

# UNIVERSAL PERIODIC REVIEW OF JAMAICA

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## SUBMISSION BY J-FLAG & WE-CHANGE FOR THE UNIVERSAL PERIODIC REVIEW UN HUMAN RIGHTS COUNCIL 42nd SESSION (SEPTEMBER 2019)

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### **INTRODUCTION**

This report is submitted by J-FLAG<sup>1</sup> and Women's Empowerment for Change<sup>2</sup> (WE-Change) and discusses some of the major issues facing LGBT persons in Jamaica. The report is organized in three major sections: legal barriers to equality and non-discrimination, limits in social protection, and ending stigma and discrimination. It concludes with specific recommendations for the Government of Jamaica (GOJ) to protect and guarantee the rights of the LGBT community.

### **INTERNATIONAL & REGIONAL OBLIGATIONS**

Jamaica is party to the following key international and regional human rights conventions:

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Conventions on the Rights of the Child (CRC)
- American Convention on Human Rights (ACHR)
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belem do Pará" (Belem do Para)
- Universal Declaration of Human Rights (UDHR)
- American Declaration on the Rights and Duties of Man (American Declaration)

### **ISSUES**

#### ***Legal Barriers to Equality and Non-Discrimination***

##### ***2015 UPR Process***

1. In their National Report during the 2015 Universal Periodic Review cycle, the Government of Jamaica (GOJ) stated that "there is no legal discrimination against persons on the grounds of their sexual orientation".<sup>3</sup> In its presentation during the review process, GOJ opined that "the Constitution guaranteed basic human rights to all Jamaicans and prohibited discrimination on the basis of sex or gender".<sup>4</sup> The former statement is premised, seemingly, on a limited conception of discrimination as being only direct and explicit and the latter is only technically true; the result being a misrepresentation of Jamaican legal realities.
2. The Human Rights Committee has produced a working definition of discrimination consistent with the definitions to be found in CEDAW and the International Convention for the Elimination of All Forms of Racial Discrimination, which Jamaica has ratified.<sup>5</sup> Discrimination is defined as "any distinction, exclusion, restriction or preference which is based on any ground... and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and

freedoms.” This definition goes beyond direct and explicit forms of discrimination, but include indirect forms through the use of seemingly general and innocuous statutory and constitutional provisions.

### *Problems in the Legal Framework*

3. With this in mind, there are several legislative provisions which impair the ability of LGBT Jamaicans to freely enjoy their rights on an equal footing with cisgender, heterosexual Jamaicans. Section 76 of the Offences Against the Person Act though criminalizing anal intercourse generally, disproportionately criminalizes consensual same-sex intercourse between men”. The punishment for which is a maximum sentence of ten years’ imprisonment.<sup>6</sup> The Act further criminalizes all forms of male same-sex sexual relations.<sup>7</sup>
4. The Human Rights Committee (“HRC”) in *Toonen v. Australia*<sup>8</sup> held that article 26 of the ICCPR, prohibiting discrimination and requiring equal protection against same, include sexual orientation as a protected group.<sup>9</sup> This has been applied in the Supreme Court of Belize and the High Court of Trinidad and Tobago to find that their laws criminalizing consensual same-sex sexual conduct between adults were in breach of the right to equality and therefore unconstitutional.<sup>10</sup> Therefore, in addition to the breach of the right to privacy protected under article 17 of the ICCPR, the sections in the OAPA are a form of legal discrimination.
5. Consequent to the retention of these laws is the definition of sexual intercourse in the 2009 Sexual Offences Act, which is limited to vaginal penetration by a penis.<sup>11</sup> Rape is defined as only occurring when a man has sexual intercourse with a woman without her consent.<sup>12</sup> Sexual intercourse is also a central element of the crimes of incest<sup>13</sup> and sex with minors.<sup>14</sup> All of these definitions exclude forced anal penetration since that may be seen as impliedly amending section 76 which could potentially make the section no longer exempt from a constitutional challenge on the basis of rights infringement.<sup>15</sup> The result of this is uneven protection for different forms of sexual abuse. In particular, where there is intimate partner sexual violence, persons in same-sex relationships have less options for protection. Trans women who may have had gender-affirming surgeries who are vaginally raped cannot be legally considered to have been raped, buggered or grievously sexually assaulted.
6. Beyond sexual offences, there are other laws which are discriminatory in their effect as it relates to LGBT persons in Jamaica. The Property (Rights of Spouses) Act 2004, the Domestic Violence Act 2005 and the Maintenance Act 2005 all exclude same-sex couples from their protection.<sup>16</sup> The DVA in particular recognizes visiting relationships which are unmarried couples who are not cohabiting but can be deemed in a relationship.<sup>17</sup> Because of the exclusively heterosexual definitions, LGBT persons are not protected from domestic violence where the relationship is non-cohabitational, guaranteed property and maintenance rights as safety nets at the end of their relationships. It should be noted that the Human Rights Committee in *Young v Australia*<sup>18</sup> found that denying unmarried same-sex couples benefits given to unmarried heterosexual couples was a violation of article 26. These laws should therefore be similarly construed as legal discrimination by exclusion.

7. Of note, these laws are protected from constitutional challenge by section 18(1) of the Charter of Fundamental Rights and Freedoms. In section 18(2), the recognition of same-sex unions, ostensibly even by Parliament, is prohibited. This is a constitutional exclusion of same-sex couples. This is in addition to the savings law clause in section 13(12) which prevents challenge to sections 76 and 79 of the OAPA, among others.
8. Critically, article 26 of the ICCPR also requires States to protect individuals from discrimination. Sections 13(3)(g) and (h) of the Charter broadly guarantee the rights to equal protection of the law and equitable and humane treatment by a public authority. These ostensibly include the prohibition of sexual orientation and gender identity discrimination. However, discrimination by private actors is dealt with under section 13(3)(i) which has a closed list of protected statuses. Sexual orientation and gender identity are not included in this list. In fact, the language of “discrimination on the basis of sex” was intentionally avoided so as to prevent the reasoning in *Toonen* from applying.<sup>19</sup> Since the last UPR review process, J-FLAG has received three unconfirmed reports of sexual orientation discrimination in the context of employment, which remains permissible under Jamaican law.
9. In recognition of the challenges within Jamaica’s legal system, the Human Rights Committee made several recommendations in their review of the Government’s compliance with the ICCPR.<sup>20</sup> They recommended, *inter alia*, amending laws and enacting comprehensive anti-discrimination legislation to prohibit all forms of discrimination; decriminalizing sexual relations between consenting adults of the same sex and removing saving clauses in the Charter of Fundamental Rights and Freedoms.<sup>21</sup> To date, none of this has been done, however, the Offences Against the Person Act, the Sexual Offences Act and the Domestic Violence Act are still under review.
10. During Jamaica’s last UPR cycle, eleven delegations recommended decriminalization of same-sex relations between consenting adults and the enactment of anti-discrimination provisions, including Brazil, Argentina and Chile.<sup>22</sup> These recommendations did not enjoy the support of the GOJ.<sup>23</sup>

### ***Social Protection***

#### ***2015 UPR Process***

11. During the process, the GOJ supported recommendations related to social protection from six delegations.<sup>24</sup> The GOJ has adopted both the National Policy on Poverty and the National Poverty Reduction Programme since the 2015 UPR Process. The GOJ has not since adopted a revised national policy on housing.

#### ***Social Protection & LGBT Persons***

12. There is no constitutional protection within the Jamaica Charter of the rights to social security, housing or work as guaranteed in articles 6, 9, 10 and 11 of the ICESCR. Social protection is secured through piecemeal legislation, policies and programmes such as the Poor Relief Act 1886 and Government programmes such as the Programme for Advancement through Health and Education (PATH) and other services offered through the Ministry of Labour & Social Security.

13. J-FLAG commissioned a review of the National Policy on Poverty and the National Poverty Reduction Programme which was submitted to the Planning Institute of Jamaica.<sup>25</sup> It was found that the “culture of poverty” approach within the policy was problematic because it maintains bias against the poor and there was a failure to address discriminatory attitudes as a cause of poverty.<sup>26</sup> The latter is particularly important when considering social protection for LGBT persons as it speaks to the institutional framework to address poverty among this vulnerable group.
14. Since the last UPR process, J-FLAG has received nine (9) reports of incidents, whether home invasion or expulsion, that led to a member of the LGBT community being displaced from their homes. The absence of a government-run shelter that caters generally to the homeless population, means that homeless LGBT persons live in state of precarity when they are displaced. The absence of laws and policies which prohibit discrimination in hiring practices within the private sector also adds to this precarity for LGBT persons. The existing support for the LGBT homeless population largely comes from civil society organizations such as the Larry Chang Foundation which operates a temporary housing facility, without significant GOJ financial support.

### ***Ending Stigma & Discrimination***

#### *2015 UPR Process*

15. Unlike the recommendations related to law reform, the Government of Jamaica affirmed its opposition to discrimination and violence, including on the basis of sexual orientation in its country report.<sup>27</sup> The GOJ also supported the recommendations by Canada and the Netherlands, respectively, to take measures to “to investigate and prosecute all incidents and acts of violence targeting individuals based on sexual orientation”<sup>28</sup> and “step up its efforts to protect all citizens from violence and discrimination, including lesbian, gay, bisexual and transgender persons”.<sup>29</sup> The GOJ was of the view that they were already implementing these recommendations or in the process of doing so.<sup>30</sup>
16. The GOJ also accepted several recommendations to establish a national human rights institution in accordance with the Paris Principles,<sup>31</sup> scale up efforts to address gender equality and gender-based violence<sup>32</sup> and address discrimination in the context of HIV/AIDS.<sup>33</sup>

#### *Ongoing Challenges*

17. In the J-FLAG commissioned study, the Developmental Cost of Homophobia: The Case of Jamaica (2016), it was found that of 316 LGBT Jamaicans, 32% reported being threatened with physical violence in the last five years, compared to 12% who reported being attacked. Similarly, 23.7% reported being threatened with sexual violence in the last five years and 19% being sexually assaulted. However, 41% did not report incidents because they did not think the police would do anything and 30% thought the matter was too minor. 1 in 4 feared homophobic reaction from police and 1 in 5 felt too embarrassed and did not want anyone to know.

18. Since the last UPR process, J-FLAG has received a myriad of unconfirmed reports of human rights violations. We have received 49 reports of physical attacks, 28 reports of threats and verbal assault, 8 reports of mob attacks. In addition, notwithstanding, the Jamaica Constabulary Force Policy on Diversity, there have been 6 reports of police harassment and inaction. Of note, only 14 of these cases were reported to the police.
19. Through partnership with GOJ, through the Ministry of Health & Wellness, J-FLAG has been able to provide training to over 1000 healthcare workers on providing non-discriminatory and responsive services to members of the LGBT community over the past three years. In addition, cooperation with the government has further facilitated human rights training for youth and community workers, youth and student leaders and social protection service providers.
20. Notwithstanding their support for the recommendations, a national human rights institution has not been established in Jamaica nor has draft enabling legislation been made public accessible for the commencement of public consultation. Also, the National Policy on Gender Equality has yet to be implemented. Though recommended by the Human Rights Committee, a national public education campaign promoting human rights has not been undertaken.<sup>34</sup>
21. Public healthcare presents several systemic issues that prevent the average Jamaicans from utilising the full extent of the services with socioeconomic barriers, under-resourced facilities and understaffed. Sexual orientation and gender identity amalgamate to make it difficult for LGBT persons to experience health care that is absent from assumptions, misconceptions and discriminatory treatment.

## **RECOMMENDATIONS**

### ***Legal Barriers to Equality and Non-Discrimination***

#### ***Addressing the Legal Framework***

- I. Amend the Offences Against the Person Act to decriminalize same-sex sexual relations between consenting adults.
- II. Amend the Sexual Offences Act to redefine sexual intercourse, rape, grievous sexual assault and sexual intercourse with a person under 16 to be gender neutral and afford equal protection to all persons from different forms of sexual violence.
- III. Review current family law arrangements and reconsider the provisions in light of their exclusion of LGBT persons from their rubric of protection.
- IV. Amend the Charter of Rights to prohibit all forms discrimination, including explicitly on the basis of age, sex, gender, gender identity, sexual orientation, health status, disability and marital status, whether in the public or private sector.
- V. Enact comprehensive anti-discrimination legislation to provide accessible remedies for all forms of discrimination whether in public or private and in particular in the context of education, health, housing, social security, employment or accessing services.

### ***Social Protection***

- VI. Revise the GOJ approach to social protection and poverty to more specifically address the challenges faced by vulnerable groups, including LGBT persons and PLHIV which help to make and keep them poor.
- VII. Consolidate GOJ laws and policies on social protection to ensure greater harmonization and remove duplication and ensure that the services offered are non-discriminatory and responsive to the needs of vulnerable groups, including LGBT persons and persons living with HIV (PLHIV).
- VIII. Revise the existing policy on homelessness and implement a responsive and non-discriminatory GOJ policy on housing and homelessness and mobilize resources to address the needs of the homeless population, including the homeless LGBT population.
- IX. Ensure greater synergies between GOJ and civil society organizations who are in the social protection sector to ensure there is an established referral system that better serves the needs of all Jamaicans.

### ***Ending Stigma & Discrimination***

- X. Implement fully the National Policy on Gender Equality and its corollary, National Strategic Action Plan to Eliminate Gender Based Violence.
- XI. Standardize collaboration with civil society to scale up efforts to reduce stigma and discrimination across all sectors, in particular education, health, labour and social security.
- XII. Introduce and implement monitoring mechanisms to ensure favourable policies, such as the JCF Policy on Diversity, are implemented in actuality and make GOJ services accessible and responsive to the needs of vulnerable groups.
- XIII. Mobilize resources for and lead a national human rights and social justice campaign to promote respect for the rights of all Jamaicans, including LGBT persons, PLHIV and persons living with disabilities, in partnership with civil society, community-based organizations and faith-based organizations.
- XIV. Enact anti-bullying legislation, policies and programmes to adequately address the challenges faced by students, including to prohibit discrimination against and victimization of LGBT youth in schools.

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<sup>1</sup> J-FLAG is a human rights and social justice non-profit NGO established in December 1998 whose mandate is to improve the lives, wellbeing and livelihood of LGBT Jamaicans, done through policy advocacy, capacity building of public servants and community building. J-FLAG also receives reports of human rights violations committed against members of the LGBT community.

<sup>2</sup> Women's Empowerment for Change (WE-Change) is a community-based advocacy organization that was established in 2015 out of a need to strengthen the women's movement in Jamaica and advocate for and with lesbian, bisexual and transgender (LBT) women.

<sup>3</sup> Government of Jamaica, *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21*, 2015, U.N. Doc A/HRC/WG.6/22/JAM/1 [105]

<sup>4</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Jamaica*, 2015, A/HRC/30/15 [35]

<sup>5</sup> Human Rights Committee GC 18, 1989 [7]

<sup>6</sup> Offences Against the Person Act 1864, s. 76

<sup>7</sup> *ibid*, s. 79.

<sup>8</sup> *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

<sup>9</sup> *ibid*

<sup>10</sup> See *Caleb Orozco v Attorney General of Belize and others* (unreported) Supreme Court, Belize claim no. 668 of 2010 (judgment delivered 10 August 2016) and *Jason Jones v Attorney General of Trinidad & Tobago and others* (unreported) High Court, Trinidad & Tobago, claim no. CV2017-00720 (judgment delivered 12 April 2018)

<sup>11</sup> Sexual Offences Act 2009, s. 2

<sup>12</sup> *ibid*, s. 3

<sup>13</sup> *ibid*, s. 7

<sup>14</sup> *ibid*, s. 10

<sup>15</sup> See recent Joint Select Committee, *Report of the Joint Select Committee appointed to complete the Review of the Sexual Offences Act along with the Offences Against the Person Act, Domestic Violence Act and Child Care & Protection Act* (2018) 6, 7 available at

<<https://japarliament.gov.jm/attachments/article/2050/JSC%20Sexual%20Offences%20Report.pdf>>

<sup>16</sup> See definition of spouse in section 2 of each Act.

<sup>17</sup> *ibid*

<sup>18</sup> Communication No. 941/2000, U.N. Doc CCPR/C/78/D/941/2000 (2003)

<sup>19</sup> See Joint Select Committee of Parliament, *Report of Joint Select Committee on its deliberations on the Bill entitled An Act to Amend the Constitution of Jamaica to provide for a Charter of Rights, and for connected matters* (2002) available at: <<https://jis.gov.jm/media/charter-of-rights1.pdf>>

<sup>20</sup> Human Rights Committee, *Concluding observations on the fourth periodic report of Jamaica*, U.N. Doc CCPR/C/JAM/CO/4 (2016)

<sup>21</sup> *ibid* [16]

<sup>22</sup> Human Rights Council (*supra* note 4) [121.27 – .28], [121.30 – .39] and [121.41]

<sup>23</sup> *ibid* [121]

<sup>24</sup> *ibid* [118.18 – .19], [118. 21], [119.51 – .53]

<sup>25</sup> Maziki Thame, *Policy Brief on National Policy on Poverty and National Poverty Reduction Programme* (2017) available at <[http://www.equalityjamaica.org/assets/policy\\_brief\\_national\\_poverty\\_policy\\_jflag.pdf](http://www.equalityjamaica.org/assets/policy_brief_national_poverty_policy_jflag.pdf)>

<sup>26</sup> *ibid* 15, 16

<sup>27</sup> Government of Jamaica (*supra* note 3)

<sup>28</sup> Human Rights Council (*supra* note 4) [119.20]

<sup>29</sup> *ibid* [119.21]

<sup>30</sup> *ibid* [119]

<sup>31</sup> *ibid* [118.2 – .8], [119.7 – .13]

<sup>32</sup> *ibid* [118.9 – .15], [119.18 – .19]

<sup>33</sup> *ibid* 119.56

<sup>34</sup> Human Rights Committee (*supra* note 20) [18]