

**Collective Civil Society Submission to the Joint Select Committee  
reviewing the Sexual Offences Act and Related Acts**



**WOMAN INC.**



Caribbean  
Vulnerable  
Communities  
Coalition



**J-FLAG**



**HelpAge  
International**

*age helps*

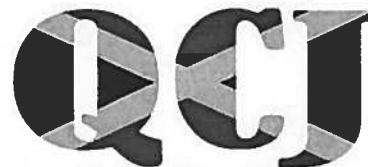


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## 2 EXECUTIVE SUMMARY

**TO THE JOINT SELECT COMMITTEE OF PARLIAMENT APPOINTED TO REVIEW THE SEXUAL OFFENCES ACT 2009 - An ACT to Repeal the Incest (Punishment) Act and certain provisions of the Offences Against the Person Act; to make new provision for the prosecution of rape and other sexual offences; to provide for the establishment of a Sex Offender Registry; and for connected matters.**

This collective submission is made with the primary objective of strengthening our legislative framework which governs the substantive and procedural laws on sexual offences in an effort to equally protect all persons within the jurisdiction. The goal is to ensure that the laws, policies and practices in place allow for just and effective remedies for all victims of sexual violence. To this end, gaps within the current legislation governing sexual offences are identified and alternatives are proposed. These submissions support the Government of Jamaica's efforts in attempting to eradicate the scourge of sexual violence from our society.

In summary, our recommendations are that:

1. The definition of sexual intercourse be extended to 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;
2. The language used throughout the Sexual Offences Act be gender neutral;
3. Sexual activity be defined in similar terms as currently exist in the Child Pornography (Prevention) Act 2009;
4. The offence of rape be extended to include forced penetration of the anus or mouth by the penis and also forced penetration of the vagina or anus with an object manipulated by an offender;
5. All marital rape exemptions be removed;

6. The legislation should determine what acts of grievous sexual assault should be tried in the Resident Magistrate's Court and in the Circuit Court; The offense should also be expanded to include penetration of the mouth by an object for a sexual purpose;
7. The offences in sections 8, 9, and 11 should be applicable not only to adults but to all persons who are above the age of sixteen years;
8. The section 10(3) defence should not apply where the complainant is under the age of twelve years;
9. A close in age defence with the proposed restrictions should be considered;
10. Causing a child to watch a sexual act in certain circumstances should be recognized as an offence;
11. Where an offence is committed against a person under the age of eighteen years by a person in a position of trust or authority to the complainant, then this fact shall be an aggravating factor in the determination of sentencing;
12. The legislation should determine in what circumstances indecent assault should be heard in the Resident Magistrate's Court and in the Circuit Court;
13. The language used in referring to persons with mental disorders and disabilities be revised; that the section dealing with persons with mental disorders should also include persons with intellectual disabilities; that the Act makes it an offence to cause a person with a mental disorder, intellectual disability or physical disability to without consent engage in sexual activity with a third person or to watch a sexual act;
14. Decriminalization of activities surrounding 'prostitution' so as to better protect the safety, health and security rights of persons choosing to engage in sex work;
15. The violation of elderly persons living in or in the care or residential care facilities and institutionalized facilities be recognized and criminalized;
16. Reference to the complainant's sexual behaviour in trials concerned with sexual offences be further limited;
17. The Sexual Offences Act makes it clear that there should be no adverse inference from delay by the complainant in reporting a sexual offence;
18. The law on compellability be revised to allow for a spouse to be a compellable witness where the matter concerns a sexual offence committed against a child;

19. There be mandatory record and investigations as well as prohibition of confrontation during the investigations;
20. The provisions for *in camera* hearings be extended to the select vulnerable groups;
21. The use of sentencing guidelines for sexual offences;
22. The provision of compensation to complainants.

Finally we state our support for submissions made which call for an amendment to respective laws to: (a) allow for the provision of medical services, information and advice to minors under the age of sixteen without parental consent; and (b) expressly provide immunity from prosecution to health care professionals in select circumstances against aiding, abetting and facilitating offences concerning children under the age of sixteen.

### **3 BACKGROUND**

- 3.1** Sexual violence is a form of gender-based violence and an affront to the inherent dignity and human rights of victims. In Jamaica, various forms of sexual violence and a wide range of sexual offences are perpetrated against men, women, boys and girls. It is however recognized that acts of sexual violence are disproportionately carried out against women and girls. There is a high rate of sexual violence in Jamaica and significant underreporting. Where acts of sexual violence are reported the response from the justice system is often deemed to be inadequate.
- 3.2** In light of this context, the submissions herein are made primarily with the objective of strengthening our legislative framework which governs the substantive and procedural laws on sexual offences in an effort to equally protect all persons within the jurisdiction. The goal is to ensure that the laws, policies and practices in place allow for just and effective remedies for all victims of sexual violence. To this end, gaps within the current legislation governing sexual offences are identified and alternatives are proposed. These submissions support the Government of Jamaica's efforts in attempting to eradicate the scourge of sexual violence from our society.

### **4 NORMATIVE FRAMEWORK**

- 4.1** The Sexual Offences Act 2009 (hereinafter referred to as "the Sexual Offences Act") protects against various forms of sexual violence and seeks to offer redress for harms experienced. We consider that the standards set out in the Constitution of Jamaica, 1962 by virtue of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ("hereinafter referred to as the 2011 Charter of Fundamental Rights and Freedoms") and the international human rights standards that Jamaica has committed to must provide the normative framework for addressing sexual offences in Jamaica.
- 4.2** As the supreme law of the land, The Constitution of Jamaica 1962 guards the human rights of all persons within the jurisdiction. It places on the State a positive obligation to protect all persons from sexual violence and guarantees the equal protection of the law for all. In addition to this positive obligation, Jamaica also has a positive duty to comply with the terms of international human rights conventions that it has ratified. The obligation is such that under general international law and specific human rights covenants, Jamaica may be responsible for private acts if the State fails to act with due diligence to prevent violations

of rights or to investigate and punish acts of violence and provide compensation.<sup>1</sup> Of particular relevance to this review process and the resulting amendments to the Sexual Offences Act are the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979 and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention) 1994 which Jamaica ratified on 19<sup>th</sup> October, 1984 and 14<sup>th</sup> December, 2005 respectively.

- 4.3 By being a State Party to these conventions Jamaica gave an undertaking to take necessary measures to achieve the full realization of the rights set out in the conventions. These measures include legislative measures to prevent and punish acts of violence against women, improving access to justice by establishing fair and effective legal procedures for victims and establishing the necessary legal and administrative mechanisms to ensure that victims of all forms of gender-based violence including sexual violence have access to just and effective remedies.<sup>2</sup> The equal access to just and effective remedies is one of the central tenets of these two conventions. In reviewing Jamaica's Sixth and Seventh Combined Report, the CEDAW Committee in its 2012 Concluding Observations highlighted the creation of the Sexual Offences Act as a positive aspect. The Committee also detailed its principal concerns with respect to sexual violence and made recommendations for improving the Act.<sup>3</sup>
- 4.4 The Sexual Offences Act would be strengthened not only by the inclusion of the recommendations made herein but also by its closer alignment with and special reference to these conventions. This could be achieved by expressly stating within the Sexual Offences Act that the primary aim of the Act is to protect all persons within the jurisdiction from various forms of sexual violence and that the Act is also in furtherance of Jamaica's obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979 and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention) 1994.

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<sup>1</sup>See UN Committee for the Elimination of All Forms of Discrimination against Women, *General Recommendations No 19, para. 9* in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (12<sup>th</sup> May, 2004) UN Doc HRI/GEN/1/Rev.7

<sup>2</sup> See Article 24 of the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18<sup>th</sup> December 1979 by the UN General Assembly, entry into force 3<sup>rd</sup> September 1981) 1249 UNTS 13; Article 3 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Belém do Pará Convention" (adopted 9<sup>th</sup> June, 1994 at the 24<sup>th</sup> Regular Session of the General Assembly to the OAS, entry into force 5<sup>th</sup> March, 1995)

<sup>3</sup> See Concluding observations of the Committee on the Elimination of Discrimination against Women, Fifty-second session 9-27 July 2012, Jamaica, CEDAW/C/JAM/CO/6-7.



## **PART I- PRELIMINARY**

### **5 Definition of Sexual Intercourse- section 2**

**5.1** We are concerned about the limited definition of sexual intercourse as set out in section 2 of the Sexual Offences Act. Sexual intercourse is defined as “the penetration of the vagina of one person by the penis of another person”. The consequence of this definition is that only women and girls are protected from some forms of sexual violence.

**5.2** It is a fact that our society recognizes and acknowledges the existence and practice in Jamaica of various forms of penetrative sexual intercourse. These forms of penetration are also recognized within our legislation and include:

(a) Penetration of the vagina by the penis (recognized in section 2 of the Sexual Offences Act);

(b) Penetration of the anus by the penis (recognized in section 76 of the Offences Against the Person Act by virtue of the common law definition of buggery);

(c) Penetration of the mouth by the penis (recognized in section 4 (c) of the Sexual Offences Act);

(d) Oral penetration of the vagina (recognized in section 4 (e) of the Sexual Offences Act);

(e) Sexual penetration of the vagina or anus by the fingers (recognized by virtue of section 4 (a) (i) of the Sexual Offences Act); and

Penetration of the vagina or anus by the use of an object (recognized in section 4 (a) (ii) of the Sexual Offences Act).

**5.3** We are of the view that where any of the abovementioned forms of sexual penetration is carried out on a person without that person’s consent, the law must give it its appropriate recognition by protecting against it in a way that duly reflects the gravity of the harm experienced by the victim. To this end, we submit that the definition of sexual intercourse should be extended to 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. This approach has been adopted in various jurisdictions including in some

of our neighbouring Caribbean countries. **The amended section 2 will therefore include the following:**

**“Sexual intercourse” means:**

- (a) the penetration of the vagina, anus or mouth by the penis of another person; and**
- (b) the penetration of the vagina or the anus by an object manipulated by another person except where the penetration is carried out for proper medical services.**

This amendment will affect the definition of rape and our submissions in this regard are set out in paragraph 8, which expressly deals with the offence of rape

## **6 Need for gender neutral language throughout the Sexual Offences Act-section 2**

- 6.1 It is our submission that the language of the Sexual Offences Act and the definitions therein be gender neutral.** Continuing the practice within archaic laws governing offences against the person, many provisions dealing with sexual offences offer protection only to those of the female sex. Several Caribbean countries for example, The Bahamas, Guyana and Trinidad and Tobago have ensured that their laws governing sexual offences are gender neutral. In our Sexual Offences Act there is limited protection for men and boys who are victims of various forms of sexual violence. It may be argued that this practice is discriminatory. For example, by requiring male victims of forced anal sex to resort to section 76 of the Offences Against the Person Act which broadly criminalizes “buggery” and for which offence consent is irrelevant, 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”.<sup>4</sup>
- 6.2 This discrimination 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

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<sup>4</sup> On the minimization of “rape” of males, see for example analysis by Christine M. Evans, *Challenging “Unnatural Crimes”: The Connection between LGBTI Rights and Gender-Specific Sexual Violence Laws in Belize*, 11 NW. J. INT’L HUM. RTS. 189 (2013).

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.

## **7 Need for Definition of Sexual Activity in section 2**

**7.1** We propose that the definition of sexual activity as currently exist in the Child Pornography (Prevention) Act, 2009 be adopted in the Sexual Offences Act. Certainty within the Sexual Offences Act of what constitutes sexual activity will prove especially useful as it relates to protecting children, elderly persons and persons with mental disorder, intellectual disabilities or physical disabilities. Some of our submissions concerning vulnerable groups also highlight the need for certainty.

**1.1** It is our recommendation that section 2 of the Sexual Offences Act be amended to include the following:

**“sexual activity” means actual or simulated -**

- (a) sexual intercourse;**
- (b) activity other than sexual intercourse, whether involving persons of the same or opposite sex -**
  - i) involving the penetration of the anus, vagina or mouth with any part of a person's body, or the anus or vagina with anything else; and**
  - ii) which a reasonable person would consider sexual;**
- (c) touching of a sexual organ, or the anal region, of a person with any part of the body, or with or through anything else, in a manner which a reasonable person would consider sexual;**
- (d) bestiality;**
- (e) masturbation; or**
- (f) sadistic or masochistic abuse.**

## **PART II - RAPE, GRIEVOUS SEXUAL ASSAULT AND MARITAL RAPE**

### **8 Definition of Rape – section 3**

- 8.1** Following from our submissions on the definition of sexual intercourse and the need for gender neutral language throughout the Sexual Offences Act, we also wish to point out that the definition of rape as set out in section 3 (1) of the Sexual Offences Act offers no protection against various forms of forced sexual penetration. Further it offers absolutely no protection to men and boys whom we know are sometimes victims of forced anal sexual intercourse.
- 8.2** It is imperative that the legislative framework acknowledges the severity of violence perpetrated and the gravity of harm experienced when there is forced penetration of the anus or mouth by the penis or where there is forced penetration of the vagina or anus with an object manipulated by an offender. By failing to recognize these harms as rape or by classifying them all as grievous sexual assault without any stipulation as to the court in which respective acts are to be tried, the legislation provokes questioning of the State's commitment in providing just and effective remedies for all victims of sexual violence.
- 8.3** It is therefore our submission that the offence of rape should also apply to forced penetration of the anus or mouth by the penis and where there is forced penetration of the vagina or anus with an object manipulated by an offender. In light of this, some of the acts currently listed in section 4 dealing with grievous sexual assault will become redundant. The approach proposed is not novel as several jurisdictions having recognized the varying forms of penetrative sexual violence perpetrated against its men, women, boys and girls, have adopted a similar approach in extending their definition of rape. These jurisdictions include: Barbados (forced penetration of the anus by a penis, forced penetration of the mouth by a penis, forced penetration of an object into the vagina or anus); The Bahamas (forced penile penetration of the mouth; forced penetration of the anus by a penis; forced penetration of the vagina or anus with an object); Guyana (forced sexual penetration of the anus by any part of a person's body; forced sexual penetration of the vagina or anus with an object; forced

cunnilingus, forced fellatio, forced anal intercourse and forced female to female genital contact).<sup>5</sup>

8.4 We also recommend that the offence of rape also be extended to include circumstances where the accused causes the complainant to engage in sexual intercourse with a third person. This provision currently exists for the offence of grievous sexual assault.

8.5 **In light of our submissions for the extension of the definition of sexual intercourse, gender neutrality of language, and revision of the acts which constitute grievous sexual assault, we invite the Joint Select Committee to consider rewording section 3 (1) which defines rape as follows:**

**“A person (hereinafter called “the offender”) commits the offence of rape if -**

**(a) the offender**

- i) has sexual intercourse with another person (hereinafter called “the victim”); or**
- ii) causes the victim to engage in sexual intercourse with a third party;**

**(a) without the victim’s consent; and**

**(b) knowing that the victim does not consent to sexual intercourse or recklessly not caring whether the victim consents or not.**

## 9 Marital Rape – section 5

9.1 Marital rape is governed by section 5 of the Sexual Offences Act. It limits the circumstances under which a married woman can be protected from forced sexual intercourse perpetrated upon her by her husband. Whilst at the time of the creation of this law in 2009, it appeared to have been the view that its provision was an advance in the protection afforded to married women, it was actually a step back from the common law position that existed at the time.

9.2 Prior to 1991, the common law position was that a man could not rape his wife. In 1991, this position changed by virtue of the English House of Lords decision in *R v R* reported at [1992] 1 A.C. 599. The court confirmed that the common law position had changed.

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<sup>5</sup> See Barbados Sexual Offences Act 1992; The Bahamas Sexual Offences and Domestic Violence Act Chap 99 “2006 Rev”; Guyana Sexual Offences Act, 2010.

Marriage was to be viewed as a partnership between husband and wife who were equals in the eyes of the law. It was anachronistic to assume that a woman had irrevocably given her consent to having sexual intercourse with her husband by virtue of being married. The court made it clear that where a statute speaks of the offence of rape, it must be interpreted to include non-consensual sex by a husband with his wife.

9.3 Therefore as of 1991, the common law position in Jamaica was that where a husband had sexual intercourse with his wife without her consent, he committed the offence of rape. In 2009, our Sexual Offences Act took away this protection offered to married women and instead communicated that a married women could not be raped by her husband unless: they were separated as defined by the Matrimonial Causes Act; she had a written separation agreement with their husband; divorce proceedings had commenced; there was a protection order from the court in favour of the wife against the husband; or the husband knowing he was infected with a sexually transmitted disease forced his wife to have sexual intercourse with him. The current state of the law therefore is that forced sexual intercourse perpetrated by male partners upon their female partners in common law or visiting relationships is recognized as rape, whilst if carried out by a married man against his wife it is not unless the abovementioned circumstances are proved.

9.4 **We recommend that section 5 in its entirety be removed from the Sexual Offences Act, thereby allowing for the forced sexual intercourse against a woman to be recognized and criminalized as rape, irrespective of her marital status.** We wish to point out that several Caribbean countries for example, Guyana in 2010, Bermuda in 1993 and Trinidad and Tobago in 2000 have expressly brought their laws in line with the current common law position by providing no exemptions for rape carried out by a husband against his wife. The CEDAW Committee in its recent Concluding Observations on Jamaica urged 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.”<sup>6</sup>

## 10 Grievous Sexual Assault – sections 4 & 6

### 10.1 *Determination of Court for Trial – section 6*

10.1.1 We note that for the offence of grievous sexual assault, the Sexual Offences Act does not stipulate which acts of grievous sexual assault must be heard in the Resident Magistrate’s Court and which must be heard in the Circuit Court. The determination as to which court

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<sup>6</sup> See para. 22 (b), Concluding observations of the Committee on the Elimination of Discrimination against Women, Fifty-second session 9-27 July 2012, Jamaica, CEDAW/C/JAM/CO/6-7.

an offence is tried is therefore left to the discretion of the police or prosecutor. The consequence of this is that it is very likely that in some instances the court selected by the police or prosecutor is not appropriate in relation to the gravity of the offence and the harm experienced by the victim.

**10.1.2** The need for express stipulation within the Sexual Offences Act is especially important when one considers the range of sentences that are set out depending on where the offence is tried. If the offence is heard in the Resident Magistrate's Court, the accused is subject to a maximum sentence of three years' imprisonment while if an accused is convicted in the Circuit Court the accused may be sentenced to a term of imprisonment ranging from fifteen years to imprisonment for life.

**10.1.3** Our firm position is that the Sexual Offences Act should expressly stipulate in what circumstances the offence of grievous sexual assault should be tried in the Resident Magistrate's Court and in the Circuit Court.

## **10.2 Definition of Grievous Sexual Assault – section 4**

**10.2.1** In light of our submissions on extending the definition of sexual intercourse and consequently rape, we submit that section 4 (1) which lists the acts constituting grievous sexual assault will only include circumstances where the offender:

- (a) penetrates the vagina or anus of the victim with a body part other than the penis of the offender (as currently provided in section 4 (a) (i)); or
- (b) causes another person to penetrate the vagina or anus of the victim by a body part other than the penis of that person (as currently provided in section 4 (b) (i)); or
- (c) places his or her mouth onto the vagina, vulva, penis or anus of the victim (as currently provided in section 4 (e)); or
- (d) causes another person to place his or her mouth onto the vagina, vulva, penis or anus of the victim (as currently provided in section 4 (f)); or
- (e) for a sexual purpose penetrates the mouth of a victim with an object.

Provisions in section 4 (3) dealing with consent should remain as is.

## PART IV – SEXUAL OFFENCES AGAINST CHILDREN AND INDECENT ASSAULT

### 11 Sexual touching or interference, sexual grooming of a child, & householder etc., inducing violation of a child – sections 8, 9 & 11 respectively

- 11.1 It is observed that for the purpose of Part IV dealing with sexual offences against children and indecent assault, “child” is defined as a person under the age of sixteen years. This does not accord with the definition of child in section 2 of the Sexual Offences Act that provides that a child is a person under the age of eighteen years.
- 11.2 The offences set out in section 8 (sexual touching or interference), section 9 (sexual grooming) and section 11 can only be committed by an “adult” whom the Sexual Offences Act defines as a person who is over the age of eighteen years. Therefore where sexual touching or interference or sexual grooming is committed upon persons under sixteen years of age by persons between the age of sixteen and eighteen years, there is no offence. Consequently should a person who is seventeen years old sexually groom or for a sexual purpose touches or interferes with an eight-year-old child, there is no offence. That eight-year-old child has no protection under the law.
- 11.3 The same applies where it is a person between the ages of sixteen and eighteen who has sexual intercourse with or engages in an act, which constitutes grievous sexual assault upon a person under the age of sixteen years. The exclusion of perpetrators between the ages of sixteen and eighteen years old for the purposes of sections 8, 9 and 11 cannot be justified.
- 11.4 **There is a huge gap in the current law. We therefore recommend that these offences should not only be applied to adults but should be extended to apply all persons who are above the age of sixteen years. Wherever the word “adult” appears in sections 8 and 9 it should be replaced by “a person who is over the age of sixteen years”.**

### 12 Sexual intercourse with person under sixteen – section 10

#### 12.1 *Defence in section 10(3)*

- 12.1.1 Where a person under twenty-three years of age has sexual intercourse with another person under the age of sixteen years, section 10(3) provides a defence to that person if he is a first time offender and if he had reasonable cause to believe that the child was over the age of



sixteen years. This defence is generally known as the “young man’s defence” and it relates to a mistake of fact as to age.

**12.1.2** We note however that with the enactment of this section 10(3) in 2009 (among others) there was the repeal of several sections of the Offences Against the Person Act which protected against sexual intercourse with girls under sixteen. Of particular relevance is the now repealed section 48 of the Offences Against the Person Act, which expressly provided protection for girls under the age of twelve. The section read as follows:

“ Whosoever shall unlawfully and carnally know and abuse any girl under the age of twelve years shall be guilty of felony, and being convicted thereof, shall be liable to imprisonment for life.”

**12.1.3** The young man’s defence was not available to anyone who had sexual intercourse with a girl under twelve years of age. By virtue of section 50 of the Offences Against the Persons Act (now repealed), it was only available to persons who had sexual intercourse (then referred to as “unlawful and carnal knowledge”) with girls above the age of twelve and under the age of sixteen years.

**12.1.4** We submit that there is no justification for our modern law on sexual offences to limit the protection available to our children who are below the age of twelve years. Such children fall well within the definition of “child of tender years” set out in section 20 (3) of our Child Care and Protection Act, 2004. **We submit that the young man’s defence ought not to be made available where an adult has sexual intercourse with a child who is under the age of twelve years. We therefore recommend that section 10 (3) be amended to expressly provide that the defence shall not apply where at the time of the commission of the offence the child was twelve years of age or younger.**

## **12.2 Close in age defence**

**12.2.1** We note the introduction of a National Child Diversion Policy which is being implemented in some parishes, the primary purpose of which is to provide alternative options to youth offenders to steer them away from the formal justice system and refer them to diversion programmes that will facilitate positive behaviour modification and rehabilitation.<sup>7</sup> We also note the acknowledgement of this policy in the 2012 Prosecution Protocol<sup>8</sup> which

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<sup>7</sup> See Government of Jamaica Policy Development Programme as at 1 April 2012, Cabinet Office - available at [cabinet.gov.jm](http://cabinet.gov.jm) accessed on September 6, 2014.

<sup>8</sup> The Decision to Prosecute: A Jamaican Protocol, Office of the Director of Public Prosecutions, Jamaica. April 2012 available at [dpp.gov.jm](http://dpp.gov.jm) accessed on September 6, 2014.

protocol applies to all cases where a decision to commence proceedings is made after 16<sup>th</sup> day of April, 2012.

**12.2.2** We hold the view that notwithstanding the option of diversion from the formal justice system, given our reality of the widespread consensual sexual activity between minors especially in a “boyfriend-girlfriend” scenario and given the general acknowledgement of “the longer term damage which can be done to a child because of an encounter with the criminal law early in his or her life”, we submit that the inclusion of a close in age defence within the Sexual Offences Act is worth considering.

**12.2.3** We recommend that the close in age defence would only apply in certain circumstances to a person under the age of eighteen years who is charged with an offence under section 10 (1) or (2) against a child who is fourteen years of age or over but under sixteen years of age. For the defence to apply, the accused must:

*(a)* be no more than two years older than the complainant; and

*(b)* not have been previously charged with an offence under section 10 (1) or (2); and

*(c)* not be in a position of trust or authority towards the complainant; and

*(d)* not be a person with whom the complainant is in a relationship of dependency.

### **13 Causing a Child to watch a Sexual Act**

**13.1** We note a gap in the Sexual Offences Act 2009, the Child Care and Protection Act, 2004 and the Child Pornography (Prevention) Act, 2009. Whilst the latter criminalizes using or involving children in the production of child pornography, it does not speak to where a person knowingly causes or incites a child to watch child pornography or to watch sexual activity. There is no law currently criminalizing such act. We therefore submit that the following provision should be included in the Sexual Offences Act:

**“A person commits an offence if he or she for the purpose of obtaining sexual gratification intentionally causes a child to watch him or her or a third party engaging in a sexual activity or to look at an image of any person engaging in a sexual activity.”**

made to the police and also of little or no investigation being carried out in certain instances. There is the concern that the failure to take reports seriously is sometimes attributed to the complainant's class or status, gender, gender identity, assumed or known sexual orientation, choice of work (for example, sex work) or marital status etc.

**22.2** We are of the opinion that if the legislation mandates the detailed recording and complete investigating of all reports of sexual violence, then this may help to bolster the resolve and confidence of complainant's and witnesses in reporting incidences of sexual violence. **It is therefore recommended that the Sexual Offences Act expressly state that:**

**“(1) Where an offence under this Act is reported to the police, the police shall in every case record the report and conduct an investigation.**

**(2) Failure to comply with subsection (1) constitutes neglect of duty by the respective police personnel with responsibility for the report and investigation and upon the complainant establishing that a report was made or where the complainant subsequently prosecutes same privately the said police personnel shall be subject to disciplinary proceedings.”**

## **23 Confrontation**

**23.1** It is submitted that the Sexual Offences Act also provide that at no point during the investigative stage of the proceedings shall the complainant be required to recount the complaint or any part thereof in the presence of the accused.

## **24 In camera hearings**

**24.1** In camera hearings allow for greater respect for the privacy of accused and complainants before the court in a sexual offence matter. Section 23 of the Criminal Justice (Administration) Act 1960 currently allows for offences in sections 3 (rape), 4 (grievous sexual assault), 5 (marital rape), 10 (sexual intercourse with a person under sixteen), 13 (indecent assault) and 18 (procuration) to be heard in camera. We however note that although the current practice is to hear offences against children in camera, section 23 of the Criminal Justice (Administration) Act does not expressly mandate that this should be done. To remedy this omission, it is our submission that section 23 of the Criminal Justice (Administration) Act 1960 this section be amended to expressly state that it includes all offences against children. It should also include the offence in section 16 (violation of a person suffering from

mental disorder or physical disability) and the proposed new offence of violation of elderly persons living at or in the care of residential care facilities and institutionalized facilities etc.

## **25 Special arrangements for children giving evidence**

**25.1** We welcome the enactment of the Evidence (Special Measures) Act, 2012 that authorizes the Court to allow vulnerable persons such as children and complainants in sexual offences cases to give evidence by means of a live link or video recording. We have considered the current status of the existing court environment for child complainants and witnesses in sexual violence cases and the likelihood of secondary victimization. **We therefore invite the Joint Select Committee to consider the following for inclusion in the Sexual Offences Act provisions which:**

- (a) Prohibits the placing of a child complainant or child witness within close proximity to the offender in court;**
- (b) Allows the option of barring the child complainants or child witnesses from the view of the accused; and**
- (c) Allows for the use of anatomically correct dolls or puppets in obtaining evidence from a child complainant or witness.**

## PART VIII – MISCELLANEOUS

### 26 Sentencing Guidelines

- 26.1** We firmly believe that sentencing should be commensurate with the gravity of crime perpetrated and the culpability of the offender. It should also help in addressing the safety of survivors of sexual violence. **In an effort to reduce sentencing discrepancies for sexual offences and ensure consistency in sentencing outcomes, we recommend that the Sexual Offences Act should expressly mandate the development and implementation of sentencing guidelines. It should further provide that unless the court is satisfied that it would be contrary to the interest of justice to do so, the sentencing guidelines must be followed by the court as is relevant to the case of the accused.** It is acknowledged that the introduction of sentencing guidelines may contribute to the “normalization of sentences imposed” in cases of sexual violence.
- 26.2** Several jurisdictions in recognizing the benefit of sentencing guidelines especially in cases concerned with sexual offences, have by means of legislation mandate the development and implementation of sentencing guidelines. In England and Wales for example, the Sentencing Guidelines for Sexual Offences Act 2003 were issued by the Sentencing Council in accordance with section 120 of the Coroners and Justice Act 2009.<sup>11</sup> In 2013, Bermuda also developed the sentencing guidelines for sexual offences. The Bermuda Sentencing Guidelines were inspired by general principles and approaches of guidelines of England and Wales but ensured that the guidelines were “adapted to take into account Bermuda’s distinctive legislative context”.<sup>12</sup>
- 26.3** Sentencing guidelines can expressly speak to and categorize the degree of harm caused to the complainant. It can set out a range of factors that speak to the culpability of the offender such as: the recording of the offence, there being a significant degree of planning, the offence being motivated by presumed or actual sexual orientation, or presumed or actual gender identity. Sentencing guidelines can therefore also help to bring visibility to some types of harm like corrective or curative rape which is largely invisible in our legislative framework but is nonetheless being experienced by women in Jamaica. Corrective or curative rape is

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<sup>11</sup> England and Wales Sentencing Council, Sexual Offences Definitive Guideline 2013, effective from 1 April, 2014 available at <http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm>

<sup>12</sup> The guidelines were developed by the Judiciary after consultation with the Attorney-General, Bermuda Bar Council, the Commissioner of Police, the Director of Public Prosecutions, the Department of Child and Family Services, the Department of Child and Family Services, the Department of Court Services and special interest groups.

perpetrated by men against women who claim that their intent is to “cure” the women of their lesbianism.

## **27 Compensation**

- 27.1** It is recognized that victims of sexual violence suffer not only physical trauma but there also tends to be psychological and financial implications with which victims and their families must grapple with. These effects are sometimes long lasting. In recognizing this, many jurisdictions expressly provide within their protective sexual violence and domestic violence legislation that during proceedings under the respective Act the victim can receive compensation from the accused for personal injury, loss or damage occasioned by the offence. This is a “welcomed development as such provisions help reduce the likelihood of victims accepting bribes for discontinuing with the legal proceedings”.<sup>13</sup>
- 27.2** We recommend that this approach be also adopted in Jamaica and further submit that the Sexual Offences Act makes it clear that the views of the complainant are to be taken into consideration on the question and determination of compensation. It must be borne in mind that some complainants may prefer not to accept compensation from the accused and where such view is expressed, the Act should expressly provide that the Court should respect it.

## **28 Health care services to Children under the age of 16 years**

- 28.1** Section 8 of the Law Reform (Age of Majority) Act 1979 expressly gives minors over the age of sixteen the power to consent to any surgical, medical and dental treatment. Parental consent is not required. Consequently, persons below the age of sixteen years cannot obtain any surgical, medical and dental treatment without parental consent. This is so, even where the minor’s need for medical services is as a direct result of the action of the parents for example, in instances of incest or physical or sexual abuse perpetrated by the parents against the minor.<sup>14</sup> We share the view that this creates an absurdity in the law which must be cured.
- 28.2** We therefore take this opportunity to express our support for submissions put forward to the Joint Select Committee calling for the amendment of the Law Reform (Age of Majority) Act

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<sup>13</sup> See Tenesha Myrie, *Web Resource Content Document on Laws Governing Gender-based Violence in the English-speaking Caribbean*, prepared for UNIFEM Caribbean Office 2010 available @ [www.unifem.car.org/GBVlawportal/](http://www.unifem.car.org/GBVlawportal/) and [Caribbean.unwomen.org/en/Caribbean-gbv-law-portal/developments-in-the-law](http://Caribbean.unwomen.org/en/Caribbean-gbv-law-portal/developments-in-the-law)

<sup>14</sup> We are also mindful of data from the Office of the Children’s Registry, which shows that in 2012 92% of the reports of sexual abuse were for females (2,542) and 205 reports of sexual abuse of male. Categories of reports of sexual abuse were further broken down into buggery, sexual intercourse with a minor, exhibitionism, fondling, incest, oral sex and rape. For 2012, there were 1,500 (54%) reports of sexual intercourse with a minor, 364 (13%) reports of fondling, 101 (4%) reports of buggery, 293 (11%) reports of rape and 116 (4%) reports of incest. From the total number of reports of sexual abuse and physical abuse received by the Office of the Children’s Registry in 2013,

to in certain circumstances allow for the provision of medical services, information and advice to minors under the age of sixteen without parental consent.

**28.3** We also support the submissions which call for an amendment of the Sexual Offences Act to expressly provide immunity from prosecution to health care professionals against aiding, abetting and facilitating offences concerning children under the age of sixteen. This immunity would be extended only to professionals who in good faith and with utmost professional standard of care provide health care services to minors under the age of sixteen for the purposes of:

- (a) Protecting the child from sexual transmitted infection;
- (b) Protecting the physical safety of the child;
- (c) Protecting and preserving the health and well-being of the child by providing contraceptives in order to prevent pregnancy; and
- (d) Promoting the emotional well-being of the child by giving of advice.

## **29 Concluding comments and recommendations**

**29.1** The aim of sexual violence legislation, in our view, is to protect the fundamental rights of persons to bodily integrity through punishing and prosecuting perpetrators as an approach to preventing sexual violence and meting out justice, thus responding to the needs of victims/survivors of such violence. We acknowledge that sexual violence can result in negative long and short-term health outcomes including physical trauma such as vaginal fistula, HIV infection, unwanted pregnancy, and where abortion is legally restricted, unsafe abortion. Vulnerability to sexually transmitted infections (STIs) including HIV, may be higher in non-consensual sex due to the genital trauma and in cases of multiple perpetrators (gang rape). Resulting psychological trauma can have a negative effect on sexual behaviour and relationships, capacity to parent, the ability to negotiate safer sex and increased potential for drug and alcohol abuse

**29.2** The health sector is at the nexus of prevention, treatment and rehabilitation following sexual violence. As accompaniment to the Sexual Offences Act, now under review, the health sector in particular, should be enabled to improve its capacity to provide clinical treatment, preventative therapy, psychological support and information and advice, commonly referred to as post-rape care services. These need to interface with providers of HIV services (private,

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the relationship of suspected offender to the child is dominated by mother/stepmother; father/stepfather; other relatives and boyfriend/girlfriend; and the location of abuse has primarily occurred at the child's home, at the suspected offender's home or at some other location. See Statistical Bulletin 2012.

public and NGO) for HIV testing and counselling and HIV post-exposure prophylaxis (PEP) administration and adherence counselling. They also need to interface with reproductive health services for treatment of physical/genital trauma, emergency contraception, and STI prophylaxis and treatment. In this regard, we express the view that it is imperative that our legislators recognize the need to adequately address our termination of pregnancy laws especially within the context of sexual violence. Additionally, there should be no conflation of consensual and non-consensual sex as stipulated in the current criminalisation of same-sex intimacy. In this regard, while this is a controversial issue in review of this Act, it would be remiss of us not to mention for consideration of the committee the decriminalisation of private consensual same-sex intimacy.

**29.3** The health sector should be strengthened to adequately collect, store and analyse evidence and effects of violence and deliver that evidence to the criminal justice system for purposes of its investigations and use in any trial. Thus legislation cannot effectively offer justice to victims/survivors without clearly articulated and functioning linkages between the health and legal systems. This interface requires strengthening the existing policy and regulatory frameworks and implementation systems and structures. Practitioners that work in the health sector, would need also to be sufficiently (re)trained to understand the reformed legislation and efficiently be equipped to apply it without fear or fervour; and uphold the dignity and rights of the citizens with which they interact.

**29.4** Medical-legal linkages are required in a functioning chain of evidence that includes accountable tracking mechanisms for obtaining, preserving and conveying evidence from the community and health facility to the police and the courts<sup>15</sup>. Forensic evidence with DNA testing, as provided for in the law requires a functional evidence chain, a criminal data bank, decentralised DNA capacity and follow-up mechanisms; all of which require significant strengthening in Jamaica. Therefore, it is our view that legislative reform behoves us to critically look at the linkages in reforming and implementing the law in the full consideration of the sensitivity of the issues, whether the victim is male or female.

**29.5** Sexual violence has been on the increase in Jamaica, with young females under the age of 16 being the most vulnerable<sup>16</sup>. Despite all efforts, reporting of incidents of sexual violence is relatively low; and the prosecution of offenders is also low. While the clear-up rate of sexual offence case is slow, with an average of 30% for over a decade<sup>17</sup>. Where linkages across the health, justice and security sectors need improvement, survivors may have to contend with recounting their experience to varied providers as they seek to access services. The burden on the survivor should not be so heavy and a more enabling and supporting

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<sup>15</sup> See also "Sexual Violence legislation in Sub-Saharan Africa: the need for strengthened medico-legal linkages", Nduku Kilonzo, Njoki Ndung'u et.al. In *Reproductive Health Matters* 2009: 17 (34): 19-19.

<sup>16</sup> According to Violence Related Injuries Report: Ministry of Health 2007, 2009 and between 2007 and 2012, there were 6,800 patients seen for sexual assault, 6,451 of whom were female. The largest number of female patients fell in the 10-14 category, with 4,224 females seen.

<sup>17</sup> Economic and Social Survey of Jamaica (ESSJ) (Selected Years).



environment must be built in. Common procedures, information on service delivery standards, protocols and referral mechanisms across these sectors could potentially improve linkages between sectors and access to services by the survivors and will go a long way in ensuring a healthy population by 2030, according to one of the key goals of Vision 2030. It behoves decision-makers to look at the social implications of the law and consider creating regulatory obligations on the afore-mentioned ministries and their relevant departments in the delivery of post-rape care services. Legal placement of responsibility would facilitate the development of standards and harmonised referral pathways across the relevant sectors.

**29.6** Finally therefore, it is our submission that the Sexual Offences Act should also consider the establishment of a Multi-Task Force to draw up rules and regulations to govern implementation. This task force should comprise Act should also consider the establishment of a Multi-Task Force to draw up rules and regulations to govern implementation. This task force should comprise the police, the judiciary, the Attorney-General's Office, civil society representatives, and all relevant ministries and their departments.

END

## ANNEX: INFORMATION ON CONTRIBUTORS

1. **Caribbean Development Activists & Women's Network (Caribbean DAWN)** is a non-governmental organization (NGO) network of community activists, development practitioners and scholars. Caribbean DAWN focuses on gender justice, sustainable development and democracy using rights based approaches in research, advocacy and analysis of national, regional and global environments. In recent years, Caribbean DAWN has focused primarily on the Political Economy of Globalization & Trade; and Sexual and Reproductive Health and Rights. Contact: Shakira Maxwell, [cbn.dawn@gmail.com](mailto:cbn.dawn@gmail.com).
2. **Caribbean Vulnerable Communities Coalition (CVC)** is a NGO which provides services directly to and on behalf of Caribbean-wide populations who are especially vulnerable to HIV infection or often forgotten in access to treatment and healthcare programmes. These groups include men who have sex with men, sex workers, people who use drugs, orphans and other children made vulnerable by HIV, migrant populations, ex-prisoners, and youth in especially difficult circumstances. Contact: Dr Carolyn Gomes, [cvcvolunteer1@gmail.com](mailto:cvcvolunteer1@gmail.com).
3. **HelpAge International** is an NGO that works globally to help older people claim their rights, challenge discrimination and overcome poverty, so that they can lead dignified, secure, active and healthy lives. HelpAge's work in Jamaica aims at tackling age discrimination, promoting solidarity between generations and moving towards a society for all ages. We take part in the global Age Demands Action campaign where older people across Jamaica are trained in advocacy and brought together to ask relevant government authorities for improvements to policies and services. Contact: Rhian Holder, [helpage@cwjamaica.com](mailto:helpage@cwjamaica.com) or [rhian.holder@helpage.org](mailto:rhian.holder@helpage.org).
4. **Institute for Gender & Development Studies (IGDS)**, Mona Unit, UWI produces and disseminates knowledge on gender related issues in the Caribbean in support of the mission of the University of the West Indies (UWI), and to enhance Caribbean development. The Vision is to train UWI graduates and promote gender sensitive development in all sectors through teaching, research and outreach/public service and activism. Contact: Dr Leith Dunn, [leith.dunn@uwimona.edu.jm](mailto:leith.dunn@uwimona.edu.jm).
5. **Institute for Caribbean Children and Families (ICCF)**: Through the directorship of clinical social worker/child welfare specialist, Dr Claudette Crawford Brown, the ICCF offers innovative direct intervention strategies to children and their families who have been traumatized by violence, separation and/or abuse. Contact: Dr Claudette Crawford Brown, [claudettebrown@hotmail.com](mailto:claudettebrown@hotmail.com).
6. **J-FLAG** is a human rights NGO that represents the interests of Lesbian Gay Bisexual and Transgender (LGBT) Jamaicans. Over its fifteen year existence it is often the first port of call for information on sexual and gender minorities. J-FLAG is also prominently involved in defending the human rights of LGBT Jamaicans on various levels ranging from legal

and constitutional reform to the provision of crisis intervention for vulnerable populations. To find out more, please visit <http://jflag.org/>. Contact: Dane Lewis, [admin@jflag.org](mailto:admin@jflag.org).

7. **Jamaica AIDs Support for Life (JASL)** is the oldest and largest HIV/AIDS, human rights, non-governmental organisation in the island. JASL is dedicated to: preserving the dignity and rights of persons living with HIV and AIDS; helping in the fight against the spread of HIV and AIDS by providing education and other interventions; promoting changes in attitudes and behaviour; and empowering persons to respond positively to the challenges associated with being vulnerable to infection in Jamaica. Contact: Nicolette Jones, [infojasl2010@gmail.com](mailto:infojasl2010@gmail.com) or [info@jasforlife.org](mailto:info@jasforlife.org).
8. **Quality of Citizenship Jamaica (QCJ)** was founded in January 2013 and its mission is to empower, educate and advocate for lesbian, bisexual women and transgender persons. QCJ does research on issues including health and well-being for the community we serve and works on issues of autonomy, sexual and reproductive health, sexual and physical violence. We actively support all initiatives to improve the lives of our constituents and the women of Jamaica in general. Contact: Jalna Broderick, [info@qcjm.org](mailto:info@qcjm.org).
9. **Rose Robinson Hall:** Mrs. Robinson Hall is a social worker/child welfare specialist and member of the Jamaica Association of Social Workers (JASW). This national organization works to enhance the professional development of its members, support the maintenance of standards of practice and contribute to sound social policy. Contact: [rrobinsonhall@yahoo.com](mailto:rrobinsonhall@yahoo.com).
10. **Tenesha Myrie:** Ms. Myrie is an Attorney-at-Law and Tutor for Constitutional Law at the Faculty of Law, University of the West Indies, Mona Campus. Contact: [tpfmyrie@yahoo.com](mailto:tpfmyrie@yahoo.com).
11. **Vivian Gray:** Mr. Gray is the chairman and a member of the legal and ethical committee of the National AIDS Committee. The legal and ethical committee provides policy advice and voluntary legal services to persons who are vulnerable to, living with, or affected by HIV/AIDS. Contact: [viviangrayjr@yahoo.com](mailto:viviangrayjr@yahoo.com).
12. **WMW Jamaica** was established in 1987 and cultivates gender-equity, justice and violence-free social relations by using gender-aware media analysis and transformative action. We are a not-for-profit, NGO providing training, advocacy and research. Contact: Hilary Nicholson, [hello@wmw.org](mailto:hello@wmw.org).
13. **Woman Inc.** is a NGO formed in 1984 with locations in Kingston and Montego Bay. Its objective is to promote the welfare of women through direct services, and to promote the advancement of women by conducting relevant educational and advocacy activities. Woman Inc. offers free counseling services to victims of rape, incest and domestic violence and the Kingston Chapter also offers temporary, emergency accommodation for abused women and their children. Contact: Carol DaCosta at [cagdawl@hotmail.com](mailto:cagdawl@hotmail.com) or [wicrisiscentre@yahoo.com](mailto:wicrisiscentre@yahoo.com).



## 14 Offences where the accused is in a position of trust or authority

- 14.1** We are of the view that the Sexual Offences Act warrants express recognition of the circumstance where an accused is in a position of trust or authority to the complainant. This is especially important in relation to child victims. It is also important in relation persons with mental disorders, intellectual disabilities, physical disabilities and elderly persons in residential or institutionalized care facilities. The Child Care and Protection Act already supports this notion by virtue of the recognition in section 6 of “prescribed persons” who have a duty to report the need for care and protection of a child.
- 14.2** We again note that under the Child Care and Protection Act, a child is defined as a person under the age of eighteen years. However for the purposes of Part IV of the Sexual Offences Act that deals with sexual offences against children, a child means a person under the age of sixteen years and we note that the offence in relation to an “adult in authority” under Sexual Offences Act which is provided for in section 10 (4) is limited to sexual intercourse with a person under the age of sixteen years. We submit that young persons under the age of eighteen years but over the age of consent (16) may nonetheless be vulnerable in the context of abuse and violence perpetrated against them by persons in a position of trust or authority and this fact must also be considered. Consequently, we invite the Joint Select Committee to include the fact of an accused’s position of trust or authority where the complainant of a sexual offence is under the age of eighteen years but over the age of consent.
- 14.3** We therefore recommend that the Sexual Offences Act expressly state that where an offence is committed against a person under the age of eighteen years by a person in a position of trust or authority to the complainant, then this fact shall be an aggravating factor in the determination of sentencing.

## 15 Indecent Assault – section 13

- 15.1** We also observe that for the offence of indecent assault, the Act does not stipulate in what circumstances the offence must be heard in the Resident Magistrate’s Court and which must be heard in the Circuit Court. The determination as to which court an offence is tried is therefore left to the discretion of the police or prosecutor. The consequence of this is that it is very likely that in some instances the court selected by the police or prosecutor is not appropriate in relation to the gravity of the offence and the consequent harm experienced by the victim.
- 15.2** The need for express stipulation within the Sexual Offences Act is especially important when one considers the range of sentences that are set out depending on where the offence is tried. If the offence is heard in the Resident Magistrate’s Court, the accused is subject to a

maximum sentence of three years' imprisonment while if an accused is convicted in the Circuit Court he or she may be sentenced to a maximum term of fifteen years' imprisonment.

**15.3 We submit that for the offence of indecent assault, the Sexual Offences Act should expressly stipulate in what circumstances the offence should be tried in the Resident Magistrate's Court and in the Circuit Court.**

## **PART V – OTHER OFFENCES**

### **16 Violation of person suffering from mental disorder or physical disability – section 16**

#### ***16.1 Language used in referring to persons with mental disorders and disabilities***

**16.1.1** We observe that in referring to persons with mental disorders or disabilities, the language used throughout section 16 of the Sexual Offences Act is “person who is suffering from a mental disorder or physical disability.” The use of “suffering from” is understood to be offensive and is not generally retained in modern laws. The language consistently used throughout our recent 2014 Disabilities Bill is “person with a disability” as opposed to “person suffering from”. We recommend that references to “person who is suffering from” throughout section 16 of the Sexual Offences Act be replaced with “person with”. This would be consistent with modern legislative practice and also the current language used in the 2014 Disabilities Bill.

#### ***16.2 Exclusion of persons with intellectual disabilities***

**16.2.1** We are also concerned that the class of persons protected under section 16 by virtue of the definition of mental disorder in section 2 may not extend to persons with intellectual disabilities. It is our submission that section 2 be amended to provide for a definition of “intellectual disability” which means “a disability characterized by significant limitations in both intellectual functioning and adaptive behaviour and which originates before age 18”. It is also our submission that section 16 (1) be amended to include “intellectual disability”.

#### ***16.3 Causing a person with a mental disorder, intellectual disability or physical disability to without consent engage in sexual activity with a third person or to watch a sexual act***

**16.3.1** It is also our recommendation that the protection offered by section 16 should be extended to include circumstances where a person causes a person with a mental disorder, intellectual disability or physical disability to engage in sexual activity with a third party or to watch a sexual act. This protection could be captured in a new subsection (2) which would read as follows:

**“A person commits an offence against a person with a mental disorder, intellectual disability or physical disability (knowing that the person is**

suffering from such a disorder or disability) and who does not consent to the act or is incapable of consenting to the act –

- (a) causes a person with a mental disorder, intellectual disability or physical disability to engage in sexual activity with him or herself or a third party;
- (b) causes a person with a mental disorder, intellectual disability or physical disability to watch a sexual act.

## **17 Procuration & Living on earnings of Prostitution– sections 18 & 23**

### **17.1 *Laws governing sex work***

**17.1.1** We invite the Joint Select Committee to consider the concerns of persons involved in sex work with a view to decriminalizing the activities surrounding sex work. The de facto criminalization of prostitution in Jamaica is achieved by the criminalization of several activities surrounding sex work in various pieces of legislation such as the Sexual Offences Act, the Towns and Communities Act and the Offences Against the Person Act. Under the Sexual Offences Act, these activities are set out in sections 18 and 23 and deal with: procuring a person to become a prostitute (section 18), knowingly living off the earnings of prostitution (section 23) and soliciting for immoral purposes (section 23).

**17.1.2** Section 18 makes it an offence to procure a person to become a prostitute or an inmate of a brothel. The penalty for this offence is imprisonment of a maximum term of ten years or both fine and imprisonment. Section 23 (a) makes it an offence for anyone to knowingly live on the earnings of prostitution while section 23 (b) makes it an offence for anyone whether in public or private to persistently solicit for immoral purposes. All offences under section 23 carry a maximum term of imprisonment of three years or fine of Five Hundred Thousand Dollars if convicted in the Resident Magistrate's Court. If however a person is convicted in the Circuit Court the maximum term of imprisonment is ten years. Section 3(r) of the Towns and Communities Act makes it an offence for a person to loiter in any public place and solicit any person for the purpose of prostitution. Whilst section 68 of the Offences Against the Person Act deals with suppression of brothels.

**17.1.3** Sex workers engaging in prostitution are subject to arrest without warrant for minor offences by virtue of section 80 of the Offences Against the Person Act and section 18 (2) of the Sexual Offences Act and consequently have limited constitutional protection with respect to their liberty by virtue of the exception to the constitutional protection of freedom



of person set out in section 14 (1) (f) of the Jamaica 2011 Charter of Fundamental Rights and Freedoms.

## **17.2 *Impact of laws on the health, safety, liberty and security of sex workers***

**17.2.1** The legislative objectives of the laws governing prostitution were presumably aimed at addressing public nuisance, community health and safety issues as well preventing persons from being exploited as prostitutes. In examining the operation and effect of these laws, the principles of arbitrariness (where there is no connection between the effect and the object of the law), overbreadth (where the law goes too far and interferes with some conduct that bears no connection to its objective) and gross disproportionality (where the effect of the law is grossly disproportionate to the state's objective) are most relevant.<sup>9</sup> Our submission is that whatever objectives there were in the creation of these laws are far outweighed by the negative impacts of these offences on the safety and security of sex workers. This therefore gives the Parliament of Jamaica very good grounds for revisiting these laws with a view to decriminalizing the activities surrounding sex work.

**17.2.2** When one examines for example, the offence of living on the earnings of prostitution, our submission is that this offence goes further than is needed to in order to address its presumed legislative objective of preventing exploitation of prostitutes and is therefore overly-broad. It not only targets pimps and "parasitic, exploitative conduct" in which they engage, it goes further by punishing everyone who lives off the earnings of prostitution. It does not distinguish between: (i) those who exploit prostitutes; and (ii) those who receive a material benefit from the prostitution by virtue of family relationships (spouse, child and dependents for who the sex worker owes a duty of care and responsibility) or by virtue of providing legitimate goods or services (for example, pharmacists or accountants) or by virtue persons who informally provide protective or administrative services to persons engaging in sex work.

**17.2.3** It is our submission that the current legislative framework governing sex workers negatively impacts on sex worker's guaranteed right to security of the person in section 3(a) of the 2011 Charter of Fundamental Rights and Freedoms. The prohibitions set out in the laws heighten the risks that sex workers face in prostitution by imposing dangerous conditions. The overly-broad prohibition of solicitation, "captures and outlaws" communication necessary to negotiate and agree upon the terms of the transaction including safer sex practices. The law in effect prevents sex workers from taking steps to protect themselves from the risks associated with their activities. The suppression of

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<sup>9</sup> See the recent case of *Canada (Attorney General) v Bedford* [2013] 3 R.C.S., heard by Canada's highest court, the Supreme Court.

brothels prevents sex workers from working in an environment in which they are better able to put measures in place to protect their physical and sexual health.

**17.2.4** The vulnerabilities of sex workers to sexual and other forms of violence cannot be overlooked. They are subject to violence not only by their clients but by the police whom they may at will confiscate and destroy property such as condoms and materials on safe sex. Violence against sex workers is underreported as victims are silenced by the fear of further violence and fear of prosecution.

**17.2.5** In order for the State to adequately protect sex workers from sexual violence, it must be prepared to confront the debilitating effects of the current laws governing sex work and must have an appreciation of the intersected vulnerabilities of persons engaging in this form of work. There also has to be a recognition that some sex workers freely choose to engage in the activity of prostitution. The reasons for doing so are varied but the choice constitutes a choice to engage in a legitimate form of work. Jamaica's obligation in protecting its citizens from violence is not negated by a citizen's choice of work.

## **18 Violation of elderly persons in residential care facilities, institutionalized facilities, domestic setting etc.**

**18.1** There is a need for the State to acknowledge and deal with the specific vulnerabilities of elderly persons living within or in the care of residential care facilities and institutionalized facilities. Such elderly persons may be subject to sexual violence perpetrated against them by persons in a position of trust or authority. They may even be subject to sexual violence from other elderly persons living within or accessing care at the facilities. We observe that due to their level of dependence and consequent vulnerability these elderly persons face certain difficulties in reporting and accessing just and effective remedies for sexual abuse. It is therefore imperative that the State develops a supportive legal framework to encourage elderly persons to report instances of sexual abuse. Complementary to this must be the sensitization and training of respective groups such as health care workers and police officers to recognize and investigate respectively, elderly sexual abuse.

**18.2** In aiding the development of a supportive legal framework, it is our recommendation that that for the purposes of the Sexual Offences Act elderly persons whom are living within or in the care of residential care facilities and institutionalized should be deemed to be

vulnerable persons. Elderly persons within the domestic setting should also be deemed to be vulnerable persons to the extent that they are largely dependent on others for their care.

**18.3 In light of the foregoing we recommend that the Sexual Offences Act:**

**18.3.1 Makes it an offence for any person in a position of trust or authority to without the consent of the elderly person (“a person over the age of sixty years”) engage in any sexual activity with the elderly person or cause the elderly person to engage in any sexual activity with a third party.**

**18.3.2 Places a mandatory reporting requirement on “prescribed persons” to report to the police and other respective authorities actual and suspected cases of sexual abuse perpetrated against elderly persons. “Prescribed persons” should include: persons deemed to be in a position of trust or authority such as caregivers, health care workers and health care professionals, and persons who by virtue of their employment or occupation has a responsibility to discharge a duty of care towards the elderly person.**

**18.3.3 Expressly provide that where a report of actual or suspected sexual abuse of an elderly person is made in good faith by a prescribed person, the report shall not be deemed to be in breach of any confidentiality obligations with respect to the disclosure of the elderly person’s confidential information.**

## PART VI – CAPACITY, CONSENT, EVIDENTIARY MATTERS, ANONYMITY OF COMPLAINANT

### 19 Restriction of evidence at trial for rape or other sexual offence – section 27

- 19.1** Section 27 in its current state allows for the Judge to permit the introduction of evidence of the complainant’s sexual history with persons other than the accused. It is submitted that any introduction of the complainant’s sexual history that is not concerned with the specific sexual activity that forms the subject matter of the charge serves “to deflect attention away from the accused onto the complainant”. Not only does this re-victimize the complainant by violating the complainant’s privacy, it affects the complainant’s credibility. Notwithstanding the guidelines provided in section 27 (3) for the exercise of the judge’s discretion to grant leave to allow such evidence, there is nonetheless loopholes which can allow for “unfavourable judicial interpretation”.
- 19.2** By limiting the use of the complainant’s sexual history or behaviour to the specific sexual activity that forms the subject matter of the charge, the legislation can help to protect complainant’s privacy and avoid introduction of evidence that could prejudice the judge or the jury against the complainant.
- 19.3** We therefore recommend that section 27 be amended to expressly provide as follows or in similar terms:

**“(1) In proceedings in respect of rape or other sexual offence under this Act, no evidence shall be adduced and no question shall be asked in cross-examination in relation to the sexual behaviour or activity or reputation of the complainant (whether with the accused or with any other person) other than the sexual activity that forms the subject-matter of the charge.**

**(2) In proceedings in respect of rape or other sexual offence under this Act, evidence that the complainant has engaged in sexual activity, whether with the**

**accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant: -**

**(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or**

**(b) is less worthy of belief.”**

## **20 No adverse inference from delay in reporting**

**20.1** It is recognized that many victims of sexual violence often delay in reporting the incidences to the police for various reasons including: fear of retaliation, humiliation; fear of stigmatization, lack of trust in the justice system; fear of not being believed, financial or emotional dependence on the perpetrator. Despite these legitimate concerns, a delay in reporting of sexual violence, especially where it is sexual violence perpetrated against women and girls, “is often interpreted as demonstrating that the complainant is unreliable.”<sup>10</sup> It is therefore imperative that the Sexual Offences Act expressly provides that there is to be no adverse inference from delay in reporting an offence under the Act.

**20.2** We therefore recommend the insertion of provisions in the Sexual Offences act that:

- 1) Prohibit the court and the jury from drawing any adverse inference from a delay of any length between the alleged commission of the offence and the reporting thereof; and**
- 2) Require that the Resident Magistrate or Judge in any case of sexual violence inform the jury and himself/herself as the case may be that a delay in reporting should not be held against the complainant**

**20.3** To this end, section 71 of the Guyana Sexual Offences Act 2010 is a useful guide. This section deals with warning to jury and provides as follows:

*“Where on the trial of an accused person for an offence under this Act evidence is given or a question is asked of a witness which tends to suggest an absence of complaint in respect of the commission of the alleged offence by the person upon*

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<sup>10</sup> See discussion and recommendation in para 3.9.6 on page 41 of the Handbook for Legislation on Violence against Women, United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), New York, 2012.

*whom the offence is alleged to have been committed or to suggest delay by that person in making any such complaint, the judge shall –*

- (a) give a warning to the jury to the effect that an absence of complaint or a delay in complaining does not necessarily indicate that the allegation that the offence was committed is false; and*
- (b) inform the jury that there may be good reasons why a victim of a sexual offence may hesitate in making or may refrain from making a complaint about the assault.”*

## 21 Compellability

21.1 The law with respect to compellability in Jamaica is set out in section 4 of the Evidence Act. This law provides that in criminal proceedings, a husband or wife is prevented from giving evidence for or against the other. We are of the view that this prohibition should not apply where in matters concerned with sexual offences committed against children. Our position is supported when one considers the pervasiveness of sexual violence perpetrated against children in the home. Several jurisdictions including England and Wales (by virtue of section 80 of the Police and Criminal Evidence Act 1984 (PACE)) recognizes as one of the exceptions to the law on spouses and compellability, cases which involve an alleged sexual offence against a victim whom at the material time was under sixteen years of age. Such an approach in Jamaica would also be consistent with the objects of the Child Care and Protection Act in particular its primary object which is to promote the best interests, safety and well-being of the child.

21.2 We therefore recommend that the following provision be included in the Sexual Offences Act and that section 4 of the Evidence Act be accordingly revised to also provide as follows.

**“The spouse of a person charged with an offence committed against a child under this Act may be called as a witness for either the prosecution or defence and without the consent of the person charged. If a spouse is so called, notwithstanding any other law, the spouse shall be a compellable witness.”**

## 22 Mandatory record and investigations

22.1 With respect to the conduct of investigations we submit that the Sexual Offences Act should expressly provide that it is mandatory for the police to record and investigate reports of sexual offences. It is acknowledged that incidences of sexual violence are significantly underreported in Jamaica. There are also accounts of reports not being taken seriously when