

KNOW YOUR RIGHTS

MEN WHO HAVE SEX WITH MEN

AND THE LAW

(Extracted from Legal Literacy Trainers' Manual)

Prepared by



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Communities
Coalition



ROBERT
CARR
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A. LAWS GOVERNING MEN WHO HAVE SEX WITH MEN

WHAT LAWS SPECIFICALLY APPLY TO MEN WHO HAVE SEX WITH MEN?

1. Offences Against the Person Act
2. Laws governing vagrancy and loitering, and sex work
3. Laws protecting against violence

The Offences against the Person Act

The Offences against the Person Act criminalizes buggery. This is generally understood to mean anal intercourse or penile penetration per anum. The offence carries a maximum penalty of ten years imprisonment at hard labour. An attempt to commit the offence carries a penalty of seven years imprisonment at hard labour.

There is also the offence of gross indecency, which carries a penalty of up to two years imprisonment. Gross indecency captures sexual acts between males, which do not include penile-anal penetration.

Laws governing Vagrancy and loitering

The content of these laws, which authorize the police to arrest without a warrant, was explored in the Module 7: Interactions with Law Enforcement Officials. These laws are specifically important to men who have sex with men because of the wide discretion, which the police has in arresting men who have sex with men, especially those who are homeless, who engage in sex work or who fall in the category of marginalized youth. Also of relevance are the laws governing sex work wherein there are offences such as solicitation, procurement and loitering. The wide discretion of the police to arrest without warrant for vagrancy and loitering offences make men who have sex with men in particular those who are homeless, those who use drugs or those who engage in sex work vulnerable to detention. Within this context, they may be subjected to violence and deprived of their due process rights. The vagrancy and loitering offences are set out in the Towns and Communities Act and the Offences against the Offences Act and include:

- a. Where persons have committed certain minor offences in their view or in the view of some other credible person⁹⁶
- b. Where a person is loitering between 7pm and 6am and the police has good case to suspect that this person has committed or is about to commit an felony⁹⁷

⁹⁶Towns and Communities Act, section 4

⁹⁷Offences Against the Person Act, section 80

c. Where a person is a drunk, loose or disorderly person who is disturbing the public peace or who loiter at certain times and are unable to give a satisfactory account of himself⁹⁸. Where a person loiters in any public place and solicit any person for the purpose of prostitution⁹⁹

Laws protecting against violence

As regards protection from violence within the home, men who have sex with men are protected by the usual criminal laws governing assault, wounding, threats of violence etc. It is to be noted however that as regards the law that specifically govern domestic violence i.e. The Domestic Violence Act allows for persons who are being abused or threatened in a domestic setting to obtain a protection and occupation orders. If a male person is being abused by his male sexual partner, he cannot apply for protection as a spouse. It is only if he is a member of the household in which the perpetrator resides, that he can apply for protection 'a member of the household'.

As regards, violence and threats of violence in the public setting, the usual criminal laws as set out in the Offences against the Person Act governing assault, wounding and threats would apply. The JCF now has a Diversity Policy, which affirms the acceptance of all persons irrespective of characteristics such as sexual orientation and which affirms the legal obligation on the police force to equally protect all persons and to treat them in a fair and equitable manner. The Diversity Policy is meant to aid in fulfilling the mandate of the Constitution's Charter of Rights, section 13(3)(h) which requires fair and equitable treatment of everyone by public bodies.

B. LEGAL CHALLENGE TO THE OFFENCES AGAINST THE PERSON ACT

The Offences against the Person Act has been challenged in Jamaica's local courts and also at the international level. At present there is a matter before the Supreme Court in which Maurice Tomlinson, who identifies as homosexual is alleging that the criminalization of buggery between consenting individuals over age 16 violates certain rights under the Constitution.¹⁰⁰ The rights, which he identified, are:

- Right to liberty and security of the person

⁹⁸Towns and Communities Act, section 7

⁹⁹Towns and Communities Act, section 3 (r)

¹⁰⁰Maurice Tomlinson v Attorney General of Jamaica Claim No. 2015 HCV 0573

- Right to freedom of expression
- Right to equality before the law
- Right to freedom from discrimination on the ground of being male or female in respect of the offence of gross indecency
- the right to respect for and protection of private and family life, and of privacy of the home, guaranteed by section
- the right to protection from torture, or inhuman or degrading punishment or other treatment

It is recognized that such laws violate international human rights law. In the neighbouring Caribbean country of Belize, the Supreme Court recently found that a similar law violated Mr. Caleb Orozco's constitutional rights. Mr. Tomlinson's case however has a unique obstacle. By virtue of 13 (12) of the Constitution of Jamaica, the Courts are prevented from declaring that certain laws governing sexual offences are inconsistent with the Constitution. The law being challenged by Mr. Tomlinson is one such law. This Maurice Tomlinson case is still before the courts. It is important to know that.

C. VIEWS OF INTERNATIONAL HUMAN RIGHTS BODIES

At the international level, the discriminatory nature and dehumanizing effect of the criminalization of sexual acts and intimacy between consenting adults has been firmly established.¹⁰¹ Treaty monitoring bodies in their explanation of the rights under treaties such as the International Covenant on Civil and Political Rights and the Inter-American Commission on Human Rights in respect of the American Convention on Human Rights have determined that the scope of protection under these treaties are such that they protect against discrimination on the basis of sexual orientation.

The Human Rights Committee which is the treaty monitoring body for the International Covenant on Civil And Political Rights expressed that provisions under the Offences against the Person Act which criminalizes consensual same-sex relationships promotes discrimination against homosexuals and advised Jamaica to “decriminalize sexual relations between consenting adults of the same sex, in order to bring its legislation into line with the Covenant and put an end to prejudices and the social stigmatization of homosexuality”

¹⁰¹ General Assembly. Human Rights Council, Nineteenth session, Agenda items 2 and 8, Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity A/HRC/19/41 , November 2011

It is advised that the laws be amended with a view to prohibiting discrimination based on sex, sexual orientation and gender identity.¹⁰² Central to this finding by the Committee is the provision of article 26 of the ICCPR, which provides that:

In 2011, the Human Rights Committee also took note of reported 'stigmatization against people with HIV/AIDS, which conflates HIV/AIDS with homosexuality. The Committee expressed concern that this stigmatization, which is partly fuelled by the laws that criminalize consensual same-sex relationships, hampers access to treatment and medical care by persons living with HIV/AIDS, including homosexuals. The Human Rights Committee advised Jamaica to take concrete measures to raise awareness of HIV/AIDS with a view to combating prejudices and negative stereotypes against people living with HIV/AIDS, including homosexuals and to ensure that persons living with HIV/AIDS, including homosexuals, have equal access to medical care and treatment.¹⁰³

The Inter-American Commission on Human Rights has also considered the treatment of persons in the LGBTI community in Jamaica. In 2012, the Inter-American Commission on Human Rights produced a report on Jamaica after conducting a country visit in 2008. The 2012 report highlighted how the fear of violence from the police inhibits the ability of members of the gay community to make reports to the police where they are subjected to violence or discrimination. The IACHR also highlighted how the exclusion of LGBT persons from the protection of the justice system made it more likely for such persons to remain in abusive relationships without seeking police protection.¹⁰⁴ In its thematic report on violence against LGBT persons in the Americas, the IACHR indicated that criminalization of same-sex consensual intimacy negatively impact the rights to life, personal integrity, personal liberty, privacy, and access to health and other services.¹⁰⁵

¹⁰²Human Rights Committee, Concluding Observations for Jamaica 2011 – para 8 - 9

¹⁰³Human Rights Committee, Concluding Observations for Jamaica 2011 – para 8 - 9

¹⁰⁴IACHR, Report on the Situation of Human Rights in Jamaica, 2012

¹⁰⁵IACHR Violence Against LGBTI Persons in the Americas, 2015



“ I am entitled to fair and professional treatment by you and you are required to give full respect to my human rights and dignity both in the Constitution and echoed in the Diversity Policy.

“ I have the right not to be arbitrarily arrested and deprived of my liberty,

“ If I am detained or arrested:

- I have the right to communicate with my family, my partner, my religious counsellor and a medical practitioner of my choice.
- I have the right to be informed of the nature of any charge against me and in a language that I understand.
- I have the right to communicate with and retain an attorney-at-law.
- I have the right to accept assistance from the Duty Counsel.
- I am entitled to bail and should be brought before the court within a reasonable time.
- I should be treated humanely and with respect for the inherent dignity of the person.