



# **Equality for All Group Submission to the Joint Select Committee Review of the Sexual Offences Act 2009 and related Acts of Parliament**

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A submission to the Joint Select Committee of Parliament for the review of the Sexual Offences Act 2009 and considerations for the Child Care and Protection Act, the Domestic Violence Act and the Offences Against the Person Act as part of this process.

Prepared by the Equality for All Group (TransWave, WE-Change and J-FLAG)

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## **Background of Contributing Organizations**

The Equality for All Group currently comprises of J-FLAG, WE-Change and TransWave Jamaica, a triumvirate of human rights and social justice advocacy organizations each with a mandate of securing equality before the law and equal protection of the law to all Jamaicans as guaranteed by section 13(3)(g) of the Charter of Fundamental Rights and Freedoms.

J-FLAG is an eighteen (18) year old human rights and social justice organization that advocates for the recognition and protection of the inalienable human rights of Lesbian, Gay, Bisexual, and Transgender (LGBT) Jamaicans. J-FLAG's work involves support and emergency services for the victims of discrimination, violence or displacement; political activism for policy, law and constitutional reform; public education and training; LGBT community empowerment, outreach and mobilization.

WE-Change is a twenty (20) month old community-based woman-led human rights and social justice advocacy organization which seeks to increase the participation of lesbian, bisexual and trans (LBT) women in social justice advocacy and national development. WE-Change also has a broad mandate to address issues of gender inequality, inclusive of tackling rape culture and reducing violence against women and girls.

TransWave Jamaica is a seventeen (17) month old organisation dedicated to improving the quality of life of the Jamaican transgender population. Their vision focuses on promoting the health and well-being of transgender Jamaicans. To this end, TransWave is working to improve the quality and quantity of transgender health care services offered, as well as increasing their visibility and improving awareness of the issues faced by transgender persons.

The group of organizations seeks to uplift the human dignity of LGBT persons by fostering their full inclusion in the Jamaican society. In keeping with their shared mission, the Equality for All Group offers this submission to the Joint Select Committee of Parliament with respect to the review of the Sexual Offences Act 2009, the Domestic Violence Act 2005, the Offences Against the Person Act, 1864 and the Child Care and Protection Act, 2004 with the aim of ventilating issues found therein that affect the human dignity and quality of life of LGBT Jamaicans.

## **Background of Legislation up for Review**

The Sexual Offences Act (SOA) 2009 was borne out of the move to refine sexual crimes under Jamaica's criminal code. This piece of legislation was designed to achieve **inter alia** collating disparate elements of the criminal law concerning sexual offences into one statute, codifying common law principles, and refining the spectrum of sexual offences as proscribed by Jamaican law in order to bring them in alignment with modern jurisprudence and practices. In its review of the Sexual Offences Act, the Joint Select Committee has also indicated that the Child Care and Protection Act, the Domestic Violence Act, and the Offences Against the Person Act will be reviewed as a part of this process.

The Child Care and Protection Act (CCPA) 2004 was promulgated in an attempt to incorporate provisions of the Convention on the Rights of a Child (CRC) ratified by Jamaica in 1991. The Act, guided by what is deemed to be in the best interests of children, places a duty on caregivers to report incidences of child abuse. It also criminalizes child abuse, child neglect and child abandonment.

The Domestic Violence Act (DVA) 2005 amended the 1996 Act and provided legal remedies for persons experiencing physical and mental abuse within the private sphere. The legislation provides for remedies in the event that a person is abused by their romantic partners, their family members or persons they otherwise cohabit with.

The Offences Against the Person Act (OAPA) 1864 contains a number of criminal offences that cover a variety of acts including sexual acts such as the 'abominable crime of buggery' and 'gross indecency'. Sections 76 through 79 of the Offences Against the Person Act, is collectively referred to as 'the anti-buggery law' in common parlance.

## **Normative Framework**

Jamaica is a signatory to several international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) 1966, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979 and the Convention on the Rights of the Child, 1989. Jamaica ratified the ICCPR in 1975, CEDAW in 1984 and the CRC in 1991. Article 6 of the ICCPR guarantees the right to liberty and security of the person and in Article 26, the right to equality before the law

and equal protection of the law is guaranteed. Articles 2, 5 and 15 of CEDAW place an obligation on the government to modify their laws to reflect principles of gender equality, to address negative gender stereotypes and to secure equality between men and women. Articles 19 and 34 of the CRC require the government to take all appropriate measures to protect children from sexual abuse and sexual exploitation.

The monitoring bodies responsible for the implementation of the ICCPR and CEDAW (the Human Rights Committee and the Committee on the Elimination of Discrimination Against Women) have recommended amendments to the Sexual Offences Act 2009, the Domestic Violence Act 2005 and the Offences Against the Person Act, 1864 in order for Jamaica to comply with their international obligations. The CEDAW Committee recommended the complete criminalization of marital rape in July 2012 and the Human Rights Committee recommended strengthening the SOA and DVA to increase protections for women, children and men against sexual and domestic violence in November 2016.

At the regional level, Jamaica ratified the American Convention on Human Rights in 1978 and the "Convention of Belem do Pará": Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women in 2005. Article 7 of the American Convention guarantees the right to liberty and security of the person and article 24, the right to equality before the law and equal protection of the law. The Convention of Belem do Pará requires the government to take all appropriate measures to address violence against women, including sexual violence. The Inter-American Commission on Human Rights in their August 2012 Report on the Situation of Human Rights in Jamaica recommended the strengthening of laws to protect women and children.

At the national level, the 2011 Charter of Fundamental Rights and Freedoms guarantees the right to life, liberty and security of the person (section 13(3)(a)), the right to equality before the law (section 13(3)(g)) and the right to freedom from discrimination on the basis of being male or female (section 13(3)(i)(i)).

The SOA, DVA, OAPA and CCPA need to be amended to be consistent with the human rights protections guaranteed at the national, regional and international levels. Amending this cluster of legislation is also consistent with the Government of Jamaica's expressed commitments and obligation to respect, protect and fulfill the rights

guaranteed at all three levels.

### **A. Proposed Amendments to the Sexual Offences Act**

The Equality for All Group urges that any review of the law would need to provide comprehensive and robust protection for sexual crimes committed against those without the capacity to consent, including and especially children.

It is the submission of the Equality for All Group that the issues highlighted herein be considered by the Joint Select Committee as it seeks to create a more expansive and effective Sexual Offences Act that is respectful of the human dignity, bodily autonomy, bodily integrity and rights of all Jamaicans, including Lesbian, Gay, Bisexual and Transgender (LGBT) Jamaicans and that is consistent with their constitutional obligation to guarantee equality before the law and equal protection of the law.

#### **Part I – Preliminary**

- Re-definition of ‘sexual intercourse’ to be gender neutral.
- Re-formulating language throughout the Act so that it is gender neutral in keeping with the proposed gender neutral definition of sexual intercourse.

##### 1.1 Definition of ‘Sexual Intercourse’

1.1.1 The definition of ‘sexual intercourse’ contained in Section 2 of the Sexual Offences Act is explicitly gender and orifice specific. This definition has direct implications for the definition of “rape”, “incest” and “sexual intercourse with person under 16”. Rape is defined as a man having sexual intercourse with a woman without her consent, incest is defined as sexual intercourse between certain family members and sexual intercourse with person under 16 deals with sexual intercourse with persons under 16 who cannot consent to same. There are indirect implications for all other offences criminalized under the Sexual Offences Act. In other words, acts of sexual violence which do not involve sexual intercourse do not amount to ‘rape’, ‘incest’, or ‘sexual intercourse with person under 16’. These acts may be considered “Grievous Sexual Assault”, “Indecent Assault” or “Sexual Touching” (if it is committed against children). There are acts of sexual violence which fall outside of the Sexual Offences Act such as “Buggery”. The definition of sexual intercourse is therefore a foundational feature of the Sexual Offences Act around which several offences are organized

and critical to one's ability to secure justice when they experience rape, sexually assault or other forms of sexual violence.

- 1.1.2 According to the Act, sexual intercourse is "the penetration of the vagina of one person by the penis of another person". Consequently, penetration of the anus by the penis, a body part other than the penis or by an object does not amount to sexual intercourse and therefore, if a person, A, forcefully penetrates the anus of a person, B, B is not raped under the law. This is equally true of penetration of the mouth by the penis. The sentence for rape and sexual intercourse with person under 16 is minimum fifteen (15) years imprisonment to a maximum of life imprisonment. A person convicted for incest is liable to life imprisonment. These offences are triable in the Supreme Court.
- 1.1.3 The sentence for Grievous Sexual Assault is minimum fifteen (15) years imprisonment to a maximum of life imprisonment if tried in the Supreme Court. If it is tried in the Parish Courts, then the maximum sentence is three (3) years. The maximum sentence of Indecent Assault is fifteen (15) years if tried in the Supreme Court and three (3) years if tried in the Parish Courts. The maximum sentence for Sexual Touching is ten (10) years. The maximum sentence for Buggery (as contained in the OAPA) is ten (10) years.
- 1.1.4 We submit that the definition of sexual intercourse and the implications of same through the Act abridge the right to equal protection of the law as guaranteed in our constitution. The legislation creates a hierarchy of offences by which sexual violence in the form penis-to-vagina penetration carries the highest form of punishment. Sexual violence that does not meet this standard is not equally punished, regardless of the impact on the victim. The result is that sexual violence in circumstances where penis-to-vagina penetration cannot occur (such as where the victim is a boy) will never receive the highest form of punishment. It is undeniably problematic for a person charged with rape to be able to claim as a valid the defence that he raped a young girl anally and not vaginally and only convicted of the lesser offence of buggery. **We submit that our laws criminalizing sexual violence should accord with the principles of equality and non-discrimination and provide adequate protection for all children from all forms of sexual violence, regardless of the gender of the rapist.**

The revised definition of sexual intercourse should, borrowing from the Bahamas Sexual Offences and Domestic Violence Act 1991, read as follows:

**“Sexual intercourse” means:**

**(a) sexual connection occasioned by any degree of penetration of the vagina of any person or anus of any person, or by the stimulation of the vulva of any person or anus of any person, by or with –**

**(i) any part of the body of another person; or**

**(ii) any object used by another person, except where the penetration or stimulation is carried out for proper medical purposes; and**

**(b) sexual connection occasioned by –**

**(i) the introduction of any part of the penis of any person into the mouth of another person,**

**(ii) placing the mouth or any part thereof of any person on the penis of another person;**

**and any reference in this Act to the act of having sexual intercourse includes a reference to any stage or continuation of that act.”<sup>1</sup>**

## 1.2 Gender Neutral Language

1.2.1 Consistent with the re-definition of sexual intercourse to guarantee equal protection of all children, women and men from sexual violence, there is a need to reformulate the language used throughout the Sexual Offences Act to be gender-neutral. The current language of the Act makes the gender of the perpetrator determinative of the offence they are charged with it. The effect is that sexual violence between persons of the same-sex is not capable of being deemed rape, incest or sexual intercourse with person under 16, the offences more strictly punished.

1.2.2 In Part II, Section 3 which states, *inter alia*, that a man commits the offence of rape if he has sexual intercourse with a woman without her consent. This means that the man, as the person in possession of a penis, must be the active participant and conversely the woman, as the person in possession of a vagina, must be the passive participant. Therefore, a woman cannot rape a man under Jamaican law

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<sup>1</sup>The Sexual Offences and Domestic Violence Act (Bahamas) 2009 section 4.

and similarly a man cannot be raped by another man since both parties are male persons.

- 1.2.3 In Part III, Incest is defined in section 7(1) as a male person having sexual intercourse with their mother, grandmother, daughter, sister, niece, aunt or granddaughter and in section 7(2) as a female person having sexual intercourse with their father, grandfather, son, brother, nephew or grandson. Acts which do not amount to sexual intercourse do not amount to incest and acts occurring between family members of the same-sex equally do not amount to incest. In Part IV, section 10 criminalizes only sexual intercourse with persons under 16. Sexual intercourse can only occur between persons with a penis and a vagina. This excludes same-sex sexual activity involving children.
- 1.2.4 The gender-specific nature of these offences create gaps within the legislation and consequent gaps in the protection of children, women and men from sexual violence. **We therefore submit that the language of the Sexual Offences Act and the definitions therein be gender neutral.**

## **Part II - Rape, Grievous Sexual Assault and Marital Rape**

### 2.1 Definition of 'Rape' – Section 3

- 2.1.1 This definition of sexual intercourse impacts directly on the definition of the offence of 'rape' and as described above, is foundational to the criminalization of other acts of sexual violence. The submission urging a gender and orifice neutral definition of sexual intercourse would, to a large extent, expand the definition of rape to cover varied forms of sexual violence. Vaginal, anal and some forms of oral penetration would be equally prohibited and subject to a minimum sentence of 15 years.
- 2.1.2 Consistent with the recommendation for gender-neutral language throughout the Act, we submit that the offence of rape should apply where one person has sexual intercourse (through its expanded definition) with another without their consent. We also recommend that the offence of rape also be extended to include circumstances where the accused causes the complainant to engage in sexual intercourse with a third person. This provision currently exists for the offence of

grievous sexual assault.

**Section 3(1) of the Act should be replaced with the following:**

**“A person (hereinafter called “the offender”) commits the offence of rape if -**

**(a) the offender**

**i) has sexual intercourse with another person (hereinafter called “the victim”); or**

**ii) causes the victim to engage in sexual intercourse with a third party;**

**(b) without the victim’s consent; and**

**(c) knowing that the victim does not consent to sexual intercourse or recklessly not caring whether the victim consents or not.**

2.2 Definition of ‘Grievous Sexual Assault’ – Section 4

2.2.1 With reference to the arguments made regarding the foundational nature of the definition of sexual intercourse, re-defining “sexual intercourse” means that many of the offences currently covered under section 4 of the Act would be made redundant as they would be rightly absorbed within the offence of rape. There remain, however, acts of sexual violence such as non-consensual penetration of the mouth with an object or with a body part other than the penis as well as where the offender forces the victim to penetrate herself/himself with their fingers or an object that should be regarded as ‘Grievous Sexual Assault’ and be criminalized accordingly.

**Section 4(1) of the Act should be replaced with the following:**

**A person (hereinafter called "the offender") commits the offence of grievous sexual assault upon another (hereinafter called the "victim") where, in the circumstances specified in subsection (3), the offender -**

**(a) for a sexual purpose penetrates the mouth of a victim with an object;**

**(b) causes another person to penetrate the mouth of a victim with an object for a sexual purpose;**

**(c) penetrates the mouth of a victim with a body part other than the penis, for a sexual purpose;**

**(d) causes another person to penetrate the mouth of a victim with a body part other than the penis, for a sexual purpose;**

**(e) causes the victim to penetrate the victim’s vagina or anus or stimulate**

- the victim's vulva or anus with the victim's body part; or**  
**(f) causes the victim to penetrate the victim's vagina or anus or stimulate the victim's vulva or anus with an object.**

2.3 Consent – Section 3(2) and 4(4)

2.3.1 Sections 3(2) and 4(4) of the Act outlines the circumstances in which consent is vitiated. These circumstances are where the consent is given as a result of a physical assault or threats of violence to the victim or a third person and where consent is given by the victim on the basis of false/fraudulent representation as to the nature of the Act or the identity of the offender. There are several other circumstances in which consent given is compromised. The law should not limit the vitiating of consent to physical violence, threats of same and mistaken identity as it does not account for the different power relations that persons exist in and how these power relations can make individual vulnerable to sexual exploitation.

2.3.2 Under the Act, if a person, A, who is a University Lecturer, uses his authority over a person, B, his student through suggesting that failure to have sex with high could have negative consequences on B's performance in the course and resultingly B consents out of fear of those consequences, then this is not recognized as rape. Similarly, if a person, C, knows that a person, D, is intoxicated or C herself intoxicated D then the consent that D gives may be considered valid even though D is drunk or high.

2.3.3 Sexual Offences legislation in other commonwealth Caribbean jurisdictions recognize that consent may be vitiated in circumstances beyond the use of force, threats and mistaken identity. In Barbados and Dominica, they recognize that the use of authority over a person can vitiate consent as well as any form of intimidation<sup>2</sup>. In Trinidad and Tobago, the detainment of a person vitiates consent.<sup>3</sup> In Dominica, the Act does not recognize a person as consenting where the consent came as result of drugging or otherwise intoxicating that person.<sup>4</sup>

2.3.4 In accordance with the recommendations to strengthen laws protecting children,

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<sup>2</sup> Barbados Sexual Offences Act 2002, s.3(2)(e) and (f), Dominica Sexual Offences Act 1998, s.3(2)(e) and (g)

<sup>3</sup> Trinidad and Tobago Sexual Offences Act 2000, s.4(1)(b)(iv)

<sup>4</sup> Dominica Sexual Offences Act 1998, s.3(2)(f)

women and men from sexual violence, it is critical to ensure that the loopholes within the law that perpetuate the commission of acts of sexual violence with impunity are rectified. **We therefore submit that Act be amended to recognize that consent may be vitiated in the circumstances where it is given as a result of the use of authority, the use of intimidation of any kind, the detainment of a person or the administration of drugs, alcohol or any other intoxicating substance.**

**Sections 3(2) and 4(4) of the Act should be amended by replacing them with the following**

- (a) extorted by physical assault or threats or fear of physical assault to the victim or to a third person; or**
- (b) obtained by false and fraudulent representation as to the nature of the act or the identity of the offender; or**
- (c) obtained by the unlawful detaining of the victim or a third person; or**
- (d) obtained by the use of the offender's position of authority over the victim; or**
- (e) obtained by intimidation of any kind from the offender; or**
- (f) obtained by the administration to the victim of a drug, matter or thing, with intent to stupefy or overpower the victim or causing the victim to take the same with intent to stupefy or overpower the victim.**

## 2.4 Marital Rape – Section 5

2.4.1 Section 5 of the Sexual Offences Act, rather than criminalizing marital rape, acts as a fetter to the criminalization of rape occurring between married persons. The common law position was, since 1991, that a husband could be prosecuted for raping his wife.<sup>5</sup> This position was altered by section 5 and therefore Jamaica took a step backwards, failing to provide equal protection to all women who are raped.

2.4.2 Section 5, aside from the flagrant gender discrimination, discriminates against women on the basis of marital status. A man can claim that he is married to a woman and therefore cannot be prosecuted for rape, unless the marriage falls within one of the circumstances listed in section 5(3). Consequently, unmarried women in Jamaica who are raped by their partners have greater protection than a

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<sup>5</sup> R v R [1992] 1 AC 599

married woman. **The complete criminalization of marital rape is necessary for the protection of all women from sexual violence and consistent with the government's responsibility to address all forms of violence.**

2.4.3 **We recommend that section 5 in its entirety be repealed from the Sexual Offences Act, thereby allowing for the forced sexual intercourse against a woman to be recognized and criminalized as rape, irrespective of her marital status.**

2.5 'Aggravated Rape' and 'Aggravated Grievous Sexual Assault'

2.5.1 The current Sexual Offences Act gives further protection to certain vulnerable populations beyond just the criminalization of rape and grievous sexual assault. The Act makes it an offence for a person to have sexual intercourse with a person under 16 as well as having sexual intercourse with a person who is physically or mentally disabled where that person is unable to give consent. This is consent with the trend within the Commonwealth to protect those whose vulnerability make them targets for sexual violence.<sup>6</sup>

2.5.2 We submit, however, that these protections do not go far enough. The sections protect vulnerable populations from being exploited by preventing the defence of consent from being raised but what they do not do is punish more severely those persons who target these vulnerable groups for sexual violence. In Western Australia for example, rape is considered aggravated when a child is present during the act, when it happens between family members or in the domestic sphere broadly, when a person over 60 years old is the victim, where a dangerous weapon is used, where there are multiple offenders, where the offender harms, humiliates or threatens to kill the victim and where the victim is a child between 13 to 15 inclusive.<sup>7</sup> The effect is that sexual penetration without consent has a penalty of 14 years imprisonment whereas the aggravated form of the offence has a penalty of 20 years imprisonment.

2.5.3 The 2016 National Crime Victimization Survey indicate that experiences of sexual assault are higher among youth and adolescents (16-24) and the elderly (over 65).

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<sup>6</sup> Antigua and Barbuda Sexual Offences Act 1995, s.11; Bahamas Sexual Offences and Domestic Violence Act 1991, s.12; Barbados Sexual Offences Act 2002, s.8; Dominica Sexual Offences Act 1998, s. 11; Trinidad & Tobago Sexual Offences Act 2000, s. 12

<sup>7</sup> Western Australia Criminal Code, Ch. XXVI s. 221, Ch. XXXI ss. 319 and 326.

The survey did not disaggregate the crime victimization data on the basis of sexual orientation, gender identity or disability. Notwithstanding, anecdotal evidence of “corrective rape” of members of the LGBT community, particularly lesbian, bisexual and trans women suggests that they are especially vulnerable to sexual violence. “Corrective Rape” is a term used to describe the rape of an individual with the intention changing their sexual orientation. Importantly, while lesbian, bisexual and trans women are more susceptible to such abuses, gay and bisexual men are also vulnerable. In some cases, these abuses are commissioned by parents, guardians and other caregivers who may force a child to have sex with someone of the opposite sex, force them to watch persons of the opposite sex engaging in sexual activity or force them to watch/view pornographic materials with the expectation this will ‘correct’ their non-heterosexual orientation.

- 2.5.4 We submit that there is a need to strengthen protections from sexual violence to those populations with increased vulnerability as well as strengthen punishments where rape and sexual violence is committed in particularly violent or gruesome circumstances. We recommend that the Act be amended to specifically criminalize aggravated forms of rape and grievous sexual assault.**

**Section 5A should be inserted after Section 4 of the Act and before Section 6 and state the following:**

- (1) A person (hereinafter called "the offender") who commits an offence under section 3 or 4 upon another (hereinafter called the "victim") in circumstances of aggravation, as specified in the subsection (2), is liable on conviction in the Circuit Court to imprisonment for life or such other term as the court considers appropriate, not being less than twenty-five years**
- (2) In this section, circumstances of aggravation means circumstances in which -**
  - (a) the victim is of or under the age of 12 years**
  - (b) the victim is of or over the age of 60 years**
  - (c) there are two or more offenders**
  - (d) the offender is armed with an offensive weapon within the meaning of the Offensive Weapon (Prohibition) Act or a firearm**

**within the meaning of the Firearms Act**

- (e) **the offender does bodily harm to the victim or a third person**
- (f) **the victim is physically or mentally disabled and the offender knows or reasonably ought to have known in the circumstances that the victim was so disabled**
- (g) **the offender commits the offence because of the victim's perceived or actual sexual orientation or gender identity.**

**Part IV – Sexual Offences Against Children and Indecent Assault**

3.1 Sexual Intercourse with person under 16 – section 10 – Title of the Offence

3.1.1 In 2014, the Office of the Children's Registry (OCR) recorded 3,403 reported cases of sexual abuse of our children; an average of 9 cases every day. Sexual intercourse with a person under sixteen was the most reported offence to CISOCA between 2014 and 2016 with a total 1420 reported incidents. Sexual Touching was fourth with 163 reported incidents. Suffice to say, the data show sexual violence against children continues to be a critical issue.

3.1.2 One of the factors surrounding the scourge of sexual violence against children is the culture of silence and complicity which perpetuates the idea that “it’s just a little sex”. Parliament, through the legislation, is guilty of entertaining and validating these sentiments by labelling child sexual abuse: “sexual intercourse”. Rape and sexual intercourse are distinct activities. The latter involves mature individuals acting upon their agency, the former is the abuse of and forcible denial of the agency of another individual. An act robbing children of their dignity and bodily autonomy should be denounced through strong language indicative of our intolerant attitude to child abuse.

3.1.3 **We submit that the words “sexual intercourse with person under 16” be replaced with the words “statutory rape” in the arrangement of sections, body of the legislation and marginal notes.**

3.2 Definition of Statutory Rape

3.2.1 Under the Act, the provisions of section 10 only come into effect where a person under sixteen engages in “sexual intercourse” or is raped. The provisions related to the persons who have authority over the child victim under section 10(4) do

not apply where the child is subjected to acts amounting to grievous sexual assault. Even though section 4(3)(b) vitiates the consent of a person under 16 who these acts are committed against, there are no further considerations as is the case with section 10 which better addresses the issue of the custody of children who have been assaulted.

3.2.2 We submit that for the better administration of the provisions of this Act to afford equal protection to all children who have been abused as well as to ensure that there are few to no gaps within the scheme of the Act that the wording of sections 10(1) and 10(2) be amended to include grievous sexual assault. We also submit that section 4(3)(b) be repealed as the consent of persons under 16 to acts amounting to grievous sexual assault would be dealt with under section 10.

3.2.3 **Sections 10(1) and 10(2) of the Act should be amended by including acts amounting to grievous sexual assault as a basis for statutory rape and not just “sexual intercourse”. Section 4(3)(b) of the Act should be repealed.**

**The Act should be amended as follows:**

**10(1) Subject to subsection (3): -**

- (a) an adult (hereinafter called the “offender”) commits an offence where the offender:
  - (i) has sexual intercourse with; or**
  - (ii) commits an act specified under section 4(1) of this Act upon a person who is under the age of sixteen years.****
- (b) a person (hereinafter called the “offender”) commits an offence where the offender:
  - (i) has sexual intercourse with; or**
  - (ii) commits an act specified under section 4(1) of this Act upon**  
**a person who is under the age of twelve years.****

**10(2) Subject to subsection (3): -**

- (a) an adult who attempts to commit an offence under section 10(1)(a) is guilty of an offence.**
- (b) a person who attempts an offence section 10(1)(b) is guilty of an offence.**

**Part VI – Capacity, Consent, Evidentiary Matters, Anonymity of Complainant**

4.1 Restriction of Evidence at Trial for Rape – section 27

4.1.1 Section 27(1) marks an important step in combating the impunity with which rape often occurs within Jamaica. It restricts information related to the sexual history of the victim unless the judge sees it fit to allow it where it is material to the case. Negative stereotypes of women oftentimes impact their ability to seek justice for sexual violence. These stereotypes include the presumption that a woman who has several sexual partners must have consented to sexual intercourse with the offender. There are also stereotypes about women’s clothing that suggest that a woman who wears more revealing clothing invites sexual assault and rape.

4.2.1 **We submit that section 27(1) should go further to restrict evidence that will negatively affect the jury’s perception of the victim even though it does not affect the credibility of the victim or the likelihood of the offence being committed.**

**Section 27(1) of the Act should be amended and read as follows:**

**In any proceedings in respect of rape or other offence under this Act, no evidence shall be adduced and no question shall be asked in cross examination relating to the sexual behaviour of the complainant with a person other than the accused or the clothing or general appearance of the complainant during the time the offence is alleged to have been committed or at any time before or after, unless leave of the Judge is obtained on application made by or on behalf of the accused.**

**B. Proposed Amendments to the Domestic Violence Act**

The Equality for All Group also urges that any review of the Domestic Violence Act be done with a view to bridging the current legal gaps and providing protection to all persons who are victims of the different forms of domestic violence, intimate partner violence and gender-based violence.

It is the submission of the Equality for All Group that the issues highlighted herein be considered by the Joint Select Committee as it seeks to create a more expansive and effective Domestic Violence Act that is respectful of the human dignity, bodily

autonomy, bodily integrity and rights of all Jamaicans, including Lesbian, Gay, Bisexual and Transgender (LGBT) Jamaicans.

### **Part I - Preliminary**

#### 5.1 Definition of 'Domestic Violence'

5.1.1 The Domestic Violence Act does not provide a legal definition for domestic violence in its interpretation Act. The effect of this is that the basis for redress within the Act is limited. Sections 4(2) and 7(3) of the Act set the standard. Only where a person has been physically abused or threatened with abuse or where the person has suffered physical or mental injury and this is likely to recur can that person seek relief.

5.1.2 The primary problem with this is that it limits access to protection from domestic violence to cases of physical or mental injury or abuse which fails to take into account emotional or financial abuse which results from living in a hostile environment. The secondary problem is the requirement that the abuse or injury is likely to recur. From an evidentiary standpoint, it is difficult for a victim to speak with certainty to the likelihood of the future actions of another person and it potentially puts persons at risk by removing the possibility for protection for one-off incidents of violence. Another problem is that it gives no protection for persons, particularly women, who have faced sexual abuse but who may not be interested in pursuing criminal justice.

5.1.3 Within the Commonwealth Caribbean, there are examples of expansive definitions of domestic violence which work to protect against not just the obvious forms of violence that exist but those forms of violence which often times make persons, particularly women, vulnerable. These definitions include financial abuse, emotional abuse, sexual abuse and harassment.<sup>8</sup> To the extent that an individual cannot seek protection for all the forms of abuse that often times precede and lead up to physical violence is problematic and to the extent that we criminalize marital rape but do not provide women with speedy relief through the orders within the Act for the same sexual abuse faced.

5.1.4 **We submit that the Act should be amended to give wider protection from all**

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<sup>8</sup> Trinidad and Tobago Domestic Violence Act 1999; Barbados Domestic Violence (Protection Orders) (Amendment) Act 2016; Bermuda Domestic Violence (Protection Orders) Act 1997

forms of domestic violence, and not just those that are readily identifiable. The Act should respond effectively to the ways in which intimate partner violence and gender-based violence occur and in particular how violence against women occurs with impunity in the private sphere. We recommend that the Act be amended to provide a broad legal definition of domestic violence which is the standard by which legal remedies are sought and accessed.

Section 2 of the Act should be amended to insert the following, borrowing from Trinidad and Tobago, Barbados and Bermuda:

**“domestic violence” includes physical, sexual, emotional or psychological or financial abuse committed by a person against a prescribed person.**

**“emotional or psychological abuse” means a pattern of behaviour of any kind, the purpose of which is to undermine the emotional or mental well-being of a prescribed person including –**

- (a) persistent intimidation by the use of abusive or threatening language;**
- (b) persistent following of the person from place to place;**
- (c) depriving that person of the use of his property;**
- (d) the watching or besetting of the place where the person resides, works, carries on business or happens to be;**
- (e) interfering with or damaging the property of the person;**
- (f) the forced confinement of the person;**
- (g) persistent telephoning of the person at the person’s place of residence or work;**
- (h) making unwelcome and repeated or intimidatory contact with a child or elderly relative of the person; and**
- (i) in the case of a child: -**
  - (i) seeing or hearing the physical, sexual or emotional or psychological abuse of a relative; or**
  - (ii) being placed at risk of seeing or hearing that abuse occurring.**

**“financial abuse” means a pattern of behaviour of a kind, the purpose of which is to exercise coercive control over, or exploit or limit a person’s access to financial resources, the effect of which is to hinder the applicant’s financial**

**independence or ability to maintain a child or dependant or to ensure financial dependence on the respondent.**

**“sexual abuse” means: -**

- (a) the commission of or attempt to commit any act that would amount to an offence under the Sexual Offences Act; or**
- (b) sexual contact of any kind that is coerced by force, threat of force or intimidation of any kind.**

5.2 “Prescribed Persons” – Who can seek relief

5.2.1 Currently, section 2 of the Act lists “prescribed persons” – those persons who can seek redress under the Act – as spouses (married or unmarried), parents, children, dependents, members of the household of and persons in a visiting relationship with the abuser. This list has particular limits and does not consider all the persons affected by intimate partner violence and domestic violence. The definition of spouses and visiting relationship for example are exclusively heterosexual. The implication is that persons in same-sex unions are excluded from the redress provided by the Act though evidence show that police has, on several occasions, intervened in such incidents.

5.2.2 The importance of the regime created by the Act must not be missed. The Act provides an opportunity for those persons, mostly women, to seek relief in the Family Court or Parish Courts rather than go through the criminal justice system. These proceedings offer privacy to those persons that are deterred from seeking justice by the openness of ordinary criminal trials. Within our Jamaican context, domestic violence still carries a sense of shame for victims. It is therefore imperative that all person who face this form of violence are able to use this regime and receive the benefit of the relief it provides.

5.2.3 Children of persons in visiting relationships who witness violence being meted out to their parents are another group of persons unable to seek relief. Children of persons in non-cohabiting same-sex unions are also not able to seek relief. The Government of Jamaica has a responsibility to provide equal protection to all persons, especially children, from all forms of violence, consistent with the right to equality before the law guaranteed at the international, regional and national levels.

- 5.2.4 Across the Commonwealth Caribbean, there are examples of broad recognition of romantic and sexual relationships. In Barbados, they have a broad definition of visiting relationships which covers “a relationship where the parties do not live together in the same household, but in which there are romantic, intimate or sexual relations.”<sup>9</sup> In Guyana, persons who “are or have engaged in a relationship of a sexual nature” may seek relief.<sup>10</sup> In Bermuda, persons in “close personal relationships” which may or may not include sexual relations may seek relief.<sup>11</sup>
- 5.2.5 **We submit that a broader category of persons in romantic and/or sexual relationships and the children of those persons be recognized so that no group is excluded from legal protections. Failing to do this would be tantamount to the State facilitating the exposure of certain vulnerable groups to violence.**

**Section 2 of the Act should be amended to include the following:**

**“Domestic Relationship” means a relationship with the respondent, whereby the applicant is: -**

- (a) the spouse of the respondent;**
- (b) a parent of the respondent;**
- (c) a child of the respondent;**
- (d) a dependant of the respondent;**
- (e) a member of the respondent’s household;**
- (f) a person who the respondent is in a visiting relationship with;**
- (g) a person the respondent is engaging or has engaged in romantic, intimate or sexual relations; or**
- (h) A child of a person the respondent is engaging or has engaged in romantic, intimate or sexual relations.**

**Section 2 of the Act should be amended by replacing the definition of “prescribed person” and replacing it with the following: -**

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<sup>9</sup> Barbados Domestic Violence (Protection Orders) (Amendment) Act 2016, s. 2

<sup>10</sup> Guyana Domestic Violence Act 1996, s.3(1)

<sup>11</sup> Bermuda Domestic Violence (Protection Orders) Act 1997, s. 4(4)

**“prescribed person” means a person in a domestic relationship with the respondent.**

## **Part II - Application for Orders**

6.1 The threshold for relief – sections 4(2) and 7(3)

6.1.1 Consistent with the recommendation under section 5.1 to expand the forms of domestic violence prohibited, sections 4(2) and 7(3) require amendment as they present the legal threshold for obtaining protection and occupation orders. **The recommended definition of domestic violence should be the basis of obtaining relief under the Act.**

**Section 4(2) of the Act should be replaced with the following:**

**(2) On hearing an application under subsection (1), the Court may make a protection order if it is satisfied that the respondent has engaged in domestic violence.**

**Section 7(3) of the Act should be replaced with the following:**

**(3) The Court may make an order under subsection (2) only if the Court is satisfied that:-**

- (a) the respondent has engaged in domestic violence; or**
- (b) such an order would be in the best interests of a child.**

6.2 Protection Orders – Section 4(1)

6.2.1 The current wording of the section 4(1) of the Act which outlines the nature of the orders that the court can make also needs revision. The current formulation is limited because it premised only on the basis of physical or mental injury. The types of orders do not take into account the possibility of financial abuse. With the recommended definition forming the legal basis of the order as recommended in section 6.1, **we recommend that the powers of the Court in providing for relief through protection orders be expanded.**

**Section 4(1) of the Act should be amended by replacing it with the following:**

**(1) Application may be made to the Court for a protection order to -**

- (a) prohibit the respondent from entering or remaining in the household residence of any prescribed person; or**
- (b) prohibit the respondent from entering or remaining in any area specified in the order being an area in which the household residence of the prescribed person is located; or**
- (c) prohibit the respondent from entering the place of work or education of any prescribed person; or**
- (d) prohibit the respondent from entering or remaining in any particular place; or**
- (e) prohibit the respondent from from molesting a prescribed person by**
  - 
  - (i) watching or besetting the household residence, place of work or education of a prescribed person;**
  - (ii) following or waylaying the prescribed person in any place;**
  - (iii) making persistent telephone calls to a prescribed person;**
  - (iv) using abusive language to or behaving towards a prescribed person in any other manner which is of such nature and degree as to cause annoyance to, or result in ill-treatment of the prescribed person;**
  - (v) damaging any property owned by, or available for the use or enjoyment of, the prescribed person, or any property in the care or custody or situated at the residence of the prescribed person; or**
- (f) prohibit the respondent from taking possession of, damaging, converting or otherwise dealing with property that the applicant may have an interest in, or is reasonably used by the applicant, as the case may be; or**
- (g) prohibit the respondent from causing or encouraging another person to engage in conduct referred to in paragraphs (a) - (f); or**
- (h) direct the respondent to return to the applicant specified property that is in his possession or under his control; or**
- (i) direct the respondent to pay compensation for monetary loss incurred by an applicant as a direct result of conduct that amounted to domestic violence; or**
- (j) direct the respondent to relinquish to the police any firearm licence, firearm or other weapon which he may have in his possession or control and which may or may not have been used; or**

**(k) provide such further and other orders as the Court may deem appropriate in the circumstances.**

6.3 Breach of Protection Order – section 5

6.3.1 Currently, the punishment for breaching the protection order under section 5(1) is six months' imprisonment and/or a fine of ten thousand dollars. The judge has discretion to give a sentence that is lower than the one outlined above. The breach of a protection order may involve serious acts of violence, including murder or grievous bodily harm. The weak penalty for breaching the order significantly discredits the protective nature of the order.

6.3.2 Given the recent upsurge in cases of domestic violence and violence against women, and the Government push to strengthen measures to combat same, strengthening the punishment for breach of this court order is especially important. By way of example, where a public company under the Companies Act fails to comply with legal requirement to hold a statutory meeting, the maximum fine is fifty thousand dollars.<sup>12</sup> When the legal system values the failure to have a corporate meeting higher than the risk that comes with the breach of protection order, then it is quite clear that the Government has failed in its obligation to protect citizens from violence.

6.3.3 **We submit that the punishment for breaching a protection order is considerably low and is inconsistent with the obligation to protect all Jamaicans and in particular women and children from violence. We recommend that the punishment be strengthened commensurate with the risk that it is posed.**

**Section 5(1)(a) of the Act should be amended by deleting the words “ten thousand dollars” and replacing it with the words “one-hundred and fifty thousand dollars and deleting the words “six months” and replacing it with the words “one year”.**

6.4 Criminal Liability for Domestic Violence

6.4.1 For the reasons outlined in paragraph 6.3.2, we urge that the Government creates

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<sup>12</sup> Companies Act, s. 127(9)

criminal sanctions for incidences of domestic violence which may be prosecuted through the family court. The advantages of the Domestic Violence regime as highlighted in paragraph 5.2.2 must be once again underscored. Victims of domestic violence are more likely to pursue criminal charges where their privacy is respected and they are able to access meaningful relief alongside a conviction.

**6.4.2 We strongly recommend that domestic violence be criminalized and prosecuted in the Family Court and Parish Courts under the authority of the Domestic Violence Act.**

**The Act should be amended by insert under Part III General after section 13, section 13A which reads as follows:**

**Section 13A (1) Any person who commits an act of domestic violence is guilty of an offence and is liable on summary conviction before the Court to a fine not exceeding three hundred thousand dollars or to a term of imprisonment not exceeding three years or to both.**  
**(2) Any person who attempts to commit an act of domestic violence is guilty of an offence and is liable on summary conviction before the Court to a fine not exceeding two hundred thousand dollars or to a term of imprisonment not exceeding two years or to both.**

### **C. Proposed Amendments to the Offences Against the Person Act**

The Equality for All Group urges that the review of the Offences Against the Person Act should be done with the aim of removing redundancies within the law as well correcting existing loopholes as well as respecting the rights of all Jamaicans.

It is the submission of the Equality for All Group that the issues highlighted herein be considered by the Joint Select Committee as it seeks to create a more expansive and effective Sexual Offences Act that is respectful of the human dignity, bodily autonomy, bodily integrity and rights of all Jamaicans, including Lesbian, Gay, Bisexual and Transgender (LGBT) Jamaicans.

**7.1 Unnatural Crime – Section 76 & 77**

- 7.1.1 The crime of buggery as set out in the Act currently criminalizes penile penetration of the anus between persons regardless of consent. The Act also criminalizes the penetration of the vagina or anus of an animal. With reference to the recommended definition of sexual intercourse in paragraph 1.1.4, the crime of buggery partly becomes redundant as anal rape would be adequately protected under the Sexual Offences Act under the offences of rape and statutory rape. Children would not be able to consent to penis-to-anus penetration. Buggery would then only criminalize bestiality and consensual penis-to-anus intercourse between adults.
- 7.1.2 The criminalization of penis-to-anus intercourse between consenting adults is a violation of the right to privacy guaranteed under section 13(3)(j) of the Jamaican Charter of Rights. There is no overarching public good that justifies the criminalization of same as has been held in Belize.<sup>13</sup> Insofar as our international and regional human right obligations are concerned, it is trite law that criminalizing consensual intimacy is a violation of human rights and inconsistent with these obligations.
- 7.1.3 Even with the expanded definition of sexual intercourse, the inherent danger in leaving buggery in its current state is that men who anally rape women and men will be charged with this offence (as it is easier to prove than rape) and receive significantly lighter sentences. The buggery charge means less work for prosecutors and police and that is potentially dangerous. The law needs amendment to remove any possibility of legal loopholes for rapists.
- 7.1.4 Section 77 creates three offences: attempted buggery, indecent assault with intent to commit buggery and indecent assault on a male person. Attempted buggery would be absorbed in attempted rape to the extent of the changes in the definition of rape. Indecent assault is already criminalized under the Sexual Offences Act and the gender-specific offence is equally protected under the Act as men can be victims of indecent assault and grievous sexual assault, with higher penalties for their abusers.
- 7.1.5 **We support the continued criminalization of bestiality and we therefore**

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<sup>13</sup> *Caleb Orozco v The Attorney General of Belize* 2016 (Supreme Court Claim No. 668 of 2010)

**submit that the law be amended to only criminalize bestiality, allowing for the offences of rape, statutory rape and incest to be the only offences that anal rapists can be charged for.**

**Section 76 should be deleted and replaced with the following:**

**Whosoever shall engage in any sexual activity with any animal commits shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years**

**Section 77 should be deleted and replaced with the following:**

**Whosoever shall attempt to commit the offence in section 76 shall be guilty of an offence and being convicted thereof, shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour.**

8.1 Outrages on Decency – section 79

8.1.1 For the reasons outlined in paragraph 7.1.2 on the violation of the right to privacy by the criminalization of consensual intimacy between adults and for the reasons outlined in paragraph 7.1.4 on the wide protection from coercive sexual assaults on men that would exist in a reformulated Sexual Offences Act, section 79 is both oppressive and redundant. It also violates the right to equality before the law and the right to freedom from discrimination on the basis of being male or female by specifically criminalizing consensual intimacy between men.

8.1.2 **We recommend that section 79 in its entirety be repealed.**

9.1 **Strengthening Regulations and Facilitating Systemic Reform**

9.1.1 Importantly, while we work on improving our laws in relation to rape, sexual assault and other sexual offences to provide greater protection for Jamaicans, we should ensure that the regulations supporting the implementation of the Sexual Offences and Domestic Violence Acts be updated in a timely manner to give effect to the changes made. In addition, resources must be committed to developing and/or amending guides, curricula, and other information and educational materials that will facilitate greater awareness and understanding among police officers, lawyers, parents and caregivers, educators, and judges,

among others to enable greater access to and build confidence in using the redress mechanisms available to report such crimes and secure justice for our children, women and men.

9.1.2 It is critical that as a part of this process, efforts be made to improving the redress mechanisms to build confidence among citizens to report crimes perpetrated against them or another person. This is especially crucial where offences perpetrated against children and other vulnerable and marginalized groups such as the poor, people with disabilities, and LGBT persons are concerned. It is often the case that people who experience rape and other forms of sexual abuse and those who have knowledge of such incidents do not feel empowered enough to report the offences perpetrated against them because they feel the incident is too minor, nothing will come of making a report, they will be further victimized, the perpetrators will be informed that they have made a report, and their case will be dragged through the court for a very long time. In fact, only one in ten adults report incidents of child abuse when it is brought to their attention.<sup>14</sup>

9.1.3 Importantly, the way in which the justice system treat with these offences is foundational to improving the state's ability to address these crimes and play a greater role in securing justice for those who have experienced abuse. People who experience these offences must know and be assured that the investigation processes and courts will treat them respectfully and that their cases will be dealt with in a timely manner. They need guarantee that the process will fair and just, that they will have equal access to highly trained personnel regardless of their location or socioeconomic status, and that they will not be made to feel they caused themselves to be abused because of their dress and other factors.

## 10.1 Conclusion

10.1.1 The four Acts being review have a shared goal of protecting Jamaicans from different forms of violence and abuse. In their current formulation, there exists significant gaps which antithetic to the goal of protection for all Jamaicans. The recommendations offered by the Equality for All Group are tailored to fill those

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<sup>14</sup> Office of the Children's Registry, *Baseline Survey: Knowledge, Attitudes & Practices Regarding Child Maltreatment in Jamaica* (2014) Retrievable at  
<http://www.ocr.gov.jm/images/Docu/Baseline%20Survey%20KAPB%20Child%20Abuse%20February%202010,%202014.pdf>

gaps and ensure there is protection for all Jamaicans, including women, children, persons with disabilities, the elderly, the poor and LGBT persons.

10.1.2 The recommended definitions of sexual intercourse and domestic violence are both central to the larger submissions and we urge the Joint Select Committee to strongly consider implementing those two recommendations in particular. The flawed definition of sexual intercourse that currently exists and the absence of a definition of domestic violence creates a context in which several forms of abuse occur with impunity or with relatively weak punishment.

10.1.3 It is critical that at this point in our history, Jamaica continues on the path they have started on in making strides towards Vision 2030. Vision 2030 itself highlights domestic violence and sexual violence as one of the challenges to achieving its goals. We urge the Committee not to lose an opportunity to take a progressive step towards protect Jamaica's women, children and men.

10.1.4 It is our belief that the recommendations, if incorporated during the reformation of the legislation will create a strong framework for effective crime reduction and protection of all Jamaicans.

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