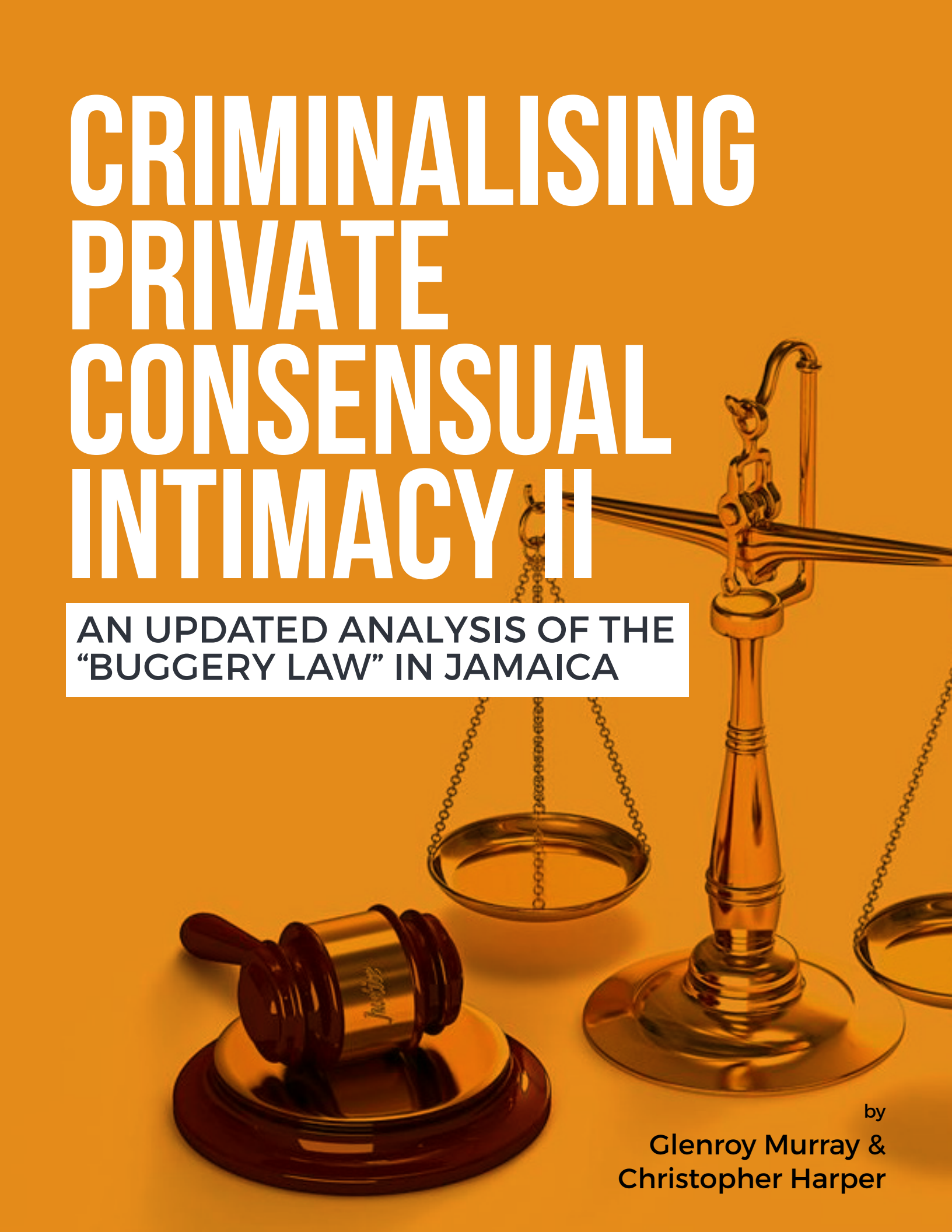


CRIMINALISING PRIVATE CONSENSUAL INTIMACY II

A golden scale of justice and a wooden gavel on a wooden base, set against a golden background. The scale is on the right, and the gavel is on the left. The background is a solid golden color.

AN UPDATED ANALYSIS OF THE
“BUGGERY LAW” IN JAMAICA

by
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INTRODUCTION

It has been five years since the passage of the Jamaica Charter of Fundamental Rights and Freedoms. Within that time, there has been significant developments in the jurisprudence on the buggery law. The decision in *Naz Foundation v Government of NCT of New Delhi* has been overruled by the Supreme Court of India, the landmark decision of *Caleb Orozco v The Attorney General* made the Belize Supreme Court the first in the region to strike down the buggery law and the Human Rights Committee has once again recommended the repeal of the buggery law.

This paper serves of an update to research conducted in 2012 around the status of the buggery law within Jamaica and other nations across the world.



DOMESTIC LAWS CRIMINALIZING CONSENSUAL ACTIVITIES BETWEEN MEN

WHICH SECTIONS OF THE OFFENCES AGAINST THE PERSON'S ACT (OAPA) 1864 CRIMINALIZE SEXUAL ACTIVITIES BETWEEN MEN?

Taken together, sections 76, 77 and 79 of the OAPA 1864 present a strong prohibition against sexual activities between men.

WHAT TYPES OF SEXUAL ACTIVITIES ARE CRIMINALIZED?

Section 76 criminalizes buggery: the penetration of the anus of a man or woman by the penis of another man. It also criminalizes sexual intercourse with animals. It is irrelevant whether the sexual conduct was committed in public or private or whether the conduct was consensual or non-consensual. The sentence for buggery is a maximum of ten (10) years' imprisonment with hard labour. It is noteworthy that the following forms of anal penetration is legal, except where it is non-consensual per section 4 of the Sexual Offences Act (SOA) 2009:

- The penetration of the anus of a woman by an object controlled by another person or by a body part other than a penis.
- The penetration of the anus of a man by an object controlled by a woman or a woman's body part.

Section 77 criminalizes any attempt to commit buggery. It also criminalizes any unwanted touching of a man with the intention of committing buggery as well as any unwanted touching of one man by another man where the intent of that other man is sexual. The sentence for this offence is a maximum of seven (7) years' imprisonment, with or without hard labour.

Section 79 criminalizes acts of gross indecency carried out by a man with another man. Gross indecency is generally interpreted to mean mutual masturbation, oral sex, other forms genital stimulation and/or other similar types of sexual activities. However, the term 'gross indecency' is so broad that any sexual and/or intimate act between two men that is deemed "grossly indecent" by an arresting officer or judge can lead to a maximum of 2 years' imprisonment, with or without hard labour. This can conceivably include kissing, hand-holding and other acts of male-to-male

intimacy. A man is liable if he is a party to the acts of gross indecency and/or he gets or attempts to get another man to commit the acts of gross indecency.

WHAT IS THE LIKELIHOOD OF BEING CHARGED, ARRESTED AND PROSECUTED UNDER SECTION 76?

The statistics related to reports, arrests and prosecution of buggery shows that the rate of prosecution is very low. In the period 2008 – 2010, only 57.5% of the reported cases of buggery resulted in arrest, and of those arrests, only 16.67% resulted in prosecutions – consequently only 9.59% of the reported cases resulted in prosecution. The data collected for this period did not speak to how many of the prosecutions ended in conviction. In the period 2011- 2015, 58.8% of the reported cases of buggery resulted in an arrest, and of those arrests, only 39.42% resulted in prosecutions and of those prosecutions, 52.4% resulted in convictions. Consequently, 12.15% of the reports resulted in convictions. The Table below gives the exact numbers.

	2008 - 2010	2011 - 2015
REPORTS	73	354
ARRESTS	42	208
PROSECUTIONS	7	82
CONVICTIONS	N/A	43



The statistics for the period 2011-2015 also demonstrate that the persons primarily affected by the criminalization of anal sex as formulated in section 76 are not consenting adult males, but instead adult women and children who are victims of non-consensual anal penetration. Forced penile penetration of the vagina is deemed rape under section 3 of the Sexual Offences Act, 2009. The sentence for rape is 15 years to life imprisonment. By treating forced anal penetration as a distinct offence, the law gives less protection to those women and children who experience this form of sexual violence. Of the 354 reported cases, only 7.62% (27 cases) involved an incident between two adult men. Of the 82 cases that were prosecuted, only 8.54% (7 cases) involved an incident between two adult men. Of the 43 convictions, only 4.65% (2 cases) involved an incident between two adult men. The table below gives a more thorough breakdown.

	VICTIMS				
	Men	Women	Boys (Under 18)	Girls (Under 18)	Total
Reports	27	52	153	122	354
Prosecutions	7	9	39	25	82
Convictions	2	3	27	10	43

Based on the data, boys – who cannot be considered victims of rape under the law – are the most affected population. 25 of the 39 prosecuted cases where the victims were boys, were incidents between adult male perpetrators and boys. Girls closely follow boys with the second highest number of cases. 18 of the 25 prosecuted cases where the victims were girls, were incidents between adult male perpetrators and girls. All the cases with adult victims were between themselves and adult male perpetrators. Beyond the criminalization of private consensual intimacy, the buggery law when paired with the Sexual Offences Act creates an unequal regime for protection against sexual violence. As the data shows, the real victims are women, children and youth.

The data for this section was prepared by Jamaica Constabulary Force Statistics and Information Management Unit and the Office of the Director of Public Prosecutions. It should be noted that the data does not reflect whether the cases between adults involved consensual intercourse. Since buggery is crime regardless of consent, the data collection process is not concerned with the fact of same. It should also be noted that the data related to the prosecution of cases between 2011 and 2015 did not include cases from the parishes of Trelawny and St. James.

WHAT IS THE SITUATION IN THE REST OF THE COMMONWEALTH CARIBBEAN?

Within the Commonwealth Caribbean, there are 6 countries which have repealed the laws criminalizing consensual same-sex intimacy, however 5 of these countries have a higher age of consent for same-sex activity. There are 6 countries which criminalize both male-to-male and female-to-female sexual activity. There are 4 countries which criminalize only male-to-male intimacy and Belize is the only country in which the laws have been struck down in Court. Within the region, Jamaica does not have the most discriminatory laws related to the criminalization of consensual same-sex intimacy; it is in the middle of the pack.

COUNTRY	LEGISLATION	PROVISION	MAX. SENTENCE	IMPACT
Anguilla	The law was repealed in 2000.			The age of consent for same-sex sexual activity is higher than for heterosexual intercourse.
Antigua & Barbuda	Articles 12 & 15 of the Sexual Offences Act	Article 12 criminalizes buggery, whether in public or private, consensual or non-consensual. Article 15 criminalizes “serious indecency” which is every sexual act outside of penile penetration of the vagina, unless done between a man and a woman over the age of 16.	Buggery - 15 years when committed between adults. Serious Indecency - 5 years when committed between persons over 16.	Both Male-to-male and female-to-female intimacy private consensual intimacy are criminalized.

COUNTRY	LEGISLATION	PROVISION	MAX. SENTENCE	IMPACT
Bahamas	The law was repealed in 1991.			
Barbados	Sections 9 & 12 of the Sexual Offences Act	Section 9 criminalizes buggery, whether in public or private, consensual or non-consensual. Section 12 criminalizes "serious indecency" which is every sexual act outside of penile penetration of the vagina, unless done between a man and a woman over the age of 16.	Buggery – Life Imprisonment Serious Indecency – 10 years when committed between persons over 16.	Both Male-to-male and female-to-female intimacy private consensual intimacy are criminalized.
Belize	Section 53 of the Criminal Code	Section 53 criminalizes unnatural crime which is carnal intercourse against the order of nature – all sexual activity outside of penile penetration of the vagina.	Unnatural Crime – 10 years	Both Male-to-male and female-to-female intimacy private consensual intimacy are criminalized. (THIS HAS BEEN STRUCK DOWN IN THE CALEB OROZCO CASE)
Bermuda	The law was repealed in 2000 by the Caribbean Territories (Criminal Law) Order.			The age of consent for same-sex sexual activity is higher than for heterosexual intercourse.
British Virgin Islands	The law was repealed in 2000 by the Caribbean Territories (Criminal Law) Order.			The age of consent for same-sex sexual activity is higher than for heterosexual intercourse.
Cayman Islands	The law was repealed in 2000 by the Caribbean Territories (Criminal Law) Order.			The age of consent for same-sex sexual activity is higher than for heterosexual intercourse.

COUNTRY	LEGISLATION	PROVISION	MAX. SENTENCE	IMPACT
Dominica	Articles 14 and 16 of the Sexual Offences Act	Article 16 criminalizes buggery, whether in public or private, consensual or non-consensual. Article 14 criminalizes “serious indecency” which is every sexual act outside of penile penetration of the vagina, unless done between adult men and adult women.	Buggery – 10 years’ imprisonment and possible psychiatric treatment. Serious Indecency – 5 years’ imprisonment	Both Male-to-male and female-to-female intimacy private consensual intimacy are criminalized.
Grenada	Article 431 of the Criminal Code	Article 431 criminalizes Unnatural Connection which is a vague description of penile penetration of parts of the body other than the vagina.	Unnatural Connection – 10 years’ imprisonment.	Male-to-male intimacy is criminalized.
Guyana	Sections 352 and 354 of the Criminal Law (Offences) Act	Section 354 criminalizes buggery, whether in public or private, consensual or non-consensual. Section 352 criminalizes men who commit acts of “gross Indecency with a male person” which is all forms of sexual activity and intimacy between men.	Buggery – Life Imprisonment Gross Indecency – 2 years’ imprisonment	Male-to-male intimacy is criminalized.
Montserrat	The law was repealed in 2000 by the Caribbean Territories (Criminal Law) Order.			The age of consent for same-sex sexual activity is higher than for heterosexual intercourse.

COUNTRY	LEGISLATION	PROVISION	MAX. SENTENCE	IMPACT
Saint Christopher & Nevis	Section 56 of the Offences Against the Person Act	Section 56 criminalizes buggery, whether in public or private, consensual or non-consensual.	Buggery - 10 years' Imprisonment	Male-to-male intimacy is criminalized.
Saint Lucia	Sections 132 and 133 of the Criminal Code.	Section 133 criminalizes buggery between men, whether in public or private, consensual or non-consensual. Section 132 criminalizes acts of "gross indecency" which is every sexual act outside of penile penetration of the vagina, unless done between adult men and adult women.	Buggery - 10 years' Imprisonment Gross Indecency - 10 years' imprisonment on indictment, 5 years' imprisonment on summary conviction	Both Male-to-male and female-to-female intimacy private consensual intimacy are criminalized.
Saint Vincent & the Grenadines	Sections 146 and 148 of the Criminal Code.	Section 146 criminalizes buggery, whether in public or private, consensual or non-consensual. Section 148 criminalizes acts of "gross Indecency with persons of the same sex" which is all forms of sexual activity and intimacy between persons of the same sex.	Buggery - 10 years' Imprisonment Gross Indecency - 5 years' imprisonment	Both Male-to-male and female-to-female intimacy private consensual intimacy are criminalized.

COUNTRY	LEGISLATION	PROVISION	MAX. SENTENCE	IMPACT
Trinidad & Tobago	Sections 13 and 16 of the Criminal Code.	Section 13 criminalizes buggery, whether in public or private, consensual or non-consensual. Section 16 criminalizes acts of “serious indecency” which is every sexual act outside of penile penetration of the vagina, unless done between men and women over the age of 16.	Buggery - 25 years’ Imprisonment Serious Indecency - 5 years’ imprisonment	Both Male-to-male and female-to-female intimacy private consensual intimacy are criminalized.
Turks & Caicos Islands	The law was repealed in 2000 by the Caribbean Territories (Criminal Law) Order.			The age of consent for same-sex sexual activity is higher than for heterosexual intercourse.

INTERNATIONAL HUMAN RIGHTS TREATIES & THE BUGGERY LAW

Sections 76, 77 and 79 of the OAPA (and laws similar to it) are not consistent with the protection of human rights guaranteed in international human rights guaranteed in the International Bill of Human Rights. Consider the following provisions:

HUMAN RIGHTS ARE UNIVERSAL AND EQUALLY APPLIED

Universal Declaration of Human Rights, Article 2.

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

International Covenant of Civil and Political Rights Article 2

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

THE RIGHT TO PRIVACY

Universal Declaration of Human Rights, Article 12.

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

International Covenant of Civil and Political Rights, Article 17

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.***
- 2. Everyone has the right to the protection of the law against such interference or attacks.***

THE RIGHT TO EQUALITY BEFORE THE LAW

Universal Declaration of Human Rights, Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

International Covenant of Civil and Political Rights, Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

THE HUMAN RIGHTS COMMITTEE

The Human Rights Committee is the UN treaty body which monitors the implementation of the International Covenant on Civil & Political Rights which Jamaica ratified in 1975. It has considered the issue of sodomy laws and their compliance with the Covenant.

Toonen v Australia (1994) (No.488/1992 CCPR/C/ 50/D/488/1992, March 31, 1994)

An Australian citizen challenged a law similar to the buggery law in Tasmania. He brought the case before the Human Rights Committee on the basis that the law violated the rights enshrined in the International Covenant on Civil and Political Rights (ICCPR). The Committee held that the law violated the right to privacy guaranteed in Article 17. The Committee noted:

[It] is undisputed that adult consensual sexual activity in private is covered by the concept of “privacy”... The Committee considers that Sections 122(a), (c) and 123 of the Tasmanian Criminal Code “interfere” with the author’s privacy, even if these provisions have not been enforced for a decade... [Any] interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the “reasonableness” test in the circumstances of the case, and that they arbitrarily interfere with Mr. Toonen’s right under article 17.

The Committee did not therefore consider whether the sections violated the right to equality before the law having found the right to privacy breached. They noted however that the prohibition on sex discrimination in the Covenant under article 26 also prohibited sexual orientation discrimination.

Concluding Observations on Jamaica

The Human Rights Committee in their 3rd and 4th periodic review of Jamaica's compliance with the ICCPR in 2011 and 2016, respectively have recommended the repeal of laws criminalizing same-sex sexual intimacy. The recommendations are as follows:

In 2011: *The Committee is also concerned that the State party continues to retain provisions under the Offences against the Person Act which criminalises consensual same-sex relationships, thus promoting discrimination against homosexuals. The State party should 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 2016: *The Committee also reiterates its concern that the State party continues to retain provisions under the Offences against the Person Act that criminalizes consensual same-sex relationships, thus promoting discrimination against homosexuals. It should decriminalize sexual relations between consenting adults of the same sex to bring its legislation in compliance with the Covenant and put an end to prejudices and social stigmatization of homosexuality.*



INTERNATIONAL JURISPRUDENCE & THE ANTI-BUGGERY LAW

There have been several judgements from national courts across the world which outline how laws similar to section 76 violate human rights law, particularly the rights to privacy, dignity, equality and non-discrimination and the freedom of expression.

Belize (2016) – *Caleb Orozco v The Attorney General of Belize* (Supreme Court Claim No. 668 of 2010)

The Supreme Court of Belize found that section 53 of the Belize Criminal Code was in violation of the rights to dignity, privacy, freedom of expression and the right to equality and read it down to not apply to consensual sexual activity between adults. The Chief Justice reasoned that the reference to God in the preamble to the Bill of Rights did not mean that Christian values were privileged. He further reasoned that the stigmatization of homosexuality caused by criminalization was a violation of the right to dignity and that the right to equality was breached as section 53 made a distinction between homosexuality and heterosexuality and therefore there was sexual orientation discrimination. The Supreme Court held that the prohibition on sex discrimination included sexual orientation discrimination relying on the ruling in *Toonen v Australia*.

India (2014) – *Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC 1

The Supreme Court of India overruled the decision of the New Delhi High Court which held that Section 377 of the Penal Code was in violation of the rights to equality and non-discrimination. The Supreme Court held that there was no discrimination because the section criminalized activity irrespective of who committed it. It ignored that the section disproportionately affected LGBT persons.

United States of America (2003) – *Lawrence v Texas* (539 U.S. 558 (2003))

The Supreme Court of the United States held that the sodomy law in Texas which criminalized same-sex sexual intimacy was in violation of the due process clause of the United States constitution by violating the right to privacy of homosexuals. The sodomy laws in Texas, and by extension the other 13 states in which they existed, were invalidated.

South Africa (1998) - *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15

The Constitutional Court of South Africa held that section 20A of the Sexual Offences Act which criminalizes sexual acts between men violates the right to dignity, equality before the law and privacy. The South African Constitution guarantees equality before the law and explicitly prohibits sexual orientation discrimination. The Court acknowledged that the criminalization of private consensual same-sex intimacy has a harmful impact on the lives of LGBT persons as it stigmatizes them and legitimizes their discrimination.

Northern Ireland (1981) – *Dudgeon v The United Kingdom* [1981] ECHR 5

The European Court of Human Rights found that sections 61 and 62 of the Offences Against the Person Act were in breach of article 8 of the European Convention of Human Rights which guarantees the right to respect for private life. These sections criminalized buggery and sexual activity between men. The Court reasoned that the criminalization of same-sex intimacy was not necessary in a free democratic society, even in the interest of public morality. The fact that many persons in society see homosexuality as morally repugnant does not provide a justification for criminalizing same, given the stigma and discrimination that criminalization perpetuates.



IMPACT OF CHARTER OF RIGHTS ON SECTION 76, 77 AND 79

RIGHT TO PRIVACY AND FAMILY LIFE AND PRIVACY OF THE HOME

The right to privacy and family life and privacy of the home is guaranteed under section 13(2)(j) of the Charter, namely the right of everyone to:

- i. protection from search of the person and property;
- ii. respect for and protection of private and family life, and privacy of the home; and
- iii. protection of privacy of other property and of communication;

ITS MEANING AND IMPLICATION FOR SECTION 76, 77 AND 79:

The “right to be left alone” should be seen not simply as a negative right to occupy a private sphere free from government intrusion, but as a right to get on with one’s life, expression of self and the ability to make fundamental decisions about intimate relationships without penalisation. Privacy must be regarded as suggesting at least some responsibility on the state to promote conditions in which personal self-realisation can take place.

These sections inherently stipulate that either the aggrieved party respects the law and refrains from engaging - even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his/her homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution. The very existence of such legislation continuously and directly affects one’s private life. The cases of *Dudgeon* and *Orozco* indicated that this violation of the right to privacy is not justified by dominant views of morality within a given society. Criminalization of private consensual same-sex intimacy is disproportionate because of its impact on the private lives of LGBT persons.

As far as sections 76, 77 and 79 impinges on a homosexual man’s right to engage in private and consensual sexual activities with another adult, they are in violation of the right to private and family life and privacy of the home.

THE RIGHT TO FREEDOM FROM DISCRIMINATION ON THE GROUND OF BEING MALE OR FEMALE

The Right to Freedom from discrimination on the ground of being male or female is protected under Section 13(2)(i)(i) of the Charter; this is recognised as the non-discrimination clause.

ITS MEANING AND IMPLICATION FOR SECTION 76, 77 AND 79:

The law should not differentiate between persons on the basis of them being male or female. The law can either be expressly unfair or unfair in its effect. It must be noted that the language of “being male or female” was specifically chosen over words like “sex” and “gender” to avoid the ruling in *Toonen* which would prohibit sexual orientation discrimination. This ruling was followed in *Orozco* as the Belize Constitution prohibits discrimination on the basis of sex.

It is unclear how this provision will be interpreted, whether it will be treated as meaning the same as sex discrimination or something completely different.

The implication is therefore that section 76 may not be seen as being discriminatory on the basis of being male or female because it is a general prohibition on penile penetration of the anus. Sections 77 & 79 however may be seen as discriminatory on the basis of being male or female because the provisions specifically speak to same-sex sexual activities involving men and not same-sex sexual activity between women.

THE RIGHT TO EQUALITY BEFORE THE LAW

The Right to Equality before the law is protected under section 13(2)(g) of the Charter

ITS MEANING AND IMPLICATION FOR SECTION 76, 77 AND 79:

The primary mission of the equality clause is the protection of a society in which all are secure in the knowledge that they are recognised at law as human beings equally deserving of concern, respect and consideration. The right to equal protection of the law requires that the laws themselves be equal.

The right to equality is broader than the right to non-discrimination as it is not limited to prohibiting only some forms of discrimination. It guarantees equality to all persons. As such, it can be reasonably argued that where laws discriminate on the basis of any status, including sexual orientation or gender identity, then these laws are in violation of section 13(3)(g). Therefore sections 76, 77 and 79 which are aimed at prohibiting sexual intimacy between gay men, violate the right to equality in that they criminalise consensual sexual intimacy between gay men.

IS THE GOVERNMENT JUSTIFIED IN KEEPING SECTIONS 76, 77 AND 79 ON THE BOOKS EVEN THOUGH THEY VIOLATE RIGHTS ENSHRINED IN THE CHARTER?

No right is absolute. Section 13(2)(a) of the Charter allows the individual's rights to be limited but only if the limitation is justifiable in a free and democratic society.

The ruling in *Dudgeon* notes that "some degree of regulation of male homosexual conduct can be justified in a free and democratic society if it is done to provide sufficient safeguards against exploitation and corruption of others, particularly those who are especially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence."

In assessing whether limitations on rights can be justified, the general test is whether the limitations pursue a legitimate aim and whether the limitations are proportionate to the aim being pursued. For the limitation to be valid, the legislative objective must be sufficiently important to justify limiting a fundamental right; the measures designed to meet the legislative objective must be rationally connected to it and the limitation of the right must be no more than is necessary to accomplish the objective. In some cases there is a fourth consideration and that is whether the law has met the overriding consideration of the need to strike an appropriate balance between the interests of the society and those of the individual and groups affected.

While there may be a legitimate reason for criminalizing some forms of same-sex sexual activity as noted in *Dudgeon*, it is doubtful that there is any discernable objective for the criminalisation of anal sexual intercourse between consenting adult males in private other than the enforcement of private moral opinions of a section of the community. Even if a legitimate aim is established, the aim is far outweighed by the harmful and prejudicial impact it has on gay men. Criminalization is therefore disproportionate. Sections 76, 77 and 79 of the OAPA violate rights in the Charter and cannot be justified.

EFFECT OF THE SAVINGS LAW CLAUSE ON SECTIONS 76, 77 AND 79

NATURE OF SAVINGS LAW CLAUSE

Section 13(12) of the Charter of Fundamental Rights provides that:

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;***
- b. obscene publications; or***
- c. offences regarding the life of the unborn,***

shall be held to be inconsistent with or in contravention of the provisions of this Chapter.

The general savings law clause provides immunity to the specific group of laws indicated above provided that they were in force before the new Charter was enacted in 2011. The fact that the old general savings law clause was removed and replaced with one that specifically immunizes which are subject to great controversy including the buggery law is quite telling. The intention of s. 13(12) is therefore plain. It serves to put beyond judicial review controversial laws criminalising buggery, abortion and pornography.

Section 13(12) creates exceptions to the rights regime which has undoubtedly given more ample protection to equality and privacy rights. This regime has been relevant to women and sexual minorities who historically faced discrimination treatment under colonial laws and were excluded from the protection of the independence constitution. This savings provision thereby neutralises the benefit of a bill of rights and has been rightly described as “profoundly anti-constitutional”.

EFFECT OF THE SAVINGS LAW CLAUSE

Sections 76, 77 and 79 though violating rights enshrined in the Charter without any reasonable justification cannot be challenged in the constitutional court. This therefore institutionalizes the discrimination of gay men and by extension LGBT persons as these laws are given constitutional legitimacy. Sections 76, 77 and 79 can only be amended through the legislature.

The savings law clause acts as barrier to LGBT Jamaicans being full and equal citizens. It is for this reason that the Human Rights Committee in reviewing Jamaica's compliance with the ICCPR in 2016, recommended that:

“Saving clauses in the Charter of Fundamental Rights and Freedoms relating to the Offences of the Persons Act and Sexual Offences Act should be removed where they obstruct the amendment of legislation that enhances the rights of women or any other group.”

CONCLUSION

Sections 76 – 79 of the Offences Against the Person Act, insofar as it criminalizes consensual intimacy between adults, and particularly between men, is in flagrant breach of the rights to equality before the law, non-discrimination on the basis of being male or female and privacy as guaranteed in the Jamaica Charter of Fundamental Rights and Freedoms. This argument is supported by jurisprudence across the world and within international human rights law. In fact, the Human Rights Committee has consistently recommended that Jamaica repeal of laws criminalizing consensual intercourse between adults, to be in conformity with the International Covenant on Civil and Political Rights. However, the Charter of Rights prevents individuals from challenging these laws by a virtue of a savings law clause in section 13(12). The Human Rights Committee has now called for the amendment of same as it act as a barrier to the full enjoyment of the rights of minorities.

From a regional perspective, Jamaica is not the most “homophobic place on earth” or in the Caribbean. We are in the middle of the pack, as we do not criminalize intimacy between two women, nor do we criminalize “cross-dressing”. Notwithstanding that, the statistical reality is that the criminalization of anal sex in its current form affects women, children and youth far more than it affects gay men. It is therefore incumbent on Parliament to rectify the situation to provide better protection for these populations. The retention of the buggery hurts the wider population more than it helps those who would not see any movement towards equality for LGBT Jamaicans.

APPENDIX

BUGGERY OFFENCES REPORTED FOR YEARS
2011 - 2015 BY GENDER AND PARISH

PARISH	2015				2014				2013				2012				2011			
	Child (0-17 Yrs)		Adult		Child (0-17 Yrs)		Adult		Child (0-17 Yrs)		Adult		Child (0-17 Yrs)		Adult		Child (0-17 Yrs)		Adult	
	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F	M	F
Kingston	2	0	0	1	2	2	1	2	6	2	1	0	7	2	1	1	2	2	0	0
St. Andrew	5	3	1	1	10	4	1	3	8	3	0	4	7	12	3	2	4	1	3	1
St. Catherine	5	6	0	2	6	6	4	1	7	4	1	6	7	5	0	2	0	0	0	1
St. James	0	2	0	2	3	2	0	3	2	5	0	1	1	0	0	2	0	1	0	0
Trelawny	0	2	0	0	1	1	0	0	0	0	0	2	1	0	0	0	1	0	0	0
Westmoreland	2	4	0	0	3	0	0	1	0	2	1	1	1	0	0	0	0	1	1	0
Hanover	0	1	0	0	0	0	0	0	1	0	0	0	1	1	0	0	0	0	0	1
St. Mary	1	1	0	0	2	2	0	0	1	2	0	1	1	3	1	0	0	0	0	0
St. Ann	1	1	0	1	2	2	0	1	1	2	0	2	1	4	0	0	0	1	0	0
Portland	1	0	0	0	5	0	0	0	0	2	0	0	1	0	1	0	0	1	1	0
Manchester	2	2	0	0	6	2	2	1	1	1	0	1	3	1	0	0	0	0	0	0
Clarendon	5	1	0	0	5	3	0	2	2	7	1	1	9	1	2	0	1	0	1	0
St. Elizabeth	0	0	0	1	0	1	0	1	0	0	0	0	0	4	0	0	0	0	0	0
St. Thomas	2	1	0	0	4	1	0	0	0	2	0	0	1	0	0	0	0	0	0	0
Grand Total	26	24	1	8	49	26	8	15	29	32	4	19	41	33	8	7	8	7	6	3

PERSONS ARRESTED FOR BUGGERY FOR YEARS 2011 TO 2015 BY PARISH

	2011		2012		2013		2014		2015	
	Child	Adult	Child	Adult	Child	Adult	Child	Adult	Child	Adult
Kingston	0	0	2	2	2	5	2	2	0	1
St. Andrew	0	1	5	4	2	2	2	6	1	4
St. Catherine	1	0	1	9	6	2	3	7	2	10
St. James	0	0	0	0	3	1	4	6	0	2
Trelawny	0	0	1	0	2	0	0	1	2	2
Westmoreland	0	0	0	0	1	2	0	2	1	3
Hanover	0	0	0	1	0	1	0	0	0	2
St. Mary	0	0	0	3	0	1	1	0	2	2
St. Ann	1	1	0	3	1	3	3	2	0	1
Portland	0	2	1	0	0	0	5	2	1	0
Manchester	0	0	0	3	1	2	3	1	0	1
Clarendon	0	0	1	7	1	2	2	6	1	4
St. Elizabeth	0	0	0	1	0	1	1	0	0	1
St. Thomas	0	0	0	0	3	2	2	3	1	2
Total	2	4	11	33	22	24	28	38	11	35

PROSECUTION OF BUGGERY FOR THE YEARS 2011-2015

RURAL PARISHES

NO.	NAME OF ACCUSED	PARISH	COM-PLAINANT	COM-PLAINANT GENDER M/F	AC-CUSED MINOR/ADULT	COM-PLAINANT MINOR/ADULT	SENTENCE
1	DM	Saint Ann	K M	Female	Adult	Minor	Not guilty, discharged
2	NT	Saint Ann	ST	Female	Adult	Minor	Guilty 10 years imprisonment
3	AM, JB & KC	Saint Ann	JT	Male			Not guilty, discharged
4	KB	Saint Ann	BV	N/A	Adult	N/A	Guilty 5 years imprisonment
5	MK	Saint Ann	NW	Male	Adult	Minor	Guilty 3 years imprisonment
6	JG	Saint Ann	NC	Female	Adult	Adult	Guilty 15 years imprisonment
7	JV	Saint Ann	JD	N/A	Adult	N/A	Nolle prosequi entered
8	RC	Westmoreland	NB	Male	Adult	Minor	Not guilty, discharged
9	LB	Westmoreland	JB	Female	Adult	Adult	Not guilty, discharged
10	MJ	Westmoreland	SL	Female	Adult	Minor	Not guilty, discharged
11	WD	Saint Elizabeth	AB	Female	Adult	Adult	Not guilty, discharged
12	CQ	Saint Elizabeth	LH	M	Adult	Adult	Not guilty, discharged
13	AJ	Saint Elizabeth	SJ	Male	Adult	Minor	Not guilty, discharged
14	DW	Saint Mary	RN	Male	Adult	Minor	Guilty 3 years imprisonment
15	AL	Saint Mary	TJ	Male	Adult	Adult	Guilty 10 years imprisonment
16	LD	Saint Mary	RH	Female	Adult	Adult	Not guilty, discharged
17	TO	Saint Mary	RS	Male	Adult	Minor	Guilty 2 years imprisonment
18	RH	Saint Mary	SH	Male	Adult	Minor	Guilty 10 years imprisonment
19	RW	Clarendon	DM	Male	Minor	Minor	Not guilty, discharged

NO.	NAME OF ACCUSED	PARISH	COM-PLAINANT	COM-PLAINANT GENDER M/F	AC-CUSED MINOR/ADULT	COM-PLAINANT MINOR/ADULT	SENTENCE
20	DS	Clarendon	DM	Male	Minor	Minor	Guilty Probation Order 3 years
21	OM	Clarendon	JT JT	Female Female	Adult Adult	Minor Minor	Not guilty, discharged
22	JB	Clarendon	BS	Male	Adult	Minor	Guilty 3 years imprisonment
23	LR	Clarendon	TR	Female	Adult	Minor	Conditional Nolle Prosequi entered
24	AJ	Clarendon	RT	Male	Minor	Minor	Guilty Probation Order 3 years
25	CG	Clarendon	TR	Male	Minor	Minor	Guilty 3 years imprisonment at hard labour
26	AD	Clarendon	SY	Female	Adult	Minor	Not guilty, discharged
27	JB	Clarendon	SA	Female	Adult	Minor	Guilty 12 months imprisonment at hard labour, suspended for 2 years
28	KP	Clarendon	RP	Male	Adult	Minor	Guilty 12 months imprisonment
29	EW	Clarendon	AW	Female	Adult	Minor	Not guilty, discharged
30	WD	Clarendon	TR	Female	Minor	Minor	Guilty Probation Order 3 years
31	CB	Clarendon	RW	Male	Adult	Minor	Guilty 4 years imprisonment
32	PC	Hanover	JC	Female	Adult	Minor	Not guilty, discharged
33	WG	Manchester	PG	Female	Adult	Adult	Not guilty, discharged
34	DR	Manchester	TW	Female	Adult	Minor	Guilty 9 years imprisonment at hard labour
35	HS	Manchester	BS	Male	Adult	Adult	Not guilty, discharged
36	SB	Saint Thomas	TE	Male	Minor	Minor	Guilty 3 years Probation Order Release into custody
37	BH	Portland	MP	Female	Adult	Minor	Not guilty, discharged
38	KB	Portland	DD	Male	Minor	Minor	Guilty 3 years imprisonment

NO.	NAME OF ACCUSED	PARISH	COM-PLAINANT	COM-PLAINANT GENDER M/F	AC-CUSED MINOR/ADULT	COM-PLAINANT MINOR/ADULT	SENTENCE
39	CW	Portland	TM	Male	Adult	Minor	Guardianship
40	RW	Saint Catherine	DJ	Male	Adult	Minor	Guilty 6 years imprisonment
41	OB	Saint Catherine	CW	Female	Adult	Adult	Guilty 7 years imprisonment
42	JB	Saint Catherine	ST	Female	Minor	Minor	Guilty Probation Order 2 years
43	EC	Saint Catherine	WR	Male	Adult	Minor	Guilty 3 years imprisonment at hard labour
44	ML	Saint Catherine	OG	Male	Adult	Minor	Discharged
45	DL	Saint Catherine	PL	Male	Adult	Minor	Guilty 3 years imprisonment
46	MS	Saint Catherine	OJ	Male	Adult	Minor	Guilty Probation Order 3 years
47	KM	Saint Catherine	RF	Male	Adult	Adult	Nolle Prosequi not entered
48	RR	Saint Catherine	RS	Male	Adult	Minor	Guilty 3 years imprisonment
49	EW	Saint Catherine	NF	Female	Adult	Adult	Guilty 15 years imprisonment to serve 10 years before eligible for parole
50	RM	Saint Catherine	TC	Male	Adult	Minor	Guilty 7 years imprisonment
51	KM	Saint Catherine	NM	Female	Adult	Minor	Guilty 4 years imprisonment
52	HM	Saint Catherine	CW	Female	Adult	Minor	Nolle Prosequi entered
53	WT	Saint Catherine	RT	Male	Adult		Not guilty, discharged
54	PB	Saint Catherine	AH	Male	Adult	Adult	Conditional Nolle Prosequi entered
55	AB	Saint Catherine	KW	Male	Adult	Minor	Correction Order
56	AD	Saint Catherine	AD	Male	Adult	Adult	Guilty 8 years imprisonment

PROSECUTION OF BUGGERY MATTERS FOR THE YEAR 2011

KINGSTON & ST ANDREW

ACCUSED	PARISH	COM-PLAINANT	COM-PLAINANT GENDER (M/F)	ACCUSED MINOR/ADULT	COM-PLAINANT MINOR/ADULT	VERDICT
A.O.A	KINGSTON	K.M	FEMALE	ADULT (24 YRS)	ADULT (21 YRS)	NOT GUILTY
A.H	ST. ANDREW	S.H	FEMALE	ADULT (59 YRS)	MINOR (7 YRS)	NOT GUILTY
R. A	ST. ANDREW	L.P	FEMALE	ADULT (19 YRS)	MINOR (13 YRS)	NOT GUILTY
T. R	KINGSTON	O.B	MALE	MINOR (13 YRS)	MINOR (12 YRS)	GUILTY 3 YEARS PROBATION ORDER AND PSYCHIATRIC TREATMENT

PROSECUTION OF BUGGERY MATTERS FOR THE YEAR 2012

KINGSTON & ST ANDREW

ACCUSED	PARISH	COM-PLAINANT	COM-PLAINANT GENDER (M/F)	ACCUSED MINOR/ADULT	COM-PLAINANT MINOR/ADULT	VERDICT
C.A	KINGSTON	D.B	MALE	ADULT (18 YRS)	MINOR (11 YRS)	GUILTY 3 YEARS PROBATION ORDER
D.F	KINGSTON	D.P	MALE	MINOR (16 YRS)	MINOR (12 YRS)	GUILTY 2 YEARS PROBATION ORDER
D.F	KINGSTON	A.M	MALE	MINOR (16 YRS)	MINOR (9 YRS)	NOT GUILTY
H.M	ST. ANDREW	O.B	MALE	ADULT (38 YRS)	MINOR (13 YRS)	NOT GUILTY

PROSECUTION OF BUGGERY MATTERS FOR THE YEAR 2013

KINGSTON & ST ANDREW

ACCUSED	PARISH	COM-PLAINANT	COM-PLAINANT GENDER (M/F)	ACCUSED MINOR/ADULT	COM-PLAINANT MINOR/ADULT	VERDICT
R.S	KINGSTON	O.P	MALE	MINOR (13 YRS)	MINOR (15 YRS)	GUILTY 3 YEARS PROBATION ORDER
A.S & H.M	KINGSTON	S.C	FEMALE	ADULT (32 YRS) ADULT (33 YRS)	ADULT (29 YRS)	NOT GUILTY
C.G	KINGSTON	M.D	MALE	ADULT (40 YRS)	MINOR (13 YRS)	GUILTY 15 YEARS IMPRISONMENT

PROSECUTION OF BUGGERY MATTERS FOR THE YEAR 2014

KINGSTON & ST ANDREW

ACCUSED	PARISH	COM-PLAINANT	COM-PLAINANT GENDER (M/F)	ACCUSED MINOR/ADULT	COM-PLAINANT MINOR/ADULT	VERDICT
J.S	ST. ANDREW	C.W	MALE	ADULT (18 YRS)	MINOR (17 YRS)	ADMONISHED & DISCHARGED
O.J	KINGSTON	A.M	MALE	MINOR (15 YRS)	MINOR (4 YRS)	NO EVIDENCE OFFERED
J.B	KINGSTON	M.A	MALE	MINOR (15 YRS)	MINOR (10 YRS)	GUILTY 3 YEARS PROBATION ORDER
O.J	ST. ANDREW	T.P	MALE	ADULT (40 YRS)	MINOR (21 YRS)	ACCUSED DIED

PROSECUTION OF BUGGERY MATTERS FOR THE YEAR 2014

KINGSTON & ST ANDREW

ACCUSED	PARISH	COM- PLAINANT	COM- PLAINANT GENDER (M/F)	ACCUSED MINOR/ ADULT	COM- PLAINANT MINOR/ ADULT	VERDICT
E.L	ST. ANDREW	T.L	FEMALE	ADULT (54YRS)	MINOR (15YRS)	NOLLE PROSEQUI ENTERED ON THE AVAIABILITY OF THE WITNESS T.L
S.S	ST. ANDREW	S.W	FEMALE	MINOR (16YRS)	MINOR (16YRS)	GUILTY · COUNT 1 - 3 YEARS IMPRISONMENT · COUNT 2- 1 YEAR IMPRISONMENT · COUNT 3 - 3 YEARS IMPRISONMENT SENTENCES TO RUN CONCURRENTLY
J.W	KINGSTON	M.M	FEMALE	ADULT (28YRS)	MINOR (11YRS)	GUILTY 25 YEARS IMPRISONMENT
L.W	KINGSTON	O.M	MALE	ADULT (45 YRS)	MINOR (12YRS)	NOLLE PROSEQUI ENTERED ON THE FITNESS OF THE COMPLAINANT O.M TO GIVE EVIDENCE
P.D	ST. ANDREW	L.B	MALE	MINOR (17YRS)	MINOR (5YRS)	NOLLE PROSEQUI ENTERED ON THE AVAILIBLY OF L.B TO GIVE EVIDENCE
R.B	ST. ANDREW	H.J	MALE	MINOR (15YRS)	MINOR (10YRS)	DISCHARGED
L.B	KINGSTON	T.L	FEMALE	ADULT 38YRS)	MINOR (7YRS)	GUILTY · COUNT 1 - 12YEARS IMPRISONMENT · COUNT 2 - 6 YEARS IMPRISONMENT SENTENCES TO RUN CONCURRENTLY

ACCUSED	PARISH	COM-PLAINANT	COM-PLAINANT GENDER (M/F)	ACCUSED MINOR/ADULT	COM-PLAINANT MINOR/ADULT	VERDICT
T.B	KINGSTON	G.W	MALE	MINOR (14YRS)	MINOR (4YRS)	GUILTY 2 YEARS PROBATION ORDERMASTER T.B TO RECIEVE COUNSELLING MUST BE EXCEMPTED FROM REGISTRATION AS A SEX OFFENDER
M.J	ST. ANDREW	P.P	FEMALE	MINOR (13YRS)	MINOR (13YRS)	DISCHARGED
J.A	KINGSTON	S.W	FEMALE	MINOR (17YRS)	MINOR (12YRS)	GUILTY · COUNT 1: 3 YEARS PROBATION ORDER · COUNT 2: 3 YEARS AT HARD LABOUR
B.W	KINGSTON	R.S	FEMALE	MINOR (14YRS)	MINOR (12 YRS)	MATTER REMITTED TO FAMILY COURT

