



**Jamaica AIDS Support for Life
Submission to the Joint Select Committee reviewing the Sexual Offences Act and
Related Acts**

A Submission is made to the Joint Select Committee Reviewing the Sexual Offences Act 2009, with considerations also made for the Child Care and Protection Act”, the “Domestic Violence Act” and the “Offences Against the Person Act”.

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SUBMISSION TO THE JOINT SELECT COMMITTEE OF PARLIAMENT APPOINTED TO REVIEW THE SEXUAL OFFENCES ACT 2009 - An ACT to repeal the Incest (Punishment) Act and certain provision of the Offences Against the Person Act; to make new provision for the prosecution of rape and other sexual offences; to provide for the establishment of a Sex Offender Registry ; and other connecting matters.

BACKGROUND OF CONTRIBUTING ORGANIZATION

Jamaica AIDS Support for Life hereinafter referred to as JASL is the oldest and largest AIDS-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 organization'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 organization 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.

Approximately two women are raped everyday in Jamaica (JDF, 2013), with statistics from Jamaica Constabulary Force report showing that 473 women were raped between January 1, 2016 and December 24, 2016. Nearly 50 per cent of the reported cases involved children, with 180 of the victims under the age of 15 years old. Reference is made to the 2008 Reproductive Health Survey which 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 rape incidences go unreported, especially when our boys and men are victims.

It is the position of JASL that not only is rape and sexual assault a serious social issue; it is also a public health one which must quickly be addressed. As a service provider, it is noted that persons who experience sexual assault are at risk a range of medium to long term health problems. These include sexual transmitted diseases, HIV and syphilis, pregnancy, mental health problems and (attempts at) suicide.

This submission is made primarily to strengthen the legislative framework around sexual offences and to ensure that the laws governing same are inclusive enough to provide protection for the all persons affected. This submission is also made against the background that said committee will be reviewing the "**Child Care and Protection Act**" hereinafter referred to as the **CCPA**, the "**Domestic Violence Act**" hereinafter referred to as the **DVA** and the "**Offences Against the Person Act**" hereinafter referred to as the **OAPA**.

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.

Specific recommendations include:

1. For the Sexual Offences Act to adopt a gender neutral language throughout the Act;
2. Broaden the definition of sexual intercourse to include the penetration of the mouth or anus by a penis, any other body part or object;
3. Broaden the offence of rape to include non- consensual penetration of the mouth or anus by a penis or object and remove the exemptions for marital rape;
4. A close in age exemption with the restriction herein should be considered;
5. Decriminalising activities surrounding prostitution from a public health perspective;
6. Allow for the provision of sexual and reproductive health services, commodities and information to persons under sixteen without parental consent in specific circumstances and provide immunity from prosecution for Health Care Professionals who provide such services in the clinical and best interest of the minor.

PART ONE - PRELIMINARY

1 Broaden the definition of "Sexual Intercourse" as per Section 2 of the SOA

1.1 The Jamaican Sexual Offences Act hereinafter referred to as the **SOA** defines sexual intercourse as "penetration of the vagina of one person by the penis of another person". We submit that such gender specific and orifice specific language provides no protection for our men and boys if it is that they encounter forced anal or oral penetration *via* penis or manipulated object. Additionally, the language provides limited protection to our women and girls if it is that they are also forcefully penetrated in the mouth and anus with a penis or object. Many of the health risk associated with vaginal penetration by a penis are also associated with oral and anal penetration by a penis and there are also those that are associated with any form of penetration with other parts of the body or an object. STIs such as gonorrhoea, Genital Herpes and syphilis can be passed on through oral sex or *via* an object that has come in contact with the infected region and then used to penetrate a person.

1.2 Accordingly, we submit that the definition of sexual intercourse be broadened to include (i) the penetration of a person's anus or mouth with the penis of another person or object manipulated by another person (EXCEPT for medical purposes) and (ii) adopt a gender neutral language.

1.3 A broadened definition would not be new to Jamaican legislation as our Child Pornography (Prevention) Act 2009 has a very broad definition of sexual activity that can be adopted. It reads:

"Sexual Activity" means actual or simulated –
(a) Sexual Intercourse;

- (b) activity other than Sexual Intercourse whether involving persons of the same or opposite sex-**
- (i) involving the penetration of the anus, vagina or mouth with any part of a person's body or the anus or vagina with anything else; and**
- (ii) which a reasonable person would consider sexual**
- (c) touching of a sexual organ, or the anal region, of a person with any part of the body, or with or through anything else, in a manner which a reasonable person would consider Sexual;**

1.4 It is our position that equality before the law for all Jamaicans is a fundamental right protected under the Constitution. This is supported by the Charter of Fundamental Rights and Freedoms which expressly states that "the Parliament shall pass no law and no organ of the state shall take any action which abrogates, abridges or infringes on these rights" (**Section 13 (2) (b)**). Among the rights herein referred to is "equality before the law" (**Section 13 (3) (g)**); It can therefore be inferred that if the Parliament continue to uphold laws that do not guarantee equal protection it would have acted contrary to the Constitution. It must also be noted that by virtue of being signatory to and ratifying international conventions such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the government has a responsibility to ensure that domestic laws are in line with these instruments.

2 Adopt a gender neutral language throughout the Sexual Offences Act

2.1 Our **SOA** despite amendment in 2009 continues to be biased towards our women and girls even though it is widely known and accepted that men and boys are also victims of forced sexual penetration.

2.2 The Constitution of Jamaica which is the supreme law of the land by virtue of the Charter of Fundamental Rights and Freedoms guarantees protection for all citizens and secures equality before the law for all. It is our position that the adoption and utilization of gender neutral language throughout the SOA will guarantee such rights. Gender neutral means the language or expressions used should be of such that it cannot be taken or interpreted to be referring to one gender only. This would mean that sections that speak to man or woman such as Section 3 (1) which reads "**A man commits the offence of rape...**" and Section 3 (1) (b) which reads "**without the woman's consent**" Should read "**A person (the accused) commits the offence of rape**" and "**without the other persons ("the complainant") consent.**"

2.3 Section 76 of the Offences Against the Person Act clearly recognizes that forced and consensual anal penetration of women and girls as well as men and boys do occur and broadly criminalises same. Those who are victims of forced anal penetration are subjected to seeking redress within the confines of the OAPA, under "Buggery" and not "Rape", with "buggery" carrying a penalty of up to 10 years, while rape carries a penalty of minimum 15 years to a maximum of life imprisonment.

2.4 This creates unfairness for men and boys as their only recourse for forced anal penetration is categorised as buggery which makes it appear that the crime committed against them is less than rape. This amounts to discrimination on the basis of gender.

2.5 The thrust of gender neutrality is being recommended to bring sexual abuse of men by other men, or child sexual abuse by men or women, all under the protection of the Law in a more comprehensive way. If 16% of adolescent boys age 10-15 did not consent to their first sexual encounter (CARICOM 2014), their exposure to HIV and other STIs are ultimately increased and the law therefore must take a firm stance to dissuade perpetrators.

2.6 There are countries in the region such as Guyana, The Bahamas and Trinidad & Tobago that have already taken steps to ensure that their laws around Sexual offences are gender neutral and we can look at their legislation as an example. In Guyana's Sexual Offences Act 2010 Section 3(1) reads:

A person ("the accused") commits the offence of rape if:

(a) the accused-

(i) engages in sexual penetration with another person ("the complainant"); or

(ii) causes the complainant to engage in sexual penetration with a third person;

(b) the complainant does not consent to the penetration; and

(c) the accused does not reasonably believe that the complainant consents

PART TWO – RAPE, GRIEVOUS SEXUAL ASSAULT AND MARITAL RAPE

3 Broaden the offence of rape to include non- consensual penetration of the mouth or anus by a penis, any other body part or object.

3.1 Having broadened definition of "Sexual Intercourse" this will now allow for the broadening of the offence of Rape to capture this definition. As it stands, the definition of rape as set out in Section 3 (1) of the SOA provides no protection for persons who experience forced anal and oral penetration. The Guyanese example outlined in **2.6** is an excellent example for application here.

1.1 As a service provider to an average of 10,000 persons annually who are infected and affected by HIV and AIDS and other STIs, some of whom would have contracted life threatening STIs due to either forced vaginal, forced oral or forced anal penetration, it is the position of the organization that it is the duty of the State to firmly assert that these heinous offences will be treated with the seriousness they deserve. Without defining such acts as "Rape", the State becomes an aid to the furtherance of psychological trauma often experienced by victims when they perceive their experiences to be belittled due to inequitable access to justice. This further affects the willingness of persons to report offences, creating a cycle of violence with perpetrators who will be aware of this.

- 3.3 The exclusion of forced penetration of mouth and anus (and in instances of children below age 16 who cannot legally consent), may alter healthcare practitioners' perception and treatment of sexual assault incidents e.g. the provision of Post Exposure Prophylaxis (PEP); which is anti-retroviral drugs given to persons who have had a possible exposure to HIV to prevent the contraction of the virus; is at times offered to women/girls who are raped. The limited definition of rape limits PEP's application in forced anal incidents involving both females and males as the injured parties despite the fact that the risk of contracting STIs including HIV are very much present as a result of anal penetration.
- 3.4 By having the law reflect defining Rape as forced penetration of the anus of mouth of any person by a penis, other body part or object, some offences listed under Section 4 that are broadly categorized as Grievous Sexual Assault will no longer be necessary. Again we submit that this proposition is ,not new to the region as we can look to Guyana, The Bahamas and even Barbados as jurisdictions that have amended their legislation around sexual offences to reflect same.

4 Removal of Marital Rape Exemption

- 4.1 It is our submission that Section 5 of the SOA which governs marital rape be entirely removed so a woman who is forced into intercourse is recognized in law as being raped regardless of her marital status. The present position that a married woman cannot be raped by her husband unless certain conditions are met is untenable. The conditions which include her being separated from her husband as per the Matrimonial Causes Act: her having a written separation agreement with her husband; divorce proceedings having commenced; the issuance of a protection order to the wife against the husband as per the Domestic Violence Act prior to the forced penetration: or the husband forcing his wife to engage in intercourse knowing he has an STI. In our work over the past 3-4 years looking at gender based violence and the connection to HIV; we have found that there is an extremely high number of cases of intimate partner violence and most of these happen in marriages as well as common law relationship situations. These situations normally involve forced sex where there is no opportunity for the woman to negotiate condom use and thus increase her risk of contracting HIV and other STIs
- 4.2 Prior to 1991 the law did not recognize any such thing as marital rape. However the House of Lords decision in the case of **R v R [1992] 1 A.C. 599** changed that position. Since that decision women now had protection under the law against marital rape by virtue of the common law position. The 2009 Sexual Offences Act of Jamaica took away that Common Law protection by way of statute and proved to be a backward step from the existing Common Law position.
- 4.3 It is inconsistent with good thinking to believe that a woman has given irrevocable consent to sexual intercourse with her husband as long as they are married. We urge the committee to accept the logic in our submission and bear in mind the international

obligations of the Jamaican Government by virtue of conventions it has ratified. We reference paragraph 22 (b), Concluding observations of the Committee on the Elimination of All forms of Discrimination Against Women Fifty – second Session 2012 where Jamaica was urged to amend the SOA with the view of criminalising all marital rape with no restrictive conditions within a clear time frame. It is almost 5 years which in our opinion is more than enough time to address the issue.

6 Institute a Close In Age Exemption

- 6.1 According to the National Integrated Strategic Plan (2015) at least 33% of persons between 15 and 24 years in Jamaica reported having sex before 15 years old. The submission also notes the increasing numbers of minors whom are interfacing with the criminal justice system on charges related to sexual offences. To this end, the Jamaica AIDS Support for Life's recommendation is aligned with the recently instituted Child Diversion Policy which seeks to provide social interventions and divert minors from the criminal justice system.
- 6.2 In furtherance of the point, it is the position of JASL that more child friendly social interventions coupled with comprehensive sexual and reproductive health services and commodities be provided to minors who are engaging in "consensual" sexual activity with each other, especially in "girlfriend-boyfriend" relationships, rather than criminalization.
- 6.3 A close in age exemption is also known as a "Romeo and Juliet law" was created to protect young people from the relatively extreme consequences of violating the age of consent, which could label a young person as a sex offender for the rest of their life simply for having consensual sex with their boyfriend or girlfriend. In Canada for example, the age of consent is 16, but there are two close-in-age exemptions: sex with minors aged 14–15 is permitted if the partner is less than five years older, and sex with minors aged 12–13 is permitted if the partner is less than two years older.
- 6.4 It is therefore recommended that Jamaica adopts a similar close in age exemption. To reiterate, the position of JASL is not to encourage sexual intercourse between minors; but rather, we recommend exploring more beneficial social interventions that do not involve criminalization. **The parties involved however must:**
- (a) be no more than two years apart if the minor is 12 and 13 years old**
 - (b) be no more than four years apart if the minor is 14 and 15 years old**
 - (c) not be in a position of trust or authority over the other party**
 - (d) not someone with whom the person is in a relationship of dependency.**
 - (e) not suffer from a mental or intellectual disability.**

PART THREE – OTHER OFFENCES

7 Decriminalisation of activities surrounding prostitution

- 7.1 In 2012, the World Health Organization (WHO) declared that “all countries should work toward decriminalization of sex work and elimination of the unjust application of non-criminal laws and regulations against sex workers.” Criminalization of sex work negatively impacts persons’ right to access quality healthcare and thereby drive HIV prevalence; criminalizes dependents of sex workers’ such as their children and the elderly; as well as allow sexual assault to go unreported.
- 7.2 It is our submission that the committee look with favour at decriminalising activities around prostitution in consideration for the adults who by their own choice engage in sex work and also their dependents and close friends who benefit from their earnings or live with them. Sections 18 and 23 of the SOA which deals with Procurement and Living off the Earnings of Prostitution respectively have proven to have debilitating effects on those who chose to engage in this type of work. Other pieces of legislation such as the Offences Against the Persons Act section 68, and The Town and Communities Act section 3 (r) speak to the Suppression of Brothels and Loitering and Soliciting in a Public Place for Prostitution.
- 7.3 It is our submission that the impact of the laws prohibiting sex work does more harm than good and is not achieving the desired objective. If the intent is to protect public health, the total suppression does not achieve this. A Brothel provides an opportunity for sex workers to carry out their activities in a safe, hygienic place where the necessary commodities to promote safer sex can be promoted and made readily available and the security of the persons involved in the trade (providers and clients) can be better managed. This will help to promote and increase safer sex practices and thus reduce the prevalence rate of HIV and other STIs. Continuing on the path of criminalization will only allow the activity to continue in the clandestine way in which it presently operate forcing sex workers to operate in street corners, dilapidated abandoned buildings, gullies, gutters and places that will promote the spread of diseases and create a public health crisis. Criminalization will continue to drive sex workers underground, reduces the reporting of incidents of violence against them and decreases the number who readily access preventative and treatment services. Importantly, the very public health and other service providers such as those concerned directly with the prevention, treatment and care of persons living with or affected by HIV and other STIs can also be prosecuted for habitually being in the company of a prostitute pursuant to the Section 23 (3) of the SOA.
- 7.4 The JASL recommends that a more realistic approach is to de-criminalize sex work and put in place a regulatory regime so that persons who engage in sex work comply with general laws dealing with labour, occupational health and safety and human rights. In countries such as New Zealand and Australia, decriminalization has resulted in higher

rates of condom use and thereby reducing HIV risk; allowing sex workers to report and for police to address illegal acts such as sexual assault as they occur.

7.5 In more developed countries like Canada where these matters have been tested in court, the courts have held that provisions in law like those dealing with living off the earnings of a prostitute and suppression of brothels are overly broad, unconstitutional and violate human rights. See for example the judgment of the Supreme Court of Canada in Canada **(Attorney General) v. Bedford, 2013 SCC 72 (CanLII)**. Available at:<http://www.canlii.org/en/ca/scc/doc/2013/2013scc72/2013scc72.htm>

8 The provision of Sexual & Reproductive Health Services to Children under 16 & the protection of Health care professionals.

8.1 Despite the astonishing statistics of the number of persons under the age of sixteen engaging in sexual activity, contracting STIs and even getting pregnant, there are legal restrictions on the provision of sexual and reproductive health services to these minors. Available data shows that 33% of persons between 15 and 24 in Jamaica reported having sex before age 15, 18% of all births in Jamaica occur to teenagers with Jamaica being the fourth highest in the Caribbean in adolescent pregnancy, knowledge about HIV prevention has declined in the 15-24 age group to below 40% and 16% of adolescent boys between 10 – 15 did not consent to their first sexual encounter.

8.2 The Jamaica AIDS Support for Life therefore submits that the committee look with favour at submissions for amending the Law Reform (Age of Majority) Act to allow for the provision of sexual and reproductive health services to persons under sixteen without parental consent in specific circumstances. Currently, the law requires health care providers to seek parental consent to treat a child and this may get complicated in instances where the child may be suffering sexual abuse from the parents themselves. It is the organization's belief that in strengthening the SOA and providing greater protection for the most vulnerable, particularly minors between twelve and sixteen years of age, the committee should ensure that provisions are in place for them to have legal access to comprehensive sexual and reproductive services and commodities when a professional assessment deems same necessary.

8.3 It is also our submission that the Sexual Offences Act be amended to provide immunity from prosecution for health care professionals who act in the best clinical interest of the child to provide sexual and reproductive health services without parental consent. We submit that this be expressly stated in the Sexual Offences Act in order to provide a clear picture as to where the legislature stands when it comes to protecting our children and those who act in their best interest. Providing this protection is for the purpose of protecting them sexually transmitted infections, pregnancy and continued emotional trauma.

It cost the Jamaica government US\$2000 annually to provide health care services for adolescent mothers (CISF 2014). This does not include other cost on the health care sector if they have HIV which means there will be additional expenses for PMTCT clinic or any other STI that would require treatment. In a country with an already overburdened and under resourced health Sector it would not be prudent to add to the burden with un realistic legislation.

9 Support for Amendments to the Domestic Violence Act and Offences Against the Person Act

9.1 We openly state our support for submission calling for amendments to the **DVA**:

- (a) to give wider protection from all forms of domestic violence besides the easily identifiable ones that normally comes with physical signs. **(Section 2)** These include Psychological, emotional, financial, verbal to name a few.
- (b) to provide protection for a broader category of person in romantic and/or sexual relationships and their children **(Section 2)**
- (c) to ammend **section 4(2)** and **& 7 (3)** to widen the threshold to be met for obtaining Protection and Occupation Orders. The present requirements limit the circumstances under which an order may be given to the use of or threat to use violence, the cause of physical or mental injury and the likely-hood that same may be done again or if same would be in the best interest of the child. This limits persons who may very well be in situations where an order is justified.

This will allow for recognition of many forms of Domestic Violence that we see in our daily Work, provide protection for a wider group of persons who suffer Domestic Violence and reduce the incidents of HIV and other health related complications that may arise as a result of violence in a broader domestic context

9.2 We also submit our support for calls to amend the **OAPA**:

- (a) **Sections 76 & 77** should be amended to speak to relations with animals only and the attempts to have such relations.
- (b) **Section 79** should be repealed

These sections which speak to “Unnatural offences” **(S. 76 & 77)** and “Outrages on Decency” **(S. 79)** has proven to have devastating effects on the HIV prevalence rate among this adult males who engage in sexual activity with each other. The prevalence rate is currently 32.8% and represents the highest among the populations greatest affected by HIV. In light of this public health crisis we supported the above recommendations around these sections.

10 Conclusion

10.1

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 should be governed by accepted rules, rather than arbitrary decisions of rulers. These rules should be general and abstract, 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.

10.2

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:

- (a) Use gender neutral language throughout the Sexual Offences Act.
- (b) Define Sexual Intercourse to include the penetration of the mouth or anus by a penis.
- (c) Broaden the offence of rape to include non- consensual penetration of the mouth or anus by a penis and remove the exemptions for marital rape.
- (d) Implement a close in age exemption with the restrictions outlined herein.
- (e) Decriminalising activities surrounding prostitution.
- (f) Allow for the provision of sexual and reproductive health services, commodities and information to persons under sixteen without parental consent in specific circumstances and provide immunity from prosecution for Health care professionals who provide such services in the best interest of the minor.

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