It applies whether the statement is made in a public place or in a private place and it is broad enough in its terms to cover statements by one individual to another individual. Whether in fact that would be likely to be accepted as the legitimate range of the section is perhaps doubtful.

Again this is, as in section 1, an indictable offence with the liability of imprisonment for two years, or an offence punishable on summary conviction. Of course, it is again the option of the Crown whether the charge will be an indictable offence or an offence punishable on summary conviction, and in the case of an indictable offence the accused would have the option of a trial by magistrate or by judge without jury or by a court composed of a judge and jury.

This by the way does follow on the recommendation of the Cohen Report as contained on page 69 and is in exactly the same terms. There it appears as recommendation No. 3 on page 69, and the defence set out in subsection (3) again follows exactly the form of the Cohen Report as set out on page 69. It is based on the words used in connection with defamatory libel.

You will see this form of words used already in the Criminal Code as reproduced in the Cohen Report on page 44. Paragraph (a) provides for the defence of absolute truth.

Senator Hollett: Who is to decide whether it is in the public interest or otherwise?

Mr. Scollin: Well, this is really the same court as has to determine at present under section 259 in the case of defamatory libel against an individual as distinct from against a group. Section 259 as reproduced on page 44 says:

> 259. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter that, on reasonable grounds, he believes is true, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit.

The Chairman: In other words, these words will have been judicially defined by the courts already in previous cases?

Mr. Scollin: Now, this is a case which is commonly known as "reverse onus.". You will see that the provision is that no person shall be convicted of an offence under subsection (2) where he establishes certain things. This is not a case of the Crown having to prove the negative. The Crown, under subsection (2), would have to prove that the accused communicated statements and that he thereby willfully promoted hatred or contempt and that that hatred or contempt was promoted against an identifiable group. That would be as far as the Crown would have to go in terms of proof. It would then be a matter for the accused to establish either of his defences—not of course by the same high standard of proof required of the Crown, but in the ordinary way by a preponderance of probabilities. The burden of proof beyond a reasonable doubt would always remain on the Crown, but it is for the accused to establish both of these defences.

Senator Fergusson: Does not the Crown also have to establish that it is likely to lead to a breach of the peace?

Mr. Scollin: That is under the first subsection, and there is no defence of truth or reasonable belief in truth open in that instance.

The Chairman: The word "wilfully" in there puts a little higher burden on the Crown because they have to prove an intent on the part of the person.

Mr. Scollin: I agree.

The Chairman: When they have got that far, he has the defence available to him, but they would have to prove an intent or "knowing wilfullness" is the way it is interpreted.

Mr. Scollin: You will see that, in part, in the case of defamatory libel in section 261, reproduced at page 44. There it says:

> No person shall be deemed to publish a defamatory libel where he proves that the publication of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published and that the matter itself was true.

In other words, the burden of proof on the accused in cases of defamatory libel is two-pronged. Here it has been restricted; all the need establish is that the statements communicated were true. There need be no test or proof that it was for the public benefit at the time it was published. Now that is under paragraph (a) of subsection (3).

Perhaps I should just point out and stress the word "or" between (a) and (b). He can take advantage of either of these in his defence—either that they were true or that on reasonable grounds he believed them to be true