

**REPORT OF
THE JOINT SELECT COMMITTEE
TO CONSIDER AND REPORT ON THE REPORT
ON THE REVIEW OF JAMAICA'S DEFAMATION LAW**

Members of this Honourable House are reminded that on July 1, 2008, the Honourable House of Representatives passed the following resolution:

BE IT RESOLVED that, notwithstanding Standing Orders 76 (1 and 2), this Honourable House of Representatives appoint a Special Select Committee comprising the following Members:

Hon. Dr. Horace Chang

Hon. Clive Mullings

Hon. Laurence Broderick

Mr. Desmond Mair

Mrs. Maxine Henry-Wilson

Mr. Michael Peart

Rev. Ronald Thwaites

to sit jointly with a similar Committee to be appointed by the Senate to consider and report on the Report on the Review of Jamaica's Defamation Law.

BE IT FURTHER RESOLVED that seven (7) Members shall be the quorum of the Committee.

On July 4, 2008, the Senate, on a motion moved by the Attorney General, Minister of Justice and Leader of Government Business, who had obtained suspension of the Standing Orders, passed the following resolution:

BE IT RESOLVED that notwithstanding Standing Orders 73 (2), this Honourable Senate appoint a Special Select Committee comprising of the following Members:

Senator the Hon. Dorothy Lightbourne

Senator the Hon. Arthur Williams

Senator Desmond McKenzie

Senator Arnold J. Nicholson

Senator Keith D. Knight

to sit jointly with a similar committee to be appointed by the House of Representatives to consider and report on the Report on the Review of Jamaica's Defamation Law.

BE IT FURTHER RESOLVED that seven (7) members shall be the quorum of the Committee.

On October 28, 2008, the House moved a further resolution removing **Mrs. Maxine Henry Wilson** from the Committee and substituting therefor **Mr. Phillip Paulwell**.

Members are further reminded that, by virtue of a resolution approved by the House of Representatives on March 31, 2009 and the Senate on 27th March 2009, the composition of the Committee as set out above, was made to continue in force for the 2010/2011 session of Parliament and the Committee empowered to proceed with matters that were before it from the stage reached at prorogation.

Your committee began its meetings on March 19, 2009 and at that meeting the quorum of the Committee was set at four members. Your Committee held seven meetings to deliberate the issue, the last of which took place on December 16, 2010. In deliberating the subject matter, your committee decided on a consultative approach and therefore various groups with interest in communication were invited to make presentations. The following groups appeared before your committee and made presentations:

- Digicel
- Media Association of Jamaica & Press Association of Jamaica.

Your Committee also reviewed the papers that were submitted and reviewed by the Small Committee as it was felt that this would provide background information to the recommendations made in the Report and prevent duplication of efforts.

Your Committee also felt that it would be useful to hear from an expert in the field of defamation laws before making its concluding observations and recommendations to Parliament, and

therefore Mr. Mark Stephens, an attorney-at-law from law firm Finers Stephens Innocent in London was invited to analyze the report of the Small Committee and make a presentation to the Committee.

1.0 INTRODUCTION

The Committee chaired by Justice Hugh Small (retired) (hereinafter referred to as the Small Committee) was established to review the law of defamation and make recommendations for “changes that will ensure transparency and accountability in the context of a new framework of good governance”. Specifically, the terms of reference required the review committee to make recommendations which would support freedom of the Press, provide reasonable protection for damaging publications, prevent suppression of information to which the public was reasonably entitled, impose appropriate burdens of accountability on public officers in public trust, set standards for malicious intent and responsibility for due care prior to publication and evaluate actual damage caused by defamatory publications and suggest appropriate remedies.

The Small Committee focused on various issues in its deliberations such as the interrelation between the Access to Information Act and the Defamation Law and transparency, accountability and good governance. Jamaica’s current Defamation law is concentrated on providing redress for persons who allege that their reputation has been damaged. Modern trends in the law of defamation are that the right to freedom of expression should be considered and defamation laws should be liberalized in line with the new trend.

The Small Committee also examined the matter of constitutional rights in relation to freedom of expression. The report of the review committee noted that freedom of the Press was not recognized in the Constitution but it was accepted that the individual’s right to freedom of expression was the constitutional right from which the freedom of the Press was derived, and that the Press had no greater right than the individual.

Issues such as the defence of qualified/absolute privilege, the limitation period for defamation actions, whether consideration should be given to placing a greater burden on public officials as plaintiffs, self regulation of the media and caps on damages to be

awarded were also reviewed by the Committee. The Small Committee also considered a reform of Jamaica's defamation law by legislation and looked at the approach of other countries such as Australia, Barbados and Ireland. According to the Small Committee there is general agreement that reforms should be made to the defamation laws to bring them in line with many of the improvements in other Common Law jurisdictions. The report of the review committee listed thirteen (13) areas in respect of which agreement was reached and two (2) areas of disagreement.

2.0 FINDINGS AND RECOMMENDATIONS

Your Committee decided that it would examine each recommendation that was made by the review committee and determine whether they should accept them. Your Committee also considered the suggestions made and points raised by the media groups which made presentations to it. After extensively reviewing the recommendations presented in the Report of the Review of Jamaica's Defamation Law, your Committee is pleased to present its findings and recommendations.

2.1 Findings and Recommendations on the Recommendations Made by the Small Committee

Recommendation 1 –Abolition of the Distinction Between Slander and Libel

The recommendation of the Small Committee was that 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.

This recommendation was supported by the Media Association of Jamaica. **Your Committee accepts this recommendation.**

Recommendation 2 - Limitation Period for Action

The Small Committee recommended that 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.

The current limitation period is six years. Mr. Stephens recommended a reduction of this period to one year from the date of publication of the defamatory material. In his view that would allow sufficient time for the aggrieved party to become aware of the defamation and take action.

Your Committee felt that in our culture a period of two years would be more suitable. Your Committee therefore agreed to recommend a limitation period of two years from the date that the defamatory material was published, with a proviso that any extension should be in circumstances that the Court felt the interests of justice required.

Recommendation 3 Replacement of the Defence of Justification

The Small Committee recommended that 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 claimant's reputation having regard to any such charges which are proved to be true in whole or in part.

The Media Association agreed with this recommendation. Mr. Stephens also indicated that the defence of truth was what was being adopted worldwide. **Your Committee accepts this recommendation.**

Recommendation 4- Defence of Triviality

The Small Committee recommended that 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.

Your Committee did not agree with this recommendation as it was felt that triviality should go to damages, not to whether or not the person had been defamed.

Recommendation 5 –Defence of an Offer of Amends

The recommendation of the Small Committee was that a defence of an offer of amends, similar to that in the Barbados Defamation Act, be introduced. The Small Committee's report states that an offer of amends will allow a person who has published a statement that is 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 provision 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 notify 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 anytime before it is accepted.

Your Committee accepts this recommendation. Compensation to the aggrieved person should also be a plank of the offer of amends.

Recommendation 6 - Publication of an Apology

The Small Committee recommended that publication of an apology should not be construed as an admission of liability and will not be relevant to the determination of fault. It would be relevant to the assessment of damages and may be relevant to the defence of an offer of amends.

The Media Association had raised the issue that if summary trials and summary judgments were allowed, there would be no need for offer of amends, declaratory orders, correction orders or apologies. However your Committee felt that there was no certainty as to how quickly the summary trial might be possible. **Your Committee therefore accepts the recommendation of the Small Committee.**

Recommendation 7- Defence of Innocent Dissemination

The recommendation of the Small Committee was that a defence of innocent dissemination, similar to that contained in the harmonized defamation statutes of Australia, be established.

Members of the Committee felt that in light of modern communication technology the mass media should be protected in the case of reasonable innocent dissemination, but the law should provide that where had been brought to the attention of the publisher that the material was likely to be defamatory then any further publication would not attract the defence of innocent dissemination. The matter of publication on a website was also discussed and it was felt that if it had been brought to the attention of the publisher that the information was defamatory, a statement to that effect should be published. That would absolve the original publisher and warn other persons.

Mr. Stephens in his presentation to the Committee had opined that Internet Service Providers who host websites, and where there was no human intervention, should have a defence of being a mere conduit. The Committee also recognized that some organizations had their own content on the website and in that case they should be responsible for the libel.

Your Committee accepts the recommendation of the Small Committee.

Recommendation 8 - Remedy of Declaratory Order

The Small Committee recommended that 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. **Your Committee accepts this recommendation.**

Recommendation 9 - Remedy of a Correction Order

The Small Committee recommended that, 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 claimant, be established. **Your Committee accepts this recommendation and also recommends that it be linked with the declaratory order.**

Recommendation 10 - Role of Judge and Jury

The Small Committee recommended that provisions be introduced that the role of the jury should be to determine whether the defamatory matter was published by the defendant and whether any defence has been proven, and the role of the Judge should be to assess the amount of compensation that should be awarded.

Your Committee accepts this recommendation.

Recommendation 11- Assessment of General damages

Your Committee was of the view that the principles recommended by the Small Committee for the assessment of damages are already a part of the existing jurisprudence. Therefore your Committee recommends that there should be no change

to the existing law. Further your Committee does not recommend codification as it might restrict the Judge from taking into account other relevant considerations.

Recommendation 12-Recognition of Various Media Formats

The Small Committee recommended that the various media formats 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 recognized.

Your Committee noted that with the multiplicity of media formats some of which might be out of the control of the original publisher, a defence was needed. **Your Committee was of the view that the defence of innocent dissemination as proposed at recommendation 7 should be sufficient to address this issue. Your Committee recommends accordingly.**

Recommendation 13- Common law Offence of Criminal Libel

The Small Committee recommended that the common law offences of criminal libel including blasphemous, obscene and seditious libel be abolished.

Both the Media Association of Jamaica and Mr. Stephens supported this recommendation. Mr. Stephens stated that the international standard was that no one should be locked up for what they say.

Your Committee accepts the recommendation.

Recommendation 14 - Wire Service Defence

The Media Association of Jamaica indicated that the media had to subscribe to wire services and news agencies worldwide which provided content over which they had little

control. They proposed that there should be a defence of innocent dissemination in such defamation cases.

Your Committee agrees with that proposal and recommends that the defence of innocent dissemination as put forward under Recommendation 7 should apply.

Recommendation 15 - Appropriate Standard for Public Officials

The Small Committee was divided on whether there should be a higher standard of proof in cases where public officials sued in relation to statements regarding the conduct of public affairs. In Jamaica the standard for public officials is the same as for other citizens.

The Small Committee had put forward three options. The first was to adopt the Sullivan principle which requires the public official to prove actual malice. The second option was to reject the Sullivan principle but change the burden of proof,- that is, the public official would be required to prove that the publication was not only defamatory but also false. The third option was to make no change to the law, as the defence of reasonable journalism established in the Reynolds case and clarified and applied in later cases is adequate. **Your Committee favoured the third option.**

Recommendation 16 - Cap on damages

The Small Committee considered the issue of whether or not there should be a cap on damages that may be awarded because of the devastating effect that large awards could have on media houses. The Media Association of Jamaica supported the imposition of a cap on damages and further pointed out that the costs associated with defamation actions could lead to bankruptcy of media houses. Mr. Stephens had put forward the view that the cap could be fixed based on the level of damages that would be awarded to a person if he became a paraplegic as a result of injury.

Your Committee took the view that Judges were reasonable people and in any event their decisions were subject to review by a higher Court. In addition, other recommendations which the Committee has made, such as the institution of the declaratory and correctional orders and the offer of amends, would go towards mitigation of damages. **Your Committee therefore recommends that no cap be placed on damages.**

2.2 Findings and Recommendations on Other Issues Raised During the Deliberations

1 Multiplication of Publications

The Media Association had raised the issue that each time the defamatory material was published it was a new cause for action. **Your Committee felt that if the publisher was made aware of the defamation and took appropriate action he would have a defence. However if he continued to publish it after being made aware then he should not have a defence.**

2 Limitation Period for Internet Publications

The Media Association of Jamaica had proposed that the limitation period for libel be extended to internet publications. **Your Committee agreed that the limitation period should be two years from the date of first publication on the particular website and recommends accordingly.**

3. Re-publication by Other Websites

Another issue that was raised by the Media Association of Jamaica was that other websites could publish defamatory material which had been removed from the original website and some protection ought to be afforded to the original website publisher in such circumstances

Your Committee felt that the defence of innocent dissemination should be applied in such circumstances.

4. Special Jury

Consideration was given to the provisions in the Jury Act for the selection of Special Juries in criminal and civil cases. Your Committee felt that such Special Juries could be useful in defamation actions where special expertise might be required.

3.0 THANKS AND COMMENDATION

Your Committee wishes to thank the persons and organizations that participated in the discussions. Special thanks are extended to Mr. Mark Stephens who provided very valuable insights and to the technical team comprising representatives of the Legal Reform Department, Attorney General's Chambers, Office of the Parliamentary Counsel, and the Ministry of Justice. Your Committee also expresses sincere gratitude to the Clerk to the Houses of Parliament and staff for their invaluable assistance.

Houses of Parliament

December 2010.

APPENDIX
ATTENDANCE RECORD

7 Meetings

	Present	Absent	Apology
Sen. Hon Dorothy Lightbourne	7		
Hon. Dr Horace Chang	3	4	1
Sen. Desmond McKenzie	2	5	0
Sen. Hon. Arthur Williams	6	1	1
Sen. A.J. Nicholson	6	1	1
Sen. K.D. Knight	5	2	0
Mr. Clive Mullings	4	3	0
Mr Phillip Paulwell	4	3	2
Hon. Laurence Broderick	3	4	1
Mr Michael Peart	0	7	0
Mr. Desmond Mair	1	6	3
Rev. Ronald Thwaites	7		

SIGNATURES OF MEMBERS

.....
Sen. the Hon. Dorothy Lightbourne

.....
Senator the Hon. Arthur Williams

.....
Sen. Desmond McKenzie

.....
Senator A.J. Nicholson

.....
Sen. Keith D. Knight

.....
Hon. Dr. Horace Chang

.....
Mr. Clive Mullings

.....
Hon. Laurence Broderick

.....
Mr. Desmond Mair

.....
Mr. Phillip Paulwell

.....
Mr. Michael Peart

.....
Rev. Ronald Thwaites

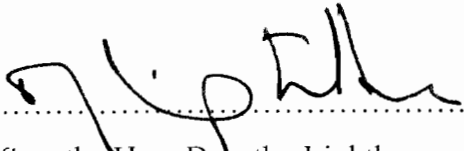
APPENDIX

ATTENDANCE RECORD


7 Meetings

	Present	Absent	Apology
Sen. Hon Dorothy Lightbourne	7		
Hon. Dr Horace Chang	3	4	1
Sen. Desmond McKenzie	2	5	0
Sen. Hon. Arthur Williams	6	1	1
Sen. A.J. Nicholson	6	1	1
Sen. K.D. Knight	5	2	0
Mr. Clive Mullings	4	3	0
Mr Phillip Paulwell	4	3	2
Hon. Laurence Broderick	3	4	1
Mr Michael Peart	0	7	0
Mr. Desmond Mair	1	6	3
Rev. Ronald Thwaites	7		

SIGNATURES OF MEMBERS



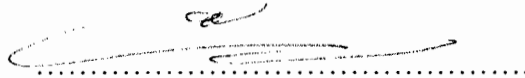
Sen. the Hon. Dorothy Lightbourne



Senator the Hon. Arthur Williams

.....

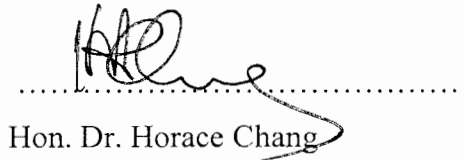
Sen. Desmond McKenzie



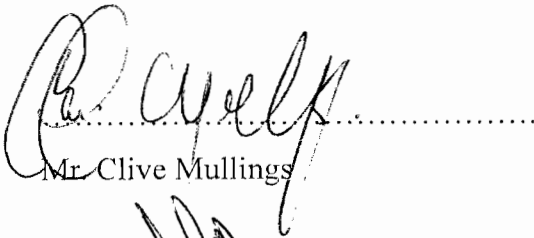
Senator A.J. Nicholson

.....

Sen. Keith D. Knight



Hon. Dr. Horace Chang



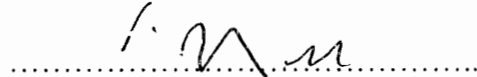
Mr. Clive Mullings

.....

Hon. Laurence Broderick

.....

Mr. Desmond Mair



Mr. Phillip Paulwell

.....

Mr. Michael Peart



Rev. Ronald Thwaites