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TITLE: Submission by SISTREN Theatre Collective to the Joint Select Committee of Parliament on the Sexual Offences Act 2009.

Pursuant to Section 41 (2) of the Sexual Offences Act 2009, SISTREN Theatre Collective puts forward to the Joint Select Committee the present written submission as a contribution to the review process of the motioned Act.

Recommendations informing this submission include those identified in a public consultation facilitated by Friedrich Ebert Stiftung (FES). This consultation was supported by female and male law students from UWI, Mona Campus who are currently interns at FES, and by academics from the Faculty of Law, UWI Mona Campus.

The submission comprises the following points:

I. The relevant international human rights normative framework

II. Section 3(1) on the definition of rape

III. Section 3 (2) (a) (b) on the notion of consent

IV. Section 5 (3) (a) to (e) on the conditioned criminalization of marital rape

V. Recommendations for regulations

I. Preamble: The normative human rights framework

By virtue of signing and ratifying international and regional human rights treaties, the Government of Jamaica has agreed with the human rights standards stipulated therein and thus has committed to bring in line its laws, policies and programmes with such standards. More

specifically, Jamaica is a State party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) since 1980 and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Belém do Pará) since 2005. Under these treaties, the Government of Jamaica has the legal duties: 1. to ensure women's human right to live a life free from discrimination and, in particular from violence, 2. to ensure women's enjoyment of human rights on a basis of equality with men, and overall, 3. to improve and secure women's human rights both on paper and in reality through laws, policies and programmes.¹

Discrimination against women persists in Jamaica and such discrimination "violates the principles of equality of rights and respect for human dignity".² The most pervasive form of discrimination is violence against women. Such violence includes "physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty".³ It can take place in either public spaces or in the private space of the home, and can be inflicted by either public authorities or private individuals, often known to the victim.⁴ The incidence of violence against women nullifies women's ability to enjoy rights on an equal basis with men and debilitates their capacity to contribute to the society and the family. Under human rights law,

- the right to life,
- the right to bodily integrity,
- the right to liberty and security of the person,
- the right to equal protection under the law,
- the right to equality in the family,
- the right to the highest standard attainable of physical and mental health

are just a few of those rights that are violated when violence against women occurs.⁵

Statistics collected by Jamaica Constabulary Force (JCF) as to July 2014 indicate that in Jamaica, violence against women is still a widespread reality.⁶ In its 2012 Concluding

¹ CEDAW, 1979, UN Doc. A/RES/34/180, Art.2; CEDAW General Recommendation 19, 1992, UN Doc. HRI/GEN/1/Rev.9 (Vol.II); Belém do Pará, 1994, 33 ILM 1534, Art. 7.

² CEDAW, 1979, UN Doc. A/RES/34/180, Preamble, para. 7.

³ CEDAW General Recommendation 19, 1992, UN Doc. HRI/GEN/1/Rev.9 (Vol.II), para. 6.

⁴ CEDAW General Recommendation 19, 1992, UN Doc. HRI/GEN/1/Rev.9 (Vol.II), paras. 8 & 9.

⁵ CEDAW General Recommendation 19, 1992, UN Doc. HRI/GEN/1/Rev.9 (Vol.II), para. 7.

⁶ With regard to rape, JCF statistics show that since 2011, when the Sexual Offences Act 2009 came into force, there has been an increase in the rate of reported cases of rape from 459 in 2011 to 516 in 2012. Although there has been a decrease in 2013 to 413 reports and 348 have been made up to July 5 in 2014, the rate of rape remains high while the clearance number for these cases remains low. In 2011, there were 274 unresolved cases of rape to 459 reported cases and in 2012 there were 310 unresolved cases to 516 reported cases. Since 2011, the clearance number has not been higher than 209 to 413 cases in 2013 and 193 to 348 cases up to July 5 in 2014. See JCF Statistics and

Observations to Jamaica, the CEDAW Committee addressed the incidence of violence against women in the country and raised particular concerns with respect to the protection afforded to women under the Jamaican law against *marital rape*. More specifically, the Jamaica Sexual Offences Act 2009 criminalizes marital rape only in certain circumstances.⁷ Consequently, in the cases where there is no situation of, agreement or proceedings for separation of the spouses; no order or injunction for non-cohabitation, non-molestation or ouster from the matrimonial home for the personal protection of the wife; or the husband has the knowledge of being infected with a sexually transmitted infection⁸ the Jamaican law *condones* the incidence of such violence between spouses. Therefore, the CEDAW Committee urges the Government of Jamaica to amend the Sexual Offences Act 2009 “with a view to criminalizing all marital rape, with no restrictive conditions, within a clear time frame.”⁹

The review of the Jamaica Sexual Offences Act 2009 along the lines proposed in the present written submission is in furtherance of the legal obligations that the Government of Jamaica has under international and regional human rights treaties to put an end to the climate of impunity for violence against women in the country.

II. Section 3 (1) on the definition of sexual intercourse and acts amounting to rape

Section 3 of the Jamaica Sexual Offences Act 2009 provides that:

“(1) A man commits the offence of rape if he has sexual intercourse with a woman
(a) without the woman's consent; and
(b) knowing that the woman does not consent to sexual intercourse or recklessly not caring whether the woman consents or not.”

The section therefore stipulates that rape can only occur where there is “sexual intercourse” within the meaning of section 2 of the Sexual Offences Act 2009, which is defined as penetration of the vagina by the penis. The provision is also crafted so that only a man can be the perpetrator of rape, while only a woman can be the victim of the same offence.

Considering these ramifications, we submit accordingly:

1. The definition of “sexual intercourse” should be revised. The limited definition of “sexual intercourse” as articulated in section 2 of the Act is at odds with various sections of the Act.¹⁰ For example, section 16, which reads “[a] person commits an offence who

Information Management Unit, ‘Jamaica Constabulary Force Periodic Serious and Violent Crimes Review’ issued July 6, 2014. Since marital rape is not fully protected under the law, the incidence of such violence could not be measured.

⁷ CEDAW Concluding Observations, Jamaica, 2012, UN Doc. CEDAW/C/JAM/CO/6-7, para. 21.

⁸ The Sexual Offences Act (Jamaica) 2009, section 5 (3) (a) –(e).

⁹ CEDAW Concluding Observations, Jamaica, 2012, UN Doc. CEDAW/C/JAM/CO/6-7, para. 22 (b).

¹⁰ See as examples sections 10(1)-(2), 11(a), 16(1), 17(a)-(b) and 18 which are either gender-neutral or otherwise explicitly refer to a female being the perpetrator of “sexual intercourse”.

has or attempts to have sexual intercourse with a person who is suffering from a mental disorder or physical disability (knowing that the person is suffering from such a disorder or disability) and who does not consent to the act of intercourse or is incapable of consenting to the act.”¹¹ This stipulation is irreconcilable with the definition of “sexual intercourse” as provided in section 2 of the Act. As it presently stands a female person is not capable of “penetrating” except where she uses an implement. Therefore, the argument could be made that though section 16 is gender neutral, a female could not legally be found liable under the section since she cannot “penetrate” within the definition of “sexual intercourse” now in section 2.

On these grounds, we submit that the definition of “sexual intercourse” should be expanded to include invasion of the body of a person, however slight, resulting in anal penetration, oral penetration, penetration by any other part of a person’s body or by the manipulation of objects. In addition, we submit that sexual intercourse also occurs where a person causes their vagina, anus or mouth to be intruded however slight by the penis or any other body part of another.

The Bahamas has used a model, which is capable of reconciling the inconsistencies between the definition of sexual intercourse and certain offences as they are presently articulated in the Sexual Offences Act 2009.¹² Using the Bahamas Act as an example, we submit that the definition of “sexual intercourse” could read as follows:

“sexual intercourse” means —

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

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

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

(b) sexual connection occasioned by the introduction of any part of the penis of any person into the mouth of another person,

and any reference in this Act to the act of having sexual intercourse includes a reference to any stage or continuation of that act.”¹³

To be clear, we also submit that sexual intercourse also occurs where a person causes their vagina, anus or mouth to be intruded by the penis or any other body part of another. This would be included as a part of the definition of sexual intercourse in conjunction with the example from The Bahamas Sexual Offences and Domestic Violence Act 2009.

¹¹ Sexual Offences Act (Jamaica) 2009 section 16(1).

¹² More specifically sections 7 (incest), 10 (sexual intercourse with a person under 16), 11 (inducing or encouraging violating of a child under 16), 16 (violation of a person suffering from mental disorder or physical disability) and 17 (forcible abduction).

¹³ The Sexual Offences and Domestic Violence Act (Bahamas) 2009 section 4.

2. The articulation of acts that amount to rape should be gender-neutral. Both males and females should be recognized as offenders and victims. This would be achieved by the use of the word “person” to refer to the offender and “person” to refer to the victim. This would be consistent with various other sections of the Act, which are formulated in a gender-neutral manner. This formulation would also be consistent with the definition of “sexual intercourse” as submitted above. Therefore we submit that section 3 (1) should read:

- 3(1) “A person commits the offence of rape if he/she has sexual intercourse with another person:
 - a) without the person's consent; and
 - (b) knowing that the person does not consent to sexual intercourse or recklessly not caring whether the person consents or not.
 - (c) causes a person to engage in sexual intercourse with another person, without the person’s consent.”

It is important to note that lack of consent remains an essential element of the offence of rape. However, our submissions for the amendment of consent have been outlined in Section III below.

3. It is keen to note that the understanding of rape as submitted above would have the effect of making some aspects of the offence of grievous sexual assault redundant. The aspect of section 4 on grievous sexual assault that would remain unaffected relates to the offender “placing his or her mouth onto the vagina, vulva, penis or anus of the victim.”¹⁴ Given these considerations, we submit that the sanctions for rape should be no less than fifteen years.

III. Section 3(2)(a)(b) on the notion of consent

Currently, with respect to consent, the offences under the Act are committed where sexual intercourse takes place:

- a. “without the woman's consent; and
- b. knowing that the woman does not consent to sexual intercourse or recklessly not caring whether the woman consents or not.”¹⁵

Further, the Act provides that consent shall not be treated as existing where the apparent consent is:

- a. “extorted by physical assault or threats or fear of physical assault to the complainant or to a third person; or
- b. obtained by false and fraudulent representation as to the nature of the act or the identity of the offender.”¹⁶

¹⁴ Sexual Offences Act (Jamaica) 2009 section 4(e).

¹⁵ Jamaica Sexual Offences Act, section 3(1), section 4(3)(a), section 5(1)

¹⁶ Jamaica Sexual Offences Act, section 3(2), section 4(4), section 5(2)

It is submitted that the word “woman” should be substituted with the word “person” in accordance with redefinition of “sexual intercourse”.

In addition to the above-mentioned circumstances, it is submitted that consent should not be treated as existing where:

- i. “the offender knew or ought reasonably to have known himself/herself to be suffering from a sexually transmitted infection”¹⁷, yet has concealed this from the victim.
- ii. “it is obtained through intimidation of any kind”¹⁸, whether, emotional, psychological or financial by the offender towards the victim.
- iii. “it is obtained by reason of the use of the offender’s position of authority over the victim”¹⁹ or the victim’s position of dependency upon the offender.

It is also submitted that there should be specified in the Act the required standard of consent. The common law position merely requires an honest belief in consent.²⁰ However, we submit that the requisite standard ought to be that of reasonable belief. Therefore a provision ought to be included stipulating that:

“If at a trial for an offence under this Act the jury has to consider whether a person believed that another was consenting to sexual intercourse or to any other sexual act, the Judge shall direct the jury that the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether that person so believed.”²¹

IV. Section 5 (3)(a) to (e) on the conditioned criminalization of marital rape

As the law currently stands, there are several conditions attached to the offence of marital rape. These are as follows:

- a. “the spouses have separated and thereafter have lived separately and apart within the meaning of the Matrimonial Causes Act;
- b. there is in existence a separation agreement in writing between the spouses;
- c. proceedings for the dissolution of the marriage or for a decree of nullity of marriage have been instituted;
- d. there has been made or granted against the husband an order or injunction, as the case may be, for non-cohabitation, non-molestation or ouster from the matrimonial home for the personal protection of the wife; or
- e. the husband knows himself to be suffering from a sexually transmitted infection.”²²

¹⁷ Jamaica Sexual Offences Act, section 5(3)(e). Under the current Act, this circumstance is a condition for the offence of marital rape. However we submit that it ought to be a circumstance, which vitiates consent in all instances of rape. This ought to be so regardless of the relationship between offender and victim.

¹⁸ Barbados Sexual Offences Act, section 3(2)(f)

¹⁹ Barbados Sexual Offences Act, section 3(2)(e)

²⁰ *R v Cogan and Leak* [1976] QB 217; *DPP v Morgan* [1976] AC 182

²¹ Trinidad and Tobago Sexual Offences Act, 1986, section 28; Barbados Sexual Offences Act, 1992, section 24.

²² Jamaica Sexual Offences Act, section 5(3)(a)-(e)

It is submitted that these conditions should be removed and that there should be no conditions upon the offence of marital rape. Once sexual intercourse takes place without consent, such should equally be considered rape. This ought to be the case regardless of the relationship between the offender and the victim.²³

The effect of the current conditions is that a husband may only be considered to have raped his wife in circumstances in which the marriage has effectively broken down. While the marriage subsists, a man cannot be considered to have raped his wife if he has sexual intercourse with her without her consent. This position is an expression of an anachronistic view of marriage and the status of women. It is based upon a theory of marriage whereby a woman gives implied consent to sexual intercourse with her husband, which she cannot retract.²⁴ As a result, a married woman is denied her rights over her body, and her sexual autonomy and agency. This position is unjust, as it leads to the violation of women's right to equality in the family. Such legally sanctioned discrimination cannot be supported in modern society in view of the social and legal changes that have occurred with respect to the status of women.

The presence of these conditions is regressive in view of the common law position as decided in R v R.²⁵ The House of Lords, affirming the decision of the Court of Appeal, held that a husband was guilty of rape absolutely where his wife does not consent to sexual intercourse. No conditions were imposed.

Furthermore, the effect of the conditions on the offence of marital rape is to afford less protection to married women than women in other relationships such as common law and visiting unions. Unlike married women, these women have the benefit of protection under the rape provision in section 3 of the Act where the single consideration is the presence of absence of consent. The result is discrimination on the ground of marital status and violation of the right to equal protection under the law.

V. Recommendations for Regulations from Public Consultation on the Review of the Sexual Offences Act 2009:

- **Sensitization:** Following the August 23, 2014 Public Consultation with Women's Groups on the Review of the Sexual Offences Act 2009, there is a call for the sensitization of health service providers as well as for those persons involved in the justice system, such as judges, prosecutors, lawyers, jurors, other court personnel, and police officers. One participant shared an experience where her colleague went to report an incident of rape, to which a police officer jeered her, asking "*which position they took her in*". Recalling the Women's Committee's Concluding Observations on Jamaica's sixth and seventh periodic reports in 2012, the Government of Jamaica was reminded of its duty to "*adopt a comprehensive strategy and to take sustained measures [including awareness-raising and public educational campaigns, targeting... Government officials and practitioners], to address and eliminate the negative stereotypes and adverse traditional beliefs and*

²³ Trinidad and Tobago Sexual Offences Act, section 4(5). This section stipulates that the provision on rape generally, which does not carry any conditions, "also applies to a husband in relation to the commission of the offense of rape on his wife."

²⁴ Hale, *The History of the Pleas of the Crown* 629.

²⁵ *R v R* [1991] 2 All E.R. 257

practices that discriminate against women."²⁶ These stereotypes re-victimize rape victims and deny them access to justice. The CEDAW Communication, *Karen Vertido v Phillipines*²⁷, illustrates how stereotypes of the ideal rape victim deny women access to justice and leads to a breach of a State's duty. The Government should sensitize the above-mentioned officials of the need to act with due diligence, care and decency when working with victims of rape, actively combating the stereotypes that dictate how rape occurs and which denies justice to certain persons. Support for this sensitization process is also found in CEDAW General Recommendation 19 on Violence Against Women.²⁸

- **Counseling Services:** One of the female participants in the Review Process was adamant that the law ought to establish and govern counseling services for victims of rape, in order to deal with the ongoing trauma that exists even after a successful trial. In her own words, "[rape] stays with you for the rest of your life." There is support in international law for her request. The Convention of Belem Do Para, in articles 8d and 8f, requires state parties to "provide appropriate specialized services for women who have been subjected to violence" and to "provide [said women] access to effective readjustment and training programs to enable them to fully participate in public, private and social life."²⁹ The CEDAW Committee 2012 Concluding Observations indicate that Jamaica should "strengthen victim assistance and support programmes by providing women victims of violence with legal aid, medical support, mental health services, rehabilitation services, and shelters."³⁰ These two read together with paragraph 24(k) of CEDAW General Recommendation 19 indicates that the Government of Jamaica has a duty to all victims of sexual abuse³¹ and at this juncture, the recommendation has been acknowledged and requested from within our borders.
- **Confidentiality:** In taking into account the reality and sensitivity of sexual crimes, it is recommended that victims who are fearful of their identities being publicized be allowed *in camera* trials. Also, victims should be allowed the possibility of videoconferencing as a medium of testimony should they feel uncomfortable being in the same room as the accused.
- **Victims with disabilities:** Victims of rape and other forms of sexual abuse who are visually, or otherwise impaired face particular difficulty when identifying their rapists by traditional means. It is therefore recommended, in light of the recent tabling in Parliament of the Bill entitled *The Disabilities Act 2014* which fails to consider these provisions, that other means of perception be taken into account for persons who cannot identify their rapist through traditional means. The Court should be required to take into account, the auditory, olfactory, gustatory and tactile receptivity of disabled persons.

²⁶ CEDAW Concluding Observations, Jamaica, 2012, UN Doc. CEDAW/C/JAM/CO/6-7 para 20. The duty flows from the state obligations found under articles 2(b), (c), (d), (f) and 5(a) of CEDAW.

²⁷ CEDAW, Communication No. 18/2008 (2010), CEDAW C/46/D/18/2008.

²⁸ CEDAW General Recommendation 19, 1992, UN Doc. CEDAW/C/GC/19, paras. 23 and 24(f).

²⁹ Belém do Pará, 1994, 33 ILM 1534, Arts. 8(d) & 8(f).

³⁰ CEDAW Concluding Observations, Jamaica, 2012, UN Doc. CEDAW/C/JAM/CO/6-7, para 22(e).

³¹ CEDAW General Recommendation 19, paragraph 24(k) reads "States parties should establish or support services for victims of family violence, rape... including refuges, specially trained health workers, rehabilitation and counseling". See UN Doc. CEDAW/C/GC/19, para. 24(k).

- **Gender Equality:** The legislation should be formulated and promulgated in a manner that affirms the equality of men and women. The law must recognize the bodily integrity of all Jamaicans, including women. In doing so, attention must be paid to CEDAW Articles 2(a), (b), (c) and (d) as well as the definition of discrimination provided in Article 1. The latter comes into sharp focus, as the 2012 CEDAW Concluding Observation for Jamaica urges that *“the State party enacts comprehensive national legislation to ensure the principle of equality between women and men with specific provisions prohibiting discrimination against women, in line with the definition contained in article 1 of the Convention, and a definition of discrimination that encompasses both direct and indirect discrimination, and discrimination in all areas of life”*³²

Persons endorsing this submission who were involved in the public consultation, August 23, 2014.

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³² CEDAW Concluding Observations, Jamaica, 2012, UN Doc. CEDAW/C/JAM/CO/6-7, para 12.

