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a paper on **national human rights institutions & the human rights situation of lgbt persons in jamaica**

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INTRODUCTION

National Human Rights Institutions (NHRIs) are State bodies with a constitutional and/or legislative mandate to protect and promote human rights. They are part of the State apparatus and are funded by the State[1]. Their function as enumerated by the Paris Principles is to protect and promote the human rights secured by international law within the domestic sphere of Member States of the United Nations. This paper seeks to question how the establishment of such an institution will impact the human rights situation within Jamaica, particularly for the Lesbian, Gay, Bisexual and Transgender (LGBT) community.

The paper will consider the Paris Principles which outline the operational framework, roles and responsibilities of NHRIs and make a determination as to whether there are any current spaces in which such an institution can be regarded as existing within the Jamaican context. It will then set out the situation of human rights abuses faced by the LGBT community and the legal framework within which these abuses are committed, often times with impunity. Finally, there will be an analysis of the possible formation of a Jamaican NHRI and how that will address the concerns of the LGBT community, with a view to making useful recommendations concerning the establishment of this body within our legal framework.

[1] *Office of the United Nations High Commissioner for Human Rights, National Human Rights Institutions: History, Principles, Roles and Responsibilities (United Nations 2010) 13*

THE PARIS PRINCIPLES
A PUTATIVE NHRI FRAMEWORK

The Paris Principles were adopted by the United Nations General Assembly in its 44th session on the 4th of March 1994. They established the minimum operational standard for NHRIs within several guidelines. The implications of these guidelines will be considered in order to weigh the possibility and merit of having an NHRI within the Jamaican jurisdiction.

The first and second principles read as follow:

1. A national institution shall be vested with competence to promote and protect human rights.
2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.

The first establishes the broad mandate of an NHRI. The promotion and protection of human rights go beyond the duty on States to respect the rights of the citizen; the latter is generally framed as a duty of non-interference[2]. Protection involves positive action by the State to ensure observance of the right by both State and non-State actors and promotion involves making persons aware of their rights and how to access them[3]. The second principle requires the State to actually go through the process of lawmaking or constitutional amendment. This is an important step as a legislative or constitutional basis gives the NHRI legitimacy and some measure of credibility and accountability[4]. Such a body cannot act outside of the four corners of its lawmaking document. This would mean Parliament would have to go through the rigorous process of drafting legislation and having public consultation. Even more so, if the method to be taken is by way of a constitutional amendment. Section 49 of the Jamaican Constitution outlines the varied and lengthy procedures for constitutional amendment.

[2] *CESCR GC 12, 1999, E/C.12/1999/5, para. 15*

[3] *Ibid*

[4] *International Council on Human Rights Policy, Assessing the Effectiveness of National Human Rights Institution (ATAR Roto Press SA 2005) 7*

The third principle lists the responsibilities of an NHRI. They are:

A. To submit to the Government, Parliament and any other competent body, on an advisory basis… opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights (with a discretion to publicize them). These advisory documents would cover:

i) Any legislative or administrative provisions,

ii) Any situation of violation of human rights which it decides to take up;

iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;

(iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such human rights violations.

B. To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

C. To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;

D. To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;

E. To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights;

F. To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;

G. To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

A close look at these responsibilities reveals the possibility of a classification into three categories. The first category is for the first responsibility which outlines the interaction of the NHRI vis a vis the State on internal human rights matters. The second category encompasses the second to the fifth responsibility which speak to the NHRI's interaction with International Human Rights Law and its enforcement. The final category is a grouping of the sixth and seventh responsibility which addresses NHRI's promotion of human rights within the wider public sphere. In this way, the NHRI has a tripartite responsibility to interact with the State, International and Regional Human Rights Mechanisms and the wider public on human rights issues.

NHRI'S RESPONSIBILITY VIS A VIS THE STATE

In analyzing the benchmarks that could be used in assessing the effectiveness of NHRIs, the International Council on Human Rights Policy in conjunction with the Office of the United Nations High Commissioner for Human Rights (OHCHR) considered what minimum standards would be required under the Paris Principles for an NHRI to achieve its mandate[5]. Consequentially, any consideration of an establishment of an NHRI would be wise to consult these suggested benchmarks. Therefore, in order for a Jamaican NHRI to satisfy its first category of responsibility, it must have power to:

1. Monitor laws on its own initiative, whether these laws have already been enacted or are about to be enacted. In the latter case, it should be empowered to make recommendations during the legislative process[6].
2. Compel attendance of witnesses and production of evidence in furtherance of the responsibility to report on the human rights situation in various parts of the country. It will need effective authority to gather information[7].
3. Make regular visits to all places of detention with full discretion as to time and frequency. Such visits should be comprehensive[8].

[5] *Ibid*
[6] *Ibid 18*
[7] *Ibid*
[8] *Ibid 19*

4. Monitor human rights compliance by private and public bodies. This enables them to comment on the human rights situation overall when advising the government[9].
5. Monitor the performance of all relevant public authorities[10].
6. Initiate and publish inquiries – Such inquiries entail not only monitoring, but also public hearings of witnesses and the release of public reports containing recommendations for action to the relevant authorities[11].

Any limiting of these powers would undercut the ability of the NHRI to fulfill its general mandate under the first principle. They are indispensable to the protection and promotion of human rights.

NHRI'S INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW

The United Nations' human rights system involves the adoption of several international human rights treaties such as the Universal Declaration of Human Rights (UDHR), 1948, the International Covenant on Civil and Political Rights (ICCPR), 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 which cover the respect, protection and fulfillment of rights generally. There are also right and group specific treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Conventional on the Elimination of All Forms of Discrimination Against Women (CEDAW).

States such as Jamaica that have ratified these various treaties[12] are bound to follow the articles that are found therein by virtue of the age old principle of pacta sunt servanda codified in Article 26 of the Vienna Convention on the Law of Treaties (VCLT), 1969. Several of these treaties establish monitoring bodies which monitor compliance and corollary optional protocols to these treaties have been issued allow for

[9] *Ibid*

[10] *Ibid*

[11] *Ibid*

[12] *The ICCPR and the ICESCR were ratified in 1975. ICERD was ratified in 1971, CEDAW in 1984 and the Convention on the Rights of the Child (CRC) in 1991.*

individual complaints to be received by these bodies. As in the case of Jamaica, there are often times reservations to the treaties issued by Member States when ratifying treaties. There is also a refusal to adopt the optional protocol to allow for individual complaints. The implementation of international human rights law norms therefore is left up to the whims of the State.

NHRIs are essential in ensuring that not only these treaties are ratified and optional protocols adopted but also, acting as a domestic monitoring body, determining whether the country has been implementing the articles as agreed to. Also, it would be involved in the reporting process, providing treaty bodies with its own account of the human rights situation within a state, complementing the often times celebratory reports of government. Benchmark powers suggested are[13]:

1. The power to produce parallel reports on compliance with treaty obligations.
2. The power to disseminate information about international mechanisms such as reports of the proceedings of treaty-monitoring bodies and findings of special procedures.

NHRI'S RESPONSIBILITY TO THE PUBLIC GENERALLY

The public's awareness of the rights they are entitled to and the duties owed by the State to them is key to ensuring a society is human rights conscious and human rights violations are not carried out with impunity. The very duty of States to fulfill rights under international treaties and the first principle's mandate to promote rights underlines the significance of this human rights consciousness. The NHRI therefore is responsible as the centre of human rights knowledge within a nation for the education of the public. Benchmark powers therefore are[14]:

1. The power to conduct public awareness and education campaigns for the public and officials. Vulnerable groups should be specifically targeted for these campaigns. Their rights are often contested and they are more likely to be victims of abuse.

[13] *(n 4) 19, 20*

[14] *Ibid 20*

2. The power to provide training courses for officials. National institutions should press all departments of government to introduce human rights training for staff, and may themselves act as resource and training centres for the public and governmental or nongovernmental bodies.

The Paris Principles go on to outline how an NHRI should be constituted and what safeguards should be in place so as to secure its independence. It is suggested that the method of appointment should afford a membership marked by pluralism and expertise in various fields. It is also suggested that the funding of the NHRI should ensure independence from Government though majority of the funding is likely to come from the Government. In furtherance of this, security of tenure should be firmly established in the lawmaking document of the NHRI.

Other actions to be taken by the NHRI, outlined by the Paris Principles that have not already suggested are as follows:

A. Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;

B. Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;

C. Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions);

D. In view of the fundamental role played by the non-governmental organizations (NGOs) in expanding the work of the national institutions, develop relations with the NGOs devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

THE JAMAICAN CONTEXT

Ombudsman and Public Defender offices have been associated with NHRIs in the international community[15]. Within Jamaica, both positions are established. The Political Ombudsman (Interim) Act 2002 and the Public Defender (Interim) Act 2000 establish both public officials respectively. However, the functions of these bodies in the former instance does not cover human rights protection and promotion and in the latter instance, covers only some instances of rights abuses as a part of a broader mandate dealing with maladministration.

Section 12 of the 2002 Act empowers the Political Ombudsman to conduct investigations where actions taken by one political party may lead to a dispute between political parties. Under section 20, the Political Ombudsman may be required to make reports of such investigations conducted to Parliament. Section 13(1) of the 2000 Act gives the Public Defender investigative powers where, inter alia, "any person or body of persons has suffered, is suffering or is likely to suffer an infringement of his constitutional rights as a result of any action taken by an authority or an officer or member of that authority". However, these powers are limited by section 13(2). Of note "any action done with respect to orders or directions to the Jamaica Defence Force or members thereof, or any proceedings under the Defence Act" cannot be investigated. Similarly, the Public Defender may be required to provide reports to Parliament[16].

These authorities, though given broad investigative powers, do not satisfy the Paris Principles. The Political Ombudsman plays a vital role in our two-party system in theory and it is best that the NHRI not be so associated. That leaves the Public Defender as the remaining local mechanism for consideration. The mandate of the Public Defender is limited to investigating acts of public authorities. The Public Defender is limited in its functions to merely investigating certain actions, there is no duty/power to promote human rights[17]. The Public Defender provides no avenue for redress for complainants outside of referrals to attorneys-at-law and as such does not adequately fulfill the function of protection of human rights. Outside of annual reports to Parliament, the Public Defender has a mere discretion on providing reports of individual cases and any such reports to the media are required to be laid before Parliament prior to such dissemination[18]. The Act provides no requirement to make recommendations to public authorities following investigations. The Appointment Procedures are problematic as there are no criteria related to human rights experience[19] and the appointments are done without public consultation or publication of

[15] *(n 1) 15*

[16] *Section 23(2) of the Public Defender (Interim) Act 2000*

[17] *Section 15(5) of the Public Defender (Interim) Act 2000*

[18] *Section 23(4) of the Public Defender (Interim) Act 2000*

[19] *Section 5 of the Public Defender (Interim) Act 2000*

vacancies[20]. To summarize, while the Public Defender carries the NHRIs responsibility vis a vis the State insomuch that it investigates the actions of public bodies, it does not interact with international human rights law – either by making recommendations to state bodies or being involved in treaty bodies' report mechanisms – nor does it sufficiently interact with the public generally through awareness-raising and education.

An NHRI would not be best served by being created through the expansion of the powers of the Public Defender. There are no other bodies that have been mandated by the constitution or by legislation to consider the issue of human rights, and as such an NHRI must be newly established with as many as the Paris Principles that can be reasonably implemented so as to boost its functionality, widen its mandate, guarantee its independence and underscore the importance of its engagement with civil society.

[20] *Section 4(2) of the Public Defender (Interim) Act 2000*

THE HUMAN RIGHTS SITUATION OF LGBT PERSONS IN JAMAICA

It has been nine years since the TIME's article referring to Jamaica as "The Most Homophobic Place on Earth?" was written[21]. There has been much conversation on the human rights situation of LGBT persons not just in Jamaica, but in the Caribbean as well as worldwide. As the United States of America incrementally extend the legal benefits of marriage to same-sex couples and Ireland's public votes in support of same-sex marriage by way of a referendum, the global community is far more critical of countries that still allow for the discrimination of persons on the basis of sexual orientation. Some of the statistics received are not as dire as one would expect, but from a purely legal and public perception perspective, there is much work to be done. This section will have a look at the statistics provided by the J-FLAG, an NGO directly involved with advocating for the rights of the LGBT community generally. Because of the general under-reporting of homophobic violence to the security forces, the data collected by this NGO are expected to be more reflective of the actual situation faced by this vulnerable group subject to the NGO's limitations. These statistics will indicate the frequency of the occurrences of physical violence, sexual violence and/or threats to the person. There will be a consideration of public perception statistics as well as the current legal situation that undergirds these realities.

VIOLENCE, ABUSE & THREATS

Despite the efforts of the NGOs and the lofty goal of transforming Jamaica into a place of tolerance and equality for LGBT persons, the statistics still leave much to be desired of the society. In March of 2012, it was documented that:

[21] *Tim Padgett, 'The Most Homophobic Place on Earth?' TIME (New York, 12 April 2006) <http://content.time.com/time/world/article/0,8599,1182991,00.html> accessed 1 June 2015*

> Between January and June 2011, J-FLAG recorded as many incidents of harassment and violence towards LGBT Jamaicans as during all of 2010 (51 incidents). The 2010 and 2011 incidents – reported to or investigated by J-FLAG – range from verbal abuse, to brutal beatings and so-called "corrective rapes" of lesbians by heterosexual men, to murder. Twenty of the reported incidents were physical in nature, and perpetrated by mobs, family members, neighbors and often times police[22].

In December of 2013, it was further recorded:

> Between 2009 and 2012, a total of 231 reports were made to J-FLAG. Most incidents were related to assaults, physical attacks, and displacement from homes and communities. Other incidents included extortion and threats as well as sexual violence, particularly against lesbians and bisexual women. The reports show that those who are most affected are usually young males and… from the lower socio-economic strata.
>
> …
>
> Between January 2012 and August 2013, for example, a total of 87 incidents were reported to J-FLAG, however, only 64.37% of them were perpetrated in that period[23].

In total, that amounts a surplus of 300 incidents of homophobic violence or threats of violence between 2009 and August 2013. It is of note that J-FLAG's statistics are limited by its location with a majority of the reports coming out of the nearby parishes of Kingston, St. Andrew and St. Catherine[24].

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[22] *Kevin Jones and Elliot Imse, Humanizing LGBT Jamaicans: Considerations for the Jamaica Forum for Lesbians, All-Sexuals & Gays'2012 National Strategic Plan (March 2012) 10*

[23] *J-FLAG, Homophobia and Violence in Jamaica (December 2013) 2, 3*

[24] *Ibid 3*

What J-FLAG's statistics indicate is that the harassment, threats and violence are still matters of grave considerations despite members of the public readily dismissing these claims as lies. Notably, the intimidation/threats of violence directly contributed to the decision of Javed Jaghai to discontinue his case against the state on the matter of the buggery law[25].

PUBLIC PERCEPTION

Outside of flagrant acts of violence and intimidation, the culture of homophobia has allowed these acts to continue with impunity. The public perception of homosexuality as "morally wrong" or "against the natural order" has made it difficult for many LGBT persons to live comfortably, especially those in lower strata of society, as indicated. The 2011 National Survey on Attitudes and Perceptions of Jamaicans towards Same-Sex Relationships found that Jamaicans are generally homophobic and some LGBT persons are more at risk than others. It found that anti-gay attitudes and views were most common among, inter alia, people in low income communities and people who had no university education[26]. The March 2012 Report had the following statistics:

> **Jamaicans overwhelmingly support criminalizing homosexuality (85%). One public opinion poll shows 83 percent of Jamaicans find male homosexuality "morally wrong," and 75 percent believe female homosexuality is "morally wrong." Another survey shows 72 percent of Jamaicans "strongly disapproved" of homosexuals running for office, and 91 percent "strongly disapproved" of same-sex marriage[27].**

[25] *'Jamaican Gay Man Drops Court Challenge Against Anti-Buggery Law' The Gleaner (Jamaica, 29 August 2014) < http://jamaica-gleaner.com/power/55113> accessed 15 June 2015*

[26] *Ian Boxhill, National Survey of Attitudes and Perceptions of Jamaicans Towards Same Sex Relationships (January 2011)* [27] *(n 18) 9-10*

It went on further to explain:

> Misperceptions of same-sex attraction as a "choice" or "form of rebellion" are widespread, according to the advocates, and many are surprised to hear gay and lesbian people cannot be attracted to the opposite sex in the same way that heterosexuals cannot be attracted to the same sex. Additionally, advocates believe some Jamaicans perceive homosexuality as illegal, due to a misunderstanding of the buggery law[28].

In October of 2014, the Jamaica Gleaner reported the results of the Gleaner-commissioned Bill Johnson poll. Its findings were as follows:

> 91 per cent of Jamaicans believe lawmakers should make no attempt to repeal the controversial buggery law, which makes it a criminal offence for persons to engage in anal sex.
>
> 82 per cent of Jamaicans said they believed homosexual men were not treated fairly by either the legal system or the police in Jamaica. 10 per cent said they were treated the same, while 8 per cent said they did not know. However, 68 per cent said they should not have the same rights as others, while 26 per cent said they should, and 6 per cent did not know.
>
> At the same time, 79 per cent said lesbians are not treated the same as others by the police and courts, 13 per cent believe they are treated equally, and eight per cent did not know. But 65 per cent believe they should not have the same rights as other people under the Jamaican legal system, 30 per cent said they should, and five per cent did not know.[29]"

[28] *'Ibid 10*

[29] *'Majority Of Jamaicans Resolute On Keeping Buggery Law Intact' The Gleaner (Jamaica, 6 October 2014) <http://jamaica-gleaner.com/article/lead-stories/20141006/majority-jamaicans-resolute-keeping-buggery-law-intact> accessed 1 June 2015*

The 2014 LAPOP study revealed that 69.1% of Jamaicans strongly disapproved of the rights of homosexuals to run for office and 89% strongly disapproved of gay marriage[30].

THE HOMOPHOBIC LEGAL CONTEXT

Sections 76 to 79 of the Offences Against the Person Act (OAPA), 1864 have become styled as the "Buggery Law" within local discourse. These sections have been at the cornerstone of the debate on homosexuality and the rights of LGBT persons, however it is important to note that this act does not by itself amount to the full gamut of our homophobic laws. The Buggery Law, The Sexual Offences Act and the 2011 Charter of Rights as well as the common law on Provocation and certain family law legislation create the legal context within which LGBT Jamaicans are treated as second class citizens.

THE BUGGERY LAW

Section 76 places a blanket restriction on the abominable crime of buggery[31], whether or not the act was consensual and whether or not it was done in public or private with the attendant punishment of 10 years with hard labour upon conviction. Section 77 makes attempted buggery an offence. Section 78 sets the evidentiary requirement for proof of the offence and Section 79 makes it an offence for "any male person who, in public or private, commits… any act of gross indecency with another male person." The case of ***R v Jacobs***[32] confirmed that buggery related only to intercourse ***per anum*** by a man with a man or woman, or intercourse ***per anum*** or ***per vaginam*** by either a man or a woman with an animal.

[30] *Anthony Harriot, Balford Lewis and Elizabeth Zechmeister, The Political Culture of Democracy in Jamaica and in the Americas, 2014: Democratic Governance across 10 Years of the AmericasBarometer (USAID April 2015)*

[31] *The section conflates intercourse with persons as well as with animals*

[32] *(1817) Russ & Ry 331.*

Many defenders of the section are quick to point out the section as applying not only to homosexual couples. However, the section is discriminatory in its effect as homosexual men who generally have consensual anal sex are disproportionately affected by the law[33]. Also, when one considers the impact of the section on the lives of gay men, as was the approach in the South African case of ***The National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others***[34], the discrimination becomes clear. The impact includes the legitimization of their abuse and the entrenchment of stigma. It is conceded that research has shown that most cases of prosecution relying on section 76 deal with minors being abused and even those cases are few in number[35]. However, the possibility of consenting adults being prosecuted still looms[36]. Also, while section 76 might raise the veil of neutrality, section 79 is flagrantly homophobic. It criminalizes general intimacy between men and in clear terms concerns itself with private action. This section acts as a catch-all where buggery cannot be proved so as to ensure a conviction.

THE SEXUAL OFFENCES ACT 2009

The Sexual Offences Act (SOA) was drafted so as not to disturb the place of eminence granted to our buggery law. Therefore, section 2 defines sexual intercourse as being limited to penile penetration of the vagina. The act then in section 3 makes rape an offence for which only men can be charged and only occurring in instances of sexual intercourse without a woman's consent. The punishment was a minimum of 15 years and a maximum of life imprisonment. The consequences were two-fold. This meant that only women experiencing a particular form of heterosexual sexual abuse would receive the greatest protection as men could not be victims of rape and women could not be perpetrators. This also meant that conduct that fell outside of the limited rubric of rape would have to amount to another offence. The other offence was the newly created Grievous Sexual Assault (GSA) which criminalized non-consensual sexual conduct that fell short of rape but did not amount to buggery. This offence had two possible sentences which was wholly dependent on which tier court the perpetrator found himself/herself in[37].

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

[34] *[1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998)*

[35] *(n 29) 4*

[36] *Ibid*

[37] *Section 6(b) of the Sexual Offences Act provides seperate sentences for GSA. If a person is convicted in a Resident Magistrate's Court, their sentence cannot exceed three years and if that person is tried and convicted in the Supreme Court, the offence would attract a minimum sentence of 15 years.*

The regime created by the SOA reveals a heterosexist imperative whereby abuse that occurs in a heteronormative fashion is given more legal protection with higher sentences and then this trickles down with buggery as the broad crime with a lesser sentence. In other words, a hierarchy of offences is created with rape at the top, GSA in the middle and buggery at the bottom. The implication for LGBT persons who are victims of same-sex abuse is that they are treated in a discriminatory manner by the law. Men can only rely on the offence of buggery when abused - in a very specific manner - but at the same time run the risk of being prosecuted themselves for other acts of buggery committed and women have only GSA to rely on when abused by other women. Transgender women pre-surgery would not be "rape-able" at law and would be in the same predicament as gay men and trans-men pre-surgery would not be able to be convicted of rape. The question of their position is post-surgery is also problematic. The case of ***Corbett v Corbett***[38] expressed the view that sex is fixed at birth and therefore, would not recognize the transition of a trans-person into their new sex. This could have serious implications for a trans-woman who is raped or a woman who is raped by a trans-man post-surgery.

FAMILY LAW PROVISIONS

Marriage has been the cornerstone of family law and therefore the fact that same-sex couples are denied the right to marry has had serious implications for family law. At common law, the case of ***Hyde v Hyde***[39] defines marriage as being strictly heterosexual. Section 4 of the Matrimonial Causes Act, 1989 makes same-sex unions a ground for finding a marriage void. In both the Maintenance Act and Property (Rights of Spouses) Act define spouses to the exclusion of same-sex unions[40]. The result of this is that all the benefits accrued under these pieces of legislation are denied to same-sex couples.

Under the Domestic Violence Act, 2005 a "prescribed person" – the category of persons who may seek protection and occupation orders in instances of violence or threats of violence – is defined as one who is a spouse, in a visiting relationships, a dependant, child or member of the household[41]. To be considered a spouse or in a visiting relationship, that relationship must be heterosexual[42] and therefore the only

[38] *[1970] 2 All ER 83*

[39] *[1866] L.R. 1 P&M 130*

[40] *Section 2 of both the Maintenance Act 2005 and the Property (Rights of Spouses) Act 2004*

[41] *Section 2 of the Domestic Violence Act*

[42] *Ibid*

recourse for a person who is in a homosexual union or otherwise non-heterosexual union is if the parties are living together. Non-cohabiting persons in homosexual unions have no recourse in the instance of domestic violence.

This furthers the heterosexist imperative highlighted within the SOA. It can therefore be concluded that Jamaican legislation does not concern itself much with LGBT citizens except to criminalize them.

THE 2011 CHARTER OF RIGHTS

On the face of it, the Charter has afforded rights to LGBT citizens that were not hitherto granted to them. The right to privacy and family life as well as the rights to equality before the law and equitable and humane treatment by a public authority[43] can be reasonably regarded as providing protection for all Jamaicans, LGBT citizens included. However, the Charter's homophobia is very much evident. The decision to use the words "on the basis of being male or female" in section 13(3)(i) was a deliberate attempt to ensure that sexual orientation discrimination was not prohibited after the Joint Select Committee on Constitutional and Electoral Reform refused J-FLAG's submission on this point[44].

The homophobia goes further. Section 13(12) has been introduced as the new savings law clause shielding laws from adjudication on the basis of human rights violations under the Charter. The Buggery Law and The SOA would be prime candidates for rigorous constitutional litigation, however 13(12) particular saves sexual offences from constitutional challenge. This is a clear intention to treat homophobia as an extra-constitutional norm[45].

Finally, section 18(1) of the constitution restricts marriage to heterosexual unions and with that homophobia is permissible within and without the constitution. Even more problematic is section 18(2) of the Constitution which proscribes the legal recognition of non-heterosexual relationships. It, presumably, impedes parliament from amending the family legislation outlined above to correct the discriminatory

[43] *Sections 13(3)(j), (g)and (h) respectively*

[44] *Joint Select Committee of Parliament, Report of Joint Select Committee on its deliberations on the Bill entitled An Act to Amend the Constitution of Jamaica to provide for a Charter of Rights, and for connected matters (2002)* [40] *Section 2 of both the Maintenance Act 2005 and the Property (Rights of Spouses) Act 2004*

[45] *Derek O'Brien and Se-shauna Wheatle, 'Post-independence constitutional reform in the Commonwealth Caribbean and a new charter of fundamental rights and freedoms for Jamaica' (October 2012) Public Law 683, 684*

exclusion of same-sex unions. This rights-giving document through the reforms process became a tool of oppression.

THE LAW ON PROVOCATION

Finally, provocation exists as a partial defence to murder under section 6 of the OAPA 1864. The section reads:

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

At common law, one of the "things done or said" that may provoke someone to lose his self-control is a homosexual advance. This has allowed gruesome acts of murder as in the case of ***Marvin Marcano v The State***[46] to escape the full extent of the law as it regards intentionally taking a life. Such a law justifies the killing of LGBT persons and undergirds the violent homophobia within our society.

In spite of the homophobic laws, the negative public perception as well as the threats and physical violence that plague the Jamaican LGBT community, LGBT rights advocates and groups have been actively engaging the public. They are not crippled by the society or the inactive government. J-FLAG continues to conduct training programmes for public officials and conduct sensitization campaign. Angeline Jackson of QCJ has been noted for advocacy by President of the United States of America, Barack Obama. Many other NGOs

[46] *Cr. App. No. 2 of 2002 (July 26, 2002) (CA, Trinidad and Tobago)*

have been committed to the cause of improving the situation of LGBT persons, whether it be providing relief for the homeless and dispossessed, or being a part of the current review of the SOA.

As it stands, these NGOs are the champions of the human rights of the average citizen. An NHRI would be fundamental in complementing their efforts to ensure that human rights are respected, protected and promoted. However, the caveat pointed out is that "if an institution becomes too closely associated with civil society bodies, in particular human rights NGOs, this may compromise its independence."[47] The independence of the NHRI is of paramount consideration. It plays a key role in bridging the gap between civil society and the government. The NHRI cannot be seen as biased towards a particular group as it is accountable to the public and is mandated to secure the human rights of all persons.

[47] *(n 4) 16*

THE NHRI FRAMEWORK NEEDED TO ADDRESS LGBT RIGHTS CONCERNS IN JAMAICA

In coming to a determination on which NHRI Framework would be appropriate for the human rights situation in Jamaica, it must be noted that there are several institutional structures that the organization might utilize. There are the commission-style model, the ombudsman institutions, hybrid institutions, advisory or consultative bodies and human rights institutes and centres[48]. The determining factor in categorizing an NHRI is not the name given to it but rather its structure and operational framework. The Paris Principles help to ensure a minimum set of standards and therefore that NHRIs share certain similarities as regards powers and responsibilities. However, some institutions may emphasise one of their functions for example, their advisory, monitoring or promotion function while others may put a greater emphasis on investigation.

Human Rights Commissions are characterized by being State-sponsored, with the explicit mandate to protect and promote human rights, though some may focus only on a specific area. They are typically headed by a number of members, full and/or part-time, who are decision-makers. Investigation is a core function, and many can receive individual complaints[49]. Human rights commissions tend to have sufficient numbers of members to assure pluralism but plurality has implications for the speed of decision-making and for cost[50].

Human Rights Ombudsman Institutions are characterized by being state-sponsored, with the mandate to protect and promote human rights. They usually are headed by a single member who is the decision-maker (although some of these institutions have Deputies). They have a mandate to deal principally with human rights, although they may be specialized to address single human rights issues such as women's rights. They investigate human rights, and often can receive individual complaints, as a core function[51]. They are limited to making recommendations, although more recently, some such institutions have been

[48] *(n 1) 15*

[49] *United Nations Development Programme and the Office of the United Nations High Commissioner for Human Rights, UNDP-OHCHR Toolkit for collaboration with National Human Rights Institutions (United Nations 2010) 22[40] Section 2 of both the Maintenance Act 2005 and the Property (Rights of Spouses) Act 2004*

[50] *Ibid*

[51] *Ibid 24*

given authority to go to court or to a specialised tribunal in specific instances where recommendations have been ignored or rejected. They focus on mediation, the use of "good offices" to investigate and resolve complaints, and they prize confidentiality. They favour quick resolution and so generally are not as focused on formal legal investigations[52]. This model is heavily dependent on the reputation, integrity and leadership of the ombudsman herself or himself, as well as on the authority that the position exercises in society. Having a single-member head complicates the requirement for pluralism; a single member from the majority culture or ethnic group may diminish credibility among those in the population who do not see themselves reflected in the leadership or who believe that their special concerns or needs are not reflected or understood. There are ways to get around these difficulties, including the use of advisory boards or councils[53].

Given the systemic nature of the human rights abuses against LGBT persons, the model that is most appropriate is the commission-style model as it is most likely to give full effect to the Paris Principles. To clarify, the responsibility to promote human rights through awareness-raising and to encourage the implementation of human rights treaties may be lost upon an Ombudsman institution like the Public Defender whose focus is on individual complaints resolution. However, the cost factor that comes with Commission-style models and the popularity of Ombudsman-style models within small island states and in Latin America may forecast the latter being the model adopted. In those circumstances, it is imperative that the institution is fully compliant with the Paris Principles and is empowered to deal with the situation facing Jamaican LGBT citizens in a way which recognizes the multi-layered nature of the violations.

The South African and Indian Human Rights Commission both have impressive frameworks for their operations. The South African Commission is given constitutional legitimacy as it is an entity created by the South African Constitution whose powers and functions are legislated to give effect to its constitutional mandate. In India, however, the Commission is a creature of ordinary legislation but the framework is no worse for it.

[52] *Ibid*

[53] *Ibid*

Section 184 of the South African Constitution reads as follows:

1. The South African Human Rights Commission must:
   a. promote respect for human rights and a culture of human rights
   b. promote the protection, development and attainment of human rights; and
   c. monitor and assess the observance of human rights in the Republic.

2. The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power:
   a. to investigate and to report on the observance of human rights;
   b. to take steps to secure appropriate redress where human rights have been violated;
   c. to carry out research; and
   d. to educate

3. Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.

4. The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.

These provisions are given effect to by virtue of the South African Human Rights Commission Act, 2013. In particular, section 13 lists out its broad mandate in full compliance with the Paris Principles. In section 5(1)(b) of the Act, the composition of the commission is mandated to be determined with the exclusion of not just members of the public service but also staff-members and office-bearers of political parties.

The Indian National Human Rights Commission is established by the Protection of Human Rights Act, 1993. In section 12, its functions are listed as follow, to:

a. inquire, suo motu or on a petition presented to it by a victim or any person on his behalf (or on a direction or order of any court) into complaint of
   i. violation of human rights or abetment thereof; or
   ii. negligence in the prevention of such violation, by a public servant;

b. intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;

c. visit, notwithstanding anything contained in any other law for the time being in force, any jail or other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection, for the study of the living conditions of the inmates thereof and make recommendations thereon to the Government;

d. review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;

e. review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures;

f. study treaties and other international instruments on human rights and make recommendations for their effective implementation;

g. undertake and promote research in the field of human rights;

h. spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;

i. encourage the efforts of non-governmental organizations and institutions working in the field of human rights;

j. such other functions as it may consider necessary for the protection of human rights.

These functions are complemented by a restrictive constitution of five appointed members (three of which must be from the judiciary) and other ***ex oficio*** members from other national commissions required by section 5.

Georgia provides an equally impressive example of the framework of an Ombudsman-style NHRI. The Office of the Public Defender of Georgia is established by the Organic Law of Georgia on the Public Defender of Georgia, 1996. The Public Defender is mandated to monitor the protection of human rights under article 2. Article 3 vests the Public Defender with the power to monitor the activity of government authorities as well as physical and legal persons as well as the power to promote the restoration of violated rights and to carry out educational activities with regards to human rights. Under article 31 the Public Defender is charged with the functions of the National Preventative Mechanism to deal specifically with the freedom from torture and inhumane treatment as well as mandated to cooperate with civil society on

issues of discrimination. Article 4 guarantees the independence of the Public Defender. Article 5 further supports that independence with immunity from prosecution except with the consent of Parliament.

Articles 12 – 20 gives the public defender broad investigative powers to deal with complaints of human rights abuses generally, as well as specifically discrimination. Confidentiality of communication as well as a mandate to investigate abuses in prisons are secured within these provisions. Article 21 gives her/him the power to make recommendations and submit proposals to the government following these rights abuses and also the power to inform the mass media of the results of these investigations. Importantly, article 23 requires "all state and local self-government authorities, officials or legal persons shall be obligated to assist the Public Defender of Georgia in every way… for the Public Defender of Georgia to exercise his/her powers." Further, persons and/or bodies under investigation are obligated to submit explanations and any document requested must be submitted within 10 days. Article 25 makes any failure to fulfill aforesaid obligations or any obstruction of the activity of the Public Defender punishable by law.

Articles 26 establishes the Office of the Public Defender to support the activity of the Public Defender. The Deputy Public Defender is established to manage the staff of the Public Defender's Office. Further, specialized centres within the office may be set up by the Public Defender to fulfill her/his mandate.

THE WESTMINSTER PROBLEM

It has been recommended that an NHRI should be accountable to Parliament, as the representative of the people[54]. In support of this is the view that Parliament plays a unique role in the protection of equality and non-discrimination rights. It is contended that Parliaments are a core part of human rights protection, particularly in scrutinizing legislation and actions of the executive[55]. Katherine Zappone, Rapporteur of the Council of Europe to Ireland states further that Parliaments have an important role in protecting NHRIs, particularly in protecting against undue cuts to an NHRI's budget and resources[56]. However, the recommendation and its supporting are not particularly applicable to our Commonwealth Caribbean Westminster-style of governance. Within our Westminster system, the Legislature is deeply intermingled

[54] *(n 4) 12*

[55] *Council of Europe Parliamentary Assembly Committee on Equality and Non-Discrimination, Improving cooperation between National Human Rights Institutions (NHRIs) and parliaments in addressing equality and non-discrimination issues (Report Doc. 13506, 2014) para B.4*

[56] *Ibid para B. 53*

with the Cabinet. It is commonplace for a Member of Parliament to serve as a cabinet member. Cynthia Barrow-Giles gives a poignant presentation of the issue:

> Further, the inherited Westminster arrangements, unlike the American presidential prototype, do not provide for strong and effective checks on prime ministerial power. These political arrangements do not easily allow consensual government and there is a natural tendency for partisan politics to be paramount in a context of both the fusion of power and the need of the executive (the cabinet) to maintain the confidence of the legislature. It is primarily for this reason that parliament has been reduced to rubber stamping the wishes of the executive branch of government. Also, one of the major dysfunctionalities of the Westminster parliamentary system of government, as practiced in the Commonwealth Caribbean, is the virtual absence of oversight committees allowing for scrutiny of public officials and ensuring transparency and accountability[57].

It therefore would be problematic for an NHRI who is tasked with holding Cabinet accountable to its international human rights treaty commitments, among other things, to be held accountable by that very body with the mask of Parliament. However, the importance of the NHRI being held accountable is not to be diminished. Due to the unique position the NHRI holds in the space between government on one hand and NGOs and the wider public on the other, the NHRI has multiple accountabilities, least of all the accountability to those that appointed persons to the NHRI and secure its funding[58].

It is at this point humbly submitted that the recommendation of accountability to Parliament be abandoned. Within our Constitutional Monarchy, the constitution is made supreme by virtue of Section 2 of the constitution as well as section 48. The former declares the document's supremacy and the latter points out that Parliament's authority is subject to the provisions of the Constitution. The Charter of Rights forms part and parcel of the supreme document, and the NHRI is primarily concerned with the observance of these rights, and as such it is further submitted that the NHRI should be held accountable to an independent body, similar to the Judicial Services Commission. it is perfectly placed to determine whether

[57] *Cynthia Barrow-Giles, 'Regional Trends in Constitutional Development in the Commonwealth Caribbean' 2010 SSRC 4, 5 < http://www.cpahq.org/cpahq/cpadocs/Cynthia%20Barrow.pdf> accessed 19 August 2015*

[58] *Anne Smith, 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' (2006) 28 Human Rights Quarterly 904, 937-941*

the NHRI is functioning according to its mandate. This body would be tasked with the duty of appointing persons to either the commission or the office of the public defender or deputy public defender. This body would be therefore well placed to determine whether the persons so appointed have been acting fulfilling the NHRI's varied obligations, having borne in mind the relevant duties of the Commissioner or (Deputy) Public Defender when making such appointments. The appointment procedure in Sierra Leone adopts the establishment of a selection panel drawn from members of civil society who provides a shortlist of candidates to the President who then seeks the approval of Parliament for said appointment[59]. Such a method guarantees independence and it is my contention that in our jurisdiction, said panel should be formalized into an oversight body which holds the NHRI accountable.

LGBT ISSUES AND THE NHRI

As indicated above, the Paris Principles impose a tripartite responsibility on NHRIs. The NHRI must review the actions of the State and make it aware of human rights violations, documenting its responses and making recommendations. It must also be medium through which international human rights treaties are ratified, monitored and implemented within the State and it must educate the wider society on issues concerning human rights. These responsibilities closely align with the issues facing LGBT Jamaicans. The homophobic legal culture must be addressed. As part of its function to review government action, laws and ensure compliance with international human rights norms, an NHRI would have to address the ways in which both the legislation and the constitution itself discriminate against the LGBT population. To that extent, an NHRI must be fully empowered as in section 12(d) of Indian Act to review laws in place.

Some NHRIs are empowered to receive complaints, and in India's framework that would explain the need for high court judges to be members of the commission. However, our already overburdened court system would not be able to stand another function thrust upon its higher officials, especially where those persons may not be so minded to make the drastic changes required to deal with the impunity that ensues when the human rights of LGBT persons are violated. A Jamaican NHRI not being empowered to hear complaints, should be able to bring constitutional claims on behalf of marginalized groups and victims of human rights violations. Javed Jaghai's experience in Jamaica and that of Caleb Orozco in Belize[60] underscores the

[59] *Human Rights Act of Sierra Leone 2004, First Schedule*

[60] *Julia Scott, 'The Lonely Fight Against Belize's Antigay Laws' New York Times (New York, 22 May 2015) <http://www.nytimes.com/2015/05/24/magazine/the-lonely-fight-against-belizes-antigay-laws.html> accessed 15 June 2015*

importance of having a body with standing and sufficient resources and personal anonymity to withstand the dangers of social prejudice. This power would be complementary to any power to investigate and report on human rights violations.

Since public perception of LGBT Jamaicans fuels the culture of exclusion and intolerance and since education on human rights is within the mandate of an NHRI beholden to the Paris Principles then such an institution would need to be so empowered in Jamaica to address the cultural attitude towards LGBT persons. Partnering with campaigns being done by NGOs as well as training public officials on its own initiatives would be indispensable to combating negative perceptions and misconception of LGBT persons as well as to the creation of a rights conscious Jamaican citizenry.

Examples of how NHRIs are addressing LGBT rights issues globally are as follows:

- The Kenya National Commission on Human Rights has adopted a strong stance on LGBTI rights since around 2010, but has met with resistance from the government, as homosexuality is considered a criminal offence. Non-governmental bodies in Kenya have been regional leaders. The KNHCR has pressed for government change by producing a groundbreaking report on sexual minority rights; engaging with media and citizens on those issues; supporting the legal case of an intersex person; and consistently engaging with the UN UPR system[61].

- The South African government is a regional leader in pressing for the codification of LGBTI rights protection. South African Human Rights Commission has successfully lobbied the government to bring LGBTI rights to the attention of the wider UN human rights bodies; has produced research on LGBTI issues in South Africa; and successfully brought legal cases against hate speech[62].

- The Philippines Commission on Human Rights has good connections and collaborates well with civil society organisations; it has participated in rights marches; it has received and given LGBTI-sensitivity training; supported legal cases; and helped develop national policies, largely working through HIV channels[63].

- KOMNAS HAM in Indonesia uses good links with the LGBTI community to inform and educate its work; and has received a high number of complaints, indicating awareness and trust in the

[61] *Evie Browne, 'Lesbian, gay, bisexual, transgender and intersex rights in national human rights institutions' 2014 GSDRC 3 < http://www.gsdrc.org/docs/open/HDQ1098.pdf> accessed 19 August 2015*

[62] *Ibid 5*

[63] *Ibid 8*

organisation. It has provided training to government officials and the LGBTI community[64].

» The Nepal National Human Rights Commission includes LGBTI rights in its overall strategic plan; has investigated and monitored violations; and conducted capacity building, awareness raising and advocacy for LGBTI rights. It has appointed a focal person since 2005 to manage these activities. The NNHRC also monitors government plans, policies and regulations for possible human rights issues, including LGBTI rights. It is currently working closely with the government to formulate the next National Human Rights Action Plan. Detention monitoring is also a high priority for NHRC, where it documents violations and complaints[65].

THE JAMAICAN NHRI

The Jamaican NHRI that adequately addresses the concerns of the LGBT community, as stated previously, must be one in full compliance with the Paris Principles. The model that is most needed within our homophobic legal context is the Commission-style model however the cost associated with that model must and will be borne in mind. Within our economic constraints, an Ombudsman-style model is most likely. However, an expansion of the Public Defender is undesirable as the current regime is greatly lacking in compliance with the Paris Principles. A shift in the focus of the Public Defender's mandate is needed and new enabling legislation will best mark that shift. There are concerns with this model however, especially as it regards the rights of a minority groups such as the LGBT citizenry. It is important that the Public Defender be someone that is committed to the protection and promotion of the human rights of all Jamaicans, including explicitly LGBT persons. To ensure this, an advisory board made up of human rights experts and stakeholders should be adopted to complement the lack of pluralism that comes with the Ombudsman-style model.

The broad constitutional and legislative mandate and functions of the South African Human Rights Commission is an example of best practice. Its functions must cut across the tripartite nature of its obligations i.e. the NHRI must engage the state as in South Africa through lobbying the government for legal reform, being involved in parliamentary debate and other aspects of the legislative process and bringing cases. There must be awareness-raising through education as in the case of Nepal. Research and

[64] *Ibid 9*

[65] *Ibid 7-8*

engagement with civil society is also important so as to better appreciate the experiences of the LGBT community in its particularly marginalized position.

Outside of its mandate and functions, the NHRI must be vested with Independence of operations through adequate funding and budgetary autonomy[66]. The appointment procedures should be open and transparent with clear and objective criteria, including human rights expertise and/or experience[67]. Each commissioner or (deputy) public defender should have adequate security of tenure, preferably five years[68]. The public legitimacy of the NHRI depends on its member(s) not seeming aligned with either government or civil society. In that vein, the appointment by an independent body with accountability to that body is recommended similar to the approach in Sierra Leone with the relevant modifications. The NHRI should unlike the current Public Defender be mandated to make recommendations when the results of an investigation requires it with adequate follow-up. Also, there should be direct involvement international and regional treaty bodies so as to better police the State's implementation of international human rights norms.

The latter features of the NHRI are significant when addressing the rights of the LGBT community. In a country where the rights of LGBT persons are not merely controversial but strongly contested and protested, the independence of the NHRI is important so as to garner public legitimacy. Public involvement in the selection of commissioners or (deputy) public defenders is of significant importance, even more so where that appointed individual makes a controversial decision. That being said, the NHRI should not reproduce discrimination for public favor but has a duty to protect and promote human rights for all Jamaicans, and within that rubric there must be a clear plan of action for dealing with the rights of LGBT persons. It is on that latter point that human rights experience as a criteria becomes important. The ability for LGBT persons to acquire redress through recommendations or cases being brought on that group's behalf by the NHRI is also fundamentally important. A key example is the SAHRC being the second applicant in the National Coalition case which dealt with the decriminalization of sodomy in South Africa. A Jamaican NHRI must in this be regard be a voice for an often times voiceless community in the legal context.

[66] *Paris Principle B.2*

[67] *Ibid B.1*

[68] *(n 4) 12*

CONCLUSION AND RECOMMENDATIONS

The Paris Principles have provided us with a framework that can be used to combat the systemic violation of the human rights of LGBT persons. An ideal NHRI is well placed between government and civil society; not too independent as to be accountable to no one and not too connected to government as to be accountable to the executive. If fully empowered to promote and protect human rights of Jamaican citizens, an NHRI can go a far way in changing the culture of Jamaica which is often times ignorant of and/or adverse to the rights of citizens, especially those in marginalized groups. The LGBT community has very particular challenges and while several NGOs are dedicated to advocating for equality for this section of the society, there are clear legal and social limitations which are closely connected to a systemic denial of rights. Any NHRI introduced in Jamaica must be tasked with powers to review laws, to implement international human rights norms and bring claims on behalf of victims of rights abuses. In furtherance of these goals, it is recommended that:

1. The Constitution be amended to incorporate the NHRI as a body with as much legitimacy and protections as the three arms of government. This can be done by an adoption of the South African formulation which uses strong mandatory language requiring the government to establish this body. The entity, its constitution, functions and powers, appointment procedures, security of tenure of officers etc. may be all included in such an amendment so as to save time instead of introducing two pieces of legislation. Alternatively, the body should be set up by an act of Parliament with all the relevant provisions outlined above.

2. The model of NHRI adopted should be a commission-style model similar to the South African model. Alternatively, the Ombudsman-style model should be used with the adoption of an advisory board.

3. The NHRI so incorporated be held accountable to an independent oversight body that may be created for the purposes of appointments, removals and ensuring the functions of the body are being carried out according to its mandate. Alternatively, a Joint Select Committee of Parliament should be created for the purposes of oversight only with appointments being done by an ad hoc body of persons drawn from civil society in line with the Sierra Leone approach.

4. The NHRI be empowered to bring constitutional claims on behalf of marginalized groups and/

or individual complainants.

5. The NHRI be empowered to make reports and complaints not only to the State on the human rights situation but to all regional and international human rights bodies who, by virtue of ratification of relevant treaties, the government ought to follow its directions.

6. The NHRI be empowered to conduct education campaigns, training sessions and research on human rights so as to advance the human rights consciousness of the society at large.

7. Like South Africa, that all office-bearers and staff members of political parties, whether or not they are Cabinet members or Members of Parliament, be ineligible to be a member of the NHRI.