

**Report to the Hon. Bruce Golding, Prime Minister  
on the  
Review of Jamaica's Defamation Laws**

**Submitted by**

**the Committee commissioned by  
the Hon. Prime Minister  
chaired by Justice Hugh Small**

**February 29, 2008**



## **Introduction**

This committee was established to review the law of defamation and to make recommendations for “changes that will ensure transparency and accountability in the context of a new framework of good governance.” The focus of this initiative is on good governance and the appropriate burden of accountability that rests on public officials and persons who hold positions of trust. Our letters of appointment required us to consider recommendations that:

- (a) support the principle of freedom of the press;
- (b) provide reasonable protection against false and damaging publication;
- (c) prevent the suppression of information to which the public is reasonably entitled;
- (d) impose appropriate burdens of accountability on public officials holding positions of trust.
- (e) set standards for establishing malicious intent and responsibility for due care prior to publication and;
- (f) evaluate the actual damage caused by defamatory publications and suggest appropriate remedies.

The Committee completed its work in the three month period set by the Prime Minister at its first meeting having attempted in this limited time to stimulate public discussion and solicit recommendations. It recognised that while it was not a formal Law Commission it needed to examine technical legal issues. It also accepted that this report on its deliberations and recommendations should avoid the use of specialist terms that are used in the legal profession. We accept that there are several issues, such as the interrelation between the Freedom of Information Act and Defamation Law that have not been fully explored. We trust that there will be ongoing public discussion of these and other issues.

At the commencement of its assignment the Committee noted that the main thrust of the Terms of Reference was on transparency, accountability and good governance. It recognised the urgent need to give high priority to these principles in our public and private business culture. Traditionally the law of defamation is not focused on supporting the enforcement of standards of accountability and governance. It is fundamentally concerned with providing redress for persons who allege that their reputations have been disparaged. Nevertheless we accept that there has been a modern tendency in the law of defamation to accommodate the right to freedom of expression.

“Unlike defamation law, which seeks to limit harmful statements, freedom of expression encourages public discourse. The United States, a leader in the field because of its expansive First Amendment, has developed three common justifications for free speech. First, open discussion creates a “marketplace of ideas,” in which ideas compete in the public sphere until truth emerges. Second, “intelligent self-government” requires free speech because citizens need to understand and debate matters of public concern. Third, people can only experience true autonomy and self-fulfilment if they are allowed to express themselves; thus free expression represents an end in itself. Freedom of speech can also be considered a fundamental right, which in turn helps protect other rights. If people can speak freely, they can assert their rights openly and protest any infringements. Executive Director of the organization known as ARTICLE 19, Andrew Puddephatt, compares freedom of expression to the canary in a coal mine. Like the collapse of the canary, which warned miners of poison gas, suppression of expression indicates that other violations will soon occur. The pendulum between reputation and expression has swung

back and forth throughout history, but the past fifteen years have produced an international trend toward liberalizing defamation law.<sup>1</sup>"

There is another issue about which we wish to make an observation at the outset of this Report. Many persons assume that Freedom of Expression and the law relating to defamation is primarily concerned with the media. It needs to be emphatically stated that the rights and obligations with which we are concerned apply with equal force to discussion at citizen's associations and in community groups where people meet to have dialogue. It applies to countless situations that range from discussions on call-in radio programmes, to statements made in relation to the affairs of sports associations and letters to the press.

### **Good Governance, Accountability and Transparency**

The United Nations Commission on Human Rights has grappled with the concept of good governance in its quest to further international commitment to protecting individual human rights;

"Governance is the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights. Good governance accomplishes this in a manner essentially free of abuse and corruption, and with due regard for the rule of law. The true test of "good" governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights." Resolution 2000/64 of the UN Commission on Human Rights titled The Role of Good Governance in the promotion of Human Rights states:

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<sup>1</sup> Defamation Law: Positive Jurisprudence by Bonnie Docherty; Harvard Human Rights Journal, Volume 13 Spring 2000 page 267

"...that good governance practices necessarily vary according to the particular circumstances and needs of different societies, and that the responsibility for determining and implementing such practices, based on transparency and accountability, and for creating and maintaining an enabling environment conducive to the enjoyment of all human rights at the national level, rests with the State...

... Good governance has 8 major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society.<sup>2</sup>

Transparency and accountability are important pillars in democratic societies. This committee accepts that -

"Transparency and accountability are critical for the efficient functioning of a modern economy and for fostering social well-being. In most societies, many powers are delegated to public authorities. Some assurance must then be provided to the delegators—that is, society at large—that this transfer of power is not only effective, but also not abused. Transparency ensures that information is available that can be used to measure the authorities' performance and to guard against any possible misuse of powers. In that sense, transparency serves to achieve accountability, which means that authorities can be held responsible for their actions. Without transparency and accountability, trust will be lacking between a government and those

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<sup>2</sup> <http://www.unescap.org/huset/gg/governance.htm>

whom it governs. The result would be social instability and an environment that is less than conducive to economic growth.”<sup>3</sup>

Each citizen of Jamaica has a role to play in promoting good governance. Each citizen has a duty to resist and expose corruption. The duties to promote good governance and resist corruption were clearly expressed in the opinion of Justice Brandeis of the United States Supreme Court when he said that a fundamental principle of government is that the greatest menace to freedom is an inert people and that public discussion is a political duty.<sup>4</sup>

The Committee’s work was based on the assumption that while due regard must be had to a person’s reputation -

- a) Integrity in the conduct of all public offices, duties and service is fundamental to the strengthening and maintenance of democratic government.
- b) Transparent, responsible, accountable and participatory government, responsive to the needs and aspirations of the people, is the foundation on which good governance rests, and that such a foundation is a *sine qua non* for the promotion of human rights.
- c) A free and independent media is essential for making citizens aware of corruption. The media, by investigating and reporting on corruption, provides an important tool in the fight against the abuse of public power and, shedding light on the wrongdoings of public officials.
- d) The population depends on the print and electronic media to be kept abreast of how public officials conduct public affairs and use financial and other resources over which they have power and influence.

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<sup>3</sup> Address by Agustín Carstens Deputy Managing Director of the International Monetary Fund At the Regional Workshop on Transparency and Accountability in Resource Management in CEMAC Countries; Malabo, Equatorial Guinea January 27, 2005

<sup>4</sup> Whitney v California 274 U.S. 357

- e) It is when people are armed with information about the conduct of public affairs that they are most enabled to effectively influence the decision that the public officials make on their behalf.
- f) Integrity and accountability in the public life of the Nation requires that we promote and protect a culture of openness in all public affairs.
- g) The laws of Jamaica must be modernised to support the principles of integrity and accountability.

### **Freedom of Expression is a Constitutional and International Human Right**

In discharging its mandate the Committee took the provisions of the Jamaica Constitution as the background against which it conducted its work. Freedom of Expression is a guaranteed fundamental human right and freedom under the provisions of Section 13(b) of the Constitution. Respect for private and family life is protected under section 13(c).

Section 22(1), which is one of the provisions of Chapter III enacted to protect the fundamental rights and freedoms, amplifies a person's freedom of expression so as to include "the freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication". Section 22(2) makes it clear that no law which makes provision which is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons shall contravene the right of the individual to freedom of expression.

Although the Constitution does not expressly recognise Freedom of the Press, it is accepted that the individual right to Freedom of Expression is the constitutional right from which the freedom of the press is derived. The press has no greater right than the individual. When the press asserts its right to



protection under the Constitution it invokes an individual fundamental human right. In the context of a constitutional democratic community, Press Freedom is central and critical to the exercise and enjoyment of the right of freedom of expression, which is itself so essential to good governance, transparency and accountability. When the press asserts its right to protection it invokes an individual fundamental human right which is exercised in the public sphere, in furtherance of the interest of the individual as well as those of the community.

International Law has also recognised Freedom of Expression as a Fundamental Human Right. Article 19 of the Universal Declaration of Human Rights protects freedom of expression by stating that: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 12 of the Declaration provides that "No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."

A restriction on freedom of expression including one for the protection of the reputations of others cannot be justified unless it can be established compellingly that it is necessary in a democratic society. Defamation laws cannot be justified unless their genuine purpose and demonstrable effect is to protect the reputations of individuals against injury. They cannot be justified if their purpose or effect is to protect individuals against harm to a reputation which they do not have or do not merit, or if their purpose or effect is to prevent legitimate criticism of officials or the exposure of official wrongdoing or corruption.

In a democratic society the people are the governors. In the process of carrying out their role as governors it is important for the people to have access to information so that they can make informed decisions. The media plays an

important role as a conduit to inform the citizens of governmental activities and misconduct and to facilitate the decision-making process. Where the media is silenced because of the fear of libel actions, it leads to a chilling effect and an ineffective democracy. Because of this, speech involving public issues requires greater protection.

Free speech promotes the free flow of ideas essential to political democracy and democratic institutions and limits the ability of the state to subvert other rights and freedoms. It promotes the search for truth and is intrinsically valuable as part of good government.

Developments in the law of defamation in the Supreme Courts of the United States of America<sup>5</sup> and India<sup>6</sup> have imposed special rules with regard to the burden of proof which must be discharged by a public official who seeks damages for a statement related to the discharge of his public duties. In the case of the United States these rules have been founded on the scope of the First Amendment to its Constitution that prohibits the making of laws that restrict freedom of expression:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”.

### **Summary of the current state of Jamaican Law of Defamation**

Slander and libel are different types of defamation. Slander is spoken defamation; libel is defamation in permanent form. Defamation is a statement

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<sup>5</sup> New York Times Co. v. Sullivan, 376 U.S. 254 (1964),

<sup>6</sup> Rajagopal v State of Tamil Nadu (1994) (SC2) GJX 0941 SC

made by one individual to another which tends to bring the character or reputation of a third person into disrepute, or to expose that person to personal embarrassment in the minds of ordinary well-thinking members of society. If the statement tends to injure the reputation of the person it is presumed to be false. The maker and publisher of the statement can overcome the presumption of falsity by proving that the material parts of the challenged statement are accurate.

The main structure of the Common Law of defamation originated and developed out of the social and political history of England. Defamation was originally a criminal offence and cases of political libel were tried in the Star Chamber until it was abolished in 1641. Interestingly, criminal libel is still very much a part of the Jamaican landscape in this modern day and age. English defamation laws were originally designed to protect the nobility from criticism and to place limits on political debate. They were not enacted to promote good governance, transparency and accountability. They were designed to protect individual reputations. The English Common Law of defamation was applied in Jamaica from shortly after it became a British colony in 1655. The Libel and Slander Act, originally enacted in 1851, and the Defamation Act enacted in 1961, with their subsequent amendments, still constitute the statutory foundation of Jamaica's defamation law. Over the years Jamaican courts have adopted several innovations that have alleviated the strictures of the common law. It is therefore appropriate that a review of the law should be undertaken at this time. This review must be placed in the context that the supreme law of Jamaica is the Jamaican Constitution.

One of the issues that is frequently raised by advocates for defamation law reform is the chilling effect that existing defamation laws are said to have. It is a term that describes a situation where speech or conduct is suppressed or limited for fear of the consequences that may follow on the publication of a particular

matter. It refers to the self-censorship that journalists and news media impose, where they have information that ought to be published but where they are inhibited for fear of the threat of costly and lengthy lawsuits.

To be actionable, the publication must be defamatory. That is, it must involve an imputation against the reputation of another person. Any imputation which may tend to "lower the plaintiff in the estimation of right-thinking members of society generally" or "to expose him to hatred, contempt or ridicule or to injure his reputation in his office, trade or profession or his financial credit" is defamatory of a person. In order to establish the existence of defamation, it is not necessary to prove that the allegation is believed by the person to whom it is published. Proof of disbelief may go to reduce damages. The law presumes that all defamatory statements are false. The person defamed does not have to prove that what was said about him was false. The person who published the defamatory statement may prove that the statement was true. Defamatory material is not presumed to be malicious. Further, it does not matter if the defamation was intentional or the result of negligence. "Whatever a man publishes he publishes at his peril." However defamation must be a direct attack on an actual reputation, not an alleged reputation that a "victim" believes he deserves.

Once the claim has been made out by the plaintiff the defendant may attempt to rely on the defence of justification (truth), fair comment or privilege.

It is a defence to establish that the publication constituted comment on a matter of public interest, and was not an assertion of fact. That is, it was comment on a matter already in the public domain. The comment/criticisms must be made in good faith without malice.

There are two types of privilege, absolute privilege and qualified privilege. They are designed to protect certain types of statements in the public interest. Absolute privilege offers a complete defence for people "with a public duty to speak out". For example, Members of the House of Representatives and Members of the Senate may speak freely in Parliament. Judges, attorneys-at-law and witnesses cannot be sued for what they say in court and officials are not liable for certain reports about matters of state.

Qualified privilege has been developed by judge-made law. Qualified Privilege applies on an occasion where there is a mutual interest, that is, the publisher and the recipient share a special relationship which creates a duty/interest situation. This is also applicable where it is in the public interest and depends on there being a recognised social or moral duty to impart the information to a person who has a recognised social or moral interest in receiving the information. For example, a report made by the supervisor of work crew, to the manager of the operation, regarding the honesty of a worker in the work crew will be covered by qualified privilege even if it has a defamatory meaning about the worker. This is because the supervisor is under a duty to report dishonesty and the manager has an interest in receiving reports on the honesty of the workforce. The defence of qualified privilege will not succeed if it is proved that the publisher was motivated by malice. Malice, in law, includes publication that is motivated by spite or improper motive, and publication without proper regard as to whether the matter published is false, or not caring whether it is true or false.

Qualified privilege also protects statements made in the public interest<sup>7</sup> provided the publisher has practiced "responsible journalism". The following principles of responsible journalism were established in the case of *Reynolds v Times Newspapers* and have been applied in Jamaica:

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<sup>7</sup> Three Jamaican cases where this happened are *Abrahams v Gleaner Company*, *Bonnick v Morris* and *Harper v Seaga*. All of them were decided on the basis of the Common Law as laid down in the English case of *Reynolds v Times Newspapers Ltd.* [1997] 4 All. ER 609.

- (a) The common law does not recognize or develop a category of "political information" the publication of which attracted qualified privilege.
- (b) The established approach to qualified privilege has been adapted to "enable the court to give appropriate weight in today's conditions to the importance of freedom of expression by the media on all matters of public concern and to confine interference with freedom of speech to what was necessary in the circumstances of the case."
- (c) In considering whether allegations made in the press attracted qualified privilege courts of law will pay attention to the circumstances of each case and take account of ten issues, namely:
  - (1) the seriousness of the allegation,
  - (2) the nature of the information,
  - (3) the extent to which the matter was of public concern,
  - (4) the source of the information,
  - (5) the urgency of the matter,
  - (6) whether comment had been sought from the Plaintiff,
  - (7) whether the publication contained the Plaintiff's side of the story,
  - (8) the tone of the publication,
  - (9) the circumstance of the publication and
  - (10) the timing of the publication.

The court should have regard to the importance of freedom of expression and should be slow to conclude that a publication was not in the public interest especially where the information was already in the field of public discussion.

In a recent Jamaican case<sup>8</sup> the Privy Council for the first time applied the principles of the Reynolds case to (a) an action of slander and (b) to a case where there was no complaint that the defamatory statement was made by a

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<sup>8</sup> Harper v Seaga

journalist. The Privy Council extended the application of the rules of responsible journalism, stating that the Reynolds principles were a liberalisation of the traditional rules. The Court agreed with the trial judge that the published information was no more than rumour, there was no verification of whether the sources were reliable, and consequently there was a failure to take requisite care to check the reliability of the disseminated information.

### **Limitation Periods for Defamation Actions**

The limitation period for defamation actions in Jamaica was derived from the 1623 Limitation Act of England. It is six years from the time that the libel was published or the slander was spoken, except where the slander is actionable without proof of special damages. In that case, the limitation period is two years from the time the words were spoken. In 1985, the limitation period for defamation under English Law was changed to three years. In 1996, that period was further reduced to one year. Australian jurisdictions also adopted a one year period when they adopted uniform new defamation laws for all states and territories. New Zealand and Canada adopted two year periods of limitation. Barbados established a two year period in 1996. These countries have modernised their limitation periods by establishing a fair balance between the interests of plaintiffs, who need sufficient time to prepare their cases and the interests of defendants, who ought not to have the threat of proceedings pending for an inordinate period. In this information age, when arriving at limitation periods, a balance must be maintained between the interests of free speech and the protection of reputation. Provisions are often made that permit the courts to extend the limitation period in special circumstances.

The Committee thinks that in Jamaica there should be a reduction of the six year limitation period since persons who bring defamation actions from a genuine wish to vindicate their reputations should be encouraged to do so at the earliest

opportunity. With the passage of time, memories fade and records may be destroyed. The Committee also feels that the shortening of the period is supportive of freedom of expression and legitimate debate. There are no statistics as to the usual period between the accrual of defamation claims and the dates on which actions are filed in Jamaica but the Committee noted that the claims by Anthony Abrahams and Hugh Bonnick against the Gleaner Company were brought within days of the publications complained of.

### **Damages**

Frequent references were made during the deliberations of the Committee and the public consultations to the basis on which juries and judges award damages to compensate persons who have been defamed. There were concerns that awards for damages for defamation bear no equipoise to those awarded for personal injury and death. There were several comparisons between the award to the estate of Agana Barrett for his loss of life and those made to public persons who were defamed.

The Committee refrained from thoroughly exploring this area because the principles on which damages are awarded for civil wrongs is part of a complex technical legal matrix which are beyond our mandate and the composition and support resources under which we functioned.

### **Public Officials Defamation Claims in Jamaica and other Jurisdictions**

In Jamaica, 'public officials-plaintiffs' enjoy the same level of protection as do ordinary citizens, as far as the laws of defamation are concerned. The level of protection afforded the ordinary citizen in Jamaica, is largely informed by the common law of England which is in a constant state of evolution. Should this



continue to be the case when Jamaica has a Constitution which guarantees freedom of expression and arguably, by extension, freedom of the press?

England does not have a constitution that guarantees the Right to Freedom of Expression. However, the European Convention of Human Rights is now a part of the English legal system. The House of Lords, their highest court, has refused to develop the category of speech relating to political matters. They have also refused to impose a greater burden on plaintiffs who sue for alleged defamatory statements related to the conduct of their public duties.

This sharply contrasts with the approach of the United States Supreme Court in *New York Times v Sullivan* 376 U.S. 254 (1964), a case that arose out of the struggle for civil rights in Alabama in the 1960s. The Supreme Court held that libel proceedings were subject to the First Amendment whenever they involved public officials. Justice Brennan spelled out the changes that were required in the common law of libel.

“The first and principal result of the Sullivan decision was to shift the burden of proof in libel cases. A second was to introduce an element of what lawyers call “fault”...Now the plaintiff had to show that the defendant had published a falsehood with a high degree of fault; namely knowingly and recklessly. It necessarily followed that the plaintiff first had to show that there was something false in the publication, so the burden shifted to him...Another significant result of the Sullivan decision was to make it clear that the First Amendment protects statements of fact as well as doctrines or political opinions...”<sup>9</sup>

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<sup>9</sup> *Make No Law: the Sullivan Case and the First Amendment*  
by Anthony Lewis; Chapter 15 What it meant pages 156 to 157.

It established that, to win a libel case, the burden is on the public official or public figure to prove that the statement was published by the defendant with knowledge of its falsity or with reckless disregard for the truth and that he suffered damage from the publication.

Justice Brennan's often quoted reason for the decision the Court reached was:

"We consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials"<sup>10</sup>

India<sup>11</sup> is the only Commonwealth country to have followed the Sullivan jurisprudence<sup>12</sup>. The Indian Supreme Court based its reasoning on constitutional principles. In a case where a newspaper editor and printer sought to prevent officials of State from restraining the publication of the biography of a convicted murderer which may have implicated them, several constitutional provisions were considered. The Indian Supreme Court, after citing Sullivan, ruled that though public officials have a right to privacy –

"...the remedy of action for damages is simply not available in respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made by the defendant...with reckless disregard for the truth....in such a case it would be enough for the defendant to

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<sup>10</sup> 376 US 254, 270 (1964)

<sup>11</sup> Rajagopal v State of Tamil Nadu (1994) 6 S.C.C. 632, 650

<sup>12</sup> Pakistan and Argentina which are not bound by common law principles also adopted Sullivan jurisprudence

prove that he acted after reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages.”

The Court held that a public official has no remedy in damages for defamation in matters relating to his official duties unless he proves the publication was made with reckless disregard of the truth or out of personal animosity. Where malice is alleged it is sufficient for the defendant to prove he acted after a reasonable verification of the facts.

In the case of *Reynolds v Times Newspapers* the House of Lords declined to follow *New York Times v Sullivan*. In the leading judgment, Lord Nicholls referred to the rejection of the Sullivan defence by the Supreme Court Procedure Committee, chaired by Neill L.J. in 1991 and the subsequent enactment of the Defamation Act of 1996. The House of Lords decided to develop the law by expanding the principles of qualified privilege.

In *Hill v. Church of Scientology of Toronto*<sup>13</sup> the Canadian Supreme Court gave full reasons for its refusal to follow *Sullivan*. The main judgment of Justice Cory referred to criticisms of *Sullivan* by Chief Justice Burger and Justice White of the United States Supreme Court in the case of *Dun & Bradstreet, Inc v Greenmoss Builders* to the effect that;

“...when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality. The public is left to

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<sup>13</sup> [1995] 2 S.C.R. 1130

conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amendment interests... and the rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty."

Justice Cory held that freedom of speech, like the other fundamental freedoms, is freedom under the law, and that over the years the law has maintained a balance between, on the one hand, the right of the individual . . . whether he is in public life or not, to his unsullied reputation if he deserves it, and on the other hand . . . the right of the public . . . to express their views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people.

In Australia, the High Court rejected the Sullivan approach on the basis that Australia's constitutional architecture differs from that of the United States of America. It ruled<sup>14</sup> that qualified privilege exists for the dissemination of information, opinions and arguments concerning government and political matters affecting the people of Australia, subject to the publisher proving reasonableness of conduct. The Court regarded its decision as an extension of the categories of qualified privilege, and considered that the reasonableness requirement was appropriate having regard to the greater damage done by mass dissemination compared with the limited publication normally involved on

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<sup>14</sup> Lange v. Australian Broadcasting Corporation (1997) 189 C.L.R. 520,

occasions of common law qualified privilege. As a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation would not be reasonable unless the defendant had reasonable grounds for believing the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Further, the defendant's conduct would not be reasonable unless the defendant sought a response from the person defamed and published the response, except where this was not practicable or was unnecessary.

The South African Constitutional Court, in a case which raised the question of whether the common law of defamation as developed by the courts was inconsistent with the Constitution, declined to follow the Sullivan principle and ruled that the Common Law was not inconsistent with the Constitution.<sup>15</sup> This was a case in which a politician sued a newspaper for stating among other things, that the politician was involved in a gang of bank robbers. The defendants asserted that the statements were matters of public interest and that the politician failed to allege that the statement was false. They also pleaded section 16 of the Constitution which protected freedom of speech and that it is inconsistent with section 16 of the Constitution to permit a plaintiff to recover damages for the publication of a statement relating to matters of public interest, alternatively to matters of political importance, alternatively the fitness of a politician for public office, in circumstances where that plaintiff does not allege and prove the falsity of the statement in question. The Court did not accept these submissions and held that the Common Law was not inconsistent with the provisions of the Constitution.

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<sup>15</sup> Fred Khumalo and others v Bantubonke Harrington Holomisa

## **Reforming Defamation Law by Legislative Innovations**

Several common law jurisdictions have made amendments to their defamation statutes that Jamaica could consider adopting. The committee examined the new Defamation Acts in Australia and Barbados and the proposed changes that are in a Bill now before the Irish parliament. The common feature of these countries is the abolition of the distinction between libel and slander and the establishment of a single tort of publication of a defamatory statement. Barbados and Australia introduced the new defence of triviality. It applies where the defendant proves that in the circumstances of the publication the plaintiff is not likely to suffer harm to his reputation. Barbados and Australia also provide for defences of contextual truth which applies where there is more than one defamatory imputation and the defendant proves that one or more of them is substantially true and those not proven to be true do not further harm the reputation of the plaintiff because of the substantial truth of the imputations. In the Australia and Irish legislation the publication of an apology does not imply admission of liability and evidence of an apology is not admissible in proof of liability in a defamation action.

In Australia, a number of new defences were created. It is a defence if the defendant proves that the matter about which the plaintiff sues (a) was contained in a public document or a fair copy of a public document or (b) is a fair summary or extract of a public document. A new defence of innocent dissemination is provided for secondary publishers, such as booksellers, librarians, broadcasters of live programmes and operators and providers of communications systems. Those secondary publishers escape liability if they prove that they did not know or could not reasonably have known that the matter complained of was defamatory and that their lack of knowledge was not due to negligence. The role of the jury is to find whether the defamatory matter was published by the defendant and whether any defence has been proven, and

the judge assesses the amount of compensation that will be awarded. In assessing the amount of compensation to be awarded, the judge must ensure that there is an appropriate and rational relationship to the harm sustained by the plaintiff.

Two important innovations relate to the award of damages. Firstly, there is a limitation of AUS\$250,000.00, (with a statutory formula to take account of inflation) on the maximum amount that can be awarded for non-economic loss. Secondly, awards of punitive or exemplary damages have been abolished for defamation.

The modernisations in Barbados include a provision that introduced a defence of comment to replace the Common Law defence of fair comment. The defence is not limited or affected by the fact that dishonourable or corrupt motives have been attributed to the plaintiff.

The Irish Bill contains several innovations that are unique. There is a new proposal that both the plaintiff and the defendant will be required to submit a sworn affidavit verifying the allegations contained in their claim and defence respectively. Both plaintiff and defendant will have to make themselves available for cross-examination on these affidavits. It will be a criminal offence for a plaintiff or defendant to make a statement in such an affidavit that is false in a material way or which he knows to be false or misleading.

The Bill also makes provision for new remedies which a court may grant instead of, or in addition to, damages. These remedies will, in the normal course, depend on a request by the plaintiff. The new remedies include a declaratory order, for which a plaintiff may apply, instead of damages, and a correction order. The declaratory order is intended to offer a speedy means of redress where the only issue is the wish of a plaintiff to have an acknowledgement that the matter in

question was defamatory of him or her. The correction order may direct the terms of any correction which a court orders to be made in favour of a plaintiff.

The defence of fair and reasonable publication on a matter of public importance is created. It is designed to facilitate public discussion where there is both a benefit and an interest in such discussion taking place. The availability of the defence for publishers of relevant periodicals is subject to conditions, notably membership of the recognised Press Council and adherence to its decisions and Code of Standards.

### **Criminal Libel**

Criminal Libel is still an offence at Common Law in Jamaica. Marcus Garvey and Leonard Howell were imprisoned for Criminal Libel. It is remarkable that under section 7 of the Libel and Slander Act 1851 the truth of the matters published shall not amount to a defence unless it was for the public benefit that the matters should be published. This offence originated in medieval times when defamation law was used to restrict freedom of expression and long before our contemporary commitment to the protection of human rights developed. The abolition of criminal libel is included in our recommendations.

### **Self Regulation of the Media**

During the course of its work the Committee commissioned a paper on media ethics. It considers that the State should not be involved in regulation of the media as this would be contrary to the constitutional principles of freedom of expression. The press and journalists in several Common Law countries have established their own organisations for monitoring press freedom and enforcing appropriate ethical standards for the practice of journalism.



The paper commissioned by the Committee stated that the Press Association of Jamaica developed a code of ethics for journalists in 1965. What was missing was any form of sanction or any mechanism to provide redress to the members of the public who were wronged by the media other than by the traditional methods. It also stated that while most of the major media houses have developed in-house codes of conduct, they suffer from the following weaknesses:

1. There is no uniformity intra industry.
2. The public is largely unaware of the code and its provisions.
3. In the instances where a code is published no sanctions are stated.
4. There is no stated procedure to deal with complaints.

The paper included a draft Code of Practice for Jamaican Journalists and Media Organisations. Its thinking was that the entire spectrum of print, television, radio, and other electronic media should come together to establish (a) a common set of standards and (b) an organisation to promote freedom of the press and appropriate standards of professionalism.

The members of this Committee strongly urge the media fraternity to undertake this suggestion as a matter of urgency, and note (a) the strong support of the media representatives for the establishment of the former and (b) their reservation, as it pertains to the establishment of the latter, absent material modernisation of the current libel laws. The merits stand on their own and though they would be an appropriate companion for any legislative changes in defamation laws, they should not be dependent on the timing and the extent of these changes.

## **Modernising Jamaica's Defamation Laws**

There is general agreement that reforms should be made to the defamation laws to bring them into line with many of the improvements in other Common Law jurisdictions. Most of the areas in which there is disagreement relate to public person defamation standards. The areas of agreement for the amendment of the law are that:

1. The distinction between slander and libel be abolished and that a single civil action of defamatory publication that requires no proof of special damages be established.
2. The limitation period for an action of defamation be reduced to one year from the publication of the defamatory statement but with provisions fixing an appropriate formula for the extension of that period by the Court where the interests of justice so require.
3. The defence known as justification be replaced by the defence of truth. Where an action for defamation is brought in respect of the whole or any matter published, the defendant may allege and prove the truth of any of the charges contained in that publication, and the defence of truth will not fail by reason only that the truth of every charge is not proved if the matter, taken as a whole or that the publication does not materially injure the plaintiff's reputation having regard to any such charges which are proved to be true in whole or in part.
4. A defence of triviality in circumstances where the publication of the matter complained of was such that the person defamed is not likely to suffer harm to his reputation be introduced.
5. A defence of an offer of amends similar to that in the Barbados Defamation Act be introduced. An offer of amends will allow a person who has published a statement alleged to be defamatory of another and who claims that he did not do so intentionally to make an offer of amends. The offer will be for the publication of a suitable correction of

the statement complained of and for a sufficient apology to the aggrieved person. There should also be provisions that where copies of the statement have been distributed by or with the knowledge of the person making the offer that he take such steps as are reasonably practicable to notifying persons to whom copies have been distributed. The offer will not be available to a person after a defence has been served. An offer of amends will be capable of being withdrawn at any time before it is accepted.

6. A publication of an apology will not be construed as an admission of liability and will not be relevant to the determination of fault. It will be relevant to the assessment of damages and may be relevant to the defence of an offer of amends.
7. A defence of innocent dissemination similar to that contained in the harmonised defamation statutes of Australia be established. (see Appendix I)
8. A new remedy of a declaratory order be established, for which a plaintiff may apply, instead of damages, as a means of redress where the only issue is the wish of a plaintiff to have an acknowledgement that the matter in question was defamatory and false as it referred to him or her.
9. A correction order to enable a court to order the publication of a correction as an additional remedy to declaratory judgments and to allow the courts to direct the terms of any correction that may be made in favour of a plaintiff be established.
10. Provisions be introduced that the role of the jury is to find whether the defamatory matter was published by the defendant and whether any defence has been proven and that that of the judge be to assess the amount of compensation that will be awarded. The Committee notes that the removal of trial by jury in defamation cases was proposed by the representatives of the Press Association and the Media Association.

11. Provisions for the assessment of General Damages be introduced that will require the judge to have regard to all the circumstances of the case, including: (a) the means of publication and the gravity of the allegations in the defamatory statement, (b) the extent to which the defamatory statement was circulated, (c) the offer, timing or making of any apology, correction or retraction by the defendant to the plaintiff, (d) if an offer to make and/or apology was made, the period of time after publication in which this was done (e) the importance of the plaintiff's reputation in the eyes of particular or all recipients of the defamatory statement, and (f) evidence given concerning the reputation of the plaintiff.
12. The various media by which statements could be published, which would include wired and wireless means as well as new media e.g. streaming webcasts and podcasts be recognised.
13. The common law offences of criminal libel including blasphemous, obscene and seditious libel be abolished.

In relation to the proposed Defence of Innocent Defamation, the media fraternity disagrees with the inclusion of paragraphs 1(b) and 1(c) of Appendix 1. They contend that the conditions expose them to liability that is onerous and unreasonable.

The Committee considered a proposal that there should be a limit to the amount that may be awarded non-economic damages in defamation actions. The media members of the Committee urged the following points:

- 1) There has been an increase in media houses in recent times;
- 2) New and emerging media are very susceptible to even relatively modest awards of damages;

- 3) Jamaican insurance companies are no longer interested in providing coverage for defamation liability for media. Where they are, the cost is prohibitive.
- 4) Some media houses have been obliged to purchase insurance coverage overseas. When this occurs, the policies carry high co-insurance rates and high excess provisions.

The Committee accepts that the desirability of maintaining a free press in Jamaica must be balanced against the impact that costly awards can have on our media, given the inevitability that mistakes will be made in journalism. The committee is unable to agree on a recommendation for capping awards for non-economic damage.

The areas on which there was no agreement are:

- (1) The appropriate standards for public officials and whether a higher standard of proof should be required of them.
- (2) Simplification of the various heads of damage recoverable in defamation cases.

### **Division of opinion on Appropriate Standards for Public Officials**

In relation to the appropriate standards where public officials sue in relation to statements regarding the conduct of public affairs, three different approaches were advocated. Each approach is summarized in the language of its proponents.

#### **First Approach: Follow the Sullivan Principles**

The first approach was that the law should be amended to introduce the Sullivan principles. In Jamaica, there is no distinct standard for public officials as against the ordinary citizen and both are equally held to the standards set out in the

English common law and local defamation laws. It is proposed that the defamation laws of Jamaica be amended to adopt the NY Times v. Sullivan model for all citizens of Jamaica, for the following reasons:

1. The New York Times v. Sullivan model promotes good governance as it encourages, transparency, accountability and diminution of corruption;

In New York Times v. Sullivan the court, implemented an additional safeguard for the constitutional right to freedom of speech as, arguably, any other ruling would have the effect of abrogating this right and muzzling the press<sup>16</sup>. The court recognised "the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

2. It Is Desirable That Public Officials Who Are the Agents of the People Should Be Freely Criticized By The People To Whom They Are Accountable

At the heart of New York Times v. Sullivan decision, is the recognition by the Supreme Court of that jurisdiction, of the desirability of holding public officials accountable to the people who put them in office.

The ruling of Chief Justice Thompson CJ in case of City of Chicago v Tribune Co<sup>17</sup> shows an earlier recognition by the Supreme Court of Illinois of the desirability of creating different standards for public institutions:

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<sup>16</sup> It is the considered view of many legal minds that "freedom of the press" is constitutional by extension, given the entrenchment of the right to "freedom of speech" in many Caribbean constitutions, such as Jamaica. Dame Bernice Lake, for instance, in a speech delivered on the 6<sup>th</sup> of December, 2007, in Jamaica, at a seminar on Press Freedom and Corruption, argued that because Press Freedom springs from the fundamental right to Freedom of Expression Press Freedom has been effectively constitutionalised.

<sup>17</sup> (1923) 139 NE 86

"The fundamental right of freedom of speech is involved in this litigation, and not merely the right of liberty of the press. If this action can be maintained against a newspaper it can be maintained against every private citizen who ventures to criticise the ministers who are temporarily conducting the affairs of his government. .... it is clear that a civil action is as great, if not a greater, restriction than a criminal prosecution..... A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions....It follows, therefore, that every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved, he shall have the right to speak his mind freely."<sup>18</sup>

This view has found resonance in countries, even in conservative ones, such as England<sup>19</sup>. In *Derbyshire Country Council v Times Newspapers Ltd.*,<sup>20</sup> it was held that a local authority was not entitled to sue for libel in respect of words which reflect on it in its governmental and administrative functions. The following quotation from his Lordship, Lord Keith of Kinkel, is irresistible:

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<sup>18</sup> p. 90

<sup>19</sup> The *NY Times v. Sullivan* decision has also been applied in India in the case of *R. Rajagopal Alias R.R. Gopal and Another where B.P. Jeevan Reddy J* was strongly of the view that the remedy of action for damages should not be available for public officials with respect to acts and conduct "relevant to the discharge of their official duties.

<sup>20</sup> The *Derbyshire Council* case did not specifically decide the position in regard to statements made in regard to the individuals who make up the body. However, academics such as Eric Barendt, Professor of Media Law at University College London, have forcefully argued that the language and reasoning of Lord Keith, who delivered the judgment of their Lordships' House, are equally applicable to government trading corporations and to the individuals who make up such bodies.

"It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism."<sup>21</sup>

In the Caribbean case of *Hector v Attorney-General of Antigua and Barbuda* the Judicial Committee of the Privy Council expressed a similar view:

"In a free democratic society, it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind."

3. The constant threats of civil or criminal suits from public officials acts as a sword of Damocles over the heads of the media resulting in a reticence to report on acts of corruption

In *City of Chicago*, CJ Thompson was mindful of the stifling effect that the threat of civil actions could have on criticism of state officials. In *Derbyshire City Council*, Lord Kinkel, after referring to two American decisions, was also mindful of the stifling effect of civil suits, said:

"While these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is

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<sup>21</sup> [1993] AC 534 reported <http://mavrkydefamationcaselaw.blogspot.com> [1993] AC 534,



not available. This may prevent the publication of matters which it is very desirable to make public. ”

4. The constitutional framework does not militate against an amendment of existing laws to adopt the NY Times model.

It is true that the constitutional framework of Jamaica does not support the implementation of NY Times v. Sullivan under the existing legal regime as s. 22 (2) provides that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision, which is reasonably required for the purposes of protecting the reputations, rights and freedoms of other persons.

To apply NY Times v. Sullivan, without a change in the defamation laws would, therefore, be unconstitutional, given the above provisions which adopt the current laws of defamation, and thereby curtails freedom of expression to the extent of same. It should be noted, however, that the operative curtailment extends only to those laws which are “reasonably” required to protect reputation. Even if it is conceded that the extension of Reynolds privilege to public persons is reasonably required to protect reputation, which is not an area beyond dispute, nothing in the Constitution prevents us from changing the laws of Jamaica to accord with the New York Times vs. Sullivan model and to remove any doubt of unconstitutionality.

It should be noted that Jamaica’s constitutional model is more akin to that of the United States than England’s is to the United States. While England does not have a written constitution and no constitutional provision speaking to freedom of expression, Jamaica has a written constitution which expressly speaks to freedom of expression<sup>22</sup>.

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<sup>22</sup> See footnote regarding constitutional entrenchment of freedom of the press.

Finally, the impact of Sullivan should be borne in mind:

"Before this decision there were nearly US\$300 million in libel actions outstanding against news organizations from the Southern states and these had caused many publications to exercise great caution when reporting on civil rights for fear that they may be held accountable for libel. After the New York Times prevailed in this case, news organizations were free to report the widespread disorder and civil rights infringements. The Times maintained that the case against it was brought to intimidate news organizations and prevent them from reporting illegal actions of public employees in the South as they attempted to continue to support segregation."<sup>23</sup>

**Second Approach: Reject the Sullivan Principles  
but change the onus of Proof**

The Sullivan case was decided on the application of the principles of the United States Constitution. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>24</sup> On that foundation the US Supreme Court has ruled that speech concerning public affairs is more than self-expression; it is the essence of self-government.<sup>25</sup> The First Amendment states that:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

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<sup>23</sup> See Wikipedia, "NY Times v. Sullivan"

<sup>24</sup> Roth v. United States, 354 U. S. 476, 484 (1957)

<sup>25</sup> Garrison v. Louisiana, 379 U. S. 64, 74-75 (1964).

There are two reasons why Jamaica should not follow the Sullivan jurisprudence. The first is that it is of recent vintage and still controversial in the United States of America. A number of jurists in the United States have advocated a reconsideration of the *New York Times v. Sullivan* standard. These include one of the justices of the Supreme Court who participated in that decision. In *Dun & Bradstreet, Inc. v Greenmoss Builders*<sup>26</sup> Justice White J. stated, and Chief Justice Berger concurred with him that he had "become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.

The Constitution of Jamaica differs from the Constitution of the United States in several respects and contains no absolute prohibition similar to the First Amendment and no express provision that expressly recognises freedom of the press. There is no provision that enables Jamaica to import the constitutional principle of *Sullivan* into our jurisprudence.

The Jamaican Parliament can, without amending our Constitution, enact new laws that place a different burden on public officials who sue for defamation that relates to the conduct of public affairs. It can justify changes in the Common Law of defamation if it requires special standards of proof and if it considers that the right of the public to know the truth in the conduct of public affairs will be enhanced by new developments in defamation law.

This can be achieved by legislation that will require a public person suing for defamation in respect of a publication relating to the conduct of public affairs to allege that in addition to the publication being defamatory of him or her, it was

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<sup>26</sup> 472 U.S. 749 (1985)

also false. Such an amendment would not undermine the objective of defamation actions protecting reputations and would also support a greater level of transparency in public affairs. It coincides with the views taken by the Law Reform Commission of New South Wales:

“A wholesale importation of the Sullivan principles into the law of New South Wales would hinder effective adjudication of the issue of truth, which the Commission sees as an important yardstick by which to assess any defamation law. The Commission believes that free speech is better served by requiring the plaintiff to prove falsity. This not only addresses the plaintiff’s key complaint that the defendant has published a false and defamatory imputation; but also promotes free speech by eliminating liability entirely for statements which the plaintiff cannot prove to be false.”<sup>27</sup>

### **Third Approach: Leave the Law as it is**

The third position was that there should be no change in the law on the basis that the Reynolds Case, as clarified and applied in later cases, is adequate. In light of this development the establishment of a special regime for the purpose of balancing the freedom of expression on public or political issues or in relation to public officials with the protection of the reputation of the individual is not required. As was said in the 2003 Jamaican case of *Bonnick v Morris*, in relation to the public interest defence, (referred to as the Reynolds privilege), and cited in the *Jameel* case, “[s]tated shortly, the Reynolds privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and

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<sup>27</sup> <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R75CHP5>

the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege.”

It is contrary to the basic principle of the common law that an accused person is not required to prove his innocence of the charge. It is for the accuser, in the final analysis, to prove culpability either beyond a reasonable doubt or on a balance of probabilities. This is not just a technical rule to be applied in the courts. It embodies a basic cultural norm of a democratic society. Commonwealth countries whose courts have considered this rule, the United Kingdom, Canada, Australia and New Zealand have rejected its application in their jurisdictions, and only India appears so far to be prepared to accept it within its legal system.

It is contrary to the express provisions of our Constitution. Section 22 which enshrines freedom of expression expressly makes that freedom subject to laws for the protection of “the reputations, rights and freedoms of other persons”. The defamation law which is designed to protect the reputations of all persons in Jamaica is based on the assumption that a defamatory statement is false unless and until the contrary is established. Any legislation, therefore, that seeks to identify a class of persons – such as public officials – whose reputations are not subject to the same assumption as in the case of other members of society, would deprive them of the equal treatment that section 13 of the Constitution guarantees.

As a matter of practical good governance we should seek to encourage persons to enter the public service of their country. A legal provision that brands such persons as untrustworthy until the contrary is proved will have the opposite effect.

## **Acknowledgements**

The Committee wishes to acknowledge the contributions that several persons made to the fulfilment of its assignment. It expresses its gratitude to the members of the public who responded to the invitation to make submissions and to attend the public consultations. In this regard it also wishes to make special mention of the staff of the University of the Northern Caribbean, the Southern Bar Association, the Cornwall Bar Association and the Montego Bay Chamber of Commerce. It acknowledges with gratitude the generous contributions made by newspapers, radio stations and television networks who gave free advertisement space for notices informing the public of the work of the committee and the venues and locations of the public consultations. Several news media promote public interest by hosting interviews and discussion programmes. It wishes to make special reference to the support received from the Jamaica Information Service, and in particular, Mr. Ian Boyne and the staff of the Office of the Prime Minister. It wishes to make special mention of the support received from Mrs. Charmaine Nelson, Miss Mari-Ann Whyte and Mrs. Pauline Barrett.

The Committee is also grateful to those members of the public who made written submissions. They are listed at Appendix II. The Committee's work was greatly assisted by those persons who presented papers on different aspects of defamation law and freedom of expression. The list of written papers considered by the Committee is appended as Appendix III.

## **Closing Comments**

The Committee worked diligently to complete its assignment within the schedule that the Prime Minister established. It achieved this goal by the full participation of its membership who served without research staff. Its work demonstrated the necessity for the establishment of a full-time Law Reform Commission. When

reform of its defamation laws was undertaken in Australia, New South Wales was served by a permanent statutory commission which deliberated for two years. The Law Commission of England periodically reviews different aspects of defamation law including, perceived abuses of defamation procedure, gagging writs, contempt of court<sup>28</sup> and defamation and the Internet<sup>29</sup>. The Government may wish to consider the desirability of establishing a Law Reform Commission as a permanent, independent body to study and make systematic review of Jamaican Laws. Such a Commission would be able to address issues which were raised in the public consultations that are related to freedom of expression and defamation. They include privacy and contempt of court, issues that the Committee could not undertake in the time that was available.

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<sup>28</sup> <http://www.lawcom.gov.uk/docs/defamation.pdf>

<sup>29</sup> <http://www.lawcom.gov.uk/docs/defamation2.pdf>

**Appendix I**  
**Defence of innocent Dissemination**

- (1) It is a defence to the publication of defamatory matter if the defendant proves that:
  - (a) the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor, and
  - (b) the defendant neither knew, nor ought reasonably to have known, that the matter was defamatory, and
  - (c) the defendant's lack of knowledge was not due to any negligence on the part of the defendant.
- (2) For the purposes of subsection (1), a person is a "subordinate distributor" of defamatory matter if the person:
  - (a) was not the first or primary distributor of the matter, and
  - (b) was not the author or originator of the matter, and
  - (c) did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.
- (3) Without limiting subsection (2) (a), a person is not the first or primary distributor of matter merely because the person was involved in the publication of the matter in the capacity of:
  - (a) a bookseller, newsagent or news-vendor, or
  - (b) a librarian, or
  - (c) a wholesaler or retailer of the matter, or
  - (d) a provider of postal or similar services by means of which the matter is published, or
  - (e) a broadcaster of a live programme (whether on television, radio or otherwise) containing the matter in circumstances in which the broadcaster has no effective control over the person who makes the statements that comprise the matter, or



- (f) a provider of services consisting of:
  - (i) the processing, copying, distributing or selling of any electronic medium in or on which the matter is recorded, or
  - (ii) the operation of, or the provision of any equipment, system or service, by means of which the matter is retrieved, copied, distributed or made available in electronic form, or
- (g) an operator of, or a provider of access to, a communications system by means of which the matter is transmitted, or made available, by another person over whom the operator or provider has no effective control, or
- (h) a person who, on the instructions or at the direction of another person, prints or produces, reprints or reproduces or distributes the matter for or on behalf of that other person.

## **Appendix II**

List of persons/organisations who made written submissions

1. Broadcasting Commission of Jamaica
2. Caribbean Institute of Media and Communication (CARIMAC)
3. Norman Manley Law School Students
4. Director of Public Prosecutions
5. Mr. F. C. Hamaty QC
6. Mrs. Sandra Minott- Phillips
7. Mr. Anthony Gifford QC
8. Mr. Hugh Hyman
9. Mr. Claude Robinson
10. Mr. Lucius White
11. Mr. Alexander Reid
12. Mr. Michael H. Lawson

### **Appendix III**

#### **List of Written Papers Considered by the Committee**

1. The Law of Defamation As It Is Now by Hon. David Coore QC and Mr. David Batts
2. Procedural issues in Defamation in Jamaica by Mr. Jermaine Spence
3. Public Person Standards in Defamation in the English-speaking Caribbean and The United States of America by Dr. Roxanne Watson
4. Codes of Conduct and Mechanisms of Media Accountability by Mr. Neville James
5. Legislative Innovations in Defamation Law In Australia and Ireland by Ms. Tamara Dickens
6. Recent Judicial Developments in Defamation Law in England by Ms. Celia Bartley
7. Awards of Damages in Defamation by Ms. Dorcas White
8. Criminal Libel by Mr. Jermaine Spence
9. Arguments Against The "Wire Service Defence" by Walter Scott and David G. Batts
10. Proposals in Respect of the contents of the Report by the Defamation Commission by Hon. David H. Coore, O.J. Q.C.
11. Distinction between Libel and Slander by Hon. Shirley Miller, OJ, QC
12. Arguments for an Innocent Dissemination or Wireless Service Defence by Lester Spaulding
13. In Favour of the Sullivan Standard for Public Officials by Desmond Richards
14. Commentary on the Matter of Edward Seaga v. Leslie Harper, Privy Council Appeal No. 90 of 2006 by Walter Scott and David Batts

## Appendix IV

The Members of the Committee were:

Justice Hugh Small, QC - Chairman  
Hon. Shirley Miller, OJ, QC  
Hon. David Coore, OJ, QC  
Hon. Oliver Clarke, OJ  
Mr. John Vassell, QC  
Mr. Walter Scott  
Mr. David Batts  
Mr. Lester Spaulding  
Mr. Neville James  
Mr. Desmond Richards  
Mr. Jermaine Spence  
Mr. Patrick Bailey<sup>30</sup>

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<sup>30</sup> Mr. Bailey was unable to participate in the proceedings of the committee due to ill-health.