



**Jamaica AIDS Support for Life
Submission to the Joint Select Committee reviewing the Sexual Harassment
Act**

A Submission is made to the Joint Select Committee Reviewing the Sexual Harassment Act
2019.

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Jamaica AIDS Support for Life

Submission to the Joint select Committee of Parliament on the:

SEXUAL HARASSMENT ACT 2019

DECEMBER 2019

SUBMISSION TO THE JOINT SELECT COMMITTEE OF PARLIAMENT APPOINTED TO REVIEW THE SEXUAL HARASMENT ACT 2019 - An ACT to make provision for the prevention of Sexual Harassment and for connected matters.

Background of Contributing Organisation

Jamaica AIDS Support for Life, hereinafter referred to as JASL, is the oldest and largest HIV-focused, human rights, non-governmental organisation in the region. It is dedicated to preserving the dignity and rights of persons living with HIV and AIDS, and those vulnerable to HIV infection. Importantly, a key component of the organisation's work is to create an enabling environment for those infected and affected by HIV through bio-medical and social support services. In its fight against the spread of the epidemic in Jamaica, the organisation has a comprehensive public health approach through prevention efforts such as public education around HIV, as well as efforts to protect those who are most vulnerable to contracting the virus.

In 2013 the United Nations Commission on the status of women included several clauses about sexual harassment in public spaces in its agreed conclusions. This was a first for the Commission and signaled a shift in how this issue is viewed and its level of importance. It expressed deep concern about violence against women and girls in public spaces, including sexual harassment, especially when it is being used to intimidate women and girls who are exercising their human rights and fundamental freedoms. It called on States to increase measures to protect women and girls from violence and harassment, including sexual harassment and bullying in both public and private spaces, to address security and safety, through awareness-raising, involvement of local communities, crime prevention laws, and policies. JASL believes that as one of the member states of the United Nations, Jamaica has an excellent opportunity for this Sexual Harassment Act to be in line with international standards and live up to its international obligation, by ensuring it is very comprehensive piece of legislation

Sexual harassment is a serious violation of human rights that have led to more serious sexual offences such as rape and even murder. In 2018 France passed laws outlawing sexual harassment after public outcry about an incident where a woman, Marie Lagurre, was attacked due to the fact that she did not respond favourably to sexual harassment from a man. The 2008 Reproductive Health Survey reports that almost half (48.8%) of all sexually active females, 15-24 years old, said they were coerced into having sex the first time they ever had sex. Similarly, in Jamaica 16% of adolescent boys aged 10-15 years did not consent to their first sexual encounter (CARICOM, 2014). The statistics is further alarming when one considers that most incidents of sexual violence go unreported, especially when our boys and men are victims. These incidents frequently start with some form of sexual harassment and eventually lead to more serious events.

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It is the position of JASL that not only is sexual violence a serious social issue; it is also a public health issue and a serious violation of human rights that must quickly be addressed. As a service provider, it is noted that persons who experience sexual violence are at risk for a range of medium to long term health problems. Sexual harassment causes people, especially women to feel anxiety or depression and prompt them to change their route or regular routine (Stop Street Harassment, 2019).

This submission is made primarily to strengthen the legislative framework around sexual offences with the addition of this new Sexual Harassment Act and to ensure that the laws governing same are inclusive enough to provide protection for the all persons affected.

Our recommendations are in keeping with the Government of Jamaica's commitment, as per vision 2030, to ensure that all Jamaicans know their rights and responsibilities and stand equal before the law.

The specific recommendations are:

1. Include the word "written" as part of the definition of "sexual advance";
2. Broaden the definition of sexual harassment to include stalking;
3. Broaden the coverage of the Bill to include sexual harassment in the streets;
4. Include a specific provision to deal with sexual harassment committed by an outsider towards an employee of an institution on the premises;
5. Include a specific timeline for the issuing of the policy statement outlined in Section 4.
6. Define "immediate" and "appropriate" as used in Section 5(1) of the Bill;
7. Be more explicit in terms of gender harassment;
8. Remove the provision in the Bill that requires the harassment to be reported within 12 months;
9. Increase penalty for employers in breach;
10. Include provision for persons found guilty of sexual harassment to be entered in Sex Offenders Registry in specific circumstances;
11. Ensure the Tribunal is properly constituted, resourced and efficient;
12. Clarify the jurisdiction of the Tribunal where sexual harassment leads to other sexual offences covered under the Sexual Offences Act (SOA); and
13. Mandate public education around sexual harassment in multiple spaces.

1. Include the word "written" as part of the definition of 'sexual advance'

1.1 Where the Bill defines sexual advance, part "(e)" reads "any other physical, gestural, verbal, non-verbal or visual conduct of a sexual nature." We submit that the word "written" should be included in this section to capture any perpetrator who may choose to harass an individual through letters or any other form of written communication.

2. Broaden the definition of sexual harassment to include stalking

2.1 It is important to note that stalking is not a substantive offence in either the Sexual Offences Act or the Offences against the Person Act and is only addressed in the Domestic Violence Act within the context of domestic situations. Stalking can also take place within institutions (as persons who intend to harass may frequent departments or sections of an institution where they have no business for the purpose of harassing someone), as well as it can occur within the context of street harassment. Broadening the definition of sexual harassment, and in turn, have the Bill address stalking would

remedy the lacunae in the law.

3. Broaden the coverage of the Bill to include sexual harassment in the streets.

3.1 The Bill in its current form provides protection from sexual harassment that takes place in work spaces and institutions but provide no coverage for sexual harassment in the streets. We submit that the coverage should be broadened to include incidents of sexual harassment that takes place in the street. This is important as the there is much evidence to show that street harassment is one of the most frequent forms of sexual harassment.

3.2 Street harassment is defined as a form of harassment primarily sexual harassment that consists of unwanted comments, gestures, honking, wolf whistling, cat calling, following, persistent sexual advances and touching in a public place such as in the streets, malls and on public transportation (Whittaker, Elizabeth & Robin M. Kowalski 2015). It is an internationally accepted best practice that when countries move to legislate sexual harassment, street harassment must be included. France, Peru and the Philippines are countries that have seized this opportunity.

3.3 According to a 2019 national study on Sexual Harassment and Assault conducted by the University of California San Diego Center on Gender Equality, 76% of women and 35% of men experience verbal harassment. The national study which had a sample of 1,182 women and 1,037 men found that although sexual harassment takes place across a range of locations the most frequent is in public spaces with 68% of the women reported experiencing sexual harassment in the street, park or store. On the other hand, the same study found that most sexual assault takes place in private spaces. The inference from such actions suggests that perpetrators of street harassment do not see it as wrong and as such a strong message must be sent.

3.4 Whether walking the streets, using public transport, going to school or selling goods at the market, women and girls are subject to the threat of sexual harassment and violence. This reality of daily life limits women's freedom to get an education, work, participate in politics or to simply enjoy their own neighbourhoods. Yet despite its prevalence violence and harassment against women and girls in public spaces, remain a largely neglected issue, with few laws and policies in place to address it. (Bachelet, 2013). We submit that not addressing street harassment in this legislation would be a missed opportunity to address what appears to be a clear breach of citizens' human rights. There is always the proposition that street harassment is hard to prosecute but the evolution of technology has given us an unprecedented opportunity to end street harassment.

3.5 Sexual harassment is not handled comprehensively or taken as seriously as it should in the Caribbean. Quite a few countries have specific legislation on sexual harassment and most of them have limited the legislation to sexual harassment within the workplace. Impact Justice, an eight-year regional justice sector reform project funded by the Government of Canada drafted a Bill which deals with sexual harassment anywhere it occurs and it is anticipated that CARICOM will accept the Bill (Velma Newton, Regional Project Director, Impact Justice & The Daily Observer Antigua 19/5/2018). Sexual harassment is an issue being addressed worldwide and this Bill provides an opportunity for Jamaica to be a leader in CARICOM by properly

drafting and enacting same.

4. Include specific provisions to deal with sexual harassment committed by an outsider against an employee of an institution on the premises.

4.1 Third party sexual harassment happens when the harassment is committed by an outsider instead of another employee. This can be from clients, customers, vendors, who come on site or otherwise interact with employees, independent contractors who work for the company, and employees or contractors of a different company (for example, security guards or maintenance and repair personnel who regularly come on company property).

4.2 While an employer or operator of an institution does not have the same control over third parties as it would over its own employees as the case may be, an employer should be legally responsible for sexual harassment of its employees by a third party, if s/he knows or should have known about the harassment and failed to take immediate and appropriate corrective action. Such a provision will make way for an employer to realize that if an employee complains that a client is harassing him/her, the company must immediately investigate the situation and if it finds that harassment took place, act to address the problem. This may mean that the employer must inform that client of the harassment found to have taken place and the need to desist from same. The intervention of the employer must be of such that it minimizes or eliminates the interaction between that client and the employee or where that is not possible or the action of the client continues, sever ties with that client.

5. Include a specific timeline for the issuing of the policy statement

5.1 Section 4 of the Bill imposes a duty on an employer or a person in charge of an institution to issue a policy statement concerning the prevention of sexual harassment in the business or undertaking and the protection of the workers from sexual harassment in same. The section continues by requiring the employer or person in charge of an institution to take steps to ensure that all in their employ or care are aware of the policy statement. There is, however, no timeline for the issuing of this policy statement. We submit that the Bill should expressly indicate that the statement must be issued within a specific time period subsequent to when the Act comes into force or following the time of the establishment of a new business.

6. Define “immediate” and “appropriate” as used in the Bill

6.1 Section 5 requires an employer to take “immediate” and “appropriate” action to deal with the sexual harassment of a worker if it comes to his/her attention. We submit that “immediate” and “appropriate” should be defined in the preliminary section of the Bill so that there is no doubt as to what these terms mean.

5.2 It can be understood that “immediate” and “appropriate” as used in the Bill is quite subjective and as such, an employer who is in breach could argue that the actions taken were “immediate” and “appropriate” in his/her view. Having regard for all the circumstances that a complainant may raise, it may be left up to a judge to consider those circumstances to determine “immediacy” and “appropriateness”. If the Bill defines

these terms there can be no lack of clarity or room for varying judicial interpretations.

7. Be more explicit in terms of gender harassment

7.1 Sexual harassment has a power dynamic at its core that constantly reminds historically marginalised groups, such as women and members of the LGBTQ community of their vulnerability to harassment. Further, it reinforces the ubiquitous sexual objectification of these groups in everyday life. Sexual harassment can be sexist, racist, transphobic, homophobic, ableist, sizeist and/or classist. It can be downright discriminatory. Sexual harassment is an expression of the interlocking and overlapping oppression that members of these groups face and it functions as a means to silence their voices and “keep them in their place” (Thomson Reuters Foundation, 2014).

7.2 While the Bill is gender neutral in its language it must be minded that people are sexually harassed daily in the workplace and on the streets due to their gender identity and/or sexual orientation. It must be expressly stated in the Bill, that acts which are initiated as a result of these factors (real or perceived), and action words or gestures that can be linked to these factors, amount to sexual harassment under this act.

7.3 Sexual harassment based on gender identity and sexual orientation is discrimination and the Constitution of Jamaica prohibits discrimination. While this provision may be very narrow the constitution gives rights to all Jamaicans regardless of any status and omitting any group may amount to a constitutional breach. We submit that the Bill should clearly prohibit this kind of discrimination and treat same as an offence.

8. Remove the provision from the Bill that requires the harassment to be reported within 12 months

8.1 Section 25(2) requires a complaint to be made within 12 months of the incident or in the event that it is a series of incidents within the 12 months of the last act in the series. In the context of the culture of silence around sexual offences and the trauma experienced by survivors of sexual violence, it must be appreciated that many may take some time before they are able to talk about it. There are numerous factors that could contribute to time elapsing between the occurrence and the reporting which includes but are not limited to, psychological trauma, current circumstances, no confidant to talk to, and risk to their own lives. We submit that there should be no statute of limitation on this offence and as such it should be treated like all other sexual offences. This would be in keeping with our current laws around sexual offences.

8.2 Legislation dealing with sexual offences normally stipulate special provisions for more severe penalties when the perpetrator is a person in a position of power and authority. This is due to the recognition that there is a power imbalance and that the abused party is in most cases helpless, unaware that they are being abused or feel that they are compelled to do what the abuser wants. In light of this power dynamic it can be understood why the abused may be reluctant to make the report and time can easily elapse. In this light we submit that this 12-month timeline for making reports be removed.

9. Increase penalties for employers in breach

9.1 Section 10(3) provides for an authorized officer to give direction to a person found to be in breach of Section 3 or 4 of the Act to comply with the directive within a specified period. Section 10(4) prescribes a penalty not exceeding \$1,000,000 if the person is found guilty of not complying with the directive without reasonable cause. We submit that in the event that an employer is in breach, this fine is very minimal.

9.2 An employer that fails to comply with Section 3 or 4 of the Act would have failed in its responsibility to ensure that a work environment is free of sexual harassment and would have also failed to issue a policy statement as per the guidelines in Section 4. Such a breach could mean that many employees may have been subjected to an environment that is not free from sexual harassment and perpetrators in the workspace would have had no knowledge of the company's position on the matter. A fine of no more than \$1,000,000 may be a mild penalty for some companies for such an egregious breach. We submit that the fine should be increased to a more substantial sum that would significantly affect the company if they fail to comply.

9.3 The Bill defines an employer as “a person who engages in any form, a worker”. This is very clear when the employer is a sole trader. It becomes more complicated when the person overseeing the employment of persons for work are mere agents of the employer or are running a company or institution that is owned and operated by a board. This could get even more complicated when there are large entities and the person in charge never engages with the employee. We submit that the Bill should clearly stipulate who is responsible when a company or institution is found in breach. This will make it less challenging for the aggrieved party to get redress in the event of an award or to know who to hold accountable for when there are breaches to the Act.

10. Include provision for persons found guilty of sexual harassment to be entered in the sex offender's registry in select circumstances

10.1 We submit that a person who is convicted under this legislation should be recorded as a sex offender if:

- a. The offence is committed against a person under 16;
- b. The offence is committed by a person in a position of authority over the complainant;
- c. The offence is committed against a person over 60 years of age; and
- d. The offence is committed against a person suffering from a physical or mental infirmity

10.2 The Joint Select Committee of Parliament that reviewed the Sexual Offences Act and other related acts made a recommendation for a new offence, 'Predatory Sexual Assault' to be included in the Sexual Offences Act. The aim of this is to provide even greater protection for our children who are so frequently victims of sexual violence. This legislation should continue in the spirit of that committee's recommendation in that regard, in ensuring that our children are duly protected, and that people in positions of authority are not allowed to feel they can exploit the vulnerable in the exercise of such authority.

11. Ensure the Tribunal is properly constituted, resourced and efficient

11.1 Section 11 provides for the establishment of a Sexual Harassment Tribunal with power to hear and decide matters of sexual harassment. This Tribunal of 12 members must comprise four attorneys-at-law, four certified mediators and four other persons as selected by the Minister with responsibility for Gender Affairs upon consultation with the Ministers responsible for Labour and Justice. We submit that the Bill clearly mandates that one of the final four must be a representative of civil society with the requisite skills as outlined in the Bill. This will not only provide for readily available expertise to be at the disposal of the Tribunal but will honour the government's commitment to include civil society at the table in matters of national importance.

11.2 We submit that the government be very clear in this process by outlining the resources that are being put in place to establish and maintain the office of the secretariat of the Tribunal. Section 24 provides for the Tribunal to be provided with a secretary and staff as necessary to assist the tribunal in the performance of its duties. We have over the years seen too many statutory bodies set up with powers to address serious ills that affect ordinary Jamaicans daily but are prevented from doing so because they are not adequately resourced. We cite Independent Commission of Investigations (INDECOM) and the Office of the Children's Advocate (OCA) as perfect examples in this regard.

11.3 It is important that any system set up to administer justice functions expeditiously. As such, besides furnishing the Tribunal with the requisite financial and human resources, guidelines must be put in place to ensure its efficient operation. We submit that there should be clear stipulations for the immediate drafting of the regulations to complement this Act and the necessary boundaries be clearly articulated in said regulations to ensure that matters heard by the Tribunal are heard in a reasonable time frame. We are quite aware that there are nuances specific to each case that may cause delays, but if specific timelines are set to guide the disposal of matters, then there will be more efficiency and cases that may go outside of that timeline could be seen as the exception rather than the norm.

12. Clarify the jurisdiction of the Tribunal where sexual harassment leads to further sexual offences covered under the SOA.

12.1 The Tribunal as created by Section 11 of the Act have jurisdiction to hear only matters related to sexual harassment. The Sexual Offences Act, however, handles numerous sexual offences ranging from sexual grooming to rape. In many instances the most egregious of the sexual offences start with sexual harassment and in others, sexual harassment forms part of a series of events that lead to indecent assault, grievous sexual assault and even rape.

12.2 In the event that someone is brought before the court for any of the sexual offences under the SOA which was the end result of sexual harassment; the following questions must be considered:

- a. Should the sexual harassment matter before the Tribunal and the other sexual offence before the court be heard concurrently?
- b. Should one matter precede the other?

- c. Should the survivor be made to relive the horrifying experiences before two separate bodies?
- d. Should the jurisdiction to hear the sexual harassment matter be moved from the Tribunal to the court?

12.3 It must be noted that many survivors of sexual violence, especially those who were in a position of dependency in relation to the perpetrator, endured long periods of sexual harassment that eventually went further. It will not always be the case where one comes forward before sexual harassment turns to grievous sexual assault or rape. As such, it is important to make provisions for all matters to be dealt with in the best interest of the survivor.

13. Mandate public education around sexual Harassment in multiple spaces.

- 13.1 Experts have expressed that due to Jamaica's highly sexualized culture, the enforcement of laws governing sexual harassment may prove challenging. According to associate counseling psychologist and Chair of the Jamaican Psychological Society (Jampsy), Rosemarie Voordouw, education and training are essential in combating sexual harassment in the workplace. Voordouw expressed that she has seen sexual harassment at its ugliest in some Jamaican work spaces and our culture makes us accept it as the norm (Jamaica Observer 5/12/19) We submit that refusing to legislate because something is deeply ingrained in our culture is not acceptable. Emphasis should be placed on ensuring that public education is carried out to educate citizens on sexual harassment.
- 13.2 Section 3(2) of the Bill mandates a person in charge of an institution to make every reasonable effort to ensure that students, residents, wards, inmates, patients, members as the case may be are not sexually harassed. In order to fulfill this obligation, it will be necessary to start having conversations around sex and sexual harassment in our schools. To adequately protect students from sexual harassment they must know what sexual harassment is, what steps to take if they feel they are being sexually harassed and what avenues for redress are available to them. This can only be achieved through robust public education and targeted conversation in the institutions where our students spend significant portions of their days each week.
- 13.3 The Ministry of Education Youth and Information in a bulletin advising school administrators in education and training institutions urged them to take the necessary steps to eliminate sexual harassment, said that sexual harassment "is a barrier to equal opportunity and treatment of females and males". In an effort to ensure that all students are safe and secure while in their care, school administrators are being directed to become familiar with a brochure issued by the Bureau of Gender Affairs, which guides the process on how to treat with such incidents. The Ministry reminded institutions that they have a responsibility to develop a policy to address sexual harassment; conduct workshops/training sessions with all teaching staff and other employees; ensure that the issue of sexual harassment is incorporated in the curricula; put in place a complaint/grievance procedure or committee to handle reports of sexual harassment from students; protect against victimisation and false accusations; and to ensure that the accuser and accused have an equal chance to be heard

14. Conclusion

14.1 Laws are instituted in order to address ills in society and to address the mischief that their absence create. If the law is not addressing the mischief or addressing it at the demise of others, then it is the responsibility of the State to fix it. The rule of law requires that people be governed by accepted rules, rather than arbitrary decisions of rulers. These rules should be not be general and abstract, must be known and certain, and apply equally to all. The submissions we make serve to ensure this is the case. Constitutional governments are based on a previous commitment to freedom under the rule of law and it essentially puts a legal limitation on government. As such, constitutional governments must function to protect the lives and liberties of citizens without violating the rights of some to provide gains to others. Constitutional governments must step in when the culture of the masses infringe on the constitutional rights of any of its citizen and enact the necessary legislation to remedy that infringement.

14.2 It is within this framework that the submissions herein are presented. We stand united with the government in its aim to provide a Jamaica where all can live and pursue their goals in life without the feeling that their rights are being infringed or the protections afforded to other are not available to them. It is for this reason we make these recommendations:

1. Include the word “written” as part of the definition of “sexual advance”;
2. Broaden the definition of sexual harassment to include stalking;
3. Broaden the coverage of the Bill to include sexual harassment in the streets;
4. Include a specific provision to deal with sexual harassment committed by an outsider towards an employee of an institution on the premises;
5. Include a specific timeline for the issuing of the policy statement outlined in Section 4.
6. Define “immediate” and “appropriate” as used in Section 5(1) of the Bill;
7. Be more explicit in terms of gender harassment;
8. Remove the provision in the Bill that requires the harassment to be reported within 12 months;
9. Increase penalty for employers in breach;
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13. Mandate public education around sexual harassment in multiple spaces.

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