

September 23, 2014

The Hon. Mark Golding
Minister of Justice
Chair, Joint Select Committee Reviewing the Sexual Offences Act



Dear Minister:

Re: Review of Sexual Offences Act

We write to you on behalf of a civil society organization, with more than 100 members, that works both domestically in Canada and internationally to strengthen the response to HIV and AIDS through ensuring and fulfilling the human rights of people living with HIV and of members of communities that have been particularly affected by the epidemic. We have worked with various partner non-government organizations in the Caribbean, including organizations in Jamaica, over the years to make HIV prevention and treatment efforts in the region more effective.

We are, therefore, deeply concerned about the continued criminalization of consensual sexual relationships between adult men in Jamaica and the stigmatization, marginalization and violence that it helps perpetuate. Our concern has intensified in recent years in light of a seeming surge in virulent expressions of hatred, up to and including mob assaults, torture and murder, directed against gay men and other members of the lesbian, gay, bisexual and transgender communities. These acts contravene the most fundamental, universally-recognized human rights. Furthermore, they not only cause irreparable harm to those victimized, and to their families, friends and loved ones, but also damage the fabric of Jamaica's democracy and its international reputation.

In light of these concerns, we write to you and your colleagues on the Joint Select Committee to share respectfully our recommendation that the Committee recommend as follows:

- Clause 2 should be deleted from the first schedule of the *Sexual Offences Act*, such that the provisions of the Act (Part VII) regarding reporting and remaining registered as a sex offender are no longer applicable in the case of offences under sections 76, 77 and 79 of the *Offences Against the Person Act*; and furthermore,
- Sections 76 (“unnatural crime”), 77 (attempted unnatural crime) and 79 (“outrage on decency”) of the *Offences Against the Person Act* (OAPA) should be repealed in their entirety.

We recognize that the Committee's review is specifically of the *Sexual Offences Act*. However, that Act extends the regime of reporting, registering and supervising a person as a sex offender to a person convicted under any of the three above-mentioned provisions of the OAPA – that is, they intensify significantly the already significant criminal penalties contemplated in those provisions.

Given this link between the two statutes, any review of the *Sexual Offences Act* should consider not only whether it is acceptable and justifiable to treat those convicted under the OAPA sections as sex offenders, but should consider whether those underlying sections criminalizing consensual sexual behaviour between adults, originally enacted 150 years ago, are warranted.

In our submission, the answer to both those questions, without reservation, is that the provisions are indefensible in a modern, secular democracy such as Jamaica and should be repealed, as a matter of both respect for human rights and sound public health policy.

We would like to offer a few observations for consideration by the Committee, and the Government of Jamaica, in your deliberations.

Not surprisingly, given the shared history of Canada and Jamaica as British colonies, both countries inherited substantially similar provisions in their criminal law regarding the criminalization of consensual sexual activity between adult males. Indeed, the wording of the current sections 76, 77 and 79 in Jamaica's OAPA is similar to provisions previously found in earlier iterations of Canada's *Criminal Code*. However, in the subsequent modernization of its criminal law, and reflecting basic human rights principles of non-discrimination and respect for privacy, the Canadian Parliament repealed such provisions more than 40 years ago.

This has been an important step along the country's road toward building a modern, secular, pluralistic democracy whose legal foundations included respect for basic human rights, in line with its commitments as a member of the international community of nations. Respect for difference within the human family, and the promotion of a society that values tolerance and equality, are not only now firmly embedded in basic constitutional documents but widely shared values that Canadians affirm, time and again, are important to them as features of a successful, healthy society. It seems to us, from the perspective of outside observers dedicated to the proposition that fundamental human rights are indeed the universal birthright of all people, that these principles are also reflected in Jamaica's own national motto ("Out of Many, One People") and national anthem ("Teach us true respect for all").

We do not for a moment suggest that Canada's progress in fully protecting and realizing fundamental human rights is complete. Indeed, there are many serious human rights challenges still facing the country on many fronts, including profound systemic inequities still unaddressed by policymakers. But the recognition, by courts and by legislators, that it is unjust to criminalize adults for exercising their personal autonomy in their consensual sexual relationships has been one of the more salutary developments in Canada's evolution as a nation.

There has, of course, been opposition to such recognition of the human rights – and, sadly, it has often come from certain conservative religious leaders, some of whom have been active in promoting intolerance not just at home but also abroad, including in Jamaica. (It should be noted that there are also numerous religious leaders and bodies, from various faith traditions in Canada, who have been firmly supportive of the basic equality rights of lesbians, gay men, bisexuals and transgender people.) Yet despite histrionics from some such quarters, decriminalizing adults' consensual sexual behaviour has not resulted in any profound social harms or destruction of social institutions in Canada. Rather, what we have witnessed is the social benefit of affirming the inalienable rights of all persons, including the right to personal liberty (i.e., to be free to love and to develop one's own personality, without harm to others), to freedoms of conscience and expression, and to equal treatment under the law.

Nor is there any sound basis for the wildly unscientific claims that continued criminalization of consensual sexual activity between adult men – and specifically, in the proponents' minds, anal sex – is somehow necessary as a measure to prevent HIV or other sexually transmitted infections (STIs). This reasoning is flawed on several counts. For one thing, it ignores that heterosexual men and women also engage in "buggery" (the term used in the OAPA), yet the law only prohibits sexual activity between men. Furthermore, by this faulty logic, given the significant transmission of HIV and other STIs associated with sexual activity between heterosexual men and women in Jamaica, and indeed around much of the world, it would make sense to criminally prohibit vaginal intercourse. If the Committee or Parliament seeks to justify criminal consensual sex between adults as an HIV prevention policy, then not only should it be required to demonstrate some evidence that such an infringement of basic liberties would be effective (which in fact the available evidence contradicts), but it would have to criminalize not only gay men but heterosexual intercourse as well in order to avoid a charge of hypocrisy. Put simply, the existing provisions of the OAPA criminalizing consensual sex between adult men amount to discrimination, pure and simple, contrary to well established international human rights treaties binding on Jamaica.

It also amounts to counterproductive policy in responding to HIV. The ongoing stigmatization of gay men and other men who have sex with men only makes it more difficult to engage in effective HIV prevention work, including safer sex education and access to safer sex materials, while also creating additional barriers for those who are criminalized and stigmatized in gaining access to health care services (including for those who are living with HIV). Indeed, this is a principal reason that both UNAIDS and the Global Commission on HIV and Law, as well as human rights and public health experts and the UN Secretary General, have all urged countries to respect and protect human rights as an essential element of an effective HIV response, including repealing laws that criminalize consensual sex between gay men and other men who have sex with men.

As the Global Commission noted in its review, Jamaica has the highest HIV prevalence (approximately 33 percent) in the western hemisphere among men who have sex with men. Meanwhile, many other countries that do not criminalize consensual sex between men have far lower HIV prevalence in this population. This alone should indicate that criminalizing male-male sex is not effective HIV prevention policy. As the Global Commission put it, after gathering extensive evidence and testimony from affected communities and other experts in every region of the world: “Countries must repeal all laws that criminalise consensual sex between adults of the same sex and/or laws that punish homosexual identity.” Among the Commission’s other recommendations that seem particularly relevant to Jamaica, given the high levels of violence directed at people by virtue of their real or perceived sexual orientation and/or gender identity: “Countries must promote effective measures to prevent violence against men who have sex with men.”¹

We also wish to sound a caution: it is a very dangerous and slippery slope to accept that the religious teachings of any particular faith should be the basis for determining the criminal law of the land. That way lies theocracy, incompatible with basic human rights principles. It would be a dereliction of responsibility on the part of law-makers, including members of the Committee, to fall into the illogic of those religious figures who declare that criminalizing *other* adults’ consensual sexual activity is required in order to preserve their *own* religious freedoms. To put it plainly: prosecuting and imprisoning people for having consensual sex with other adults of the same sex clearly violates a wide range of basic human rights, including liberty, equality, privacy and freedom of conscience and expression, but removing this threat of imprisonment in no way infringes upon the freedom of others to hold whatever religious beliefs they may choose. It is simply to determine that one person’s religious beliefs do not dictate or limit another person’s autonomy over their own body and sexuality.

We hope these reflections are of assistance to the Committee in its deliberations and that you will indeed conclude that, in this sesquicentennial anniversary year, it is finally time for Jamaica to modernize its criminal law, in line with fundamental human rights principles established by the international community, by eliminating the homophobic vestiges of the colonial era.

Sincerely,



Richard Elliott
Executive Director

cc: Clerk, Houses of Parliament, clerk@japarliament.gov.jm
Clerk, Joint Select Committee, monica.robinson@japarliament.gov.jm

¹ See Global Commission on HIV and the Law, *Risks, Rights & Health* (July 2012), online: www.hivlawcommission.org. Chapter 3 deals specifically with the correlation between stigma and HIV risk among “key populations,” including men who have sex with men.