



June 5, 2019

The Canadian HIV/AIDS Legal Network
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Mr. Victor Madrigal-Borloz
Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity
Office of the United Nations High Commissioner for Human Rights
Palais Des Nations
1211 Geneva 10
Switzerland

Dear Dr. Madrigal,

The Canadian HIV/AIDS Legal Network promotes the human rights of people living with, at risk of or affected by HIV or AIDS, in Canada and internationally, through research and analysis, litigation and other advocacy, public education and community mobilization. Relying on sound evidence and analysis to challenge the stigma and discrimination faced by LGBT people that leads to misguided policies and injustice, the Legal Network strives for a world in which the health and human rights of LGBT people everywhere are fully protected.

Jamaica is one of the countries where we actively collaborate with partners on the ground to reduce stigma and discrimination against LGBT people. We are therefore pleased to provide you with the following responses to the questions in your letter of 6 May 2019 where you sought input for your upcoming report that will focus on marginalisation and exclusion of LGBT people from socio-cultural environments.

Please feel free to contact the undersigned should you require any further clarification.

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1. Key areas in which people (in your country, region or worldwide) suffer socio-cultural and economic exclusion as a result of violence and discrimination on the basis of sexual orientation and/or gender identity; in particular,
 - a) What knowledge, including data, exists in the State planning bases in relation to socio-cultural and economic exclusion based on sexual orientation and gender identity, including levels of poverty, homelessness, education, employment, health, political participation and any other relevant social indicator?
 - b) How are individuals, groups or communities differently affected, based on their sexual orientation and/or gender identity?

- c) What are the main barriers in ensuring equal access to education, health care, employment and occupation, housing and other relevant sectors?

Violence and discrimination

LGBT people in Jamaica live in a climate of societal homophobia, and discrimination based on sexual orientation, gender identity and gender expression is widespread.¹ LGBT Jamaicans are “taunted, threatened, fired from their jobs, thrown out of their homes, beaten, stoned, raped, and even killed.”² Between January 2011 and March 2017, J-FLAG, an organization that advocates for the rights of Jamaican LGBT people, documented 261 acts of violence and discrimination against members of the LGBT community.³ The violations, happening in both private and public spaces, are committed by a wide cross section of persons both known and unknown to victims including family members, friends, church members, community members, police officers, landlords, coworkers, etc.⁴ Subsequent to the publicized murder of 16-year-old Dwayne Jones in 2013, a transgender teen in St James, there have been several news reports of horrific attacks against LGBT people across Jamaica.⁵ However, many incidents go unreported and undocumented due to discrimination experienced by the police force. Out of the 17 documented cases of human rights violations against the LGBT community between January and June 2018, only five cases involved reports made to the authorities, due to fear of discrimination or inaction on the part of the police.⁶

In addition to actual physical violence, threats and expressions of violence are widespread in Jamaica. Dancehall has been suggested to play a role in promoting anti-gay discrimination in Jamaica. Dancehall is a form of music that originated in Jamaica in the late 1970s and it is one of Jamaica’s most popular genres.⁷ Many dancehall songs contain messages that are violent towards the LGBT community, speaking of beating and shooting gay men.⁸

Barriers to health care, employment, housing and education

There is a disproportionately high HIV infection rate among men who have sex with men in Jamaica, with a rate of nearly 31.4 percent.⁹ The barriers to health care that the LGBT population face include discrimination, ridicule and/or rejection in healthcare centres. There is a fear of a lack of privacy and anonymity when LGBT people access health care services.¹⁰ Individuals are put at risk of their sexual orientation being revealed, whether by the health care provider breaching confidentiality or the mere fact of pursuing treatment for HIV and AIDS is perceived as inferring they are gay.¹¹ If gay men answer truthfully about whether they are sexually active, they have confessed to a criminal act. If they answer untruthfully, by saying they are not sexually active

¹ D. E. Smith, “Homophobic and transphobic violence against youth: The Jamaican context,” May 2017 at www.tandfonline.com/doi/full/10.1080/02673843.2017.1336106

² Human Rights Watch [HRW], “Not Safe at Home: Violence and Discrimination against LGBT People in Jamaica,” October 2014, at www.hrw.org/report/2014/10/21/not-safe-home/violence-and-discrimination-against-LGBT-people-jamaica

³ Jamaica Forum for Lesbians All-Sexuals and Gays [J-FLAG], “Report on Human Rights Violations 2011-2017”, June 2018 at <http://jflag.org/wp-content/uploads/2018/06/Human-Rights-Violations-2.pdf>

⁴ Ibid.

⁵ J-FLAG, “Homophobia and Violence in Jamaica”, December 2013 at <http://jflag.org/wp-content/uploads/2014/07/Homophobia-Violence-in-Jamaica-JFLAG-2013.pdf>

⁶ J-FLAG, “Annual Country Status Update”, July 2018 at <http://jflag.org/wp-content/uploads/2018/09/Annual-Country-Status-Update.pdf>

⁷ K. West, “Understanding and Reducing Sexual Prejudice in Jamaica: Theoretical and Practical Insights From a Severely Anti-Gay Society,” *The Journal of Sex Research* 55(4-5) (2018): pp. 472-485

⁸ Ibid.

⁹ Human Rights First [HRF], “The World as it Should Be: Advancing the Human Rights of LGBT People in Jamaica,” July 2015 at www.humanrightsfirst.org/sites/default/files/HRF-Jamaica-Report-final.pdf

¹⁰ J.P. Figueroa, “Understanding the HIV Prevalence of HIV and Other Sexually Transmitted Infections among Socio-Economically Vulnerable Men Who Have Sex with Men in Jamaica,” *PLoS ONE* 10(2):e0117686 (2015) at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0117686>

¹¹ HRW 2014, supra note 2.

or have sex with women, they are deprived of the appropriate health information and resources necessary.¹² These barriers lead to the LGBT community being deterred from seeking critical HIV and AIDS prevention, testing, treatment, care, and support services.¹³ Even when willing, those who manifest physical symptoms may be refused public transportation, keeping them from accessing needed medical care.¹⁴

In the workplace, the 2004 Staff Orders for the Public Service, bans discrimination on the grounds of sexual orientation in civil service. There is no equivalent protection for workers in the private sector and as a result, LGBT people in Jamaica face discrimination when both seeking and maintaining employment.¹⁵ In a survey (McFee & Galbraith, 2016) of 316 Jamaicans who identify as LGBT, more than half of lesbians and gay men, and almost a third of bisexual and transgender respondents experienced harassment or discrimination in the workplace that year.¹⁶

Many members of the LGBT community experience discrimination in access to housing. Reports have been made of setting homes on fire in attacks motivated by a desire to force individuals out of their community.¹⁷ LGBT youth comprise up to 40 percent of Jamaica's homeless youth population.¹⁸ Youth are sometimes rejected by their families and ejected from their homes once the family learns of their sexual orientation or gender identity.¹⁹ In a national study commissioned by J-FLAG in 2015, 75 percent of the 1003 respondents said that they would feel uncomfortable to live with a gay person, and almost half (47 percent) stated that they would not allow their child to live in the house if their child were gay or allow the gay child around his siblings (37 percent).²⁰ In addition to being kicked out of their homes by family members, LGBT people are driven out by neighbours and community members who attack or threaten them, forcing them to flee.²¹ These individuals encounter obstacles finding shelter. Many are forced to live below the streets in storm drains.²² There are no shelters specifically for LGBT youth and landlords are unwilling to rent to LGBT people.²³ Homeless LGBT individuals are forced to move frequently to avoid the threat of violence and authorities chasing them away from the places they have settled.²⁴

Elsewhere in the community in schools and other educational institutions, the incidence of bullying of LGBT students is particularly high, according to the executive director of J-FLAG, Jaevion Nelson.²⁵ In a study where students were asked to provide a profile of peers most likely to be bullied, they noted, among others, those perceived to be LGBT as top characteristics.²⁶ In addition to bullying, the education system fails to protect LGBT youth at school. Many cases of bullying go unreported as the students do not have the confidence in

¹² Canadian HIV/AIDS Legal Network, "Constitutional challenge to Jamaica's anti-sodomy law: Questions & Answers," December 2015 at www.aidslaw.ca/site/constitutional-challenge-to-jamaicas-anti-sodomy-law-qa/?lang=en

¹³ Ibid.

¹⁴ HRW 2014, supra note 2.

¹⁵ Ibid.

¹⁶ R. McFee & E. Galbraith, "The Developmental Cost of Homophobia: The Case of Jamaica", January 2016 at http://jflag.org/wp-content/uploads/2014/08/The-Developmental-Cost-of-Homophobia-The-Case-of-Jamaica_20162.pdf

¹⁷ HRW 2014, supra note 2.

¹⁸ Ibid.

¹⁹ HRF 2015, supra note 9.

²⁰ J-FLAG, "Awareness, Attitude & Perception Survey About Issues Related to Same Sex Relationships," August 2015 at <http://jflag.org/wp-content/uploads/2018/06/Jamaica-National-Survey-on-Homophobia-2016.pdf>

²¹ HRW 2014, supra note 2.

²² HRF 2015, supra note 9.

²³ Ibid.

²⁴ J-FLAG, Women's Empowerment for Change, The Colour Pink Foundation, TransWave, Center for International Human Rights, Global Initiatives for Human Rights of Heartland Alliance for Human Needs & Human Rights, "Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Jamaica: A Shadow Report", September 2016 at <http://jflag.org/wp-content/uploads/2018/06/Jamaica-LGBT-Report-September-2016-final.pdf>

²⁵ The Jamaica Gleamer, "Editors' Forum: J-FLAG: Schools Not Taking Bullying Of LGBT Students Seriously," May 2019 at <http://jamaica-gleaner.com/article/lead-stories/20190506/editors-forum-j-flag-schools-not-taking-bullying-LGBT-students>

²⁶ UNICEF, "Investigating the prevalence and impact of peer abuse (bullying) on the development of Jamaica's children," July 2015 at www.cda.gov.jm/wp-content/uploads/bullying_full-report_FINAL.pdf

school administrators to take the matter seriously.²⁷ In fact, homophobic school counselors completely shun LGBT students.²⁸ In January of 2016, the president of the Jamaica Association for Guidance Counsellors in Education revealed that “counsellors who are of the Christian faith [...] will not [...] look at those students at all.”²⁹

Transgender people and lesbian women

While the laws against “buggery” and “gross indecency” do not specifically reference transgender people or lesbian sexual conduct, gender non-conforming Jamaicans and women who have sex with women, are most likely to suffer violence and discrimination.³⁰ The prevalence of domestic violence is exacerbated for lesbian women, who face the dual threat of gender-based violence and discrimination, plus violence and discrimination based on sexual orientation or gender identity. There is a trend of “corrective rape” by men with the “purported justification that rape will ‘cure’ gay women” and “make them straight”.³¹ Transgender people in Jamaica face a combination of ignorance and discrimination with regards to access to hormonal and surgical treatments for their transition.³²

2. Root causes and structural factors responsible for marginalisation and socio-cultural and economic exclusion, such as laws, public policies, institutional practices, organizational behaviours, and prevailing ideologies, values and beliefs?

The entrenched discrimination against the LGBT community arises from and is exacerbated by political and legal stigmatization, police violence, and inability to access the justice system.³³ As the Inter-American Commission on Human Rights (IACHR) states, the laws against homosexual conduct “may contribute to an environment that, at best, does not condemn, and at worst condones discrimination, stigmatization, and violence against the LGBT community”.³⁴

The *Offences Against the Person Act* of 1864 criminalizes sexual conduct between men in Jamaica. Those convicted under Article 76, which criminalizes “the abominable crime of buggery”, also known as the “buggery statute”, receive sentences of up to 10 years imprisonment and hard labour.³⁵ Other provisions in the Act, including “attempted buggery” and “outrages on decency” result in sentences of up to seven years or two years imprisonment, respectively, with or without hard labour. The *Sexual Offences Act* (2011) requires anyone convicted of these offences to be registered as a sex offender and to always carry a pass or face 12 months in prison and a J\$1 million dollar fine.³⁶ Additionally, s.3 of the *Sexual Offences Act* (2011), narrowly defines rape as the non-consensual penetration of a vagina by a penis but does not accordingly recognize male rape. Male rape is only recognized as “buggery” with perpetrators facing a significantly lower penalty.³⁷

²⁷ Ibid.

²⁸ M. Tomlinson, “Jamaica is failing its LGBT youth”, January 2016 at www.humanrightsfirst.org/blog/jamaica-failing-its-LGBT-youth

²⁹ The Jamaica Gleamer, “Guidance Counsellors Shun Gay, Lesbian Students,” January 2016 at <http://jamaica-gleaner.com/article/lead-stories/20160111/guidance-counsellors-shun-gay-lesbian-students>

³⁰ HRW 2014, supra note 2.

³¹ J-FLAG, Women’s Empowerment for Change, The Colour Pink Foundation, TransWave, Center for International Human Rights, Global Initiatives for Human Rights of Heartland Alliance for Human Needs & Human Rights supra note 24.

³² Ibid.

³³ Ibid.

³⁴ Inter-American Commission on Human Rights [IACHR], “Report on the Situation of Human Rights in Jamaica,” August 2012, at www.oas.org/en/iachr/docs/pdf/Jamaica2012eng.pdf

³⁵ Offences Against the Person Act (1864).

³⁶ Sexual Offences Act (2011).

³⁷ Sexual Offences Act (2011).

Therefore, the “buggery statute” in combination with the *Sexual Offences Act* creates an unequal regime for protection against sexual violence.³⁸

Despite Jamaica being a signatory to several international conventions and treaties that prohibit discrimination and protect human rights, there is no comprehensive anti-discrimination legislation.³⁹⁴⁰⁴¹ Jamaica’s Charter of Fundamental Rights and Freedoms outlines protections from discrimination; however, sexual orientation and gender identity are not included in the list of protected classes.⁴² Rather than prohibiting discrimination on the grounds of “sex”, Jamaica’s Charter prohibits discrimination on the grounds of being “male or female”.⁴³ This use of language limits judicial interpretation of Jamaica’s Charter as including protections on the basis of sexual orientation and gender identity. However, in *Tomlinson v Television Jamaica Ltd.*, the court stated that opening paragraph of the Charter is broad and comprehensive enough to suggest an interpretation of entitling all Jamaicans to the listed rights and responsibilities, including LGBT people.⁴⁴

Prosecutions under these laws are rarely pursued.⁴⁵ However, the sociocultural and legal environment are responsible for prevailing ideologies that LGBT people should be treated as criminals.⁴⁶ As individuals believed to be engaged in criminal activity, police are less likely to investigate crimes against them.⁴⁷⁴⁸ Police officers use the laws as leverage to extract bribes, threatening to arrest or release the names of LGBT people to the media, friends, family, or the broader community.⁴⁹⁵⁰ Therefore, there is a general mistrust of the police force and reluctance to report cases of violence against the LGBT community to the relevant authorities.⁵¹⁵² Incidents of police themselves being the perpetrators of violence against the LGBT community, or standing by during attacks by private actors, reaffirms the message to the community that LGBT people have no recourse to justice and no protection from the state.⁵³

Other ways the laws have been used to justify violence and discrimination are the responses to the revelation that Jamaican school counselors refuse to offer counselling services to students who identify as LGBT. The former head of Jamaica’s teachers union Norman Allen used the state of the law to justify the discrimination and stated that the Jamaica Teachers’ Association cannot call for counselors to be trained to work with LGBT youth because sodomy is illegal in the country.⁵⁴

Public opinion appears to be deeply entrenched against legal reform. J-FLAG’s 2015 national study concluded that a majority (74 percent) of the Jamaican public do not support a change to the “Buggery Law” or the

³⁸ G. Murray & C. Harper, “Criminalizing Private Consensual Intimacy II: An Updated Analysis of the “Buggery Law” in Jamaica,” 2017 at <http://jflag.org/wp-content/uploads/2014/08/Criminalizing-Private-Consensual-Intimacy-.pdf>

³⁹ J-FLAG, Women’s Empowerment for Change, The Colour Pink Foundation, TransWave, Center for International Human Rights, Global Initiatives for Human Rights of Heartland Alliance for Human Needs & Human Rights supra note 24.

⁴⁰ D.E. Smith 2017, supra note 1.

⁴¹ HRW 2014, supra note 2.

⁴² HRF, “LGBT Issues in Jamaica Fact Sheet”, at www.humanrightsfirst.org/sites/default/files/Jamaica-LGBT-Fact-Sheet.pdf

⁴³ Amnesty International, “Jamaica: Submission to the UN Universal Periodic Review,” May 2015 at www.amnesty.org/download/Documents/AMR3800042014ENGLISH.pdf

⁴⁴ *Tomlinson v Television Jamaica Ltd.* 2013 JMFC Full 5.

⁴⁵ G. Murray & C. Harper 2017, supra note 26.

⁴⁶ HRW 2014, supra note 2.

⁴⁷ Ibid.

⁴⁸ Amnesty International 2015, supra note 34.

⁴⁹ HRF 2015, supra note 9.

⁵⁰ HRW 2014, supra note 2.

⁵¹ HRF 2015, supra note 9.

⁵² J-FLAG, Women’s Empowerment for Change, The Colour Pink Foundation, TransWave, Center for International Human Rights, Global Initiatives for Human Rights of Heartland Alliance for Human Needs & Human Rights 2016, supra note 24.

⁵³ J-FLAG, Women’s Empowerment for Change, The Colour Pink Foundation, TransWave, Center for International Human Rights, Global Initiatives for Human Rights of Heartland Alliance for Human Needs & Human Rights 2016, supra note 24..

⁵⁴ M. Tomlinson 2016, supra note 28.

Jamaican Charter to allow greater protection to LGBT Jamaicans.⁵⁵ Approximately 93 percent of the respondents across all the study populations (general public, employers and politicians) agreed with the statement that ‘homosexuality is a sin’ and 61 percent of the sample believed that with professional help, LGBT people could become heterosexuals.⁵⁶ The laws substantially hinder the government’s ability to create ameliorative programs for the LGBT community because they will be accused of providing “special” services to a population that is criminal.⁵⁷ As stated above, both the International Covenant on Civil and Political Rights (ICCPR) and the American Convention of Human Rights (ACHR), both place obligations on Jamaican authorities to protect and promote various fundamental rights.⁵⁸ The current Jamaican sodomy laws and the abuses documented violate these international obligations.

Respectfully yours,

A handwritten signature in blue ink, appearing to be 'M. Tomlinson', on a light-colored rectangular background.

Maurice Tomlinson
Senior policy analyst
The Canadian HIV/AIDS Legal Network

⁵⁵ J-FLAG 2015, supra note 20.

⁵⁶ Ibid.

⁵⁷ HIV/AIDS Legal Network 2015, supra note 12.

⁵⁸ HRW 2014, supra note 2.