



# **PEOPLE'S NATIONAL PARTY WOMEN'S MOVEMENT**

## **RECOMMENDATIONS & COMMENTARY**

### **FOR THE AMENDMENT OF THE**

### **THE SEXUAL OFFENCES ACT 2009**

#### **SECTION 1 – PRELIMINARY STATEMENT & RATIONALE**

- 1.1** Jamaica is a matrifocal society with a patriarchal value system. The predominance of this value system which could be viewed as the international status quo has sometimes led to the dilution, retardation and repression of legislation which ought to be passed for the protection of our women and children.
- 1.2** The Movement is steadfast in its belief that every Jamaican has a right to protection from Sexual Offences and has attempted to take an international comparative legislative approach in the making of these submissions, with the view that this approach is most appropriate in light of the ratification of international treaties which not only give credence to the view that women's rights are human rights but have also imposed positive obligations upon the state to protect persons from physical and psychological maltreatment which constitute violations of our inalienable civil liberties.
- 1.3** Reference is made to the International Convention of the Prevention, Punishment and Eradication of Violence Against Women – the Convention of Belém do Pará of 1994. We would remind that same dictates that the government of Jamaica is obliged to evidence in its domestic legislation and governmental policy that violence against women is an offence against human dignity and a manifestation of the historically unequal power relations between the sexes. Our signature on same must be perceived as being real, meaningful, as opposed to being observed as superficial.
- 1.4** These submissions are also made within the context of the United Nations Convention on the Elimination of All Forms of Violence Against Women (CEDAW) by virtue of which we, as a nation since 1984, have committed to incorporating the principle of gender parity within our legal system, abolishing all discriminatory laws and adopting those which are appropriate to prohibit discrimination against women. It is time that we give life to these international human rights conventions in our domestic courts and on our statute books. Following the example of South Africa, reference to these conventions should be made in the preamble of the revised legislation.

## **SECTION 2 – SUBMISSIONS & RECCOMENDATIONS:**

### **1. The Definition of Consent**

- 1.1 The word “consent” appears twenty-eight (28) times in the current Act without definition despite the fact that in instances of rape *“the victim and suspect are known to one another in the majority of cases... [Consequently] in a large number of cases the main evidential issue is one of consent as opposed to identification.”*<sup>1</sup>
- 1.2 This lack of definition of the word consent confers not only a broad discretion upon the interpreters of the law who in past instances have adopted a patriarchal approach to judicial recourse for sexual offences, but it also lends uncertainty to both victim and offender as to when a sexual offence has been committed. This lack certainty and uniformity of definition should clearly signal to Parliament that a *“significant development in policy, law and practice... aimed specifically at improving the investigation and prosecution of rape offences”* should be instituted as happened in England in 2003.<sup>2</sup> It could be inferred that English Parliament deemed it necessary to provide a statutory definition for consent in order to not only give a clear indication of what is intended by use of the word while evidencing the purpose of the underlying Act which is to afford the greatest protection and judicial recourse for victims of sexual offences.
- 1.3 The importance of statutory definitions for pertinent words was highlighted by the 11<sup>th</sup> Chief Justice of Australia, The Honourable Anthony Gleeson Murray, who inferred that there can be interpretational difficulty for the bench as *“Acts of Parliament often require interpretation. Their meaning is not always self-evident and in any event the volume and complexity of legislation produces inconsistency and uncertainty.”* In furtherance he quotes a learned brother who stated obiter: *“It is for Parliament to specify and to do so...as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen...”*<sup>3</sup>
- 1.4 We propose that in resolution of uncertainty, ambiguity and in the interest of the underlying objective of the legislation that similar to Section 74 of the Sexual Offences Act 2003 of England & Wales, it should be stated clearly in the amended Sexual Offences Act that for the purposes of same, *“a person consents if she agrees by choice, and has the freedom and capacity to make that choice.”*

### **2. The Expansion of Evidentiary/Rebuttable Presumptions with regard to Consent**

- 2.1 A rebuttable presumption can be defined as an assumption of fact accepted by the court until disproved by the accused. In England, Canada and South Africa, presumptions have been implemented for the safeguarding of both complainant and accused and additionally for the guidance, ease and the provision of clarity for both the bench and crown. At section 3(2) of the existing Act there are two rebuttable presumptions which without evidence to the contrary negate the element of consent. That is where there is a physical assault or threats or fear of same and where there is fraudulent representation. It is contended that these presumptions should be expanded and more comprehensively defined to include common instances which auger the implementation statutory safeguards.
- 2.2 Inspiration can be drawn from Canada where an absence of consent is presumed when:
- (a) The agreement is expressed by the words or conduct of a person other than the complainant;
  - (b) The accused counsels or incites the complainant to engage in the activity by abusing a position of trust, power or authority;

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<sup>1</sup> Her Majesty’s Inspectorate of Constabulary & Her Majesty’s Crown Prosecution Service Inspectorate (2007:159)

<sup>2</sup> Her Majesty’s Inspectorate of Constabulary & Her Majesty’s Crown Prosecution Service Inspectorate (2007:8)

<sup>3</sup> Murray (2007)

(c) The complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(d) The complainant having consented to engage in the sexual activity expresses, by words or conduct, a lack of agreement to continue to engage in the activity.<sup>4</sup>

2.3 Two other additions can be taken from the English Act from whence our existing evidentiary presumptions were taken. That is where an absence of consent is presumed and where it is proved that the defendant did the relevant act and knew that at the time of the relevant act or immediately before that:

(a) The complainant was asleep or otherwise unconscious; or

(b) The complainant had been administered or had taken a substance that was capable of stupefying or overpowering the complainant at the time of the offence.<sup>5</sup>

2.4 The aforementioned are rebuttable presumptions which according to the English House of Commons advise would provide “*assistance to the jury in guiding them through the process*” and further directed that they are intended to “*send out a very clear message that does shift the balance in favour of the complainant.*”<sup>6</sup> This shift in favour of the complainant within the Jamaican context could be seen as a preventative and cautionary statutory directive especially in light of the annual average of one hundred and seventy seven (177) rapes which have been committed against child victims for the years 2014 to 2016.<sup>7</sup>

2.5 It is hereby recommended that the aforementioned rebuttable presumptions be included in the amended statute as in keeping with the view of the British Commons, “*the circumstances which will give rise to a rebuttable presumption against consent or a belief in consent are all situations in which consent is generally absent. Accordingly, we do not find it unreasonable to require the defendant – in those circumstances – to show sufficient evidence to raise a real issue about consent, or his belief in consent, before the matter can be put to the jury.*”<sup>8</sup>

### **3. The Age of Consent & The Definition of “A Child”:**

3.1 The definition of a child as “*a person under the age of sixteen years*” should be deleted from the Sexual Offences Act 2009 and should be amended in keeping with the definition of a child as per Section 2 which defines a child as “*a person under the age of eighteen years*”.<sup>9</sup>

3.2 The Women’s Movement supports the assertion that “*while adolescents need to exercise their decision-making skills as they mature, they still need protection from adult sexual predators.*”<sup>10</sup> Despite the fact that under the Age of Majority Act, a minor who attains the age of sixteen (16) can effectively give consent to medical treatment like an adult, we would contend that the right to consent to curative treatment and the right to carte blanche sexual autonomy are distinguishable as the physical and emotional consequences of adolescent sexual activity in many instances can result in adverse, emotionally traumatic, anxious, depressive and deleterious psychological outcomes especially for a minor.<sup>11</sup>

3.3 Additionally, neurologists have proven that brain maturity is not achieved by any human until age twenty-five (25) which occurs ten (10) years after puberty as the dorsal prefrontal cortex of the frontal lobe which is responsible for “*inhibiting impulses, weighing consequences of decisions and most importantly, prioritizing and strategizing to obtain a solution to the presenting problem*” is the last area of the lobe to

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<sup>4</sup> Criminal Code of Canada

<sup>5</sup> Sexual Offences Act 2003 of England & Wales

<sup>6</sup> Ibid

<sup>7</sup> Jamaica Constabulary Force (2017)

<sup>8</sup> House of Commons (2003)

<sup>9</sup> Sexual Offences Act 2009 - s.8(1) speaks to sexual touching/interference & s.9(1) speaks to sexual grooming (Jamaica).

<sup>10</sup> Drobac, Jennifer (2006:2)

<sup>11</sup> Gillick v West Norfolk & Wisbech AHA [1985] UKHL 7

mature.<sup>12</sup> This evidences that a person under the age of twenty-five (25) is unlikely to be capable of weighing the consequences of sexual activity and inhibiting impulses when coerced into same. This signals the need for a greater level of protection to be provided both familial and that of the law prior to one's attainment of the age of majority.

- 3.4 Consideration of neuroscience coupled with the negative psychological outcome and long-term physical and financial effects of adolescent sexual activity seems to have led over fifty (50) jurisdictions worldwide to statutorily impose an age of sexual consent of eighteen (18) years or above.<sup>13</sup> As a leader in the development of progressive policies it is incumbent on Jamaica to take this stance for the protection of its adolescents who according to the Ministry of Health are birthing an average of 50,743 children per annum.<sup>14</sup> Most all of these adolescents are without financial support from the children's fathers with no recourse to state care sans the placing the child up for adoption.
- 3.5 Consequently, the Movement recommends that the statutory definition of a child should be harmonized and is of the view that sexual relations between an adolescent of under eighteen (18) years and a person who has achieved the age of majority should be defined as statutory rape with the bench being given the discretion to consider the circumstances of the sexual relationship, its dynamic and occurrence while meting out commensurate punishment.
- 3.6 The Women's Movement is supportive of the Child Diversion Policy which aims to steer youth offenders away from the formal justice system through counselling, the issuance of warnings, cautions and enrolment in diversion programmes to instill positive behavior modification and rehabilitation. This policy should be applied where sexual intercourse occurs between two children (that is two persons under the age of 18) with the consent of both 'partners'.

#### 4. The Definition of Rape

- 4.1 It is submitted that the definition of rape as per Section 3 of the Sexual Offences Act should be amended to include all forms of penetration of any part of the body (e.g. mouth, anus, and vagina) by a person of another person without the consent of the recipient. The law should clearly state that rape relates not only to the penetration of one's body by a sexual organ but by any other body part or by any object/s including digits.
- 4.2 A discussion on the expansion of the definition of rape to include forced oral sex was held in the British Commons wherein it was concluded by the Select Committee that there would be no difficulty in the statutory expansion in the definition of rape as the Members saw "*the logic of grouping all forms of non-consensual penile penetration – including the penetration of the mouth – within the same offence*". The members furthered that "*the law on rape has adapted successfully to changes of definition in the past and [they found] no reason to suspect that juries [would] be reluctant to convict on the new definition.*"<sup>15</sup>
- 4.3 It is submitted that Jamaica must take guidance from jurisdictions such as South Africa where rape and all of its elements are exhaustively defined to encompass any form of "*sexual penetration*" which within that Act has a corresponding meaning with the term "*sexual violation*" to include any act that causes:
- (a) Direct or indirect contact between genital organs, anus, breasts (in the case of females) and any part of the body of another person or animal or any object; or

<sup>12</sup> Miller & Cummings (2007:577)

<sup>13</sup> Ages of Consent Worldwide, Available at: <https://www.ageofconsent.net/world>

<sup>14</sup> Ministry of Health (Jamaica), Teen Births Per Parish 2008-2012 (Undated)

<sup>15</sup> House of Commons (2003)

(b) The mouth of one person and the genital organs, anus, breasts (in the case of females), the mouth or body part of another person or any other part of the body of another person which could be used in an act of sexual penetration, cause sexual arousal or stimulation or be sexually aroused or stimulated thereby or the masturbation of one person by another.<sup>16</sup>

4.4 Section 4(1) of the existing Act which speaks to Grievous Sexual Assault with specific reference to Section 4(1)(a) that speaks to the penetration of the vagina or anus of a victim with any body part or object other than the penis should be included wholesale in the circumstances which constitute rape thus providing a comprehensive definition of *“the most serious, most feared and the most debated of all sexual offences.”*<sup>17</sup>

## **5. Marital Rape**

5.1 It is recommended that Marital Rape should be an offence without any qualifications or exemptions. Therefore all of Section 5(3) of the Act should be expunged. As happens in several other countries, there should be no exemption or different punishment for the offence of rape based on the relationship between the parties. As stated in the Policy for Prosecuting Rape in Northern Ireland, the same policy should apply *“to all types of rape, including marital and relationship rape, acquaintance and stranger rape, both against male and female victims.”*<sup>18</sup>

5.2 The Movement supports the view that *“Violations of women’s human rights are often linked to their sexuality and reproductive role. Ensuring that women have full autonomy over their bodies is the first crucial step towards achieving substantive equality between women and men. Personal issues - such as when, how and with whom they choose to have sex, and when how and with whom to have children – are at the heart of living a life with dignity.”*<sup>19</sup>

## **6. Mandatory Minimum Sentence for Incest**

6.1 Similar to Section 6(1)(a) of the Sexual Offences Act 2009 which institutes a minimum sentence of 15 years upon conviction for rape and Section 10(4) of the Act which institutes a minimum sentence of 15 years upon conviction for sex with a minor (presently defined as a person below 16 years), a section must be included under Part III of the Act to institute a minimum sentence of 15 years upon conviction for the offence of incest. This will not only create uniformity in sentencing as it pertains to rape, sex with a minor and incest which all carry a maximum penalty upon conviction of imprisonment for life but will also reflect the gravity and egregiousness of the offence of incest for the public good.

## **7. Attempt, Conspiracy, Incitement or Inducing another person to commit Sexual Offence**

7.1 In some instances third parties aid, abet, induce, incite, instigate, instruct, command, counsel and procure the primary offender in the committal of sexual offences against the victim. The occurrence of these acts is seemingly more prevalent than publicly acknowledged as third parties who are sometimes women themselves, arrange for the rape or sexual abuse of other women and children.

7.2 It is reported that there are some persons, *“who harm their own children...male coerced offenders [who are] passive females in relationships with abusive males who would do just about anything to keep their man happy. They may think that the co-abuse will actually bring them closer together.”* There is another group

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<sup>16</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, Republic of South Africa, s.3 with ref. to s.2

<sup>17</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act (2007) – Republic of South Africa

<sup>18</sup> Public Prosecution Service for Northern Ireland, 2010 (2010:1.5)

<sup>19</sup> Pillay, Navi (2012)

of third party offenders whose offences “include forcing young girls into prostitution” with an economic motivation as opposed to one which is sexual.<sup>20</sup>

7.3 Protection from these Third Party offenders should be included on the face of the amended Sexual Offences Act as these heinous actions should not only be admonished but the third party offender should also bear equal responsibility and be meted the same punishment as the offender as happens in South Africa where *any person who attempts, conspires with any person or aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person to commit a sexual offences is guilty of an offence and liable on conviction to the punishment which a person convicted of actually committing that offence would be liable.*<sup>21</sup>

## 8. Misconduct in Public Office

8.1 The law should seek to penalize members of the constabulary force to whom sexual offences are reported but who fail to act or who are found to be deliberately negligent in the performance of their duties in matters relating to sexual offences against the person. This traditionally common law offence which in some jurisdictions carries a maximum life sentence should be recorded in the Act owing to the fact that Jamaica’s cultural response to sex offences has been to “turn a blind eye”.

8.2 The elements of the offence should arise as per the Crown Prosecution Service of England & Wales’ guidelines which speak to the offence in a general manner, when “*a public officer acting as such, willfully neglects to perform his duty and/or willfully misconducts himself to such a degree as to amount to an abuse of the public’s trust in the officer holder without reasonable excuse or justification.*” According to same, a public officer is deemed to be “*a person who carries out a public duty or an office of trust [and] must therefore be inferred from the facts of the particular case.*”<sup>22</sup>

## SECTION 3 – POLICY RECCOMENDATIONS

### 1. A Policy for Prosecuting Rape & Sexual Offences

1.1 In an effort to provide guidance with regard to how policing and prosecution decisions pertaining to sexual offences ought to be made and for widespread public education which is woefully lacking in Jamaica, the Women’s Movement is of the view that a policy should be formulated for the use of public officers, private citizens and non-governmental organizations alike. It is hoped that such a document will not only increase public awareness while acting as a deterrent but that it will also lead to a higher prosecution rate for sexual offences. The policy should also speak to the compulsory training of public officers who are likely to have to interface victims of sexual offences.

### 2. Sentencing Guidelines for Sexual Offences

2.1 The Women’s Movement is of the view that comprehensive sentencing guidelines through the judiciary should be instituted and prescribed with regard to the degree of the severity of punishment upon conviction for each sexual offence. As exists in several other jurisdictions, these guidelines similar to that of the United States will:

*“(a) Incorporate purposes of sentencing (i.e. just punishment, deterrence, incapacitation and rehabilitation);*

<sup>20</sup> Mallet, Xanthe (2017)

<sup>21</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, Republic of South Africa, s.55

<sup>22</sup> Crown Prosecution Services (2017)

- (b) *Provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offences with similar characteristics convicted of similar criminal conduct, while permitting sufficient judicial flexibility to take into account relevant aggravating and mitigating factors; and*
- (c) *Reflect, to the extent practicable, advancement in knowledge of human behaviours as it relates to the criminal justice process.*<sup>23</sup>

Accordingly, the Women's Movement is of the view that any offence committed against a person with a disability or minor should be seen as an aggravating factor which should increase the sentence based on the incapacity of the disabled victim and the age of minority of the child victim. Offences such as gang rape and circumstances involving unlawful imprisonment should also be cited as an aggravating factor.

### **3. DNA Forensic Evidence & DNA Rape Kits**

3.1 DNA evidence forensic evidence and DNA rape kits should be utilized to ascertain a profile of the offender. The DNA sample ultimately should be placed into a database to assist in the solving of sexual offences and other offences in a swift and timely fashion with precision.

### **SECTION 4 – CONCLUSION**

4.1 The Women's Movement of the People's National Party thanks the Joint Select Committee of Parliament for its audience and looks forward to the adoption and insertion of its recommendations in the amended Sexual Offences Act of Jamaica and in the correspondence policies which must accompany same.

### **PEOPLE'S NATIONAL PARTY WOMEN'S MOVEMENT – 2017**

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<sup>23</sup> Eskridge, C. at <https://www.unl.edu/eskridge/cj211sentence.html>



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