Ruddock gave a Boris Karloff smile, and said: "In my family people have always used their minds as a weapon." It was a chilly moment in our interview.

Robert Askin himself, of course, was the subject of one of the most notorious cases of defamation of the recently dead. The day before his funeral, The National Times published allegations that he was corrupt. It was sayable in print because he was no longer living, although barely cold. The rumour and gossip that had been circulating for years was suddenly officially (though controversially) sayable.

But back to Philip Ruddock. Both my sources, who were at his briefings, gained the impression that a large part of Ruddock’s motivation for the changes he intends to make is personal. Ruddock proposes to restrict the defence of fair comment, which now protects most fact-based expressions of opinion, so that "prejudiced, biased and grossly exaggerated opinions will receive no protection". Although Ruddock wept no tears and showed no explicit vulnerability, my sources both gained the impression that he had been stung by the criticism of his role in his previous portfolio of Immigration. One said: "He blinked a lot and his lips were all stiff."

This also squares with what Ruddock said in his interview with me last year. When I asked him about the so-called cash-for-visas affair, he threatened me with a writ and implied he might also sue members of the Opposition if they continued to raise the matter. When I challenged him on this later, he insisted he would never use defamation but he didn’t want the Opposition to know that he wouldn’t. "And there are limits. People need to know there is always a risk," he said.
One last thing about Ruddock. Most commentators have assumed that the discussion paper proposing reforms to defamation is loosely put together and that not much determination lies behind the proposed changes. Ruddock gave those who attended his briefings quite a different impression. He seemed determined to push it through, and quickly. The next stage will be draft legislation. If the Howard Government is still in office, the legislation will be before Parliament before the end of the year.

No sane journalist could claim to like defamation law. It causes too many sleepless nights and obsessive anxiety about meaning - intended and unintended. Most of the real story of defamation takes place a long way from the courts. My first experience with it was as a cadet journalist. I had written a "soft" story about a champion teenage violin player living in Horsham, Victoria. I had said he was considered "eccentric" because he preferred to practise violin than to kick a footie with his mates. His mother threatened action. She thought I was implying he was homosexual. Of course no action resulted. This wasn't serious. But I don't doubt the reality of her outrage.

More seriously, a good journalist can't avoid defaming people. Most journalism worth reading is potentially defamatory. I, like most other journalists of any longevity, can tell stories about the articles that didn't make it to print.

Like this one, which I worked on in the late 1980s: a well-known property developer, a friend, confidante and sponsor of one of the nation’s most prominent politicians, was in business with an organised-crime figure. This story is true in its import, but could not be published because in another sense it was not "true". The property developer was a director of a company that owned a hotel and employed the staff of the hotel. The organised-crime figure was a director of a different company that owned the licence for the hotel. If the story had been published, both men would certainly have sued, and so would the politician. The evidence wasn't actually proof of their being "in business together", because they did not share a company. The story never caused a blip on the legal radar screen.

Then there are all the little magazines that cannot even dream of publishing very controversial stuff, even if it is true. Just the cost of responding to legal letters is beyond their reach. A book publisher once told me that what he feared most was the sight of his own lawyer's letterhead coming through the fax machine, and the thought of what it had cost for the letter to be written.

I can breast beat about freedom of speech with the best of them. Having caused controversy, I also know the sting of being defamed. My daughter’s seventh birthday party was wrecked for me a year ago. We took her to Wonderworld, but I saw it all...
through a mist of tears and fury, because Christopher Pearson had published untrue allegations about me in *The Weekend Australian*. As the roller-coaster gave me the illusion of near death, my mind was preoccupied with matters of reputation.

I had wounded Pearson, which is why he hit back. Such is public life. Nevertheless, I wanted to sue so badly it hurt. But journalists always look ridiculous being sensitive. Like Philip Ruddock, we look better - perhaps are better - when we hide personal vulnerability behind the institutional facade.

Yet for all the righteous breast beating (which I am sure gets very dull for those outside the push and pull of public life) I must admit that the law fascinates me, and precisely because of the elements in my Ruddock anecdote. Here we have the collision between the personal and the public, between the vulnerability of human beings living among their fellows, and the cool language of the law.

Defamation is so real, so full of hurt and affront. The stakes are enormous, and yet the battles are so abstract. The realities of the way the law operates mean that there is a big difference between what is sayable over coffee and lunch - between what everyone knows and is talking about -- and what can be given the authority and reach of print or broadcast.

At the same time, on those few occasions when a case actually makes its way to court, the first thing that must be decided is what the words published actually meant. And that can look ridiculous indeed. In his book *Slapping on the Writs* (UNSW Press, 2003), Brian Walters quotes Justice David Levine, defamation list judge of the NSW Supreme Court, complaining about how he had to deal with arid and abstract arguments about what words, sentences and phrases mean, and the ridiculous words now enshrined in the defamation list "Jesuitical, casuistry ... and best of all, 'epexegetical'" (which means, according to my dictionary, relating to the addition of words to make meaning clear).

"The amount of the court’s time, let alone litigants’ resources, expended profligately in the determination of what words, sentences and phrases mean is positively scandalous," Levine said. This is textual analysis, but with immediate, practical consequences, at a phenomenal cost. Defamation is fascinating because in the concepts and the real politic of the law, we see the flesh and bones of the kind of people we are, struggling alongside notions of the kinds of people we think we ought to be.

Defamation has to do with that most social of activities, the spread of news and views. The history of news makes it clear that journalism tends to arise, almost organically, when the society we live in becomes too big for us to hear by word of mouth what happened in the city’s courts, or why there was a pall of smoke on the horizon in the afternoon, or of the death of a prominent citizen.
If journalism arises organically so does its regulation and control. Word-of-mouth is impossible to govern. Not so journalism. The first professional messengers in human societies were nearly always in the pay of rulers and governments, and this affected both what they communicated and how and to whom they did it. Issues of regulation and spin are at least as old as nation states and cities.

The historian Mitchell Stephens has made the point that now, when information churned out by journalists is all-pervasive, the nature of gossip has changed. In the modern world it is possible to find out what was served for dinner last night at the White House, but it is harder to find out why the ambulance called to the house down the street last night, or why your neighbours were shouting in their kitchen. Our notions of human society have altered as news binds, informs and alarms larger communities. And so the notion of what is sayable, what is tolerable, is changing.

I don't suppose many High Court judges have read Mitchell Stephens's *A History of News* (Harcourt and Brace, 1997), yet over the past 10 years, this notion of a changed and enlarged human society has been given legal force through a series of judgements that have, at least in law, redefined our notions of nation, and what is sayable between us.

The two crucial decisions are the Theophanous case and the Lange case. The names of Andrew Theophanous, the former Federal Labor MP, and David Lange, the former New Zealand prime minister, have, like all legal principles, taken on a life of their own, remote from the human beings who first felt hurt and outraged enough to try to invoke the law. Together, Theophanous and Lange have led to a conception of society as a giant kind of club. Between the members of this club, some kinds of things - what the High Court has described as "government and political matters" - must be sayable, but only under some circumstances. In order to claim a defence, the publisher must establish that it was "reasonable in the circumstances" to air the material. In that concept - reasonableness - lies a welter of human fallibility, hurt, presumption, social nicety and history.

Andrew Theophanous moves like an old man these days, although he is only 57. He walks through the Melbourne winter sun to meet me at an inner-suburban cafe, his hands shake when he sits down. His deep, dark-toffee eyes are impenetrable. His mouth moves in the slightly trembling way of the aged. It is tempting to think this is what jail does to a man. But perhaps it is more the result of a loss of reputation. Theophanous is the first Federal MP ever jailed for corruption.

When he was released from Dhurringile, a low-security prison near Murchison in north-east Victoria early this year after 629 days in jail, he told *The Age* that he was not treated badly, but there were "moments of terror, moments of fear, but also moments of warmth and companionship ... I have endured nearly 21 months of great suffering and
sadness, but it is wonderful to be with my family again." He had been in jail for almost half of his three-year-old daughter’s life.

Theophanous had been found guilty of two counts of conspiracy against the Commonwealth and two counts of bribery, and sentenced to six years’ jail with a minimum of 42 months. But both terms were halved by the Court of Appeal, which quashed one of the conspiracy charges and ordered a retrial. Theophanous has always claimed to be innocent: he is appealing his conviction to the High Court. Meanwhile, the Commonwealth Director of Public Prosecutions is trying to charge him with fresh allegations of defrauding the Commonwealth and accepting money for immigration advice without being a registered agent.

These are the issues that now occupy Andrew Theophanous. He leafs, fingers trembling, through documents about his case, his mind darting from one aspect to another. But long before Theophanous was convicted his name was written into the history of defamation law in a precedent that established what many might think a common-sense principle - that politicians should be prepared to take more "heat" than ordinary citizens, that they "exist" in a way private citizens do not.

It began in 1992, when Bruce Ruxton, then the famously inflammatory president of the Victorian RSL (we used to call him "dial a quote" in my days on The Age), wrote a letter to the Sunday Herald Sun newspaper calling for Theophanous to be thrown off a parliamentary immigration committee. Ruxton wrote:

If reports coming out of Canberra are true about the alleged behaviour of Dr Andrew Theophanous, then it is high time he was thrown off Parliament's immigration committee. I have read reports that he stands for most things Australians are against. He appears to want a bias shown towards Greeks as migrants ... It has been reported that Dr Theophanous wants the British base of Australian society diluted so that English would cease to be the major language. What is this man on about? And what language would he suggest we use to replace English? I'm grateful there's an election in the wind. I hope the people of Calwell give Dr Theophanous the heave. Poor old Arthur Calwell must be spinning in his grave at the idiotic antics of the man in the seat named after him. Calwell was a great Australian and the architect of this country's postwar immigration policy.

Theophanous sued. Today, in retirement and slightly mellowed, Ruxton still thinks there was nothing defamatory in what he said. "I think it was silly of him to sue. I used to run across Andrew sometimes and I would rib him about it, but he wouldn't laugh."

Theophanous, on the other hand, still remembers the sting. "It was outrageous. He was saying I was un-Australian." Ruxton might not have been so amused, and
Theophanous not so persistently outraged, had they had to bear the costs of the subsequent legal action. But very quickly the Theophanous case had gone above and beyond the human beings it theoretically concerned, and was before the High Court as a test case, with the legal costs being funded by a newspaper publisher keen to test the law. Legal minds had been reading the wind and knew that change was coming.

Before Philip Ruddock’s recent discussion paper, the last serious consideration of national defamation-law reform was an Australian Law Reform Commission (ALRC) report in 1976, which made a number of recommendations. Ruddock has picked at this report like a magpie, treasuring up some things and ignoring others. The ALRC report opened its discussion of the law by talking of "honour, reputation and dignity", and the need to balance these with freedom of expression and access to information in the public interest. None of these terms was defined, though both the law as it then existed and that proposed by the ALRC attempted to balance them.

The terms honour and dignity sit oddly alongside the jostling and rudeness that constitutes most public life. One imagines pot-bellied clubbable chaps harrumphing over the yellow press, rather than the highly polished sound bites, spin doctoring and dog whistling of modern communications. The ALRC itself commented that the law took little account of "changed social conditions, technological advances and the growth of national consciousness and national communication". The ALRC also noted that the law was in fact inefficient at what it was meant to do - protect and vindicate reputation. Trials took forever, the courts had no power to order publication of corrections and, even when this was done, it was often after lengthy legal negotiations or litigation and merely served to refresh the content of the defamatory material in everyone’s minds. On the other hand, many defamation actions were started with no intention to go to trial. Only about 2 per cent of all writs lodged ended in court and there were no statistics on the number of threatening letters that did not even result in a writ being lodged, but nevertheless stopped debate. The ALRC commented that so-called "stopper writs" were "generally successful" at preventing further publication and debate.

The changes recommended by the ALRC were never acted upon. Until Theophanous and Lange, the law remained much as it has always been - complex, different in every state, and yet encapsulating very similar ideas. What is publicly sayable in defamation law? In theory, judges do not create the common law but "discover" it in the habits and customs of the people. But in defamation, which is a patchwork of common law, and statute drawn from the common law, there is artificiality to this idea. Gossip, or networking, is the stuff of reputation, as we all know. But some gossip must not be published. The lines are drawn around straining concepts like "reasonableness" and "fairness" and "absence of malice".
Generally, there are three strands to legal ideas of when it is permissible to hurt someone’s reputation. Firstly, there is the old-fashioned notion of truth, which is by itself a defence in defamation law in most states, but not in the ex-convict states of NSW and Queensland. In those jurisdictions, truth alone is not enough. You must also prove that what you have published is in the public interest or of public benefit. The case law suggests that this unique situation developed in the 1800s because of newly respectable citizens who wanted to prevent publication of their convict pasts.

And truth is never simple. In all states, you must prove not only the literal truth of what you say, but also the innuendoes that arise from what you have published. I remember being told, in the wake of the controversy over High Court judge Lionel Murphy’s interventions in the case of his "little mate" Morgan Ryan, that it was unwise to refer to public figures as having "mates". The word mateship had come to carry with it a miasma of improper influence. Public figures could be said to have "friends".

I was also taught that a journalist can virtually never say that someone lied. It may be possible to prove that someone gave wrong information, but to say that they lied is to say that they deliberately misled, and to delve into the murky and unprovable world of human motivation. Some things, commonly spoken of, are not provable and therefore not officially sayable.

The second strand of what it is legally permissible to say concerns expressions of opinion. This is the "fair comment" defence. (The law, being fundamentally pre-modern, assumes that it is both necessary and possible to distinguish between fact and comment.) The law holds that we should be able to express opinions on matters of established fact, providing our comment is not motivated by malice. Here the law and the courts necessarily delve into motivation. Forests have been felled for law books and court judgements that investigate the question of what constitutes malice, and whether the mere existence of malice automatically means that a particular publication is motivated by malice. On and on it goes. In its search for truth, the law constructs its own fictions, one of which is that human motivation is a fixed thing, possible to determine.

It is the defence of fair comment that Ruddock wants to narrow. If he has his way, only opinions that are "reasonable" will be protected. But as was demonstrated in a submission to Ruddock by the Communications Law Centre (CLC), it is very hard to say what "reasonable" actually means. The CLC conducted research that showed that at least a third of Australians had problems seeing opinions with which they disagreed as being "reasonable".

Whatever the law says, the truth is that for many people the definition of "reasonable" is "agrees with me".
The third strand of defences under defamation law is the stuff of the Theophanous and Lange decisions. It is the notion that there are some forums and circumstances where freedom of speech is particularly important or "privileged". There are two kinds of privilege. Absolute belongs to parliaments and courts. Anything can be said by participants in the forum. Even out-and-out lies are protected.

Subtler, and yet I think packing more visceral power, is qualified privilege, which delineates the way society hangs together and the relatedness of people. Qualified privilege says that some groups of people are necessarily related to each other - that they have duties to each other and that primary among these is the exchange of information. Under qualified privilege journalists can report on the proceedings of parliament and the courts, so long as they do so fairly, accurately and in good faith. They have a duty to their public to do so. (But if they are motivated by malice, the right to the defence disappears.)

Subtler still, communications between people with a common interest in something are protected. Members of a club, for example, can discuss the affairs of the club among themselves and be protected. A resident can make a complaint to the mayor about a council employee. These people have a common legitimate interest and a duty to each other. More can be said between them than can be said in the street or in a newspaper.

It is a gentle and civilised idea. And it is in this area - the notion of groups of people bound by common interest - that the Theophanous and Lange decisions altered the conception of what it means to be Australian.

Australia is the only Western nation without a bill of rights. And yet, in a number of cases leading up to Theophanous, the High Court found that our constitution implied a right to freedom of expression on government and political matters. The idea was that the constitution laid down a system of democracy, which could not work unless the electorate was informed. If a law so restricted citizens' ability to be informed that the constitution could not operate, then the law must be invalid.

The Theophanous decision was important because it extended this principle to defamation actions. The High Court said that people must be able to discuss government and political matters, and MPs and their performance of their duties. If this discussion was defamatory, then it was defensible, providing the publisher thought the allegations were true and did not publish recklessly.

Theophanous lost his case. He had long since ceased to care much about it. Today, even he believes public figures should be subject to more "heat" on their reputations than others. But he has no clear opinion of where the line should be drawn. The Theophanous principle came before the court again a few years later, when David Lange sued the ABC
Four Corners program over its rebroadcast of a New Zealand program casting doubt on the integrity of his government over issues to do with fund-raising and donations to the New Zealand Labor Party.

People feared that the High Court would overturn the Theophanous constitutional defence. The composition of the High Court had changed. Black-letter lawyers had replaced reformists. The court was unanimous in upholding the implied protection for political speech in the constitution but their more conservative honours did a neat trick in "clarifying" the Theophanous decision. The implied protection for freedom of speech, their honours said, was not a personal right. There was no such thing as a "right to freedom of speech" in Australia. Rather, the protection operated as a kind of qualified privilege. Modern mass media, and political parties, had made our country into a very large club. The court said:

> Each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia ... The common convenience and welfare of Australian society are advanced by discussion - the giving and receiving of information - about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. Consequently, those categories now must be recognised as protecting a communication made to the public on a government or political matter ... The existence of national political parties operating at federal, state, territory and local government levels, the financial dependence of state, territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable.

It was the fine and fascinating decision, but in practice, as always in defamation law, it operates differently from might be expected. To claim qualified privilege, the publisher must establish that its publication was "reasonable in the circumstances". What does this mean? It depends on the circumstances. At the very least, the High Court said, the publisher has to prove that it has done everything it could to check truth, believes the publication to be true and has sought and published a right of reply from the person defamed.

Peter Bartlett, one of the nation’s most senior defamation lawyers who has held my hand through the legalling of many stories, believes the idea of "reasonableness" operates very unreasonably indeed from a journalist’s perspective. The decided cases, he says, make it clear that a journalist will almost never be able to satisfy the test. In the eyes of a judge or jury with complete hindsight, there will almost always be one more person the journalist should have contacted, one more call to make. As well, any journalist who
relies on confidential sources - which happens in almost every story of import - will have
trouble satisfying the reasonableness test without revealing his or her source.

The Lange defence has only rarely been successfully invoked in court. Nevertheless
the High Court decisions have had a real effect. After the decision came down, many
writs from politicians who would otherwise have gone to court settled. Since then, the
number of writs from politicians has plummeted.

Today, Theophanous, acknowledges that he is someone almost entirely without good
reputation, a situation he describes as surreal. On the one hand, he has to accept that
the media can say almost anything about him - above and beyond what has been found
true by the courts. Most people, he says, are under the impression he got a Chinese
woman a visa in return for sexual favours. There was evidence (which he disputes) that
he suggested he might take sex instead of money to help her out. But there was no charge
and no finding on this. He says he never met the woman.

Theophanous is never mentioned in public without the baggage of his conviction. On
the other hand, life continues. His friends remain his friends. His family stands by him
and loves him. It is almost as though, in the circle of those who know him personally,
there is no such thing as damaged reputation. Even for a public figure, in the end there is
only human connection. The real impact of destroyed reputation, Theophanous suggests,
is that the circle narrows. You are denied membership of society - and even, in a sense,
denied existence. In public life, the person becomes a label - corrupt MP - rather than a
human being. Theophanous feels he truly exists only in the eyes of the people he can
reach out and touch.

Whether David Lange feels the same way is impossible to know. He lives a semi-
reclusive life. The New Zealand ALP has been told not to hand out his email address or
his telephone number, only a post office box address is available. I wrote to him and got
no reply. To whom and how does he exist, in the wake of the reputation-damaging case
now part of legal history? It is impossible to know.

The breast beating over defamation law is inevitable, if dull. When the words are so
grand and abstract, so removed from the way people actually talk and think, a tone of
righteousness and portentousness is inevitable. On the one side we have honour, dignity
and reputation. On the other is freedom of speech, and that amorphous and jangling term,
the public’s right to know (which always begs the question - what and why?).
The real issues in defamation law are both bigger and smaller than these words suggest. They are to do with human contact and the way in which the information age and journalism have changed the way we perceive our fellow human beings. We know so much and so little. The spreading of news by means other than by word of mouth assumes both a reduction in intimacy and its expansion. These are the facts of modern life that the High Court says makes "inevitable" the new kind of qualified privilege. But the world viewed from a distance loses its subtle shades of grey.

When we hear about dinner at the White House, we receive the information in order to judge it. When we see the ambulance at the bottom of the street, our hearts are more likely to jump with sympathy and concern, even if we have no mechanism, no neighbourly network, to help us find out what it means. Both law and journalism are social constructs - regulating and binding us together. They meet and clash in defamation law.

Now you know something about Philip Ruddock’s family. You know something of my family. You know something of Andrew Theophanous and how he appears to me now, in the wake of his disgrace. You will doubtless read this new knowledge into any future media accounts of the actions of these men and anything else you read by me. You are, in a sense, a member of the same "club" as Ruddock and Theophanous and me. You touch us, engage with us. We exist to you.

Ruddock, in particular, ignites passion. Many of you will have said things about him that cannot appear in print without fear of defamation. As Ruddock wishes, you know there are limits. Gossip remains gossip. When we speak prudently in public, we construct our little walls of facts, express opinion on those facts and pretend that reputation can be regulated.

References
Julianne Schultz, Reviving the Fourth Estate, Democracy, Accountability and the Media, Cambridge University Press, 1998, Chapter 9
Attorney-General's Department, "Outline of Possible National Defamation Law", March 2004, p3
Justice David Levine’s comments are from a speech delivered on August 31, 1999, and are quoted on p 59-60 in Walters, Brian, Slapping on the Writs - Defamation, Developers and Community Activism, UNSW Press, 2003
Melissa Fyfe, "Freed, Theophanous does a Pauline Hanson", The Age, February 6, 2004
Communications Law Centre, "Submission to the Attorney-General of Australia concerning proposals for a National Defamation Law