



# **Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Jamaica: A Shadow Report**

**Submitted for consideration at the 118<sup>th</sup> Session of the  
Human Rights Committee  
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# **Human Rights Violations Against Lesbian, Gay, Bisexual and Transgender People in Jamaica: A Shadow Report**

## **I. Introduction**

This shadow report on violations of the human rights of lesbian, gay, bisexual, and transgender (LGBT) people in Jamaica is submitted to the Human Rights Committee (“Committee”) in anticipation of the Committee’s consideration at its 118<sup>th</sup> Session of Jamaica’s compliance with the International Covenant on Civil and Political Rights (“Covenant”). This report is submitted by the following organizations: J-FLAG;<sup>1</sup> Women’s Empowerment for Change (WE-Change);<sup>2</sup> The Colour Pink Group Foundation;<sup>3</sup> TransWave;<sup>4</sup> the Center for International Human Rights of Northwestern Pritzker School of Law; and the Global Initiatives for Human Rights of Heartland Alliance for Human Needs & Human Rights.

The purpose of this report is to draw the Committee’s attention to the ongoing violations of the Covenant rights of LGBT individuals in Jamaica. These violations include, in particular, the following:

- \*\* While Jamaica has taken an important step forward by developing a new policy to guide police response to violence based on sexual orientation and gender identity, more needs to be done to prevent, prosecute and punish violent attacks, including mob violence and sexual assault against LGBT individuals, and including cases where the police themselves have stood by or been the perpetrators;
  
- \*\* Jamaica has not taken sufficient measures to respect and ensure the rights of individuals to equality and non-discrimination regardless of their real or perceived sexual orientation and gender identity; and

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<sup>1</sup> J-FLAG is the foremost organisation in Jamaica advocating for, and working to improve the human rights situation of, lesbian, gay, bisexual and transgender (LGBT) persons. The organisation promotes social change by empowering the LGBT community, building tolerance for, and acceptance of, LGBT people, and creating a foundation for policy and legislative reform.

<sup>2</sup> Women’s Empowerment for Change (WE-Change) is a rights-based, women-led, community-based advocacy group committed to increasing the participation of lesbian, bisexual and transgender [LBT] women in social justice advocacy in Jamaica and the Caribbean.

<sup>3</sup> The Colour Pink Foundation is a nongovernmental organization in Jamaica, focused on reaching Gay, bisexual men, and other Men who have sex with men (MSM), and Transgender persons, who are homeless or displaced. CPG focuses on providing education, life skills, and linkages with healthcare providers in order to provide clients with the necessary tools, and empower them, to rise out of poverty and to positively contribute to the Jamaica society

<sup>4</sup> TransWave, a Jamaican NGO founded in August 2015, promotes transgender health and well-being through advocacy and visibility. TransWave highlights and shares stories of transgender and gender nonconforming Jamaicans while educating the wider society about issues faced by the community. In addition, it focuses on building the capacity of the community to increase their involvement in advocacy and social justice.

\*\* Jamaica has failed to develop a legal system that is responsive to and inclusive of the rights of LGBT persons by repealing laws that violate their rights, amending laws to equally protect LGBT persons, and creating legislation to address the various challenges they continue to experience.

In its November 2011 Concluding Observations, this Committee made the following recommendations to Jamaica:

“The State party should amend its laws with a view to prohibiting discrimination on the basis of sex, sexual orientation and gender identity. The State party should also decriminalize sexual relations between consenting adults of the same sex, in order to bring its legislation into line with the Covenant and put an end to prejudices and the social stigmatization of homosexuality. In this regard, the State party should send a clear message that it does not tolerate any form of harassment, discrimination or violence against persons for their sexual orientation, and should ensure that individuals, who incite violence against homosexuals, are investigated, prosecuted and properly sanctioned.”<sup>5</sup>

Regrettably, as our report will show, Jamaica has not amended its laws to prohibit discrimination on the basis of sex, sexual orientation and gender identity. Nor has Jamaica repealed its laws which criminalize same-sex sexual relations between consenting adult males. While, as will be noted, the State has taken some measures to promote tolerance and respect for sexual and gender minorities, much more needs to be done.

Our report will conclude with proposed questions to be asked during the Committee’s dialogue with Jamaica, and proposed recommendations to be made to Jamaica at the conclusion of the Committee’s review.

## **II. Failure to adequately prevent, prosecute and punish violent attacks, including mob violence and sexual assault against LGBT individuals, and including cases where the police themselves have stood by or been the perpetrators**

Violent attacks and threats of violence perpetrated against sexual and gender minorities have been all too frequent in Jamaica. LGBT individuals have been attacked, and sometimes killed, by mobs. Lesbians have been raped in what is perversely viewed as “corrective rape,” in the belief that intercourse with a man will “cure” a lesbian of her sexual orientation. Frequent threats of violence have led LGBT individuals to live in fear and, in some cases, to flee their homes. The State has failed in its obligation to take appropriate measures to prevent these attacks and to vigorously investigate and prosecute the attackers. On some occasions the police themselves have attacked victims or have stood by during attacks by private actors.

These attacks and threats, examples of which are provided below, violate rights protected by Articles 6 (life), 7 (torture and cruel, inhuman, or degrading treatment), and 9 (security of person).

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<sup>5</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee: Jamaica*, ¶ 8, UN Doc. CCPR/C/JAM/CO/3 (17 Nov. 2011).

Jamaica's failure to take adequate measures to respect and ensure these rights violates its obligations under Article 2(1) (obligation to respect and ensure, without discrimination) and 26 (equal protection of the law). The attacks on teens under the age of 18 additionally violate article 24, which recognizes that every child has the right, without discrimination, to special measures of protection on the part of the child's family, society and the State. The sexual attacks against lesbians additionally violate Article 3 (equality of women and men).

#### **A. Violent attacks**

During interviews conducted by Human Rights Watch in April and June 2013 with 71 self-identified LGBT Jamaicans, twelve of the people interviewed reported that "they knew of a friend, partner, lover, or associate who had been murdered because of their real or perceived sexual orientation or gender identity."<sup>6</sup>

In a 2015 J-FLAG survey of 316 LGBT Jamaicans, 43% of respondents reported receiving threats of physical violence in the last 5 years, and 18% reported being threatened with sexual violence. On average, these individuals received two or three such threats each.<sup>7</sup>

Unfortunately, this violence continues. From January to June 2016, 23 individuals reported to J-FLAG that they had been physically assaulted or attacked due to their sexual orientation or gender identity.<sup>8</sup>

The following are examples of violent attacks due to sexual orientation or gender identity:

Dwayne Jones, a sixteen-year-old teen, was murdered by a mob in Irwin, a town in St. James on 21 July 2013. Dwayne had attended a dance party wearing women's clothing. The teen was viciously attacked when people at the party realized that Dwayne was biologically male. Dwayne was stabbed, beaten, shot and run over by a car before his body was dumped in the bushes by the side of a road.<sup>9</sup> No one has been brought to justice for this crime.

A gay man from Montego Bay and a group of his gay male friends were attacked around 6:00 p.m. one evening in March 2013 by a mob of about ten men. The attackers, armed with machetes, stones and other weapons, came at them yelling "Battyman fi dead."<sup>10</sup> "Battyman" is a derogatory term for a man who has sex with men, and "fi dead," in Jamaican, means "should be dead" or "must

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<sup>6</sup> Human Rights Watch, *Not Safe at Home: Violence and Discrimination against LGBT People in Jamaica*, pp. 8, 23 (21 Oct. 2014), available at [https://www.hrw.org/sites/default/files/reports/jamaica1014\\_ForUpload\\_1.pdf](https://www.hrw.org/sites/default/files/reports/jamaica1014_ForUpload_1.pdf) [hereinafter HRW 2014].

<sup>7</sup> J-FLAG, *The Developmental Cost of Homophobia: The Case of Jamaica*, pp. 51-52 (4 Nov. 2015) [hereinafter J-FLAG 2015].

<sup>8</sup> J-FLAG, *Support Services Department Incident Report 2016. Incidents from January – June 2016*, p. 1 (June 2016).

<sup>9</sup> HRW 2014 *supra* note 6, p. 1; THE GUARDIAN, *Jamaica's first public gay pride event a symbol of change: 'It felt liberating'*, 10 Aug. 2015, available at <http://www.theguardian.com/world/2015/aug/10/jamaica-first-gay-pride-celebration-symbol-change>.

<sup>10</sup> HRW 2014, *supra* note 6, pp. 24-25.

die.”<sup>11</sup> While the victims were able to escape, one had his nose broken by the mob. That victim went to the police that evening, but, he said, “the police didn’t make any effort.”<sup>12</sup>

On 6 October 2013 in New Kingston, a gay man was severely beaten in the parking lot at his workplace by three male co-workers. This attack continued for fifteen minutes in the presence of the company’s security guard. Despite several cries for help, the guard made no effort to assist the abused victim. The attackers taunted the individual with homophobic slurs, such as “*Battyboy fi dead!*” The victim suffered severe muscle damage in his right eye causing his vision to significantly deteriorate. Out of fear of further public shaming and ridicule, the victim has never reported this incident to the police.<sup>13</sup>

On 15 June 2014, a transgender teen, who was in the process of transitioning her appearance, was attacked when she attempted to purchase lip gloss at a store in May Pen, Clarendon. Local People had become suspicious because of her androgynous appearance. When she was seen in the store, a rumor went around that “*There is a Battyman in the store.*” An aggressive mob gained momentum outside the store entrance, chanting “*Kill her, mek wi kill her! Mek wi light har on fire!*” Even after the police arrived, the violent mob was unstoppable. The teen narrowly escaped with the help of store workers and the police (two of whom went beyond the call of duty to make sure she was safe).<sup>14</sup>

On 6 March 2016, a transgender woman was severely beaten and left for dead in a gully. After attending an event at the National Stadium in Kingston, the victim and her friends had stopped at a gas station in New Kingston. As they left the gas station, a vehicle carrying a group of men stopped in front of them, blocking them from driving off. Almost immediately, another vehicle blocked them from behind. The men in the front car alighted from their vehicle and pulled the transgender woman from her car. They beat her severely, then took her to an inner city community where she was beaten again. The attackers then threw her body in the Sandy Park Gully in St. Andrew and left her for dead. Fortunately, the victim was spotted by a man who called the police, and the woman was taken to a hospital. The beatings left her with a fractured right arm and wounds on her face, arm, hips, and back.<sup>15</sup>

## **B. Sexual assault**

On 22 August 2014, two men broke into the Portmore home of a 37-year old lesbian and raped, beat, and stabbed her. Prior to that night, many people in the victim’s neighborhood, having seen her female partner visiting her home, had yelled “sodomite” and threatened her. On the night of the attack, the woman was awakened by the intruders’ shouts of “sodomite, lesbian, dirty girl, we have come for you.” The men took turns raping her. They beat her severely, breaking her arm, and stabbed her in the stomach with a 12-inch knife. She was hospitalized in critical condition.<sup>16</sup>

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<sup>11</sup> *Id.*, Note on Jamaican Language, p. III.

<sup>12</sup> *Id.*, at 25.

<sup>13</sup> Incident reported to J-FLAG on 30 Sept. 2014.

<sup>14</sup> Incident reported to J-FLAG on 27 Mar. 2015.

<sup>15</sup> J-FLAG, *Support Services Department Incident Report 2016, Incidents from January – June 2016*, pp. 1-2 (June 2016).

<sup>16</sup> Incident reported to J-FLAG on 4 Nov. 2015.

On 15 July 2015 in Rockfort, Kingston, a group of men approached a lesbian and threatened to rape her, telling her that after sexual intercourse with a man, a lesbian would be “cured” of her homosexuality. The woman also received several death threats such as “lesbian fi dead” from people in her neighborhood. These ongoing threats forced the woman to move from Kingston to another part of Jamaica.<sup>17</sup>

In September 2015, a lesbian who lived with her female partner in St. Andrew reported being continually subjected to rape threats by neighborhood men. Neighborhood men perceived her as being masculine and “edgy” because she dressed like a man and had a short buzz cut hairstyle. She was repeatedly subjected to homophobic slurs and threats of rape, such as: “You Sodomite, we will straighten you out. All you need is a big cocky in you. Sodomite fi dead.”<sup>18</sup>

A 26-year-old lesbian, who was subjected to “corrective rape” as a child, continues to face death threats and threats of rape even today. At the age of twelve, she was raped by her own relatives and other men from her neighborhood to “cure” her of her homosexuality. After facing continuous abuse, threats and remarks because of her sexual orientation, she left her neighborhood to live “in the bushes,” *i.e.*, in the undeveloped areas of rural Jamaica. As a result of these ongoing abuses, she tried to leave Jamaica and obtain asylum in the Netherlands.<sup>19</sup>

Gay men as well as lesbians have been victims of sexual assault. For example, on 9 February 2015, a 22-year-old gay man suffered a brutal sexual assault. When the victim and his friend arrived at the friend’s home for the night, three men were waiting for them armed with machetes. Saying, “Batty man love do nastiness, so you don’t mind doing it to us,” one of the assailants forced the victim to perform oral sex and then anally penetrated him. The victim experienced heavy anal bleeding and passed out. Later, he learned that he had contracted two sexually transmitted infections from his assailant.<sup>20</sup>

## **C. Attacks and inaction by police**

### **1. Police as perpetrators**

On some occasions, the police themselves have been perpetrators. For example:

In January 2013, a gay man who had been beaten by a large crowd was handcuffed by the police and placed in a police car. While the man was handcuffed in the car, a police officer hit him with his baton, saying, “Hey, you’re a fish [a pejorative term in Jamaica for men who have sex with men], and you are a battyman.” At one point the police stopped the car and the two officers continued to hit him. At the station, another police officer told him, “Fish don’t last long in St. Ann,” and “Everyone who comes in comes out dead.” He was held in handcuffs overnight, and released in the morning with the admonition that he should go to church.<sup>21</sup>

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<sup>17</sup> Incident reported to both J-FLAG and the NGO Aphrodite’s P.R.I.D.E Jamaica on 20 Aug. 2015.

<sup>18</sup> Incident reported to J-FLAG on 24 Sept. 2015.

<sup>19</sup> Incident reported to J-FLAG on 7 May 2015.

<sup>20</sup> J-FLAG, *Support Services Department Incident Report, Incidents from 2014-2015*, p. 1 (June 2016).

<sup>21</sup> HRW 2014, *supra* note 6, p. 34.

Late in the night on 21 July 2015, a young woman was walking to her home in Kingston. A police officer came up to her and told her to take another route instead of walking the way she was going. She said no, and told the police officer that the other way was not safe for a woman walking by herself. The officer pulled her pants and pepper sprayed her three times. He then told her, “You’re acting like a man so he’s going to treat her like a man.” The officer also popped off her chain and broke her phone during the interaction. The woman believed she was targeted by the police officer because she was perceived to be dressed like a tomboy, which made the police officer assume she was gay.<sup>22</sup>

In October 2015, a masculine-expressing lesbian was subjected to homophobic slurs, abusive treatment and arbitrary detention at a police station in St. Andrew. The police called her a “sodomite” and threatened to take her to another location where she would be beaten. Although she was never charged with any crime, she was remanded for almost four months.<sup>23</sup>

## **2. Police failure to intervene to stop an attack**

The Jamaican police have made efforts to encourage reporting of crimes against LGBT persons and to intervene when such crimes occurred.<sup>24</sup> For example, on 22 August 2013, five men thought to be gay were trapped in their house in Green Mountain by a mob attack until the police escorted them to safety.<sup>25</sup> However, there have been other occasions when the police have refused to intervene when a crime against an LGBT individual was in progress. For example:

In January 2013, the police watched and did nothing for about twenty minutes while a mob of about 30 people attacked a gay man. Armed with knives, machetes and sticks, the attackers shouted homophobic insults as they beat the man. When the police finally intervened and placed the victim in a police car to separate him from the mob, they handcuffed and beat him.<sup>26</sup>

## **3. Inaction and abuse by police when LGBT individuals attempt to report crimes**

On other occasions, the police refused to take action when LGBT individuals attempted to report crimes, and instead subjected the LGBT crime victims to verbal abuse. For example:

When, in August 2012, a lesbian couple went to the Greater Portmore police station to report that they had been raped, they were verbally abused by the police. When the women had returned home one night, two men accosted them, forced them into their house at gunpoint and raped them, saying “You not with nuh man.” When the women reported the crime, the police officer asked if they were related. The women said that they were “just friends, sharing the place.” The police officer responded, “You’re sodomites, look at her, a sodomite them, why did you come to the police

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<sup>22</sup> Incident reported to the NGO Aphrodite’s P.R.I.D.E. Jamaica.

<sup>23</sup> J-FLAG, *Support Services Department Incident Report, Incidents from 2014-2015*, p. 1 (June 2016).

<sup>24</sup> J-FLAG, *Homophobia and Violence in Jamaica*, p. 3 (Dec. 2013), available at <http://jflag.org/wp-content/uploads/2014/07/Homophobia-Violence-in-Jamaica-JFLAG-2013.pdf> [hereinafter J-FLAG 2013].

<sup>25</sup> Affidavit of Javed Saunja Jaghai indicating reasons for withdrawal of claim, The Supreme Court of Judicature of Jamaica, August 2014, available at [http://ufdcimages.uflib.ufl.edu/AA/00/02/56/31/00001/Affidavit\\_javed\\_jaghai\\_ROTATED.pdf](http://ufdcimages.uflib.ufl.edu/AA/00/02/56/31/00001/Affidavit_javed_jaghai_ROTATED.pdf).

<sup>26</sup> HRW 2014, *supra* note 6, p. 27 (this incident was also referenced in prior section on violence by the police).

station? A fuck you want, a fuck you get.” According to the women, the police did not take any action.<sup>27</sup>

In February 2013, a gay 17-year-old was beaten severely by his brother because of his sexual orientation. When he went to the Montego Hills police station to report the crime, he was made to wait for for four hours, and even then, the police did nothing, saying ”That’s the reason he is being beaten. He’s a battyman, a fish.”<sup>28</sup>

In another February 2013 incident, when a homeless gay youth went to the New Kingston police to report having been chased by a mob of construction workers, the police officer on duty would not let the him use his pen to sign the complaint: “You are battyman. We don’t want battyman to use our pen.”<sup>29</sup>

Moreover, it is noteworthy that the perception of a significant number of Jamaicans is that the police treat LGBT persons worse than heterosexual persons. According to the 2012-2013 Jamaica National Crime Victimization Survey, 46.5% residents in Kingston reported that they feel that the police treat homosexuals worse than heterosexuals.<sup>30</sup> The percentages in other parishes were: St. Andrew (16.5%), St. Thomas (19.1%), St. Mary (31.8%), St. James (32.3%), Clarendon (28.2%), St. Catherine (22.3%) and Trelawney (28.3%).<sup>31</sup>

#### **4. Unwillingness of LGBT crime victims to report crimes against them, due to police attitudes**

It is important to note that in an effort to improve public confidence in the police, in 2011 the Jamaica Constabulary Force issued a Policy on Diversity with the aim to “effectively transform the negative aspects of police culture manifested in the scant regards paid to reports made by members of diverse groups, as it relate to the incidence of crimes committed against them.”<sup>32</sup> According to the policy definitions, diverse groups comprise, among others, persons of various sexual orientations.<sup>33</sup> In addition, the police have undergone a number of human rights-related capacity building and sensitization workshops. For example, in September 2015, two-hundred and thirty (230) police officers participated in a two-day training which ‘focused on the safety and security of women and girls, persons living with disabilities, marginalised youth, and members of the lesbian, gay, bisexual or Transgendered (LGBT) community.’<sup>34</sup> However, as J-FLAG stresses, “much more work needs to be done to ensure that all Jamaicans are protected and where their rights are infringed, they are treated equally before the law.”<sup>35</sup>

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<sup>27</sup> *Id.*, pp. 29-30.

<sup>28</sup> *Id.*, p. 33. “Fish” is another pejorative term used in Jamaica for men who have sex with men. *Id.* at III.

<sup>29</sup> *Id.*, p. 34.

<sup>30</sup> Jamaica Ministry of National Security, *The 2012-2013 Jamaica National Crime Victimization Survey. Final Report*, p. 259 (2013).

<sup>31</sup> *Id.*, p. 262.

<sup>32</sup> Jamaica Constabulary Force Orders No. 3351, p. 1 (25 Aug. 2011), *available at* <http://library.jcsc.edu.jm/xmlui/bitstream/handle/1/116/Force%252520Orders%2525203351A%252520dated%2525202011-08-25.pdf?sequence=1>.

<sup>33</sup> *Id.*, p. 2.

<sup>34</sup> JAMAICA OBSERVER, *Cops urged to use diversity training to make a difference*, Oct. 14, 2015, *available at* <http://www.jamaicaobserver.com/news/Cops-urged-to-use-diversity-training-to-make-a-difference>.

<sup>35</sup> J-FLAG 2013, *supra* note 24, p. 4.

Negative police attitudes towards LGBT persons persist and as a consequence, many LGBT crime victims do not even attempt to report crimes to the police. For example:

In August 2014, a young man rented two rooms for himself and his partner in St. Catherine. He told the landlady that the partner was his cousin. The landlady would watch them and peep through the door. Once, when the young man was traveling, upon his return home he found his partner sitting outside crying and shaking. The partner told the man that their landlady had brought someone with a gun and had threatened them and said they had to get out, saying that the Holy Spirit had told her that they were gay. The couple did not report any of this to law enforcement authorities because, in their view, “it doesn't go anywhere.”<sup>36</sup>

This attitude is widespread among LGBT individuals. After interviewing 71 LGBT individuals during April and June 2013, Human Rights Watch reported that “[m]ost of the LGBT people we interviewed said they did not even report criminal acts to the police, fearing they would be unresponsive because of the victim’s sexual orientation or gender identity.”<sup>37</sup> This same view was widely expressed at a focus group held in Kingston in October 2015 with a group of ten homeless gay and transgender individuals.<sup>38</sup> LGBT NGOs in Jamaica report the same, based on their extensive work with LGBT victims of hate crimes.

A 2013 J-FLAG report titled “Homophobia and Violence in Jamaica” indicates that a significant number of incidents perpetrated against LGBT persons were not reported until several months after they occurred.<sup>39</sup> Among the reasons for this late reporting was the fear to be known as part of the LGBT community.<sup>40</sup>

A 2015 study commissioned by J-FLAG (and published in 2016) on “The Developmental Cost of Homophobia” indicates that a large number of LGBT people did not report the last incident of physical or sexual assault that was perpetrated against them to the police. Thirty percent of the persons did not report because they felt the incident was too minor to be reported, while 40.5% did not report because they felt the police would not do anything to address the matter. About 1 in 4 (25.5%) feared a homophobic response from the police, and about 1 in 5 (22.9%) did not report because they felt too ashamed or embarrassed and did not want anyone to know what had happened to them.<sup>41</sup>

### **III. Failure to take appropriate measures to respect and ensure the right of LGBT individuals to equality and non-discrimination**

Notwithstanding measures undertaken to address the abuse and reduce stigma against the LGBT population, such as the above mentioned Jamaica Constabulary Force Policy on Diversity and human rights-related capacity building and sensitization workshops for the police, homophobia and transphobia are widespread in Jamaica, leading to frequent acts of discrimination based on

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<sup>36</sup> Interview with victim, 30 Oct. 2015.

<sup>37</sup> HRW 2014, *supra* note 6, p. 17.

<sup>38</sup> Focus group discussion, 28 Oct. 2015.

<sup>39</sup> J-FLAG 2013, *supra* note 24, p. 3.

<sup>40</sup> *Id.*

<sup>41</sup> J-FLAG 2015, *supra* note 7, p. 59.

sexual orientation and gender identity. Regrettably, Jamaica has failed to enact laws to outlaw and sanction discrimination on the basis of sexual orientation and gender identity by private actors. Indeed, by continuing to criminalize male same-sex sexual conduct, Jamaica gives seeming legitimacy to the stigmatization of, and discrimination against, LGBT individuals.

By failing to protect LGBT individuals from stigmatization and discrimination based on their sexual orientation and gender identity, Jamaica has violated its obligations under Articles 2(1) and 26 to respect and ensure the rights to equality and non-discrimination.

In cases affecting teens under age 18, there is an additional violation of the Article 24 obligation to provide special measures of protection to children.

#### **A. Failure to prohibit by law discrimination on the basis of sexual orientation and gender identity**

Although Jamaica's 2011 Charter of Fundamental Rights and Freedoms (Chapter III of the Jamaican Constitution) includes "the right to equality before the law,"<sup>42</sup> this broadly-worded provision is followed by a narrower one on "the right to freedom from discrimination."<sup>43</sup> By its terms, this latter provision applies only to discrimination based on certain enumerated grounds.<sup>44</sup> There is no catch-all category of "other status," and neither sexual orientation nor gender identity are among the grounds on which discrimination is prohibited.<sup>45</sup> Indeed, instead of prohibiting discrimination on the basis of "sex" – a form of discrimination that this Committee found in 1994 to include discrimination based on sexual orientation<sup>46</sup> – the 2011 Jamaican constitutional provision prohibits discrimination on the ground of "being male or female."<sup>47</sup>

#### **B. Pervasive homophobia and transphobia**

The examples set out above of mob attacks, rapes, and other acts and threats of violence motivated by the victim's actual or perceived sexual orientation or gender identity attest to the homophobia and transphobia present in Jamaican society. So, too, do the examples of discrimination discussed below.

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<sup>42</sup> The Jamaican Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, § 13 (3) (g) (Jam.), available at [http://www.japarliament.gov.jm/attachments/341\\_The%20Charter%20of%20Fundamental%20Rights%20and%20Freedoms%20\(Constitutional%20Amendment\)%20Act,%20202011.pdf](http://www.japarliament.gov.jm/attachments/341_The%20Charter%20of%20Fundamental%20Rights%20and%20Freedoms%20(Constitutional%20Amendment)%20Act,%20202011.pdf) [hereinafter "Jamaican Charter 2011"].

<sup>43</sup> *Id.* § 13 (3) (i).

<sup>44</sup> The Jamaican Charter guarantees "the right to freedom from discrimination on the ground of – (i) being male or female; [and] (ii) race, place of origin, social class, colour, religion or political opinions." See Jamaican Charter 2011, *supra* note 42, § 13 (3) (i).

<sup>45</sup> *Id.*

<sup>46</sup> Human Rights Committee, *Toonen v. Australia: Communication No. 488/1992*, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (4 April 1994).

<sup>47</sup> Jamaican Charter 2011, *supra* note 42, § 13 (3) (i) (i). The *Report of the 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* shows that this Joint Select Committee advised that the word "sex" be used as meaning male or female in order to ensure that "sex" is not interpreted to include "sexual orientation." See *Report of the 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*, § 13(2)(j) (20 July 1999), available at <http://jis.gov.jm/media/charter-of-rights1.pdf>.

A 2015 survey of 942 members of the Jamaican general public, which was commissioned by J-FLAG, confirmed the magnitude of homophobia in Jamaica. Sixty-five percent of respondents said that gay people should not be allowed to work with children. Only 36% of respondents said they would allow their gay child to continue living in their home, and 43% of respondents said they would not let a gay child be around his or her siblings. Sixty-five percent of respondents said they avoid gay people, and 75% agreed that gay sexual behaviour should be illegal. Fifty-nine percent of respondents reported that they would physically hurt a gay person who approached them, and 58% have used terms like “faggot.”<sup>48</sup>

In June 2014, an estimated 25,000 Jamaicans rallied in the heart of Kingston to “resist the homosexual agenda” and oppose repeal of the laws criminalizing male same-sex sex. The mass rally was organized by Jamaica CAUSE (Churches Action Uniting Society for Emancipation), a coalition of religious groups formed in 2012. The crowd shouted its approval when the chairman of the rally, Alvin Bailey, proclaimed that “our emancipation means standing against the homosexual agenda, emancipation for us means standing up against the repealing of the buggery law.”<sup>49</sup>

Jamaica CAUSE held another mass rally in Kingston on 27 September 2015, ahead of a visit to Jamaica by British Prime Minister David Cameron, to urge the Jamaican government not to give in to international pressure on Jamaica to decriminalize same-sex sexual acts and to allow same-sex marriage.<sup>50</sup> It was estimated that nearly 20,000 supporters attended the rally.<sup>51</sup> Dr. Everett Brown, president of Jamaica’s largest religious denomination, the Seventh Day Adventists, characterized “same-sex marriages and homosexuality” as “evil” and an “abomination,” and as the “product of minds void of understanding.” Roman Catholic Father Richard Ho Lung “urged attendants at the rally to resist the LGBT agenda, which he said is from the devil.”<sup>52</sup>

A 2015 survey of 316 LGBT Jamaicans found high rates of harassment and discrimination. The survey found that 71% of males who identify as gay had experienced some form of harassment or discrimination in the last 12 months; 59% of lesbians, 35% of bisexuals and 29% of transgender person had experienced same. It is important to note that while there has been considerable progress towards improving the human rights situation of LGBT people in Jamaica, 43% reported being threatened with physical violence in the last five years. While threats might be more frequent than actual occurrence of violence, they create a culture of hostility and fear among LGBT people in the country. Consequently, many LGBT people report avoiding public places like squares and roadways and public transportation, public establishments, and faith-based organizations.<sup>53</sup>

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<sup>48</sup> Market Research Services Ltd., *Awareness, Attitude & Perception Survey About Issues Related to Same Sex Relationships* (Aug. 2015), at p. 16.

<sup>49</sup> JAMAICA OBSERVER, *Thousands rally against tossing out buggery act; shout out for clean, righteous living*, 30 June 2014, available at [http://www.jamaicaobserver.com/news/No-to-homo-agenda\\_17050490](http://www.jamaicaobserver.com/news/No-to-homo-agenda_17050490).

<sup>50</sup> JAMAICA OBSERVER, *Government warned! Urged to resist pressure from British PM to support gay agenda*, 29 Sept. 2015, available at [http://www.jamaicaobserver.com/news/Government-warned-\\_19231117](http://www.jamaicaobserver.com/news/Government-warned-_19231117).

<sup>51</sup> NEW YORK TIMES, *On Being Queer in the Caribbean*, 31 October 2015, available at [http://www.nytimes.com/2015/11/01/opinion/sunday/on-being-queer-in-the-caribbean.html?\\_r=0](http://www.nytimes.com/2015/11/01/opinion/sunday/on-being-queer-in-the-caribbean.html?_r=0).

<sup>52</sup> JAMAICA OBSERVER, *Government warned! Urged to resist pressure from British PM to support gay agenda*, 29 Sept. 2015, available at [http://www.jamaicaobserver.com/news/Government-warned-\\_19231117](http://www.jamaicaobserver.com/news/Government-warned-_19231117).

<sup>53</sup> J-FLAG 2015, *supra* note 7, pp. 35, 44, 48.

Unfortunately, incidents of violence, harassment and intimidation are continuing in the current year. Between January and June 2016, 52 incidents were reported to J-FLAG. These included, among others, 26 incidents of sexual assaults, other physical attacks or arson, and 23 incidents of verbal assaults, threats or intimidation.<sup>54</sup>

### **C. Discrimination in access to health care**

The 2015 survey of 316 LGBT Jamaicans found that “the experience with healthcare service providers was varied. The majority of the respondents (52.5%) reported being forced to undergo seemingly unnecessary medical or psychological testing. A third (32.2%) also experienced inappropriate curiosity regarding their identity. Approximately 17% felt they had not received equal treatment, and 15% declined treatment because they felt fear or discrimination or intolerance, and 15% also felt the need to change their general practitioner or specialist because of negative reaction.”<sup>55</sup>

Transgender individuals lack access in Jamaica to hormonal and surgical treatments for their transition process.<sup>56</sup> Some, in their desperation, have begun buying hormones online and self-medicating.<sup>57</sup> Without the supervision of a trained medical professional these individuals may overdose or underdose, leading to medical complications.<sup>58</sup>

A second problem in accessing healthcare is the discriminatory treatment LGBT individuals too often receive at hospitals and health centers. While doctors and nurses sometimes discriminate against LGBT patients, the problem lies with non-medical staff such as security guards, janitors, and reception staff as well. Non-medical staff have turned LGBT patients away or treated them in a humiliating manner. On occasion, they have violated patient confidentiality by disclosing to others a person’s sexual orientation or gender identity.

In one case in 2014, the staff member in charge of medical docketts at the Comprehensive Health Clinic disclosed, without permission, the HIV status of a transgender woman to local community members. The woman had to change her healthcare service provider, to avoid further public shaming and ridicule.<sup>59</sup>

On 24 October 2015, a gay man and an ally were attacked by a violent mob in the Cholera Cemetery area of Kingston. Both men were severely beaten and the gay man’s face was cut and his chest was slashed. When he was taken to Kingston Public Hospital, though he was admitted in critical condition, the non-medical staff refused to assist him, because he identified as a gay man.<sup>60</sup>

In another case, a homeless gay man who was experiencing extreme pain from a sexually transmitted infection was denied entry to the Comprehensive Health Clinic on Slipe Pen Road in

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<sup>54</sup> J-FLAG, *Support Services Department Incident Report 2016, Incidents from January – June 2016*, pp. 1-2 (June 2016).

<sup>55</sup> J-FLAG 2015, *supra* note 7, p. 57.

<sup>56</sup> Interview with representative of The Colour Pink Foundation, 28 October 2015.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Incident reported to J-FLAG on 3 Nov. 2015.

Kingston. A friend of his had arranged financing for the treatment and had offered to accompany him to the clinic, but the man initially refused to go, saying he would rather die than risk his life by going to the hospital. He was afraid of being publicly shamed and ridiculed because of his sexual orientation. His friend persisted and took him to the hospital. Due to his homeless status, the individual was wearing a marina (a vest) and shorts. Although the hospital's policy is to provide such patients with plastic overalls, the security officer refused him entry into the hospital, unless fully dressed.<sup>61</sup>

#### **D. Discrimination in employment**

In November 2012, a gay man who was employed at the rank of Lieutenant was reportedly dismissed from the Jamaica Defence Force after fifteen years of service because of his sexual orientation. His superior was made aware of his sexual orientation and requested a meeting with the man. The Lieutenant was asked if he was gay, and upon answering in the affirmative, he was asked to leave the force. He became extremely depressed, feeling anger, helplessness and hopelessness, and attempted to commit suicide.<sup>62</sup>

A transgender woman reported that because of repeated past experiences with employment discrimination, she has stopped trying to find a steady job and only works when she can obtain freelance work for British or American businesses. She related multiple examples of being let go from jobs due to her gender identity.<sup>63</sup>

In 2012, a gay man was severely beaten by three of his male coworkers in the bathroom of his workplace. The victim's tooth was broken during the attack. The victim believes he was attacked because he was viewed as effeminate or flamboyant.<sup>64</sup>

It is noteworthy that data from the J-FLAG 2015 study indicate that persons who tend to be more open about their LGBT status are more likely to be denied a job.<sup>65</sup>

#### **E. Discrimination in housing and homelessness**

LGBT individuals have experienced discrimination by landlords and landladies who refuse to rent to them or force them out of their home because of their sexual orientation or gender identity. In one case, a young man had rented two separate rooms in St. Catherine in 2014 for himself and his partner, telling the landlady that the other man was his cousin. They did not actually need two rooms, but they paid the extra money to rent a second room to maintain the fiction that they were living separately. But his landlady watched them, suspecting they were gay. The men moved out when their landlady, accompanied by someone with a gun, threatened the men and told them they had to get out.<sup>66</sup>

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<sup>61</sup> Interview with the friend who had taken the gay man to the hospital, 28 Oct. 2015. Although the friend who was interviewed could not recall the date of this incident, she indicated that it occurred sometime after 2012.

<sup>62</sup> Interview with J-FLAG staff, 30 Oct. 2015.

<sup>63</sup> Interview with victim, 28 Oct. 2015.

<sup>64</sup> Interview with J-FLAG staff, 30 Oct. 2015.

<sup>65</sup> J-FLAG 2015, *supra* note 7, p. 66.

<sup>66</sup> Interview with victim, 30 Oct. 2015 (this incident was also referenced in earlier section on violence).

In another case, in 2012, a human rights defender and their friend sought to rent a two-bedroom apartment in New Kingston. They report being asked intrusive questions by the individual responsible for the property about whether or not they were certain they were just friends and about why they wanted to rent the apartment. Their attempt to rent the property failed because, the caretaker reported, the property owner is a Christian and does not desire to rent to homosexuals.<sup>67</sup>

Homelessness is a very serious problem for many LGBT Jamaicans. LGBT individuals have been forced to leave their homes and communities and live on the streets due to lack of tolerance, violence and threats of violence. Between January 2012 and July 2014, J-FLAG received 61 reports from LGBT persons, including children, who were displaced and denied their right to shelter and a family.<sup>68</sup> All of the twelve reports received in 2012 were from boys under 18 years of age.<sup>69</sup>

One homeless gay man recounted his experience as follows:

“They couldn’t take my ‘lifestyle’. . . . I had to leave from a very tender age. Well I was threatened because of my lifestyle because as I stated that’s the road I chose to travel and they always speak about stuff that they would do and I see them do stuff so I felt threatened about my life and since 14 so I left. My mom has a farm in Golden Spring and so on and off I would go there and I really don’t stay there a lot because I am not originally from there and if where I am from persons will hurt me what strangers would do to me . . . I’ve seen them beat guys, I saw them beat a guy who was not gay but who performs oral sex. I saw them torture him and that is when I left because they would always hit-out against boys like me. They tried to beat me already because of an incident where I got caught with a boy . . .”<sup>70</sup>

Life for displaced and homeless LBGT individuals is extremely hard.<sup>71</sup> As one gay man put it, “[L]iving on the road for a gay man is very very hard, hard.”<sup>72</sup> Another agreed: “[I]t tough out there, it really tough out there.”<sup>73</sup> Homeless LGBT individuals live in abandoned buildings, open lots and gullies. They are forced to move frequently, both to avoid the threat of violence and because the authorities constantly chase them away from the places where they have settled. Those who are homeless do not have access to such basic necessities as running water, proper bathroom facilities, a place to shower and facilities for ironing their clothes, with the result that their appearance impedes their ability to get or keep a job.<sup>74</sup>

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<sup>67</sup> Interview with the human rights defender who was denied the apartment, 28 October 2015.

<sup>68</sup> J-FLAG, Recommendations for the 22<sup>nd</sup> UPR Session of Jamaica.

<sup>69</sup> J-FLAG, Presentation for Recommendations for the 22<sup>nd</sup> UPR Pre-Session of Jamaica.

<sup>70</sup> Focus Group Discussion, 28 October 2015.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

Homeless LGBT individuals are at great risk of experiencing violence. One homeless individual recounted an incident in October 2015, when he woke up to find himself bleeding because a passerby had dropped a stone on his head.<sup>75</sup>

Homeless LGBT people are caught in an unending cycle of violence. They have been forced to leave their communities because of the fear and threat of violence, yet they are forced to live on the streets where they are equally faced with physical violence being perpetrated against them.

#### **IV. Failure to create a responsive and inclusive legal system**

Jamaica's legal framework largely reflects heteronormativity and cisnormativity. Constitutional provisions, diverse legislation and principles developed in common law create a legal regime in which lesbian, gay, bisexual and transgender Jamaicans are excluded, discriminated against, denied equal protection and in some instances criminalized. While there are areas which have the potential to protect LGBT persons from violence and discrimination, this piecemeal protection suffers from poor implementation as cultural prejudices against LGBT persons remain popular. This section will consider the laws which have a direct or indirect negative impact on LGBT persons, those which exclude LGBT persons and the gaps in recognition and protection of LGBT persons.

##### **A. Gaps in recognition and protection**

The Jamaica Charter of Fundamental Rights and Freedoms guarantees the rights to equality before the law,<sup>76</sup> to equitable and human treatment by a public authority in the exercise of any function<sup>77</sup> and to freedom from discrimination.<sup>78</sup> The freedom from discrimination does not protect against discrimination on the basis of sexual orientation or gender identity. The effect of this is that discriminatory treatment in employment, education, healthcare and housing (as exemplified above) at the hands of non-state actors is allowed to occur with impunity. Jamaica does not have any anti-discrimination legislation and therefore the only protection against discrimination lies within the Charter. This means that LGBT persons have no legal recourse for the different forms of discrimination they face at the hands of private actors. This presents a large gap in the protection of LGBT persons as the stigma and discrimination that is perpetuated in different areas of their lives remains unaddressed. This gap in legal protection allows for violation of their right to equality before the law and non-discrimination under article 26.

Trans persons in particular are confronted with the reality of legal non-recognition. Jamaica has no legislative or policy framework which would allow for trans persons to have their gender identities formally and institutionally recognized through changes on their birth certificates and other forms of identification. The result is that laws which have gender-specific provisions treat them differently. For example, the section 3 of the Sexual Offences Act of Jamaica, 2009 provides

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<sup>75</sup> Focus Group Discussion, 28 October 2015.

<sup>76</sup> Jamaica Constitution, section 13(3)(g).

<sup>77</sup> *Ibid.*, section 13(3)(h).

<sup>78</sup> *Ibid.*, section 13(3)(i).

that only women can be victims of rape. Trans women are considered men within the law.<sup>79</sup> This means that men who rape trans women cannot be convicted of rape, but only the lesser offence of indecent assault.<sup>80</sup> The sentence for a conviction of rape is fifteen (15) years to life imprisonment while the sentence for a conviction of indecent assault is maximum (15) years imprisonment. This violates the right of trans persons to be recognized everywhere as a person (Article 16) and to equal protection of the law (Article 26).

“Corrective Rape” (as defined above) and other targeted forms of violence against the LGBT community and particularly LBT women are not defined within our criminal laws. The absence of hate-crime legislation means that homophobic and transphobic violence and the incitement of same is not recognized within our laws. Mob violence, “corrective rape”, “gay bashing” and other forms of violence are captured in the generic legal protections available which do not allow for a thorough investigation within the criminal justice system of the specific forms of violence experienced by the LGBT community. This violates the right of LGBT persons to life (article 6) and the right to liberty and security of the person (article 9).

There are no state laws or policies which address explicitly homophobic and transphobic bullying and harassment in schools and the workplace. This means that LGBT Youth have little legal protection against the targeted physical and verbal abuse they have come to experience in schools. Also, negative attitudes towards homosexuality have prevented the implementation of comprehensive sexuality education which would enable LGBT Youth to actualize their sexual and reproductive rights. Both of these issues are compounded with policies and practices within public and private educational institutions which perpetuate stigma around and discrimination against LGBT persons. The failure of the State to implement policies which would protect LGBT Youth from physical and psychological harm is a violation of article 24 which outlines the need to provide special protection for all children.

## **B. Legal exclusion**

Family law legislation such as the Property (Rights of Spouses) Act 2004, The Maintenance Act 2005, The Intestates’ Estate and Property Charges Act 1937, The Inheritance (Provision for Family and Dependents) Act, 1993 exclude same-sex unions from all the legal benefits that are given to both married and unmarried heterosexual unions. Section 18 of the Jamaica Charter of Fundamental Rights and Freedoms prevents these laws from being challenged in court and goes further to prevent the legal recognition of same-sex unions. The result is that persons in same-sex unions are shut out from laws which would give them a fifty percent share in the family home in which they have lived and contributed to financially and non-financially,<sup>81</sup> that would give them an entitlement to be maintained by their partners where the need exists,<sup>82</sup> that would give them entitlements on the death of their partner whether they die intestate<sup>83</sup> or if they die with a will

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<sup>79</sup> The UK case of *Corbett v Corbett* [1970] 2 All E.R. 33 established that sex, for the purposes of marriage law, is determined by biological sex. The case of *R v Tan* [1983] QBD 1053 expanded this principle in *Corbett* to be applicable to all areas of life. There is no Jamaican legislation or case law to rebut the applicability of these cases.

<sup>80</sup> Indecent assault captures all forms of touching that is done for a sexual purpose without the consent of the person being touched and is prohibited under section 13 of the Sexual Offences Act.

<sup>81</sup> The Property (Rights of Spouses) Act (2004), s. 6.

<sup>82</sup> The Maintenance Act (2005), s. 4.

<sup>83</sup> The Intestates’ Estates and Property Charges Act (1937), s. 4.

which fails to adequately provide for them.<sup>84</sup> Persons in same-sex unions, because of their inability to marry, are also excluded from those legal benefits that have been accorded to married couples. This means that a lesbian woman cannot pass Jamaican citizenship to her same-sex foreign partner because they cannot get married.<sup>85</sup> This family law exclusion is a violation of the right to equality before the law and equal protection of the law (Article 26).

The Sexual Offences Act of Jamaica, 2009 governs the legal regime for protection from sexual violence. The Act defines sexual intercourse as only occurring where the penis of one person penetrates the vagina of another.<sup>86</sup> The impact of this definition is that rape only occurs where a man penetrates the vagina of a woman without her consent.<sup>87</sup> All other forms of non-consensual penetration are treated differently. Intimate partner sexual violence within same-sex unions can only give rise to lesser offences such as “grievous sexual assault”,<sup>88</sup> indecent assault, or sexual touching (if it involves a minor)<sup>89</sup> whereas intimate partner sexual violence within heterosexual unions can give rise to offences such as rape and sexual intercourse with a person under sixteen which carry heavier sentences.

The Domestic Violence Act of Jamaica, 2005 also fails to equally protect LGBT persons in same-sex unions from other forms of intimate partner violence. The Act allows persons in married, unmarried, cohabiting and non-cohabiting heterosexual unions to seek protection from physical and mental violence experienced at the hands of their partners. The Act’s definitions of “spouse” and “visiting relationship” are exclusively heterosexual.<sup>90</sup> The effect of this is that LGBT persons in same-sex unions may only seek protection if they cohabit with their partners. They can apply for protection as “members of the household” of the abuser. Persons in non-cohabiting same-sex unions cannot seek protection under the Act.

This results in unequal protection for LGBT persons within these unions and amounts to a violation of the right to liberty and security of the person (article 9) and equality before the law and equal protection of the law (article 26).

### **C. Laws with negative impact**

Section 10 of the Offences Against the Person Act provides for the defense of “excusable homicide” on a charge for murder. The section reads as follows:

No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony.

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<sup>84</sup> The Inheritance (Provision for Family and Dependents) Act (1993), s. 6.

<sup>85</sup> The Jamaica Constitution (1962), s. 3(1) provides that citizenship may be passed through marriage. Marriage as defined in common law which has been applied in Jamaica is the voluntary union of one man and woman for life to the exclusion of all others. (*Hyde v Hyde* (1866) LR 1 P&D 130, 133). In fact, section 4(1)(d) of the Matrimonial Causes Act makes marriage to a person of the same-sex a ground for seeking a nullity of same. Section 4(3) of the same Act indicates that these marriages are not valid even if a decree of nullity has not yet been awarded.

<sup>86</sup> Sexual Offences Act (2009), s. 2.

<sup>87</sup> *Ibid*, s. 3.

<sup>88</sup> *Ibid*, s. 4.

<sup>89</sup> *Ibid*, s. 8.

<sup>90</sup> The Domestic Violence Act (2005), s. 2.

As it relates to “any other manner without felony,” the common law recognizes a ground for this defence which is homophobic and transphobic. Homicide is excusable or justifiable if it is committed in the prevention of a forcible and atrocious crime. Case law has established that “an attempt to commit sodomy on the person of another is an attempt to commit a forcible and atrocious crime”.<sup>91</sup> This allows person to respond with fatal violence to sexual advances by persons of the same sex and by extension, allows persons who commit homophobic and transphobic killings an avenue to escape punishment by claiming the individual tried to have same-sex sexual relations with them.

Section 6 of the Offences Against the Person Act establishes that “provocation” is a partial defence to murder. Where an individual demonstrates that they were provoked to kill by words or actions or both that would have caused a reasonable man to respond similarly, then he/she shall only be convicted of voluntary manslaughter – a lesser offence. Case law has established a homosexual advance is a ground for provocation.<sup>92</sup> This also justifies persons who have been propositioned by persons of the same sex for a date or intercourse responding violently. Persons are also able to rely on this defence to escape punishment for homophobic and/or transphobic violent acts committed by them.

These legal principles violate the rights to life (article 6), liberty and security of the person (article 9) and to equality before the law (article 26) by providing legal justification for acts of violence committed against LGBT persons. These laws facilitate the commission of homophobic and transphobic acts of violence with impunity. They limit the effective participation of LGBT persons in public life as their inherent human dignity is devalued.

Sections 76 and 77 of the Jamaican Offences Against the Person Act characterize male same-sex sexual conduct as an “unnatural offence” and an “abominable crime.”<sup>93</sup> These sections read as follows:

#### Unnatural Offences

76. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years.

77. Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour.<sup>94</sup>

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<sup>91</sup> *R v Bartley* (1969) 14 WIR 407 (CA, Jamaica).

<sup>92</sup> *Marvin Marcano v The State* Cr. App. No. 2 of 2002 (July 26, 2002) (CA, Trinidad and Tobago).

<sup>93</sup> The Offences Against the Person Act (1864), §§ 76-77, available at [http://moj.gov.jm/sites/default/files/laws/Offences%20Against%20the%20Person%20Act\\_0.pdf](http://moj.gov.jm/sites/default/files/laws/Offences%20Against%20the%20Person%20Act_0.pdf).

<sup>94</sup> *Id.*

Under the heading “Outrages on Decency,” section 79 of the Offences Against the Person Act additionally criminalizes “any act of gross indecency” by one male with another, whether the conduct takes place “in public or private:”

79. Any male person who, in public or private commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for a term not exceeding two years, with or without hard labour.<sup>95</sup>

These laws are specifically protected by the Constitution. In April 2011, Jamaica amended Chapter III of the Constitution with the adoption of a new Charter of Fundamental Rights and Freedoms (“Charter of Rights”).<sup>96</sup> The Charter of Rights declares that, with limited exceptions, “Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes” the rights enumerated in the Charter.<sup>97</sup> Among the enumerated rights are the following:

- (g) the right to equality before the law;
- (h) the right to equitable and humane treatment by any public authority in the exercise of any function;
- (i) the right to freedom from discrimination on the ground of –
  - (i) being male or female;
  - (ii) race, place of origin, social class, colour, religion or political opinions;
- (j) the right of everyone to –
  - \* \* \*
  - (ii) respect for and protection of private and family life, and privacy of the home.<sup>98</sup>

Unfortunately, section 13(12) of the Charter of Rights restricts the application of these rights to the LGBT community by sheltering Jamaica’s criminalization of same-sex intercourse from any constitutional challenge:

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<sup>95</sup> *Id.*, § 79.

<sup>96</sup> THE CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS ACT [CONSTITUTIONAL AMENDMENT] 2011, preamble, §§ 1-2 (Jam.).

<sup>97</sup> *Id.* § 2, setting out the new Sub-section 13(2) of the Constitution.

<sup>98</sup> *Id.* § 2, setting out the new Sub-section 13(3) of the Constitution.

Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to –

(a) sexual offences;

\* \* \*

shall be held to be inconsistent with or in contravention of the provisions of this Chapter.<sup>99</sup>

Jamaica’s continued maintenance of criminal laws against same-sex sexual conduct violates the Covenant rights to equality, non-discrimination, and privacy. As this Committee has repeatedly recognized, laws that criminalize private, adult, consensual same-sex sexual conduct violate the right to equality and non-discrimination enshrined in Articles 2(1) and 26. Such laws also violate the Article 17 right to protection against arbitrary or unlawful interference with privacy. It has long been the jurisprudence of this Committee that “adult consensual sexual activity in private is covered by the concept of ‘privacy.’”<sup>100</sup>

## V. Proposed questions for Jamaica

1. What measures has Jamaica taken, and what additional measures will it take, to prevent acts of violence motivated by prejudices against vulnerable and marginalized groups within the Jamaican society, including those perpetrated because of an individual’s real or perceived sexual orientation or gender identity of the victims? What additional measures has Jamaica taken to ensure such incidents are promptly and fully investigated, prosecuted, and punished, so that perpetrators are held accountable?

2. What additional measures will Jamaica take to stop police violence against and verbal abuse of citizens, including LGBT individuals, and to ensure that police officers treat LGBT individuals with respect, including in situations when LGBT individuals report crimes that have been perpetrated against them?

3. What measures has Jamaica taken, and what additional measures will it take, to promote tolerance and respect among members of the Jamaican public for LGBT individuals? Will Jamaica, as one such measure, enact enabling laws such as comprehensive anti-discrimination legislation and amend existing laws so as to create a legal system that is more inclusive of and responsive to the challenges faced by vulnerable and marginalized groups?

4. Do sections 13(3)(g) and (h) of the Jamaican Charter of Rights and Freedoms (Chapter III of the Jamaican Constitution) provide protection against sexual orientation and gender identity discrimination within the law and at the hands of a public authority in the exercise of its functions,

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<sup>99</sup> *Id.* § 2, setting out the new Sub-section 13(12) of the Constitution.

<sup>100</sup> Human Rights Committee, *Toonen v. Australia: Communication No. 488/1992*, ¶ 8.2, U.N. Doc. CCPR/C/50/D/488/1992 (4 April 1994).

respectively? Will Jamaica amend this Charter to include sexual orientation and gender identity among the grounds in section 13(3)(i) upon which discrimination is prohibited?

## **VI. Proposed recommendations for Jamaica**

The Government of Jamaica is urged to move expeditiously to implement mechanisms to improve the human dignity and access to justice for LGBT Jamaicans. These include:

1. Enacting comprehensive anti-discrimination legislation to prohibit all forms of discrimination, inclusive of discrimination on the basis of sexual orientation and gender identity. This legislation should prohibit discrimination at the hands state and non-state actors in all areas of life, including but not limited to housing, employment, education and provisions of services. Additionally, this legislation should establish a body to receive and investigate complaints and conduct hearings where necessary.
2. Modifying existing laws and enacting legislation so as to eradicate legal and policy barriers, such as the non-recognition of the identities of transgender persons and laws justifying homophobic and transphobic violence, which prevent LGBT Jamaicans from fully participating in all areas of public life on an equal footing with cisgender heterosexual Jamaicans.
3. Improving the country's strategy to address displacement and homelessness, including increasing the number of shelters and temporary housing facilities and ensuring that staff and other persons living at the facility are sensitized to enable them to foster an LGBT-friendly environment. This is necessary due to the high homophobic environment of Jamaica leading to displacement of LGBT persons, particularly children, adolescents and youth who are or are perceived to be LGBT.
4. Conducting a national human rights public education campaign to encourage the public to engender a culture of respect for the rights of all persons particularly vulnerable and marginalized groups, including LGBT persons; specifically targeting families, employers, community members and state actors in an attempt to reduce discrimination and violence as well as the number of displaced LGBT persons.