



J-FLAG Submission to the Joint Select Committee Review of the Sexual Offences Act and Related Acts

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

Prepared by J-FLAG

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Background of Contributing Organization

J-FLAG is a fifteen (15) year old human rights lobby group that advocates for the recognition and protection of the inalienable human rights of Lesbian, Gay, Bisexual, and Transgender (LGBT) Jamaicans.

J-FLAG's work involves crisis intervention for the victims of violence or displacement; political activism for policy, law and constitutional reform; public education; LGBT community mobilization; and to a lesser extent HIV prevention among key populations such as gay, bisexual, and other men who have sex with men (MSM), transgender persons, and other sexual and gender minorities.

The organization seeks to uplift the human dignity of LGBT persons by fostering their full inclusion in the Jamaican society. In keeping with this mission J-FLAG offers this submission to the Joint Select Committee of Parliament with respect to the review of the Sexual Offences Act 2009 with the aim of ventilating issues found therein that affect the human dignity and quality of life of LGBT Jamaicans.

Background of Legislation up for Review

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

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

have originated in the Indian Penal Code dating back to 1861 (based on the original English Buggery Act of 1533) and eventually proliferated throughout the colonies in various iterations.

Proposed Amendments to the Sexual Offences Act

J-FLAG urges that any review of the law would need to provide specific and robust protection for sexual crimes committed against those without the capacity to consent including and especially children.

It is J-FLAG's submission that these issues highlighted herein be considered by the Joint Select Committee as it seeks to create a more expansive and effective Sexual Offences Act that is respectful of the human dignity and rights of sexual and gender minorities in Jamaica as well as provide for the more wholistic approach to their health and well-being, and consequently, the health and well-being of the wider Jamaican populace.

Part I – Preliminary

- Re-definition of 'sexual intercourse' and 'rape' to be gender and orifice neutral.
- Addressing the disparity of available punishments for various sexual crimes to foster justice and equity for victims of sexual violence.
- Re-formulating language throughout the Act so that it is gender neutral in keeping with the proposed gender and orifice neutral definition of sexual intercourse and rape.

1.1 Definition of 'Sexual Intercourse'

1.1.1 The definition of 'sexual intercourse' contained in Section 2 of the Sexual Offences Act is explicitly gender and orifice specific. According to the Act sexual intercourse is "the penetration of the vagina of one person by the penis of another person". Sexual intercourse is distinct from anal intercourse and consequently the absence of consent for sexual intercourse connotes the offence of rape, whereas the defence of consent is not available for the crime of anal intercourse (buggery). Similarly, the current definition excludes oral copulation from the rubric of 'sexual intercourse' and instead considered it part of a distinct sexual offence which is 'grievous sexual assault'.

1.1.2 We posit that the revised definition of sexual intercourse should include 'penetration of the mouth or anus by a penis and penetration of the vagina and anus by an object except where the penetration is carried out for proper medical purposes'.

1.1.3 J-FLAG has consistently called for an amendment to the Sexual Offences Act to expand protections by formulating a gender and orifice neutral definition which also includes a provision for the manipulation of an object. This means that where one **person** has sexual intercourse with **another person without that person's consent**, the act would constitute the crime of **rape**, with no distinction based on gender or orifice, and the appropriate penalties can apply.

1.2 *Gender Neutral Language*

1.2.1 The current language used has an inherent limitation in that it offers greater protection to the female sex. In our Sexual Offences Act there is limited protection for men and boys who are victims of various forms of sexual violence.

1.2.2 As discussed earlier the existing definition of sexual intercourse necessitates a definition of rape as found in Part II Section 3 which says, *inter alia*, that a man commits the offence of rape if he has sexual intercourse with a woman without her consent. This means that the man, as the person in possession of a penis, must be the active participant and conversely the woman, as the person in possession of a vagina, must be the passive participant. Therefore a woman cannot rape a man under Jamaican law and similarly a man cannot be raped by another man since both parties are male persons. The solution for this latter scenario is believed to be found in Section 76 of the Offences Against the Person Act and specifically 'the abominable crime of buggery', and all other forms of male same-sex intimacy are criminalised by Section 79 of the same Act wherein 'gross indecency' is proscribed. This discord can be cured through the proliferation of gender and orifice neutrality throughout the statute.

Part II - Rape, Grievous Sexual Assault and Marital Rape

2.1 Definition of 'Rape'

2.1.1 This definition of sexual intercourse impacts directly on the definition of offence of 'rape' and likewise it distinguishes 'sexual intercourse' from 'the abominable crime of buggery' as defined at common law to refer to anal intercourse. The submission urging a gender and orifice neutral definition of sexual intercourse would cure this inconsistency.

2.1.2 By requiring male victims of forced anal intercourse to rely on section 76 of the Offences Against the Person Act which broadly criminalises "buggery" and for which the defence of consent is not applicable, the law "minimalizes the magnitude" of what is in fact "rape" against males implying that it is somehow less heinous than the rape of girls or women" and in so doing creates a "fallacious and discriminatory distinction between genders".

2.1.3 This inequity is most clearly seen when punishments for perpetrators of these crimes are compared. Those persons charged under section 76 of the Offences Against the Person Act are subject to a maximum term of ten years' imprisonment while the sentence for males convicted of raping women under the Sexual Offences Act ranges from a minimum term of fifteen years to a maximum term of imprisonment for life.

2.1.4 We submit that the redefinition of 'sexual intercourse' to include anal intercourse will necessitate an amendment to the Offences Against the Person Act to remove buggery as an offence since anal intercourse would be subsumed within the general definition of sexual intercourse. Similarly it would require an examination of the 'gross indecency' provision to consider whether it is consonant with the already existing legislation governing similar offences, and if not whether the disparate pieces of legislation can be harmonized or combined. Therefore by implication consent would become an available defence for anal intercourse which will prospectively be subsumed within the proposed definition of rape. This would therefore mean that adults can consent to *coitus* by way of anal intercourse without the threat of prosecution.

Part VIII - Miscellaneous

3.1 Gross Indecency

3.1.1 The retention of laws which criminalise private consensual acts of intimacy between adults is felt to be problematic both from a jurisprudential point of view as well as with respect to natural justice. The right to freedom from discrimination on the ground of being male or female; equality before the law; the right to freedom of association; the right to equitable and humane treatment; and the right to respect for and protection of private family life, and privacy of the home have all been successfully argued as reasons for the outright repeal or the more conservative limitation of the anti-buggery law in other jurisdictions to no longer criminalise the sexual acts of consenting adults in private. This would therefore mean that adults can consent to coitus by way of anal intercourse and other forms of sexual intimacy without the threat of prosecution.

3.1.2 Additionally, when private acts of intimacy between two men are criminalised by the State, the very existence of the law subjects homosexual persons to discrimination both in the public and in the private spheres. One of the social effects of the buggery law is that, *citizens feel empowered by the background of these laws to commit acts of extreme violence against individuals who are, or are presumed to be gay.*

3.1.3 Section 79 of the OAPA which is commonly referred to as the law against 'gross indecency' is seen as one of the more pernicious sections of the legislation given that it criminalises all forms of male same-sex intimacy. The term 'gross indecency' is nebulous but at common law is interpreted as male homosexual behaviour. This specific section is felt to be the most offensive to the principle of equity and symbolizes the crux of the argument for the review of the law.

3.1.4 J-FLAG urges the committee to consider the need for a re-formulation or repeal of the section in keeping with the latest developments in commonwealth jurisprudence.

3.1.5 We propose that Section 79 be repealed in order that the principle be subsumed within the rubric of gender, orifice, and object neutral definition of sexual intercourse and rape,

and also that it be considered within the rubric of the existing public indecency laws so that there will be no gender-specificity with respect to its enforcement.

3.2 Unnatural Offences with Animals

3.2.1 J-FLAG urges that the act of bestiality should be a distinct offence that is adequately criminalised.

4.1 Regional Context

In the Caribbean, a number of countries have reviewed or repealed laws proscribing same-sex intimacy stretching back hundreds of years. The most recent modification to the anti-buggery law took place in The Bahamas in 1991. Below please see a table showing select Caribbean territories affiliated with CARICOM and how each respective jurisdiction treats with the law:

Country	Buggery/Sodomy Law	Penalty
Bahamas	No	n/a
Barbados	Yes	Life
Belize	Yes	10 years
Cuba	No	n/a
Dominican Republic	No	n/a
Guyana	Yes	Life
Haiti	No	n/a
Jamaica	Yes	10 years
Suriname	No	n/a
Trinidad & Tobago	Yes	25 years

5.1 Global Context

Then, as now, the enforcement of the law raised serious concerns from private citizens and jurists alike about the constitutionality of this particular piece of legislation. These arguments have led to the review or repeal of the offensive legislation in several jurisdictions, including the country of its origin, Great Britain where it was revised insofar as it relates to private consensual homosexual acts. This was done in 1967.

There has been a steadily increasing momentum toward the development of legislation that is protective of the human rights and dignity of all citizens. The legal interrogation of fundamental questions of human rights and self-determination started in antiquity and is responsible for much of present jurisprudence and this has also been influenced by political devices such as Joint Select Committees of Parliament and other special committees designed to positively impact the development of law. One famous example was the seminal Report of the Departmental Committee on Homosexual Offences and Prostitution (better known as the Wolfenden report) which was published in the United Kingdom in 1957.

The key recommendation of the committee was that “homosexual behaviour between consenting adults in private should no longer be a criminal offence”.

This segment of the report has formed the basis for all subsequent challenges to laws proscribing, *inter alia*, consensual homosexual intimacy in private. It is the codification of the basic constitutional principles of equality before the law and privacy of the home that undergird LGBT rights and the movement toward the realization of these ideals.

6.1 General Recommendations:

6.1.1 We urge the committee to look broadly at the way the enforcement of the law negatively impacts the quality of life of sexual and gender minorities in Jamaica. This examination will require a thorough analysis of international case law and the developments emanating from the determination of constitutional challenges in various jurisdictions.

- 6.1.2 Keen attention must be paid to the creation and/or strengthening of mechanisms to offer protection to the most vulnerable in Jamaican society, especially our children and others who lack the capacity to consent.
- 6.1.3 It is J-FLAG's submission that these be considered by the Joint Select Committee as it seeks to create a more expansive and effective Sexual Offences Act that is respectful of the human dignity and rights of all Jamaicans as well as provide for the more holistic approach to their health and well-being.

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