



Submission to the Joint Select Committee of Parliament

On the revision of the:

Sexual Offences Act

Domestic Violence Act

Offences Against the Person Act

Child Care and Protection Act

**With special emphasis on Vulnerable Persons
(Women, Children, the Elderly and Persons with Disabilities)**

PREPARED & SUBMITTED BY THE OFFICE OF THE CHILDREN'S ADVOCATE

SEPTEMBER 2014

Table of Contents

| | |
|---|----|
| <u>Introduction</u> | 1 |
| <u>Sexual Offences Act</u> | 2 |
| <u>Domestic Violence Act</u> | 13 |
| <u>Offences Against The Person Act</u> | 17 |
| <u>Child Care and Protection Act</u> | 22 |
| <u>Appendices</u> | |
| • Appendix 1..... | 41 |
| • Appendix 2..... | 45 |
| • Appendix 3..... | 47 |
| • Appendix 4..... | 49 |

Introduction

The true test of the effectiveness of any legislation is the extent of its applicability in practice. It is against this background that Parliament has appointed a Joint Select Committee to review certain Acts, with special emphasis on vulnerable persons such as women, children, the elderly and persons with disabilities.

The Office of the Children's Advocate ("OCA") has as its primary focus issues which may or actually, impact upon children and therefore welcomes the invitation to make submissions to assist in the review of the following Acts:

- *Sexual Offences Act*
- *Domestic Violence Act*
- *Offences Against the Person Act*
- *Child Care and Protection Act*

The OCA was established in 2006 under the *Child Care and Protection Act, 2004* ("CCPA") and is the Commission of Parliament mandated to enforce, protect and promote the rights and best interests of all children in Jamaica. The work of the OCA is guided by the functions assigned to the Children's Advocate in Paragraph 11 of the First Schedule to the CCPA which includes, but is not limited to:

- (i) keeping under review the adequacy and effectiveness of laws and practices relating to the rights and best interests of children;
- (ii) giving advice and making recommendations to Parliament, any Minister or relevant authority, on matters concerning the rights or best interests of children.

These paragraphs specifically ground the authority of the Children's Advocate to contribute in this manner and the OCA uses this medium to make its recommendations.

Sexual Offences Act

Section 41 of the *Sexual Offences Act* (hereinafter referred to as the "SOA") has provided an in-built mechanism through which the SOA is to be reviewed five (5) years after coming into effect. Based upon our review of the SOA, we are of the view that it is a good example of legislation which provides an essential shield for our most vulnerable. There are a few key areas, however, which if addressed will serve to improve the overall efficacy of the statute. These can be outlined as follows:

Recommendation 1

Section 10 should be amended to make the legal age of consent eighteen (18) years and not sixteen (16) years as is now the case. .

Justification

1. The existing reality in Jamaica is one which posits a number of decisions that children are not considered suitable to make on their own and often times results in confusion among members of the public and among children themselves. Perhaps the most glaring example of this exists in the disparity between the age of consent (viz. 16 years) and the age of majority (viz. 18 years). It is at 18 years that a person is no longer legally considered a child; both under Jamaican law and under the tenets of the United Nations Convention on the Rights of the Child – a convention to which Jamaica is a State Party. Having attained majority, certain new entitlements flow. Some of these include the ability to legally consume alcohol, to legally purchase tobacco products, the right to vote and the right to be registered as an owner of property.

It may be credibly argued that an anomaly is created when children who are 16 years are not considered intellectually or otherwise mature enough to make certain independent decisions such as who should govern their country for a five year term, yet they are given the legal authority to engage in sexual activity which usually is accompanied by several realities which are best dealt with during adulthood. The decision to vote is an

important one but is arguably one that is unlikely to physically (and/or psychologically) impact upon a child in a very personal and direct way. In contrast, is that this same 16 year old is empowered under Jamaican law to make a decision that could have a potentially life-long personal effect, such as if they were to contract any serious communicable sexually transmitted disease(s) or become pregnant; pregnancy at an early age, often bears its own harsh consequences for both the child who is now a mother, as well as the product of the pregnancy. This contradiction is confusing our children and should be rectified.

2. The OCA is fully cognizant of the anatomical changes in a child's body which biologically occur at or about 16 years of age. Physical and hormonal maturity, however, do not equate to psychological, social or emotional maturity and as such the law should protect ALL children and not just those 15 years and younger. The OCA has been repeatedly faced with parents who lament that their child is sexually active, at times with an adult who appears not to have the child's best interest at heart, but that they (the parents) are precluded from taking any legal action against this individual because the law protects the individual. The law cannot be a substitute for good parenting, but it is our submission that it should at least provide an avenue through which misguided children (i.e. persons under 18 years) can be legally dissuaded from participating in activities that they are not properly able to negotiate given their incomplete development.
3. A direct corollary to the previous argument concerns the rate at which the human brain develops. Modern neuroscience research has revealed that the human brain does not fully mature during adolescence. In fact, the studies conclude that the pre-frontal cortex of the brain which is that section responsible for reasoning, balanced judgment and effective decision making, is not mature until a person grows out of adolescence and

into their mid-twenties.¹ This scientific fact should answer the often asked question of “why on earth does a teenager behave in this way?” Simply put, it is because their brains are not yet physically designed, or equipped, to perform any complex assessment of situations and future consequences of certain actions. On this basis, therefore, even though the evidence does not indicate that an 18 year old fully possesses these capabilities, it is our position that having had two (2) additional years within which to experience further maturation within the brain, this age is at least more consistent with protecting a child from negative exposure due to capricious decisions and serves as a good basis for increasing the age of consent from 16 years.

4. Precedent exists in other jurisdictions which boast a uniformed age of consent for sexual intercourse and the age of majority. These include Brazil, Israel, California, Arizona and Turkey.
5. Lessons can also be learnt from Canada whose Legislature took a decision in 2008 to increase the age of consent from 14 years as it had been from 1890, to 16 years; this step aptly solidifies the fact that even though different jurisdictions pattern positions that exist in others (such as is the situation with the age of consent being 16 years in Jamaica), it is perfectly acceptable, and even expected, that domestic government(s) should pursue and enact laws which are best able to address their domestic realities. On May 1, 2008 by virtue of *The Tackling Violent Crime Act* the Canadian Parliament amended its laws and increased the age of consent. This move was precipitated by the case of Dale Eric Beckham. Beckham was a 31 year old male who had travelled from his home in Texas (USA) to Canada to meet with a 14-year-old boy whom he had communicated with on the internet. Beckham engaged in sexual activity with the young boy and committed the act of buggery upon him. Upon Beckham’s arrest he could only be charged with the relatively minor offence of Possession of Child Pornography because the young boy,

¹ Joe S. McIlhaney, Jr., MD & Freda McKissic Bush, MD, *HOOKED: New Science on How Casual Sex is Affecting our Children*. Northfield Publishing, Chicago, Illinois (2008)

who reportedly suffered from suicidal tendencies and social anxiety disorder, insisted that he had consented to the sexual activity. Additionally, because there was no relationship of authority or dependency, there were no other alternatives open to law enforcement.

6. Another rationale for increasing the age of consent is to help teenagers feel less pressured to have sex at a younger age as it provides an effective negotiation tool for young people who may be more inclined to say no to early sexual activity simply because the law has set the tone by making it illegal.

Recommendation 2

Section 10 should be amended to include 'close in age group' exception(s).

Justification

1. The OCA has long registered its concern about situations in which children are criminalized for participating in what they consider 'consensual' sexual relations with another child who is within their age group. Even though we do not resile from our position that effective parenting and supervision must be practiced and that children should be taught the virtues of self-control and abstinence, we recognize that there are occasions which may occur that call for a more measured approach. A good example is provided by a male student who is in Grade 11 who has a girlfriend in Grade 10 and in experimenting they engage in sexual activity with each other. In this instance, both are below the age of 16 years and under the present law, would both be liable to be criminally charged for having sex with a person below 16 years. It is our considered view that the intention of the legislature at the time of the passage of the *Sexual Offences Act* could not properly have been to criminalize children who may find themselves in situations such as these, but rather, that the objective was really to have used the law as a means of protecting children from sexual predators who may prey upon them for their own gratification and/or to address situations in which a relationship is abusive or there

are aggravated circumstances. The inclusion of appropriately crafted *close-in-age group* exception(s) would effectively address this mischief.

2. The concept of a *close-in-age group* exception contemplates clearly defined instances in which statute will identify age groups that will be exempt from prosecution if a certain activity occurs within that grouping. It is typical for the statute which creates such an exception to stipulate firm conditions which must be complied with if the children in issue are to benefit from the exemption. This approach takes into consideration the nature of a child's biological and physical development and the probability of sexual experimentation. It also gives credence to the notion that the harm done to children engaged in sexual intercourse, is likely to be much greater if the sexual activity is with a person who is in a position of authority over the child, or who is significantly older than the child.

3. Canada is one such jurisdiction that has included *close-in-age* exceptions in its law. Under the Canadian model, even though the general age of consent is 16 years, its legislation is constructed to allow for the prosecution of older predators who engage in sexual activity with children who are below the general age of consent, while avoiding the prosecution of younger teenagers in 'normal' relationships. In the absence of 'close in age group exceptions' sexual activity, which ranges from sexual touching and kissing to sexual intercourse, with a person under the age of 16 years old is illegal. The Canadian legislation takes the protection of children a step further, by creating a second age of consent which is 18 years where the sexual activity is deemed to exploit the young person. Sexual activity is exploitative when it occurs in a relationship of authority, trust or dependency (such as with a teacher, coach or babysitter), and also includes acts of prostitution and/or elements of pornography. Other factors considered in the assessment of whether the relationship is exploitative, include but are not limited to:

- (i) The general nature and circumstances of the relationship
- (ii) The age difference between the young person and their partner
- (iii) How the relationship developed (quickly, secretly, or over the internet)
- (iv) How the partner may have controlled or influenced the young person.

The *close-in-age group* exceptions in that jurisdiction, along with the prerequisites for qualification for any exemption from prosecution, are as follows:-

- (i) 16 and 17 year olds are able to consent **EXCEPT** when their partner is in a position of authority.
- (ii) 14-15 year old minors are able to consent to sexual intercourse and thus prosecution is avoided if the following conditions are met:
 - (a) the partner who is close in age is not more than 5 years older,
 - (b) the partner is not in a position of authority
 - (c) there is no evidence of any exploitative factors within the relationship
 - (d) the partner is neither married nor in a pre-existing common law relationship.
- (iii) 12 - 13 year old minors can consent to sexual intercourse where the following conditions are met:
 - (a) the close-in-age partner is not more than two (2) years older
 - (b) the partner is not in a position of authority
 - (c) there is no evidence of any exploitative factors within the relationship.

The Canadian age groupings and conditions as outlined herein, have been included as an illustration of how the model works, and not so much as a blue print as to how Jamaica is to proceed. It would be for Jamaica to establish its own age bands and its own pre-conditions in accordance with our own Jamaican realities. As such, therefore, the

OCA would seek to depart from the 12 – 13 age band which Canada has included as in our view that is far too low for any consideration within a proposed model for Jamaica as many Jamaicans have already decried 16 years as being too young, let alone 12 – 13 years. Additionally, if it is that this recommendation were to be adopted by this Joint Select Committee of the honourable Houses, the OCA fervently urges the Parliament to carefully craft the objects of the statute so that it is abundantly clear that the purpose of these close in age group exceptions, is not to promote sexual activity among these groups, but to offer those that somehow find themselves in these situations, an alternative to criminal prosecution.

4. Turkey is another jurisdiction which has adopted the *close-in-age* exceptions. As mentioned previously in this submission, Turkish law has set both the age of majority and the age of consent at 18 years. However, Article 104 of the *Turkish Penal Code* provides that sexual intercourse with minors aged 15, 16 and 17 years can only be prosecuted where a complaint has been lodged; in other words, there is no strict statutory liability even though these persons are below the age of consent. The *Code* goes on to stipulate, however, that if the offender is a person who is forbidden by law to marry the child or is a person who is obliged to take care of the child due to adoption or foster care, then the prosecution does not need to be triggered by any complaint even where the minor is 15, 16 or 17 years of age. The existence of these factors are seen as aggravating circumstances and if there is a conviction, any punishment meted out takes this into account.
5. Apart from Canada and Turkey, much precedence exists for the use of close-in-age exceptions in other jurisdictions. Some of these are Belgium, France, the Netherlands, New Zealand, Australia and Hong Kong.

6. As mentioned previously, the OCA would recommend that Jamaica create its own pre-conditions and processes suited for the Jamaican context if any *close in age group* exception(s) is to be successfully implemented. It is relevant to note that within the Jamaican context, a "sexual diversion project" has already been tested within the criminal justice sector. Under the pilot which operates within the Corporate Area, it is proposed that where two children who are below 16 years engage in 'consensual' sexual activity, and one of them is prosecuted² and placed before the Court by the police, once certain pre-conditions are met, the child and his 'partner' are referred by the Court to the Women's Centre for counselling for a three (3) month period. Under the programme, the counselling is mandatory and the Women's Centre is obliged to prepare a full report for the purposes of the Court at the end of the period, outlining the level of the participation by both parties as well as how receptive they were to the contents of the sessions, among other things. If the Court is satisfied that the sessions were satisfactorily conducted by the Women's Centre and successfully completed by the children, then the child who was charged would not be made to face trial nor would the child be pleaded. In this instance the Office of the Director of Public Prosecutions would be asked to consider entering a *nolle prosequi* in the matter, thus effectively bringing the criminal proceedings to an end without exposing the child who stood charged for a criminal offence before the Court, to a conviction.

The prerequisites that would have to be satisfied before a child is considered eligible to participate in this regime, as well as some of the conditions attached to the programme include:-

- (i) Both parties would have to be in a 'relationship' with each other and the sexual intercourse occur within that context;
- (ii) The party charged for the offence could not be sexually involved with another partner other than the subject of the 'offence';

² It is the boy who is usually prosecuted in instances such as these. The police very rarely seek to pursue criminal proceedings against the girl, even though this can be done as a matter of law.

- (iii) The party charged cannot benefit from this alternative to the traditional criminal justice system more than once;
- (iv) The subject of the 'offence' (i.e. the virtual complainant) would have to agree to this course being adopted.

This pilot and its attendant procedure(s) could be bolstered by corresponding legislative provisions and be further refined and extended to all children who satisfied these and any other prerequisites as contemplated by the law. The OCA recommends that this be done.

Recommendation 3

A new section ought to be included into the law (viz. the SOA) to expand the level of protection to children from those who use digital technology and other means to facilitate inappropriate contact with a child.

Justification

1. The offence of Sexual Grooming as created under *Section 9* of the *Act*, requires that the offender must have met or travelled with the intention to meet the child on at least two occasions, before the offence is proved. While no issue is taken with this provision in its current formulation, the OCA's recommendation is that a new offence should be created to incorporate circumstances in which there is no intention of ever meeting the child in person, but inappropriate communications that have sexual undertones are taking place between an adult and a person under the age of 18 years.
2. The OCA is aware of many situations like those adverted to at (1) that have arisen and the alleged perpetrator cannot be prosecuted because there is no corresponding offence under the law. The typical scenario occurs when the adult sends electronic pictures or videos of themselves to children. Another manifestation occurs where the adult has sexually suggestive and/or explicit conversations with the child, but do not in fact wish (or even attempt) to meet the child. Usually social media is used to aid in these matters –

Facebook, Skype, voice notes via smart phones and what has now been termed “sexting” are frequent options.

3. The OCA contends that despite the absence of any physical contact, or the intention to have any such contact, the damage is already done due to the sexually inappropriate content that the child is exposed to, sometimes for long periods at a time. The probable psychological effect on the child coupled with the child’s lack of sufficient maturity to properly handle situations of this nature,³ is enough justification for addressing occurrences such as these.

Recommendation 4

A new provision should be included to capture situations in which an individual who is infected with a sexually transmitted disease, intentionally and maliciously has sexual intercourse with a child (or any other individual).

Justification

1. It is a well-known myth in some quarters that if a man has a sexually transmitted disease, he stands a good chance of being cured of his affliction if he has sexual intercourse with a virgin. There is a greater probability of finding a virgin within the child population than within the adult population; in fact, some may argue that the younger the child, the more likely that he or she will fit the bill. An inclusion of a provision of this nature would accord legislative recognition to this aspect of our culture and should serve to increase the level of protection to children who may be prime targets for persons who wish to expose them in this way.

³ While the child may not be at risk of engaging in actual physical contact with this particular perpetrator, there is very disturbing *virtual* contact that occurs. This has the potential of normalizing this type of behaviour from the perspective of the child who is so exposed, and thus the consequential effect of putting the child more at risk of engaging in sexual activity with another person.

2. There should of course be a graver penalty if it can be proved that the disease has been passed on to a child by a perpetrator in these circumstances.

3. *Section 22 of the Child Care and Protection Act* is already partially akin to this school of thought as in that provision it speaks to a person being charged or convicted of committing certain sexual acts against a child, being required to submit to medical examination and testing for the purpose of ascertaining whether such person is the carrier of a communicable disease. An expansion of this concept in the *Sexual Offences Act*, as proposed, would therefore be consistent and would increase the level of protection to this vulnerable group.

Domestic Violence Act

The *Domestic Violence Act (DVA)* is overall a satisfactory piece of legislation which aims to protect the rights of, and provide remedies for victims of domestic violence. The *Act* was last amended in 2004, a decade ago and therefore this proposed review is well timed. With the increasing number of reported cases of domestic violence and incidents of deaths in the media arising from domestic violence against vulnerable groups, we are of the opinion that the following changes are necessary:

Recommendation 1

A new section should be incorporated into the *DVA* making it mandatory for police officers to investigate all cases where there are reasonable grounds to suspect that a person has suffered, or is in imminent danger of suffering, physical injury at the hands of his or her spouse.

Justification

1. Police reports are replete with instances where domestic abuse and intimate partner violence, escalate into very serious wounding cases and/or murder. This should underscore the seriousness with which this issue should be treated and not be merely regarded as “man and woman story” as is the frequent label attached to instances such as these within some quarters of Jamaica.
2. There is precedent in other Caribbean Commonwealth jurisdictions for this approach. Legislative provisions in Belize and Trinidad & Tobago both speak to **Police Powers of Entry and Arrest** in their respective *Domestic Violence Act(s)* which are appended to this submission in Appendix 1. The law in these jurisdictions provide, *inter alia*, that:

“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.”

The provision(s) go on to detail the duties of the police officer which arise as a result of him having so responded to such a report. In both of these jurisdictions, these duties

include the need to complete a domestic violence report that will form a part of a National Domestic Violence Register that is maintained by the Commissioner of Police. Belize goes further by providing that in addition to this duty, the police are required to send a copy of the report to each of the Resident Magistrate's Court(s) and Family Court(s) having jurisdiction over the district in which the incident occurred. This undoubtedly underscores the seriousness with which the issue of domestic violence is treated.

Recommendation 2

The concept of domestic violence ought to be expanded to include instances of "*financial abuse*" and the DVA be accordingly amended to address relevant situations.

Justification

1. Financial abuse, which is also referred to as "economic abuse" in some jurisdictions, has been accepted as a form of abuse which is very manipulative in nature. The *Domestic Violence Act* of Trinidad & Tobago⁴ provides a useful definition of financial abuse; it defines it as,

"A pattern of behaviour of any 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."

Belize also provides an example of a jurisdiction within the region, in which financial abuse is included as a form of domestic abuse in its *Domestic Violence Act*. The relevant portions of that legislation are appended to this submission in Appendix 3.

2. In Jamaica, when one thinks of domestic violence it is normally limited to mere physical acts of violence. However, this view overshadows the existence of other forms of domestic abuse. Financial abuse, despite any formal recognition of this concept, is very

⁴ The relevant section of the *Domestic Violence Act* of Trinidad & Tobago is appended to this submission in Appendix 2

prevalent in Jamaica. There are many examples of women, in particular, who are in abusive situations but are induced to remain silent about both physical and sexual violence against themselves and their children, because they are financially dependent on the man in question. Financial (or economic) abuse is also said to occur where the spouse is exposed to mental or psychological hardship because his or her partner deliberately withholds access to financial benefits that would usually be forthcoming in a 'normal' relationship.

Recommendation 3

Section 3(2)(b) of the *DVA* is to be amended to include the Children's Advocate as one of the persons who can make an application for a protection or occupation order where the alleged conduct is used or threatened against a child.

Justification

1. This provision gives a variety of individuals the ability to make such an application to the Court. However, since the *DVA* was enacted in 1996 and pre-dates the establishment of the Office of the Children's Advocate, the Children's Advocate was omitted as one of these individuals. The basis for making this recommendation is in a bid to make the law consistent.

Recommendation 4

Section 5 ought to be amended so that the penalty for breaching a protection order is increased from a maximum fine of \$10,000 or 6 months imprisonment.

Justification

1. A protection order is a remedy granted by a court when very extreme and serious bases are accepted by the court as posing a threat to an applicant. It therefore follows, that if a respondent against whom such an order is made breaches it, then equally serious consequences should flow.

2. A penalty in circumstances such as these should be meant to function as a deterrent. Ten Thousand Dollars (\$10,000) hardly functions as a deterrent due to the erosion that has taken place in relation to the value of the Jamaican dollar.

Recommendation 5

Consideration could be given to removing the reference to “mental injury” in *Section 8(1)(a)* and replacing it with the words “psychological injury”.

Justification

1. This recommendation is made on the basis that psychological injury is broad enough to include both mental injury and emotional injury and would therefore cover more instances in which violence manifests in the home.

Offences Against The Person Act

Having reviewed the *Offences Against the Person Act* (hereafter referred to as "the OAPA") the following recommendations are being proposed:

Recommendation 1

Where an individual is accused of murdering a pregnant woman, he/she ought to be prosecuted for the death of the foetus as well.

Justification

1. Life begins at the point of conception and as such a foetus represents another life that if lost, due to the deliberate action of another who intends to cause death or grievous bodily harm, ought to be punishable.
2. This is no longer a theoretical argument within the Jamaican context as the country has had very painful examples in its recent past in which pregnant women have been murdered and the foetus expires as a result of this. The law needs to provide a commensurate response to such heinous acts.
3. If this offence is created, it also follows that one who is convicted in circumstances such as these would be exposed to a greater penalty than that which murder simpliciter would attract.

Recommendation 2

It is proposed that a new offence be created to address instances in which an individual (through whatever means) habitually stalks, waylays or persistently besets upon another person and these advances are unwelcome or threatening.

Justification

1. The *Domestic Violence Act* addresses issues of this nature when the offending behaviour occurs between parties who are in a spousal relationship.⁵ There are instances however, when an individual is targeted in this way by an individual with whom they have never had any relationship. Presently, there is no existing recourse within the criminal law to provide relief to someone who is exposed in this way. This is seen as a lacuna in the law's protective mechanism as it is reasonably foreseeable that if the response of the target is not what the person pursuing desires it to be, depending on the "pursuer's" temperament, the threat or use of physical violence or some other harm is quite probable.

2. The advances made in technology have increased the accessibility to an individual's personal space. With the wide availability and the correspondingly wide use of mobile smart phones, social media sites such as Facebook and Twitter, as well as with increasing access to the internet, there are a variety of means open to someone to contact the target of their attention/affection. This makes it easier for a 'stalker' to pose a potential threat to another individual and as such, the OAPA needs to respond to this reality.

3. Guidance may be gleaned from *Section 4* of the *Domestic Violence Act* which outlines a number of situations which would warrant the court's intervention. Some of these include prohibiting the respondent:
 - (i) from entering or remaining in any area within the vicinity of the household residence of the prescribed person;
 - (ii) from entering the place of work or education of the prescribed person;

⁵ Section 4 of the *DVA* outlines activities of this nature which can form the basis for a Court to grant a *protection order* to an applicant who satisfactorily makes out his/her case.

- (iii) from molesting the prescribed person by watching or besetting any premises in which he/she is likely to be; following or waylaying him/her in any place; making persistent phone calls to him/her; and using abusive language to or behaving towards him/her in any other manner which is of such nature and degree as to cause annoyance to, or result in ill-treatment of him/her.

This is mentioned merely as a guide and would need to be suitably expanded to make provision for the technological realities that exist within today's climate; it would also be prudent if whatever provision is crafted, is sufficiently futuristic so that the law will be able to maintain its relevance with the effluxion of time.

Recommendation 3

Cyber-bullying is not presently a concept that is covered by any legislation. It is here recommended that the OAPA is the most suitable piece of legislation to address this phenomenon and that it should be amended accordingly.

Justification

1. The effects of cyber-bullying on children are quite troubling and severe. While it is accepted that different children react differently, for a large number of them that are exposed to cyber-bullying, it has an adverse effect on their self-esteem which has the potential of triggering a variety of consequential responses. The United States of America is one jurisdiction which has provided examples of some of the results of cyber-bullying over the years. In the case of *United States vs. Lori Drew*, Drew was convicted at first instance under the *Computer Fraud and Abuse Act* for bullying Megan Taylor Meier through the social networking website MySpace.⁶ Meier was a thirteen (13) year old girl who suffered from attention deficit disorder, depression and had self-esteem issues related to her weight. As a result of unkind comments made via the internet, Meier

⁶ A useful summary of this case and the relevant background is appended to this submission in Appendix 4. Even though the first instance decision was reversed on appeal, the case provides a good illustration of the effect(s) that cyber-bullying can have on a child and the law's corresponding response.

indicated by the same means that comments like that would “make a girl kill herself”. Twenty (20) minutes later, Meier was found in her bedroom closet where she had hanged herself with a belt. While Jamaica has not yet registered any case quite so extreme, the information technology sector in Jamaica has experienced significant growth and the levels of accessibility to the use of the internet and instant messaging services on smart phones continues to increase thus opening this avenue for abuse by persons who have ill-intent. The trends that have been noted, make it reasonable to project that access in this regard will only continue to increase thus heightening the exposure to this danger. The inclusion of cyber-bullying provisions within the OAPA at this juncture, would therefore present Jamaica with a good opportunity to be proactive in its legislative agenda.

Recommendation 4

The *Act* needs to be amended to increase the penalty of Two Thousand Dollars (\$2000) in *Section 40*.

Justification

1. *Section 40* deals with aggravated assaults on women and children. In terms of protecting the vulnerable in society, this offence is one which goes to the core of this objective. Consequent upon this, it is submitted that the penalty ought to be one which is substantive enough to have the gravity of this offence underscored by the legislation. A maximum fine of Two Thousand Dollars (\$2000) is more commensurate with a minor offence and not with an offence of this nature.

Recommendation 5

- A. The penalty of a maximum period of imprisonment of seven (7) years which is stipulated in *Section 69* of the OAPA is considered to be too low and as such the legislation ought to be examined with a view of amending the section in this regard.

- B. Consideration should also be given to removing the reference to a “child under the age of fourteen years” and simply having the section refer to all children.

Justification

1. Section 69 deals with the felony of Child Stealing which essentially occurs when someone unlawfully entices away or detains a child below the age of fourteen (14) years with the intent to deprive any parent, guardian or other person having the lawful care or charge of such child. It is here submitted that within the context of the Jamaican reality wherein there has been a sharp increase in the numbers of children who are reported as being missing each week, the legislation must accord a more serious response through its provision(s). A maximum sentence of seven (7) years appears to be way to low as not only should someone convicted of such an offence be appropriately punished, but the trauma which the child victim would be forced to undergo must be proportionately balanced through the sentencing options.
2. The offence of Kidnapping which is dealt with in Section 70 of the *OAPA* provides that if one is convicted of this offence, he is exposed to a maximum sentence of life imprisonment. This fact underscores the huge disparity which is created within the statute if the seven (7) years were to be maintained under Section 69.
3. It is reasonably foreseeable that the trauma and the psychological impact on a child victim of Child Stealing would be great. This holds true for children who are above 14 years as well. As such, it is submitted that the cap of 14 years ought properly to be removed from this section in a bid to bolster the level of protection available to all children.

Child Care and Protection Act

The *Child Care and Protection Act (CCPA)* became effective on March 25, 2004 by virtue of the Governor General's assent. This legislation had as its main objective the need to strengthen the care and protection of children by introducing new standards for their treatment and welfare. It is a comprehensive statute which addresses issues pertaining to the rights and best interest of all children in Jamaica and is a direct legislative response by the Jamaican government to its obligations under the *United Nations Convention on the Rights of the Child (UNCRC)*. The OCA maintains that the *CCPA* is overwhelming good law which is revolutionary in its provisions and illustrates a progressive step within the child protection arena. The OCA does not agree that there is any need for any comprehensive overhaul of the *CCPA*; what is needed, is for its provisions to be adhered to and enforced, where relevant. Having had an intimate working knowledge of the *CCPA* since its inception, however, the OCA is ideally placed to note the following observations and to offer guidance in this area which should further promote the efficacy of the *CCPA* and ultimately redound to the benefit of the children, whom it was meant to serve.

Recommendation 1

Section 2(2)(b) which falls within the Interpretation Section of the *CCPA* should be expanded to include the mental development and capacity of the child.

Justification

1. This section outlines some of the key factors which ought to be considered when seeking to determine what amounts to the best interest of a child. The case for including a child's level of mental development and capacity is an important one as in practice, decisions are sometimes made with regard to the calendar age of the child in question, without sufficient consideration to any peculiarities that he/she may have if there is any degree of mental disability. If adequate protection is to be given to this cohort of children, who are arguably the most vulnerable of the vulnerable, there is good basis for including this as a specific factor which is to be considered.

Recommendation 2

Section 8 of the CCPA which outlines the circumstances in which a child is considered to be in need of care and protection ought to be expanded to specifically capture children who live in homes where there is intimate partner violence (domestic violence) which manifests itself in a physical manner.

Justification

1. Section 8 outlines a number of factors which help to determine if a child is in a vulnerable situation and is therefore in need of, (or could very probably be in need of), someone suitable to care for him/her and to offer the requisite degree of protection to minimize his/her exposure to harm. Where a child lives in a home where there is spousal physical abuse, it increases his/her exposure to harm in various forms – physically, emotionally and mental distress. If the law is to effectively safe-guard children from being in unstable and volatile environments, this inclusion is necessary.
2. By virtue of the *Social Learning Theory*,⁷ the view has been posited that children who are exposed to models of violent behaviour, themselves learn to be violent because over time, the behaviour is normalized and there is a sub-conscious acceptance of it. Studies in fact show, that children see domestic violence as more acceptable when it is being perpetrated by the parent of the same gender. Boys who are exposed, are more likely to do the same to their partners when they enter into intimate relations of their own, while girls who are exposed, are more likely to become victims of violence when they commence dating relations with a male partner. These studies cement the view that “children live what they learn” and that the harm done in circumstances such as these, results in producing individuals who perceive violence as an appropriate method of resolving difficult situations. This kind of teaching, does not accord with the best interest of the child being served.

⁷ The origin of this theory is linked to Albert Bandura who is a Canadian psychologist. The essence of the *social learning theory* is that people learn from one another via observation, imitation and modeling and it has great emphasis on an individual’s tendency to use attention, memory and motivation to inform his own behaviour.

3. Neuroscience has shown that children who are exposed to violence experience negative brain development. These scientists posit, that even where children are merely just aware of the violence, it is just as harmful as direct exposure. When compared to their peers, children who are so exposed are more likely to experience:-

- Behavioural, social and emotional problems;
- Cognitive and attitudinal problems
- Long term relationship problems

The younger the child, the more severe the impact on the brain as the area of the brain that is most affected is that associated with behaviour management and control, which directly affects the central nervous system.⁸ This medical perspective, provides very clear support for the position that any child in a home in which domestic violence is apparent, is a child who is existing in an abusive environment and not having his/her best interests promoted.

4. The possibility of a child in such a home suffering shield injuries is also another concern which should provide an additional basis that warrants the inclusion of children who live in homes in which domestic violence exists, as being in need of care and protection pursuant to *section 8*. A shield injury can occur when children attempt to protect a battered family member and they get hit in the “crossfire” or where the victim in the face of an imminent blow, picks up the child believing that the aggressor will not strike him/her if he/she is holding the child. In either situation, the direct physical risk posed to the child is real and would see physical violence being perpetrated against the child.

5. There is precedent for this inclusion in legislation that treats with child protection in other jurisdictions. South Africa is one such jurisdiction as in its *Children’s Act* the

⁸ There is a growing body of empirical research which indicates that child maltreatment, including the exposure to violence, may influence neurodevelopmental processes to alter the structure, organization and function of the brain and its neurobiological systems: *De Bellis, 1999; Glaser, 2000; Perry & Pollard, 1998* referenced in article entitled *The Developmental Consequences of Child Emotional Abuse: A Neurodevelopmental Perspective (Tuppet Yates, Ph.D.)*

definition of child abuse includes exposing children to domestic violence in the home. This statute mandates that the child protection system responds with the same recognition as it would to instances of neglect, sexual abuse or any other form of abuse and sees the system's primary objective as being to reduce a child's exposure to potentially harmful situations while at the same time, to promote the child's health and safety. It is of interest to note, as well, that under this legislation, the police or another designated individual is empowered to make an application to the court for the offender to be removed from the home without the need to secure the cooperation of the victim. The South African model justifies this approach on the basis that the *Children's Act* endorses the best interest principle and as such these steps can be initiated without more.

Recommendation 3

Section 9 of the *CCPA* should include explicit reference to the practice of corporal punishment.

Justification

1. This section of the *Act* focuses on the offence of Cruelty to Children and provides, *inter alia*, that where an adult who owes a duty of care to a child wilfully assaults, physically or mentally ill-treats a child in a manner likely to cause that child unnecessary suffering or injury to health, that adult commits an offence. The OCA has successfully fit instances of corporal punishment within this section; despite this, however, there is a great degree of uncertainty as to the applicability of this provision. For all avoidance of doubt, explicit reference should be made to the practice of corporal punishment.
2. The practice of corporal punishment is a legacy of slavery and colonialism which we seem to have culturally accepted as a people. What it seems to purport is that unwelcome actions ought to be corrected by the use of violence, and by so doing sub-consciously teaches children that violence or the infliction of physical pain on another human being, is the appropriate method through which to secure compliance with one's

wishes. This is unfortunate and is a practice that should not be condoned despite the fact that we have long done things this way.

3. An examination of the origins of corporal punishment points to Roman law under which fathers were permitted to kill their children as a form of punishment and to beat their wives as a form of discipline. This was subsequently changed to allow fathers instead, to beat and hurt their children as a form of punishment. Globally, women have managed, over time, to make progress in this regard and it is now (almost) universally accepted that a man does not have the right to beat his wife. Children, however, continue to be at a disadvantage in this regard, even though they are physically less able to withstand blows when compared to the typical adult and they are at a stage in life, when they will make mistakes and will need guidance so that they can learn to make better choices. The inherent unfairness in this treatment is inexplicable.

4. The psychological harm that corporal punishment causes to a child as well as the neurological impact that it has on the developing brain, should provide a powerful argument for this approach to be adopted.⁹ Children do need to be disciplined and guided effectively; to this end, greater emphasis should be placed on positive ways of parenting and parents educated as to what some of these alternatives are.

Recommendation 4

The CCPA should make explicit reference to the *Trafficking in Persons (Prevention, Suppression and Punishment) Act*, which comprehensively treats with the issue of trafficking.

Justification

1. The *Trafficking in Persons (Prevention, Suppression and Punishment) Act* (hereafter referred to as the *TIP Act*) was passed into Jamaican law in 2007, subsequent to the passing of the CCPA in 2004. As a consequence the CCPA could not have benefited from the very

⁹ *Ibid*

detailed issues that were considered in the *TIP Act*, nor could the *CCPA* have referenced it. The offence is a serious one and relates to a problem that is likely to increase over time. *Section 10* of the *CCPA* should therefore be fully aligned to the *TIP Act*.

Recommendation 5

The term “detained”, as used in *Section 12(2)*, should be substituted by more suitable language.

The word “accommodated” is proposed.

Justification

1. The word “detained” is a punitive term and is out of sync when used in relation to children who are victims of harm. *Section 12* treats with children who are victims of crime or who appear to be in need of refuge; it is an oxymoron to “detain” them when the act being described in the Section is one of *securing* them in a place of safety.
2. To retain a word that conveys punitive connotations, may serve to further increase the levels of confusion that already exist within the Jamaican landscape between a child who is in need of care and protection *and* a child who is in conflict with the law.
3. The issue of labelling and stigmatization is generally a sensitive one, and becomes even more so when treating with the child population. Terms attached to specific cohorts of children, often times influences how they are perceived and ultimately treated.

Recommendation 6

Section 14 should be expanded to include the Court’s ability, where appropriate, to make a *parental order* that would effectively bind parents over for the good behaviour of the child.

Justification

1. The parental order would target the parents in circumstances where a child is brought before a Children’s Court for offences/situations that could have been avoided but for proper parental guidance, support and discipline.

2. The primary purpose of this recommendation is to underscore the fact that parents and guardians have the core responsibility of childrearing; it is not the “Government’s job” to do so. Additionally, such an inclusion should also serve as a means of holding parents and guardians more accountable for their children.

Recommendation 7

Sections 17, 18, 19 and 20 need to be re-examined with a view to align these provisions with those contemplated by subsequent developments in the law of evidence.

Justification

1. *Sections 17 – 20* deal with the child’s inability to appear before the Court to give *viva voce* testimony at the hearing of the case. Recent amendments to the *Evidence Act* treat extensively with the receipt of evidence via video recorded and/or live link technology. For consistency, these developments need to be considered within the context of the sections here referred to.
2. *Section 20* goes further and also addresses the issue of the need for corroboration where the witness is a child of tender years. Again, amendments to the *Evidence Act* address this issue and ought to be consulted to ensure that there is congruence among the various statutes.

Recommendation 8

Section 22 needs to be re-aligned with the *Sexual Offences Act* and is also in need of an expansion with regard to the power of the Court to make certain order(s).

Justification

1. The provisions of the *Offences Against the Person Act* which are enumerated in *Section 22(1)(a)* have been amended by statute and are now all incorporated within the *Sexual Offences Act*. These offences so named are:-
 - Aggravated assaults on women or children

- Defilement of female imbecile¹⁰
- Carnal knowledge of girl under 12 years¹¹
- Carnal knowledge of girl above 12 and under 16 years¹²
- Indecent Assault¹³

Consequent upon this, references ought properly to be made to the *Sexual Offences Act* and to the corresponding new offences that are created under that *Act*.

2. *Section 22* already vests the Court with the power to make an order requiring a person charged with or convicted of certain specified offences,¹⁴ to submit to medical examination and testing for the purpose of ascertaining whether such person is the carrier of a communicable disease, if the court is satisfied that such examination and testing is in the best interest of the child. While it is accepted that this is a very useful provision, in practice its value is limited because even where the testing results confirm that both the [alleged] perpetrator and the victim are afflicted with the same communicable disease and that there is a high degree of certainty that it was transmitted to the child by the [alleged] perpetrator, no evidentiary use can be made of these results. This submission contends that if the best interest of the child is to be fully served, (as is the stated *raison d'être* of this provision), then the child victim deserves to have the best case possible advanced for the Court's consideration. To this end, there is good basis for the provision to be expanded to allow the results to be used for evidentiary purposes where appropriate and relevant.

¹⁰ This has been amended by the *Sexual Offences Act*; the offence is now called the *Violation of a Person Suffering from Mental Disorder or Physical Disability*: Section 16 - *SOA*.

¹¹ The equivalent offence created under the *SOA* is *Sexual Intercourse with a Person Under 16*: Section 10 - *SOA*. Unlike *Carnal Abuse*, this offence is now gender neutral as boys can also feature as victims within the new legislative framework.

¹² *Ibid.*

¹³ The *SOA* has maintained this offence but has made an important advancement by making the offence gender neutral as males can now be legally recognized as being victims of Indecent Assault.

¹⁴ These specified offences are those listed at Justification (1) beneath Recommendation 6 above.

3. The same justification which is outlined at (2) is adopted here and serves as the basis for positing that *Section 22* is to be further expanded to vest the Court with the power to make an order for a person charged for having committed one of these specified offences against a child, to submit to DNA testing for evidentiary purposes. An inclusion such as this would satisfactorily increase the level of protection offered by the legislative framework to children.

Recommendation 9

- A. The use of the words “unable to control” as they appear in *Section 24* which treats with the concept of a child whose parent or guardian is unable to control him/her, should be substituted with more precise words. One example of a preferred formulation is “exhibiting chronic behavioural tendencies”.
- B. Additionally, in order to facilitate and compliment this modification, *Section 24* should also be expanded to include the need for the Court to be guided by a psychologist before a determination is made as to the order which is relevant to the child in question.

Justification

1. Within the Jamaican context, the child who a parent or guardian is “unable to control” is typically one who has exhibited significant challenges to authority and other behavioural issues, because he or she had some traumatic or negative experience in the past that was not dealt with appropriately, or at all. In March 2013 the OCA tabled a special report in Parliament entitled *Recommendations to the Houses of Parliament: Focusing on the Uncontrollable Child*;¹⁵ the findings as noted in this document conclusively highlighted this issue and posited a very clear basis as to why a therapeutic approach was necessary if these children’s issues were to be properly addressed.

¹⁵ The soft copy of this special report is available in its entirety on the “Resources” page at www.oca.gov.jm.

2. As a direct consequence of (1), the Court's option of making a correctional order which is currently available for this particular cohort of children, should be removed and perhaps be substituted with a "therapeutic order".
3. *Section 24* presents the Court with options as to the various orders that can be made in relation to a child who falls within this category. With the proposal of a *therapeutic order* being added, the involvement of a psychologist in the process would only serve to enhance the Court's ability to make the best decision in all the circumstances of a particular case. The psychologist would be able to assist the Court in its determination as to what degree the child has been affected and therefore, whether the therapeutic order is best suited for a particular child, or whether a *fit person order* or a *supervision order* is appropriate. This would also assist with a more efficient use of resources as it would aid with identifying only those children who really needed to be placed in a therapeutic centre having access to these services, which would of course, come at a cost.

Recommendation 10

- A. *Section 28* which deals with the child's right to an education ought to be amended by removing sixteen (16) years of age as the upper limit.
- B. The section should also be expanded to formally recognize appropriately arranged and quality home schooling options that meet certain clearly defined minimum standards for children.

Justification

1. As presently stated, *Section 28* provides that a parent or guardian should ensure that a child "between the ages of four and sixteen years is enrolled at, and attends school." The practical manifestation of this, is that the parent's legal obligation to secure the child's education would expire when the child attains 16 years. Within the Jamaican context, it is not unusual for children who are 16 years old to be still pursuing a secondary level

education; indeed, this has become even more common with the advent of the Grade Six Achievement Test (GSAT) which seeks to prescribe the child's minimum age if he or she is to be accepted as a candidate for this examination. In order to ensure that the child's right to an education is at least protected throughout the primary and secondary level(s), therefore, the recommendation is that the words "between the ages of four and sixteen years" be removed and be replaced with words that capture children from age four through to the completion of secondary level education.

2. It is acknowledged that each child is different and thus has different needs along his or her developmental path. Consequently, home schooling may prove more appropriate for some children than others. So long as the decision is made in a manner that is consistent with the particular child's best interests and all the appropriate safe-guards are put in place to ensure that the quality of the programme is not compromised, the OCA supports parents having the right to exercise this option. An additional view which supports this position, is one which posits that it is a good thing when the law responds to a practice which is reflective of the society. Jamaica has registered quite a few success stories that focus on the academic (and other) achievements of children who are the products of home schooling. Some consistency and transparency would be added to these arrangements if the law created appropriate safe-guards and accorded formal recognition to this alternative option of securing the child's right to an education.

Recommendation 11

A new provision should be incorporated within Part II of the CCPA (perhaps immediately following *Section 30*) which empowers the Court to order family visitation with a child who is the subject of any *fit person order* or *correctional order*.

Justification

1. *Sections 29* and *30* deal with the issue of contribution orders and essentially empower the Court to order named members of the child's family to make a specific monetary contribution to the facility which will assume immediate care for the child. In instances

where the Court commits the child to the care of a fit person, [whether an individual or the Child Development Agency (CDA)], the contribution would be payable to that individual or the CDA; where the child receives a correctional order and thus would be committed to a juvenile correctional facility under the control of the Department of Correctional Services, the contribution becomes payable to the Commissioner of Inland Revenue. The family members whom the statute identifies as likely candidates to assume this responsibility are:-

- (i) The child's father, adopted father or step-father;
- (ii) The child's mother, adopted mother or step-mother;
- (iii) Any person who, at the date when any such order is made, is cohabiting with the mother of the child, whether he is the putative father or not.

It is the OCA's considered view that to have these individuals make monetary contributions is not enough. They should also be mandated to spend a minimum number of hours per week (or month) with the child, once he/she is being accommodated in any of these facilities and such an arrangement would not pose a threat to the child's well-being or negatively affect the child in any way. An inclusion of a provision of this nature, would serve to underscore the recognition that kinship ties and the continuity of family relations and care are important factors to be preserved, if at all possible, as they positively impact upon the child's development, his or her identity and sense of belonging.¹⁶

2. For the same reason(s) stated at (1), the Court's ability to make such an order should not be limited to *fit person orders* or *correctional orders*, but should also include the new *therapeutic orders* that this submission has proposed.
3. The list of persons presently identified by the CCPA as outlined at (1) may be too restrictive for the purposes of maintaining kinship ties, continuity and a sense of identity as contemplated by this recommendation. To this end, the OCA proposes that the list be

¹⁶ This principle is firmly embedded in both the *UN Convention on the Rights of the Child* and the *Child Care and Protection Act*.

revisited and thought be given to an expansion to include any suitable person who may reasonably be expected to satisfy these need(s) of the child for these purposes.

Recommendation 12

Section 39 should be expanded to specifically include the prohibition of employment of a child in:-

- (i) any massage parlours
- (ii) any betting, gaming and lottery activities
- (iii) the promotion of any parties at which it is likely that alcohol will be consumed or the smoking of any substance is likely.

Justification

1. The OCA continues to be concerned about instances in which children are alleged to be involved in these activities. In addition, the Jamaican entertainment landscape has witnessed a wide range of diversity with the frequent staging of destination parties, "sessions" and all-inclusive party packages. As such, even though *Section 39* uses very broad language, to wit, "*any conduct contrary to decency or morality*", there is a justifiable need for these specific categories to be included in the law in addition to the basic reference to employment in nightclubs.

Recommendation 13

Section 40 speaks to certain prohibitions in relation to alcohol and tobacco products; the section needs to be expanded, however, to include other addictive substances. Additionally, any expansion undertaken should aim to fully align the provisions under the CCPA with the new developments in local legislation, and where applicable, any international treaty obligations which Jamaica may have.

Justification

1. *The Public Health (Tobacco Control) (Amendment) Regulations, 2014* defines tobacco products as including "*electronic nicotine delivery systems*". To this end, this section of the CCPA should address the prohibition of the use of these electronic cigarettes (as they are

commonly called), by children. Not only would this serve to align the CCPA with the subsequent developments in the law, it would also assist with limiting children's exposure and attraction to products which simulate smoking. The view is often expressed that when children pattern a particular type of behaviour, this serves to normalize the behaviour and thus makes it easier for them to gravitate toward the habit in question. The OCA is of the view that this theory holds true for the instant situation and would thus urge that this recommendation be adopted.

2. Jamaica has ratified *The World Health Organization Framework Convention on Tobacco Control* and as such has certain obligations under that Convention. *Article 16* of the Convention, like *Section 40* of the CCPA, specifically treats with the sale of tobacco products to, and by, children. To increase Jamaica's compliance with its international obligations pursuant to this Convention, as well as to increase the level of protection offered to minors in this regard, the CCPA ought properly to be expanded to impose additional responsibilities on proprietors and/or those who sell tobacco products. In order to properly substantiate the extent to which this submission proposes the Jamaican legislature goes, the relevant aspects of *Article 16* are outlined below:

Article 16

Sales to and by Minors

1. *Each party shall adopt and implement effective legislative, executive, administrative or other measures at the appropriate government level to prohibit the sales of tobacco products to persons under the age set by domestic law, national law or eighteen. These measures may include:*
 - (a) *requiring that all sellers of tobacco products place a clear and prominent indicator inside their point of sale about the prohibition of tobacco sales to minors and, in case of doubt, request that each tobacco purchaser provide appropriate evidence of having reached full legal age;*
 - (b) *banning the sale of tobacco products in any manner by which they are directly accessible, such as store shelves;*

- (c) *prohibiting the manufacture and sale of sweets, snacks, toys or any other objects in the form of tobacco products which appeal to minors; and*
- (d) *ensuring that tobacco vending machines under its jurisdiction are not accessible to minors and do not promote the sale of tobacco products to minors.*
- 2. *Each Party shall prohibit or promote the prohibition of the distribution of free tobacco products to the public and especially minors.*
- 3. *Each Party shall endeavour to prohibit the sale of cigarettes individually or in small packets which increase the affordability of such products to minors.*
- 4. ...
- 5. ...
- 6. *Each Party shall adopt and implement effective legislative, executive, administrative or other measures, including penalties against sellers and distributors, in order to ensure compliance with the obligations contained in . . . this Article.*

This submission contends that where Jamaica is found wanting in any of the areas uplifted from *Article 16* and referenced above, the necessary amendment(s) are to be implemented. There is incontrovertible medical evidence that tobacco products can be described as being carcinogenic. The importance of this cannot be over-emphasized and this effectively makes this issue a public health one, as well as a child protection one.

- 3. The expansion of the law would be best served if this provision also targeted promoters, advertisers and hosts of parties and events where intoxicating liquor, tobacco products and other addictive substances are available to minors. Of course, this expansion would also make it an offence if any bartender, worker at the event or any other such individual makes the prohibited items available to a minor.

4. In keeping with *Article 8* of the *WHO Framework Convention on Tobacco Control*¹⁷ which focuses on protection from exposure to tobacco smoke, a new provision should be added which prohibits the smoking of tobacco products in close proximity to a child of tender years. The rationale for this proposal rests in the medical evidence of the harm that can come to an individual who is exposed to second-hand smoke.

Recommendation 14

Section 67 needs to be modified in two (2) substantial ways:-

- A. Under *Section 67(2)(a)* the Children's Advocate is to be informed by the police in the circumstances outlined.
- B. The Children's Advocate is to be given specific recognition in this particular provision as being able to give certain written directives to the Department of Correctional Services (DCS).

Justification

1. The objective of *Section 67*, is to prevent children from being deprived of their liberty for extended periods and in unsuitable facilities. The provision specifically treats with children who are apprehended by the police and who are taken to a police station but for some reason, cannot be brought before the court with promptitude. These amendments are proposed not only because they would provide useful information to the OCA, but because the OCA is the statutory body with responsibility for children and is actually empowered to engage legal mechanisms with some degree of immediacy to address issues that affect children who fall within this category.

¹⁷ *Article 8* highlights the scientific evidence which establishes that exposure to tobacco smoke causes death, disease and disability. It also mandates that each Party to the Convention shall adopt and implement measures which provide for the protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.

2. As presently stated in *section 67(2)(a)*, the officer (or the sub-officer) in charge of the police station in question, is obliged to advise the CDA and to enquire into the circumstances of the case to determine whether it is appropriate that bail be granted. What obtains in practice, however, is that the Detention and Courts Division of the Jamaica Constabulary Force (JCF) sends a weekly list to the OCA detailing which children have been taken into custody and at which station they are being held, and for what offences. From this information, the OCA¹⁸ identifies cases which warrant our intervention and where necessary, provide the necessary legal representation for the children in issue. This practice accords with the statutory duty of the Children's Advocate to ensure that the best interests of all children are observed and protected by all, including agents of the State.¹⁹ To have *Section 67(2)(a)* reflect the police's obligation to report such instances to the Children's Advocate would therefore be congruent with the functions of the Children's Advocate as a matter of law and would also be consistent with good practice.

3. The vexed issue of children being held in police lock ups has been one which has dogged the Jamaican landscape for some time, even with the passage of the *CCPA* in 2004 which sought to address this matter. For this reason, *section 67(3)* has often been brought into focus as on paper, it presents a plausible solution, viz. it provides that where a child who is apprehended by the police is not granted station bail, the CDA "shall cause the [child] to be detained in a juvenile remand centre until the [child] can be brought before a court." This, however, has proven to be more of a theoretical concept than it is a practical one. The Department of Correctional Services (DCS) within whose remit

¹⁸ The list is also sent to other departments. Where the child is at risk of being charged for a criminal offence, however, or has already been so charged, it is the OCA that has the legal authority to make active representation on the child's behalf. By way of example and in contrast to this authority, is that the CDA also receives the list but are usually able to actively remove the child only in circumstances where the child is one in need of care and protection and not one who is in conflict with the law or at risk of becoming in conflict with the law.

¹⁹ It is this additional statutory power of the Children's Advocate which often differentiates the OCA from its counterparts within the child protection sector.

juvenile remand facilities fall, are on record as saying that they can only admit a child to a remand facility if it is pursuant to the order of a court.²⁰ For this reason, even if the CDA were to assume this role as outlined within *Section 67(3)*, the DCS would not receive the child based on its operational protocols. Faced with such a challenge, the CDA would have no practical recourse as it operates *pari passu* to the DCS and in fact has no jurisdiction over the DCS.

In contrast, the Children's Advocate is the Commission of Parliament that already has the legislative authority and duty, to make recommendations and give advice to any relevant authority; this obligatory duty extends to the DCS as defined by the *CCPA*. There is also an in-built regime within the *CCPA* which provides the Children's Advocate with an avenue through which steps can be taken to secure compliance with recommendations made by the Advocate. It is against this background that the recommendation is made that 67(3) be amended to allow the Children's Advocate to issue a written directive to the Commissioner of Corrections for the limited purpose of having children who fall into this category accommodated in a juvenile remand facility. This would satisfy the DCS's need to have a written record which provides it with documentary authority on which to receive such children into its custody from a Parliamentary Commission which already has the jurisdiction to make recommendations to it. Of course, it would also reduce the number of children who are denied entry into these facilities and are kept instead at the lock up.

²⁰ A review of the *Corrections Act* and the *Child Care and Protection Act* does not reveal any strict legal requirement for this but it may perhaps be substantiated by the nuanced position which can be inferred from two specific provisions within the law. Pursuant to Section 51 of the *Corrections Act*, reference is made to the manager(s) of a Juvenile Correctional Centre being provided with "sufficient authority to receive and detain under their care the child in respect of whom the order was made" once there is an order from the court which bears the relevant endorsement. Section 51 also references Section 81 of the *CCPA* which speaks to the court issuing a correctional order that constitutes a record embodying certain information; 81(3) goes on to refer to instances in which the child's admission to the Correctional Centre is pending and the child is detained in a Juvenile Remand Centre pursuant to the same (written) correctional order.

Recommendation 15

A provision similar to *Section 62 of Part III* of the CCPA ought to be incorporated within *Part IV* of the Act which treats specifically with children who are deemed to be in conflict with the law.

Justification

1. *Section 62* outlines in detail the rights to which children are entitled if they are living in a place of safety, a children's home or otherwise in the care of a fit person. In a bid to ensure equal treatment by the law of children in conflict with the law, it is submitted that a similar section should be included in *Part IV* of the CCPA.

Appendix 1

DOMESTIC VIOLENCE ACT

CHAPTER 45:56

Act
27 of 1999
Amended by
8 of 2006

Current Authorised Pages

| <i>Pages (inclusive)</i> | <i>Authorised by L.R.O.</i> |
|------------------------------|---------------------------------|
| 1-2 | .. |
| 3-10 | .. |
| 11-22 | .. |
| 23-35 | .. |

UNOFFICIAL VERSION

L.R.O.

UPDATED TO JUNE 30TH 2013

PART VI

POLICE POWERS OF ENTRY AND ARREST

Duties of police officers.

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.

Form 7.
Second
Schedule.

(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.

Issue of warrant.

22. Where a Magistrate is satisfied, by information on oath, that—

- (a) there are reasonable grounds to suspect that a person on premises has suffered or is in imminent danger of physical injury at the hands of another person in a situation amounting to domestic violence and needs assistance to deal with or prevent the injury; and
- (b) a police officer has been refused permission to enter the premises for the purpose of giving assistance to the first mentioned person in paragraph (a),

the Magistrate may issue a warrant in writing authorising a police officer to enter the premises specified in the warrant at any time within twenty-four hours after the issue of the warrant and subject to any conditions specified in the warrant, to take such action as is necessary to prevent the commission or repetition of the offence or a breach of the peace or to protect life or property.

UNOFFICIAL VERSION

UPDATED TO JUNE 30TH 2013



No. 19 of 2007

I assent,

(COLVILL N. YOUNG)

Governor-General

17th January, 2008.

AN ACT to provide greater protection for victims of domestic violence; to repeal the Domestic Violence Act, Chapter 178 of the Substantive Laws of Belize, Revised Edition 2000 -2003; and to provide for matters connected therewith or incidental thereto.

(Gazetted 19th January, 2008.)

WHEREAS, incidents of domestic violence continue to occur with alarming frequency and deadly consequences;

AND WHEREAS, it has become necessary to reflect the community's repugnance to domestic violence in whatever form it may take and further influence the community's attitude and support social change in respect of this social ill;

AND WHEREAS, the Government is of the view that one way to achieve these goals is to strengthen legislation to ensure prompt and equitable legal remedies for victims of domestic violence;

NOW THEREFORE, BE IT ENACTED, by and with the advice and consent of the House of Representatives and the Senate of Belize and by the authority of the same, as follows:

the Court may, after holding an inquiry, revoke the Rehabilitation Order and proceed to pass sentence in accordance with subsection (1).

PART VI

Police Powers of Entry and Arrest

**Duties of
police
officers.**

24. (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

(a) to complete a domestic violence report which shall form part of a National Domestic Violence Register to be maintained by the Commissioner of Police; and

(b) to forward a copy of that domestic violence report to each of the Magistrate's Court and Family Court having jurisdiction over the district in which the complaint of domestic violence occurred.

**Second
Schedule
Form 5.**

(3) A domestic violence report shall be in the form prescribed as "Form 5" 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;

Appendix 2

DOMESTIC VIOLENCE ACT

CHAPTER 45:56

Act
27 of 1999
Amended by
8 of 2006

Current Authorised Pages

| <i>Pages (inclusive)</i> | <i>Authorised by L.R.O.</i> |
|------------------------------|---------------------------------|
| 1-2 | .. |
| 3-10 | .. |
| 11-22 | .. |
| 23-35 | .. |

UNOFFICIAL VERSION

L.R.O.

UPDATED TO JUNE 30TH 2013

- (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 intimidatory 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 dependance;

"guardian" in relation to a child includes a person who has custody of that child within the meaning of the Family Law (Guardianship of Minors, Domicile and Maintenance) Act; Ch. 46:08.

"Interim Order" means an Order made under section 8;

"member of the household" means a person who habitually resides in the same dwelling house as the applicant or the respondent and is related to the applicant or respondent by blood, marriage or adoption;

"Minister" means the Minister to whom responsibility for Social Development and Family Services is assigned;

"Order" includes an Interim Order and Protection Order;

"parent" means a person who is a parent or grandparent in relation to a child, dependent, spouse or respondent as the case may be—

- (a) by blood;
- (b) by marriage;
- (c) by adoption; or

Appendix 3



No. 19 of 2007

I assent,

(COLVILL N. YOUNG)

Governor-General

17th January, 2008.

AN ACT to provide greater protection for victims of domestic violence; to repeal the Domestic Violence Act, Chapter 178 of the Substantive Laws of Belize, Revised Edition 2000 -2003; and to provide for matters connected therewith or incidental thereto.

(Gazetted 19th January, 2008.)

WHEREAS, incidents of domestic violence continue to occur with alarming frequency and deadly consequences;

AND WHEREAS, it has become necessary to reflect the community's repugnance to domestic violence in whatever form it may take and further influence the community's attitude and support social change in respect of this social ill;

AND WHEREAS, the Government is of the view that one way to achieve these goals is to strengthen legislation to ensure prompt and equitable legal remedies for victims of domestic violence;

NOW THEREFORE, BE IT ENACTED, by and with the advice and consent of the House of Representatives and the Senate of Belize and by the authority of the same, as follows:

- (b) persistent following of the person from place to place;
- (c) depriving that person of the use of his property;
- (d) interfering with or damaging the property of the person;
- (e) the watching or besetting of the place where the person resides, works, carries on business, attends for education, or happens to be;
- (f) making persistent or unwelcome telephone calls to the person;
- (g) the willful or reckless neglect of a child, spouse, or dependant;
- (h) the forced confinement of the person, child, spouse;
- (i) verbal or non-verbal threats of physical violence;
- (j) inducing, coercing or forcing a person, without the person's consent, to take a drug that alters the will of that person, or that reduces the capacity of that person, to resist;

CAP. 103.

"drug" means a substance or product prescribed under Part I, II or III of the Second Schedule of the Misuse of Drugs Act;

"financial abuse" means a pattern of behaviour of any 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;

"guardian" in relation to a child, includes a person who has custody of that child;

"household residence" means

- (a) in relation to both spouses, the dwelling house that is used habitually by both or either of them

Appendix 4

United States v. Drew

United States v. Drew is the final decision in a criminal case that charged Lori Drew of violations of the Computer Fraud and Abuse Act (CFAA) over the alleged "cyberbullying" of a 13-year old, Megan Meier, who committed suicide. The federal district court vacated the jury's verdict convicting Drew of a misdemeanor violation of the CFAA.

Allegations leading to indictment and trial

In 2006, Lori Drew (nee' Shreeves) lived in St. Charles County, Missouri, with her husband Curt and their teenaged daughter. Megan Meier, who at one time had been friends with Drew's daughter, lived down the street from Drew.

During the summer of 2006, Drew reportedly became concerned that Meier was spreading false statements about her daughter. Drew, her daughter, and Drew's employee, Ashley Grills, allegedly decided to create a MySpace account for a non-existent 16-year-old boy under the alias "Josh Evans" and to use that account to discover whether Meier was spreading false statements about Drew's daughter.

A MySpace account in the name of "Josh Evans" was created in September 2006. Drew allegedly used the MySpace account to contact Meier, who apparently believed that "Josh Evans" was a 16-year-old boy. "Josh Evans" communicated with Meier through October 16, 2006, via the MySpace account in a manner described by the prosecution as flirtatious.

On or about October 16, 2006, "Josh Evans" reportedly sent Meier a message to the effect that the world would be a better place without her. Additional MySpace members whose profiles reflected links with the "Josh Evans" profile also began to send Meier negative messages. Subsequently, Meier's mother discovered that her daughter had hanged herself in her bedroom closet.

After Meier's death, the "Josh Evans" account was deleted, and Drew reportedly directed another minor who knew about Drew's activities to "keep her mouth shut".

State decision regarding prosecution

In December 2007, Missouri prosecutors announced that they would not charge Drew in connection with Meier's death. St. Charles County Prosecutor Jack Banas stated there was not enough evidence to bring charges.

Indictment

Thomas O'Brien, U.S. Attorney for the Central District of California, undertook prosecution of federal charges in connection with the case. On May 15, 2008, Drew was indicted by the Grand Jury of the United States District Court for the Central District of California on four counts. The

first count alleged a conspiracy arising out of a charged violation of 18 U.S.C. § 371, namely that Drew and her co-conspirators agreed to violate the CFAA by intentionally accessing a computer used in interstate commerce "without authorization" and in "excess of authorized use," and by using interstate communication to obtain information from the computer in order to inflict emotional distress in violation of 18 U.S.C. § 1030(a)(2)(C). Counts Two through Four allege that Drew violated the CFAA by accessing MySpace servers to obtain information regarding Meier in breach of the MySpace Terms of Service, on September 20, 2006, and October 16, 2006.

Amicus brief in support of defendant

On September 4, 2008, the Electronic Frontier Foundation filed an amicus brief in support of Drew's motion to dismiss the indictment. The brief argued that Drew's indictment was wrongful because Drew's alleged violation of the MySpace terms and conditions was not an "unauthorized access" or a use that "exceeds authorized access" under the CFAA statute; that applying the CFAA to Drew's conduct would constitute a serious encroachment of civil liberties; and that interpreting the CFAA to apply to a breach of a websites' Terms of Service would violate the Due Process protections of the Constitution and thereby render the statute void on the grounds of vagueness and lack of fair notice.

Jury trial and split verdict

This case was heard by a jury, and the jury's verdict was announced on November 26, 2008. The jury was deadlocked on Count One for Conspiracy, but unanimously found Drew not guilty of Counts Two through Four. The jury did, however, find Drew guilty of a misdemeanor violation of the CFAA.

Guilty verdict set aside

On November 23, 2008, Drew filed a motion for acquittal. On August 28, 2009, U.S. District Judge George H. Wu formally granted Drew's motion for acquittal, overturning the jury's guilty verdict.

In his opinion, Wu examined each element of the misdemeanor offense, noting that a misdemeanor conviction under 18 U.S.C. § 1030(a)(2)(C) requires that:

1. The defendant intentionally have accessed a computer without authorization, or have exceeded authorized access of a computer
2. The access of the computer involved an interstate or foreign communication
3. By engaging in this conduct, the defendant obtained information from a computer used in interstate or foreign commerce or communication

Wu found that many courts have held that any computer that provides a web-based application accessible through the internet would satisfy the interstate communication requirement of the

second element, and that the third element is met whenever a person using a computer contacts an internet website and reads any part of that website.

The only issue arose with respect to the first element, and the meaning of the undefined term "unauthorized access". Wu noted the government's concession that its only basis for claiming that Drew had intentionally accessed MySpace's computers without authorization was the creation of the false "Josh Evans" alias in violation of the MySpace Terms of Service. Wu reasoned that, if a conscious violation of the Terms of Service was not sufficient to satisfy the first element, Drew's motion for acquittal would have to be granted for that reason alone. Wu found that an intentional breach of the MySpace Terms of Service could possibly satisfy the definition of an unauthorized access or access exceeding authorization, but that rooting a CFAA misdemeanor violation in an individual's conscious violation of a website's Terms of Service would render the statute void for vagueness because there were insufficient guidelines to govern law enforcement as well as a lack of actual notice to the public.

Wu cited several reasons an individual would be lacking in actual notice:

- The statute does not explicitly state that it is criminalizing breaches of contract, and most individuals are aware that a contract breach is not typically subject to criminal prosecution
- If a website's Terms of Service control what is an "authorized" use or a use that "exceeds authorization", the statute would be unconstitutionally vague because it would be unclear whether any or all violations of the Terms of Service would constitute "unauthorized" access
- Allowing a conscious violation of website's Terms of Service to be a misdemeanor violation of the CFAA would essentially give a website owner the power to define criminal conduct

Wu summed up his opinion by stating that allowing a violation of a website's Terms of Service to constitute an intentional access of a computer without authorization or exceeding authorization would "result in transforming section 1030(a)(2)(C) into an overwhelmingly overbroad enactment that would convert a multitude of otherwise innocent Internet users into misdemeanant criminals". For these reasons, Wu granted Drew's motion for acquittal. The Government did not appeal.

Related proceedings

In early December 2007, Missouri prosecutors announced they would not file charges against Lori Drew in connection with Megan Meier's death. At a press conference, St. Charles County Prosecutor Jack Banas stated there was not enough evidence to bring the charges. As a result, the federal government decided to pursue the case in Los Angeles, where MySpace is based. The Meiers did not file a civil lawsuit.

Legislative responses

Missouri legislators amended the state's harassment law to include penalties for bullying via computers, other electronic devices, or text messages. The bill was approved on May 16, 2008. More than twenty states have enacted legislation to address bullying that occurs through electronic media. These laws include statutes that mandate that school boards must adopt policies to address cyberbullying, statutes that criminalize harassing minors online, and statutes providing for cyberbullying education. California enacted Cal. Educ. Code §32261 that encourages schools and other agencies to develop strategies, programs, and activities that will reduce bullying via electronic and other means.

A bill was introduced in Congress in 2009 (H.R. 1966) to set a federal standard definition for the term cyberbullying, but the proposal was criticized as overbroad and did not advance.