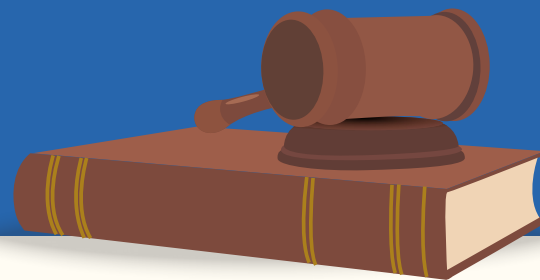


LEGAL ANALYSIS OF  
**ESC RIGHTS**  
**IN JAMAICA**

———— Simplified ————

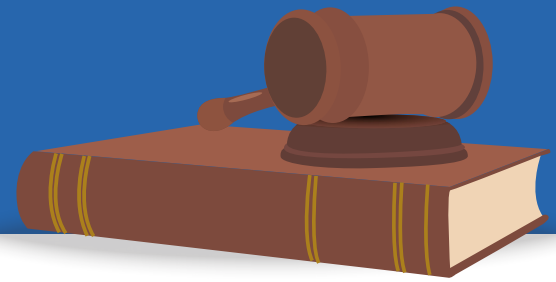


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# Introduction, History and Core Concepts



## Introduction

Although economic, social and cultural rights (ESCRs) form a part of the rights listed in the Universal Declaration of Human Rights (UDHR), 1948, they have not been given the pride of place that their better known “sister rights”, Civil & Political Rights (CPRs) have received. CPRs centre around the individual’s freedom to participate in public life unhindered by the state (freedom of speech, right to vote, freedom from discrimination), whereas ESCRs address the individual’s basic needs (right to work, right to health, right to education). As human rights are interdependent and indivisible, all these rights ought to be secured for an individual to enjoy his/her life but in the Jamaican context, ESCRs have not been as adequately incorporated into law as CPRs have. The analysis seeks to uncover the gaps and barriers, particularly for lesbian, gay, bisexual and transgender (LGBT) Jamaicans, while explaining core concepts surrounding the legal guarantee and implementation of ESCRs.

## History & Core Concepts

For ease, the focus was placed on the UN human rights system. The UN Charter of 1945 made references to “social progress” which was argued as supporting the case for including ESCRs in the UDHR. The UN Economic & Social Council (ECOSOC), created by the Charter, was given a mandate to promote respect for human rights. Under their auspices, the UN Commission on Human Rights was created. The hope was to create an international bill of rights which recognized both CPRs and ESCRs but the pressures of political tensions caused by the Cold War and the protection of ESCRs being seen as more aligned with communism led to the creation of the unenforceable and aspirational UDHR in 1948. These tensions continued into the 1960s and so two separate covenants were drafted, one guaranteeing CPRs and the other, the International Covenant on Economic, Social & Cultural Rights, guaranteeing ESCRs. Each created a separate framework for state obligations for each set of rights.

## A False Dichotomy

It was traditionally understood that CPRs were negative in nature, meaning that they focused on telling the state “what not to do” and ESCRs were positive in nature, requiring states to take action i.e. mobilize and spend resources, create systems and infrastructures etc. This however is a false dichotomy. There is a “tripartite typology” of state obligations meaning with every right (whether CPR or ESCR), states must **RESPECT, PROTECT & FULFILL** the right.

**Respect** – Do not do anything to unnecessarily interfere with people’s rights and freedoms.

**Protect** – Step in and do something when companies and individuals violate a person’s rights.

**Fulfill** – Take action to ensure a person can enjoy rights – pass laws, adjust budgets, create infrastructure and also promote rights.

## **Progressive Realization**

Given the nature of ESCRs, they will require resources and infrastructure to be fully realized for each and every individual. This concept acknowledges that this will take time and so states have flexibility in making these rights a reality, however, they cannot go backwards.

## **Maximum Available Resources**

This recognizes that not all States are at the same place economically and as such, their compliance with the ICESCR will be determined based on their use of the resources they have. In a way, securing ESCR can be seen as depending on the economic resources.

## **Minimum Core Obligation**

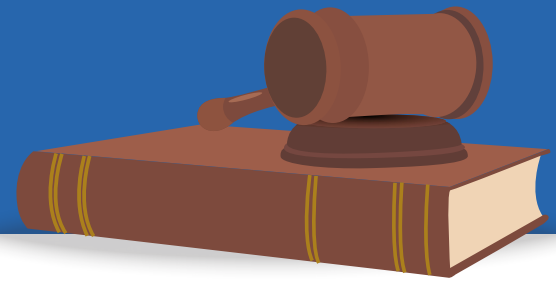
This is the baseline standard each State has to meet with each ESCR, regardless of their resources. It requires each right to be realized “to the extent that it provides for the basic needs of every member of society”. This is the floor but may unfortunately be treated as a ceiling as States may only strive to achieve this bare minimum, but it was designed to prevent them from opting out of the treaty altogether.

## **Justiciability**

This concept concerns itself with whether ESCRs can allow citizens to take the State to court for failing to meet their basic needs. Many persons have said no to this claiming that they are too vague, they are anti-democratic (violating Separation of Powers by making the unelected Court review the policy decisions of the elected Legislature and Executive) and that Courts are unfit to make these kinds of decisions.

However, these views are not settled. The South African Constitution, for example, enables the Constitutional Court to pronounce on ESCRs to varying degrees of success. Fears surrounding justiciability have been a big part of why they have been resisted within the Jamaican context.

# Substantive Rights



Jamaica ratified the ICESCR in 1971 and as such is bound to take steps to fulfill its obligations under this convention. The paper examines eight (8) of the rights contained therein.

## Prohibition of Non-Discrimination

Article 2.2 prohibits discrimination when States are implementing treaty obligations. Discrimination is defined any differential treatment based on a prohibited ground (race, colour, sex, language, social origin, birth or other status, etc) that has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise of ESCRs on an equal footing with others.

Not all differential treatment will be regarded as discriminatory. Differential treatment may be justified if there is a legitimate aim and/or effect to be achieved that is compatible with the Covenant rights and is solely for the purpose of promoting the general welfare in a democratic society. The differential treatment must be proportional to those aims and/or effects to be achieved.

The provision covers formal discrimination (discrimination in laws and policies), substantive discrimination (discrimination caused by historical and persistent prejudice), direct discrimination (explicit discrimination on a prohibited ground), indirect discrimination (discrimination caused by neutral laws and policies which have disproportionate impact on certain communities) and systematic discrimination (discrimination so pervasive and persistent that it has become institutionalized and require a comprehensive response).

## Equal Rights of Men & Women

Article 3 requires that states ensure that men and women equally enjoy all of the ESCRs set out in the Covenant. Similar to article 2.2, it recognizes how patriarchy and gender norms negatively impact women's ability to have equal access to public benefits and equal opportunity to have their needs addressed. It requires the presence of both formal and substantive equality and the removal of both direct and indirect discrimination.

## Right to Work

Article 6 guarantees the right to work, including the right of everyone to an opportunity to gain his/her living by work. It encompasses all forms of work (whether independent or dependent wage-paid work) but it is not an absolute and unconditional right to obtain employment. It includes, however, the right of the individual to freely decide to accept or choose work as well as the right not to be unfairly deprived of employment. Technical and vocational guidance, training programmes, policies and techniques to achieve steady economic, social and cultural development are all highlighted as steps to be taken by States to achieve this right.

Article 7 guarantees the right to just and favourable conditions of work. This includes the right to fair wages, equal pay for equal value of work, to decent living for themselves and their families, safe & healthy working conditions, equal opportunity for promotions, to rest, leisure and reasonable limitation for working hours and periodic holidays with pay.

## Right to Social Security

Article 9 guarantees the right to social security, including social insurance. It encompasses the right to access and maintain benefits (cash or kind) without discrimination in order to secure protection from lack of work-related income (due to sickness, disability, maternity, employment injury, unemployment, old age, family death), unaffordable access to healthcare or insufficient family support (children or adult dependents especially). This plays a critical role in poverty reduction and alleviation and prevents social exclusion. It also includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage.

## Rights of Families

Article 10 guarantees the right to protection and assistance for families. The protection here which includes children covers the same areas as the rights to work, social security, non-discrimination and equality. Importantly, the understanding of family does not depend on the existence or subsistence of marriage. Recognized unmarried unions will equally fall within this category. Some of the minimal requirements for the existence of the family are life together, economic ties and a regular and intense relationship. States are therefore required to eliminate any barriers such as unreasonable, disproportionate or discriminatory restrictions on marriage, cohabitation or the choice of parents to have children.

## Right to An Adequate Standard of Living (Right to Housing)

Article 11 guarantees the right to an adequate standard of living, including adequate food, clothing, housing and to the continuous improvement of living conditions. International cooperation is suggested for the full realization of this right. The paper focuses on housing given the challenges faced by the local LGBT community.

The right to housing can be framed as the right to live somewhere in security, peace and dignity. In determining whether housing is “adequate”, some of the factors that states must grapple with is whether there is legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy. This means therefore that the duty on the state goes beyond merely having houses built and sold.

The right to housing is particularly violated by forced evictions i.e. the permanent or temporary removal of individuals, families and/or communities against their will from their homes and/or land which they occupy without the provision of and access to appropriate forms of legal and other protection.

## Right to Health

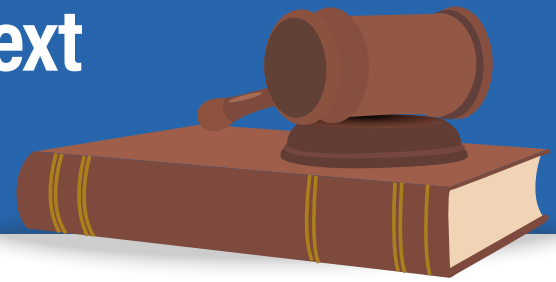
Article 12 guarantees the right to enjoyment of the highest attainable standard of physical and mental health. This requires the State to (i.) address stillbirth, infant mortality and the development of the child; (ii) improve all aspects of environmental and industrial hygiene; (iii) prevent, treat and control epidemics, endemics, occupational and other diseases and (iv) ensure medical service and attention is accessible to all.

The right to health includes the right to be control one's health and body, including sexual and reproductive freedom, and the freedom from interference (torture, non-consensual medical treatment and experimentation). By virtue of the right, individuals are entitled to a functioning and comprehensive system of health protection. This requires the State to address issues related to safe water, adequate sanitation, adequate food, nutrition, housing, healthy work conditions, healthy environmental conditions and access to health information; all of which impact health.

## Right to Education

Article 13 guarantees the right to education. It requires that States make primary education compulsory, available and free to all. Secondary education (including technical and vocational education) is to be made generally available and accessible to all and higher education should be made equally accessible to all. Additionally, the right requires states to develop a system of schools at all levels and to continuously improve the conditions of teaching staff.

# ESCRs in the Jamaican Context



## Constitutionalizing ESCRs

It is recommended that ESCRs be included in the Constitution alongside CPRs as rights capable of being enforced by the Courts and capable of binding State actions. Within the 2011 Jamaican Charter of Fundamental Rights and Freedoms, the right to a healthy and productive environment and the right to publicly funded pre-primary and primary education is guaranteed. The lack of inclusion of further ESCRs is explained by the reticence of the then Joint Select Committee around the issue of making ESCRs constitutionally enforceable. It was felt that making these enforceable would have significant implications for the State's ability to manage their resources. The decision was therefore taken not to go beyond the aforementioned rights.

Despite the lack of recognition of ESCRs, the equality provisions may provide some measure of protection so that the initiatives undertaken by the Government are equally accessible and available. Sections 13(3)(g) provides for equality before the law and sections 13(3)(h) provides for equitable and humane treatment by a public authority. In the latter case, the section is presumed to prohibit discriminatory conduct. In this way, whenever social programmes are being delivered or implemented, they should not be done on a discriminatory basis. Importantly, sections 13(3)(g) and (h) have no specified grounds and could apply to different vulnerable groups.

## State Reporting & Treaty Obligations

Each State that has ratified the ICESCR is required to submit periodic reports on the status of implementation. The paper uses the framework of the concluding observations to identify the gaps and barriers in protecting and promoting ESCRs. The Committee on Economic, Social & Cultural Rights has recommended the following to address the gaps and barriers:

1. Establish a National Human Rights Institution in accordance with the Paris Principles.
2. Ensure the provisions of the ICESCR are either constitutionalized or enacted within legal order and are justiciable.
3. Enact comprehensive anti-discrimination legislation.
4. Decriminalize same-sex relations between consenting adults.
5. Take targeted measures to eliminate sexual orientation discrimination and send a clear message to the public that discrimination, harassment or violence against queer persons is not tolerated.
6. Ensure that programmes and policies aimed at promoting gender equality are effective by adopting effective monitoring and implementation mechanisms.
7. Adopt employment strategies/policies which target women to address unemployment among women.
8. Address the root causes of youth unemployment.



9. Create universal coverage within the social security system, prioritizing marginalized and disadvantaged groups.
10. Intensify efforts to combat high levels of violence against women and girls in Jamaica.
11. Eradicate all forms of violence against children, including prohibiting all forms of corporal punishment in all settings, including the family.
12. Adopt a comprehensive housing strategy with a view to ensuring access to adequate and affordable housing with legal security of tenure for everyone.
13. Increase availability of health-care services in rural areas and increase availability, accessibility and quality of health-care services generally, including services for persons with mental illnesses.
14. Adequately equip the National HIV/STI Programme with human and financial resources to maintain progress.
15. Prohibit discrimination against persons living with HIV (PLHIV) by enacting legislation and amending/repealing laws which stigmatize PLHIV and increase vulnerability of those most at risk.
16. Ensure legislation helps women avoid unwanted pregnancies and facilitates access to safe, professional services to eliminate dangerous, clandestine abortions.
17. Improve access to education for disadvantaged and marginalized groups.

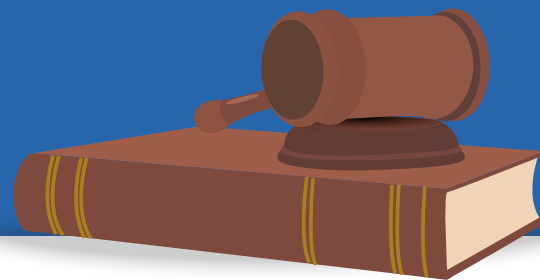
## **Stakeholder Assessment**

Key informant interviews also revealed that cultural rights were treated even less favourably than economic and social rights by the Joint Select Committee of Parliament. According to the KIs, the rights to health, work and social security were highlighted as ESCRs that ought to have been included within the Charter. They however noted that all the ESCRs are important and would benefit from being constitutionalized.

The laws, policies and programmes which address poverty and the needs of the vulnerable were found to be inadequate guarantees of the ESCRs in the covenant. Notwithstanding, employment legislation has been one of the better examples of protecting ESCRs.

The KIs generally agreed that the benefits of making ESCRs justiciable far outweighed the challenges that may arise from doing so. Many of the fears of the state can be allayed by having regard to cases from other countries where these rights are justiciable. The principle of progressive realization gives States flexibility to realize the rights and leaving it to the realm of policy invariably means that some people will be left behind.

# ESCR of LGBT People



Sexual orientation and gender identity (SOGI) discrimination often frustrates the ability of LGBT people to actualize their rights. Within the Jamaican context, this discrimination has been well documented; between 2011 and June 2017, JFLAG received 261 reports of human rights violations based on a person's LGBT status, including violations of ESCRs.

## Discrimination

Currently, the equality and anti-discrimination provisions in the Charter of Rights are inadequate. SOGI discrimination by companies and private citizens is not prohibited for example and the laws still criminalize same-sex intimacy between adult men.

## Gender Equality

Gender inequality continues to pervade the laws and legal system. Sexual offences legislation, for example, is rife with gender bias as men cannot be considered victims of certain forms of sexual assault nor are there provisions for paternity leave. Domestic violence, sexual abuse and sexual harassment of women remain pervasive and women are often disparaged when they come forward as victims and rules of evidence treat them as less credible witnesses.

Attempts to make changes to Sexual Offence Act and Domestic Violence Act are ongoing and while a Joint Select Committee of Parliament has supported the full criminalisation of marital rape, many of the gender-based distinctions in the laws remain undisturbed. The Sexual Harassment Bill has yet to make it through Parliament despite its final draft existing since 2015.

## Employment

Both the 2016 study, the Developmental Cost of Homophobia: The Case of Jamaica, and the 2019 Community Needs Assessment indicate that workplace discrimination is an ongoing reality for LGBT Jamaicans. There is no broad anti-discrimination legislation which addresses the employment context. Only a 2004 Public Sector Staff Order exists which prohibits discrimination on the basis of sexual orientation within the civil service. For employees in the private sector, the only option is to seek redress for "unjustifiable dismissals" under the Labour Relations and Industrial Disputes Act. Even then, it is not clear that SOGI discrimination will fall under this rubric and this does not address discrimination in hiring or awarding promotions.

## Social Security

Social Protection schemes such as those found within the Pensions Act and National Insurance Act exclude persons in same-sex relationships. This is coupled with the fact that a 2017 research paper showed that SOGI was not considered a form of vulnerability within the government's 2014 Social Protection Strategy. Even where some of the programmes that exist can be accessed by members of the LGBT community, it has been noted that a lack of promotion of these programmes mean that many remain unaware of their existence and potential benefits.

## **Protection of Family**

Section 18 of the Charter of Rights prohibits the legal recognition of same-sex relationship whether, married or unmarried. It also protects laws which exclude same-sex relationships from their rubric. For example, the Property (Rights of Spouses) Act and Maintenance Act, which provides a safety net for dependent members of a relationship when those relationships end, do not include same-sex relationships in their framework while recognizing and giving benefits to unmarried heterosexual relationships.

Similarly, persons in same-sex relationships do not receive equal protection under the Domestic Violence Act which provides for speedy relief in the form of protection and occupation orders. Persons in same-sex relationships only have the option, if living together, of applying as a “member of the household”.

## **Housing**

The 2019 Community Needs Assessment revealed that one in every five LGBT Jamaican has experienced homelessness or been displaced at least once in their life. Existing laws do not adequately address homelessness generally and there are no state-coordinated programmes which address homelessness caused by sexual orientation discrimination. The absence of anti-discrimination laws worsen the situation and the Rent Restriction Act provides an avenue for landlords to discriminate against LGBT persons by allowing them to terminate a lease if there is immoral/illegal conduct occurring within the property. Dominant social norms see homosexuality as immoral and the OAPA make same-sex sexual conduct between men illegal.

## **Health**

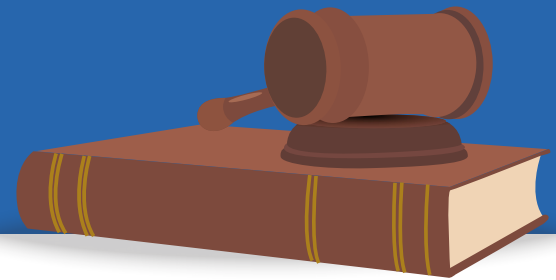
Stigma and discrimination within the health sector persists and that constitutes a barrier for LGBT Jamaicans. In addition, the failure to address mental health as a general issue complicates the reality of LGBT Jamaicans given their disproportionate experience of mental health issues. Discrimination on the basis of health status is not prohibited in the Charter and there is no legal and policy framework which addresses the unique health needs of LGBT persons, particularly trans persons.

Finally, the absence of sexual health information for persons with same-sex attraction means they are at increased risk for sexual health issues. The Child Care and Protection Act also makes it unlikely that gay and bisexual teenage boys will seek out this information since the professional with whom they share is required to report this information as a result of the criminalization of buggery and intimacy between men.

## **Education**

The Education Act gives schools the power to make their own rules, which may be discriminatory on the basis of SOGI. One prime example is how dress codes may be problematic for trans and gender non-conforming students. In addition, there still is no robust response to bullying in schools and an anti-bullying policy which explicitly prohibits bullying on the basis of sexual orientation does not exist.

# Existing Gaps



## Structural

1. The Government of Jamaica is yet to establish a National Human Rights Institute.
2. The ICESCR has not been incorporated into the local legal system and accordingly cannot be invoked before the domestic courts.
3. Government has not ratified the Optional Protocol to the ICESCR which allows for victims of violations of ESCR to present complaints at the international level.
4. There is limited civil society organization (CSO) involvement in and mobilization around treaty-based reporting.
5. There is limited knowledge among policy makers about the nature and scope of ESCR and key jurisprudential developments.
6. The 2011 Charter of Fundamental Rights and Freedoms does not guarantee a right to work, a right to social security, a right to an adequate standard of living inclusive of a right to housing and a right to health.
7. The 2011 Charter does not provide any protection for people suffering from underemployment; low remuneration; poor working conditions; exploitation, discrimination, and violation of associated rights; lack of representation and dialogue; lack of work security and professional mobility; lack of access (physical, technological, and informational); and lack of social security provisions. Further, the Government has taken no action or instituted any program to assist persons with disabilities to gain access to the workplace.
8. There is limited domestic jurisprudence on the scope and applicability of the equality provisions contained within the 2011 Charter.
9. The prohibited grounds of discrimination in the 2011 Charter of Fundamental Rights and Freedoms are limited and restrictive.
10. There is no comprehensive legislation providing protection against discrimination in its various forms.
11. There are no legal provisions prohibiting corporal punishment in all schools or domestic spheres.
12. There are no state laws or policies which explicitly address homophobic and transphobic bullying and harassment in schools and the workplace.
13. There is no law or policy prohibiting non-discrimination in life and health insurance coverage and in pensions based on HIV status.
14. Unconditional access to abortions remains illegal in Jamaica.
15. There is a limited enabling legislative environment to reinforce the policy and programmatic scope of socio-economic interventions coordinated by the State.

## Process

1. There are limited and outdated nationally representational studies conducted on the socio-economic realities of marginalized and vulnerable groups which restricts the ability of stakeholders to plan and coordinate effective measures which ensures the enjoyment of ESCR.
2. There appears to be no coverage for LGBT persons under a number of policies and programmes because the legislative framework in its current form allows for the discrimination against and continued exclusion of this particular population.
3. Social security in Jamaica does not provide for universal coverage and excludes a considerable portion of the disadvantaged and marginalized groups in society, including older persons, single parents and persons with disabilities.

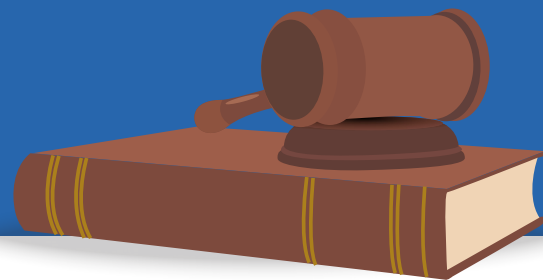
## Outcome

1. The legislative framework in its current form perpetuates discrimination against LGBT persons who have been relegated to second class citizens with limited access to basic constitutional protections.
2. Where policy and programmatic frameworks which address the needs of key and vulnerable populations exist, there are delays in the implementation of measures because of its progressive nature

## Legislative Gaps

Gaps	Details
<b>Disabilities Act</b>	The Disabilities Act has not been enforced, the commencement date has not been pronounced and Jamaica is yet to fully implement a sustained programme of protection for people living with disabilities. Moreover, basic rights of access and equal protection are routinely violated and many persons with disabilities are unaware of how the Act will protect them.
<b>Sexual Offences Act</b>	The Act provides a limited definition of sexual intercourse, a limited scope of application in relation to the offence of rape and ultimately lacks gender neutrality in its language
<b>Employment (Termination &amp; Redundancy Payments) Act</b>	The Act currently does not provide a right not be unfairly or unjustifiably dismissed which potentially deprives key and marginalized populations of substantive avenues to seek redress
<b>Property (Rights of Spouses) Act</b>	The Act excludes homosexual relationships and therefore denies them the same rights and privileges afforded to heterosexual couples.
<b>Domestic Violence Act</b>	The Act has a limited definition of spouses which only recognizes heterosexual unions. Therefore, non-cohabiting persons in “same-sex” unions cannot obtain protection, occupation or ancillary orders where they are facing abuse at the hands of their partners.
<b>Rent Restriction Act</b>	Under this Act, a landlord, having evicted a LGBT person without reasonable cause, may seek protection under the by stating that homosexuality is immoral and that tenants are using the house to engage in homosexual acts.
<b>Sexual Harassment Bill</b>	Still has not been passed by Parliament.
<b>Occupational Safety &amp; Health Bill</b>	Still has not been passed by Parliament and the existing National Policy on HIV in the Workplace lacks force of law and provides no redress.

# Recommendations



1. Conduct capacity building sessions with policy makers/legislators and critical government stakeholders with a view towards sensitizing them about the nature, scope and applicability of ESCRs.
2. Conduct capacity building sessions with CSOs/NGOs to increase their knowledge and awareness about ESCR in order to empower them to become social justice advocates.
3. Conduct capacity building sessions with community leaders to introduce them to ESCR in an effort to empower them to become social justice champions.
4. Conduct a national public education campaign on ESCR in an effort to transform the county-wide thinking about human rights.
5. Lobby decision-makers to amend the 2011 Charter of Rights to constitutionally protect and guarantee ALL the rights enumerated in the ICESCR.
6. Conduct nationally representational research on the socio-economic realities faced by vulnerable Jamaicans. Such research should focus specifically on employment, social security, housing/homelessness, health and education.
7. Lobby decision-makers to improve the country's strategy to address displacement and homelessness, including increasing the number of shelters and temporary housing facilities and ensuring that they are LGBT-friendly.
8. Lobby decision-makers to create robust legislative frameworks to codify socio-economic policies and programmes which already exist as a means of complementing the implementation of social measures:
  - i. Make the National HIV/AIDS Workplace Policy enforceable and capable of providing redress.
  - ii. Prohibit discrimination faced by key population groups in accessing life and health insurance.
  - iii. Enact comprehensive social protection legislation which assists in overcoming discrimination, physical impediments and biases in the society that engender exclusion of marginalized and vulnerable groups from human capital development, employment and inclusion in social security programmes.
9. Lobby decision-makers to amend existing socio-economic and cultural legislation to ensure that they reflect relevant and adequate human rights standards:
  - i. Enact comprehensive anti-discrimination legislation to prohibit all forms of discrimination, inclusive of discrimination on the basis of sexual orientation and gender identity. This legislation should prohibit discrimination at the hands state and non-state actors in all areas of life, including but not limited to housing, employment, education and provisions of services. Additionally, this legislation should establish a body to receive and investigate complaints and conduct hearings where necessary.

- ii. Amend laws which exclude, fail to equally protect and/or discriminate against LGBT persons.
  - iii. Amend the Employment (Termination and Redundancy Payments) Act to provide for unfair dismissal which recognizes that employees should not be dismissed on certain specified bases which are manifestly illegitimate.
  - iv. Adopt and enforce the Sexual Harassment Bill.
  - v. Lobby decision-makers to enforce and implement the Disabilities Act and the accompanying regulations and codes.
  - vi. Repeal the relevant sections of the Offences Against the Persons Act, concerning the prohibition of abortion and substitute it with civil legislation, titled “Termination of Pregnancy Act” which would outline the conditions under which medical termination of pregnancy would be lawful.
  - vii. Adopt the Occupation Safety and Health Bill.
  - viii. Act expeditiously in amending the Sexual Offences Act, the Offences against the Persons Act, the Child Care and Protection Act and the Domestic Violence Act to provide greater protection for some of the most vulnerable in society, particularly women and girls and LGBT persons.
10. Lobby decision-makers and policy makers to shift from their over-reliance on policy creation and implementation which is absent of any enforceability mechanism to creating legislation which provides citizens with protection before the courts and access to multiple avenues for redress.





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**Equality for All**  
Foundation Jamaica Ltd.

Rainbow House, PO Box 1152, Kingston 8, Jamaica W.I.  
876-667-6202 | 876-875-2328 | [www.equalityjamaica.org](http://www.equalityjamaica.org)

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