

Human Rights Violations of Lesbian, Gay, Bisexual, and Transgender (LGBT) people in Jamaica: A Shadow Report

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- Women for Women (Kingston)
- Heartland Alliance for Human Rights and Human Dignity
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- AIDS-Free World (AFW)
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I. Introduction

This shadow report on the human rights situation of LGBT people in Jamaica was written and submitted through the collaborative efforts of Jamaica Forum for Lesbians, All-Sexuals, & Gays (J-FLAG), Women for Women (Kingston), Heartland Alliance, International Gay and Lesbian Human Rights Commission (IGLHRC), AIDS-Free World (AFW), and The George Washington University Law School International Human Rights Clinic.¹

Jamaica became party to the International Covenant on Civil and Political Rights (“ICCPR”) on October 3, 1975. Jamaica submitted its second report under Article 40 of the ICCPR in January 1997.² In its concluding observations in response to that report, the Human Rights Committee (“HRC”) expressed its hope at that time that the new Jamaican Charter of Fundamental Rights and Freedoms (“Charter”) would explicitly prohibit of discrimination on the grounds of sex, and that any conflict between provisions of Section 24 of the Jamaican Constitution and the ICCPR would be eliminated.³ Since that time, however, Jamaica, has not complied with the HRC’s recommendations. Rather than prohibiting discrimination on the grounds of “sex,” the new Charter prohibits discrimination on the ground of being “male or female.” This language serves to circumvent protections guaranteed under the ICCPR by excluding from the Charter the prohibition of discrimination on the basis of sexual orientation and gender identity, which the HRC has found to be protected grounds under the category of “sex.”⁴ Jamaica failed to submit its third report under the ICCPR in 2001, but submitted its combined third and fourth reports on July 20, 2009.⁵

As recently as June 2011, the Human Rights Council has reaffirmed its commitment to LGBT issues through passage of Resolution 17/19, entitled *Human rights, sexual orientation and gender identity*.⁶ The passing of this resolution stresses the importance of LGBT-identity related

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² U.N. Human Rights Comm. [ICCPR], *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Second Periodic Report of States Parties due 1986, Addendum, Jamaica*, U.N. Doc. CCPR/C/42/Add.15 (Mar. 7, 1997).

³ U.N. Human Rights Comm. [ICCPR], *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Jamaica*, ¶4, U.N. Doc. CCPR/C/79/Add.83 (Nov. 19, 1997).

⁴ *Toonen v. Australia*, U.N. Human Rights Comm., Commc’n No. 488/1992, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

⁵ U.N. Human Rights Comm. [ICCPR], *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Third Periodic Report of States Parties, Jamaica*, ¶ 1, U.N. Doc. CCPR/C/JAM/3 (July 20, 2009) [hereinafter *Jamaica Third Periodic Report*].

⁶ U.N. Human Rights Council, Resolution 17/19, *Human rights, sexual orientation and gender identity*, U.N. Doc. A/HRC/17/L.9/Rev.1 (June 17, 2011).

issues within human rights, and underscores the great steps that the Jamaican government must take in order to bring its laws into compliance with the ICCPR.

II. Executive Summary

The human rights situation of Lesbian, Gay, Bisexual, and Transgender (LGBT) people in Jamaica is dire. The Jamaican government recently amended its Constitution, adding a new Charter of Fundamental Rights and Freedoms (Charter). However, the Charter does not contain protection against discrimination on the basis of sexual orientation or gender identity.⁷ In fact the Jamaican government explicitly excluded protections on the basis of “sex” and instead granted protections against discrimination on the grounds of being male or female, thus excluding any possibility for judicial interpretation of the Charter as including protections on the basis of sexual orientation and gender identity.

Jamaica retains colonial legislation criminalizing same-sex sexual conduct.⁸ A constitutional provision prevents judges from reviewing the constitutionality of any laws enacted prior to the adoption of the constitution.⁹ The only potential manner of overturning these laws is through legislative mechanism.¹⁰ However, the legislature has refused to take steps to strike down these provisions, and the Jamaican Prime Minister has explicitly stated that he does not support any attempt to repeal these laws.¹¹

Jamaican politicians publically engage in homophobic speech,¹² which fosters an atmosphere of intolerance towards LGBT people within the Jamaican population.¹³ Violence and discrimination against LGBT individuals is common and widespread.¹⁴ Often the police, the Jamaican Constabulary Force (“JCF”), are complicit in these crimes. Even when the police are not involved, the government is in violation of its obligations under the International Covenant on Civil and Political Rights (ICCPR) for failing to protect, investigate, and prosecute perpetrators of violence and discrimination against individuals on the basis of their sexual orientation or gender identity.¹⁵

⁷ *The Charter of Rights (and Wrongs) – Commentary*, JAMAICA GLEANER, April 5, 2011 available at <http://jamaica-gleaner.com/gleaner/20110405/cleisure/cleisure3.html>.

⁸ The Offences Against the Person Act §§ 76-77, 79, available at <http://www.moj.gov.jm/laws/statutes/Offences%20Against%20the%20Person%20Act.pdf>.

⁹ Jam. Const. § 26(8).

¹⁰ This practice was recently “re-saved” in the Charter of Fundamental Rights and Freedoms. Telephone Interview with Corbin Gordon, J-FLAG (Sept. 14, 2011).

¹¹ “*Walk for Tolerance*” calls for end to Bigotry in Jamaica, AIDS-Free World, Apr. 8, 2010, available at <http://www.aidsfreeworld.org/Our-Issues/Homophobia/Walk-for-Tolerance-Calls-for-End-to-Bigotry-in-Jamaica.aspx>; *Buggery laws firm – PM says life or 15 years for some sex-offence breaches*, JAMAICA GLEANER, Mar. 4, 2009, available at <http://jamaica-gleaner.com/gleaner/20090304/lead/lead1.html>.

¹² *Video: Violence and Venom Force Gay Jamaicans to Hide*, WORLDFOCUS 2009, available at <http://worldfocus.org/blog/2009/11/10/violence-and-venom-force-gay-jamaicans-to-hide/8299/>.

¹³ See *infra* pp. 4-6.

¹⁴ See *infra* pp. 10-11.

¹⁵ U.N. Human Rights Comm. [ICCPR], *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) [hereinafter General Comment No. 31].

Further, the Jamaican government offers no protections to LGBT individuals. Similarly situated individuals in opposite-sex and same-sex relationships are treated differently under Jamaican law.¹⁶ Transgender persons are afforded no legal recognition of their preferred gender, which marginalizes them from the rest of society. Additionally, the atmosphere of intolerance denies LGBT individuals access to minimum state services, such as health care and police protection.¹⁷

III. Substantive violations

A. Article 2(1) and Article 26 (Non-discrimination)

Articles 2(1) and 26 of the ICCPR impose obligations on each state party not to discriminate against individuals within its jurisdiction on the basis of sexual orientation or gender identity. Article 2(1) states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁸

Article 2 imposes both positive and negative obligations requiring that states parties “adopt legislative, judicial, administrative, educative and other appropriate measures” to enforce and protect these rights.¹⁹

Article 26 recognizes that:

[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁰

The HRC has stated that the reference to “sex” in Articles 2(1) and 26 include discrimination on the basis of sexual orientation.²¹ Therefore, under the Covenant, the Government of Jamaica has an obligation to not discriminate on the basis of sexual orientation, and to implement positive measures to protect LGBT individuals against discrimination against them by non-state actors. The Jamaican government not only fails to meet its obligations under Articles 2(1) and 26, it also is directly responsible for creating and fostering an environment of intolerance and prejudice

¹⁶ The Family Property (Rights of Spouses) Act, 2003, Part I.2(1).

¹⁷ See *infra* pp. 7-9.

¹⁸ International Covenant on Civil and Political Rights, G.A. Res. 2200A, 999 U.N.T.S. 171, art. 2(1) (Dec. 16, 1966) (emphasis added) [hereinafter ICCPR].

¹⁹ General Comment No. 31, *supra* note 15, ¶¶ 6-7.

²⁰ ICCPR, *supra* note 18, art. 26 (emphasis added).

²¹ *Toonen v. Australia*, *supra* note 4.

against LGBT people within the Jamaican population. This report will address these violations of Articles 2(1) and 26 through analysis of (1) the Jamaican Government's language of intolerance and its consequences, (2) Jamaica's failure to protect and investigate violations, (3) the effects of laws criminalizing same-sex conduct, (4) Jamaican Savings Laws that prevent any constitutional challenge to criminalization of same-sex conduct, and (5) differential treatment of people in same-sex and opposite-sex relationships.

1. Government Language of Intolerance and Its Consequences

The Government of Jamaica endorses and encourages violence and discrimination against LGBT individuals by state and non-state actors through its propagation of homophobic speech. Political leaders in Jamaica exploit the society's homophobia in order to garner votes in elections. For example, during the 2001 elections, the Jamaican Labour Party ("JLP") adopted the song "Chi Chi Man" by T.O.K.²² as a theme song to gain popular support in the course of its campaign efforts. This song celebrates the burning and killing of gay men.²³ The following is a translation of the original Jamaican Patois lyrics:

*Those who get together in a queer's car
Blaze the fire, let's burn them! (Burn them!!)
Those who drink in a queer bar
Blaze the fire, let's kill them! (Kill them!!)
If they bring it to us, hold on, lots of bullets are going to fly
Bullets fly, take up every calico and rat-tat-tat
Rat-tat-tat, every queer has to die Die!
Me and my niggas will make a pact
Queers must die and that's a fact.²⁴*

In response to the JLP's successful campaign, the opposition People's National Party ("PNP") adopted the song "Log On to Progress" as its campaign slogan for the 2002 elections, a reference to a popular song about kicking and stomping on gay men.²⁵

²² "Chi Chi man" is a derogatory term used to refer to homosexuals, made popular by the dancehall group T.O.K. In Jamaica, "Chi Chi" refers to wood-eating termites, while "Wood" is one of many words that refers to the penis. See *Jamaican Slang Glossary Words and Phrases*, SPEAK JAMAICAN.COM, <http://www.speakjamaican.com/glossary>. See also *Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic*, Human Rights Watch at 13, Nov. 2004, available at <http://www.hrw.org/en/reports/2004/11/15/hated-death-0>.

²³ See Leah Nelson, *Jamaican Anti-Gay 'Murder Music' Heard by Millions in the US*, ALTERNET, Dec. 31, 2010, available at http://www.alternet.org/rights/149380/jamaican_anti-gay_murder_music_heard_by_millions_in_the_us/?page=2; *The Fear that Spreads Death*, THE ECONOMIST, Nov. 25, 2004, available at <http://www.economist.com/node/3437101>; see also Regional Meeting of LGBT Activists from CARICOM States on the Inter-American Human Rights System, *The Unnatural connexion: Creating Societal Conflict Through Legal Tools: Laws Criminalizing Same Sex Sexual Behaviors and Identities and their Human Rights Impact in Caribbean Countries*, 25 (2010) (on file with authors) [hereinafter *The Unnatural connexion*].

²⁴ See *Murder inna Dancehall*, http://www.soulrebels.org/dancehall/u_lyrics_chi.htm (last visited May 1, 2011).

²⁵ Nelson, *supra* note 23; *The Unnatural connexion*, *supra* note 23, at 25.

Political leaders also use the media to disseminate their messages of hatred towards the LGBT community, justifying their views by appealing to religious doctrine. For example, in September 2010, Prime Minister Bruce Golding defended his view that same-sex conduct should remain illegal in Jamaica on the basis that Jamaica is “[f]irstly ... predominately a Christian country and a fervently Christian country.”²⁶ In addition to appealing to religious ideologies, politicians also appeal to the preservation of the Jamaican culture as a way to validate discrimination against LGBT individuals. For example, Prime Minister Golding also stated that “encouragement or recognition of the appropriateness of the homosexual lifestyle is going to undermine the effectiveness of [the] family . . . and, in that process, undermine the basic fabric of a society.”²⁷ Golding also appeared on a BBC talk show in 2008 where he stated that he would not be pressured by outsiders to recognize the rights of homosexuals.²⁸

Politicians’ public statements about the LGBT community in Jamaica illuminate not only the level of intolerance, but also ignorance of the issues facing that community. For example, in February 2009, Ernest Smith, the JLP Member of Parliament (MP) for South West St. Ann, Jamaica, stated that the JLP was “not saying that gay people should be obliterated from the face of the earth . . . but because your behavioral pattern is in breach of all decency . . . do not try to impose your filth on others, don’t force others to accept you and your filth.”²⁹ Smith further charged that reports of violence against LGBT individuals in Jamaica were myths. Instead, he alleged that violence against members of the LGBT community is committed not as a result of anti-gay sentiment, but is committed by other LGBT individuals out of jealousy or other internal conflict.³⁰ In blatant disregard of the 2004 revision of the Staff Orders for the Jamaica Civil Service, which prohibits employment discrimination based on sexual orientation,³¹ Smith accused the police force of being “overrun with gays.”³² He has since apologized not to the LGBT community, but to *the police* for making that statement,³³ highlighting the stigma associated to LGBT status in Jamaica.

Public intolerance of LGBT individuals prevents those individuals from amassing political influence. Either it is impossible for LGBT individuals to obtain political positions, or they must hide their sexual preference in order to maintain such a position.³⁴ For example, in May 2008

²⁶ *The Unnatural connexion*, *supra* note 23, at 17 n. 55 (citing Sept. 25, 2010 interview with the Jamaican Prime Minister).

²⁷ *The Unnatural connexion*, *supra* note 23, at 17 n. 56 (citing Sept. 25, 2010 interview with the Jamaican Prime Minister).

²⁸ ‘What Jamaica Wants’ - Church, Gays Divided on PM’s BBC Interview, JAMAICA GLEANER, May 21, 2008, available at <http://jamaica-gleaner.com/gleaner/20080521/lead/lead1.html> [hereinafter *What Jamaica Wants*].

²⁹ Video: Violence and Venom Force Gay Jamaicans to Hide, *supra* note 12.

³⁰ *Id.*

³¹ *Staff Orders for the Public Service*, Section 13.1.9 (2004) (Jam.), at http://www.oas.org/juridico/spanish/jam_res29.pdf.

³² PNP Ernie Smith on Stance against Gays, JAMAICA GLEANER, Feb. 19, 2009 available at <http://jamaica-gleaner.com/gleaner/20090219/lead/lead4.html> (emphasis added).

³³ *Id.*

³⁴ An LGBT individual holding office cannot reveal his/her sexual orientation or gender identity without running the risk of being stripped of his/her office. See *The Unnatural Connexion*, *supra* note 23, at 51.

Prime Minister Golding stated on British television that he would not allow homosexuals in his Cabinet.³⁵

Such open dissemination of politicians' homophobic language fosters a culture in which prejudice against LGBT individuals is not only accepted but encouraged, which in turn leads to open violence and discrimination by the civilian population. For example, in 2010, a man named Kenneth Parchment³⁶ was forced out of his sister's house by men from the community who believed him to be gay. These men, including Parchment's own 16-year-old cousin, beat him with boards, stones, and batons.³⁷ Incidents such as this one reflect a culture of homophobia that is embedded in Jamaica to such an extent that violent actions towards persons perceived to be gay go unnoticed by local authorities.

Common acceptance of public hatred towards LGBT individuals places them in an extremely vulnerable position, in which their status deprives them of significant rights within the Jamaican community. Persecution of LGBT individuals may persist even in death: in April 2007, a mob attacked a church during the burial of a man who was alleged to be gay, because protesters objected to his internment in the church cemetery.³⁸ The reverend conducting the service stated, "we were conducting the funeral just like any other funeral. Every human being has a right to his or her own lifestyle, and I am disappointed with the behaviour of the people...If we were committing the body of an adulterer, murderer, rapist or child molester there would be no problem."³⁹ Unfortunately, intolerance and violent acts such as these perpetuated by intolerance of LGBT individuals are commonplace throughout Jamaica, and are exacerbated by government complacency and frequent encouragement of this intolerance.

2. Jamaica's Failure to Protect and Investigate Violations

Under the ICCPR, the state has a positive duty to investigate and bring the perpetrators of violations of the Covenant to justice.⁴⁰ However, the government of Jamaica has demonstrated its unwillingness to protect individuals who suffer violence and discrimination on the basis of their LGBT status. In fact, the police are frequent violators and are not held accountable for their actions. Between January 2009 and August 2011, J-FLAG, an organization promoting the human rights of LGBTs, received 17 reports of homophobic incidents perpetrated by the police.⁴¹ For example, in 2008, when Constable Michael Hayden's colleagues found out that he

³⁵ *What Jamaica wants*, *supra* note 28; *Buggery laws firm*, *supra* note 11.

³⁶ Name has been changed to protect victim's identity.

³⁷ Michael Lee, *Gay Rumours Left me Homeless*, JAMAICA STAR ONLINE, July 16, 2010, available at <http://jamaica-star.com/thestar/20100716/news/news5.html>.

³⁸ Byron McDaniel, *Burial Riot – Church Stoned at Alleged Homo's Funeral – Pastor, Mourners Duck for Cover*, THE JAMAICA STAR ONLINE, April 10, 2010, available at <http://jamaica-star.com/thestar/20070410/news/news1.html>.

³⁹ *Id.*

⁴⁰ General Comment No. 31, *supra* note 15, ¶ 18.

⁴¹ Interview with Corbin Gordon, *supra* note 10.

is gay, they stole and destroyed his personal property. Constable Hayden's supervisors took no actions to remedy the situation, despite his numerous reports.⁴² Hayden reported that the other policemen made him uncomfortable and that as a result, he feared for his life.⁴³

Overall, there is a widespread phenomena of ongoing failure to properly investigate crimes committed against individuals based on sexual orientation or gender identity. As documented by Human Rights Watch, in Jamaica crimes against LGBT individuals are often dismissed as "crimes of passion" regardless of the strength of evidence that the crime was based on sexual identity.⁴⁴ The Jamaican failure to protect and investigate violations of these crimes is further discussed *infra* at Section E, regarding the states obligations under Article 14 of ensuring individuals' right to a fair trial.

3. Effects of Laws Criminalizing Same-sex Sexual Conduct

The Government of Jamaica continues to criminalize same-sex sexual conduct.⁴⁵ Laws that criminalize same-sex sexual conduct discriminate against LGBT individuals and perpetuate the existing culture of homophobia within Jamaican society. Though these laws are not often enforced, the HRC has found that mere existence of these laws violates Jamaica's obligations under the ICCPR.⁴⁶ The Government of Jamaica has not taken any steps to decriminalize same-sex conduct. On the contrary, Prime Minister Golding and Members of Parliament have been unequivocal about their intention to retain these laws.⁴⁷

In its submission to the Human Rights Council in the context of the Universal Periodic Review ("UPR") on August 20, 2010, the Jamaican Government claimed that the Jamaican Constitution affords protections of fundamental rights and freedoms, and that "[t]he Government of Jamaica respects the rights of all individuals and does not condone discrimination or violence on against any person or group because of their sexual orientation."⁴⁸ The state's UPR Report cites the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Bill, introduced in Parliament in December 1998, and approved in 2011, as proof of Jamaica's respect for human rights.⁴⁹ However, the Charter makes no mention of protection based on sexual orientation; in

⁴² Gay Cop Demands Rights – 'I am Proud, Standing Tall' – Says he is not Being Treated Equally in the Police Force, THE JAMAICA STAR ONLINE, Feb. 1, 2008, available at <http://jamaica-star.com/thestar/20080201/news/news1.html>.

⁴³ *Id.*

⁴⁴ Human Rights Watch, *supra* note 22.

⁴⁵ See *infra* p. 13 for text of the laws criminalizing same-sex sexual conduct.

⁴⁶ *Toonen v. Australia*, *supra* note 4.

⁴⁷ Prime Minister Bruce Golding made disparaging remarks in 2009 announcing that he had no intention of repealing sodomy laws. "Walk for Tolerance" calls for end to Bigotry in Jamaica, *supra* note 11; *Buggery Laws Firm*, *supra* note 11.

⁴⁸ U.N. Human Rights Council, *National Report Submitted in Accordance with Paragraph 15(a) of the annex to the Human Rights Council Resolution 5/1, Jamaica*, ¶ 10, U.N. Doc. A/HRC/WG.6/9/JAM/1 (Aug. 20, 2010) [hereinafter Jamaica UPR Report].

⁴⁹ *Id.* at ¶ 11.

fact, the Charter does not make any mention of protection on the basis of sex. Instead, it outlaws discrimination based on being male or female.⁵⁰ The Charter's protections of fundamental rights and freedoms, therefore, do not apply to individuals who suffer discrimination because of their sexual orientation or gender identity.

Laws criminalizing same-sex conduct have broad consequences for the Jamaican LGBT community. These laws effectively prohibit LGBT individuals from receiving many basic services because securing access to those services would require those individuals to admit to committing an activity that is considered criminal by the law.⁵¹ For example, LGBT individuals have difficulty acquiring health care services adapted to their specific needs because they may either be hesitant to reveal their sexual orientation to health care professionals, or health care professionals may be unwilling to learn or unknowledgeable about specific needs of different populations. This puts LGBT individuals at greater risk of contracting sexually transmitted infections, including HIV, than their heterosexual counterparts, due to a lack of appropriate preventative care.⁵² In its August 2010 submission to the UPR, Jamaica details its efforts to prevent HIV/AIDS. However, the State's report makes no reference to improving treatment options available to LGBT persons as a means of achieving that goal. In fact, there is no mention whatsoever of issues regarding sexual orientation in the report's health and HIV/AIDS section.⁵³

Health workers in Jamaica reportedly routinely mistreat patients with HIV or AIDS by providing inadequate care or by denying treatment altogether. In certain cases, doctors are afraid to touch infected patients, effectively preventing them from conducting adequate examinations. Additionally, those with visible HIV symptoms have been denied access to public transportation, making it difficult to access health care facilities. Those who have made it to clinics are sometimes turned away and subjected to abusive comments from health care providers, decreasing the chances that they will get treatment. Cases have been documented in which health workers have released confidential medical information about HIV/AIDS patients to the public and other patients by segregating the HIV positive patients from the other patients.⁵⁴

In addition to the lack of access to health care services, LGBT individuals also lack access to protective police services. They are reluctant to report violence because, in addition to police complicity in violence against LGBTs,⁵⁵ victims often cannot report the violence without

⁵⁰ *The Charter of Rights (and Wrongs)*, *supra* note 7.

⁵¹ *The Unnatural Connexion*, *supra* note 23, at 25.

⁵² *HATED TO DEATH*, *supra* note 22, at 44; Statistical evidence shows a correlation between laws criminalizing same-sex conduct and HIV prevalence among MSM. *The Unnatural Connexion*, *supra* note 23, at 52.

⁵³ Jamaica UPR Report, *supra* note 48, at ¶ 55.

⁵⁴ *HATED TO DEATH*, *supra* note 22, at 39-44.

⁵⁵ *The unnatural connection*, *supra* note 23 pp. 6-7.

admitting their sexual orientation and therefore incriminating themselves under the laws prohibiting same-sex sexual conduct.⁵⁶

4. Savings Law Clauses Prevent Challenge of Anti-LGBT Law

Section 26(8) of the Constitution of Jamaica provides:

Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.⁵⁷

This practical effect of this section is that it prevents judges from reviewing the constitutionality of criminal laws that were in effect prior to Jamaica's independence in 1962, when its constitution was ratified. Such provisions, known as Savings Law Clauses, prevent LGBT individuals accused under laws criminalizing same-sex sexual conduct from seeking judicial review of the constitutionality of the statute, a remedy that is available to defendants accused of other criminal laws not implicated by the Savings Law Clauses. This differential treatment is justified by the constitutional provision. The HRC, however, has consistently held that constitutional provisions may not be invoked to justify violations of the ICCPR.⁵⁸

No steps have been taken by the government to redress this issue; rather, the Jamaican Parliament has re-saved the existing buggery laws in the new Charter of Fundamental Rights and Freedoms, through its exclusion of protections on the basis of sex (or sexual orientation).⁵⁹

5. Differential Treatment of Individuals in Same-sex and Opposite-sex Relationships

The HRC has consistently found that laws affording differential treatment of individuals in same-sex and opposite-sex relationships violate Article 26 of the ICCPR.⁶⁰ As discussed extensively *infra* in Section J on violations of the right to family life, Jamaica's laws enshrine protections for opposite-sex couples and deny these same protections to similarly situated same-sex couples. Furthermore, laws such as those reaffirmed in although Jamaica's new Charter of Rights explicitly recognize rights of heterosexual relationships, but deny people in same-sex relationship those rights constitute violations of the ICCPR bar against discrimination.⁶¹

⁵⁶ Police blackmail men caught engaging in sexual conduct with another man. *The Unnatural Connexion*, *supra* note 23, at 41; Interview with Corbin Gordon, *supra* note 10.

⁵⁷ Jam. Const. § 26(8).

⁵⁸ General Comment No. 31, *supra* note 15, ¶ 4.

⁵⁹ *The Charter of Rights (and Wrongs)*, *supra* note 7.

⁶⁰ *X v. Colombia*, U.N. Human Rights Comm., Commc'n. No. 1361/2005, U.N. Doc. CCPR/C/89/D/1361/2005 (2007); *Young v. Australia*, U.N. Human Rights Comm., Commc'n. No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003).

⁶¹ *The Charter of Rights (and Wrongs)*, *supra* note 7.

B. Article 6 (Right to Life) and Article 7 (Freedom from Cruel, Inhuman, Degrading Treatment)

Article 6 states that “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Article 7 adds that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Despite the obligation that Jamaica has as a state party to the treaty to protect individuals from acts committed by private persons in violation of the ICCPR, the rights to life and to freedom from cruel, inhuman, and degrading treatment of LGBT individuals in Jamaica are frequently violated. The Jamaican government should prevent such violations by exercising due diligence to prevent, punish, investigate or redress the harm caused by such acts.⁶²

The Jamaican government has failed to protect LGBT individuals from gruesome violence perpetrated against them by non-state actors. As documented by the Inter-American Commission on Human Rights in its Preliminary Observations after its visit to Jamaica in 2008, “Defenders of the rights of gays, lesbians, bisexuals and transsexuals have been murdered, beaten and threatened, and the police have been criticized for failing in many instances to prevent or respond to reports of such violence.”⁶³ J-FLAG documented that in recent years, attacks against LGBT people increased yearly: There were 27 instances of homophobic incidents in 2009, 51 incidents in 2010, and 62 incidents between January and August 2011.⁶⁴ The mere frequency and magnitude of these crimes illustrate the failure on the part of the state to protect LGBT individuals’ rights to life and physical integrity.

Violent crimes against LGBT individuals are gruesome and frequent. Some of the most striking incidences of these crimes include:

- In June 2004, Brian Williamson, the founder of J-FLAG, was found butchered in his home.⁶⁵
- Also in June 2004, Victor Jarrett was hacked to death in a mob attack triggered by police officers when they publicly accused him of being a “batty man.”⁶⁶
- In November 2005, Steve Harvey, another well-known gay activist, was abducted by a group of assailants and found dead several hours later shot in the back and head.⁶⁷

⁶² General Comment No. 31, *supra* note 15, ¶ 8.

⁶³ Inter-American Commission on Human Rights, Press release, “IACHR Issues Preliminary Observations on Visit To Jamaica,” *available at*: <http://www.cidh.org/comunicados/english/2008/59.08eng.htm>.

⁶⁴ Interview with Corbin Gordon, *supra* note 10.

⁶⁵ See Andrew Clunis, *OUTRAGED! – British Gays use Brian Williamson’s Death to Push Agenda*, JAMAICA GLEANER, June 13, 2004, *available at* <http://jamaica-gleaner.com/gleaner/20040613/news/news1.html>; *see also* HATED TO DEATH, *supra* note 22, at 1.

⁶⁶ Carol J. Williams, *In Jamaica, Fatal Attacks Push Homophobia into the Open*, THE BOSTON GLOBE, Jan. 16, 2005, *available at* http://www.boston.com/news/world/articles/2005/01/16/in_jamaica_fatal_attacks_push_homophobia_into_the_open/.

⁶⁷ Gary Younge, *Jamaican Gay Activist Shot Dead after being Abducted*, THE GUARDIAN, Dec. 6, 2005, *available at* <http://www.guardian.co.uk/world/2005/dec/06/gayrights.garyyounge>; *Jamaica: HIV/AIDS Activist Steve Harvey Mourned*, HUMAN RIGHTS WATCH, Nov. 30, 2005, *available at* <http://www.hrw.org/en/news/2005/11/30/jamaica-hiv-aids-activist-steve-harvey-mourned>.

- In April 2006, rioting students at the University of the West Indies attacked a student they believed to be gay.⁶⁸
- In 2007, after a mob of over 2000 people stoned a group of gay men including gay-rights activist Gareth Williams, police failed to take action against members of the mob and in fact abused members of the victimized group while attempting to isolate them from the mob.⁶⁹
- In November 2008, Reverend Richard Johnson was stabbed 25 times in the rectory of St. Jude's Anglican Church in Kingston because he was believed to be gay.⁷⁰
- In September 2009, the British honorary consul, John Terry, was murdered. The killer left a note on his body describing him as a "batty man."⁷¹
- In February 2011, Gay rights activist Maurice Tomlinson received a death threat.⁷² "The Inter-American Commission asked the State of Jamaica to adopt, in agreement with the beneficiary, the necessary measures to guarantee his life and physical integrity, and to inform the IACHR of the steps taken to investigate the facts that led to the adoption of these precautionary measures."⁷³ The Jamaican government has yet to contact Mr. Tomlinson and has failed to bring the perpetrator to justice.⁷⁴

Not only are LGBT individuals targeted by the general population, but they also suffer cruel, inhumane and discriminating conduct at the hands of the Jamaican Constabulary Forces. Jamaican police frequently harass LGBT individuals on the streets. In July 2010, police officers blocked access to the "Hip Strip," a popular entertainment zone, and harassed groups of men and women perceived to be LGBT.⁷⁵ As recently as February 2011, the police raided a gay bar in Montego Bay. Approximately twenty police officers kicked in the door and forcibly evacuated the bar, beating and pistol-whipping patrons in the process and shouting anti-gay slurs.⁷⁶ Ten victims had to seek medical treatment as a result of the raid.⁷⁷

⁶⁸ The , *supra* note 23, at 34.

⁶⁹ *Id.*

⁷⁰ Rev. Irene Monroe, *Jamaica's Gay Underground Christians*, CHARGE.ORG, Mar. 17, 2010, *available at* <http://news.change.org/stories/jamaicas-gay-underground-christians>.

⁷¹ Steve Bird & Tim Reid, *British Honorary Consul, John Terry, Murdered in Jamaica*, THE TIMES, Sept. 11, 2009, *available at* http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6829343.ece.

⁷² The email was sent in response to Maurice Tomlinson's letter to the editor *supra* note 75, and stated, "listen battyman we in jamaica wont endorse r accept you faggots no matter what the fuck u guys try 2 say r do.....get that through ur thick skulls!!!!!!!!!!!!!! we have different culture n upbringing fr north americans or whomever else.....you should consider moving sumwhere there.....in the meantime shut the fuck up r you will fucking die!!!!!!!!!!" Wockner, *supra* note 76.

⁷³ Inter-American Commission on Human Rights [IACHR], Precautionary Measures No. 80/11, Maurice Tomlinson, Jamaica, Mar. 21, 2011, *available at* <http://www.cidh.org/medidas/2011.eng.htm>.

⁷⁴ Email conversation with Maurice Tomlinson, April 24, 2011, on file with authors.

⁷⁵ Maurice Tomlinson, Letter to the Editor, *Gays Blocked from Hip Strip*, JAMAICA GLEANER, July 11, 2010, *available at* <http://jamaica-gleaner.com/gleaner/20100711/letters/letters2.html>. The "Hip Strip" is a "busy Friday-evening location" in Montego Bay popular with both locals and tourists for its numerous eateries and outdoor entertainment. *Id.*

⁷⁶ Rex Wockner, *Jamaican Gay Bar Raided by Police*, PINKPAPER.COM, *available at* <http://news.pinkpaper.com/NewsStory.aspx?id=4921>.

⁷⁷ *Id.*

Because police sometimes perpetrate crimes against LGBT groups, and because the police refuse to act and investigate reports of violence and discrimination, LGBT persons are by and large reluctant to report violence or harassment to the police. If and when they do report physical violence to the police, they are routinely denied help; on numerous occasions the police fail to investigate these complaints and sometimes even arrest and detain those they suspect of being LGBT rather than the perpetrators.⁷⁸ For example, in 2010 an MSM victim who was clobbered by a group of 5 men and women went to the police for assistance. The police told him that “if he was attacked *again* he should point out the perpetrators,” implying that the first attack was not worth investigating, and signaling lack of police interest in pursuing justice for victims of violence related to sexual orientation or gender identity.⁷⁹

These egregious acts of violence, threats, and discrimination towards LGBT individuals in Jamaica fosters an environment of fear and violent persecution which is clearly in violation of Jamaica’s international treaty obligations to protect the right to life.⁸⁰

C. Article 3 (Equality between Men and Women)

Article 3 of the ICCPR states: “[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”

Jamaica fails to protect women and transgender women against crimes committed on the basis of their sexual orientation and gender identity. Violence against lesbian women is prevalent in Jamaica and the state is unresponsive. Often, crimes against lesbian women and transgender women are committed in the home, and many are afraid to report sexual crimes committed against them for fear that the police will perpetuate the abuse or humiliate them.⁸¹

Gender discrimination is entrenched in Jamaican culture, and as a result, domestic violence, violence committed by a family member, is often ignored by the police.⁸² Over 50% of violent crimes committed against women occur in the home.⁸³ The problem of domestic violence is exacerbated for lesbian women, who not only face societal discrimination but experience violence and discrimination within their own families. Women for Women, the primary advocacy group for lesbians in Jamaica, has documented increasing numbers of domestic violence and rape of lesbian women, but also that few women feel they can rely on the police for fear of further victimization from the police themselves.⁸⁴

⁷⁸ Hated to Death: Homophobia, Violence, and Jamaica’s HIV/AIDS Epidemic, Human Rights Watch 10-11, Nov. 2004, available at <http://www.hrw.org/en/reports/2004/11/15/hated-death-0>; The Unnatural connexion, *supra* note 19, 42.

⁷⁹ The unnatural connexion, *supra* note 19, at 34.

⁸⁰ Press Release, Inter-Am. C.H.R., IACHR Issues Preliminary Observations on Visit to Jamaica, Inter-Am. C.H.R. Doc. 59/08 (Dec. 5, 2008), available at <http://www.cidh.org/comunicados/english/2008/59.08eng.htm>.

⁸¹ Telephone Interview with Corbin Gordon, J-FLAG (Sept. 14, 2011)

⁸² SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN JAMAICA, *supra* note 69, at 1.

⁸³ *Id.* at 5.

⁸⁴ The unnatural connexion, *supra* note 23, at 35

Gender discrimination also disproportionately affects transgender individuals. In December 2010, the police discovered the dead body of a transgender individual hidden behind a building. The victim was chopped to death.⁸⁵ Recently, a group of men raped a thirteen-year-old transgender individual in Kingston.⁸⁶ News coverage of these incidents did not reveal that any police investigation into these deaths had occurred, and Jamaican activists are not aware of any action taken to seek accountability for these murders of transgender individuals.

In addition to enduring violence and discrimination on the basis of their gender,⁸⁷ lesbian women in Jamaica are also at risk of persecution because of their sexual orientation. J-FLAG recorded six cases of corrective rape in 2006, in which men raped women in an attempt to “cure” their sexual preference.⁸⁸ In one case, a seventeen-year-old girl was kidnapped and held in captivity by her mother and pastor for eighteen days. During that time, multiple men repeatedly raped “in the attempt to ‘make her take man’ and ‘live as God instructed.’”⁸⁹ In 2008, four cases of “corrective rapes” were reported to Women for Women, and another three in 2010, including one that tragically ended in murder.⁹⁰ Although J-FLAG tracks the reports of incidents such as these,⁹¹ these numbers are likely under-representative of the actual problem of corrective rapes because women do not reveal these attacks to anyone for fear of further attacks from their families, upon whom they may be financially dependent. Furthermore, in many cases women refuse to report the attacks to the police for fear of retribution from the police themselves because of their sexual identity.⁹² In summary, lesbian women have nowhere to turn to seek accountability for or protection from these attacks, since the government of Jamaica refuses to provide them with protection from these abuses.

D. Article 17 (Right to Privacy)

Article 17(1) states that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” Moreover, Article 17(2) guarantees this right as against private individuals and imposes a duty on the state “to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks.”⁹³

Jamaica’s laws criminalizing same-sex conduct violate the right to privacy under the HRC’s jurisprudence as established in *Toonen v. Australia*.⁹⁴ Jamaican laws that criminalize same-sex conduct are located in the Offences against the Person Act:

⁸⁵ Kimmo Matthews, *Cross Dresser’s Body found in Half-Way-Tree*, JAMAICA OBSERVER, Dec. 3, 2010, available at <http://www.jamaicaobserver.com/Woman-s-body-found-in-Half-Way-Tree>.

⁸⁶ Telephone Interview with Corbin Gordon, J-FLAG (Sept. 14, 2011).

⁸⁷ Amnesty International, *SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN JAMAICA: “JUST A LITTLE SEX”*, June 21 2006, available at <http://www.amnesty.org/en/library/info/AMR38/002/2006>.

⁸⁸ Nelson, *supra* note 23.

⁸⁹ The unnatural connexion, *supra* note 19, at 35.

⁹⁰ *Id.*

⁹¹ Gordon, *supra* note 79,

⁹² Nelson, *supra* note 23

⁹³ U.N. Human Rights Comm. [ICCPR], General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17), ¶ 1 (April 8, 1988).

⁹⁴ *Toonen v. Australia*, *supra* note 14.

Section 76, “*Unnatural crime*” states:

Whoever shall be convicted of the abominable crime of buggery committed either with mankind or with any animal shall be liable to be imprisoned and kept to hard labour for a term not exceeding ten years.

Section 77, “*Attempt*” reads:

Whoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for a term not exceeding seven years, with or without hard labour.

And, Section 79, “*Outrages on decency*” reads:

Any male person who, in public or private, commits, or is party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for a term no exceeding 2 years, with or without hard labour.⁹⁵

Although the buggery law in Jamaica does not explicitly target same-sex conduct, “buggery has become a synonym for same-sex intercourse... shift[ing] the attention of society on specific sectors of the populations instead of conduct.”⁹⁶ The very existence of these laws is in violation of Article 17, even if, as in *Toonen v. Australia*, they are rarely enforced.

Denial of status of transgender people, including, but not limited to, deprivation of the right to change name and sex, is a violation of the right to privacy. In *Goodwin v. United Kingdom*, the European Court of Human Rights held that the right to privacy encompasses the right of transgender women to change their gender on their legal identification paper post-operation.⁹⁷ Moreover, Article 17 requires that states take positive measures to protect the right to privacy. Jamaican law offers no protections to transgender people. Additionally, due to widespread discrimination, Jamaican transgender people have a difficult time finding professions and are forced into either sex work or seek out aesthetic professions, finding work such as hairdressers or nail technicians.⁹⁸

⁹⁵ The Offences against the Person Act, *supra* note 2, §§ 76-77, 79.

⁹⁶ The unnatural connexion, *supra* note 23, at 18.

⁹⁷ *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 18, ¶ 93 (2002).

⁹⁸ Email with Maurice Tomlinson, *supra* note 77.

Finally, the widespread attacks that LGBT individuals in Jamaica have suffered in their homes, as described in Section B of this report, also constitute a violation of the Article 17 right to privacy. The persecution and harassment that LGBTI individuals suffer on a regular basis may frequently occur in public places, but also LGBT individuals are not free from it in the privacy of their own homes. For example, Women for Women describes that one of their members who is a lesbian was forced to leave her neighborhood due to the constant harassment, cat-calls and threats that she suffered when she would walk to and from her home with her partner.⁹⁹ In instances such as these, the state is responsible because it has an obligation under Article 17 to protect individuals' right to enjoyment of privacy in their own homes, and in Jamaica, the authorities fail on a regular basis to ensure this basic protection for members of the LGBT community.

E. Article 14 (Right to Fair Trial)

Article 14 guarantees that "all persons shall be equal before the courts and tribunals." The guarantee of equality applies regardless of the nature of the proceedings before the court.¹⁰⁰ Article 14 also requires competence, independence and impartiality of tribunals.¹⁰¹ Courts fail to protect the rights of LGBT individuals when victims are not afforded the same benefits and protections as the rest of the population because of their sexual orientation or gender identity. In its submission under the UPR in August 2010, the Jamaican government detailed its efforts to reform its justice system. It made absolutely no mention of the treatment of LGBT persons.¹⁰²

Article 14 of the ICCPR prohibits judges from allowing personal bias and prejudice to influence their decisions.¹⁰³ In Jamaica, however, judges allow their prejudice against victims of violence based on sexual orientation or gender identity to influence their decision to grant a lenient sentence to defendants in criminal proceedings. For example, defendants accused of murder are allowed to use the excuse of "self-defense" to secure lenient sentences. This defense is particularly common amongst those accused of crimes against LGBT individuals, who frequently claim self-defense against alleged sexual advances from the victim, thereby resulting in very few convictions for those who commit crimes against this group. Prince Vale, the killer of the Reverend Richard Johnson, was convicted on the charge of manslaughter and sentenced to twelve years. The jury found Vale guilty of manslaughter rather than murder, although he stabbed Reverend Johnson 25 times, based on his claim of self-defense from sexual advances.¹⁰⁴ In a similar case, Kevon Martin was charged with the murder of Steve Lindo in Lindo's own home. Over the objections of the prosecution in that case, a magistrate granted bail, indicating

⁹⁹ Interview with Women for Women, with the GW Clinic, Monday, September 19, 2011, on file with authors.

¹⁰⁰ U.N. Human Rights Comm. [ICCPR], *General Comment No. 32 Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial*, ¶ 3, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter General Comment No. 32].

¹⁰¹ *Id.* at ¶ 19.

¹⁰² Jamaica UPR Report, *supra* note 57, ¶¶ 88-95.

¹⁰³ General Comment No. 32, *supra* note 97, ¶ 21.

¹⁰⁴ *Priest's Killer gets 12 Years*, CONGER, Feb. 13 2009, available at

<http://geoconger.wordpress.com/2009/02/13/priests-killer-gets-12-years-cen-21309-p-8/>; The unnatural connexion, *supra* note 23, at 33.

that he believed Martin was acting in self-defense when he stabbed Lindo with a pair of scissors, after Lindo allegedly made sexual advances towards him.¹⁰⁵

In Jamaica, there is no specific recognition of hate crimes against individuals who are targeted based on actual or perceived sexual orientation or gender identity. Furthermore, often the victim's sexual orientation or gender identity is used as a mitigating, rather than aggravating, factor in prosecution, as is demonstrated by these incidents described above.

F. Article 9 (Right to Liberty) and Article 10 (Treatment of Individuals Deprived of Their Liberty)

Article 9 states that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” Violations of Articles 9 and 10 are reflected in the Jamaican Constabulary Forces practices regarding arrest and detention of LGBT people, and in the treatment they endure if they are detained.

1. Arbitrary Arrests and Detention by the JCF

The government discriminates against LGBT individuals through the detention and arrest practices of the JCF. Jamaica retains numerous laws that facilitate arbitrary arrest and detention of LGBT individuals. Jamaican law provides broad discretion for police to detain people on charges that are not well-defined, such as “suspicion of buggery” and “gross indecency”. The police take advantage of these laws by threatening, arresting, detaining, and prosecuting people based on their perception of an individual's gender identity or sexual orientation.¹⁰⁶ In one instance, in 2009, a Jamaican police officer who was suspected by another officer of having committed acts of “gross indecency” with another officer was detained for 12 days without charge.¹⁰⁷

Additionally, Section 80 of The Offenses Against the Person Act allows police officers to arrest any person found loitering between 7 p.m. and 6 a.m. because such behavior provides the officers with good cause to believe that such a person would commit a felony. The Towns and Communities Act, Section 3(r), allows police to “arrest without warrant and based on charges made by any ‘credible person’” that certain offences were committed within view of the charging party.¹⁰⁸ The vagueness of Jamaica's laws against “buggery” and “gross indecency,” combined with such broad police powers to arrest and detain, disproportionately affect LGBT individuals' rights to be free from arbitrary arrest or detention.

2. Conditions of Detention

¹⁰⁵ *Man before Court for Killing Alleged Homo*, JAMAICAN OBSERVER, Mar. 21, 2011, available at http://www.jamaicaobserver.com/news/Man-before-court-for-killing-alleged-homo_8541388.

¹⁰⁶ HATED TO DEATH, *supra* note 23, at 22.

¹⁰⁷ The unnatural connexion, *supra* note 23, at 40.

¹⁰⁸ HATED TO DEATH, *supra* note 23, at 22.

Furthermore, the conditions under which LGBTs are detained violate Article 9. In August 1997, the Commissioner of Corrections was alleged to have said that “warders and inmates will be issued with condoms to prevent a further increase of HIV/AIDS in the prisons.”¹⁰⁹ After this statement, which was perceived as acknowledging that men had sex with men in prisons, prison wardens at two maximum-security prisons demanded that the Commissioner resign, and they went on a “sick out” in protest. Riots broke out, and sixteen prisoners were killed because of they were believed to be homosexuals.¹¹⁰

More recently, in February 2010, the U.N. Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment, Manfred Nowak, conducted a mission to Jamaica in which he documented the conditions of detainees there.¹¹¹ He visited police stations and detention centers to assess detention conditions in Jamaica and reported that LGBT people in detention centers are locked up separately, supposedly for their own protection. However, because of this “protection,” they suffer “loss of privileges of a punitive character, such as work and recreation, including the use of the library and playing field. In the security section in the Tower Street centre, detainees were locked up in dark, solitary cells without a toilet or water, and had nobody to call for help.”¹¹²

G. Article 18 (Freedom of Religion)

As stated in Article 18(1), “[e]veryone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” Article 18(2) prohibits denying individuals the “freedom to have or to adopt a religion or belief of his choice.”

In Jamaica, LGBT faith groups exist, although they largely are forced to operate underground due to societal persecution and condemnation by faith leaders. Research studies regarding the role of religion in Jamaican culture reflect that attitudes toward sexuality are strongly influenced by religion. In a national survey conducted in 2010 by noted researcher Professor Ian Boxill, the strongest objections to homosexuality were raised on religious grounds and the need to “protect Jamaican society from changing its cultural practices for the worse.” The survey showed that 81.8% of respondents attend church and 82% deemed male homosexuality to be morally wrong, as opposed to 3.6% who did not see it as a moral issue. Of significance is the fact that 30% agreed that someone can be homosexual and also be a Christian, but 56% believe that it is not possible to be a homosexual and be religious at the same time. However, a significant minority (43%) did not share this view.¹¹³ Religious leaders are outspoken about their criticism of LGBT people and their conviction that Christians should unify against them. For example, Wellesley A. Blair, Administrative Bishop for the New Testament Church of God, told the Jamaica Gleaner

¹⁰⁹ *The week that was, August 17-23, prison riots*, THE SUNDAY GLEANER, Aug. 21, 2007.

¹¹⁰ *Id.*

¹¹¹ U.N. Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak - Addendum - Mission to Jamaica, U.N. Doc. A/HRC/16/52/Add.3 (Oct. 11, 2010) [hereinafter Report on Torture and other Cruel, Inhumane or Degrading Treatment].

¹¹² *Id.* at ¶ 47.

¹¹³ *Homophobia Linked to Education and Socio-Economic Status*, Jamaica Forum for Lesbians, All-Sexuals and Gays, May 17, 2011, available at <http://www.jflag.org/2011/05/>.

in February 2007 that he believed “[s]odomites who are caught should be beaten. ‘I believe that when the court orders lashing, some of those Sodomites who are caught and some of the criminals, should be brought in the square of Half-Way Tree and be lashed and send them home.’” He also stated that he planned to “influence the Christian community to target them (politicians) in the next election.”¹¹⁴

In addition to the persecution that LGBT faith groups suffer from other religious leaders who believe that these groups are illegitimate, these groups often fear seeking the tax-exempt status enjoyed by other religious groups for fear of bringing attention to themselves.¹¹⁵ As a result, LGBT religious groups do not receive same benefits that other religious groups receive.

H. Article 19 (Freedom of Expression) and 20(2) (Incitement to Violence)

Under Article 19(2), “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Article 20(2) states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

The Jamaican government has failed to ensure that LGBT freedom of expression is protected. In August, 2011 J-FLAG attempted to air a paid public service announcement (PSA) on Jamaica’s television networks intended to promote tolerance of the LGBT community. However, Television Jamaica refused to air the PSA. Gary Allen, the managing director of Television Jamaica’s parent company stated, “[w]e considered whether we would air it in the context of public opinion and that there has been significant public opinion to consider, particularly the response of the church to the prospects to the ad being aired [...]”¹¹⁶ He cited concern that the television station could appear to be promoting homosexual conduct because such conduct is criminalized in Jamaica.¹¹⁷ J-FLAG’s executive responded, “since we are not directly or indirectly promoting anything that is illegal, love is not illegal, we don’t see why we shouldn’t be able to go forward.”¹¹⁸

In its recent *List of issues to be taken up in connection with the consideration of the third periodic report of Jamaica*, the HRC requested information on the government’s actions regarding censure of music that incites violence.¹¹⁹ The Jamaican Broadcasting Commission issued a directive, in February 2009, regarding suitability of songs for airplay that states:

¹¹⁴ See Clarendon Spaldings, *The wrath of a bishop*, JAMAICA GLEANER, Feb. 28, 2007, available at <http://jamaica-gleaner.com/gleaner/20070228/news/news2.html>

¹¹⁵ Monroe, *supra* note 73; see also The unnatural connexion, *supra* note 23, at 43.

¹¹⁶ Nadine Wilson, *Blow to gay ad – TVJ rejects J-FLAG’s PSA*, THE JAMAICA OBSERVER, Aug. 17, 2011, available at http://www.jamaicaobserver.com/news/Blow-to-gay-ad---TVJ-rejects-J-FLAG-s-PSA_9463727.

¹¹⁷ Julie Bolcer, *Television Jamaica Rejects Gay PSA*, THE ADVOCATE, Aug. 17, 2011, available at http://www.advocate.com/News/Daily_News/2011/08/17/Television_Jamaica_Rejects_Gay_PSA/.

¹¹⁸ *Id.*

¹¹⁹ U.N. Human Right Comm. [ICCPR], *List of issues to be taken up in connection with the consideration of the third periodic report of Jamaica*, ¶ 26, U.N. Doc. CCPR/C/JAM/Q/3 (Dec. 3, 2010).

1. There shall not be transmitted through radio or television or cable services, any recording, live song or music video which promotes and/or glorifies the use of guns or other offensive weapons;
2. There shall not be transmitted through radio or television or cable services, any recording, live song or music video which promotes and/or glorifies any offence against the person such as murder, rape, mob violence and other offences such as arson.¹²⁰

Despite this directive, dancehall music that incites violence against LGBT individuals remains a problem in Jamaica. First, popular dancehall and reggae shows are unregulated, and artists are free to incite violence against LGBT individuals in these public spaces.¹²¹ Second, these songs are also widely accessible on the internet. Lastly, most artists produce edited versions of their songs for airplay, and while the words in the edited versions are less graphically violent, the message remains of hatred towards LGBT individuals remains the same.¹²²

I. Article 21 (Freedom of Assembly) and 22 (Freedom of Association)

Article 21 states that "[t]he right of peaceful assembly shall be recognized." Article 22(1) requires that "[e]veryone shall have the right to freedom of association with others[...]."

Fearing violence if they assemble in public places, LGBT groups are effectively denied the protections in Articles 21 and 22. LGBT groups cannot declare their true intent when they register as organizations under Jamaican law. For example, J-FLAG is registered with the government without having declaring its complete organizational objectives, fearing that the organization would be denied registration due to "immoral purposes" under the Companies Act.¹²³ In 2009, a member of Parliament, Ernest Smith, called for J-FLAG to be outlawed.¹²⁴ "How can you legitimise an organisation that is formed for the purpose of committing criminal offences?" said Smith.¹²⁵ Similarly, J-FLAG does not list the names of its members on its articles of incorporation for security reasons.¹²⁶

Frequent violence against people in Jamaica who are publically associated with gay-rights organizations legitimates these fears. Multiple people who have been associated with LGBT rights have been targeted, including Brian Williamson, the co-founder of J-FLAG, and Steve Harvey, who worked with sex workers and LGBT individuals to prevent the spread of HIV/AIDS. Both these activists were murdered violently in response to their advocacy for LGBT individuals.¹²⁷

¹²⁰ The Broadcasting Commission, *available at* http://www.broadcastingcommission.org/uploads/content_page_files/BCJ%20Directive-%20Violent%20Lyrics.pdf (last visited May 1, 2011).

¹²¹ Email with Maurice Tomlinson, *supra* note 77.

¹²² Email discussion with Corbin Gordon, Apr. 25, 2011, on file with authors.

¹²³ The unnatural connexion, *supra* note 23, at 47.

¹²⁴ The unnatural connexion, *supra* note 23, at 47-48.

¹²⁵ *See Outlaw J-Flag – Smith – MP says it could inspire wave of illegal groups*, JAMAICA GLEANER, Feb. 17, 2009, *available at* <http://jamaica-gleaner.com/gleaner/20090217/lead/lead6.html>

¹²⁶ Email with Maurice Tomlinson, *supra* note 77.

¹²⁷ Nelson, *supra* note 23.

J. Article 23 (Family Life)

Article 23 provides that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” The HRC recognizes the existence of various forms of family; in addition, family planning policies adopted by the state should not be discriminatory.¹²⁸ Furthermore, the HRC has affirmed through the *Young v. Australia* and *X. v. Colombia* cases that distinctions made in law between same-sex partners who are excluded from certain state-sponsored benefits and opposite-sex partners who were granted such benefits are discriminatory.¹²⁹

Laws that explicitly recognize rights of heterosexual relationships deny people in same-sex relationship those rights, in violation of the ICCPR. The Family Property Act of 2003 is one example of a Jamaican family law that offers differential protection of same-sex relationships and opposite-sex relationships which are similarly situated. The Act provides for the division of family property between spouses and children. The Act defines “spouse” to be:

- (a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years;
- (b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years, immediately preceding the institution of proceedings under this Act or the termination of cohabitation, as the case may be.¹³⁰

By limiting the definition of “spouse” in this way, the Act violates Article 23. Although the Act does not necessitate marriage for heterosexual couples to be protected under this law, it still provides no protection for non-heterosexual couples.

K. Article 24 (Special Protection of Children)

Article 24 recognizes “the right [of every child] to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”

Discrimination and other offenses against LGBT youth can result in violations of multiple Articles of the ICCPR, in addition to Article 24. LGBT children in Jamaica are not awarded special protections and often fall prey to violence and discrimination. For example, J.A.F., a seventeen-year-old girl, reported to the Special Rapporteur on Torture that the police discriminated against her and her friend because they are lesbians. They were treated roughly

¹²⁸ U.N. Human Rights Comm. [ICCPR], General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of the Spouses (Article 23), ¶ 2,5 (July 27, 1990).

¹²⁹ See *Young v. Australia* and *X v. Colombia supra* note 60.

¹³⁰ The Family Property (Rights of Spouses) Act, 2003, Part I.2(1).

and called “dogs.”¹³¹ Other instances of violations of special protections of children are demonstrated by instances in which parents take matters into their own hands when their children identify as LGBT, such as the incident referenced in Section K of this report regarding a mother who had her seventeen-year-old daughter kidnapped and raped to try to change her sexual orientation.¹³² Furthermore, the problem of “corrective rape” is most pronounced in families who are unhappy with the behavior of their lesbian daughters.¹³³

Prejudicial treatment and bullying of LGBT youth at school and university settings is also increasingly common. J-FLAG recently received a report of bullying targeted at a gay youth in December 2010 at Mico University College in Kingston. During a private conversation, a third-year student was tricked into admitting that he was gay by another student. The other student recorded the conversation and broadcast it over the school’s PA system. The student was forced to leave the school.¹³⁴ In another example of violence against LGBT youth in schools, in 2004, an eleventh-grader was nearly killed at Doonan Park Technical High School when the boy’s “father learned his son was gay and invited a group to lynch the boy at his school.”¹³⁵ According to news reports, as soon as his son’s classmates began beating his son, the father drove away from the school to allow them to continue the attack.

In addition to violence and bullying against LGBT youth within schools, little acceptance demonstrated to students of sexual orientations other than heterosexuality. As noted in the New York Times, in November 2007 the Jamaican Gleaner reported that some schools were using textbooks that suggested that same-sex unions were a type of family. Once this information was published, Andrew Holness, the new education minister, swiftly pulled the book from circulation, indicating that his staff was reviewing textbooks “to ensure that they adhere to the moral view of society.”¹³⁶

A group that works with youth in the Caribbean indicated in a recent report that there exist numerous challenges in working with LGBT children, who are more at risk than their peers to acquire sexually-transmitted diseases. For example, “homophobia and transphobia makes it difficult for outreach workers to identify and reach LGBT youth,” making it difficult to educate LGBT youth on specific risks they may face and to support them in challenges they may face as a result of their sexual orientation.¹³⁷

IV. Concluding Notes

- Jamaica retains laws criminalizing same-sex sexual conduct, which violates the ICCPR, and results in discrimination against LGBT people in Jamaica.

¹³¹ Report on Torture and other Cruel, Inhumane or Degrading Treatment, *supra* note 108.

¹³² *Supra* at p. 13.

¹³³ The unnatural connexion, *supra* note 23.

¹³⁴ Telephone Interview with Corbin Gordon, J-FLAG (Sept. 14, 2011).

¹³⁵ Tim Padgett, *The Most Homophobic Place on Earth?*, TIME, Apr. 12, 2006, available at <http://www.time.com/time/world/article/0,8599,1182991,00.html>.

¹³⁶ Marc Lacey, *Attacks Show Easygoing Jamaica is Dire Place for Gays*, THE NEW YORK TIMES, Feb. 24, 2008, available at <http://www.nytimes.com/2008/02/24/world/americas/24jamaica.html>.

¹³⁷ Advocates for Youth, *Overlooked and at Risk*, p. 3, 2010, available at http://www.advocatesforyouth.org/storage/advfy/documents/overlooked_lgbt_youth_caribbean.pdf

- Jamaican politicians use homophobic language to gain popularity, which encourages an environment of intolerance towards LGBT individuals.
- Jamaican laws provide no protections against discrimination on the basis of sexual orientation or gender identity.
- Violence against LGBT individuals is gruesome, widespread, and facilitated by the inaction and at times participation of government actors.
- LGBT individuals lack access to basic public services including health care and police protection due to the hostile environment created by the government.

V. Recommendations

The following are proposed recommendations for the Government of Jamaica:

1. Repeal Sections 76, 77, and 79 of the Offences against the Person Act (laws criminalizing same-sex conduct).
2. Amend the Charter of Fundamental Rights and Freedoms to prohibit discrimination on the ground of sex, which under the jurisprudence of the HRC includes sexual orientation and gender identity.
3. Enact legislation prohibiting discrimination on the basis of sexual orientation and gender identity in all realms, including employment, housing, education, and access to health services.
4. Adopt criminal legislation imposing higher sentences for hate crimes (violent crimes committed out of hate) committed based on the sexual orientation or gender identity of the victim.
5. Provide equality and human rights training, particularly in the area of LGBT rights, for teachers and staff in schools, governmental officials at all levels, and law enforcement officers.
6. Review and amend current legislation to provide individuals in same-sex relationship with the same rights as those in opposite sex-relationships.
7. Enact legislation that recognizes the right of transgender individuals to legally change their gender.