

DIVERSIFYING LGBT RIGHTS ADVOCACY

A LEGAL REVIEW



by

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BACKGROUND

J-FLAG is the foremost human rights and social justice organisation in Jamaica which advocates for the rights of lesbian, gay, bisexual and transgender (LGBT) people. In trying to build a Jamaican society that respects and protects the rights of everyone, J-FLAG has been, and continues to be committed to promoting social change, empowering the LGBT community, and building tolerance for, and acceptance of, LGBT people. Despite their efforts, general antipathy towards LGBT persons subsists¹. The Government of Jamaica (GoJ), however, has consistently maintained that “it is committed to the equal and fair treatment of its citizens [and that] it is opposed to discrimination or violence against persons whatever their sexual orientation.”² A majority of Jamaicans has acknowledged that LGBT persons are treated unfairly by the state; research shows that 82 per cent of Jamaicans said they believed homosexual men were not treated fairly by either the legal system or the police in Jamaica, with 79 per cent believing the same of lesbian women³. However, many Jamaicans have no interest in shifting that status quo; with 68 per cent saying gay men should not have the same rights as others and 26 per cent saying they should and 65 per cent saying lesbian women should not have the same

¹Ian Boxill, *National Survey of Attitudes and Perceptions of Jamaicans Towards Same Sex Relationships* (March 2012)

²Inter-American Commission for Human Rights, *Report on the Human Rights Situation in Jamaica* (Organization of American States 2012) 265

³Majority Of Jamaicans Resolute On Keeping Buggery Law Intact’ *The Gleaner* (Jamaica, 6 October 2014) <<http://jamaica-gleaner.com/article/lead-stories/20141006/majority-jamaicans-resolute-keeping-buggery-law-intact>>

rights as other people under the Jamaican legal system, and 30 per cent saying they should⁴.

Sections 76 – 79 of the Offences Against the Person Act, 1864 (more popularly known as the ‘buggery law’) have been at the core of legislative advocacy that seeks to address the ways in which Jamaican law discriminates against lesbian, gay, bisexual and transgender (LGBT) persons. The push for the repeal of the ‘buggery law’ has been met with great opposition. Groups such as Lawyers’ Christian Fellowship, Jamaica CAUSE and Love March Movement have consistently and strategically campaigned and rallied in their numbers to sound out their support for the retention of the ‘buggery law’.

Consequently, the LGBT rights movement in Jamaica has been hindered to a large degree by the framing of LGBT rights as being squarely or primarily about anal intercourse between males and sexual intimacy between males. This has also contributed to the invisibility of rights abuses experienced by LBT women and transgender men. Furthermore, attempts to improve the human rights situation of LGBT persons are continually misrepresented as being a part of a “gay agenda” that is primarily interested in getting rid of the ‘buggery law’.

From a legal standpoint, the ‘buggery law’ is but one feature of a system of laws that has been crafted based on heteronormative and cisnormative values which privilege the experiences of heterosexual and cisgender persons and excludes those of LGBT persons⁵. With this in mind, Jamaican LGBT rights activists will have to assess the value of embroiling themselves in a cultural warfare with the aforementioned religious groups over the ‘buggery law’ and whether it advances the cause for equal rights. Based on our realities, diversification is not merely an option but an imperative. And so it behooves us, as advocates, to conduct a wholesome research exercise into how deeply Jamaican laws reflect heteronormativity, cisnormativity, homophobia and transphobia. This will aid in determining how best to develop, frame and articulate our points of advocacy to the benefit of the community we serve.

⁴Ibid

⁵Heteronormativity refers to a social, cultural and political attitude whereby heterosexual persons are considered as the ideal citizens and policies, laws and other areas of social life are crafted around their experiences. Heteronormativity routinely excludes lesbian, gay and bisexual persons. Cisnormativity bears the same definition as it relates to cisgender persons – persons who associate with the sex they were assigned at birth. Cisnormativity routinely excludes trans persons.

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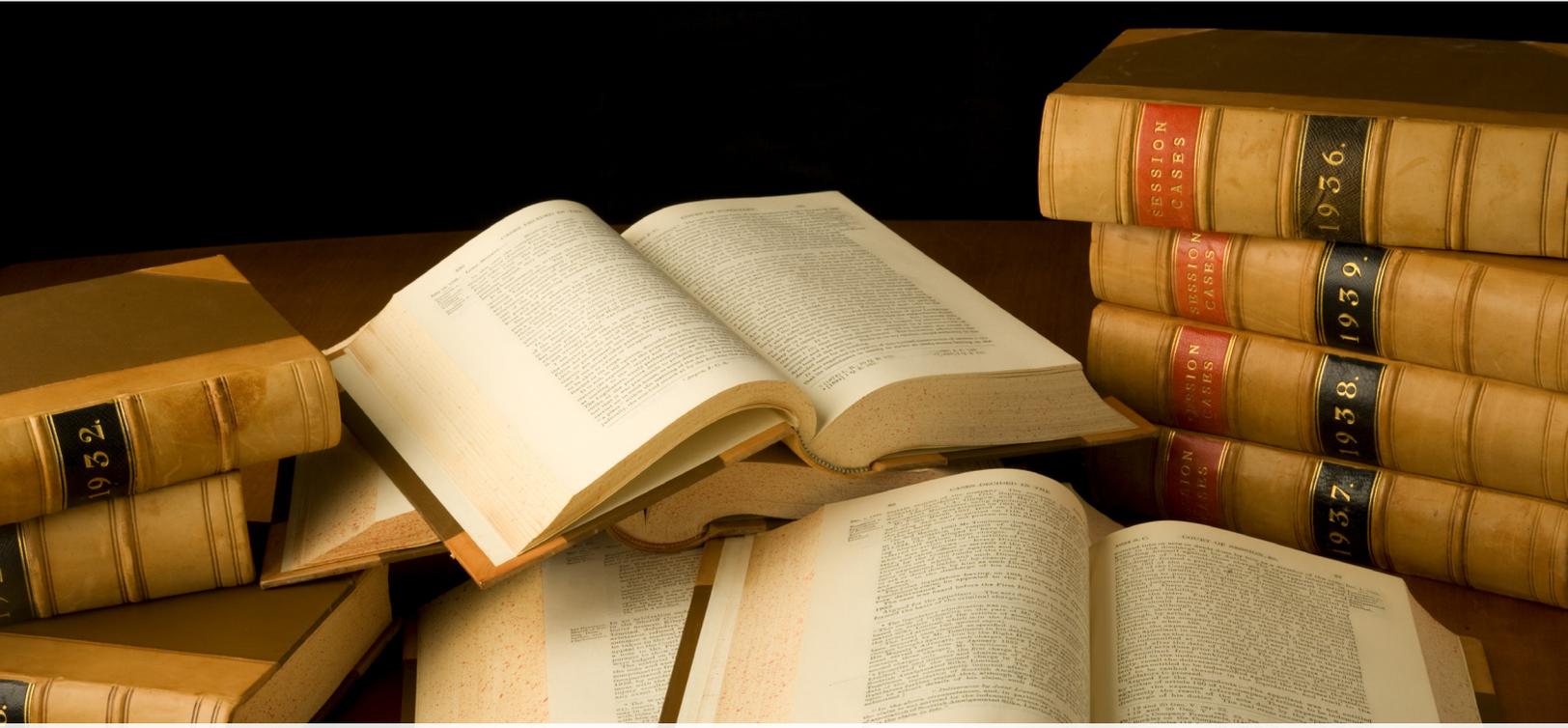


INTRODUCTION

The aim of the research is to situate the LGBT person within the Jamaican legal framework, determining how well that person is protected and identifying what gaps exist within the law that would make that a member of the LGBT community a ‘second-class citizen’. To achieve this, the researchers will first identify the rights guaranteed to Jamaica citizens, and the general limits placed thereon through an analysis of the 2011 Jamaica Charter of Fundamental Rights and Freedoms. The researchers will also analyze related case law to demarcate the scope of the application of these rights.

The paper will then investigate various areas of law and discuss the ways in which legislation and/or case law in that area limit the rights of or exclude altogether LGBT persons, and particularly lesbian, bisexual and trans (LBT) women whose issues have been invisibilised. The purpose of this is to make a determination as to whether LGBT persons have greater limits placed on their rights. This will be the subject of a discussion that will take place after we have analyzed laws related to, among other things, equality and non-discrimination, sexual offences, family law, provocation, trusts and citizenship. The discussion will seek to enumerate the limitations placed on LGBT persons specifically and illustrate what that means in their everyday lives.

After having that discussion, the conclusion will seek to outline the possible avenues for addressing the limitations identified, highlighting those that are already being pursued by advocacy groups. Finally, recommendations will be made to advocacy groups on how to diversify their points of advocacy on LGBT rights so as to fully reflect the legal situation of LGBT persons and articulate the various ways in which their rights are being and could be violated and, in some cases, upheld. The hope is that advocacy groups will be sensitized, better equipped, and more unified in their approach to LGBT rights advocacy, capturing the varied ways in which LGBT rights are being flouted and adequately representing the particular limitations faced by LBT women and trans men.



METHODOLOGY

The researchers employed the legal methods of review for this paper. The 2011 Charter of Fundamental Rights and Freedoms was analyzed with a view to enumerating the rights guaranteed. In order to consider the limits placed on rights within various areas of law, the researchers used legislation as entry points for those areas. There was a keyword search of Jamaican legislation that focused on whether the legislation considered “spouses”, whether the legislation was gender specific in its iteration of the law and whether it responded in any particular way to criminal conviction, or prescribed it for certain sexual activities. Where the legislation was not clear, clarity was sought throughout the common law. The common law was also investigated for the ways in which considered spouses, gender or responded to criminal behavior. Textbooks were also consulted for guidance.



HUMAN RIGHTS

I. RIGHTS OF THE JAMAICAN CITIZEN

To begin our discussion on the rights of the Jamaican citizen, we start at the place of the 2011 Charter of Fundamental Rights and Freedoms. This replaced Chapter III of the 1962 Jamaica Constitution and established the modern slate of recognized rights and the limits that have been placed thereon. Section 13(3) of the Charter lists the full gamut of rights recognized and they are the rights to:

- I. Life, liberty and security of the person and not to be deprived thereof;
- II. Freedom of thought, conscience, belief and observance of political doctrines;
- III. Freedom of expression;
- IV. Seek, receive, distribute or disseminate information, opinions and ideas through any media;
- V. Freedom of peaceful assembly and association;
- VI. Freedom of movement (within and throughout Jamaica);
- VII. Equality before the law;

- VIII. Equitable and humane treatment by any public authority in the exercise of any function;
- IX. Freedom from discrimination on the ground of being male or female, race, place of origin, social class, colour, religion or political opinions;
- X. Protection from search of the person and property; respect for and protection of private and family life, and privacy of the home; and protection of privacy of other property and of communication;
- XI. (Of Children) such measures of protection as are required by virtue of the status of being a minor or as part of the family, society and the State and publicly funded tuition in a public educational institution at the pre-primary and primary levels;
- XII. Enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage;
- XIII. (Upon qualification) be registered as an elector for elections to the House of Representatives, to be so registered; and of who is so registered, to vote in free and fair elections;
- XIV. Be granted a passport and not to be denied or deprived thereof;
- XV. Protection from torture, or inhuman or degrading punishment;
- XVI. Freedom of the person;
- XVII. The protection of property rights;
- XVIII. Due process; and
- XIX. Freedom of religion.

These recognized rights are afforded to all persons and section 13(1)(c) places a responsibility on all Jamaican citizens to respect the rights of others while in section 13(1)(a), the State acknowledges its obligations to promote universal respect and observance of human rights. Sections 13(4) and (5) create practical implications for these declarations by making the chapter binding upon both the government and its officials as well as ordinary citizens in particular circumstances⁶.

⁶ See *Maurice Tomlinson v TVJ and others* [2013] JMFC Full 5, 48-54 and 98 where Paulette Williams J acknowledged the application of rights but decided that it could not apply in a manner to make one person's right greater than the other.

These rights however are far from absolute and are limited within the Charter expressly and by the common law and statute. The rights to freedom of the person, protection of property, due process and religion have sections 14, 15, 16 and 17 of the Charter, respectively, dedicated to outlining the extent to which each right is limited. Section 13(12) saves specific laws from being challenged in the Courts even though said laws violate the rights to equality before the law, to non-discrimination and to privacy. These are laws related to sexual offences⁷, obscene publications and offences related to the life of the unborn child (primarily, abortion). Finally, section 18(1) saves laws which give benefits only to married and unmarried heterosexual unions, excluding all other unions and section 18(2) prohibits the contracting of or legal recognition of unions other than heterosexual unions. These also limit the rights to equality, non-discrimination and privacy and family life.

Outside of these specific limitations, there is a general limitation placed on rights by virtue of section 13(2) which allows the State to abridge, abrogate or infringe the rights set out where it is “demonstrably justifiable to do so in a free and democratic society”. These words mean the Government must show that there was a public good they were trying to achieve and that in limiting the rights, they only did what was necessary to achieve said public good⁸. It is within this general limitation on the rights of the individual that legislation and common law are able to abridge rights as they strike a balance between the rights of the individual and the interests of the community. However, these limitations, both within and without the Charter, have created a situation in which LGBT persons have greater limitations placed on their rights. These limitations will be investigated in depth so as to properly situate the LGBT person within Jamaican law.

There are 19 rights enumerated in the Charter for Jamaican citizens. S. 13(12) saves certain laws from challenge and section 18 recognizes only heterosexual relationships.

⁷Please note that Sexual Offences Act which came into force on June 30, 2011 for the most part is not saved by the Charter of Fundamental Rights and Freedoms as it came into operation after the Charter came into force on April 8, 2011.

⁸*De Freitas v Permanent Secretary of Ministry of Agriculture & Fisheries* [1998] 3 LRC 62; *Huang v Secretary of State* [2007] UKHL 11 – These cases set out what is the legal test for whether a limitation is “demonstrably justifiable in a free and democratic society”. The test is (i) whether there is a public good trying to be achieved, (ii) whether the limitation being proposed is rationally connected to the public good, (iii) whether the limitation is no more than is necessary to achieve the public good and (iv) whether the limitation will particularly affect a specific group of persons more.



II. LIMITS WITHIN STATUTE AND COMMON LAW

THE POSITION OF TRANS PERSONS

As a precursor to the discussion of how varied legislative provisions and common law principles treat with LGBT persons, we have to establish how the law recognizes trans persons. There is no case law, save for *McEwan and Others v Attorney General of Guyana*⁹, from Jamaica or the Caribbean that deals with the status of trans persons. The common law that is applicable in Jamaica, subject to an unlikely departure, is found in the UK case of *Corbett v Corbett*¹⁰ which determines the sex of persons for the purposes of marriage. Here, Omrod J determined that one's sex was determined by biological factors exclusively for the purposes of marriage and as such a trans woman, Ashley, was determined to have been male at the time of her marriage, making it void as a same-sex marriage. This 1970 ruling has been upheld in the 2001 UK case of *Bellinger v Bellinger*¹¹ however, the Court of Appeal called for Parliament to intervene to address the situation of trans persons, having acknowledged that psychological factors do impact on the sex of a person.

⁹ 6 September 2013 High Court, Guyana - This case concerns the constitutionality of the vagrancy law which prohibits being a man and wearing female attire in public or being a woman and wearing male attire "for an improper purpose". The judge made it clear that the law does not prohibit "transgender dressing" per se but rather doing so for an improper purpose.

¹⁰ [1970] 2 All E.R. 33

¹¹ [2001] EWCA Civ 1140

In the case of *R v Tan and Others*¹² the English Court of Appeal used Ormrod J’s approach to sex determination to determine that a trans woman, Gloria, who was engaged in sex work was a man for the purposes of the law and could be convicted as a man living off the earnings of prostitution which subjected Gloria to further prosecution than her co-accused Tan. In this decision, Parker J opines that “common sense and the desirability of certainty and consistency” required that Ormrod J’s ruling be applied to other areas of law. This suggests that at law generally, a trans woman is to be treated as if she were male and a trans man as if he were female. However, these decisions are not binding upon Jamaican courts, though highly persuasive. There has since been the case of *Goodwin v UK*¹³ where the European Court of Human Rights found that the laws related to the status of trans persons in the United Kingdom were in breach of article 8 on the right to private life and article 12 on the right of men and women to marry of the European Convention of Human Rights. The European Court stated:

The Court is not persuaded that at the date of this case it can still be assumed that [the terms “man” and “woman”] must refer to a determination of gender by purely biological criteria (as held by Ormrod J. in the case of *Corbett v. Corbett*, paragraph 21 above). There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender.

¹² [1983] QBD 1053

¹³ 35 EHRR 18 Miss Christine Goodwin was assigned male at birth in 1937, but she lived as a woman since 1984. In 1990 she had a gender reassignment surgery. Long before the surgery she had been married and had been a ‘father’ of four children. She argued that she was harassed and humiliated in her workplace by her colleagues. However, as she was deemed not to be a woman, her action for sex discrimination at work was unsuccessful. She was also denied a pension at age 60, the age of entitlement for women in the UK, and thus had to continue paying National Insurance until the age of 65.

It is noteworthy that the case focuses on the non-recognition of post operative trans persons, which may not be as impactful in Jamaica where many trans persons either do not seem to have the means or desire to proceed with gender reassignment surgery. For Jamaica, where there is no legislation recognizing trans persons and the law that stands to be applied on sex determination being Omrod J's biological test, said legislation is needed for the protection of the rights of trans persons. There are many examples of said legislation in the Commonwealth. In Australia, the Births, Deaths and Marriages Registration Acts allow for the registration of change of sex which changes the sex of an individual on their Birth Certificate as well as requires the recognition of that change of sex in the application of all other laws. The problem with these Acts is that they require the trans person to have gone through the surgery for their change to be recognized.

The UK Gender Recognition Act 2004 is not so limited, however one must apply to a panel and prove that they have been diagnosed with "gender dysphoria" and that they have lived in the "acquired gender" for two years immediately preceding the application and that they intend to do so until death. This application must be supported by reports from either two registered medical practitioners, one of which practises in the field of gender dysphoria or one chartered psychologist and one medical practitioner. The South African Alteration of Sex Description and Sex Status Act 2003 adopts a similar approach but makes a distinction between persons who have undergone surgical or medical treatment and those whose sexual characteristic - not limited to genitalia - have been altered by "by evolution through natural development resulting in gender reassignment". In both cases there needs to be a report by a medical practitioner, though the nature of the report will be different. Andrew Sharpe's assessment of the UK regime is apt; it reads:

“The Gender Recognition Act is clearly a positive enactment in a number of respects. Most obviously it, at least ostensibly, or at the level of legal form, dispenses with any requirement to undergo surgery of any kind, or indeed take prescribed hormones. This is positive in the sense that not all transgender people feel the need to take such measures in order to feel that they inhabit the correct gendered body. It is also positive in the sense that some individuals

who would like to take such measures are unable to do so due to financial reasons and/or medical contraindications to undergoing surgery.

[However], the Act has been objected to for two principal reasons. First, a successful application for a Gender Recognition Certificate requires an applicant who is pre-operative to demonstrate gender dysphoria. In this regard the legislation furthers a mental illness model for comprehending transgender embodiment. Second, in addition to pathologising transgender people, the Act requires married transgender persons to divorce in order to gain a full Gender Recognition Certificate.

[Also], the law requires permanent, even if apparently non-surgical, crossings. In this regard, the Act clearly aims to reproduce a binary gender order.”¹⁴

Many of the problems within the Gender Recognition Act are avoided within the Malta Gender Identity, Gender Expression and Gender Characteristics Act 2015. Section 3 states that all persons being citizens of Malta have the right to recognition of their gender identity along with the free development of their person according to their gender identity. Section 4 affords all Maltese citizens the right to request the Director to change the recorded gender and/or first name in order to reflect that person’s self-determined gender identity. This application does not require medical evidence and relies on a declaratory public deed made by the applicant affirming their gender identity does not correspond with the sex assigned at birth.



¹⁴ Andrew N. Sharpe, ‘Endless Sex: The Gender Recognition Act 2004 and the Persistence of a Legal Category’ (2007) 15 *Feminist Legal Studies* 57, 69-71

For many trans persons in Jamaica, the lack of legal recognition of their status is only a small part of their struggle. Jamaica AIDS Support for Life, a Non-Governmental Organization (NGO) which provides HIV and related services to, among others, trans persons, captures their experience as follows:

“Medical doctors upon completion of their training do not possess the skills to effectively confront the peculiarities of persons who are gender dysphoric, who identify as a gender other than their birth-assigned sex (assuming that can be determined), who wish to transition to the sex or gender they feel is right for them, or who may have already begun the process. For most health professionals, transgender identity is a brand new concept. This means that transgender persons are very hesitant to participate with formal institutions that are simply not equipped to treat them effectively. Transgender identity is therefore a severe hindrance to full participation in Jamaican society, and has serious consequences on the quality of citizenship of persons who identify as such.

While Jamaica’s legislative environment does not formally outlaw transgender identity, trans-vestism, or sex change procedures, there are no policies to deal with any aspect of the transgender experience such as change of name, stigma as a result of gender non-conformity, or access to medically-assisted gender reassignment. Interactions with the formal system and the results of these engagements are therefore unpredictable.”¹⁵

In a Shadow Report by coalition of international and Jamaican based organizations advocating for the rights of LGBT persons which was submitted to the Human Rights Committee in 2011, the experiences of trans persons were highlighted as follow:

“Transgender persons are afforded no legal recognition of their preferred gender, which marginalizes them from the rest of society. Gender discrimination also disproportionately affects transgender individuals. In December 2010, the

¹⁵ Jamaica AIDS Support for Life, *Issues Affecting Transgender People in Jamaica* (JASL, 2012) 4 accessed at <<http://jasforlife.org/html/wp-content/uploads/2012/01/Issues-Transgender.pdf>>

police discovered the dead body of a transgender individual hidden behind a building. The victim was chopped to death. Recently, a group of men raped a thirteen-year-old transgender individual in Kingston. News coverage of these incidents did not reveal that any police investigation into these deaths had occurred, and Jamaican activists are not aware of any action taken to seek accountability for these murders of transgender individuals.

Additionally, due to widespread discrimination, Jamaican transgender people have a difficult time finding professions and are forced into either sex work or seek out aesthetic professions, finding work such as hairdressers or nail technicians.”¹⁶

In 2013, there was the now infamous murder of Dwayne Jones at the hands of a mob who attacked the teen upon realizing that Dwayne was biologically male though dressed in “female attire”.¹⁷ Following a field study conducted by the Human Rights Watch in Jamaica, they made the following conclusions:

“[P]olice protection remains inadequate, and is among several factors that contribute to the specific vulnerability of LGBT people. Families and neighbors often drive LGBT people from their homes and communities; landlords refuse to rent to LGBT persons, denying them housing; health providers stigmatize them when they seek services; and employers arbitrarily fire them. Many LGBT Jamaicans become effectively homeless, forced to flee their homes and sometimes the country, and denied full citizenship rights. Among the most vulnerable are dozens of gay and transgender Jamaican children and young adults who have been rejected by their families and are living on the streets, where they face violence and harassment by police and the public.”¹⁸

Trans persons are not recognized in law by virtue of the rulings in Corbett and R v Tan. Trans recognition legislation is needed.

¹⁶ Human Rights Violations of Lesbian, Gay, Bisexual, and Transgender (LGBT) people in Jamaica: A Shadow Report Submitted for consideration at the 103rd Session of the Human Rights Committee (2011) 4, 14, 15

¹⁷ Human Rights Watch, Not Safe At Home: Violence and Discrimination against LGBT People in Jamaica (Human Rights Watch, 2014) accessed at <<https://www.hrw.org/report/2014/10/21/not-safe-home/violence-and-discrimination-against-lgbt-people-jamaica>>

¹⁸ Ibid

All of the above – compounded by the constant mischaracterization of trans women as gay men in the media, the disparaging ways in which they are often caricatured and how they are made spectacles in the courtroom – outlines the necessity for legislation which addresses discrimination on the basis of gender identity to be passed alongside any recognition of trans persons. Examples of said legislation are sections 4 and 5B of Sex Discrimination Act of Australia, 1984 which prohibits discrimination on the basis of gender identity – defined to include trans persons, section 2A of the UK Sex Discrimination Act, 1975 which prohibits discrimination on the basis of gender reassignment and section 13 of the Malta Gender Identity, Gender Expression and Gender Characteristics Act 2015, which reiterates the right to gender identity, places a duty of non-discrimination and the promotion of equality on the public service and binds the public and private sector to respect the provisions of the Act.

CITIZENSHIP

One of the fundamental areas of law for any nation is determining who can be a citizen of that nation. The rights to citizenship are a gateway to the rights and obligations of the average Jamaican citizen. Section 3(1) of the Jamaica Constitution provides that citizenship can be gained by birth within Jamaica, descent from a Jamaican or marriage to a Jamaican. Section 18(2) of the Constitution prevents the legal recognition of unions other than heterosexual ones. The implications for LGBT persons are that even if they get married in countries who guarantee marriage equality, they cannot pass their Jamaican citizenship to their partner. Their partner cannot make the application provided for under section 7(1) of the Constitution. This inability to pass citizenship to their partners, in effect, makes LGBT persons second class citizens.

Citizenship cannot be passed through same sex couples married abroad, as with married heterosexual couples.

EQUALITY AND NON-DISCRIMINATION

Sections 13(3)(g), (h) and (i) of the Charter are the only places where the general rights to equality and non-discrimination are explicitly guaranteed. The absence of statute in this area means that if one is discriminated against or treated unfairly, they can only go to the Constitutional court. As stated, the Charter allows for the citizens to seek redress for breach of rights by other citizens, however this is in limited circumstances. There has to be an examination of the provisions closely to see what protections, if any, are afforded to LGBT persons.

Equality

Sections 13(3)(g) and (h) were introduced by the Charter, guaranteeing the right to equality before the law and the right to equitable and humane treatment by a public authority, respectively. The meaning of these sections has not been rigorously determined by case law, however the paper will attempt to frame their possibilities.

The right to equality before the law effectively protects against discriminatory treatment within legislation and common law. Section 4(b) of the Constitution of Trinidad and Tobago has a similar provision. In *Central Broadcasting Services Ltd v Attorney General*¹⁹ the Privy Council clarified that “section 4(b) of the Constitution was directed to equal protection as a matter of law and in courts”. Section 13(3)(g) has not been limited by a specific list of prohibited types of discrimination. A specific listing has been fatal to those seeking relief in the past.²⁰ It can be argued that the section protects against unequal treatment of LGBT persons within the law because it has no listing which limits its scope. Therefore, laws which provide differential treatment to LGBT persons, if not saved, may be subject to a constitutional challenge. However, discriminatory legislation such as the buggery law is saved by section 13(12) from being challenged for their inconsistency with section 13(3)(g) and laws which exclude same-sex unions are saved by section 18(1).

¹⁹ [2006] UKPC 35

²⁰ See *Nielsen v Barker* (1982) 32 WIR 254 (CA) in which Massiah JA maintained that discrimination was only actionable when it fell within the categories listed in the Constitution. Here the applicant, a Danish fugitive, had married a Guyanese woman, however the law only allowed men to pass citizenship to foreigners. The applicant challenged the law as being inconsistent with the Constitution but the Court disagreed as the sex discrimination was not a prohibited type of discrimination.

The right to equitable and humane treatment by a public authority covered by section 13(3) (h) may possibly provide some protection for LGBT persons who interact with various public entities. However, we can only guess what these words mean as they are new to the region. The Joint Select Committee on Electoral and Constitutional Reform in its 2002 Report did point out that their intent was to not make the requirement of equality (understood as treating everyone the same) but rather one in which fairness would be delivered as the circumstance dictated²¹. It is possible, however, that a gay man or trans woman who seeks healthcare at a public hospital may be able to claim his rights are being infringed based if he/she receives discriminatory treatment.



#EQUALITY
FOR ALL

Non-Discrimination

Section 13(3)(i), having replaced the old section 24, re-introduced the prohibition of discrimination but in this case applies to private citizens and corporations. This is of critical importance because many perpetrators of discriminatory practices are indeed private persons. However, the section has a specific list of prohibited types of discrimination and the words “sex”, “gender”, “sexual orientation”, “gender identity” are not a part of that list. The section prohibits discrimination on the basis of “being male or female”. This was deliberately done to ensure that sexual orientation discrimination was not protected, and demonstrates a heteronormative bias within rights protection and cisnormative view of gender identity.

²¹ Joint Select Committee of Parliament, *Report of Joint Select Committee on its deliberations on the Bill entitled An Act to Amend the Constitution of Jamaica to provide for a Charter of Rights, and for connected matters* (2002)

With all of that being said, discrimination on the basis of being male or female is yet to be adjudicated and as such the meaning of the words are unclear. They do not explicitly exclude trans persons who might be discriminated against because they are male or female (albeit trans). This will have to be determined by a court of law. Also, it is unclear whether gender non-conforming persons, like LGBT persons generally, are captured under this rubric. Put another way, because a person is male he is being subjected to a particular kind of treatment for failing to meet a certain stereotype of what men should be; perhaps the stereotype that men are not to wear skirts or other female identified clothing. The latter possibility is doubtful because of the approach to sex discrimination in the case of *Attorney General v Jones*²² in which the Court held that there was no sex discrimination as both boys and girls were asked to conform to gender.

Given the uncertainties within our Charter, the LGBT community would be better served with a Charter that clearly articulates a prohibition of sexual orientation and gender identity discrimination. An example of this can be found in section 9 of the South African Constitution which clearly articulates that:

3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, **gender, sex**, pregnancy, marital status, ethnic or social origin, colour, **sexual orientation**, age, disability, religion, conscience, belief, culture, language and birth.
4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (Emphasis added)

The Equality clauses in ss. 13(3)(g) & (h) may give some protection to LGBT persons. The non-discrimination clause excludes them. The answer is to either amend the Charter as well as pass comprehensive anti-discrimination legislation.

²² KN 2008 CA 3. Here a four year old boy, Khaleel Jones, was denied entry to school because his hair was too long and the school rules only allowed girls to wear long hair to school.

And in support of this provision, national anti-discrimination legislation and policies are needed. Legislation such as the UK Equality Act 2010 and the Canadian Human Rights Act 1985 explicitly prohibit discrimination on the basis of sexual orientation in various areas of life such as employment and the provision of goods and services. Noteworthy is the St. Lucia Labour Code 2006 which prohibits disciplinary action or dismissal by an employer of an employee on the basis of sexual orientation in section 131(1)(a).²³

SEXUAL OFFENCES

Recalling section 13(12) of the Charter, laws about sexual offences that existed prior to the Charter coming into force cannot be challenged as infringing the rights guaranteed by that charter even though the laws as they stand infringe the right to equality before the law, the right to privacy and family life and the right to non-discrimination on the basis of being male or female. The legislation being considered under this section are the Offences Against the Person Act, 1864 (OAPA) and the Sexual Offences Act, 2009 (SOA).

The Offences Against the Person Act

The OAPA largely focuses on serious offences such as murder, manslaughter, suicide, provocation as well as the administration of poison among other serious offences. To a greater extent, the act is very inclusive and act as a cushion for LGBT individuals as the act criminalizes assault, assault occasioning grievous bodily harm, sending threatening letters to kill, shooting with the intent to harm, as well as the drugging of persons with intent to commit other offences, such as rape. Although the OAPA has experienced multiple amendments and repeals of certain provisions, there still remains the issue of the buggery provisions that stand to affect gay men more than they affect heterosexual persons. Section 76 of the act flatly sets out that anyone who commits the crime of buggery, committed either with humans or animals will be liable to be imprisoned and kept at hard labour for maximum ten (10) years. The case of *R v Jacobs*²⁴ confirmed that buggery penis-to-anus intercourse between

²³ Note however that section sexual orientation is not included in the list of prohibited grounds of discrimination in respect of recruitment, training, promotion etc in section 7(1) of the Labour Code.

²⁴ (1817) Russ & Ry 331

two men or between a man and a woman, or penis-to-vagina or penis-to-anus intercourse between any person and an animal. It is important to note that this provision within the act does not exclusively target gay and bisexual men however, section 80 of the act empowers police constables to arrest persons who they find between the hours of 7 p.m. and 6 a.m. without a warrant on reasonable suspicion²⁵ of the offence. There is also the common law power of arrest upon reasonable suspicion which places gay, bisexual and other gender non-conforming men at greater risk of being arrested upon suspicion of having committed buggery. Therefore the section is discriminatory in its effect as gay and bisexual men who generally have consensual anal sex are disproportionately affected by the law.²⁶

Also, when one considers the impact of the section on the lives of gay men, as was the approach in the South African case of *The National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others*²⁷, the discrimination becomes clear. Ackermann J explained it as follows:

“The criminalisation of sodomy in private between consenting males is a severe limitation of a gay man’s right to equality in relation to sexual orientation, because it hits at one of the ways in which gays give expression to their sexual orientation. It is at the same time a severe limitation of the gay man’s rights to privacy, dignity and freedom. The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays

...

[T]he effect is that all homosexual desire is tainted, and the whole gay and lesbian community is marked with deviance and perversity. When everything associated with homosexuality is treated as bent, queer, repugnant or comical, the equality interest is directly engaged. People are subject to extensive prejudice because of what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalised and turned in on itself.”²⁸

²⁵ See *Walters v WH Smith and Son Ltd* [1914] 1 KB 595

²⁶ Anika Gray, *Criminalizing Private Consensual Intimacy: An Analysis of Jamaican Laws* (June 2012) 6

²⁷ [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998). This case involved a challenge to the constitutionality of South Africa’s anti-sodomy laws.

²⁸ *Ibid* para 36, 109

Anti-sodomy laws are symbolic and send a clear message to the wider society on how LGBT persons are considered by the State. The fact that the buggery law prohibits anal sex between heterosexual couples does not alter the symbolic nature of the legislation as their sexual expression is not altogether criminalized. It is conceded that research has shown that most cases of prosecution relying on section 76 deal with minors being abused and even those cases are few in number²⁹. However, the possibility of consenting adults being prosecuted still looms³⁰.

Under Section 77, anyone who attempts to commit the crime of buggery or an assault with the intention to engage in buggery or an indecent assault on a male person is guilty of an offence that carries with a term of imprisonment not exceeding 7 years. Section 78 sets the evidentiary requirement for proof of the offence. Section 79 makes it an offence for “any male person who, in public or private, commits... any act of gross indecency with another male person.” Gross indecency is classified by common law to be any sexual act that falls short of actual intercourse. This includes masturbation, kissing or any form of touching considered indecent. It is also an offence to cause or arrange for a man to commit an act of gross indecency even if the act was conducted in private and between two consenting adults. Section 79 is blatantly homophobic as it criminalizes general intimacy between men and in clear terms concerns itself with private action. This section acts as a catch-all where buggery cannot be proved so as to ensure a conviction.

The Sexual Offences Act

The Sexual Offences Act 2009 is the most recent legislative attempt to criminalize varied forms of sexual abuse. Section 2 of the Act defines ‘sexual intercourse’ as the penetration of the vagina of one person by the penis of another person. The act was careful with its definition of ‘sexual intercourse’ to not include the word “man” or “woman”, by referencing sex organs it can reasonably be understood that trans persons can be included in the ambit of the law as they would be able to engage in sexual intercourse in particular circumstances, for example a trans woman penetrating another woman or a trans man being penetrated by another man. It is important to establish this principle as Section 3 of the SOA defines rape as an instance where a man has sexual intercourse with a woman without her consent or knowing that the woman does not consent or recklessly not caring whether the woman consents or not.

²⁹ (n 26) 4

³⁰ Ibid

Under Section 4 a person is said to commit the offence of ‘grievous sexual assault’ upon another where, in the circumstance, the vagina or anus of the victim is penetrated with a body part other than the penis of the offender or any other object manipulated by the offender. Grievous sexual assault can also be seen where the offender places his penis into the mouth of the victim, places his/ her mouth onto the vagina, penis or anus of the victim. The SOA is both heteronormative and cisnormative with its restrictive definition of sexual intercourse which was a consequence of how the legislators viewed rape. It means therefore that it is not possible for a man to be raped by another man or woman. It also means that if a woman is violated by another person with a foreign object then that act would not constitute rape.

Another implication is that a trans woman being penetrated vaginally (post-surgery) without her consent would not be raped as though there is sexual intercourse, she is not a woman

The offences of buggery, rape and grievous sexual assault give less protection to sexual assault in same-sex instances. Buggery criminalizes consensual anal sex between adults.

at law. Also trans men (post-surgery) cannot be convicted of rape as they are not men at law. Trans men (post-surgery) cannot be raped either, but only buggered, grievously sexually assaulted or indecently assaulted. Also, only women can be victims of rape, which carries a higher sentence meanwhile men can only be buggered

(if there is only anal penetration by a penis), which carries a lower sentence. Lesbian and bisexual women are equally disadvantaged as if they are assaulted by other women or trans men, no rape has occurred but perhaps grievous sexual assault; the sentence which depends on whether the charge is in the lower courts or the higher courts.

Due to the heteronormativity and cisnormativity within the legislation, there are gaps that do not adequately cover the varied abuses LGBT persons might face. Sexual intercourse and rape, as limited by the statute, provide very little protection for these classes of persons. The lack of protection is worse felt by LBT women as they are disproportionately affected by intimate partner violence and sexual violence³¹. The 2011 Shadow Report noted that:

³¹ Paige Andrew, *Media Content Analysis Report on Jamaican LBT Women* (Women’s Empowerment for Change, 2015) 16

“In addition to enduring violence and discrimination on the basis of their gender, lesbian women in Jamaica are also at risk of persecution because of their sexual orientation. J-FLAG recorded six cases of corrective rape in 2006, in which men raped women in an attempt to “cure” their sexual preference. In one case, a seventeen-year-old girl was kidnapped and held in captivity by her mother and pastor for eighteen days. During that time, multiple men repeatedly raped “in the attempt to ‘make her take man’ and ‘live as God instructed.’” In 2008, four cases of “corrective rapes” were reported to Women for Women, and another three in 2010, including one that tragically ended in murder.”³²

In the field study conducted by Human Rights Watch in 2013, victims described, among other things, 10 cases of sexual violence - 8 of which were perpetrated against lesbian and bisexual women, 1 against a trans woman and the other against a gay man. The cases of sexual violence against trans women do not fall within the definition of rape and for lesbian and bisexual women (when ‘correctively’ raped by men), they have to contend with the police, and their sometimes unresponsiveness. Of the 10 cases reported to the Human Rights Watch, only one ended up in a police investigation involving an arrest, prosecution and conviction, which was quashed on appeal. The Shadow Report captures the reality as follows:

“Often, crimes against lesbian women and transgender women are committed in the home, and many are afraid to report sexual crimes committed against them for fear that the police will perpetuate the abuse or humiliate them. Women for Women, the primary advocacy group for lesbians in Jamaica, has documented increasing numbers of domestic violence and rape of lesbian women, but also that few women feel they can rely on the police for fear of further victimization from the police themselves.”

Raping a woman for “corrective purposes” is not considered an aggravated form of rape, and so this form of targeted abuse remains largely invisible. Also, LGBT persons suffer alongside with the rest of society since Incest and Sexual Intercourse with a Minor are two offences that can only occur with sexual intercourse as defined by the act³³. A father, grandfather or uncle cannot commit incest on his male relative (which includes trans women) and a mother,

³² (n 16) 14

³³ Sexual Offences Act 2009, ss. 7 and 10

grandmother or aunt cannot commit incest on a female relative (which includes trans men). For minors, sexual intercourse with a minor is one of the few offences female offenders can be charged for. However, female minors who are assaulted by female offenders do not fall within the section. Also, a male offender cannot have “sexual intercourse” with a male minor. This Act is not immunized from constitutional review and is in clear violation of the right to equality before the law and the freedom from discrimination on the basis of being male or female, insomuch that men do not have equal protection of the law if they are raped or incest is committed against them. Also intimate partner sexual violence between same-sex couples does not have the same levels of legal protection when compared to violence between heterosexual couples.



THE LAW ON JUSTIFIABLE HOMICIDE & PROVOCATION

Justifiable homicide is a complete defence to murder; accordingly, if the judge(s) or jury accepts that the facts support the defence of justifiable homicide, the result is acquittal of the defendant³⁴. One of the grounds for justifiable homicide is “where the homicide is committed in prevention of ‘a forcible and atrocious crime’”³⁵. The Jamaican case of *R v Bartley*³⁶ the Court of Appeal held that “an attempt to commit sodomy on the person of another is an attempt to commit a forcible and atrocious crime and, if accompanied by acts of violence which

³⁴ Se-shauna Wheatle, Adjudication in Homicide cases involving Lesbian, Gay, Bisexual and Transgendered (LGBT) Persons in the Caribbean (Faculty of Law UWI Rights Advocacy Project) 18

³⁵ Ibid

³⁶ (1969) 14 WIR 407 (CA, Jamaica) In this case, a prisoner killed another prisoner who tried to rape him.

clearly manifest an intention to commit the offence, can justify the killing of the attacker”. The 2012 Dominican case of *Philbert v The State*³⁷ applied the ruling in *Bartley* and went further to establish that “the degree of force used is irrelevant once there is an honest belief based on reasonable grounds that killing is the only way to prevent the sexual act.” The effect of these rulings is to justify some instances of fatal violence committed against LGBT persons as individuals may rely on “sodomitical attack” as a crutch for their acts of violence. Any murder of an LGBT person in private spaces could be excused by claiming “sodomitical attack”, including intimate partner violence in same-sex unions.

Provocation exists as a partial defence to murder under section 6 of the OAPA. The section reads:

“Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

At common law, one of the “things done or said” that may provoke someone to lose his self-control is a homosexual advance. This means that an individual can claim that the reason he murdered someone was because that person (being male) propositioned him and he lost control in a fit of rage and killed him. These defences are available for women as well who are approached by other women. Trans women are also at risk as the law recognizes them as men. Arguably, a man can claim that a trans woman propositioned him and so he killed her. This also applies to trans men approaching women. There is some doubt in whether it applies to trans men approaching other men or trans women approaching other women.

³⁷ (April 30, 2012) (Eastern Caribbean CA, Dominica).



This has allowed gruesome acts of murder as in the Trinidadian case of *Marvin Marcano v The State*³⁸ to escape the full extent of the law as it regards intentionally taking a life. Then Chief Justice, Santarine Sharma, concluded that “the acts themselves (propositioning Marcano’s friend) were so unnatural that they would have caused a certain reaction.”

Human Rights Watch noted that among the 56 incidents of violence reported, “in at least two prominent cases, the “gay panic” defense—when a perpetrator claims that an unwarranted homosexual

sexual advance resulted in murder—has been used to justify a killing. For example, on November 7, 2010, Kevon Martin was charged with killing Steve Lindo, a gay man, by stabbing him with scissors. The magistrate granted Martin bail, despite his not having a known address, on the grounds that Martin had appeared to be acting in self-defense in response to Lindo’s demands for sex.” However, it must be noted that these common law principles can be challenged constitutionally as being in breach of the right to life and the right to equality before the law. Se-Shauna Wheatle makes strong arguments for the same on the basis that the protection afforded under section 13(3)(g), discussed above, include protection from sexual orientation discrimination within law.³⁸

Laws on Justifiable Homicide and Provocation are discriminatory in justifying homophobic violence and should be challenged constitutionally because of the rights they breach.

³⁸ Cr. App. No. 2 of 2002 (July 26, 2002) (CA, Trinidad and Tobago)

³⁹ Se-shauna Wheatle, ‘The Constitutionality of the “Homosexual Advance Defence” in the Commonwealth Caribbean’ (2016) 16 *The Equal Rights Review* 38

FAMILY LAW PROVISIONS

Section 18 of the Charter only recognizes heterosexual unions (by protecting legislation related to marriage and other unions) and outlaws the recognition of other unions. This has far reaching implications throughout several Jamaican laws but its direct impact falls within the rubric of family law. In this section, the Marriage Act (including the Muslim and Hindu variants), the Matrimonial Causes Act, the Property (Rights of Spouses) Act, the Maintenance Act, the Children (Adoption of) Act, the Children (Guardianship and Custody) Act and the Domestic Violence Act will be considered. The legislation related to inheritance, succession and intestacy will be considered separately.

The Marriage Acts & Matrimonial Causes Act

At common law, marriage is defined as the voluntary union for life of one man and one woman to the exclusion of all others.⁴⁰ This definition outlaws same-sex marriage. The Marriage Act 1897, the Muslim Marriage Act 1957 and the Hindu Marriage Act 1957 are all silent on the definition of marriage and as such the common law definition prevails. Of note however, section 6 of the Muslim Marriage Act provides that for the marriage to be valid under the act, it must not be prohibited by Islamic law. In any event, the silence of these acts are complemented by section 4(1)(d) of the Matrimonial Causes Act 1989 which states that a decree of nullity of marriage may be pronounced by the Court on the ground that at the time of the marriage, they were both of the same sex. Section 4(3) also makes it clear that marriages in respect of which a decree of nullity has not been granted are not validated by the section. The effect that this provision and section 18 of the Charter have on the lives of LGBT persons is that if a couple should get married in a jurisdiction that affords marriage to “same-sex” couples, the Court of Jamaica will not regard this marriage as legally existing. For trans persons, a trans male may be married to a trans female or cisgender male and a trans female may be married to a trans male or cisgender female, since biological sex at birth is the sex that is legally recognized. Of note, section 68 of the Marriage Act makes it a crime punishable by up to seven years’ imprisonment for any person to perform or any Marriage Officer to witness a ceremony of marriage, knowing that marriage to be void or unlawful.

⁴⁰ *Hyde v Hyde* (1866) LR 1 P&D 130, 133

The Property (Rights of Spouses) Act and The Maintenance Act

The Property (Rights of Spouses) Act, 2005 and the Maintenance Act, 2005 have changed the laws related to disputes over property and maintenance that occur after relationships end, whether married or unmarried couples. They did this by broadening the definition of spouse to include (a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years;⁴¹ (b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years. This broadening of “spouse” has recognized so called common-law relationships that are prevalent within Jamaican society.

Section 6 of PROSA has given spouses one-half share in the family home, unless the circumstances dictate otherwise. This was put in place to prevent women from being dispossessed after marriage or long years of unmarried cohabitation but also provides the possibility for men who are not breadwinners and/or homeowners from benefitting. Section 11 enables the Court to look at other property, outside of the family home, that each partner might have an equitable interest in, although there is no one-half share entitlement.⁴²

Section 4 of the Maintenance Act places an obligation on a spouse, so far as she/he is capable to maintain the other spouse insofar he/she is practically unable to meet the whole or any part of his/her needs. This maintenance ceases if that person remarries or cohabits with another person⁴³. Cohabiting has been defined as being in a conjugal relationship outside of marriage.⁴⁴

While these Acts have made special provisions for legal remedies to relevant spouses, they undoubtedly possess heteronormative and cisnormative ideologies. Homosexual relationships are excluded and as such, the same rights and privileges afforded to heterosexual couples under these acts are non-existent for homosexual ones. Therefore, any interest in a family home or other property will have to be decided by strictly trust law principles. The possibility of maintenance is non-existent. The same rules that apply to trans persons in the Marriage Acts apply here. They can form certain types of unions that may be recognized.

⁴¹ Property (Rights of Spouses) Act, 2005, s.2(1); Maintenance Act, 2005, s.2

⁴² This position might have changed with the ruling in *Miller and Another v Miller and Another* [2015] JMCA Civ 42 in which Brooks JA seems to have adopted the 50/50 approach to dividing other property.

⁴³ Maintenance Act 2005, s.7(1)

⁴⁴ *Ibid* s.2

As it relates to the maintenance of children, the situation of children within families led by LGBT couples is uncertain. For children of unmarried heterosexual unions, section 8(1) of the Maintenance Act creates an obligation on both married and unmarried parents to maintain their unmarried child who is a minor. Section 8(3)(c) places this obligation on step-parents in heterosexual unions who have accepted the child as a child of the family. Under section 8(3)(h) the obligation is placed on a broad category of persons in loco parentis, including a person “who has demonstrated a settled intention to treat a minor as a child of that person’s family”. Within this broad category of persons, partners of biological parents within same sex unions and unions involving trans persons may be included. As such, the female partner of a woman may have to pay maintenance for that child (though not for said woman) if it is shown that she accepted that child as a child of her family. The question becomes whether the union of two persons of the same sex will be regarded as a family for the purposes of that Act.

The Children (Guardianship and Custody) Act and the Children (Adoption of) Act

Both of these Acts concern themselves with the rights of persons who wish to be parents. Both of them, on the surface have no expressed provisions which disadvantage LGBT persons, however the application of the laws in question is the space in which LGBT persons can be disadvantaged. The Children (Guardianship and Custody) Act 1957 gives parents the opportunity to obtain custody orders to determine which of the two are fit to have care and control over



their child. The paramount consideration is what is in the best interest of the child. The nuanced nature of these proceedings gives the Court a wide discretion in determining what is best for the child. The conduct of the parents is one of the considerations.

For LGBT persons, heteronormative and cisnormative sentiments can be barriers to their desires to be parents. Case law from the UK (which is persuasive in our jurisdiction) has over the decades routinely demonstrated how heteronormativity plays a role in decisions regarding custody. Gay men are presented as dangerous to their children and lesbian women are seen as less motherly as their sexual desires overshadow their parenting abilities. In *C v C (a minor) (Custody: Appeal)*⁴⁵ Glidewell LJ established in clear terms the heteronormative rubric of custody decisions; he stated:

“Despite the vast change over the past 30 years or so in the attitudes of our society ... to homosexual relationships, I regard it as axiomatic that the ideal environment for the upbringing of a child is the home ... of her mother and father. When the marriage between father and mother is at an end, that ideal cannot be obtained ... the court’s task is to chose the alternative which comes closest to that ideal.

As a result, the lesbian mother who had been granted custody had to go through a retrial while temporary custody was given to the father of the child in the case. She was granted custody on the retrial after her lesbian status was taken into account. This is but one example of a group of cases that demonstrated that lesbian women were seen as less motherly as their lesbian status was weighed against them in custody hearings⁴⁶. In the case of *Re D (An Infant) (Adoption: Parents consent)*,⁴⁷ the House of Lords held that a gay father had unreasonably withheld his consent to the adoption of his son by the mother and stepfather - which would have the effect of ousting his (the father’s) parental rights. The House of Lords upheld the decision of the trial judge that the dangers of the son being exposed to “his father’s lifestyle” as he grew older would have made any reasonable father give up his parental rights. Lord Wilberforce emphasized that homosexual conduct on the part of the parent alone was not grounds for denying access to a parent. However, he maintained that “whatever new attitudes Parliament, or public tolerance, may have chosen to take as regards the behaviour of consenting adults over the age of 21 inter se, these should not entitle the court to relax, in any degree, the vigilance and severity with which they should regard the risk of children, at critical ages, being exposed or introduced to ways of life which, as this case illustrates, may lead to severance from normal society.”

⁴⁵ [1991] 1 FLR 223

⁴⁶ Sarah Beresford, ‘Get Over Your (Legal) Self: A Brief History of Lesbians, Motherhood and the Law’ (2008) 30(2) *Journal of Social Welfare & Family Law* 95

⁴⁷ [1977] AC 602

These are 20th century judgements however homophobic and transphobic attitudes persist. The illegality of buggery, the criminalization of male to male intimacy and the public condemnation of lesbian sexuality and trans persons generally may well be used against LGBT persons seeking custody of their children. These cases are likely to be used to decide custody matters.

Similarly, the Children (Adoption of) Act 1958 also contains no restriction preventing adoption by LGBT persons. Section 9 of the Adoption Act states that an applicant must be domiciled in Jamaica before he can adopt a child; it also states that the adoption order may be made on the application of two spouses authorizing joint adoption of a child. The Act goes further to state that an adoption order is restricted in respect of a child unless the applicant has attained the age of 25 or the applicant is a relative of the child in which case the applicant must be at least 18 years old. The Act becomes discriminatory where section 10(2) states that a sole male applicant may not be given favour to adopt a female child unless the court can be satisfied that there are special circumstances. The Act is silent however on what basis the Adoption Board will decide to grant an order for adoption outside of the general criteria that it is not in the best interests of a child. The fact that spouses can adopt jointly already puts LGBT couples at a disadvantage as they can only adopt as sole men and sole women. For trans persons, section 10(2) allows trans men to adopt girls as sole female applicants but creates a higher standard for trans women who are treated sole male applicants. The case law discussed above may similarly impact adoption proceedings. Judges may not see adoption by single LGBT parents as being in the best interest of child for the reasons highlighted above.

Domestic Violence Act

By virtue of the Domestic Violence Act, 2004 only persons in certain family or romantic relationships may seek protection and occupation orders in instances of violence or threats of violence. These persons are spouses, partners in visiting relationships, dependants, children or members of the household. To be considered a spouse or in a visiting relationship, that relationship must be heterosexual. The analysis then follows that trans persons in limited relationships may be considered spouses or in a visiting relationship for example a trans male and a cisgender male. For same-sex unions or unions deemed same-sex by law (like

a trans female and a cisgender male) there is only recourse where the parties are living together as then the victim of domestic violence can apply as a member of the household. This whitewashes the romantic nature of their relationship.

Non-cohabiting persons in “same-sex” unions cannot obtain the protection, occupation or auxiliary orders where they are facing abuse at the hands of their partners. Their only options remain in having their abuser charged criminally. This requires greater evidence in Court and the couple loses the benefit of speedy relief that comes with coming under the DVA⁴⁸ as well as the benefit of the aforementioned orders which can give them the right to remain in the household⁴⁹, to use the furniture therein⁵⁰ and protection from being stalked or otherwise harassed⁵¹.

Women have always been more affected by domestic violence. Between 2001 and 2006,

Family laws exclude same sex couples from the benefits they guarantee and they cannot be challenged because of section 18 of the Charter.

of the 49,407 reported cases of domestic violence, the police noted that a majority of the victims were women.⁵² In 2013, the United Nations Office on Drugs and Crime reported that in seventy percent of the cases of domestic violence fatalities, the victims were women. The situation is therefore worse for LBT women who

lack protection under the DVA and are dissuaded from reporting for reasons stated above. The 2011 Shadow Report notes:

“Gender discrimination is entrenched in Jamaican culture, and as a result, domestic violence, violence committed by a family member, is often ignored by the police. Over 50% of violent crimes committed against women occur in the home. The problem of domestic violence is exacerbated for lesbian women, who not only face societal discrimination but experience violence and discrimination within their own families.”⁵³

⁴⁸ Compared to criminal proceedings, and other family matters like divorce and property distribution, applying for protection orders through the Family Court or a Resident Magistrate’s Court takes less time.

⁴⁹ Occupations orders pursuant to section 7(1) of the DVA

⁵⁰ Ancillary orders pursuant to section 12(1) of the DVA

⁵¹ Protection orders pursuant to section 4(1) of the DVA

⁵² Tyrone Reid, ‘Domestic Violence on the Rise’ *The Jamaica Observer* (Kingston, 25 November 2007) accessed at <http://www.jamaicaobserver.com/news/129737_Domestic-violence-on-the-rise>

⁵³ (n 16) 13

SUCCESSION, INTESTACY AND INHERITANCE

This area examines family life after the death of a partner and the legal implications for persons in LGBT unions that are not recognized by law. There will be an examination of the Intestates' Estates and Property Charges Act and the Inheritance (Provision for Family and Dependents) Act. Upon the death of an individual, her/his property both real and personal become a part of her/his estate. Where a will is left behind, the executors – the people in charge of sharing out the property in the estate - of that will are required to ensure that the gifts, bequests and dispositions made in that will are passed to the beneficiaries once all funeral expenses and debts have been paid. Where no will is left behind, the person has died intestate and someone has to apply for a Grant of Administration to have the estate administered so that certain persons may benefit.

The Intestates' Estates and Property Charges Act

Where a person dies without a will, or dies with a will that does not dispose of all of his property, that person will have property on “intestacy”. Under the Intestates' Estates and Property Charges Act 1937, there is list of persons who are entitled to obtain the property left on intestacy. Within this list, there is a hierarchy of who is more entitled to the property. Those persons are (listed in the order of priority) spouses, children, parents and then to other relatives which are organized in the order of brothers and sisters (first of the whole blood then of the half blood) then grandparents then uncles and aunts (first of the whole blood then of the half blood). Where no such persons are around, the property goes to the State. Section 2(d) of the Act limits the recognition of spouses in a similar fashion as PROSA and the Maintenance Act. This means that, save for the unions involving trans persons that have been identified, LGBT unions are not included and so a woman cannot inherit from her deceased female partner nor a man from his deceased male partner without a will.

The Inheritance (Provision for Family and Dependants) Act

Even if there is a will and that will fails to leave enough property or money for a person who was dependant upon the deceased, or perhaps that dependant was not left with enough property or money on intestacy or a combination of the two, that person may claim property or maintenance under the Inheritance (Provision for Family and Dependants) Act, 1993. Section 4(2) of the Act lists the class of persons with standing to apply for the variety of orders offered in section 6. The persons are husbands and wives, children, a parent who was being or was legally entitled to be maintained, a former wife or husband that was being or was legally entitled to be maintained and finally a person who was living with the deceased in a heterosexual relationship five years immediately before his/her death. As heteronormative as the rest, this Act closes the door on LGBT persons who are left out of wills and have no

Same sex couples are excluded from legislation dealing with inheritance. These laws are also protected from challenge by section 18 of the Charter.

entitlements under intestacy. Notably, Jamaica does not allow ‘dependants’ to apply as in the case of section 95(1) (e) of the Succession Act of Trinidad & Tobago. That section allows persons “who immediately before the death of the deceased [were] being maintained, either wholly or partly, by the deceased” to apply. The only

answer then outside of a shift in laws, is the practice of creating mutual wills whereby these couples draft wills together to ensure that each partner benefits regardless of who dies first. LGBT persons who do not do this leave their surviving same-sex partners without any right outside of that which can be claimed in trust, contract or real property law.



LAST WILL
AND TESTAMENT

TRUST LAW

A trust is a legal arrangement whereby a person called a trustee holds property for the benefit of another person called a beneficiary. Depending on the nature of the trust, that person may have several obligations to invest the property and account for profits derived from dealing with the trust property. However, we concern ourselves with the analysis of the constructive trust as mechanism for dealing with family property.

Having been shut out from PROSA, LGBT persons in same-sex unions have to determine their rights to and beneficial interests in property gained throughout the course of their relationships by applying the principles of common intention constructive trusts⁵⁴. The Courts look at the nature of the relationship between the parties and determine whether there was an expression of a common intention that property purchased would be for the benefit of both parties. Where there is no such expression, the Court has to look to whether the conduct of the parties demonstrates that common intention. The Court then considers the financial contributions of both partners to see the amount of legal interest in the property both parties should be given.

In the case of *Abbott v Abbott*⁵⁵ the Privy Council had to apply the law related to common intention constructive trusts because of the absence of legislation like PROSA in Antigua. The Privy Council looked into the financial arrangements of the husband and wife, determined whether a gift from the husband's mother was a gift to them both, allowing that gift to be counted as a part of her financial contributions and then when into the quantification process to determine the share of the family home to which the wife was entitled.

Potentially, same sex couples can have property shared between them dealt with under trust law, in limited circumstances.

⁵⁴ See *Abbott v Abbott* [2007] UKPC 53,4 where the courts acknowledged the preference for using constructive trust principles rather than resulting trust when dealing with family matters.

⁵⁵ Ibid



The law has been applied in the context of a gay couple in Bahamas in the case of *Collie v Marr*⁵⁶ in which the Court of Appeal determined that the fact of their intimate cohabiting relationship meant that the purchase of some property was done in a domestic context and so the law related to the constructive trust should be applied in determining ownership. This case is highly persuasive in our Courts and may be applied to determine property ownership as between cohabiting same-sex couples in Jamaica.⁵⁷

The whole process relies on not just the fact of the relationship as is the case with PROSA but also the financial contributions of the parties. This could have the effect of leaving many LBT women and GBT men dispossessed because their non-financial contributions to a relationship do not count at common law. In fact, the appellant in *Collie v Marr* was held not to have an interest in the family home as “there [was] no reliable evidence that [he] spent any of his money on [its] development... nor was there any reliable evidence of an agreement between the parties.”

⁵⁶ (29 May 2014) Court of Appeal, Bahamas, SCCivApp No. 134/2012

⁵⁷ The concern however is that section 18(2) of the Constitution precludes the “legal recognition” of same-sex unions, however an argument can be posited that the intimate relationship is an issue of fact which will determine what trust laws apply and therefore does not amount to “legal recognition” of the relationship in the context of the Charter.

OTHER LAWS CONSEQUENT UPON MARRIAGE

Law on Undue Influence

A body of cases establishes the rules related to this equitable principle. Presumed undue influence is where the court looks at the relationship existing between the parties who have signed a contract and assumes that there was undue influence because of the nature of the relationship and requires the party against which it is claimed to show what steps they took to avoid the undue influence. In simpler terms, the court presumes one party was pressured into entering the contract and requires the other party to show there was no pressure and that they both freely consented to the contract. Whenever a wife stands surety for her husband, for example in mortgaging her house for loans being borrowed by him, the law on undue influence requires the lender to ensure that said wife is freely standing surety for her husband and not as a result of misrepresentation or intimidation by him. Lenders must explain the contract to the wife and advise her to get independent legal advice before agreeing to the contract. Failing this, a wife may set aside the contract on the basis that she was unduly influenced by her husband to enter into it. The contract will not be enforceable against her.

In the leading case of *Barclays Bank v O'Brien*⁵⁸ the House of Lords decision does not stop with wives. The learned law lords go further in explaining that the law can be applied in other relationships:

I have hitherto dealt only with the position where a wife stands surety for her husband's debts. But in my judgement the same principles are applicable to all other cases where there is an emotional relationship between cohabitees. The "tenderness" shown by the law to married women is not based on the marriage ceremony but reflects the underlying risk of one cohabitee exploiting the emotional involvement and trust of the other. **Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society. The law should recognize this. Legal wives are not the only group which are now exposed to the emotional pressure of cohabitation.**⁵⁹ (Emphasis supplied)

⁵⁸ [1994] 1 A C 180

⁵⁹ Ibid

Not only does Lord Browne-Wilkinson take the focus away from marriage, but he goes further to recognize the existence of non-heterosexual unions and bring them within the ambit of the law. As such, LGBT persons can rely on their relationship in this instance to set aside contracts entered into by way of undue influence.

Law on Evidence

Under common law, a person cannot give evidence against her/his spouse in a criminal trial. For the purposes of the law, the spouse is not competent to give evidence, nor is she/he compellable. The case that is authoritative is *R v Mount*⁶⁰ in which the wife of one of the three co-accused gave evidence incriminating two of her husband's co-accused but not her husband. The convictions were quashed on the ground that she was not competent as against her husband or his co-accused. There are exceptions of this rule but by virtue of section 18 of the Charter, LGBT couples cannot get married and as such a woman can be compelled by the prosecution to testify against her female partner.

Defamation

The tort of defamation exists to protect those who are slandered without just cause. For an individual to be successfully sued for the tort of defamation, it must be proved that defamatory words that referred to the plaintiff were published and in the case of some instances of slander, it caused damage to her/him.

Same sex couples are excluded from laws related to evidence & defamation which privilege married couples. The Law related to undue influence recognize these couple, nonetheless.

For there to be publication, a person must communicate the defamatory words to one other person. At common law, a husband and wife is treated as one person and as such, communications between do not amount to defamation. Similar to the laws on evidence, it demonstrates a

respect for the right to privacy. LGBT couples however, by virtue of section 18 of the Charter, are shut out from marriage or any analogous recognition and as such can be sued for the private communications that occur between them.

⁶⁰ (1934) 24 Crim App R 135

PROTECTION OF MINORS

LGBT minors are not to be left out of the analysis, as most persons discover their sexual orientation and gender identity before the age of 18. Here we analyze what protection the law affords to minors who are LGBT in terms of protection from all forms of abuse and abandonment as well as access to comprehensive sex education. Section 9 of the Child Care and Protection Act 2004 identifies the following:

A person commits an offence if that person, being an adult and having the custody, charge or care of any child wilfully –

- A. Assaults, physically or mentally ill-treats, neglects, abandons or exposes such child; or
- B. Causes or procures the child to be assaulted, physically or mentally ill-treated, neglected, abandoned or exposed,

In a manner likely to cause that child unnecessary suffering or injury to health (including injury or loss of sight, or hearing, or limb, or organ of the body, or any mental derangement).

This section speaks broadly to child abuse and has the effect of protecting young people from psychological and physical abuse. Within the broadest context, this section should have the capacity to protect LGBT children from discrimination, stigma, intimidation, degradation, abandonment and shaming. Of note, section 6(2) of the Act requires persons who are aware of children being abused to report the abuse to the Office of the Children’s Registry. This is backed by criminal law sanctions⁶¹. This reality is doubtful as key agencies such as the Child Development Agency, Office of the Children’s Advocate and the Office of the Children’s Registry do not have any explicit policy dealing the forms of abuse that is likely to be faced by LGBT children within the family, community, educational institutions and wider society. Fortunately, there have been recent commitments by the Ministry of Education to deal with homophobic bullying.⁶²

⁶¹ A fine not exceeding \$500,000 or six months imprisonment pursuant to Child Care and Protection Act, 2004, s.6(4)

⁶² ‘Education Minister Lashes Critics of Anti-Bullying Policy, Says Gays Have Rights Too’ *The Jamaica Gleaner* (Kingston, 22 July 2015) accessed at <<http://jamaica-gleaner.com/article/news/20150722/education-minister-lashes-critics-anti-bullying-policy-says-gays-have-rights>>

Access to Comprehensive Sexuality Education

The implementation of a programme which seeks to holistically address sexual and reproductive health within secondary schools has been raised by school administrators at all levels. While there are more general obstacles faced by the youth and adolescent population including legal barriers and discrepancies with laws and policies around the age of consent and parental consent, the lack of capacity, unwillingness and discomfort of educators in sufficiently teaching the HFLE⁶³ curriculum, LGBT youth face a number of additional issues. These are connected with the criminalization and stigmatization of same-sex intimacy. In fact, there was much uproar in the media when Jamaicans for Justice (JFJ) partnered with the Jamaica Family Planning Association (FAMPLAN) to provide comprehensive sexuality education to children at risk - in children's homes. The presentation listed anal sex as a form of penetration, noted changing attitudes towards oral and anal sex and reinforced the right to access information, tools and commodities to safeguard against the risk of early and unplanned pregnancy, and transmission of HIV and other sexually transmitted infections (STIs). This move was dubbed as part of a 'gay agenda' to teach homosexuality to children and therefore/thereby groom them towards becoming LGBT.⁶⁴

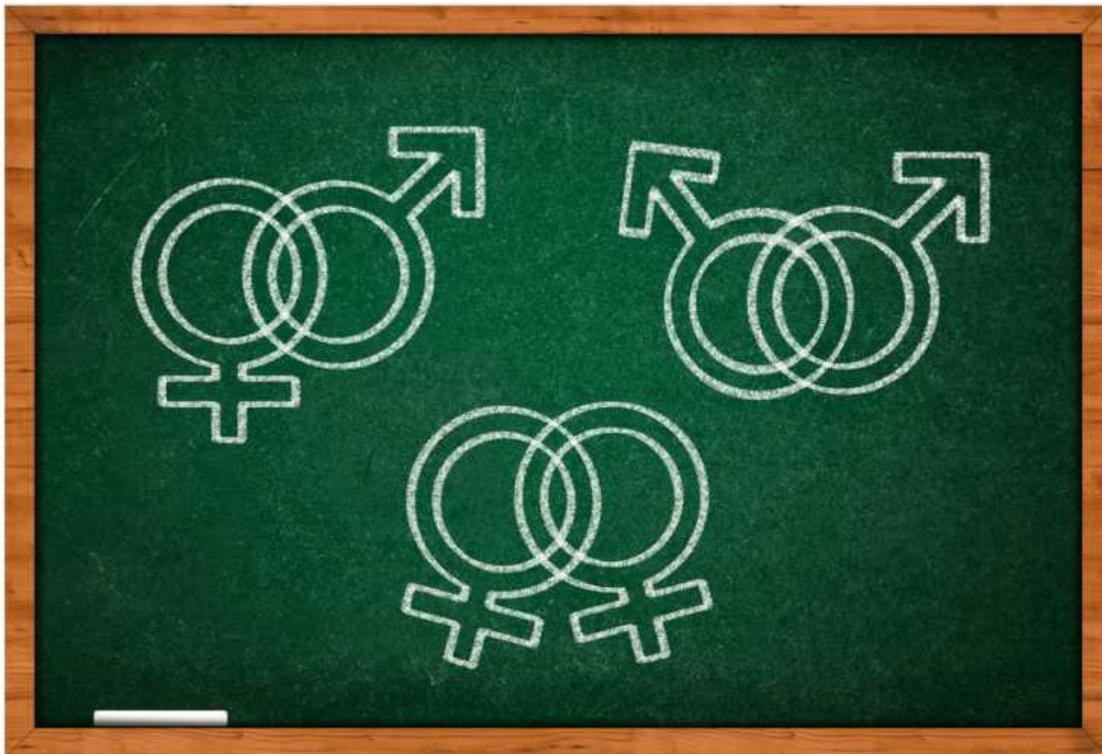
This reality is complicated by the CCPA which in section 6(1) describes guidance counsellors, teachers and other persons who are charged with the care and protection of children as prescribed persons. Section 6(3) then requires them to report abuse as well as when the Act deems children to be "in need of care and protection." Section 8(1) (c) includes a child in respect of whom certain offences have been committed. The offences to which the section relates are listed in the Second Schedule of the Act, and the schedule includes buggery and offending public decency.

Though LGBT minors are not excluded from the Child Care & Protection Act, the issues that particularly affect them are not addressed either. There is no comprehensive sexuality education for them, and "uncontrollable child" cases may put them at risk. Anti-discrimination policies are needed.

⁶³ Health and Family Life Education

⁶⁴ 'Sex Education row grows' *The Jamaica Observer* (Kingston, 19 June 2014) accessed at <http://www.jamaicaobserver.com/news/Sex-Ed-row-grows_16937499>

The implication of the statute is then that if, for example, a 15-year-old male adolescent shares with a teacher or guidance counsellor that he has a partner of the same age and they are intimately or sexually involved, that teacher or guidance counsellor has a statutory duty to report this. Though it is true that minors who engage in heterosexual intercourse are in the same situation, the offence of offending public decency particularly creates a space in which gay male students are less likely to confide in and receive sex education from persons who can empower them to make wise choices. It does this by deeming a boy who engage in any form of male-to-male intimacy as one in need of care and protection.



Finally, section 24(1) of the CCPA allows a parent or guardian to bring a child before the juvenile court where that parent or guardian proves (s)he is unable to control that child. The Court will make an order committing that child to state care or to the care of another. Within this space, parents are able to seek orders from the Court to relieve themselves of custody of their LGBT children, on the basis that they are uncontrollable. The possibility exists for LGBT teens to be deemed uncontrollable when they begin to experience desires and attractions that are taboo and who begin to experiment, to the ire of their parents.

EDUCATION

Under regulation 29 of the Education Regulations, 1980, “a student shall obey the rules of the school he is attending.” And where a “student considers that he has been victimized or otherwise unfairly treated he may appeal to the principal and, if necessary, the Board”. This sets a foundation allowing schools to have certain leeway with the rules they can make and enforce on students which has the potential to limit the enjoyment of certain rights and freedoms. This can be problematic for LGBT persons, with schools punishing homosexuality and gender non-conforming attire.

Another issue is the impact of homophobic bullying and stigmatization on LGBT students. The effects of bullying generally on Jamaican students include “the victim [being] led to feel worthless, [having] nightmares, [having] a low self esteem, health issues (“asthma”, “diabetic”), [becoming] withdrawn, [no longer] performing academically, [becoming] engaged in delinquent behaviours, [starting] to cut him/herself, [being] “spiritually scarred on the

Discriminatory policies adopted by schools as well as the absence of or failure to implement anti-bullying policies which acknowledge homophobic attitudes. Anti-discrimination legislation is needed.

inside”, [becoming] a truant and so on”.⁶⁵ Of more concern is the view that bullying has the ‘positive impact’ of “[toughening] up a boy who acts like a girl.”⁶⁶ This unfortunate perception can only serve to harm, often times gender non-conforming, and LGBT students. This situation is made even worse when teachers, guidance counsellors and other school officials

do not respond adequately to the issues faced by LGBT students. A pointed example is the recent admission by Jamaican guidance counsellors that they are not equipped to deal with issues affecting LGBT students, resulting in many of them avoiding counselling these students.⁶⁷ Clear anti-discrimination policies need to be implemented in schools along with the anti-discrimination legislation mentioned above. Training of key officials must swiftly follow.

⁶⁵ Child Development Agency, Investigating the Prevalence and Impact of Peer Abuse (Bullying) on the Development of Jamaica’s Children (CDA, 2015) 25

⁶⁶ Ibid

⁶⁷ ‘Guidance Counsellors Shun Gay, Lesbian Students’ *The Jamaica Gleaner* (Kingston, 11 January 2016) accessed at <<http://jamaica-gleaner.com/article/lead-stories/20160111/guidance-counsellors-shun-gay-lesbian-students>>

EMPLOYMENT

Sections 2(1)(a) and (b) of the Workmen’s Compensation Act have a limited definition of “dependants” which have the effect of automatically disqualifying gay or lesbian partners from seeking compensation as it refers solely to persons who are “...members of a workman’s family” or a “minor not being a member of the workman’s family” who were wholly or in part dependent upon the wages of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent. The Act goes on in section 2(1)(c) to indicate a willingness to recognise “any other person who satisfies the tribunal that immediately before the occurrence of the accident his relationship with the workman was such as to render him wholly dependent upon the wages of the workman” and in 2(1)(c)(ii) recognises special circumstances which exist that may justify additional persons being considered as a member of the workman’s family and accordingly a dependent.



The definition of member of the family in the Act includes wife or husband, however, the lack of recognition of same sex unions and same sex relationships in Jamaica, enshrined in Section 18 of the Jamaican Constitution limits these definitions, and will in effect limit the definition of wife and husband to persons existing within the heteronormative scope. While the tribunal is seemingly open to consider “special circumstances” which may warrant a broadening of the definition of family, the legislative framework within which this Act exists and the social framework within which the tribunal operates will make it unlikely for same sex spouses to make a claim under this Act.

There is no legislation which speaks to the protection of all workers from discrimination in terms of access to employment, retaining jobs, promotions, or protection from harassment at work. While steps have been taken to have policies which address the protection of vulnerable groups such as persons living with

There are no broad anti-discrimination provisions in employment laws, and workman’s legislation exclude same-sex couples. Anti-discrimination legislation is needed.

HIV, sexual orientation and gender identity discrimination in the workplace is not altogether prohibited. It is noteworthy that Jamaica’s Staff Orders for the Public Service which outlines the operational procedures for the Jamaican civil service prohibits sexual orientation discrimination. Unfortunately, there is no such protection for persons working in the private sector. Accordingly, employment discrimination and workplace harassment continues to be an issue for the LGBT community. Anti-discrimination legislation similar to those outlined above could do well to protect LGBT persons in this regard.



HOUSING

The Rent Restriction Act, 1944 was crafted to protect tenants from landlords acting unreasonably and oppressively. The issue is whether this applies to LGBT tenants. Section 25(1)(c) of the Rent Restriction Act speaks to the capacity of a landlord to evict tenants where the tenant or persons residing with them is guilty of conduct which is deemed to be a nuisance or annoyance to adjoining occupiers or the tenant is using the premises for an immoral purpose. Within the Jamaican context and considering issues of stigma and discrimination, the landlord may seek protection under the Act by stating that LGBT tenants are conducting themselves in ways that annoy other tenants or that homosexuality is immoral and the tenants are using the house to engage in homosexual acts. Occurrences of landlords dispossessing LGBT tenants are not fanciful. These occurrences were noted by the Human Rights Watch in their field study.⁶⁸ A lesbian woman's experience was shared in the report as follows:

“A week after Winnie R. began living with me, I began to experience problems with my landlord. Initially, he would make negative comments when he saw Winnie, such as that she was “too harsh” in appearance, and would complain whenever Winnie parked her car at the house. As time passed, my landlord only became increasingly more hostile, and on multiple occasions he called us “abominations”; told us he did not want “this nasty thing” in his house; and said that he wanted us to leave, claiming that we would bring destruction to his house.

Either way, sexual orientation discrimination is not prohibited by section 13(3)(i) of the Charter and therefore there is no remedy against landlords who discriminate against LGBT persons. Anti-discrimination legislation is needed in this regard.

The vagueness in the Rent Restriction Act creates a space in which discrimination in housing can occur. Anti-discrimination legislation is needed.

⁶⁸ (n 17)

INCIDENTAL MATTERS

Outside of the various areas of law already considered, there are also legislated provisions that indirectly affect the lives of LGBT persons either by excluding them or by bringing them within their scope, albeit in an unfortunate way. As we have seen, section 18 of the Charter does not just impact family law legislation, but also other areas of law which give privileges to married couples. Omrod J's ruling in *Corbett* and its expansion in *R v Tan* has muddled the waters for trans persons at law who are not fully recognized. Then there is the issue of sexual offences, and in particular buggery and offending public decency. Criminalizing consensual acts between men and prescribing imprisonment has a ripple effect across legislation. Here we will consider various legislative provisions that are indirectly impacted by the foregoing.

Pensions, Insurance and Other Allowances

Several legislative provisions provide for pension schemes, either contributory or non-contributory, whereby a pensioner's spouse gains the benefit of the pension to which the pensioner is entitled in varied circumstances. Spouses also benefit under the national insurance scheme. Civil servants, teachers and parochial officers who die in the actual discharge of his duties, in circumstances in where the cause of the injury is not their fault



and in circumstances that are specifically attributable to the nature of his duty while in their respective services can have the Governor General grant pensions to their surviving spouse.⁶⁹

⁶⁹ Pensions Act 1947, s.17(1),(2); Pensions (Teachers) Act 1947, s.13A(1),(2); Pensions (Parochial Officers) Act 1944, s.18(1),(2)

The Pensions (Civil Service Family Benefits) Act, 1976 and the Retiring Allowances (Parish Councillors) Act, 1986 create contributory pension schemes whereby spouses can benefit from the contributions made by their spouses in the civil service or working as parish councillors upon their retirement and/or death. The widows and widowers of National Heroes and Prime Ministers are also entitled to pensions upon their respective deaths.⁷⁰ Finally, the National Insurance Act provides, under section 12(1), that the widow or widower of a contributor may be entitled to widow's or widower's pension in the deceased spouse satisfies the contribution requirements. Under section 20(1)(d), a funeral grant is payable to a contributor upon the death of his/her spouse. Section 2(4) creates the possibility for persons in unmarried heterosexual couples to benefit from the widow(er)'s pension scheme. It is also noteworthy that the relevant sections of the several Pensions Acts allow the Governor-General to discontinue pensions upon conviction.⁷¹

LGBT persons in same-sex couples of course do not fall within the rubric of these pieces of legislation. The lack of recognition of their unions means that these pension benefits will not fall to them. Also, though unlikely, if a gay man is convicted of buggery or offending public decency for consensual activity, there is a chance he may lose his pension despite years of service.

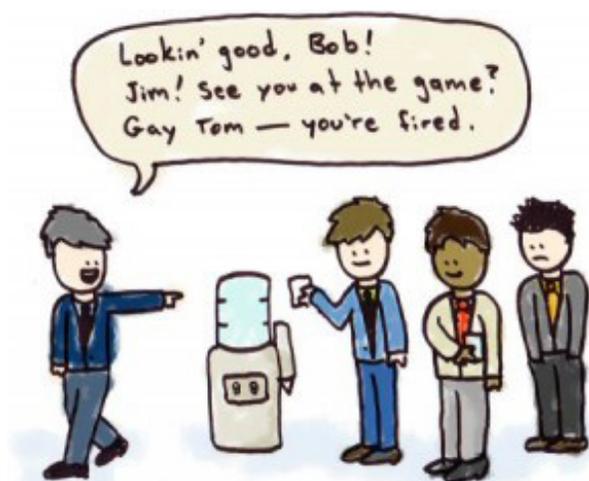
Section 96 of the Insurance Act, 2001 identifies a list of persons who may take out life insurance policies on the lives of another person. Sections 96(1)(b) and (c) provide that a husband can take out a policy on his wife's life and a wife on her husband's life, respectively. Section 96(1)(e) allows a person to take out a policy on the life of an individual whom that person is dependent on for support or education. Persons in same-sex unions cannot marry and therefore do not benefit from this provision unless they show dependency. The impact is illustrated as follows: Bella, a trans woman, is not allowed to take out a life insurance policy on the life of her cis male partner, Jake, who has suffered mental injury and cannot take out the policy in his own name. While Bella could be a beneficiary under a policy in Jake's name and vice versa, Bella cannot take steps to provide a safety net for her ailing partner.

⁷⁰ National Heroes (Widows Pensions) Act 1972, s.3(1) and Pensions (Prime Minister) Act 1965, s.5(1)

⁷¹ Pensions Act 1947, s.14(1); Pensions (Teachers) Act 1947, s.12(1); Pensions (Parochial Officers) Act 1944, s.15(1)

Professional Disqualifications

Doctors, professional engineers and chief executive officers of executive agencies are held to high standards by the law. There are legislation and rules which seek to ensure that their conduct is of the utmost integrity and that they do not bring their respective professions into disrepute. As noted above, buggery and offending public decency are criminal offences and this has implications for these persons. If any gay man in any of these professions is convicted of either offence, the possibility does exist that they may be suspended, struck off or removed from office. Section 11(1)(c) of the Medical Act, 1976 empowers the Medical Council to censure,



suspend or strike a doctor's name of the register if said doctor is convicted of a criminal offence. Section 8(c) of the Executive Agencies Act, 2002 provides that a chief executive officer may be removed from office if she/he is convicted and sentenced to a term of imprisonment. Rule 2(2)(e) of the Professional Engineers (Code of Professional Conduct) Rules, 2004 prohibits professional engineers from "[involving] himself with any practice which he knows to be of a... criminal nature" and Rule 8(5) indicates that any

breach of any of the rules shall constitute misconduct in a professional respect and are subject to the disciplinary orders that can be made under section 19(1) of the Professional Engineers Registration Act, 1987. These orders include censorship and suspension.

The position of lawyers and registered nurses is less clear. While, canon III(f) of the Legal Profession (Canons of Professional Ethics) Rules 1978, prohibits attorneys-at-law from "[acting] contrary to the laws of the land", canon VIII(d) does not deem breaching the above canon as constituting professional misconduct. However, breaching canon III(k), which prohibits "[committing] any criminal offence which in the opinion of the Disciplinary Committee is of a nature likely to bring the profession into disrepute", does constitute professional misconduct. The Legal Profession (Prescribed Offences) Rules 1998 lists "any sexual offence for which a convicted person is liable to a sentence of imprisonment of five years or upwards". This includes buggery. Section 12(4) of the Legal Profession Act 1972 allows the Disciplinary Committee to *inter alia* fine, suspend and strike off attorneys.

For registered nurses, sections 11(1)(c) of the Nurses and Midwives Act, 1966 empowers the Nursing Council to suspend the registration of or strike off nurses who are “guilty of conduct that is unbecoming to a nurse, midwife or assistant nurse”. This can potentially go beyond behavior that is criminalized. The Act is not clear on the meaning of these words and as such, the application of this rule rests within the discretion of the Nursing Council.

These legislative provisions, though not objectionable on the surface, do create a space in which discrimination against LGBT persons may occur, especially where one relies on criminalization and stigmatization of consensual sex between persons of the same sex.

Fatal Accidents Act

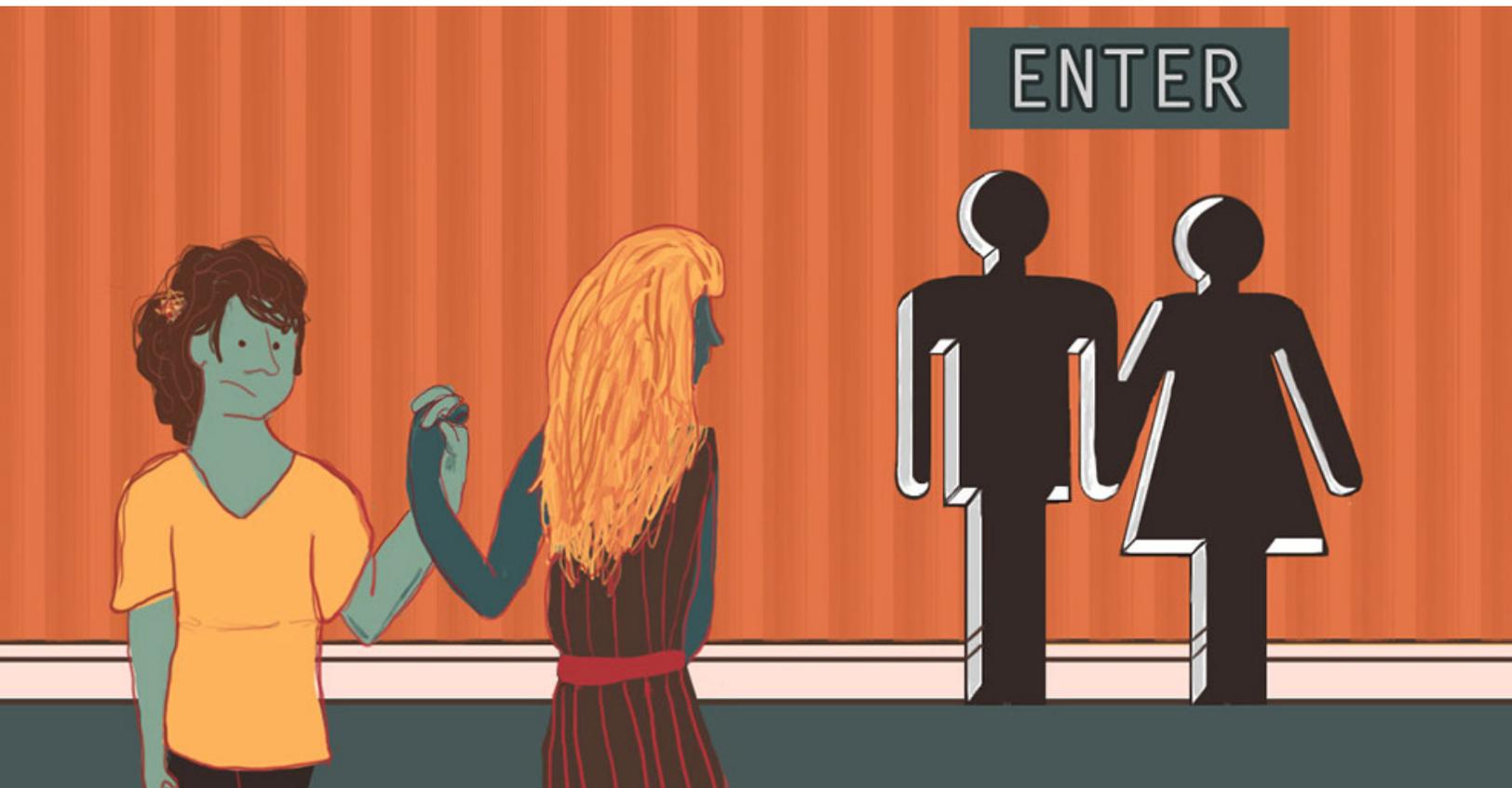
The Fatal Accidents Act, 1845 creates an essential remedy for the relatives of persons who died in circumstances that can give rise to a lawsuit. Section 4(1) of the FAA vests the right to bring an action for damages where the death occurred in the aforementioned circumstances in the personal representatives and then, if the personal representative does not act within six months of the date of the death, to near relations of the deceased. The definition of “near relations” pursuant to section 2 of the FAA is the wife, husband, parent, child, brother, sister, nephew or niece of the deceased person.

With many other legislative provisions, the exclusion of LGBT unions from marriage means that there is no legally recognized relation between persons in a same-sex couple. As such, no right under the Fatal Accidents Act exists for the lesbian/bisexual woman, trans man whose female partner dies or the gay/bisexual man or trans woman whose male partner dies.

Pension Schemes, the Insurance and the Fatal Accidents Act exclude persons in same sex unions. The criminalization of consensual sex between men creates legal grounds for disqualification in several professions. Section 18 of the Charter and the buggery law need to be addressed.

CONCLUSION

Having considered a wide cross-section of Jamaican laws, it is abundantly clear that heteronormativity and cisnormativity runs deep within our legal system. We shall now attempt to adequately situate the LGBT person with a discussion of all the limitations and exclusions that affect their rights guaranteed as Jamaican citizens.





III. DISCUSSION

Heteronormativity and cisnormativity traverse all tiers of Jamaican law. From the heights of our supreme constitutional provisions through the often times hotly contested legislative enactments and regulations and to the less known caverns of case law. So deeply entrenched are these patriarchal constructs that we will enumerate the limitations analyzed to give a fuller presentation of the problem that LGBT Jamaicans are faced with. Table A below lists, from the areas analyzed, the problematic areas of the law on the left, the areas of the law where LGBT persons are recognized on the right and the unclear and areas of partial recognition in the middle.

Problematic Areas	Unclear/Partial Recognition	Protected/Recognized Areas
Currently, trans persons are not recognized at law (<i>Corbett v Corbett; R v Tan and others</i>)	Grievous Sexual Assault provides limited protection for women assaulted by other women as well as men depending on where assaulted (Section 4 of the SOA)	Sections 13(3)(g) and (h) of the Charter of Rights prohibits discriminatory treatment within the law or by public authorities. This may include sexual orientation discrimination.
Section 18 of the Charter of Rights prevents recognition of same-sex unions	It may possible for children within families led by same-sex couples to be maintained by either partner (Section 8(3)(h) of the Maintenance Act)	Same-sex persons can seek equitable interest in their partner’s property by way of their direct and indirect financial contributions (<i>Abbott v Abbott; Collie v Marr</i>)
Section 13(12) of the Charter safeguards certain laws which are discriminatory from being challenged	An LGBT person may be prejudiced in custody proceedings (<i>C v C (a minor) (Custody: Appeal)</i>)	Same-sex couples are considered under the rubric of the law on undue influence and can set aside contracts in the appropriate circumstances. (<i>Barclays Bank v O’Brien</i>)
Same-sex unions cannot pass citizenship to their partners (Sections 3(1), 7(1) of Constitution)	An LGBT person may be prejudiced in adoption proceedings but it is unclear (<i>Re D(Adoption)</i>)	Explicit prohibition of sexual orientation discrimination in the public service (Jamaica’s Staff Orders for the Public Service)
Section 13(3)(i) of the Charter of Rights excludes sexual orientation discrimination.	Only cohabiting persons in same-sex unions can get protection under the DVA (Section 2). Non-cohabiting persons in same-sex unions are excluded.	
Consensual anal sex and male-to-male intimacy is criminalized (Sections 76 – 79 of the OAPA)	Gay nurses may be at risk for disciplinary action but it is unclear (Unlikely)	
Men cannot be raped, and woman cannot be raped by other women. Same-sex rape is not covered by the law. Position of trans person is muddled. (Sections 2 and 3 of the SOA)	LGBT minors are protected from physical and mental abuse and abandonment (Section of the CCPA) However they are routinely victims bullying and stigma	
The Law on Justifiable Homicide & Provocation provides a defence for persons who commit homophobic murders. (<i>R v Bartley; Philbert v The State; Marcano v The State</i>)	LGBT students may be subject to discriminatory school rules (Section 29 of Education Regulations). However, LGBT students may be able to challenge these rules under section 13(3)(h) of the Charter.	

Problematic Areas	Unclear/Partial Recognition	Protected/Recognized Areas
Same-sex marriages are void (Sections 4(1)(d) and 4(3) of the MCA)	Surviving same-sex partner may be able to gain benefits under Workmen’s Compensation Act if she/he shows a relationship involving dependency. (Unlikely)	
Same-sex couples have no entitlements under PROSA (Section 2(1))	Landlords may terminate tenancies on the basis of the sexual orientation or gender identity of LGBT persons on the basis of these persons being nuisances, annoyance or engage in immoral or illegal activity (Section 25(1)(c) of the RRA)	
Same-sex couples have no rights to maintenance (Section 2 of the Maintenance Act)	LGBT persons cannot take out life insurance policies on the lives of their partners, unless they are dependent on the partner for support or education (Section 96 of the Insurance Act)	
Surviving same-sex partner cannot benefit on intestacy (Section 2(d) of the IEPCA)		
Surviving same-sex partner cannot apply for reasonable financial provision upon death of partner (Section 4(2) of the IPFDA)		
Same-sex partners are not exempted from giving evidence against each other in criminal matters		
Private communications between same-sex partners are not exempted from being considered defamation		
Surviving same sex partners have no entitlements to pensions, retiring allowances or funeral grants.		
Gay Men risk losing pension benefits if convicted for buggery or offending public decency (Unlikely)		

Problematic Areas	Unclear/Partial Recognition	Protected/Recognized Areas
<p>Criminalizing anal sex and male-to-male intimacy places gay doctors, attorneys-at-law, professional engineers and chief executive officers of executive agencies at risk of having disciplinary action taken against them (Unlikely)</p>		
<p>Surviving same-sex partners have no right of action under the FAA (Sections 2 and 4(1))</p>		
<p>Gay minors run the risk of having matters reported to the OCR if they share experiences of male-to-male intimacy with teachers, guidance counsellors etc. (Sections 6(1),(3), 8(1)(c) and the Second Schedule of the CCPA)</p>		
<p>No legislated prohibition on sexual orientation discrimination or harassment in the work place in the private sector</p>		

Of the various areas of law considered, Table A indicates that there are twenty-one (21) ways in which the rights of LGBT persons are being limited, as distinct from their heterosexual counterparts. Table A also indicates eleven (11) ways where there is either partial coverage of LGBT rights or the rights stand a possibility of being infringed. Finally, the table posits the four (4) ways in which LGBT persons are recognized by law.

What Table A demonstrates is how the non-recognition of same-sex unions has varied implications throughout a legal regime which often works to “preserve the sanctity of marriage”. The legal recognition of heterosexual marriage has accorded it several benefits that LGBT couples have been denied. Of course, same-sex marriage is not the only avenue for accessing these rights. Legislation like PROSA and the Maintenance Act recognized unmarried heterosexual couples, and accorded them the rights of married persons in several circumstances. Recognizing same-sex couples outside of same-sex marriage would

be an avenue for consideration save for section 18(2) of the Charter of Rights. This singular provision stifles the progress of all LGBT persons being on an equal footing with their fellow heterosexual Jamaicans. What is left for LGBT couples under family law is the common intention constructive trust, which disfavors poor and/or non-financially contributing partners. Other areas of family life are also impacted. There is no protection for LBT women who experience domestic violence at the hands of their non-cohabiting partners. And when there is legal protection, LBT women are dissuaded from making report as a result of how they are treated by the police. In matters of adoption and custody, LBT women stand to be treated as less motherly because of their sexual orientation and gay men are likely to be seen as dangers to their children.

There is also the issue of the problematic criminalization of sexual violence which creates a hierarchy of offences which places abuse that occurs heterosexually as being more noteworthy than other forms of abuse. By crafting sexual offences legislation around buggery, legislators have left major gaps within the law. These gaps include giving unequal protection to LBT women who cannot claim rape when abused sexually by their partners. Once again, reporting to the police often times presents a challenge as even when these women are raped “correctively” by men, these crimes are not well investigated. Also, there are certain implications of buggery and offending public decency being crimes punishable by imprisonment that underscores the problematic nature of criminalizing consensual sexual behavior between adults.

The issue of sexual orientation and gender identity discrimination is one which is live within our socio-cultural context. It is not prohibited in the Charter under section 13(3)(i) and that is no accident. There is a possibility that it might be captured under sections 13(3)(g) and (h) but that will have to be determined in a court of law. These will only mean protection from State actors; which is nonetheless critical when one considers discriminatory school rules and policies and access to healthcare. However, discriminatory attitudes persist as homophobic bullying tends to be seen as a positive and the implementation of comprehensive sexuality education is continually challenged. Discrimination in employment and housing persists and greatly impact the everyday lives of LGBT persons as the data indicates. The need for anti-discrimination legislation that addresses issues of healthcare, education, housing, provision

of services, employment and adoption cannot be overstated. The lack of protection in these areas facilitates to the continued abuse of LGBT persons. In the long term, our Charter of Rights must be amended so as to remove section 18(2) and prohibit sexual orientation and gender identity discrimination.

Concern must also be given to the trans persons whose non-recognition has made it difficult to effectively say which laws work for or against them. The cisnormative approach taken in 1970 by Omrod J in Corbett is still operative within Jamaican law and will be so until some member of the Judiciary makes a bold step to depart from it or major legislative changes are implemented.

Consider how the life of a fictional character, Suzette, is deeply affected by Jamaican laws.

Suzette's Story

Suzette is a lesbian woman with a son, Dave. He is ten years old. Suzette has been working a little above minimum wage and is in an abusive visiting relationship with Kathy who helps her make ends meet. Suzette has been raped by Kathy on more than one occasion and is physically abused periodically. Suzette has lost interest in Kathy but must consider the financial help she gives her and how it helps to send her son to school. Dave's father, Eric, has been absentee for most of his life. Suzette often bad mouths Eric to Kathy when she is frustrated with his absenteeism.

Suzette has recently switched jobs as she has finally been registered as an assistant nurse working at a privately run hospital. Suzette has asked Kathy not to pick her up work because she is afraid of being outed at work. Kathy sometimes dresses in baggy clothing and Suzette has heard rumors of the previous nurse that was fired because he was "weird". Yesterday, Suzette went home to see Eric at her gate. He found her address and is distraught to know that Suzette was raising his son with another woman. Kathy had been watching Dave for Suzette that day. Eric declares he wants custody of Dave, as he does not want him to "turn out" like his "sodomite" mother. Eric also threatens to out Suzette at work if she opposes his court case. Kathy had left when Suzette arrived to allow her and Eric to speak. She dies intestate in an unfortunate car accident. Here is where Suzette finds herself.

Suzette was not raped at law, and the only charge she could have levied against Kathy is grievous sexual assault. Due to Suzette's vulnerability, it is unlikely she would elect to have her provider sent to prison. Suzette not wanting to send Kathy to prison, could not seek any protection orders from the Family Court for the domestic violence she has been suffering. Suzette could not have sought maintenance from Kathy either. If Eric becomes aware of the negative things Suzette has said to Kathy, she can be sued for defamation because the conversation is not exempted. If Eric outs Suzette at work, she can be fired with impunity, meaning the Charter does not prohibit sexual orientation discrimination from private persons.

In a custody case, the fact that Suzette is lesbian and was raising her son with a woman may be used against her to suggest she has immoral conduct and can mislead an impressionable child. Her losing her job and not having the means to provide for Dave would also put her at a disadvantage. As it relates to the death of Kathy, Suzette is not entitled to any of her pension benefits. She has no claim under her estate as Kathy died without a will. Suzette cannot even apply to have Kathy's estate administered and or apply for reasonable provision. If the Nursing Council becomes aware of Suzette's sexual orientation, the possibility is there that she may be suspended or her name struck off. This is how the law treats with women like Suzette. If Suzette were instead in a relationship with Eric who did all of what Kathy did to her and died in an unfortunate accident. She would have been able to access all of the legislative remedies mentioned.





IV. CONCLUSIONS AND RECOMMENDATIONS

Due consideration being given to multilayered nature of the legal situation of LGBT persons, the conclusions being drawn and recommendations being offered must also be multilayered. At the core of the exclusions and limitations identified are a handful of provisions. There is section 18 of the Charter, section 13(12) of the Charter, sections 13(3)(g),(h) and (i) and sections 76-79 of the OAPA and the ruling of Omrod J in *Corbett v Corbett*. What these laws say and/or omit to say form the basis of the heteronormative and cisnormative framing of our laws. We have to consider the options available to us in addressing these. There is strategic human rights litigation, advocating to Parliament for amendments to certain laws as well as suggesting policy to fill certain gaps and there are instances where no action is best.

Section 18 of the Charter saves all pieces of legislation with a restrictive definition of “spouse” from being constitutionally challenged. This means PROSA, the Maintenance Act, the DVA, the IEPCA, all Acts related to pensions, among others, cannot be challenged for excluding same-sex couples and certain couples involving trans persons. There is no possibility of strategic litigation here. The section, however, does not stop there. It prevents the recognition of

non-heterosexual unions. This seemingly precludes any legislative amendments to recognize same-sex unions in any way, be it marriage equality or the creation of civil unions. This shuts out advocacy to Parliament to amend these pieces of legislation or address common law principles. The only answer to this section is to have it removed from the Constitution altogether or at the very least, amended. This process is likely to be long and arduous because of the opposition it is likely to receive and the level of entrenchment given to the Charter of Rights.⁷²

Section 13(12) of the Charter saves our sexual offences that were in force prior to the Charter coming into force from being constitutionally challenged. This also shuts out strategic litigation on these problematic pieces of legislation, including sections 76-79 of the OAPA. In this case, advocating to Parliament for legislative amendments is a viable avenue. This is already being pursued by many individuals both locally and internationally as Jamaica's buggery law is treated as the epicenter of the homophobic laws. The Sexual Offences Act is currently being reviewed and as such, some of the points discussed here should be used to measure the outcomes of that review. Removing section 13(12) of the Charter is also another avenue that may be pursued in advocating to Parliament. This of course carries the same limitations as removing section 18. We must bear in mind however that criminalizing anal sex as well as male-to-male intimacy does have implications outside of sexual offences.

The question of protection against sexual orientation and gender identity discrimination is one that needs answering. Strategic litigation may be used to have sections 13(3)(g) and (h) fleshed out by Jamaican courts. Challenges to the law on justifiable homicide and provocation are not prohibited constitutionally and would demarcate the limits of those rights. As for section 13(3)(i), rather than seeking to amend the Charter, advocating to Parliament for comprehensive anti-discrimination legislation that goes beyond the Charter is a viable avenue. Such legislation can cover areas such as employment, education, housing and healthcare without the lengthy process attributed to constitutional amendment. Outside of that, advocating for anti-discrimination policy in various ministries is another avenue. Policies regarding the treatment of LGBT parents in custody and adoption applications may also be sought.

⁷² See Jamaica Constitution, 1962, ss.49(2)(a),(4) and (5) which require a two-third majority of both houses of Parliament or a two-third majority on two occasions from the House of Representatives and a referendum of electors with a three-fifth majority in order to amend section 18, among others.

To address the position of trans persons, strategic litigation or advocacy to Parliament may be employed. Given the comprehensive nature of the issues facing trans persons, gender recognition legislation is needed. Strategic litigation may be used to challenge the application of the certain legislation in the short term. This brings the discussion within the corners of recognized principles of judicial reasoning with the possibility of appeals. This is critical to resolving what certain laws mean for trans persons both prior to and after transitional surgeries.

Finally, there are areas of law that may not need any action to be taken because of the unlikelihood of the rights infringement. This includes the rules regarding professional disqualifications. These are tied to the illegality of buggery and as such do not need to be addressed, unless used in a discriminatory fashion.

THE KEY RECOMMENDATIONS ARE:

- Advocacy for the removal of sections 13(12) and 18 of the Charter Advocacy for amendments to the buggery law and the Sexual Offences Act
- Advocacy for amendments to family law statutes to include same-sex couples
- Challenges to the law on Provocation & Justifiable Homicide in Court
- Advocacy for Trans recognition legislation
- Advocacy for Anti-Discrimination legislation to prohibit discrimination in various sectors
- Advocacy for anti-discrimination policies related to education, child care and health

