Submission to the Joint-Select Committee of Parliament reviewing the Sexual Offences Act, the Child Care and Protection Act, the Domestic Violence Act, and the Offences Against the Person Act

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1 CHILD CARE AND PROTECTION ACT

SCOPE OF CHILD PROTECTION PROVISIONS

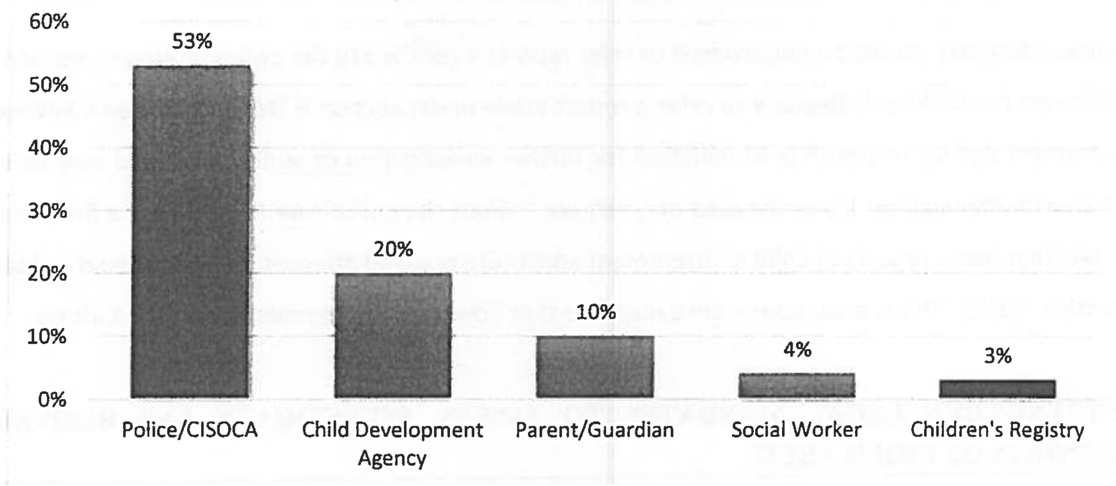
1.1 EXPAND THE LIST OF ENTITIES LEGALLY EMPOWERED TO RECEIVE REPORTS OF CHILD ABUSE UNDER SECTIONS 6(7) AND 7(1)(A) OF THE CCPA

Reporting channels for child abuse should be seamless and accessible. Presently, there is dissonance between the **legally mandated** child abuse reporting procedure, and the common practice. The former, which requires that reports be made to the Children's Registry only, using a prescribed form, is neither accessible nor practical. The child protection agencies recognize this, and informally cross-reference reports and consolidate statistics, irrespective of who receives the report. However, the law has not caught up. While the law should maintain the Children's Registry as the entity responsible for the centralization of reports and statistics, it should be amended in the following ways to make reporting more accessible and practical.

1.1.1 RECOMMENDATION: EXPAND THE ENTITIES TO WHICH THE MEMBERS OF THE PUBLIC CAN MAKE A LEGALLY MANDATED REPORT OF CHILD ABUSE UNDER SECTION 6(7) OF THE CCPA

Section 6(1) requires that any person who "has information" of child abuse, or of a child otherwise in need of care and protection," make an accurate report to the Children's Registry. Section 6(4) makes it a criminal offense not to make this report to the Children's Registry. Of the four primary child protection agencies, legally mandated reports of child abuse can only be made to the Registry. Parliament should expand the list of entities to which these reports can be made to include: the Government Agency responsible for children (the CDA); the Jamaica Constabulary Force (through the branch responsible for child abuse: CISOCA); and the Children's Advocate.

Jamaican adults are most likely to report child abuse to the police/CISOCA, not the children's registry. In fact, the Children's Registry is only the fifth most likely entity to which Jamaicans will report, and is the child protection entity of which Jamaicans are least aware – despite being the only entity to which mandatory reports can be made under section 6(7). 53% of adults are most likely to report to the police/CISOCA, and 20% are most likely to report to the CDA. Only 3% are most likely to report to the Children's Registry. This is unsurprising, given that available data on both public access to reporting channels and awareness of child protection entities suggests that Jamaicans report to a variety of government entities, depending on physical proximity and prior awareness.



Simply put, police stations and CDA offices vastly outnumber those of the Registry, and are significantly more geographically disbursed. Public access and awareness will align with this. Of the three child protection agencies established by the Child Care and Protection Act, the Registry enjoys the least public awareness. Only 40% of adults and 43% of children are aware of the Registry.[1] And less actually live close to one of its offices. Among the 43% of children reporting awareness, only 42% could recall something specific about the Registry, with more children believing that it was "where a child birth is registered," than believing it was "a place to call to report child abuse."[2] Moreover, given that the Registry can do **nothing beyond assess and refer a report to an entity capable of acting**, many view the mandatory reporting to the Registry as an unnecessary bureaucratic step of little real value. It is *partly* due to this reason that the government intends to merge the Children's Registry with the Child Development Agency, which is projected to boost the efficiency with which reports are acted upon.

The 2016 *Child Care and Protection (Amendment) Bill* specifically contemplated a similar reform to section 6(7) that would expand the entities to which mandatory reports can be made to those mentioned above, and still preserve the centralized statistical reporting by requiring them to "transmit an accurate record" of each report forthwith. This approach maintains the central database of child abuse, while expanding reporting channels. We see no reasonable disadvantage to this.

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[1] Office of the Children's Registry. "Baseline Survey: Knowledge, Attitude & Practices Regarding Child Maltreatment." 2013. P.58, 23

[2] Office of the Children's Registry. "Baseline Survey: Knowledge, Attitude & Practices Regarding Child Maltreatment." 2013. P.23

1.1.2 Recommendation: Expand the entities to which the Registrar refers reports of child abuse, to include the police under section 7(1)(a) of the CCPA

The Children's Registry should be empowered to refer reports it receives to the police. However, section 7(1)(a) only empowers the Children's Registry to refer a report made under section 6 "to the Children's Advocate and the Government agency responsible for children for further investigation or so that the child may be brought before a court under section 13, as the case may require." Given the police's national role as a first responder, and the fact that many reports of child maltreatment constitute criminal offences, the law should include them under section 7(1)(a). This is a common-sense measure that flows from recommendation 1.1.1 above.

1.2 Strengthen legal mandates to assess, investigate and respond to reports of child abuse

Parliament should close all possible gaps in the mandates upon public officials to assess, investigate and respond to reports of child abuse. The law only requires investigation by relevant authorities of reports referred to them under 7(1)(a) by the Registrar. No explicit mandate in law exists to investigate reports made by the public or otherwise come to their knowledge that are not referred by the Registrar. Such a gap can obscure accountability for failures to appropriately respond to legitimate reports of child abuse, especially those in high-risk situations. Consequently, we submit that the following amendments be effected to strengthen the state accountability framework:

1.2.1 Recommendation: Require authorities to assess/investigate reports of child abuse as soon as reasonably possible under section 7(1) of the CCPA, and penalize unreasonable, intentional or grossly negligent failure to do so under sections 7(4) and 7(5)

1.2.2 Recommendation: Require authorities to investigate reports of child abuse, regardless of whether they were referred by the Registrar

1.2.3 Recommendation: Mandate authorities to act on the outcome of investigations as soon as reasonably possible

1.2.4 Recommendation: Require an immediate alert upon receipt of reports of emergency situations to the relevant response authority from any entity receiving such a report

1.3 Expand the actions that amount to "Cruelty to Children" under section 9 of the CCPA to cover all forms of child ill-treatment

Jamaica has a duty to protect children from **all forms** of maltreatment. This duty is enshrined in the United Nations Convention on the Rights of the Child, which mandates that states "take all appropriate legislative...measures to protect the child from **all forms** of physical or mental violence, injury or abuse, neglect

or negligent treatment, maltreatment or exploitation."[3] While the present provisions on cruelty already cover many circumstances of child maltreatment, it fails to capture some important areas. Accordingly, we recommend the following changes:

1. Improve the definition of ill-treatment that constitute Cruelty to Children to directly include emotional and psychological ill-treatment under Section 9(1) of the CCPA
2. Clarify the threshold of harm under section 9(1) of the CCPA to include all action resulting in or likely cause serious physical, emotional or psychological harm, or sexual abuse or exploitation
3. Explicitly include omissions/failures to act under Section 9(1) of the CCPA

1.3.1 RECOMMENDATION: IMPROVE THE DEFINITION OF "ILL-TREATMENT" TO DIRECTLY INCLUDE EMOTIONAL AND PSYCHOLOGICAL ILL-TREATMENT UNDER SECTION 9(1) OF THE CCPA

The legislative proscription of acts constituting cruelty to children should be expressed using expansive and technically precise parameters. Parliament can improve Section 9(1) by replacing references to *mental ill-treatment* and *mental derangement* with *emotional or psychological ill-treatment/harm.* The term "mental" ordinarily refers to the cognitive functions of the brain, such as thinking, processing information, and sensory functions, while "emotional" usually refers to the feeling and expressing of emotions. Moreover, section 9(1)'s requirement that a child suffer "mental derangement" for ill-treatment to have caused "injury to health" implies that a child must manifest diagnosable mental disorders for this element of the offense to be satisfied.

Ensuring that emotional components of ill-treatment are captured under section 9(1) could expand the law's protection from emotional maltreatment, and align the legislative formulation with the prevailing public understanding of emotional abuse. Parliament could specifically insert it as a form of ill-treatment, or replace references to mental with the more technically inclusive term, "psychological," as the Office of the Children's Advocate has submitted.

This change, while seemingly minor, has empirical foundations. **71% of children 10-17 years old report experiencing child abuse in the past three months**, according to the Office of the Children's Registry's baseline study on child maltreatment.[4] 47% of adults reported observing the same.[5]

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[3] United Nations Convention on the Rights of the Child, Article 19

[4] Office of the Children's Registry. "Baseline Survey: Knowledge, Attitude & Practices Regarding Child Maltreatment." 2013. P.17

[5] Office of the Children's Registry. "Baseline Survey: Knowledge, Attitude & Practices Regarding Child Maltreatment." 2013. P7

Many other jurisdictions have recognized the distinction between the terms, and have improved their legislation to either use a broad term "psychological" or list different types of non-physical ill-treatment to remove any doubt. For example, *section 4(1) of* Trinidad and Tobago's *Children Act* captures all possible action by simply using the verb "ill-treats," without limitation, supplemented by specific reference to emotional health:

> *"the person wilfully assaults, **ill-treats**, neglects, abandons or exposes the child or causes or procures the child to be assaulted, ill-treated, neglected, abandoned, or exposed in a manner likely to cause that child suffering or injury to his physical, **mental or emotional health**."*

That provision is strikingly similar to section 9(1) of the Child Care and Protection Act, but avoids the unnecessary limitations present in Jamaican law

> *A person commits an offence if that person...assaults, **physically or mentally ill-treats**, neglects, abandons or exposes such child; or...causes or procures the child to be assaulted, physically or mentally ill-treated, neglected, abandoned or exposed, in a manner likely to cause that child unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, or any **mental derangement**).*

Adopting another approach, section 17 (2) (b) of Malaysia's Child Act 2001 establishes that a child is:

> *"emotionally injured if there is substantial and observable impairment of the child's mental or emotional functioning that is evidenced by, amongst other things, a mental or behavioural disorder, including anxiety, depression, withdrawal, aggression or delayed development."*

1.3.2 <u>RECOMMENDATION:</u> CLARIFY THE THRESHOLD OF HARM UNDER SECTION 9(1) OF THE CCPA TO INCLUDE ALL ACTION RESULTING IN OR LIKELY TO CAUSE SERIOUS PHYSICAL, EMOTIONAL OR PSYCHOLOGICAL HARM, OR SEXUAL ABUSE OR EXPLOITATION

Under section 9(1), for any act specified in that sub-section to constitute cruelty to a child, it must be "likely to cause that child **unnecessary** suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, or any mental derangement)." The threshold of harm for this offense must, at a minimum, achieve two objectives. First, it must appropriately capture all serious harm to children. Second, it must unambiguously communicate that degree of harm in a way that can guide public behaviour. The present formulation falls short of both these objectives, and can be improved by broadening the language to capture *any action that results in or places the child in imminent risk of serious physical, emotional or psychological harm, sexual abuse or exploitation.*

Replace the vague "unnecessary suffering" formulation

Section 9(1)'s "unnecessary suffering" standard is vague, unduly subjective, and a poor guide to the public, parents, and very child care professionals expected to implement it. *What exactly is necessary suffering? How much suffering is enough, before it becomes unnecessary?* Very few people know, and even fewer agree. Learning from regional mistakes, Trinidad and Tobago specifically avoided that formulation in their revised

Children Act which makes it an offense to perpetrated specified action against a child "in a manner likely to cause that child **suffering** or injury to his physical, mental or emotional health" (emphasis added), under section 4(1)(a). Jamaica's insertion of "unnecessary suffering" is an anomaly that Parliament ought to remedy.

Replace "mental derangement"

Section 9(1) articulates an imprecise, and high standard of "mental derangement" in defining "injury to health," that excludes serious emotional harm that may not constitute "derangement," and does not clearly include acts that result in sexual abuse or exploitation, despite wide consensus that these categories ought to constitute cruelty.

Adopting a simple formulation, Singapore's *Children and Young Person's Act* in section 5(2) proscribes circumstances where a person with responsibility for a child *"wilfully or unreasonably does, or causes the child or young person to do, any act which endangers or is likely to endanger the safety of the child."* Similarly, the United States' *Federal Child Abuse Prevention and Treatment Act* contemplates specified action that "results in death, serious physical or emotional harm, sexual abuse or exploitation, or...presents an imminent risk of serious harm," in section 3(2). We find this progressive.

To best recognize and anticipate multiple forms of abuse, the Jamaican Parliament must expand the threshold of harm under section 9(1) to include all action resulting in or likely cause serious physical, emotional or psychological harm, or sexual abuse or exploitation, thereby diminishing its existing vagueness.

1.3.3 Recommendation: Explicitly include omissions/failure to act in Section 9(1) of the CCPA

The law should provide maximum protective coverage to children from the various forms of abuse. By including "omissions" (also called "failures to act") in the formulation of section 9(1), the CCPA will unambiguously clarify that parents and caregivers can be held be responsible for wilful or unreasonable non-action that results in serious harm to children, where they had an opportunity and duty to do *prevent it*. The principal formulation of section 9(1) determines the type of actions that amount to cruelty in the various circumstances described in its subsections. Accordingly, it must be robust.

While a subset of omissions could constitute "neglect" under section 9(1)(a). The remit of neglect is presently circumscribed by section 9(3) to the specific non-provision of **material care** listed in section 27 and 28 – food, clothing, lodging, health care, education – and to two highly specific circumstances in 9(3(b) and 9(3)(c) – infant suffocating in bed, and child drowning, poisoned, burnt or scalded. These circumstances are too limited. *In subsequent recommendations, we suggest three specific ways to expand the remit of neglect.*

Notwithstanding this, including omissions optimizes the anticipatory reach of the law, avoiding neglect's object-matter limitations which focus on non-fulfilment of specific duties *to a child*, and not circumstances where wilful or unreasonable omissions may generally "expose such child" to harm. It was on this very basis that the 2016 proposed amendment to the CCPA attempted to include a new layer of neglect under section 9(3)(a). While we improve upon that attempt in the subsequent recommendations, we urge an expansion of the principal formulation of the section 9(1) to directly include omissions.

Jamaican law already contemplates such a formulation that equates wilful acts and omissions in the definition of infanticide. Section 75(1) of the *Offences Against the Person Act* includes this readily adaptable formulation:

> *Where a woman by any* ***wilful act or omission*** *causes the death of her child being a child under the age of twelve months... shall be guilty of felony, to wit, of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.*

Such an inclusion will refine the present formulation: "exposes such child...in a manner likely to cause that child unnecessary suffering or injury to health," by clarifying the nature of acts constituting "exposure" to include both "wilful acts and omissions," as promoted by international standards and best practices. For example, section 3(2) of the United States *Federal Child Abuse Prevention and Treatment Act* reads:

> *The term 'child abuse and neglect' means, at a minimum, any recent act* ***or failure to act*** *on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or* ***failure to act*** *which presents an imminent risk of serious harm.*

Moreover, an authoritative 2013 global study of international best practices in child protection legislation also supports this approach. Experts from the Protection Project, and International Centre for Missing & Exploited Children reviewed 400 laws in 150 countries, including Jamaica, and determined that the most effective laws explicitly included intentional failures to act/omissions in their child abuse provisions. After synthesizing the most progressive laws, they produced this model definition:

> *"Abuse shall mean any intentional or wilful act* ***or omission*** *by a parent, guardian, care-giver, or other person in a position of trust or authority causing or likely to cause physical, mental, or emotional harm to the child."*[6]

Accordingly, we recommend that the Parliament explicitly include omissions/failure to act Section 9(1) of the CCPA. At an absolute minimum, Parliament must close the protection gap by expanding neglect, as we recommend under **recommendation 1.2.**

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[6] See *Child Protection Model Law,* Article 2(b). The Protection Project and International Centre for Missing & Exploited Children.

1.4 EXPAND BOTH THE CIRCUMSTANCES AMOUNTING TO PARENTAL NEGLECT UNDER SECTION 9(3) AND THE LISTED DUTIES OF PARENTS UNDER SECTION 27 OF THE CCPA

Presently, parental failure to properly supervise a child or failure to ensure their safety is not clearly addressed in law, despite their prevalence as reasons for child endangerment. Far too often, children are left unsupervised and ignored, left wandering, or otherwise unattended to, resulting in serious harm and even death. In Jamaica, these children burn in house fires, are taken advantage of, and fall into dangerous situations, oftentimes late at night, as a product of parental neglect. Neither under section 9(3), which defines neglect, nor under section 27, which defines the duties of parents, does the Child Care and Protection Act meaningfully address these circumstances. Accordingly, we recommend expanding those provisions to:

1. Explicitly describe circumstances of gross non-supervision that amount to the neglect of children under section 9(3); and
2. Expand the duties of parents under section 27 to include non-material provisions such supervision and safety

Presently, legislation does not address all forms of child neglect established by international human rights law.[7] Under the Child Care and Protection Act, parental neglect occurs in situations where:

- A responsible adult fails to provide "care for a child" food, clothing, lodging and health care as required by section 27
- A responsible adult fails to provide education for a child as required by section 28
- An infant suffocates while lying in a bed with a responsible adult who was under the influence of alcohol or drugs, as described by section 9(3)(b)
- A child is killed or seriously injured because of improper precautions against that child drowning, being poisoned, burnt or scaled when they are near a body of water, stove or open flame, or any poisonous or flammable substance, as described by section 9(3)(c)

These provisions, while establishing important foundations, ought to be expanded to strengthen protection for children and align national legislation with international standards. The table below compares the two.

[7] See UN Committee on the Rights of the Child, "General Comment no. 13, 2011

Comparison Table: Legislative Coverage of All forms of Child Neglect Recognized by the UN Committee on the Rights of the Child

Physical neglect	PARTIALLY COVERED: Sections 9(3)(a) & 27 of CCPA
Psychological or emotional neglect	Not covered
Neglect of children's physical or mental health	PARTIALLY COVERED: Sections 9(3)(a) & 27 of CCPA
Educational neglect	COVERED: Sections 9(3)(a) & 28 of CCPA
Abandonment	PARTIALLY COVERED: section 28 of OAPA for children under two years' old

1.4.1 RECOMMENDATION: EXPLICITLY DESCRIBE CIRCUMSTANCES OF GROSS NON-SUPERVISION THAT AMOUNT TO THE NEGLECT OF CHILDREN UNDER SECTION 9(3)

Gross non-supervision of children poses serious risks to their welfare. However, despite well-documented instances of child maltreatment due to non-supervision, the *Child Care and Protection Act* does not directly contemplate this form of maltreatment beyond the extremely narrow situations described above. In recognition of this, the 2016 *Child Care and Protection (Amendment) Bill* attempted to rectify this by inserting a new paragraph under section 9(3) to create a *fourth* circumstances in which a person would be "deemed to have neglected a child in a manner likely to cause injury to the child's health." It sought to capture:

> *"(a) a parent or guardian of any child, where the child is found in any circumstances from which it can reasonably be concluded that the child has not been given adequate parental care and attention, for example, where the child is found—*
>
> *(i) unsupervised on a street or other public place late at night; or*
>
> *(ii) living with a male or female adult, in circumstances which expose the child to risk of sexual, or other, abuse."*

We recommend incorporating this language into section 9(2), to clearly define the circumstances in which gross non-supervision of children would be considered parental neglect.

This reform both extends the protective coverage of the law, and aligns the legal definitions of parental neglect with its empirically validated public understanding. **41% of Jamaican adults define neglect of a child as "leaving a child without supervision"** according to the Office of the Children Registry's Baseline Survey on child

maltreatment.[8] Yet, the Child Care and Protection Act does not recognize this form of neglect. Moreover, 23% of persons reported personally witnessing a child "left alone at home alone or somewhere else without adult supervision," in a manner that amounted to child neglect during the past 12 months.[9]

To best address this unequivocal component of child maltreatment, Parliament should include direct reference to gross non-supervision under section 9(2), as it attempted to do in 2016, and thus better align the provision with the public understanding of the offence.

1.4.2 Recommendation: Expand the duties of parents under section 27 to include non-material provisions such as safety and supervision

Distinct from section 9(3)'s enumeration of acts constituting cruelty, section 27 outlines the **legal duties** of parents/ caregivers. These duties are to provide food, clothing, lodging and health care. They form the legally prescribed general requirements of parental care. Failure to perform any of section 27's four duties listed can constitute neglect under section 9(3)(a), which in turn can constitute cruelty under section 9(1). Section 27 therefore contributes to two important national standards: 1) the elements of a criminal offense – cruelty; and 2) the national benchmarks for parenting for government policy.

While a positive start, the present four duties do not reflect the full range of parental requirements. They are unduly limited to strictly material and medical sustenance, and include no mandate for other forms of non-material care such *safety* and *supervision* as other jurisdictions do.

Parliament can help close the present protection gap, elevate the national minimum standard for parenting, and strengthen the bases upon which the child protection sector can preventatively intervene to safeguard the welfare of the child by expanding the parental duties listed in section 27.

Importantly, this is distinct from the recommendation 1.2.1 above, which seeks to add a fourth layer to 9(3)'s circumstances in which a person would be "deemed to have neglected a child in a manner likely to cause injury to the child's health." Section 27 establishes the general duties of parents, while section 9(3) defines the circumstances constituting a criminal offense.

To make another cross-jurisdictional comparison, under Canada's *Child, Youth and Family Enhancement Act*, Chapter C-12 Section 1(2.1), a child is neglected if the parent/guardian:

a) is unable or unwilling to provide the child with the necessities of life,

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[8] Office of the Children's Registry. "Baseline Survey: Knowledge, Attitude & Practices Regarding Child Maltreatment." 2013. p.45

[9] Office of the Children's Register. "Baseline Survey: Child Maltreatment." P.49

b) is unable or unwilling to obtain for the child, or to permit the child to receive, essential medical, surgical or other remedial treatment that is necessary for the health or wellbeing of the child, or

c) is unable or unwilling to provide the child with ***adequate care or supervision.***

As mentioned above, the public understanding of parental duties already outpaces the legislative understanding. The OCR's Baseline Survey on Child Maltreatment reveals that over half of Jamaican adults define parental neglect in a manner not yet covered by the law. Only 27% believed it solely to be "depriving a child of basic needs. The table below is instructive.[10]

Table Showing Interpretation of Neglect of Child Among Jamaican Adults

Leaving a child without supervision	41%
Depriving a child of basic needs	27%
Lack of care of a child	18%
Lack of attention to a child	16%
Leaving a child to fend for his/herself	5%
Depriving a child of attending school	2%
Other	2%

In addition to these principal recommendations for amendment to provisions governing neglect, and parental duties, we make the following additional recommendations:

1.4.3 Recommendation: Consider establishing a separate offense for "neglect of children," distinct from "cruelty to children" in Part 1 of the CCPA.

1.4.4 Recommendation: Consider including a defence to neglect of children based on "infirmity of mind or body," as section 3(4) of Trinidad's Children Act, 2012 does.

1.5 Recommendation: Enshrine that administering corporal punishment is not a defence to cruelty to children.

Section 9 of the CCPA makes it an offence for an adult who has custody, charge or care of a child to expose said child to forms of cruelty. The extent of the protection offered to children under this section ranges from assault to physical or mental ill-treatment, neglect, abandonment or exposure in a way likely to lead to suffering or

[10] Office of the Children's Register. "Baseline Survey: Child Maltreatment." P.45

injury, indicating that the spirit of the section aims at providing complete protection to the child against all forms of cruelty.

Of grave concern is the common law reasonable chastisement defence to this section which allows parents and persons acting in *loco parentis* to inflict "reasonable and moderate" punishment on children which considers the child's age and education and is administered with a proper instrument. This has the effect of undermining and weakening the effectiveness of the Act by allowing persons to claim that forms of violence against children, oftentimes masked as discipline and punishment, are justifiable under the shroud of being reasonable or moderate.

An approach which would be more attuned to protecting the best interest of the child would be the inclusion of provisions in the Act that indicate that the allowance of child discipline and punishment practices in alignment with child rearing should not allow any form of corporal punishment by teachers, persons in educational, or child care institutions or any adult other than the parent or guardian of said child. Further, in the instance of parents and guardians, it should not be a defence to the crime of cruelty to a child to state that the cruelty was in line with the infliction of corporal punishment in the home or family setting and was reasonable or moderate.

The Child Care and Protection Acts seeks to give life to commitments made on Jamaica's ratification of international human rights documents including the Convention on the Rights of the Child. Article 19 of the Convention calls on the State to take steps to protect children from all forms physical or mental violence, injury, abuse or neglect. Article 28(2) required that states ensure that discipline in school is administered in a way that protects the child's human dignity. Further, Article 37 of the Convention explicitly prohibits torture and other cruel, inhuman and degrading treatment and punishment of children. Corporal punishment is widely acknowledged as a violation of child rights to both their human dignity and physical integrity. The long term physical and mental implications resulting from corporal punishment of children shows that it is in the best interest of the child that the law is sufficiently clear to protect the rights of the child.)

1.6 EXPAND THE DEFINITION OF A CHILD IN NEED OF CARE AND PROTECTION IN SECTION 8 OF THE CCPA

The legal definition of "in need of care and protection" is highly relevant for accessing the special protection services afforded by the CCPA, as well as for guiding child welfare practitioners in making assessments about the best interests of vulnerable children. While the existing five criteria set forth in section 8 are progressive, parliament should expand their coverage in the following ways:

1.6.1 Recommendation: Expand the list of offences which when committed in respect of a child deem that child "in need of care and protection" in the Second Schedule of the CCPA to:

A. **Include "incest" under section 7 of the SOA**
B. **Include "kidnapping' under section 70 of the OAPA**
C. **Include "child labour" under section 36 of the CCPA**
D. **Include "employment of child in nightclub" under section 39 of the CCPA**

Sections 8(1)(c) and 8(1)(d) of the CCPA empower the court to deem children in respect of whom specific offences are committed, and the children who reside in their households as children "in need of care and protection." The specific offences are contained in the Second Schedule of the CCPA, and include: murder or manslaughter; infanticide; any offence involving bodily injury to a child; any offence under Part 1 of the CCPA and the following specific offences:

In *Offences Against the Person Act*:

- ❖ section 28 - abandoning or exposing child
- ❖ section 69 – child stealing

In *Offences Against the Person Act* when committed against a child:

- ❖ Section 29 – common assault
- ❖ Section 40 – aggravated assault on women and children
- ❖ Section 76 – unnatural crime
- ❖ Section 77 – attempt to commit unnatural crime
- ❖ Section 79 – outrages on decency

In the *Sexual Offences Act*:

- ❖ Section 8 – sexual touching
- ❖ Section 9 – sexual grooming
- ❖ Section 10 – sexual intercourse with person under 16
- ❖ Section 11 – householder inducing violation of child
- ❖ Section 15 – abduction of child under 16
- ❖ Section 20 – abduction of child for sexual intercourse

In the *Sexual Offences Act* when committed against a child:

- ❖ Section 3 – rape
- ❖ Section 4 – grievous sexual assault
- ❖ Section 5 – marital rapes
- ❖ Section 13 – indecent assault
- ❖ Section 16 – violation of person suffering from mental disorder
- ❖ Section 18 – procuration
- ❖ Section 19 – procuring violation by threats or fraud
- ❖ Section 21 – unlawful detention in premises

The four additional offences that we have recommended are highly similar to those already included and commensurate in their severe impact on children. Accordingly, we urge parliament to give effect to this common-sense expansion.

1.6.2 Recommendation: Explicitly consider child asylum seekers and refugees of undetermined status as children "in need of care and protection" under Section 8(1) of the CCPA

The law should recognize especially vulnerable children in irregular migratory flows as being in need of care and protection under section 9(1) of the CCPA. Parliament should add a provision to the law to recognize child

asylum-seeker or refugee with an unresolved application for asylum or whose refugee or asylum status has not yet been conclusively determined. A feasible location for this could be in a new paragraph under section 9(1).

1.7 EXPAND THE POWERS OF THE COURT UNDER SECTION 14 OF THE CCPA, IN RESPECT OF A CHILD DEEMED IN NEED OF CARE AN PROTECTION

Section 14 establishes the powers of the Children's Court before which any child is brought under Part 1 of the CCPA or in respect of whom any of the offences mentioned in the Second Schedule has been committed. It is in these proceedings that the Court may, for example, commit the child to the care of a fit person if they are not being appropriately cared for, place children under the supervision of probation and after-care officers, or if they are the victims of a crime, impose restrictions on the offender such as prohibitions on contacting the child victim or from entering premises at which the child resides. In accordance with the critical protective function that this section plays, the powers that it invests in the Children's Court must be robust and sufficiently broad to anticipate various circumstances in which children are at risk. As such, we recommend that the following amendments be made:

1.7.1 RECOMMENDATION: EXPAND THE RANGE OF RESTRICTIONS THE COURT MAY IMPOSE ON PERSONS FOUND GUILTY OF SPECIFIED OFFENCES AGAINST CHILDREN UNDER SECTION 14(1)(D) TO, AT A MINIMUM, BE ANALOGOUS TO THOSE MADE POSSIBLE BY PROTECTION ORDERS UNDER THE *DOMESTIC VIOLENCE ACT*

Section 14(1)(d) outlines the two restrictions that can be placed upon persons who commit *specified* offences against children. These offences are highlighted above, and are listed in the Second Schedule. They include sexual offences, such as sexual grooming, and other various forms of abuse, such as cruelty to children. They are often perpetrated by persons either in positions of power relative to the child or those who have had previous contact with them. Accordingly, the range of protective restrictions **must** align with the persistent patterns of abuse, nuisance, manipulation, and control that serial child abusers deploy.

Thankfully, guidance can be sought from the *Domestic Violence Act*, which has established regime of protective restrictions for abusers in the home, including abuse against children. Under that act, a broad range of restrictions are contemplated. That act post-dates the CCPA, and as such, contains a more elaborate set of restrictions, which are compared below. We urge parliament to, at a minimum, align section 14(1)(d) of the CCOA with section 4(1) of the *Domestic Violence Act.*

Comparison of Protective Restrictions in the CCPA and the DVA

AN ORDER UNDER SECTION 14(1)(D) OF THE CHILD CARE AND PROTECTION ACT MAY PROHIBIT FOR *NO MORE THAN TWO YEARS:*	A PROTECTION ORDER UNDER THE DOMESTIC VIOLENCE ACT MAY PROHIBIT FOR A PERIOD *DETERMINED BY THE COURT:*
Entry or presence in the child's residence	Entry or presence in prescribed person's residence

Contact or interference with the child	Entry or presence in any geographic area in which the prescribed person's residence is located
	Entry to place of work or education of prescribed person
	Entry or presence in any particular place
	Watching or besetting the residence, place of work or education of prescribed person
	Following or waylaying the prescribed person
	Making persistent phone calls to prescribed person
	Using language or behaving towards a person in a manner that causes annoyance or ill-treatment
	Damaging property owned by or available for the use or enjoyment of prescribed person or any property in the care, custody or at their residence

1.7.2 Recommendation: Empower the Court to order parenting education in specific circumstances under section 14 of the CCPA

When weak parental capacity is demonstrably responsible for child endangerment, the Court should be empowered to mandate parenting education where it would accelerate critical skill-building, and serve the best interests of the child. In fact, the previously tabled Child Care and Protection (Amendment) Bill, 2016 contemplated such a measure. It proposed an amendment to section 14 of the CCPA to require parents to

> *"undertake and complete such classes or courses of study, in responsible parenting, offered by the National Parenting Support Commission or such other entity accredited by the Minister for that purpose, as the Court considers fit;"*

We urge parliament to adopt a similar formulation to improve parenting capacity as a potential preventative measure before the risks to children brought before the Court escalate.

1.8 Recommendation: Make provisions for appropriate alternative educational arrangements under section 28 of the CCPA

Section 28 of the CPPA requires that parents ensure that children aged four to sixteen are enrolled in school. Section 9(3)(a) makes failure to do so grounds for having "neglected a child in a manner likely to cause injury to the child's health." While section 28 establishes an important parental duty, it may be construed to exclude the provision of appropriate alternative education, such as home schooling. The section reads:

Every person having the custody, charge or care of a child between the ages of four and sixteen years shall take such steps as are necessary to ensure that the child is enrolled at, and attends, school.

The phrasing of this section, which includes the requirement to "enrol" children in school and have them "attend," connotes formal enrolment at an educational institution. While this is the reality for the majority of Jamaican children, the law needs to properly account for appropriate alternative education that may not be commonly understood to fit within the remit of section 28.

To remove doubt, we urge parliament to amend the section to unambiguously allow for appropriate alternative education, for which standards can always be developed via the *Education Act* and *Education Regulations*.

1.9 Recommendation: Define "Light Work" in Law to Address in Gaps in Child Labour Enforcement under Section 34 of the CCPA

Section 34 of the CCPA prohibits the employment of children 13-14 in any work other than "light work.[11]" The law does not define "light work." Instead, section 24(2) requires that the Minister responsible for labour maintain "list of prescribed occupations…consisting of such light work as the Minister responsible for labour considers appropriate for the employment of any child of the age." The law should provide parameters for light work. Anomalously, the law defines or sets parameters for every other form of work within Part 2 of the CCPA, such as *night work*, and *industrial undertaking*, but neglects to do so for light work.

Protection of Children in the Administration of Justice

1.10 Recommendation: Empower the Court to Order Parental Interaction when Children are Committed to Institutions Whether under a Fit Person Order or a Correctional Order

Children in need of care and protection and children conflict with the law do not stop requiring familial contact and support when they enter state care/custody. In fact, some children require it even more so. This is

[11] See *Child Care and Protection Act,* 2004, section 34(1): "No person shall employ a child who has attained the Restriction on employ- age of thirteen years, but who has not attained the age of fifteen years, in the performance of any work other than in an occupation included on the list of prescribed occupations referred to in subsection (2)"

particularly the case for children serving sentences in correctional institutions who will be released into the care of their families when their custodial orders expire. However, these children, who are most at-risk and in need of familial interaction and support, are often left alone in institutions. Parliament should grant the court this power to fully recognize the best interest of the child, which in section 2(2)(d) makes "the quality of the relationship the child has with a parent or other person and the **effect of maintaining that relationship**," a primary factor "to be taken into account in determining the child's best interests."[12]

Such a measure will combat two of the primary reasons for familial breakdown when children enter state care/custody. The first: that some parents fail to maintain contact with children, effectively leaving them to the state, would ameliorated by the coercive power of a court order. The second: that some dedicated parents and family members face difficulties maintaining relationships due to the cost, distance, and bureaucratic barriers at institutions involved in visitation, would also be addressed by mandating institutions to accommodate parental interaction, as far as is reasonably practicable.

To use children in conflict with the law as an example, there is only one institution in the entire for girls on remand pending trial and girls on correctional orders, despite multiple recommendations, and clear evidence in support of smaller, community-based centres that enable community re-integration and familial contact. For boys, there are three institutions: one for all remandees island-wide that is in Kingston, and two for those serving correctional orders located in St. Ann and St. Catherine. The cost and distance of travel are obvious barriers to consistent contact, and are compounded by a constellation of institution-specific restrictions on visitation, about which many parents and children have bitterly complained for years.

The proposed ability to order parental interaction is analogous to the power to issue contribution orders under section 29(1) of the CCPA, which allows the court to mandate parents/guardians to contribute to the cost of child care for children in residential child care facilities operated by the Child Development Agency or juvenile and correctional institutions operated by the Department of Correctional Services. Moreover, in the same way that section 14(1)(a) of the CCPA allows the court to order parents to "enter into a recognizance to exercise proper care and guardianship," it should be able to mandate parents to maintain contact and to interact with these special categories of children who are not in their immediate care, especially those in remand and correctional centres who will be ultimately released back into their care once their custodial orders expire.

Such a provision must also clearly mandate institutions to accommodate parental interaction, as far as is reasonably practicable and in the best interests of the child. This will help address the longstanding shortcomings

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[12] The Child Care and Protection Act, 2004. Section 2(2)

at institutions regarding visitation. We urge the parliament to pay true respect to the legal factors to be considered in determining the best interest of the child, and strengthen parental interaction for children who are most vulnerable: those in the care or custody of the state.

1.11 Recommendation: Repeal provisions relating to children "Beyond Control"

There is strong consensus locally and internationally, that Jamaica's legislation regarding the detention of children deemed "beyond control," violates human rights. It is unconscionable that children who commit no crimes can still be lawfully incarcerated for displaying behavioural problems. While a **laudable policy directive** has drastically reduced the number of children incarcerated on correctional orders for being "beyond control," the legislation still permits the incarceration. Said another way: judges can send children to prison for being "beyond control" whenever they want, because Parliament has not repealed the relevant sections of the CCPA. Equally concerning is the fact that police still detain children in lockups for being uncontrollable. JFJ's review of two years' worth of recent police station logs confirms this.

Because the practice is demonstrably abusivee, serves absolutely no legitimate public good, and is inimical to the best interests of the child, Parliament should repeal all provisions that authorize the deprivation of liberty of children deemed "beyond control" or who otherwise display behavioural problems, unless they are lawfully deemed to be in need of care and protection as defined by section 8 of the CCPA.

1.12 Recommendation: Remove the possibility of incarcerating children in adult institutions

Jamaica faced the shameful situation in September 2013 of having an international tribunal, the Inter-American Commission on Human Rights, declare that Jamaica's legislation authorizing and practice of detaining children in adult correctional and remand centres violated international human rights law after JFJ requested precautionary measures on behalf of children victimized by the state. Parliament now has the opportunity to ensure that Jamaica never returns to that deeply damaging situation, by repealing all sections of the CCPA that authorize the detention of children in adult prisons, notably sections 78(2) and 78(6).

Section 78(2) reads:

> *(2) A person sentenced under subsection (1) shall, notwithstanding anything in the other provisions of this Act,* be liable *to be detained in such place including, save in the case of a child who has not attained the age of fourteen years,* ***an adult correctional centre****, and under such conditions as the Minister may direct, and, while so detained, shall be deemed to be in legal custody.*

Section 78(5) and 78(6), which must be read together, establish:

> *(5) Where a child under the age of fourteen years is convicted of an offence specified in the Fourth Schedule and the court is of opinion that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the child to be detained for such period, not exceeding twenty-five years, as the court may determine.*
>
> *(6) Where a sentence referred to in subsection (5) has been passed the child shall, during that period and notwithstanding anything in the other provisions of this Act, be liable to be detained in such place (including an adult correctional centre) and on such conditions as the Minister may*

1.13 Remove the possibility for imprisonment of children for life or excessively long periods

We urge parliament to correct the longstanding problems facing children in conflict with the law by removing the possibility for their recurrence. The best interest of the child is never served by protracted incarceration. Accordingly, we recommend the following:

1.13.1 Recommendation: Abolish the possibility of sentence of life imprisonment

Section 78(1) of CCPA allows for children 14 years and older to be sentenced to life imprisonment without parole. This is in violation of the United Nations Convention of the Rights of the Child (CRC). Article 37(a) states, "No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." At the very least, we must comply with the CRC. We recommend that the CCPA ban life imprisonment of children. Again, there is no legitimate public benefit to be derived from having children move from life to death inside a prison – none whatsoever.

Section 78(1):

> *Sentence of death shall not be pronounced on or on recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in place thereof such person shall be liable to be imprisoned for life.*

1.13.2 Recommendation: Reduce the special limitation on detention of children under 14 years old from 25 years

Section 78(5) allows the court to incarcerate children 12 and 13 years old for up to 25 years imprisonment. Parliament should consider reducing the number of years that is permitted under law. Again, to send a 12-year-old to prison for more than double the number of years they have even been alive is exorbitant, and serves little public benefit.

1.14 Recommendation: Remove the Special Authority under section 79 to detain children under 12 years in Juvenile Correctional Centres, despite them being below the age of criminal responsibility

In one sentence, section 79 of the CCPA *de facto* undermines core aspects of the age of criminal responsibility established in section 63. Without any guidance to the judiciary, or parameters for such an order, it permits the imprisonment of a child who is below the age of criminal responsibility in a juvenile prison simply because the court could find no other way of dealing with the child. In effect, a 9-year old petty thief can be lawfully incarcerated with 17-year-old murderers by virtue of section 79, despite being "conclusively presumed" to be incapable of committing an offense. The supreme dissonance between the protective purpose of section 63, and its trapdoor, section 79 is stark when the two sections are read in succession.

Section 63 reads: "It shall be conclusively presumed that no child under the age of twelve years can be guilty of an offence." Section 79 reads "A court shall not order a child under the age of twelve years to be sent to a juvenile correctional centre unless for any reason the court is satisfied that the child cannot suitably be dealt with otherwise."

We strongly urge parliament to repeal section 79. Children should not suffer because the state cannot find suitable solutions. Parliament should empower the court with a wider variety of orders that account for varying circumstances. It should never be an option to send a young child, below the age of criminal responsibility, to prison with convicted criminals. Such a child, unlike their prospective criminal co-inmates, may not even have the benefit of a criminal trial. If the law establishes a *de jure* age of criminal responsibility, it cannot establish a *de facto* trapdoor to escape its own prohibitions.

1.15 Recommendation: Enshrine the rights of children in correctional and remand institutions in law, in like manner as the established rights of children in children's homes, places of safety and the care of fit persons contained in section 62

Children in residential child care facilities have detailed provisions both in the CCPA and in the Child Care and Protection (Children's Homes) Regulations establishing their rights, and governing their treatment. Children in conflict with the law have no analogous provisions, despite the same legislation governing their detention. The antiquated Corrections Act only makes this passing reference to the duties of juvenile facilities in the Second Schedule: "The managers of a juvenile correctional centre are under an obligation to provide for the clothing, maintenance, upbringing and education of the persons under their care." The rights of children in police lockups are not mentioned.

We simply request that parliament mirror the laudable approach it adopted for children in residential child care facilities, by explicitly outlining the rights of children, the duties of caregivers, and specific administrative arrangements governing institutions. A clear, progressive standard already exists.

1.16 Recommendation: Establish a mechanism for the periodic review of custodial orders by the court

Parliament should establish a mechanism to review of custodial orders by the Courts, with a view to amending the order to allow for early release or conversion to a noncustodial order including licensing, probation order, supervision order etcetera, and mandatory review of custodial order prior to entry into an adult facility.

1.17 Expand the range of persons who can apply for a variation of a Court Order in respect of a child deemed In need of Care and Protection under sections 14(3) and 82(5) of the CCPA

1.17.1 Recommendation: Expand the range of actors empowered to apply for variation of an order made pursuant to section 14(3) of the CCPA, in respect of a child deemed in need of care and protection to include parties with a direct and substantial familial or statutory interest in the child's welfare

Section 14(3) permits the government agency with responsibility for children or any party to proceedings to "apply to the court for a variation or discharge of an order, if circumstances have changed significantly since the order was made." This should be amended to include persons with responsibility for the child or state-approved individuals. Specifically, they should include those persons empowered to apply on behalf of a child for an order under the Domestic Violence Act, and the Children's Advocate:

- a person with whom the child or dependant normally resides or resides on a regular basis;
- a parent or guardian of the child or dependant;
- a dependant who is not mentally disabled;
- a person who is approved' by the Minister responsible for social welfare to carry out social welfare work; or
- a Constable;

Section 68(2) provides intra-legislative precedent for removing limitations on the application for variation in an order. Under that section, no limitations are placed on the application for an order committing a child to a juvenile remand centre.

(2) Subject to subsection (3), the court which makes an order under subsection (l), committing a child to custody may, on application-

(a) vary the order; or

(b) revoke the order in respect of a child referred to in subsection (1).

1.17.2 Recommendation: Expand the range of actors empowered to apply for variation of a fit person order made pursuant to section 82(5) of the CCPA to include parties with a direct and substantial familial or statutory interest in the child's welfare

Section 82(4) and (5) outline that fit person order, except interim orders, shall remain in force until the child attains 18 years, and that court may vary the order on the Minister's application. "A fit person order may, on the application of the Minister, be varied or revoked by a Children's Court." The law should permit those actors permitted to apply for orders on behalf of children under the Domestic Violence Act and the Children's Advocate, to apply for variations of orders under section 82 of the CCPA.

1.18 Recommendation: Require that all orders committing children to any institution or fit person contain pertinent life information

While section 81(2)(b) and 82(2)(b) requires that the court transmit "a record embodying all such information in the possession of the court with respect to the child as is, in the opinion of the court, material to be known by the Minister," upon the issuance of the correctional order or a fit person order respectively. It must be expanded to explicitly include pertinent life information such as academic history, medical history, etc., which is oftentimes missing and compromises the child's continuity of care.

1.19 Recommendation: Add consideration of continuity in the child's education, training, and lawful employment to the factors to be considered in determining the best interests of the child under section 2(c)

1.20 Recommendation: Add consideration of the child's sense of racial, ethnic, individual or cultural identity to the factors to be considered in determining the best interests of the child under section 2(e)

1.21 Recommendation: Enshrine the rights to equal protection and non-discrimination in the Child Care and Protection Act

2 DOMESTIC VIOLENCE ACT

2.1 RECOMMENDATION: DEFINE "DOMESTIC VIOLENCE" IN LAW

Legislation should clearly establish the nature of the conduct to which it attempts to respond. However, the Domestic Violence Act (DVA) does not define domestic violence, resulting in various, oftentimes vague public understandings. **Parliament should formulate a clear definition of domestic violence, and ensure that it expands the range of abusive actions covered by the present legislation to at a minimum, include physical abuse, sexual abuse, emotional or psychological abuse, and financial abuse.**

While the DVA lacks a clear definition, a *de facto* definition of domestic violence can be deduced from the first criterion for granting a protection order by the Court contained in section 4(2)(a) of the Act. That section requires that the court be satisfied "that the respondent has used or threatened to use, violence against, or caused physical or mental injury to, a prescribed person and is likely to do so again." These criteria, while positive are insufficient in scope because they do not align with the varied manifestations of domestic violence that victims experience. Moreover, they limit the recognized abusive conduct to the use of violence or threats to use violence to produce specific physical or mental injury.

This excludes common forms of abuse, such as sexual abuse that does not result in physical injury, severe emotional abuse, which can include tactics such as confinement, isolation, and deprivation, and financial abuse used to control partners through deprivation and exploitation – effectively usurping their autonomy to leave, act freely, or seek help without jeopardizing their sustenance. Several jurisdictions have recognized these forms of abuse in their domestic violence legislations. Within the region, Trinidad and Tobago, has adopted such an approach. Section 3 of their Domestic Violence Act, 2006 provides useful guidance that we recommend that Parliament adopt and improve upon. It defines ket terms in the following ways:

"Domestic violence" is physical, sexual, emotional, psychological or financial abuse committed by a person against a spouse, child, and any other member of the household or a dependant. ... A Protection Order may be granted once an application is made against the person committing the act of domestic violence (the respondent)

"Emotional or psychological abuse" means a pattern of behaviour of any kind, the purpose of which is to undermine the emotional or mental well-being of a person including—

(a) Persistent intimidation by the use of abusive or threatening language;
(b) Persistent following of the person from place to place;
(c) Depriving that person of the use of his property;

(d) The watching or besetting of the place where the person resides, works, carries on business or happens to be;
(e) Interfering with or damaging the property of the person;
(f) The forced confinement of the person;
(g) Persistent telephoning of the person at the person's place of residence or work; and
(h) Making unwelcome and repeated or intimidator contact with a child or elderly relative of the person;

"Financial abuse" means a pattern of behaviour of a kind, the purpose of which is to exercise coercive control over, or exploit or limit a person's access to financial resources so as to ensure financial dependence

"Sexual abuse" includes sexual contact of any kind that is coerced by force or threat of force and the commission of or an attempt to commit any of the offences listed under the Sexual Offences Act in the First Schedule;

"Physical abuse" means any act or omission which causes physical injury

2.2 Recommendation: Expand the basis for granting a protection order under section 4(2) of the DVA to account for all recognized forms of domestic violence

Consistent with recommendation 2.1 above, the basis for granting a protection order should be expanded to align with an appropriate definition of domestic violence. The DVA should also provide clearer guidance to the court on what factors to consider in granting a protection order, so as to strengthen the Court's sensitivity to varied household circumstances, life histories, and risk profiles. At a minimum, parliament should amend section 4(2) to establish welfare-based factors that the court must consider, beyond a vague "necessary for protection."

Presently, section 4(2) outlines the circumstances under which the Court might make a Protection Order. These include Section 4 (2)(a): "where the respondent has threatened to use violence against or caused physical or mental injury to a prescribed person and is likely to do so again" or 4(2)(b) where "having regard to all circumstances, the order of protection is necessary for the protection of a prescribed person."

However, this section of the legislation is vague, and provides little guidance to courts when compared to that of other jurisdictions. Moreover, given the documented social embeddedness of gender-based violence, it is imperative that we provide guidelines for the judiciary and other actors of the justice system, as a means of preventing subconscious bias and potentially misinformed beliefs to influence decisions. Some guidelines from Section 7 of the Trinidad and Tobago Domestic Violence Act (2009) may be incorporated into the DVA. It reads:

> *The Court shall have regard for (a) The nature, history or pattern of the violence that has occurred and whether a previous Protection Order or Interim Order has been issued (b) The need to protect the applicant and any other person for whose benefit the Protection Order has been granted from domestic violence (c) the welfare of any child (d) The accommodation needs of the applicant and any other person (e) the hardship that may be caused as a result of making the order (f) the income, assets and financial obligations of the respondent, applicant and any other person*

affected by the Order and (h) any other matter that in the circumstances of the case, the Court considers relevant.

2.3 RECOMMENDATION: EXTEND THE POSSIBLE RESTRICTIONS ON RESPONDENTS FROM PROTECTION ORDERS UNDER SECTION 4(1) OF THE DVA TO ACCOUNT FOR MORE PATTERNS OF ABUSE

In section 4(1), the DVA empowers the court to impose important restrictions on abusers in respect of whom protection orders have been granted. This is a critical, positive measure that can interrupt entrenched patterns of abuse, and prevent them from recurring. While positive, these restrictions can be expanded to better represent known patterns of abuse that are not addressed by the present formulation of protection orders. By expanding the range of restrictions, Parliament will enable the courts to address well documented abusive patterns it is presently unable to address.

Presently, section 4(1) outlines the restrictions that can be placed on abusers by protection orders. They include prohibitions on the person from:

(a) entering the household residence
(b) being or remaining in an area prescribed by the order in which the household residence of the prescribed person is located
(c) entering the workplace or educational institution of the prescribed person
(d) entering or remaining in any particular place or
(e) molesting a prescribed person by:
  (I) watching the household residence, workplace, educational institution of prescribed person
  (II) following prescribed person
  (III) making persistent telephone calls
  (IV) using abusive language or behaving in a way that causes annoyance or results ill-treatment of the prescribed person or
  (V) damaging any property owned by or available for the use of the prescribed person, or any property in care or situated at the residence of the prescribed person.

These listed circumstances are not extensive enough to cover many of the issues faced by victims of domestic violence within a Jamaican context. Consistent with earlier recommendations, we believe that the Trinidadian legislation provides useful guidance on approaching this reform. Sections 6(1) and 6(2) of the Trinidad and Tobago Domestic Violence Act addresses the following conduct by abusers in respect of whom protection orders have been granted.

Prohibitions on the respondent from

- Engaging or threatening to engage in conduct which would constitute domestic violence towards the applicant
- Engaging in direct or indirect communication with the applicant (beyond telephone calls as indicated in the current Act)
- Taking possession of, damaging, converting or otherwise dealing with property that the applicant may have an interest in, or is reasonably used by the applicant, as the case may be

- ❖ Approaching the applicant within a specified distance
- ❖ Causing or encouraging another person to engage in conduct referred to in paragraphs
- ❖ Engaging in threatening conduct via technological platforms, including emails and social media

Directs the respondent to:

- ❖ return all property owned by the applicant
- ❖ Pay compensation for costs incurred as a result of the domestic violence including, but not limited to:
  - ➢ Compensation of legal fees
  - ➢ Medical expenses and other treatment that occurs as a result of offence
  - ➢ Moving expenses
  - ➢ Loss of earnings
- ❖ Seek psychological treatment or counselling in order to address underlying causes of engaging in such behaviour, as outlined by the act, from an organization that has been pre-approved by the court.
- ❖ Pay interim monetary relief to the applicant for the benefit of the applicant and any child, where there is no existing order relating to maintenance until such time as an obligation for support is determined, pursuant to any other written law in addition to
- ❖ Relinquish to the police any firearm licence, firearm or other weapon which he may have in his possession or control and which may or may not have been used
- ❖ Ensure that reasonable care is provided in respect of a child or dependant person

Importantly, it also allows an open-ended option for mutual agreement among parties that enables the "inclusion of other terms and conditions as agreed upon by applicant, respondent and court."

2.4 <u>RECOMMENDATION:</u> EMPOWER THE COURT TO MANDATE COUNSELLING OR OTHER APPROPRIATE PSYCHO-SOCIAL INTERVENTION UNDER SECTION 18 OF THE DVA

Domestic violence is not happenstance. It has entrenched psycho-social antecedents, that require response. The DVA recognizes this in section 18 by enabling the Court to recommend counselling, but does not enable it to mandate counselling for either abusers or survivors. We recommend that Parliament amend section 18 to empower the court to mandate counselling or other appropriate interventions that could improve the prospects for behaviour modification or otherwise be in the best interests of those affected.

Section 18 reads: "The Court may, on making an order under this Act, recommend that either or both parties participate in counselling of such nature as the Court may specify." We note, however, that there is sufficient precedent – locally and regionally – for strengthening this provision. Section 14(1)(f) of the CCPA empowers the court to order that a person convicted of a specified offense against a child "receive counselling for a specified period from a fit person, qualified by his knowledge of psychology or psychiatry, appointed by the court."

Similarly, The Trinidad and Tobago Domestic Violence Act (2004) makes several references to the provision of counselling. Section 6 (1) (viii) states that the respondent and/or the applicant may receive professional counselling from any person or agency or programme that is approved in writing by the Minister. Section 6 (3)

(a) goes on to implement measures that should accompany the counselling. It states that where a Protection Order directs counselling (a) the Court must receive written notification from the counsellor of sessions missed with reasonable excuse and (b) the date for a report on counselling and therapy from the counsellor. Also, Section 20 (2) indicates that respondents who refuse or neglect to comply with counselling and the court finds that such refusal is unreasonable, that the respondent is considered to have committed an offence and is liable to pay a find not exceeding three thousand dollars.

The provision of counselling is essential to creating a preventative approach to reducing instances of recidivism of instances of domestic violence. The law should establish a mechanism to assessment applicants and respondents to determine their treatment needs following the offence. By incorporating clauses that make provision of individual psychological assessment and attendance of counselling mandatory, the Domestic Violence Act (2004) will then be contributing to the eradication of this issue altogether.

2.5 Recommendation: Establish Mandatory Response Procedures

The law should mandate law enforcement to respond to all credible reports of domestic violence that involve physical violence to correct existing shortcomings in police response, and transform negative culture surrounding domestic violence that treats it is unimportant, private affairs. An entirely new section should be added to the Domestic Violence Act capture this.

It is our submission that the Act should make it mandatory for a police officer to respond to every complaint or report alleging domestic violence whether or not the person making the complaint or report is the victim. The police officer, also pursuant to the provisions of this section has a duty to complete a domestic violence report which shall form part of the National Domestic Register to be maintained by the Commissioner of Police.

Jamaican law already recognizes the importance of special mandates to respond to reports of abuse in vulnerable settings. Section 7(4) of the *Child Care and Protection Act* mandates authorities to assess, investigate and/or refer all reports of child abuse – regardless of the source – and makes failure to do so an offense under section 7(5). Jamaica, like many other countries, justifies this heightened response protocol on the increased vulnerability of the victims – vulnerabilities that also manifest in the domestic violence context, but are not recognized. Shared vulnerabilities such as: restrictions on movement (either out of fear, due to force, or just sheer inability to do so); restrictions on communication; high financial and social dependency; and the presence of shared dependents (such as children), all coalesce to **disable** victims to physically report, **disempower** them to demand protection, and **dissuade** them from seeking redress. Any law aimed at responding to victims' experiences, must do so in tangible ways. A mandatory response provision helps achieve this.

Dozens of other countries have recognized the value of this, including our Caribbean neighbours. Section 21 of Trinidad and Tobago's *Domestic Violence Act* includes this protective measure:

> *21. (1) A police officer shall respond to every complaint or report alleging domestic violence whether or not the person making the complaint or the report is the victim.*
>
> *(2) It shall be the duty of a police officer responding to a domestic violence complaint to complete a domestic violence report, which shall form part of a National Domestic Violence Register to be maintained by the Commissioner of Police.*
>
> *(3) A domestic violence report shall be in the form prescribed as "Form 7" of the Second Schedule and shall include but not be limited to—*
>
> *(a) The name of the parties;*
>
> *(b) The relationship and sex of the parties;*
>
> *(c) Information relating to the history of domestic violence between the parties;*
>
> *(d) The date and time the complaint was received;*
>
> *(e) The type of the abuse and the weapon used, if any.*

2.6 RECOMMENDATION: CONSTRUE REFERENCES TO "PARENT OR GUARDIAN" WITHIN THE DVA TO UNAMBIGUOUSLY APPLY TO PERSONS WITH PARENTAL RESPONSIBILITY FOR CHILDREN PURSUANT TO AN ORDER UNDER THE CHILD CARE AND PROTECTION ACT, SUCH AS FOSTER PARENTS

2.7 EXPAND THE RANGE OF PERSONS EMPOWERED TO APPLY FOR A PROTECTION ORDER ON BEHALF OF CHILDREN UNDER SECTION 3(2)(B) OF THE DVA

2.7.1 RECOMMENDATION: DIRECTLY EMPOWER GOVERNMENT AGENCY RESPONSIBLE FOR THE WELFARE OF CHILDREN, AND THE CHILDREN'S ADVOCATE TO APPLY FOR A PROTECTION ORDER UNDER SECTION 3(2)(B)

2.7.2 RECOMMENDATION: AMEND SECTION 3(3) OF THE DVA TO ALLOW ANY PERSON, WHETHER OR NOT A MEMBER OF THE HOUSEHOLD, TO APPLY FOR A PROTECTION ORDER ON BEHALF OF A CHILD WITH THE LEAVE OF THE COURT

Section 3(2) should be amended to allow any person to apply with the leave of the court, not "on behalf" of someone entitled to apply, but on behalf of the" victim". We further suggest the explicit incorporation of the government agency with the responsibility for children, the Children's Advocate, and the government entity for the persons with disabilities, The Jamaica Council for Persons with Disabilities. Section 3(4) places an onerous test on any application by other persons.

3 SEXUAL OFFENCES ACT

SCOPE OF OFFENCES AND POWER OF COURT

3.1 RECOMMENDATION: REPEAL MARITAL RAPE PROVISIONS UNDER SECTION 5 OF THE SOA TO ELIMINATE EXEMPTIONS TO THE GENERAL RAPE PROVISIONS BASED ON MARITAL STATUS

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 against her by her husband. The circumstances which limit protection exists where the spouses have separated and lived apart, there exists a separation agreement in writing, proceedings for dissolution of the union have been instituted, there is a protection order from the Court or the husband knows himself to be suffering from a sexually transmitted infection.

Historically, 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 [1992] 1 A.C. 599.** It was held that there was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband; and that, therefore, a husband could be convicted of the rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse. The court made it clear that the provision addressing rape must include non-consensual sex by a husband with his wife.

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. However, in2009, our Sexual Offences Act rescinded this protection and advanced that a married woman could not be raped unless under any of the earlier mentioned limiting circumstances.

Therefore, the current state of the law 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.

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.

3.2 RECOMMENDATION: MAINTAIN THE LEGAL "AGE OF CONSENT" TO SEXUAL INTERCOURSE AS SIXTEEN YEARS OF AGE

We support the submissions made by The Jamaica Youth Advocacy Network towards ensuring that the age of consent to sex, as it currently appears in Section 10 of the Sexual Offences Act, remains at 16 years old. In this vein, we explicitly reject submissions made by the Office of the Children's Advocate and the Tambourine Army as well as other civil society and religious groups which seek to raise the age of consent to 18 years as being unfounded and not in the best interest of the child.

The Convention on the Rights of the Child Committee (General Comment No. 4 Adolescent Health and Development) which oversees the implementation of and adherence to the Convention on the Rights of the Child highlights that the age of consent should recognise the status of people under 18 as rights holders and consider the evolving capacity, age and maturity. It is our belief that the current age of consent adequately considers the Jamaican reality, is consistent with the best interest of the child principle and recognises the capacity, intelligence and capability of the 16-year-old Jamaican child.

Increasing the age of consent will limit the ability of adolescents to access information, services and commodities which are geared towards ensuring the full recognition of their sexual and reproductive health rights. It has the potential to drive young person's engaging in sexual activities, especially those who belong to key populations and who may be most vulnerable because of socio-economic circumstances from seeking essential services. Further, it will criminalise consensual sexual activities between children and has the potential to complicate and overburden the criminal justice system by forcing these children through this faulty system, leaving them disillusioned to the legal process and possibly having long term effects on their development.

The key societal ills which have been raised in alignment with this conversation, namely high rates of teenage pregnancy, high HIV prevalence rates among adolescents, and protecting children from predatory sexual behaviour and sexual exploitation will not be remedied by raising the age of consent. It is essential to acknowledge that there is need for further examination into the root causes of these ills and the social, economic and cultural factors at work before seeking to amend the law in a way that will be regressive and not in the best interest the child.

The age of sexual consent as it appears in section 10 of the Sexual Offences Act, should remain at sixteen (16) years and that efforts must be made to strengthen the processes and systems which exist to prosecute offenders and to educate, empower and protect our children.

There is need for the Act to specify a close in age exception which would have the effect of providing protection to children who are engaging in consensual sexual relationships and will allow the Act to continue to protect underage children from sexual predatory relationships. In light of the low ages of sexual debut and the reality of the evolving capacity of children, the law should make accommodations for healthy sexual experiences amongst adolescents of a similar age that are freely consented to.

3.3 Recommendation: Exempt children who are close in age from prosecution for Sexual Intercourse With a Person Under Sixteen under section 10 of the SOA

We strongly support this recommendation made by the Office of the Children's Advocate. We would only add that parliament should also maintain the "young person's defense," for young persons who would not qualify for a close-in-age exception. The law should maintain the existing defence to be used at trial, and ultimately resolved by the court, which allows a *defense* based on genuine ignorance of the age of a sexual partner when the accused is under 23 years old, and is a first time offender.

3.4 Recommendation: Empower the court to make an order restricting contact of sex offenders with "vulnerable persons" as defined by regulation 2 of the Sexual Offences (Registration of Sex Offender) Regulations

3.5 Recommendation: Expand the definition of Incest under section 7 of the SOA to prohibit same-sex intercourse among family members

Currently, Part 3, Section 7 (1) and (2) outline the offence of incest. In particular, the legislation defines incest as a heterosexual act, where it is 'a male person who willingly has sexual intercourse with another person knowing that the other person is his grandmother, sister, daughter, aunt, niece or granddaughter' or 'a female who willingly has sexual intercourse with another person knowing that the other person is her grandfather, father, brother, son, uncle, nephew, grandson.

This definition is also not gender-neutral. It only speaks to heterosexual interaction. This results in a failure to address offenders who commit incestuous acts with family members of the same sex. In doing so, the law fails to protect all individuals from incestuous acts other than intercourse, including heterosexuals that are victim to homosexual predators and heterosexuals that might be victimized in ways beyond that of sexual intercourse. In

addition, without further guidance, cases where both individuals are adults may become problematic in terms of defining offender vs. victim.

It is recommended that the law be expanded to include same-sex intercourse and further guidelines created in order to determine who should be identified as the victim and the offender. This is consistent with a wealth of academic literature that discusses the importance of gender-neutrality in defining sexual offences and provision of equal protection. This step would make Jamaica a pioneer in taking steps to provide full protection to all citizens.

Guidance might be sought from the 2003 UK Sexual Offences Act Section 27 (1) (2) (3) (4) and (5), which provides a great amount of detail in defining incest. In particular, the section refers to 'familial relationships', where the victim is identified as persons under the age of consent and expands victimization beyond that of heterosexual interaction.

Sex Offender Management

3.6 Recommendation: Mandate the minister to promulgate regulations under section 38(g) of the SOA outlining the circumstances under which sex offenders may be required to participate in rehabilitation schemes

3.7 Recommendation: Limit the inclusion of children on the Sex Offenders Registry under section 30(2) of the SOA to only extreme cases, based on an individual assessment in like manner as determinations made under section 30(3)

3.8 Recommendation: Authorize the inclusion of persons convicted of sexual offences in foreign jurisdictions in the Sex Offender Registry under section 30 of the SOA

3.9 <u>RECOMMENDATION:</u> ESTABLISH GUIDELINES GOVERNING THE DURATION OF THE REGISTRATION AND REPORTING REQUIREMENT OF SEX OFFENDERS TO REPLACE THE PRESENT AUTOMATIC TEN-YEAR DURATION FOR ALL OFFENDERS UNDER SECTION 30(5) OF THE SOA THAT ACCOUNTS FOR, *INTER-ALIA*, SEVERITY OF THE OFFENSE, AND BENEFIT TO THE PUBLIC INTEREST OF REGISTRATION.

Section 30 (4) indicates that all registered sex offenders will be placed on the registry for a minimum period of 10 years. After this period, a Judge in chambers may determine whether or not their reporting requirement should be extended for a period not exceeding 10 years.

However, this legislation does not consider the need to dispense punishment proportionate to the offence and in a way, that prevents reoffending. There is no distinction made between the types of sex offenders and their terms of placement on the registry. In other words, the severity of crime has **LIMITED** influence on the length of time of placement on the sex registry. Across jurisdictions where the registry is used <u>effectively</u>, sex offenders are placed on a registry in accordance with the level of risk they pose to society; low-risk, medium and high-risk offenders. This determination of risk is reflected in the amount of time that they are placed on the registry as well as their individualised requirements. Blanket treatment and punishment of sex offenders is inconsistent with the literature that highlights best practice that is geared towards reducing recidivism. Instead it is recommended, that legislation be remodelled with consideration of the Risk-Need-Responsivity Model (RNR), where risk is assessed, the needs of the offender determined and responses tailored accordingly.

3.10 <u>RECOMMENDATION:</u> ALIGN THE DEFINITION OF A "VULNERABLE PERSON" IN REGULATION 2 OF THE *SEXUAL OFFENCES (REGISTRATION OF SEX OFFENDERS) REGULATIONS* WITH THE DEFINITION OF A "PERSON WITH A DISABILITY" UNDER SECTION 2 OF THE *DISABILITIES ACT*.

3.11 Clarify guidance on determining "legitimate interest" in information on sex offenders where the applicant is not explicitly entitled under Regulations 12(2) and 13 of the *Sexual Offences (Registration of Sex Offenders) Regulations*

3.11.1 <u>Recommendation:</u> Establish clear guidelines for determining "legitimate interest" in Tier 1 information on a sex offender by the Registrar under Regulation 12(2) where the applicant is a society, corporation or association falling outside of the designated entities entitled to that information under Regulation 11(1) (a-f)

This information may be useful to many of the enlisted eligible individuals, such as the JCF or counsellors. However, it may not be useful to all eligible individuals. In particular, providing 11 (g) & 13 (c) *(a person who in light of a proposed association has a legitimate interest)*, with the above list of information may prove to be a violation of an offender's right to privacy and may put them as well as their close associations at risk.

3.11.2 <u>Recommendation:</u> Establish clear guidelines for determining "legitimate interest" in Tier 2 information on a sex offender by the Court under Section 13(3)

4 Offences Against the Person Act

4.1 Strengthen child abandonment provisions under section 28 of the OAPA to capture a broader set of circumstances

4.1.1 <u>Recommendation:</u> Increase the age-limit for children abandoned or exposed whereby life endangered under section 28 of the OAPA from two-years old to reflect the heightened vulnerability of young children

Parliament should consider an increase in the age limit from two to seven years old, at minimum, in order to impose a protection of children over the age of two who are nevertheless dependent on their parents/guardians for protection and provision of basic necessities. While similar provisions within the Caribbean reflect the "under the age of two years" limitation (Offences Against the Person Act of Trinidad, and Barbados, section 21), but other countries have imposed a larger age limit (see table below), and we recognize the intention may be to protect new-borns and infants, we firmly believe that if abandoned, a seven-year-old quite possibly faces near certain risk of substantial injury or death.

4.1.2 <u>Recommendation:</u> Reduce the threshold of harm from "permanent injury" in section 28 of the OAPA to a standard that accounts for serious or substantial injury that may not be permanent.

The use of "permanently injured" limits the scope of this provision and the liability imposed on the offender to, despite evidence of the abandonment, the presence of evidence of a permanent injury as a result of the

abandonment. We suggest the removal of this to encompass situations where the child's harm is not, or may not be, long term but still a direct correlation to their abandonment, such as injury to their mental and emotional health, or where they experienced sexual abuse during the period of their abandonment.

Further, the health of the child should be reflected to include not only physical health and trauma, but any mental or psychological injuries which may arise.

4.1.3 RECOMMENDATION: EXPAND THE FORM OF INJURY TO CHILDREN UNDER SECTION 28 OF THE OAPA FROM SOLELY "INJURY TO HEALTH" TO ACCOUNT FOR OTHER FORMS OF SERIOUS OR SUBSTANTIAL INJURY TO WELL-BEING

"Injury to health" lends the interpretation of being limited to merely physical and noticeable injury to the child's body. We are of the view that Parliament should expand this category of "injury to health" to include the emotional harm and mental effects a child might develop, any sexual abuse, or exploitation or an act of failure to act which presented an imminent risk of serious harm as a result of being abandoned.

4.1.4 RECOMMENDATION: INCREASE THE MAXIMUM PENALTY FOR ABANDONING OR EXPOSING A CHILD WHEREBY LIFE ENDANGERED UNDER SECTION 28 OF THE OAPA TO REFLECT THE SEVERITY OF THE OFFENSE IN HARMONY WITH SIMILAR OFFENCES

When contrasted to child cruelty, under section 9 of the Child Care and Protection Act which imposes a maximum sentence of five years' imprisonment, we believe that the sentencing for this offence falls short and should be revised to reflect similar. Further, section 21 of the OAPA of Trinidad and the Criminal Law (Offences) Act of Guyana (section 94) impose a minimum sentence of five years for abandoning or exposing child whereby life endangered, whereas the Montserrat Penal Code imposes a minimum of seven years for the same. We recommended an amendment of the minimum sentencing for imprisonment which is aligned to other leading jurisdictions on the matter.

4.2 RECOMMENDATION: INCREASE THE AGE BELOW WHICH A CHILD'S CONSENT TO ACTION AMOUNTING TO KIDNAPPING CANNOT BE CONSIDERED INDEPENDENT OF HIS/HER PARENT'S WILL UNDER SECTION 70(3) OF THE OAPA BY ALIGNING IT WITH THE LEGAL "AGE OF CONSENT" TO SEXUAL ACTIVITY

Children over the age of fourteen, if kidnapped would fall under the general 70(1) provision of kidnapping. The changing of section 70(3) from fourteen to sixteen would account for children who may consent to living with someone else, but because they fall outside of the scope of 70(3), it would not be considered against the will of their parents. Parliament should consider reconciling the age "under fourteen years" in section 70(3) with the legal "age of consent". This is to protect against a situation where a 14-15 wilfully chooses to live with someone else (despite his parents will) but nevertheless cannot consent to sexual activity. By amending the "age of

consent" to the "will of his parent or guardian", the law seeks to impose a higher protection on children 16 and under being exposed to sexual activity and abuse.

4.3 Recommendation: Redefine "Aggravated Assault Against Women and Children" under section 40 of the OAPA to include assaults against boys 14-17 years old, as is the case for assaults against girls

Section 40 of the OAPA explicitly excludes boys fourteen years and older from protection against Aggravated Assault Against Women and Children. The law specially punished assaults against **all girls** zero to 17, boys zero to **thirteen**, and **all women**. A 14-year boy who is brutalized by a 45-year old man, is not protected. The law should be amended to specially punish offenses against all children by any **adult**.

This gendered age distinction in this provision should be removed. It serves no legitimate purpose, does not provide equal protection to all children as it was intended to do, and does not serve the best interest of all child. Regardless of gender, when a child is assaulted by an adult, the crime ought to be aggravating due to the clear asymmetries in power between victim and perpetrator, and greater potential for the child to suffer serious injury. A 14-year old boy suffers no less than a 17-year old girl. A child's gender does not diminish the severity of their abuse. The law ought never endorse that position.

Further, the recommendation of the Office of the Children's Advocate to increase the penalty from Two Thousand Dollars ($2000) is sensible. The present sentence is hardly commensurate to the severity of the offense.

The use of "any person" lends to an open-ended interpretation of the who the perpetrators of this offence are or can be. We believe this provision ought not to contemplate a child committing aggravated assault on a woman or other child, or an elderly person committing aggravated assault on woman, and the use of "any person" may lend such contemplations by the courts. We recommend that offence capture, simply, "any adult" who commits this offence against "any woman or child".

"consent" to the "will of his parent or guardian". The law seeks to impose a higher protection on children 14 and under being exposed to sexual activity and abuse.

4.3 RECOMMENDATIONS TO REFORM "AGGRAVATED ASSAULT AGAINST WOMEN AND CHILDREN" UNDER SECTION 40 OF THE OAPA TO INCLUDE ASSAULTS AGAINST BOYS 14-17 YEARS OLD, AND THE CASE FOR ASSAULTS AGAINST GIRLS

Section 40 of the OAPA explicitly excludes boys fourteen years and older from protection against Aggravated Assault Against Women and Children. The law [illegible] aggravated assaults against all girls from 14 to [illegible] to thirteen, [illegible]. If a 14-year-old boy child is [illegible] by a 40-year-old man, it is not covered. The law should be amended to specially punish all crimes against all children by any adult.

This gendered age distinction in this provision should be removed. It serves no legitimate purpose, does not provide equal protection to all children as it was intended to do, and does not serve the best interest of all child. Regardless of gender, when a child is assaulted by an adult, the crime ought to be aggravating due to the clear [illegible] in power between victim and perpetrator, and greater potential for the child to suffer serious injury. A 14-year old boy [illegible] no less than a 17-year old girl. A child's gender does not diminish the severity of their abuse. The law ought to [illegible] this [illegible].

Further, the recommendation of the Office of the Children's Advocate to increase the penalty from Two Thousand Dollars ($2000) is sensible. The present sentence is hardly commensurate to the gravity of the offence.

The use of "any person" leads to an open-ended interpretation of the who the perpetrators of the offence are or can be. We believe this provision ought not to contemplate a child committing aggravated assault on a woman or other child, or an elderly person committing aggravated assault on women, and the use of "any person" may lend such contemplation by the courts. We recommend that offence contains words, "any adult who commits the offence against any woman or child".