

JAMAICA

CIVIL SOCIETY REPORT ON THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

(Replies to the List of Issues CCPR/C/JAM/Q/4)

Submitted for the Review of the Fourth Periodic Report of Jamaica (CCPR/C/JAM/4) at the 118th session of the Human Rights Committee (Geneva – October/November 2016)

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JAMAICA – Joint Civil Society Report with CCPR Centre

I. INTRODUCTION

This report provides the Human Rights Committee of the United Nations with updated civil society positions that account for the matters raised in the List of Issues for Jamaica adopted at its 116th Session. It is submitted by a coalition of five leading human rights organizations, most of which have submitted independent, detailed reports of a thematic nature dealing with specific articles within their sphere of competence both for consideration in the 116th and 118th sessions. This report provides **contextual replies to the specific List of Issues, not the general status of the Covenant’s implementation**. For further comprehensive, thematic accounts of specific violations of the Covenant, the Committee may review our companion reports below.

- **NGO Report on Jamaica’s Implementation of the ICCPR** by Jamaicans for Justice and International Human Rights Clinic, Loyola Law School (December, 2015) [confidential]
- **Incarceration of Children Considered Beyond Parental Control: Violations by Jamaica** by: Stand Up for Jamaica, Jamaicans for Justice, Center for International Human Rights, Northwestern Pritzker School of Law et al. (September, 2016)
- **Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Jamaica: A Shadow Report** by J-FLAG, Women’s Empowerment for Change, Global Initiatives for Human Rights of Heartland Alliance for, et al. (October, 2016)

A. JOINING ORGANISATIONS

Jamaicans for Justice (JFJ)

JFJ is a human rights organizations with consultative status at the UN’s ECOSOC since 2014. JFJ works extensively on public security, detention, children’s rights and state accountability issues.

2 Fagan Avenue,
Kingston, Jamaica
www.jamaicansforjustice.org

Caribbean Vulnerable Communities Coalition (CVC)

CVC is a coalition of community leaders and non-governmental agencies that are advocates and service providers, working with populations vulnerable to HIV or forgotten in healthcare programmes.

Suite#1, 1D-1E Braemar Avenue,
Kingston, Jamaica
www.cvccoalition.org

Stand Up for Jamaica (SUFJ)

SUFJ provides services to prisoners in Jamaican prisons by covering the legal costs and by providing for their basic necessities, and engages in human rights advocacy around detention issues.

131 Tower Street,
Kingston, Jamaica
www.standupforjamaica.org

Jamaica Youth Advocacy Network (JYAN)

JYAN is a youth-led organization that focuses on policy advocacy, youth activism & youth sexual and reproductive rights.

1A Fairway Avenue
Kingston, Jamaica

J-FLAG

J-FLAG is a human rights and social justice organisation which works to improve the human rights situation of LGBT persons.

Kingston, Jamaica
www.jflag.org

B. CONTACT DETAILS

For Committee Secretariat correspondence or any further information related to this report, contact coordinating NGO, Jamaicans for Justice (JFJ) via: its Advocacy Manager at Malcolm@jamaicansforjustice.org, (876) 755-4524.

II. REPLIES OF CIVIL SOCIETY TO THE ISSUES IDENTIFIED IN THE LOI

The State party, Jamaica, faces a range of human rights challenges, not least of which are longstanding shortcomings in fulfilling the obligations imposed by the *International Covenant on Civil and Political Rights* (the Covenant). Despite some important progress at the policy level, effective, sustainable realization of rights remains elusive. Attention to the pervasive implementation deficits is critical to translating commitments to action. The State party, and this Committee must measure the extent of rights compliance by the **objectively measurable situation on the ground**, and not the promulgation of policy positions. The present review cycle provides the opportunity craft a pathway to full adherence to the Covenant’s provisions.

These replies to the Committee’s *List of Issues* are organized in a series of themes solely based on the Committee’s grouping of the issues at its 116th Session.

A. CONSTITUTIONAL AND LEGAL FRAMEWORK WITHIN WHICH THE COVENANT IS IMPLEMENTED (ART. 2)

NATIONAL HUMAN RIGHTS INSTITUTION

Issue 1 in Lol: *Please indicate the time frame for and the progress made in the establishment of a national human rights institution in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles), with the necessary adequate financial and human resources.*

Issue in Prior Concluding Observation (2011): *The Committee is concerned that the State party has not yet established a national institution in accordance with the Paris Principles (General Assembly resolution 48/134) (art. 2). The State party should establish an independent national human rights institution, and provide it with adequate financial and human resources, in line with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles).*

RESPONSE OF CIVIL SOCIETY

Jamaica has not established a National Human Rights Institution (NHRI) in accordance with the Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights (the Paris Principles).¹ The failure of the State party to do so leaves important gaps in Jamaica’s rights protection infrastructure that undermine the fulfilment of its obligations under Article 2 of the Covenant. Moreover, the State’s proposed path of action may not comply with the international standards if its present approach to the process is not corrected. The Committee should reiterate its previous recommendation, and probe the State party for specific details on the nature and timeline of its proposed reform

The establishment of an NHRI in the context of obligations under the Covenant

In 2011, the Committee stated that it was “concerned that the State party has not yet established a national institution in accordance with the Paris Principles,” and accordingly recommended its establishment.² To date, this remains unaddressed. The establishment of an NHRI is supported by Article 2’s requirement to “take necessary steps to...give effect to the rights recognized in the present Covenant,” which includes the establishment of administrative mechanisms such as NHRIs; and the requirement to “ensure that any

¹ United Nations General Assembly (1993), Resolution 48/134

² United Nations Human Rights Committee (2011), “Concluding observations of the Human Rights Committee: Jamaica,” CCPR/C/JAM/CO/3, para 4-5

person...shall have an effective remedy,” including “by competent...administrative...authorities, or by any other competent authority.”³

The Committee elaborated on these in its *General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, which states: “the Committee attaches importance to States Parties’ establishing appropriate...administrative mechanisms for addressing claims of rights violations under domestic law” which are “required to give effect to the general obligation to investigate allegations of violations promptly. **National human rights institutions, endowed with appropriate powers, can contribute to this end.** A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant” (emphasis added).⁴ In the context of the deficiencies in Jamaica’s administrative mechanisms to provide a remedy, mentioned in summary below, and the concessions to this effect implicated by the State party’s agreement that a NHRI is necessary, its establishment is closely connected with the State party’s fulfilment of its obligations under the Covenant, absent some alternative structure.

In its report, the State party indicated it was “actively pursuing the establishment of a National Human Rights Institution (NHRI),” and would “continue consultations with relevant stakeholders with a view to developing a hybrid model.”⁵ This commitment is not new. In 2011, the State party accepted five similar recommendations during the first cycle of its Universal Periodic Review (UPR) by the Human Rights Council, which it failed to act on.⁶ Four years later, the establishment of an NHRI was recommended eight times during the second cycle of its UPR in 2015 – all of which the State party accepted, but have not implemented.⁷

Moreover, the State party’s stated commitment to consultation is suspicious, given the Paris Principle’s unambiguous requirement that governments consult with civil society actors involved in human rights work. To date, no member of this coalition or those at the forefront of human rights protection have been consulted, despite specific requests to State party. Checks with other human rights defenders reveal a similar situation.

The value of an NHRI in compliance with the Paris Principles to closing protection gaps

The lack of a robust national mechanism for the protection and promotion of the rights enshrined in the Covenant has contributed the sustained human rights challenges experienced in Jamaica. The substitute institution, the Public Defender, which the government plans to expand to form the NHRI does not accord with the minimum standards outlined in the Paris Principles in important respects. Information widely shared by the state party suggests that the expansion may not actually involve a substantial review of the existing legislation, the *Public Defender (Interim) Act 2000*. Such an approach would not comply with the Paris Principles, and would not represent an “appropriate...administrative mechanisms for addressing claims of rights violations under domestic law,” as required by this Committee.⁸ In addition to the chronic financial and human resource deficits faced by the Public Defender, it faces challenges in other important respects, including:

³ International Covenant on Civil and Political Rights (ICCPR), Article 2(3)

⁴ United Nations Human Rights Committee (2004), *General Comment 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add, para 15

⁵ Government of Jamaica (2015), *Fourth periodic report of States parties due in 2014: Jamaica*, CCPR/C/JAM/4, para 65

⁶ United Nations Human Rights Council (2011), *Report of the Working Group on the Universal Periodic Review: Jamaica*, para 100

⁷ United Nations Human Rights Council (2015), *Report of the Working Group on the Universal Periodic Review: Jamaica*, para 118-119

⁸ Human Rights Committee, *General Comment No. 31*

1. *The inadequacy of its mandate and sphere of competence* – The Public Defender’s mandate is not sufficiently broad in scope, fails to affirmatively express a twin duty to protect and promote human rights, and does not clearly extend to “acts of omission,” in contravention of Principles.⁹
2. *The exclusion elements of the security forces from its jurisdiction* – The enabling legislation (which is still “interim”) explicitly excludes the Jamaica Defence Force (JDF) from the jurisdiction of the Public Defender, limiting the breadth of protection.¹⁰ This, despite the frequent deployment of soldiers for domestic policing operations, the adjudicated, disturbing cases of human rights violations by the military, and the State-Party’s own admission of credible reports that persons have been “tortured physically and psychologically by Jamaica Defence Force (JDF) soldiers,” which resulted in the removal of soldiers from posts.¹¹¹² This exemption was exploited by the JDF during the investigation of alleged extra-judicial killings and other human rights violations during the 2010 State of Emergency by the OPD – a matter on which the Committee has spoken strongly in the previous review – in which the JDF blocked attempts to obtain evidence by the OPD.¹³ The Public Defender has called on the state to urgently remove these exemptions¹⁴
3. *The discretionary limitation of investigations by the government* – The enabling legislation allows the Executive branch, through the Secretary of the Cabinet to limit any investigation by the Public Defender by *inter alia*, limiting the documents that can be obtained by the Public Defender, or prohibiting “giving of any information or the answering of any question or production of any documents or things” once it declares it prejudicial to security.¹⁵ Once this is done, the Public Defender “shall not further require such information or answer to be given or such document or thing to be produced.”

RECOMMENDATIONS

1. The Committee should express concern that the State party has not established a national institution in accordance with the Paris Principles (General Assembly resolution 48/134) (art. 2), despite multiple commitments to do so. It should recommend the following: **establish an independent national human rights institution, and provide it with adequate financial and human resources, in line with the principles relating to the status of national institutions for the promotion and protection of human rights (Paris Principles).**
2. The Committee should, in its open sessions with the State party, specifically request details on the nature of the proposed expansion of the Public Defender to establish a NHRI in compliance with the Paris Principles, taking into account the aforementioned challenges to compliance it presently faces.

INSTITUTIONALIZATION OF ENGAGEMENT WITH HUMAN RIGHTS MECHANISMS

Issue 3 in Lol: *Please provide information on the existence or development of a permanent institutionalized mechanism or body to coordinate government engagement with the international and regional human rights mechanisms aimed at implementing recommendations and reporting thereon.*

RESPONSE OF CIVIL SOCIETY

⁹ *Paris Principles*, A2

¹⁰ *Public Defender (Interim) Act*, 2000, section 13(1)

¹¹ See generally, *Report of the commission to inquire into certain events which occurred in Western Kingston during the month of May 2010* (2016) and the merits decision in *Michael Gayle vs Jamaica* (2005), Inter-American Commission on Human Rights

¹² Government of Jamaica (2015), *Fourth Periodic Report*, para 167. It is important to note that in this setting, JDF soldiers were being used to guard prisons. The OPD is allowed to investigate prisons.

¹³ Office of the Public Defender (2013). *Interim Report to Parliament Concerning Investigations Into The Conduct of the Security Forces During the State of Emergency Declared May, 2010 – West Kingston/Tivoli Gardens ‘Incursion’ – The Killing of Mr. Keith Oxford Clarke and Related Matters*, paras 52.0.0- 52.1.9, 52.2.9

¹⁴ *Ibid*, para 52.6.1

¹⁵ *Public Defender (Interim) Act*, Section 18

No “permanent institutionalized mechanism or body to coordinate government engagement with the international and regional human rights mechanisms aimed at implementing recommendations and reporting thereon” exists in Jamaica, to the extent that this coalition is aware. There appears to be an inter-ministerial committee – or similar variation – spearheaded by the Ministry of Foreign Affairs and Foreign Trade with general aims of coordinating reporting in some fashion. However, it is neither permanent nor sufficiently institutionalized in the operations of government. Unlike with such bodies in other jurisdictions, engagement is not mainstreamed, and implementation of outcomes is not centrally coordinated. Consequently, important recommendations go unfulfilled.

RECOMMENDATIONS

The Committee should remind the State party of the value of such mechanisms to sustaining human rights gains, particularly in respect of ensuring adherence to international standards. It should recommend the following: **establish, through formal executive directive or other appropriate, sufficiently mandatory means, a permanent governmental mechanism tasked with coordinating government engagement human rights mechanisms and implementing recommendations, in consultation with civil society.**

OPTIONAL PROTOCOL TO THE COVENANT

Issue 4 in Lol: *Given that Jamaica withdrew from the Optional Protocol to the Covenant and that it has stated that it is unable to reaccede, please indicate what measures have been taken to ensure that individuals who allege that their human rights under the Covenant have been violated have access to an effective remedy (see State party report, para. 70).*

Residents of State party have little access to an effective remedy because the breadth of the Covenant's provisions are not fully realized in Jamaican law, and the only potentially analogous international mechanism, the Inter-American System, has fledgling security. The State party withdrew from the Optional Protocol on the basis of the alleged availability of suitable remedies, the decision of *Pratt & Morgan v The Attorney General*, and its ratification of the American Convention on Human Rights. However, none of these reasons remain valid.

Inadequate coverage in domestic law

Jamaica's Charter of Fundamental Rights and Freedoms (the Charter) does not provide adequate protection against the violation of human rights that are guaranteed under the ICCPR. The Charter of Rights does not adequately protect against discrimination on the basis of gender, sexual orientation, gender identity, health status, disability or marital status. The Charter, while guaranteeing equality before the law, saves laws from challenge which are discriminatory both directly and indirectly. The ICCPR provides redress for these various forms of discrimination that the Charter ignores and therefore the argument related to the availability of suitable remedies fails.

Pratt and Morgan

The decision of *Pratt and Morgan* imposed a 5-year time limit on the execution of the death penalty. This 5 year would be spent during appeals to international human rights bodies. However, the Charter of Rights in section 13(8) nullifies the effect of *Pratt and Morgan* and therefore the argument relying on this decision also fails.

Inter-American System

The Inter-American Commission on Human Rights has been an avenue for ventilating human rights issues for Jamaicans, however financial constraints have hindered the functioning of the IACHR.¹⁶ Hearings have been suspended and staff members are being laid off.¹⁷ The IACHR is no longer a secure alternative.

B. NON-DISCRIMINATION AND EQUALITY BETWEEN MEN AND WOMEN (ARTS. 2, 3 AND 26)

OVERARCHING RIGHTS PROTECTION FRAMEWORK: THE CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS

The State party faces a range of severe gaps in anti-discrimination. Many of these stem from a flawed rights protection framework, exemplified by the Charter of Rights. As such, it is important to review this first.

The 2011 Charter of Fundamental Rights and Freedoms demonstrates a critical development in the protection of human rights in Jamaica. The 2011 Charter reformulates the guarantee of human rights in Jamaica and presents a different approach to how individual rights are treated within the law. This reformulation of rights protection is supplemented with the inclusion of rights that were hitherto not guaranteed within the Jamaica Constitution and the removal of previously problematic sections. However, the 2011 Charter has its own challenges which take away from the advances that have been made.

Reformulation of Human Rights protection

The rights which are guaranteed under the former Chapter III of the Jamaican Constitution were subject to their own specific limitations, usually on the basis of nebulous concepts such as public order, public safety or public morality. The rights were mostly framed negatively, which failed to capture the State's duty to protect and promote human rights.¹⁸ The duty bearers were limited to the agents of the State; rights violations at the hands of agents of the state could not give rise to constitutional claims.

The 2011 Charter made a number of improvements including the protection of a few economic, social and cultural rights:

1. The right to life, liberty and security of the person is framed broadly
2. The freedom of thought, conscience and observance of beliefs is separated from the freedom of religion
3. The right to seek, receive, distribute or disseminate information, opinions and ideas through any media is specifically protected
4. The rights to "equality before the law" and "equitable and humane treatment by any public authority in the exercise of any function" are separated from the freedom from discrimination and have no closed list of categories.
5. Freedom from discrimination has included other grounds: "being male or female", "social class," and "religion"
6. The right to privacy is broadened to include "respect for and protection of private and family life"
7. The right of children to special protections is guaranteed as well as the right to primary education.
8. The right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage is included
9. The right to vote is guaranteed

These rights, save the right to due process, property rights, the right to protection of the law and freedom of religion, were not subject to specific limitations but were all subject to a general limitation found in section 13(2),

¹⁶ IACHR Press Release, *Severe Financial Crisis of the IACHR Leads to Suspension of Hearings and Imminent Layoff of Nearly Half its Staff* (23 May 2016)

¹⁷ Ibid

¹⁸ See Human Rights Committee, *General Comment 6: The right to life*, para. 5

that is that the rights guaranteed will not be abridged by laws or state action save as where it is demonstrably justified in a free and democratic society. This limitation removes the arbitrary concepts such as public morality which may allow for unchecked limitation on rights.

The 2011 Charter also has other welcomed additions. Section 13(5) of the Charter binds all natural and juristic persons, therefore making non-State actors, duty bearers in specific circumstances. Section 19(2) of the Charter allows for “public or civic organizations” to bring constitutional claims of violations of rights on behalf of rights holders. This allows civil society organizations to step in for marginalized persons who are not in a position to access this remedy for themselves. Critically, section 26(8) of the old Chapter III – “the general savings law clause” – has been removed. This section prevented constitutional challenges to laws that existed prior to 1962, regardless of whether or not they violated rights.

Limited Protection from Discrimination

Notwithstanding the improvements within the 2011 Charter, there are challenges with its equality provisions that have not been addressed since the last review by this Committee. While sections 13(3)(g) and (h) of the 2011 Charter guarantee the rights to equality before the law and equitable and human treatment by a public authority, respectively, section 13(3)(i) only protects against discrimination on certain grounds. Even though it may be supposed that sections 13(3)(g) and (h) protect against discrimination regardless of status because these sections have no closed list of categories, it is unclear whether this will be the approach taken by local courts. Also, these sections relate primarily to State actors, which means that discrimination at the hands of non-State actors is only prohibited by section 13(3)(i).

Section 13(3)(i) does not prohibit discrimination broadly. It fails to address discrimination on the basis of age, sex¹⁹, gender²⁰, sexual orientation, gender identity, language, health status, marital status, disability, birth status or other status. Discriminatory treatment by employers,²¹ landlords and service providers is not prohibited under the Constitution. Outside of the 2011 Charter, there are no comprehensive anti-discrimination laws with a complaint mechanism accordingly, the failure to prohibit discrimination broadly is a violation of the State party’s obligation under article 26, to “prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground.”

Savings Law Clauses

Sections 13(7), (8), (12) and 18 grossly limit the rights guaranteed in the 2011 Charter, allowing for problematic exemptions and permitting the continuation of rights violations by the State and the derogation from the guarantee of rights within section 13(3).

Section 13(7) limits the freedom from torture and inhuman and degrading treatment by saving all the punishments that were prescribed by law immediately before the commencement of the 2011 Charter. Section 13(8) saves the death penalty²² and Section 13(12) acts as a modified general savings law clause by saving laws related to sexual offences, abortion and obscene publications from being challenged on the basis that they violate rights. Laws

¹⁹ The terms “sex” and “gender” were specifically avoided in the formulation of the Charter of Rights. This was done to avoid the protection of sexual orientation and gender identity discrimination. See *Report of the Joint Select Committee on its Deliberations on the Bill Entitled An Act to Amend the Constitution of Jamaica to Provide for a Charter of Rights and For Connected Matters*, § 13(2)(j), (20 July 1999) available at <http://jis.gov.jm/media/charter-of-rights1.pdf>

²⁰ Ibid

²¹ See JAMAICA GLEANER, *Andrews Hospital Breaks Silence, Says Workers Respect Position On Fornication and Adultery*, 20 Jun 2016 available at <http://jamaica-gleaner.com/article/lead-stories/20160620/andrews-hospital-breaks-silence-says-workers-respect-position>

²² The effect of this was to undue the cases of *Pratt & Morgan v The Attorney General of Jamaica* [1994] 2 AC 1 and *Thomas v Baptiste* [1999] UKPC 13 decided by the Judicial Committee of the Privy Council which respectively decided that the execution of the death penalty after a long delay in carrying out the sentence amounted to cruel, inhuman and degrading punishment and acknowledged that carrying out a sentence of death after subjecting a person to intolerable prison conditions would amount to cruel, inhuman and degrading punishment

which discriminate on the basis of sex such as the Sexual Offences Act which states that only women can be victims of rape and only men can be convicted of rape²³ and the Offences Against the Person Act which criminalizes intimacy between men, whether in public or private²⁴ are protected from challenge notwithstanding the right to equality before the law.

These savings law clauses collectively amount to two steps backward in the 2011 Charter which had made significant strides in the protection of human rights for all persons. Sections 13(7) and (8) permit violations of article 7 of the ICCPR and sections 13(12) and 18 offend the guarantee of equality before the law within the 2011 Charter itself and in article 26 of the covenant.

RECOMMENDATIONS

The Committee should recommend the following: **take all appropriate measures to adequately protect and promote the human rights of all persons, through amendments to the Charter of Fundamental Rights and Freedoms, to inter-alia, guarantee of the right to non-discrimination found in section 13(3)(i) to protect against all forms of discrimination by both state and non-state actors; repeal those clauses which unduly limit the human rights of its citizens, including but not limited to, the savings law clause in sections 13(7), (8) and (12).**

DISABILITY

Issue 5 in Lol: Please inform the Committee of the measures that have been put in place to promote the inclusion of persons with disabilities. Please provide information on the status of implementation of the Disabilities Act, 2014 and the number of cases that the Jamaica Council for Persons with Disabilities has taken to date.

RESPONSE OF CIVIL SOCIETY

The State party, while taking laudable legislative first steps, is yet to fully implement a sustained programme of protection for people living with disabilities. Basic rights of access and equal protection are routinely violated. Though the Government of Jamaica enacted the *Disabilities Act* in 2014 to guarantee equality to persons with disabilities and to protect them from discrimination, the Act is not in force as the commencement date has not been gazetted. Additionally, many persons with disabilities are unaware of how the Act will protect them.

The State party has taken some measures to promote inclusion of persons with disabilities, such as the implementation of a policy whereby 5% of the Housing provided by the National Housing Trust is set aside for persons with disabilities, however not all of these houses are built to the specific needs of persons with disabilities. The State party also promised 5% employment of government ministries would be for persons with disabilities, however this promise has not been honoured. Persons with disabilities have been included on government boards and committees. There are four accessible buses and persons with disabilities are given a concessionary bus fare. Persons who are deaf or physically disabled have the right to drive, depending on the nature of the disability.

Access to Public Services

Persons with disabilities still have challenges with access to public buildings and offices. Building codes which require architectural designs which are tailored to the needs of persons with disabilities are to be implemented. Most courts lack wheel chair case and sign-language translation must be requested by the prosecuting attorney where there is a complainant or witness who has a hearing and/or speech disability. Access to emergency services for persons with disabilities is also a challenge. Not all police stations have wheelchair access and nor are they all

²³ See *Sexual Offences Act* (2009), ss. 2 and 3 which respectively define sexual intercourse as the penetration of the vagina of one person by the penis of another and rape as only occurring when a man has sexual intercourse with a woman without her consent.

²⁴ See *Offences Against the Person Act* (1864), s 79

staffed with individuals who speak sign language. The same is true for other emergency services, such as hospitals and healthcare facilities.

There are no clear policies on how to identify and/or treat with witnesses or complainants who have mental disabilities. Persons with mental disabilities or mental health challenges who are charged with a crime are unduly impacted by rules regarding unfitness to plea. Where a person is deemed unfit to plea, she/he is remanded in custody and is brought back to court after periodic evaluations. There are reports of the evaluation/screening process lasting for less than ten minutes. There are not sufficient numbers of psychiatrists available to deal with the volume of persons with mental health challenges in the remand centres which calls into question the adequacy of the evaluations used to determine fitness to plea.

These unaddressed challenges as well as the *Disabilities Act* remaining unenforceable are a violation of articles 2 and 26 of the Covenant.

RECOMMENDATIONS

The Committee should emphasize the duty of states to both legislate special protective measures and secure their meaningful implementation in order to comply with the Covenant, and express concern that the State party has not taken adequate steps to implement mechanisms to better protect the rights of persons with disabilities. It should recommend the following: **improve infrastructure through the adoption and implementation of building codes as well as policies and practices to be more inclusive of the realities of persons with disabilities and gazette the date of commencement of the *Disabilities Act*, implementing all provisions of the Act and the speedy production of regulations. Further the State party should improve data collection mechanisms on the treatment of persons with mental health challenges in prisons and remand centres and engage in targeted awareness raising efforts around the *Disabilities Act***

SEXUAL ORIENTATION AND GENDER IDENTITY

Issue 6 in Lol: Please indicate steps taken to amend the laws to prohibit discrimination on the basis of sex, sexual orientation and gender identity and decriminalize sexual relations between consenting adults of the same sex. Please provide information on the specific outcome of the Diversity Policy developed by the Jamaica Constabulary Force (see State party report, paras. 73-79) and what steps will be taken to prevent acts of violence and hate crimes that reportedly occur against the lesbian, gay, bisexual and transgender population. Please indicate what has been done to put an end to incitement to violence and mob violence against that population. In line with the Committee's previous concluding observations, please indicate the steps taken to investigate reported cases of harassment, discrimination or violence against persons on the basis of the person's sexual orientation and gender identity in the fields of health, education, employment and housing (see CCPR/C/JAM/CO/3, para 8).

RESPONSE OF CIVIL SOCIETY

In its November 2011 Concluding Observations, this Committee made the following observation and recommendations to Jamaica:

While welcoming the adoption of the Charter of Fundamental Rights and Freedoms in April 2011, the Committee regrets that the right to freedom from discrimination is now expressed on the grounds of "being male or female", failing to prohibit discrimination on grounds of sexual orientation and gender identity. The Committee is also concerned that the State party continues to retain provisions under the Offences against the Person Act which criminalize consensual same-sex relationships, thus promoting discrimination against homosexuals. The

Committee further regrets report of virulent lyrics by musicians and entertainers that incite violence against homosexuals (arts. 2, 16, 26).

The Committee found in its follow-up:

[C1] The recommendation has not been implemented: State party's legislation has not been amended to prohibit discrimination on the basis of sex, sexual orientation and gender identity; sexual relations between consenting adults of the same sex have not been decriminalized; no information is provided on the way the Anti-Bullying initiative is supported by the State party and on the measures taken to ensure that individuals who incite violence against homosexuals are investigated, prosecuted and properly sanctioned

Though there has been a significant increase in the levels of tolerance within the Jamaican society, LGBT Jamaicans continue to face challenges, inclusive of legal barriers, to the equal protection of their human rights. LGBT Jamaicans still exist within a legal context that enables their exclusion. Incidents of harassment and violence against members of the LGBT community continue to occur, often times with impunity, and stigma and discrimination still feature prominently in the lives of many LGBT Jamaicans.

Incidents of Violence and Harassment

LGBT individuals have been attacked, and sometimes killed, by mobs. Lesbians have been subjected to “corrective rape.” Frequent threats of violence have led LGBT individuals to live in fear and, in some cases, to flee their homes. In a 2015 J-FLAG survey of 316 LGBT Jamaicans, 43% of respondents reported receiving threats of physical violence in the last 5 years, and 18% reported being threatened with sexual violence. On average, these individuals received two or three such threats each.²⁵ From January to June 2016, 23 individuals reported to J-FLAG that they had been physically assaulted or attacked due to their sexual orientation or gender identity.²⁶ These experiences of violence are sometimes met with inaction and indifference by the police. There are incidents in which the police themselves are the perpetrators.

Incidents of police involvement contribute a culture of silence within the LGBT community. A 2015 study commissioned by J-FLAG on “The Developmental Cost of Homophobia” indicates that a large number of LGBT people did not report the last incident of physical or sexual assault that was perpetrated against them to the police. Thirty percent of the persons did not report because they felt the incident was too minor to be reported, while 40.5% did not report because they felt the police would not do anything to address the matter. About 1 in 4 (25.5%) feared a homophobic response from the police, and about 1 in 5 (22.9%) did not report because they felt too ashamed or embarrassed and did not want anyone to know what had happened to them.²⁷

The State party has failed in its obligation to take appropriate measures to prevent these attacks and to vigorously investigate and prosecute the attackers. These attacks and threats violate rights protected by Articles 6 (life), 7 (torture and cruel, inhuman, or degrading treatment), and 9 (security of person). Jamaica’s failure to take adequate measures to respect and ensure these rights violates its obligations under Article 2(1) (obligation to respect and ensure, without discrimination) and 26 (equal protection of the law).

Stigma & Discrimination

Homophobic and Transphobic attitudes remain popular within the Jamaican society. A 2015 survey of 1003 Jamaicans, which was commissioned by J-FLAG and published in 2016, noted that 65% of respondents believed that LGBT people should not be allowed to work with children. Only 36% of respondents said they would allow their gay child to continue living in their home, and 43% of respondents said they would not let a gay child be around his or her siblings. Sixty-five percent of respondents said they avoid LGBT people, and 75% agreed that

²⁵ J-FLAG, *The Developmental Cost of Homophobia: The Case of Jamaica*, pp. 51-52 (4 Nov. 2015) [hereinafter J-FLAG 2015].

²⁶ J-FLAG, *Support Services Department Incident Report 2016. Incidents from January – June 2016*, p. 1 (June 2016).

²⁷ J-FLAG 2015, *supra* note 7, p. 59.

LGBT sexual behaviour should be illegal. Fifty-nine percent of respondents reported that they would physically harm an LGBT person who approached them.

In the health care sector, LGBT Jamaicans face discrimination from health care professionals as well as from non-medical staff. Non-medical staff have turned LGBT patients away or humiliated them and have disclosed an LGBT patient's sexual orientation or gender identity to a third party. LGBT Jamaicans have to contend with discriminatory treatment by both employers and co-workers and in the area of housing, landlords are not sanctioned if they refuse to rent to an LGBT person or wrongfully evicting them on the basis of their sexual orientation or gender identity.

Gaps in Recognition & Protection

The Jamaica Charter of Fundamental Rights and Freedoms does not protect against discrimination on the basis of sexual orientation or gender identity. The effect of this is that discriminatory treatment in employment, education, healthcare and housing at the hands of non-state actors is allowed to occur with impunity. Jamaica still does not have any anti-discrimination legislation and therefore the only protection against discrimination lies within the Charter. Targeted forms of violence against the LGBT community are not defined within Jamaican criminal laws. The absence of hate-crime legislation means that homophobic and transphobic violence and the incitement of same is not recognized within Jamaican laws. Mob violence, "corrective rape"²⁸ and other forms of violence are captured in the generic legal protections available which do not punish violence motivated by hatred and/or intolerance for particular groups.

There are no state laws or policies which address explicitly homophobic and transphobic bullying and harassment in schools and the workplace. This means that LGBT Youth have little legal protection against the targeted physical and verbal abuse they have come to experience in schools. This is compounded with policies and practices within public and private educational institutions which perpetuate stigma around and discrimination against LGBT persons.

Legal Exclusion

Family law legislation excludes same-sex unions from all the legal benefits that are given to both married and unmarried heterosexual unions. Section 18 of the Jamaica Charter of Fundamental Rights and Freedoms prevents these laws from being challenged in court and goes further to prevent the legal recognition of same-sex unions. The Sexual Offences Act of Jamaica, 2009 governs the legal regime for protection from sexual violence. The Act's definition of sexual intercourse²⁹ and rape³⁰ means that there is unequal protection for persons in same-sex unions who experience intimate partner sexual violence. Their abuse only amounts to lesser offences such as "grievous sexual assault",³¹ indecent assault, or sexual touching (if it involves a minor)³² whereas intimate partner sexual violence within heterosexual unions can give rise to offences such as rape and sexual intercourse with a person under sixteen which carry heavier sentences.

The Domestic Violence Act of Jamaica, 2005 also fails to equally protect LGBT persons in same-sex unions from other forms of intimate partner violence. The Act's definitions of "spouse" and "visiting relationship" are exclusively heterosexual.³³ The effect of this is that LGBT persons in same-sex unions may only seek protection if they cohabit with their partners. They can apply for protection as "members of the household" of the abuser. Persons in non-cohabiting same-sex unions cannot seek protection under the Act.

²⁸ "Corrective Rape" defines the rape of an individual, usually lesbian, bisexual or trans women, with the intention of "making that person heterosexual".

²⁹ Sexual Offences Act (2009), s. 2

³⁰ Ibid, s. 3

³¹ Ibid, s. 4

³² Ibid, s. 8

³³ The Domestic Violence Act (2005), s. 2

Laws with Negative Impact

Sections 76 – 79 of the Offences Against the Person Act, 1864 continue to criminalize consensual anal sex and same-sex intimacy between men. Even though these laws, arguably, violate the right to equality before the law within the Charter of Rights, they cannot be subjected to a constitutional challenge. Section 13(12) of the Charter saves laws that existed before the passing of the Charter which relate to, among other things, sexual offences.

Positive Steps

In August 2011, the Jamaica Constabulary Force issued a Policy on Diversity with the aim to “effectively transform the negative aspects of police culture manifested in the scant regards paid to reports made by members of diverse groups, as it relate to the incidence of crimes committed against them.”³⁴ According to the policy definitions, diverse groups comprise, among others, persons of various sexual orientation.³⁵ In addition, the police have undergone a number of human rights-related capacity building and sensitization workshops. For example, in September 2015, two-hundred and thirty (230) police officers participated in a two-day training which ‘focused on the safety and security of women and girls, persons living with disabilities, marginalised youth, and members of the lesbian, gay, bisexual or Transgendered (LGBT) community.’³⁶ However, as demonstrated, “much more work needs to be done to ensure that all Jamaicans are protected and where their rights are infringed, they are treated equally before the law.”³⁷

RECOMMENDATIONS

The Committee should express concern that LGBT persons face severe rights violations within the State party, enabled by a legal context that effectively excludes them from equal protection, and that the State party has not taken all necessary steps to safeguard the rights, dignity and access to justice for LGBT Jamaicans. It should recommend the following:

- 1. Enact comprehensive anti-discrimination legislation to prohibit all forms of discrimination, inclusive of discrimination on the basis of sexual orientation and gender identity. This legislation should prohibit discrimination at the hands state and non-state actors in all areas of life, including but not limited to housing, employment, education and provisions of services. Additionally, this legislation should establish a body to receive and investigate complaints and conduct hearings where necessary.**
- 2. Amend laws which exclude, fail to equally protect and/or discriminate against LGBT persons so as to eradicate legal and policy barriers which prevent LGBT Jamaicans from fully participating in all areas of public life on an equal footing with cisgender heterosexual Jamaicans.**
- 3. Improve the country’s strategy to address displacement and homelessness, including increasing the number of shelters and temporary housing facilities and ensuring that staff and other persons living at the facility are sensitized to enable them to foster an LGBT-friendly environment.**
- 4. Conduct a national human rights public education campaign to encourage the public to engender a culture of respect for the rights of all persons particularly vulnerable and marginalized groups, including LGBT persons; specifically targeting families, employers, community members and state actors in an attempt to reduce discrimination and violence as well as the number of displaced LGBT persons.**

³⁴ Jamaica Constabulary Force Orders No. 3351, p. 1 (25 Aug. 2011)

³⁵ *Ibid.*, p. 2.

³⁶ JAMAICA OBSERVER, *Cops urged to use diversity training to make a difference*, Oct. 14, 2015

³⁷ J-FLAG 2013, *supra* note 25, p. 4.

HIV/AIDS

Issue 7 in LOI: Please provide information on the implementation of the National Workplace Policy on HIV/AIDS and the progress made on the National Integrated Strategic Plan for Sexual Health and HIV, which, inter alia, aims to reduce stigma and discrimination. Please provide information about steps to pass the Occupational Health and Safety Act to prevent discrimination against HIV-positive persons in the workplace (see State party report, para. 81). Please provide information about *the impact of the National HIV-Related Discrimination Reporting and Redress System, including data on the number of cases successfully handled by the System (see State party report, para. 82)*

Prior Concluding Observation: *The Committee regrets reports of prevalent societal stigmatization of people with HIV/AIDS...The State party should take concrete measures to raise awareness of HIV/AIDS with a view to combating prejudices and negative stereotypes against people living with HIV/AIDS. The State party should also ensure that persons living with HIV/AIDS...have equal access to medical care and treatment.*³⁸

RESPONSE OF CIVIL SOCIETY

Discrimination against people living with HIV/AIDS persists in Jamaica, largely due to the absence of any meaningful legal protection. To date, the State party has failed to address the Committee's recommendation, and despite some commendable policy steps, it continues to violate Articles 2 and 26 of the Covenant by failing to prohibit discrimination on the grounds of health status, or assuring equal treatment in various spheres of public life, including employment and health services. As described in section 13³⁹, Jamaica's constitutional provisions exclude "health status" from its anti-discrimination provisions, and Jamaica has no comprehensive anti-discrimination legislation.

Accordingly, the nascent protection efforts embodied in the *National HIV/AIDS Workplace Policy* and the *National HIV-Related Discrimination Reporting and Redress System* have not been meaningfully implemented and lack any real accountability structures. Without a comprehensive HIV and AIDS law, an anti-discrimination law or human rights act/commission to legally enforce non-discrimination, existing and future HIV and AIDS policies and strategic plans will not have the desired result of ensuring equal access to prevention, care, treatment, and support by key populations, as well as the full enjoyment of PLHIV in all aspects of social, cultural, civil, and political life.⁴⁰

The HIV Response in Jamaica

The creation and implementation of Jamaica's 2012-2017 National HIV Strategic Plan seeks to guide the nationwide HIV response and impact the epidemic. The Plan highlights that the epidemic expands beyond the scope of health and is a developmental issue which calls for the involvement of various stakeholders, spearheaded by the State. The HIV epidemic in Jamaica is generalized (1.7%) and concentrated in four key populations: men who have sex with men (MSM), drug users/homeless, sex workers, and prisoners.⁴¹ Recent data from Spectrum 2015 has indicated that the HIV prevalence rate among adolescents (10-19) is a growing concern and is worthy of examination and programmatic intervention.

While efforts have been made to enact and update the existing policies, there are gaps in research and programs which will aid in the reduction of HIV transmission and AIDS related deaths among established and emerging key populations. Additional research including qualitative research must be conducted to examine the social contexts and drivers of HIV vulnerability, especially for the most invisible sub-groups within the key populations that do not take up services. Issues such as gender roles, gender-based violence, stigma and discrimination and cultural and religious attitudes continues to adversely affect the response. The State must encourage and develop sustained

³⁸ UN Human Rights Committee, *Concluding Observations*, para 9

³⁹ Jamaica (Constitution) Order in Council 1962, section 13

⁴⁰ HIV and AIDS Legal Assessment Report for Jamaica, Nov 12, 2013

⁴¹ Ibid

public awareness programs to combat myths surrounding HIV and AIDS and must frame the HIV response from a human rights approach.

These efforts are undercut by legal barriers which impact the HIV epidemic, notably the criminalisation of sex work and private, consensual same-sex sexual acts as well as the barriers hindering the provision of certain information, services and commodities to adolescents under the age of 16. These laws prevent members of key populations from seeking necessary information, testing and treatment and has the effect of driving groups underground.

National HIV/AIDS Workplace Policy

The National HIV/AIDS Workplace Policy, which was developed by the Ministry of Labour and Social Security (MLSS) and adopted in 2013, provides guidelines for both the public and private, formal and informal sectors, to develop and implement HIV/AIDS workplace policies and programmes to protect workers living with or affected by HIV and AIDS. It is a positive, long-overdue *first step*. However, while the government has attempted to achieve its national adherence – such as by establishing a Steering Committee to support integration of a HIV-sensitive approach in the operations of the Ministry of Labour & Social Security – meaningful implementation has not occurred, leaving much more to be done.

The policy lacks the force of law, and depends in large part on the voluntary support of various private and public actors. Importantly, without the force of law, accountability for breaches remains elusive, which necessarily undercuts the normalization efforts. As this Committee has noted on several occasions, robust accountability structures, and cross-cutting access to a remedy are necessary components of rights protection. The increased vulnerability of persons living with HIV/AIDS heightens the importance of these. Absent those foundations, the present policy – while laudable – is inadequate. The policy is expected to be reviewed in 2016 but no announcement to this effect has been made.

Efforts to reduce stigma and discrimination and manage HIV issues in the workplace hinge on the full and meaningful involvement of the private sector – whether small, medium or large enterprises – in the HIV response. It must be noted that while entities such as the Jamaica Employers Federation (JEF) are involved, there is no sustained and coordinated private sector response through for example Jamaica Business Council on HIV/AIDS (JABCHA), which has not been in operations for a number of years.

Some other activities have occurred since 2014, but a wide range of civil society actors indicate that they have had little impact. They include: capacity building for staff of the MLSS; some engagement of persons living with HIV (PLHIV) to provide administrative support to the Steering Committee and make presentations during sensitization and awareness sessions; voluntary capacity building for trade union delegates around advocacy and policy monitoring; development of an updated HIV curriculum for private sector entities/workplaces to support HIV sensitization in the workplace.

National HIV-Related Discrimination and Redress System (NHRDRS)

Stigma and discrimination perpetrated against people living with HIV (PLHIV) continue to be a challenge. Between 2005 and 2016, a total of 267 reports of HIV-related discrimination were recorded through the National HIV-Related Discrimination and Redress System (NHRDRS). Unfortunately, actual redress for these complains remains largely to be seen. One of its greatest weaknesses the NHRDRS faces is that it is led by a non-governmental organization, the Jamaica Network of Seropositives (JN+), and not the government of Jamaica. This severely hampers its ability to facilitate redress in a more meaningful and consistent way, and limits the extent to which it represents fulfilment by the State party of the obligations imposed by the Covenant.

According to JN+, the system has some value but its effectiveness is hindered by the lack of adequate redress partners, and entities empowered to mandate redress for discrimination. While there have been a few success stories, the vast majority of cases remain unresolved. For example, JN+ recently received a report of male teacher who is allegedly being treated unfairly at his workplace after information about his HIV status was shared without his consent.

Awareness of the NHRDRS is also low. The fact that very few people are actually aware that it exists continues to constrain its prospective efficacy. Greater awareness raising is needed to encourage persons to use it. Credible information suggests that a Redress Directory and low-literacy flyer are currently being developed to promote the system, but stakeholders fear that the lack of redress partners will continue to be a bottleneck. The system has been noted as lacking an institutional home, sufficient human resources, and adequate technical capacity.⁴²

Stigma and discrimination in the larger context

The four key areas in which HIV-related discrimination is noted to occur is within access to essential services, equality of PLHIV in public life and private life, key populations and access to justice.⁴³

Stigma and discrimination meted out to key and vulnerable populations such as gay, bisexual and other men who have sex with men, sex workers and transgender people, continue to impact on access to and uptake of HIV and other health services. While there have been a number of initiatives by state and non-state actors, efforts to reduce stigma and discrimination under the framework of the *National Integrated Strategic Plan for HIV and SRHR* continue to be weak. Stigma and discrimination in health facilities and across the Jamaican society continue to be a major issue which affect the success of the national response.

There have been noticeable improvements but programmes and initiatives to create a more enabling environment and promote human rights continue to be one of the most underfunded components of the national HIV response. The vast majority of initiatives are centred around the Greater Involvement of People living with HIV/AIDS, and Positive Health Dignity and Prevention Programmes (PHDP). There is also a dearth of organisations with specific focus on addressing stigma and discrimination and improving the human rights situation.

The government must however be commended for its willingness and continued strong partnerships with key population organisations such as J-FLAG which it has been working with for a number of years. While the partnerships between the government and civil society have been yielding positive results, no systematic changes have been made with regards to policy and law. Similar efforts need to be explored with other entities, including greater attention to strengthening their role in the response for there to be much more success.

RECOMMENDATIONS

The Committee should state that the lack of legal protection against HIV/AIDS-related discrimination conflicts with the State party's obligations under the Covenant, and negatively impacts the HIV/AIDS response. It should recommend the following: **establish, in legislation, protection from discrimination based on health status, including HIV/Status, accompanied by a robust enforcement and redress mechanism.**

The Committee should welcome the National HIV/AIDS Workplace Policy, and express concern about the lack of an enabling legislative framework to assure meaningful adherence, and the implementation deficits presently faced by the programme. It should recommend the following: **strengthen the National HIV/AIDS Workplace Policy to, inter-alia, give it the force of law for which formal redress for breaches can be provided; undertake national awareness-raising efforts to promote the National HIV/AIDS Workplace and provide technical support to small, micro, medium and large enterprises to develop their own policies.**

The Committee should emphasize that initiatives to address stigma and discrimination require sufficient budgetary support for them to be effective, and for the State party to fulfil its obligations under the Covenant. It should recommend the following: **expeditiously increase the resources, both human and financial, to initiatives**

⁴² Gray, Vivian A. 2013. "Review of the National HIV-Related Discrimination Reporting and Redress System in Jamaica." Kingston, Jamaica: Futures Group, Health Policy Project.

⁴³ ABA ROLI HIV/AIDS Legal Assessment Tool,

http://www.americanbar.org/content/dam/aba/directories/rol/misc/aba_rol_i_hiv_aids_legal_assessment_tool_11_12.aut_hcheckdam.pdf

to address stigma and discrimination, by *inter-alia*, increasing the total budgetary allocation by at least 5% within the next two years.

The Committee should recommend the following: **works with the relevant stakeholders to enhance/improve the National HIV Reporting and Redress System, including undertaking public education programmes to promote its use, and significantly increase the number of people available to document reports and manage each case.**

GENDER DISCRIMINATION

Issue 8 in Lol: *Please provide information on the results of efforts to change entrenched stereotypical attitudes with regard to traditional gender roles and to increase the number of women in decision-making positions in the public and private sectors through the implementation of new practical initiatives. Please provide information on any temporary special measures that the State party has implemented in order to give effect to the provisions of the Covenant (see State party report, para. 108).*

RESPONSE OF CIVIL SOCIETY

The Government of Jamaica through the adoption in Parliament of private members' motions have acknowledged the need to take steps to address systemic gender inequalities which limit women's participation in decision-making. These private motions alongside the draft of the Sexual Harassment Bill and the review of the Sexual Offences Act demonstrate that the Government is slowly taking steps in the right direction towards dealing with gender inequality. However, the Government has failed to implement, in a meaningful way, strategies to remove different structural barriers to women's participation in decision-making and to gender equality.

Stereotyped Roles of Women

While noting that the Government of Jamaica has at times expressed commitments to dealing with the social, economic and political inequality between males and females in Jamaican society, there have been little progress made on a societal level to address these fundamental inequalities. This is further exacerbated by a weak, ineffective, inefficient national machinery commencing with the Bureau of women's/gender affairs.

A key example is the continued greater burden of unpaid work in the home, communities and in key service sectors, e.g. healthcare that women continue to carry. Conservative estimates by Economic Commission of Latin America and the Caribbean say pay inequity is a norm in the workplace with women getting as much as 20 cents less per dollar.

The Jamaica Survey of Living Conditions [JSLC] 2012 and the Economic and Social Survey [ESSJ] 2014 revealed, among other things, that females accounted for 60.2 per cent of public sector workers while males accounted for 59.5 per cent of the private sector, with the latter offering higher salaries and that women's unemployment rate is consistently higher than men's. In January 2016 STATIN reported an overall unemployment rate of about 17% for women and 10% for men with rates for young women 25 and under being 48% to young men's 33%.

It is acknowledged that the government has amended the Constitution to prohibit discrimination on the basis of being male or female in section 13(3)(i), however the impact of this amendment is yet to be felt. It is unclear to what degree private companies and other non-State actors can be held accountable to this provision. The wording of the provision is also curious. The language of "being male or female" was deliberately used to refer to the discrimination of persons on the basis of biological sex differences. The word "gender" was intentionally avoided and so it is unclear whether this section can adequately discrimination that is the result of stereotypical notions of what men and women should do There is a need for comprehensive anti-discrimination legislation which prohibits discrimination on the basis of sex and gender and provides accessible avenues for redress for different women.

Article 3 and 26 of the ICCPR require more than just formal equality being guaranteed in the Constitution, this Committee in its General Comment 28 indicated that “States parties should review their legislation and practices and take the lead in implementing all measures necessary to eliminate discrimination against women in all fields, for example by prohibiting discrimination by private actors in areas such as employment, education, political activities and the provision of accommodation, goods and services” (para 31). The realities of women’s unemployment indicate that there is no substantive equality and therefore Jamaica is not fulfilling its obligations under Articles 3 and 26.

Women’s Participation in decision-making

Despite commitments made by the GOJ to increase and enhance women’s role in Power and Decision-Making, the reality falls way below the promises and even commitments. A review and monitoring of both private sector and public sector leadership yielded the following:

1. The total percentage of women on ten (10) private sector boards for the periods 2007-2008, 2012 and 2015-2016 are 11%, 17% and 17% respectively.
2. As at May 2016, the total percentage of women on forty-seven (47) private sector boards review is 21%, and the total percentage of female chairs on these boards is 6%.
3. The total percentage of women on twenty-six (26) public sector for the years 2008, 2012 and 2016 are 34%, 33% and 39% respectively.
4. The total percentage of women on one-hundred and thirty (130) public boards across eleven (11) ministries is 35%, and the total percentage of female chairs on these boards is 17%.

Note that the particular ten private sector and twenty-six public sector boards in question have been subject to monitoring since 2008.

The review indicates that for private sector between 2008 and 2016, male domination has prevailed and there has been minimal to no significant upward change in the overall average sex composition of the private sector boards on the ‘Watch List’ since 2008. The average female membership across the boards being compared is essentially steady at less than 20%. For the public sector, the percentage of female members has continued to hover under 40% with an average of 35% of the appointees being female, in 2008 and 2016. The highest actual percentage among the twenty-six public boards in 2016 is 39%.

Boards with the highest numbers of females seemed to be closely aligned with what is seen as the traditional work areas of females, such as education, social services, and health to some degree. For example, the Early Childhood Commission, a Board within the Ministry of Education, Youth and Information, has had between 72%-80% female members the last 8 years. At the same time, Boards within particular Ministries continue to show significantly low levels of female memberships, no female chairs or no female members at all. These include Boards with oversight for critical everyday resources for women and their families: Water – NWC; Housing –NHT; Solid Waste –NSWMA; Transportation – JUTC; etc. lack gender parity or balance;

The current percentage of women in Parliament is at its historic highest – 17.5% in the lower house and 23.8% in the upper house, 19.1% overall. The current percentage of women in the executive arm of government is 23%.

Actions Taken

The State Party report is correct in stating that the private members’ motion was adopted to convene a Joint Select Committee to “seek to identify, address and correct the systemic gender inequalities which result in women’s under representation in Parliament and local authorities, in the organs of political parties and on public boards, including through the use of “temporary special measures.”” The discussion around possible gender quotas did not lead to any positive outcomes for women. In any event, a change in administration has resulted in the dissolution in this Joint Select Committee, with no clear indication of whether it will be reconvened.

Articles 3 and 25 require State parties to “take effective and positive measures to promote and ensure women’s participation in the conduct of public affairs and in public office, including appropriate affirmative action.”⁴⁴ The poor levels of representation of women on public boards and in government indicate that there is a need to employ temporary special measures as well as continuously challenge patriarchal ideals of leadership which continue to act as a barrier to women’s equal participation. Jamaica has failed to meet the obligations that arise under Articles 3 and 25 in not adequately following up on the private member’s motion.

RECOMMENDATIONS

The Committee should emphasize the importance of the Government of Jamaica moving expeditiously to address gender inequality in its various forms. The Committee should recommend the following:

- **Enact comprehensive anti-discrimination legislation to prohibit discrimination on the basis of sex and gender**
- **Implement temporary special measure such as affirmative action to increase the representation of women in Parliament, the Cabinet and public boards.**
- **Review, update and implement legislation such as the Employment (Equal Pay for Men and Women) Act and the Labour Officers’ Act and further enact legislation to provide for paternity leave and guarantee minimum wage for domestic workers.**
- **Conduct gender sensitization campaigns with the public as well as mainstream gender into the secondary school syllabuses across all subject areas highlighting women’s historical contributions to nation building and building an awareness of the importance of gender equality**

C. VIOLENCE AGAINST WOMEN, INCLUDING DOMESTIC VIOLENCE (ARTS. 2, 3, 6 AND 26)

Issue 9 in Lol: *Please provide information on the status of the comprehensive legislation to prevent and address sexual harassment. Further to the efforts to combat gender-based violence and gender discrimination, please provide information about the impact of such policies (see State party report, paras. 131-137). Please provide information about the level of training of the staff in the Victim Support Unit, the police, and the existence of adequate shelters for victims of gender-based violence, including domestic violence. Please provide information on investigations and prosecutions into cases of violent and deliberate killing of women (femicide/feminicide) and clarify whether such acts are criminalized in the Penal Code.*

RESPONSE OF CIVIL SOCIETY

In its November 2011 Concluding Observations, this Committee made the following observation and recommendations to Jamaica:

The Committee regrets that incidents of rape and domestic violence against women are prevalent in the State party. The Committee further regrets the lack of shelters for victims of domestic violence (art. 7).

The State party should strengthen its efforts to combat gender-based violence and to ensure that cases are dealt with in an appropriate and systematic manner by, inter alia, investigating, prosecuting and punishing the perpetrators. It is encouraged, in particular, to increase the training of the staff in its Victim Support Unit and the Police on violence against

⁴⁴ Human Rights Committee, General Comment No. 28 (para 29) HRI/GEN/1/Rev.9 (Vol. I)

women, including sexual abuse and domestic violence. Furthermore, the State party should provide adequate shelters for victims of gender based violence including domestic violence.

The legislation which addresses violence against women remains inadequate and there is a clear need for policies and infrastructure to respond to violence against women and girls. The Government has indicated that steps will be taken to amend and supplement these laws and policies however they remain unaddressed.

Legislative Regime

The Sexual Offences Act provides limited protection to women who experience sexual violence. The Act defines sexual intercourse as exclusively penile penetration of the vagina and rape as non-consensual sexual intercourse committed against a woman by a man. Rape has the largest sentence within the Sexual Offences Act but only occurs in limited circumstances. The offence of Incest is similarly limited to sexual intercourse between relatives of a different sex. Under the Sexual Offences Act, marital rape exists where only in instances where divorce proceedings have started, where they have separated, where there is a separation agreement, where a protection order has been issued against the husband and where the husband has an STI.⁴⁵

The Domestic Violence Act provides some protection against physical and mental injury caused by intimate partners and family members. However, the Domestic Violence Act does not cover sexual abuse. This means a woman cannot seek protection orders where she has been sexually assaulted by her partner. Her only recourse is the criminal law. The punishment for breaching a protection order has little punitive force and is disproportionate to the violence that women are likely to experience.

The Sexual Harassment Bill has been drafted but has not been tabled in Parliament. The same goes for the review of the Sexual Offences Act and the Domestic Violence Act. The failure to address the gaps within these laws breach the obligation of the state to prevent and provide protections for violence against women under articles 2, 3, 6 and 26.

Institutional Deficiencies

There is only one shelter for victims of gender-based violence. This shelter is located in Kingston and is operated by a non-governmental organization, Woman Inc. The government does provide subventions for the shelter however, the shelter's locations means that it is largely accessible to women in rural areas. The shelter also operates on limited resources. The Government has failed to create shelters which are accessible to all women who experience violence.

Domestic violence is not a crime, although one may seek protection orders if they experience same. The result therefore is that there is poor data collection on the incidences of domestic violence as well as violence against women generally. National Victimization Surveys, though highlighting who is affected by particular forms of violence, do not address directly gender-based violence. Outside of this, there is a general lack of data collection mechanisms regarding gender-based violence which impacts how policies are implemented regarding gender-based violence.

Actions Taken

The 2011 National Policy for Gender Equality has within its framework the adoption of measures to eliminate violence against women. It mandates, among other things, strengthening the Victim Support Unit, establishing a 24-hour national telephone hotline, conducting an awareness-raising campaign around gender-based violence, integrating gender analyses into data collection methods and providing protection against sexual harassment.

The Minister of Culture, Gender, Entertainment and Sports has indicated her intention to review the Sexual Offences Act, the Domestic Violence Act and other such legislation which impacts gender equality with a view to providing greater protections for violence against women and girls.

⁴⁵ Sexual Offences Act (2009), s. 5

RECOMMENDATIONS

The Committee should recommend the following:

1. **Review and amend the Sexual Offences Act and Domestic Violence Act to better protect against violence and against women and girls.**
1. **Pass the Sexual Harassment Bill into law and implement its provisions so as to eliminate the occurrences of sexual harassment in employment.**
2. **Implement the National Policy on Gender Equality, particularly those mandates related to data collection, integrating gender analysis and improving support services to women who have experience violence.**
3. **Conduct gender sensitization campaigns with the public to raise awareness about the occurrences of gender-based violence and to shift the cultural attitudes that facilitate it**

SEXUAL AND REPRODUCTIVE RIGHTS, MATERNAL MORTALITY AND ABORTION (ART 6 AND 17)

Issue in Lol (2016): Please provide information about the result of the legislation review in relation to sexual and reproductive rights, maternal mortality and abortion as well as the progress of such a review, if it exists. What steps have been taken to articulate a policy for safe reproductive healthcare services? Has the State party considered reviewing and amending, as necessary, the country's abortion laws? Please indicate what steps have been taken to ensure that reproductive health services are available and accessible to all women and girls as per previous concluding observations

Issue in Prior Concluding Observation (2011): The State party should amend its abortion laws to help women avoid unwanted pregnancies and not to resort to illegal abortions that could put their lives at risk. The State party should take concrete measures in this regard, including a review of its laws in line with the Covenant. Furthermore, the State party should ensure that reproductive health services are available and accessible to all women and girls.

RESPONSE OF CIVIL SOCIETY

Jamaica has not made any notable progress in relation to sexual and reproductive rights, maternal mortality or abortion. Sexual and reproductive rights, the issue of maternal mortality and the provision of safe legal abortions most directly impact the rights of women and girls in Jamaica and has consistently affected their health and wellbeing. The State has made no serious efforts towards the creation of laws or policies which address sexual and reproductive health and rights and has continued to rely on the savings clause contained within its constitution to preserve laws which speak to the life of the unborn child.

Termination of Pregnancies

The State party report has indicated that "In Jamaica, abortion is permissible on medical grounds."⁴⁶ The basis for this statement stems from a policy which was enacted in 1975⁴⁷ by the then Minister of Health and medical practitioner Kenneth McNeil which allowed for abortion services to be provided in one public health clinic. The policy was refined in 1989 and affirmed by a memorandum which acts as evidence of the position used to govern the Glen Vincent Health care Centre Fertility Management Unit. It outlined the criteria to allow for termination services. Further there were policy papers in the early 1990's which facilitated termination services at a public

⁴⁶ Government of Jamaica (2015), Fourth periodic report of States parties due in 2014: Jamaica, CCPR/C/JAM/4, para 119

⁴⁷ "Abortion: Statement of Policy." Paper No. 1 signed by Kenneth A. McNeil, Minister of Health and Environmental Control, 15 Jan. 1975. (M.P. No. HH 490/01)

hospital, which was discontinued by the mid 1990's.⁴⁸ Much reliance has also been placed on the common law position which was articulated in the 1939 decision of *R v Bourne* in which it was determined that an abortion could be considered lawful where "the act was done in good faith for the purpose only of preserving the life of the mother."⁴⁹

Jamaica's current legal position on abortion exist in the 1864 Offences Against The Person Act (the Act), section 72 and section 73. Pursuant to section 72, any pregnant women who takes any substance or uses any instrument to procure a miscarriage is guilty of an offence. Notably, the section extends to criminalize the act of any person who unlawfully administers any substance to a woman, or uses any instrument on her, with the intent to procure a miscarriage, whether or not the woman is with child. These offences are punishable by a sentence of life imprisonment.

Section 73 of the Act criminalizes the act of any persons who unlawfully supplies any substance or instrument to a woman, knowing that she intends to use same to terminate her pregnancy. This offence carries a sentence of three years imprisonment.

The absence of legislation to substantiate the State's assertion that abortions are in fact permissible on medical grounds calls into question the validity of the statement. The policy statement which was written in 1975 and affirmed in 1989 do not amount to a policy and provides no legal protection to medical professionals who are at risk of prosecution if they are found to be in contravention of the Offences Against the Persons Act, which clearly outlines the offence. It is unfeasible and impractical for medical professionals to rely solely on the 1939 common law decision of *R v Bourne*⁵⁰ to determine what can be considered lawful abortion.

The State has noted that "The provisions in the Offences Against the Person Act which relate to the life of the unborn are saved. The Charter of Fundamental Rights and Freedom for Jamaica provides that "nothing contained in, or done under, the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, [...] shall be held to be inconsistent with or in contravention of the provisions of this Chapter" - and this includes offences regarding the life of the unborn."⁵¹ In this instance, the savings clause has the effect of preserving laws which are archaic and which lead to adverse health outcomes for marginalised groups of women.

The state party has also noted that "Several advisory commissions have been established to review the laws and articulate a policy for safe reproductive healthcare services in Jamaica, with special emphasis on abortions."⁵² While the establishment of the Abortion Policy Review Advisory Committee in 2005 and the development and submission of a final report in 2007⁵³ are commendable, it must be highlighted that in the 9 years that have since elapsed, the state has failed to act on any of the recommendations presented in the report. The state has repeatedly relied on the work which was done by the Committee to indicate that there is an intention to examine the issue, however, the lack obvious lack effort to update the data, review laws or create policy guidelines to protect health care professionals is indicative of a lack of political will to act on data which has been gathered and the expert advice which has been presented within the report.

⁴⁸ Abortion Policy Review

⁴⁹ *R v Bourne* [1938] 3 All ER 615 at 617

⁵⁰ *R v Bourne* [1938] 3 All ER 615

⁵¹ Government of Jamaica (2015), *Fourth periodic report of States parties due in 2014: Jamaica*, CCPR/C/JAM/4, para 117

⁵² Government of Jamaica (2015), *Fourth periodic report of States parties due in 2014: Jamaica*, CCPR/C/JAM/4, para 116

⁵³ Abortion Policy Review Advisory Group Final Report 2007. Available at http://www.japarliament.gov.jm/attachments/375_Abortion%20Policy%20Review%20Advisory%20Group%20Final%20Report.pdf

The emergence and spread of the Zika virus which has been directly linked to microcephaly in babies born to mothers with the virus is a new concern which impacts the reproductive rights of women and which calls for renewed examination of termination of pregnancy issues.

While the creation of laws to facilitate safe abortions is not a requirement for compliance with the Covenant, the high rates of maternal mortality and morbidity stemming from botched abortions, and the impact that absence of such a law has on the reproductive health of women, especially those who are young, single, unemployed or in low paying employment requires that the state take steps to protect the health and wellbeing of women and girls.

Sexual and Reproductive Health of Women and Girls

The efforts made to address sexual and reproductive health of women and girls remains dependent on short term programmatic initiatives and are not enshrined in a sexual and reproductive law or policy to ensure accountability and consistency. The State had undertaken the review of the Sexual Offences Act and other related Acts in 2014, however the process was not concluded and since the change in administration, there have been no steps to date to reconvene the Joint Select Committee to allow for the resumption of the review process.

To ensure that there is adequate protection for the sexual and reproductive health and rights of women, there must be a Sexual and Reproductive Health law which will work in conjunction with any HIV or AIDS policies or laws in existence and which will ensure accountability for all entities vested in health. For this to be truly effective it is necessary that the State pass anti-discriminatory laws which protect all persons from discrimination as they seek to access sexual and reproductive information, services and commodities.

The global community has acknowledged the importance of sexual and reproductive health as an aspect of the right to health.⁵⁴ Notably the Sustainable Development Goals adopted by the UN General Assembly contains goal 3 which calls on state parties to “Ensure healthy lives and promote well-being for all at all ages” and goal 5 which aims to “Achieve gender equality and empower all women and girls”.⁵⁵ While the state has continuously recognised reproductive health, there is need for greater recognition of sexual health for women and girls as a part of complete health and there should be efforts to have sustained state run programs and initiatives focusing on sexual and reproductive health and rights of women and girls.

The state must develop sustained public campaigns promoting the sexual and reproductive health of women including vulnerable women and marginalised women and women including lesbian, bisexual and transgender (LBT) women, women living with HIV, women with disabilities, and women and girls whose engaged in sex work and adolescents. The state must also provide women and girls with sexual and reproductive services and commodities at affordable rates, reduced costs or at no cost, including condoms, including female condoms, and contraceptive pills, and other forms of contraception towards empowering women to take charge of their own sexual and reproductive health. Additionally, there must be greater efforts to research social and cultural drivers which impact women’s sexual and reproductive health. A thorough examination of the role of gender roles, gender based violence including sexual violence and intimate partner violence and its impact on women’s sexual and reproductive health is essential.

Age of Consent

The age of sexual consent as outlined by the law in Jamaica is sixteen (16) years old.⁵⁶ The presumption which has stemmed from this is that the age at which a child can consent to receiving information, services, treatment and commodities in relation to their sexual and reproductive health and is also at 16 years old. This has acted as a

⁵⁴ General Comment No. 22 (2016)

⁵⁵ United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development, adopted by the UN General Assembly in Sept. 2015

⁵⁶ Sexual Offences Act, 2009, section 10

barrier for young persons below the age of 16 accessing relevant information and services towards the protection of their sexual and reproductive health.

While the state notes “The Adolescent Health Unit of the Ministry of Health (MOH), with the support of a multi-sectoral Adolescent Policy Working Group has led the process of reviewing policies that limit adolescent access to Sexual and Reproductive Healthcare Services”, the initial reviews of the Sexual Offences Act and other related Acts by the Joint Select Committee of Parliament in 2014 raised the issue of whether the age of consent should be raised to 18 years old. A main advocate in favour of this position is the Children’s Advocate.

The Jamaica Youth Advocacy Network notes in its rebuttal submission that raising the age of consent would have the effect of further complicating and burdening the criminal justice system by dragging children who engage in sexual relations through a less than perfect justice system and will further drive sexually active adolescents and youth underground, acting as a hindrance for them to seeking important information and services. It was stressed that emphasis must be placed on the importance of culturally sensitive, age appropriate, life-skills based comprehensive sexuality education which also speaks to health promotion and development which is appropriately taught to all learners across the life-cycle, across all educational institutions and in places of safety.⁵⁷ Raising the age of consent will not stem the ills which have been identified among adolescents namely early age of sexual debut, high rates of teenage pregnancy and a high HIV prevalence rate among young key populations.

RECOMMENDATIONS

The Committee should express concern that the State party has to date not acted on the recommendations made to it by the Abortion Policy Review Advisory Committee which submitted a report 9 years ago and has taken no steps towards amending its abortion laws. It should recommend the following: **amend its abortion laws to help women avoid unwanted pregnancies and not to resort to illegal abortions that could put their lives at risk. The State party should take concrete measures in this regard, including a review of its laws in line with the Covenant. Furthermore, the State party should ensure that reproductive health services are available and accessible to all women and girls.**

The Committee should, in its open session with the State party, request details about the creation of anti-discriminatory laws and a sexual and reproductive health law or policy towards ensuring that the sexual and reproductive rights of women and girls are protected. The Committee should recommend: **the development of a Sexual and Reproductive Health law which will seek to provide guidance, protection and opportunities for redress for sexual and reproductive health issues which are faced by all persons, including women and girls.**

The Committee should emphasise the importance of initiatives to tackle sexual and reproductive issues faced by women and girls and the importance of partnerships with non-governmental organisations working with and for women and girls. The Committee should note the need for data on key issues such as abortion and gender based violence. It should recommend the following: **increase resources towards research on social and cultural drivers which impact the sexual and reproductive health of women and girls and further ensure that laws which hinder access to sexual and reproductive health services are removed to act as barriers for women and girls seeking to access sexual and reproductive health information, services and commodities.**

D. STATE OF EMERGENCY, EXTRAJUDICIAL KILLINGS AND INVESTIGATIONS (ARTS. 2, 4 AND 6)

INDEPENDENT COMMISSION OF INVESTIGATIONS (INDECOM)

⁵⁷ The Jamaica Youth Advocacy Network (JYAN) Submission to the Joint Select Committee for the Review of Jamaica’s Sexual Offences Act and Related Acts. Available at <https://goo.gl/3azNUl>

Issue 12: Please also provide information on the level of resources allocated to, and the mandate of, the Independent Commission of Investigations (INDECOM) set up to carry out independent and effective investigations into alleged cases of extrajudicial killings and assaults by law enforcement personnel. Please provide information about the outcome of its work. Please provide information on the status of the review conducted by the Joint Select Committee of Parliament in 2015 of the Independent Commission of Investigations Act.

RESPONSE OF CIVIL SOCIETY

The State party has not taken sufficient measures to empower the Independent Commission of Investigations (INDECOM) to carry out its functions, both in relation to Committee's recommendation to bring clarity to INDECOM's mandate and powers, and the provision of adequate resources. These outstanding issues threaten the State party's fulfilment of the Covenant's obligations to ensure effective, impartial investigations, and to provide an effective remedy. While there has been some positive progress in terms of political support, the Committee's core recommendations remain unaddressed.

Mandate and powers of INDECOM

The Committee has expressed keen interest in securing an enabling legislative environment for INDECOM to be effective. However, the State party's failure to reform the INDECOM Act to address the well-established challenges – despite the formation of a parliamentary subcommittee – continues to threaten this. Since the Committee's recommendation to "clarify the mandates of INDECOM and the Office of the Director of Public Prosecutions with regard to powers to prosecute law enforcement personnel,"⁵⁸ INDECOM has been forced to litigate numerous, costly cases – some of which are still ongoing – in order to secure its authority. Basic powers that are central to any independent investigative mechanism's functions – to lay charges, arrest suspects, prosecute, and compel information – have been challenged in the Courts by members of the security forces, delaying the realization of INDECOM's potential effect. Importantly, most court resolutions have been positive. In 2013 the Jamaican Constitutional Court in *The Police Federation and others v The Commissioner of the Independent Commission of Investigations and the Attorney General of Jamaica* held that:

1. The Commissioner and the investigative staff of INDECOM have the power of arrest both under common law and by virtue of the INDECOM Act, having been conferred with the powers of a constable
2. The Commissioner and investigative staff have powers at common law to charge and initiate prosecutions of members of the Police Force
3. There is no requirement for a ruling of the DPP before members of the Police Force are arrested and charged by officers of INDECOM
4. The powers possessed by officers of INDECOM to arrest, charge and prosecute members of the Police Force in no way undermine the constitutional authority of the DPP who still retains the authority to take over and/or discontinue any prosecution where such action is deemed appropriate by the DPP.⁵⁹

Despite the foregoing, **this matter was appealed and the decision of the Court of Appeal – which could entirely reverse these gains and invalidate active cases – is still outstanding.** The protracted uncertainty and recurring legal challenges has contributed to ambiguity in relation to the mandates of INDECOM and the DPP – which the State party is capable of solving through legislation – and has forced INDECOM to dedicate substantial time, resources and energy to litigating for its survival. Moreover, in the instant matter, the judgment of the Court of Appeal may not even resolve these ambiguities since the Police Federation could also appeal to Jamaica's final appellate court – the Privy Council.

The State party's failure to take "all the necessary steps" in this regard, as required by the Covenant, has no reasonable justification. It established and properly dissolved a Joint-Select Committee of Parliament to review the INDECOM Act which made several important recommendations to address the aforementioned issues, and a

⁵⁸ Concluding Observations, 10

⁵⁹ Para 334

range of others. But it has not *acted* to reform the law. While the State party has reported that a Cabinet submission has been prepared, this procedural step is no substitute for enactment. Several important legislative measures have languished despite a Cabinet submission being prepared. This should not be one such case.

INDECOM's resources

Fully recognizing the financial constraints within which the State party operates, its financial support for INDECOM has not been adequate. INDECOM remains severely underfunded by the State, and has to devise alternative fundraising strategies. While the State party has reported that INDECOM's annual budget is "approximately J\$300 million," it is important to note that **the vast majority of INDECOM's funding is provided by international donors.** Without grants, the majority of its work would be substantially reduced, and it would have to reduce staff. This fundamentally threatens the sustainability of INDECOM's work, and its security of independent operations.

New procedural threat to INDECOM's independence

The State party, potentially unwittingly, undermined INDECOM's independence in its passage of the *Committal Proceedings Act* (2013) by making aspects of INDECOM's work dependent on police support.⁶⁰ The Act is not itself a problem; it abolishes the preliminary examination hearing and introduce committal proceedings. Preliminary examination is a first step in Jamaica's criminal jurisdiction to determine whether there is sufficient evidence to commit an accused person to stand trial. The Act empowers a Parish Court Judge (formerly Resident Magistrate) to make this determination based on written statements.

The harm arises in section 6 which requires that the written statements to be recorded by a member of the Jamaica Constabulary Force. **It excludes INDECOM, and with it the possibility of INDECOM bringing written statements to court for committal proceedings unless such statement is signed by member of the Jamaica Constabulary Force – the same force it investigates and prosecutes.** This compromises the independence of INDECOM's operations on face, and is a retrograde legislative step that has already tangible hampered INDECOM's work. Parish Court Judges – faced with conflicting legislative signals – have now taken issue with INDECOM's exercise of its original statutory role in light of the new Committal Proceedings Act, and have rejected their attempts to file statements. As before, INDECOM is now compelled to seek court action to resolve another hindrance resulting from unclear and discordant statutes – and the State party's lethargy in addressing same.

RECOMMENDATIONS

The Committee should express concern about the continued lack of legislative clarity on the interplay between INDECOM and the Office of the Director of Public Prosecutions with regard to the conduct of investigations and prosecutions. (arts. 2, 6 and 7). It should recommend the following: **make the necessary amendments to Independent Commission of Investigation Act to clarify the mandate and role of INDECOM with regards to the powers to prosecute law enforcement personnel, to lay written statements in committal proceedings, and to compel written statements from law enforcement personnel.**

E. RIGHT TO LIFE, PROHIBITION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT AND TREATMENT OF PERSONS DEPRIVED OF THEIR LIBERTY (ARTS. 6, 7 AND 10)

TREATMENT OF PEOPLE DEPRIVED OF LIBERTY

⁶⁰ See *Committal Proceedings Act*

Issue 13 in Lol: Please provide information on the results of the measures taken to improve the treatment of persons deprived of liberty, in particular steps taken to lower overcrowding in places of detention. Please provide information on the outcome of the review of the detention system carried out by the subcommittee led by the Minister of National Security and the Minister of Justice (see State party report, para. 161). Please provide information on the implementation of the measures outlined in the Administration Policy for Persons Deprived of Liberty. Please also provide information on the use of alternative non-custodial sentences used to alleviate the problem of overcrowding in prisons (*ibid.*, para. 172).

RESPONSE OF CIVIL SOCIETY

The State party systematically violates Articles 6, 7 and 10 of the Covenant. Jamaica's places of detention are manifestly cruel, inhumane and degrading. The physical condition of lockups and prisons is indisputably deplorable, the treatment of detainees deeply discomforting, and the State party's response indifferent. Other reports submitted for this review by members of this coalition and others – all of which this coalition endorses – have sufficiently established the extent of the violations of the Covenant associated with Jamaica's detention and prison system. And while this report provides a general overview of the challenges that persist, multiple reputable bodies, including the Inter-American Commission on Human Rights (2015), INDECOM (2012-2015), Amnesty International (2014-2016), and the UN Special Rapporteur on Torture (2010-2011) have authoritatively described the grave situation facing any person deprived of liberty in Jamaica.

Gaps in legislative framework

As this Committee has recognized numerous times, proper legislative regulation of detention is necessary to protect the rights of persons deprived of liberty. In Jamaica, there is currently no clear statutory framework governing the treatment of persons in pre-trial detention. The majority are held in police lockups – dungeon style areas inside police stations originally intended to be short-term holding areas. Police lockups have become long-term detention environments and incubators for the worst human rights violations, including killings and torture, already established by this Committee in its previous reviews. A previous, archaic, regulatory framework, once existed, but was repealed with the passage of the Corrections Act, which *does not* regulate police lockups. The State party is in need of some legislative framework in relation to the treatment of persons in pre-trial detention. This can both guide its actors and citizens in relation to the rights of persons deprived of their liberty pending trial.

To the Committee's immediate concern in its *List of Issues*, the recently adopted *Administration Policy for Persons Deprived of Liberty* has no force in law, and can hardly be externally enforced beyond voluntary commitments by the police. It is a – laudably progressive – policy directive based on best practices that, despite its short lifespan, has been systematically breached with little accountability. The lack of a statutory framework governing pre-trial detention enables this.

General status of conditions and treatment

No “measures taken to improve the treatment of persons deprived of liberty,” in which the Committee has taken interest in its *List of Issues* have meaningfully addressed the situation. In the strongest of terms, this coalition condemns the treatment of persons deprived of liberty in Jamaica. Without reservation, nearly all places of detention fall well below international minimum standards, and offend our collective humanity. Widespread unlawful detention exists, places of detention remain overcrowded public health hazards, and officials in charge of places of detention routinely abuse those in their care with impunity. The cascading human rights violations are of such a severity that many detainees and inmates continue to experience severe mental health problems resulting from their incarceration.

Overcrowding – Both police lockups and prisons still face chronic overcrowding that make detention situations hostile, unsafe and unhealthy. The Tower Street Adult Correctional Facility in Kingston, for example, continues to operate with an inmate population twice that of its maximum capacity. Numerous credible reports reveal that this has resulted in scores of inmates being crammed into tiny cells – designed in the Colonial era – that lack any basic plumbing, lighting and ventilation.

Health and sanitation – Places of detention are still filthy, unhealthy environments that precipitate health emergencies. At many places of detention and prisons, rats, roaches, lice, and crabs have overrun the facilities. In some instances, police lockups have had to be ordered closed by public health departments, notably the Kingston Central Police Station in 2013.⁶¹ Most cells lack a toilet, and detainees and inmates are usually only released once daily for bathroom and hygienic care. As such, it is standard practice for inmates to urinate and defecate in their cells, normally in lose bags and bottles they have acquired. Unsurprisingly, reports of infections and other sicknesses are high. To exacerbate that situation, prison officials routinely deny detainees and inmates access to medical care – in many cases as a punitive measure,

Treatment – Officials habitually abuse, mistreat and neglect persons in their care. INDECOM has related several deaths in custody, and other actors report frequent beatings, humiliating acts and other forms of degrading treatment. Notably, in its national report, the State party concedes that allegations of torture have been levelled against officials. This situation persists, with near impunity.

Separation – There has been progress to ensure that minors detained are held separately from adults. However, those accused persons are not systematically separated from convicted persons. Numerous complaints of judgment debtors being held in the same cell as persons who have been charged for murder exist, in violation of article 10.

Prevention – No effective, rights-based special training by the State party of officers on the duty to respect the Standard Minimum Rules for the Treatment of Prisoners exists. The State party has facilitated a few training exercises by NGOs like Jamaicans for Justice on this point. This ad hoc training mechanism is insufficient to correct widespread disregard of the Human Rights of persons deprived of their liberty.

Sentencing guidelines

Whilst it is apparent that the State party has taken some effort to implement sentencing guidelines to assist legal practitioners and Judges to be aware of the existences of viable alternatives to imprisonment. These guidelines are not publicly available to legal practitioners and some members of the judiciary report that they have not seen the draft Sentencing Guidelines.

RECOMMENDATIONS

The Committee should express alarm at the longstanding rights violations faced by people deprive of liberty. It should recommend the following: **implement, through legislation, comprehensive reform of the system of detention, taking into account international human rights standards for the deprivation of the liberty.**

ANTI-TORTURE PROVISIONS

***Issue 14 in LoI:** Please indicate the number of cases successfully brought before the courts under anti-torture provisions in domestic law such as those within the framework of the Constitution, and steps taken to define torture as a separate offence in the criminal legislation to comply with article 7 of the Covenant. Please also provide information on any results stemming from the implementation of the memorandum of understanding between the Office of the Public Defender and the Jamaica Constabulary Force which sets out a framework to reduce some of the delays in the investigation of constitutional breaches by members of the Force.*

Jamaica still has not defined torture in its criminal law, in accordance with Article 7, nor has it established a sufficient legislative framework for addressing it, despite the assertion that existing oversight bodies are a viable substitute. The State party's position that there is no need to establish anti-torture provisions in law – beyond a vague, undefined, untested reference in its Charter – is unpersuasive.

⁶¹ RJR News, "Health department orders closure of Kingston Central Police Lock-up," Dec 10, 2013

Mention of torture – without reasonable definition – within a Charter is not an effective measure in the context of the Covenant’s obligations. Yet, on uncertain basis, the State party further asserts that this also “provides for the right to protection from torture or inhuman or degrading punishment or other treatment,” creating a “specific constitutional redress.”⁶² Tellingly, despite the widespread reports of torture and other forms of cruel, inhuman and degrading treatment, the State party is unable to provide a single case of this remedy being effectively utilized.

The State party also suggests that existing provisions in its Offences Against the Person Act that criminalize assault and battery are sufficient to cover torture, cruel, inhuman and degrading treatment. This is false. First, the dissimilar objective characteristics of each offense make the coverage dis-analogous. Second, torture etc. exist in non-physical forms that are not covered by assault and battery. This Committee has extensively addressed the various forms of torture and cruel, inhuman and degrading treatment, including psychological and emotional trauma. Despite many reports to that effect, Jamaica lacks any serious legislative framework to address it. The State party systematically defeats its own argument to this effect when it includes seven complaints from inmates “housed at the Horizon Adult Correctional Centre, that they were being tortured physically and **psychologically**.”⁶³

RECOMMENDATION

The Committee should explicitly state that the scope of the Covenant's obligation to proscribe acts of torture are not fully reflected in the State Party's laws or the robustness of its preventative mechanisms. It should recommend the following: **Establish explicit anti-torture provisions in law that *inter alia* define torture and other forms of cruel, inhuman or degrading treatment as criminal offenses.**

F. RIGHT TO AN EFFECTIVE REMEDY AND FAIR TRIAL (ARTS. 2, 6 AND 14)

JUSTICE REFORM AGENDA

Issue 17 in Lol: Please provide information about the impact of the efforts made to implement the Government’s Justice Reform Agenda aimed at addressing the reported backlog of cases, the reform of the justice system, including its resource constraints, and the enhancement of access to an effective legal remedy (see State party report, paras. 173-178). To what extent have the projects, pilot programmes and provision of pro-bono legal services had a positive effect on the enhancement of speedy and fair trials? Please provide information on steps to amend the Legal Aid Act.

The State party has, regrettably, faced setbacks in the implementation of its Justice Reform Agenda which is reportedly aimed at addressing the reported backlog of cases. Most practitioners see the successful passage of the committal proceedings as a mere transfer of the backlogs from the parish courts to the Supreme Court. There are already well document problems in relation to the progress of matters in the Supreme Court with many matters taking more than three years before trial commence in the Supreme Court. It is the lack of reform of the justice system, including the continued resource constraints which has adversely affected the enhancement of access to an effective legal remedy

There is no credible evidence that the projects, pilot programs or pro-bono legal services have had a positive effect on the enhancement of speedy and fair trials. In fact, whilst the state has nominally increased the rate offer to Attorney for work on behalf of the indigent, the sum offered for the entire legal representation in most cases is less than US\$300. This fee is way below the market rate and members of the public report that the small fees offered to them has resulted in sub-par representation in court. In many cases, we receive reports of legal aid Attorneys simply not appearing for scheduled matters. The poor state of legal aid service has resulted in lengthy trial dates as court dates are often delay by the failure of Attorneys to appear for trial matters.

⁶² Government of Jamaica, *Fourth Periodic Report*, para 159.

⁶³ *Ibid*, para 164

THE CORONER'S COURT

Issue 18 in Lol: Please provide information on the number of inquests made by the Coroner's Court in addressing issues of excessive use of force by law enforcement personnel and specify the number of prosecutions carried out by the Director of Public Prosecutions concerning extrajudicial killings since the previous review by the Committee in 2011.

The Special Coroner's Court is still insufficiently tasked to sufficiently address the number of cases entrusted to it. A coroner's inquest is usually held to determine whether anyone should be held criminally liable for a death in cases where the issue is not clear cut to the authorities or if there is difficulty in determining who should be charged. Evidence is led before a jury which decides on the issue.

The Special Coroner Court has only one Judge. He is required to travel to all 13 court parishes to hear special coroner cases. He notes that he currently has severe resource constraints. In an article in the Jamaican newspaper he outlines the problems faced by his office. The Special Coroner court can only hear a maximum of three to four cases per a month. He however has a backlog of more than 300 – 400 cases.⁶⁴ Jamaicans for Justice had approximately more than 495 cases which are awaiting a hearing date from the Special Coroner's Court. Some of these matter existed before the formation of the Court but were transferred by Parish Coroner Court to the Special Corner Court upon its formation. In one case, we have client who are waiting more than 13 years for the starting of an inquest by the Special Coroner Court. This client started the case with five civils witnesses to the fatal shooting. The client reports that two of her witnesses have died whilst she awaits the start of the inquest. She is still waiting for the start of this matter.

The Special Coroner's cannot clear the back log without additional Coroner to assist him to carry out his mandate. The Court is an essential element of the investigation of police fatal shooting.

G. RIGHTS OF THE CHILD (ARTS. 9, 10, 14 AND 24)

Issue 19 in Lol: Further to the current review and revision of the Child Care and Protection Act (see State party report, para. 182), please provide information on the time frame for its amendment, in particular its paragraph 24, which would remove the possibility of incarcerating a child on the basis of being beyond parental control. Please provide information about the number of persons that have been issued correctional orders under paragraph 24 of the Act over the past two years.

Three companion reports from members of this coalition authoritatively address this issue, the nature of the violations, and the required recommendations. This coalition unreservedly supports those expert reports. With regard to the status of reforms, the State Party has failed to deliver on the changes to the Child Care and Protection Act that it has promised reforms for over a decade. It's commitments to this Committee are not new, and its assertion that a reform proposal is "under review," has little value. The possibility of incarcerating a child on the basis of being beyond parental control exists in Jamaica, and is still being utilized.

While the Cabinet took a decision to phase this out, and *correctional orders* from judges have almost ended, **a review of the weekly station logs by Jamaicans for Justice reveals that many children are still detained in police lockups by officers for being "uncontrollable," often for illegal periods and in inhumane settings.**

Issue 20 in Lol: Please provide information on steps that have been introduced to remove minors from police lock-ups and to provide alternative arrangements to detention in line with the Covenant. Please provide disaggregated

⁶⁴ Jamaica Observer, "Case overload choking Coroner's Court," May 10, 2016

data on the number of children detained in police lock-ups. Please provide information on the status of the Child Diversion Policy and its implementation.

Three companion reports from members of this coalition authoritatively address this issue, the nature of the violations, and the required recommendations. This coalition unreservedly supports those expert reports. With regard to the status of removing minors from police lockups, the State party continues to detain children in these settings. A review of police station logs by Jamaicans for Justice from 2014-2016 reveal that many children are still detained in police lockups, with almost all of them in custody for over 24 hours. Many had been detained for questionable reasons such as “indecent language.”

The Child Diversion Bill is being drafted.

Issue 22 in Lol: *Please indicate the impact of the safe school policy on the promotion of non-violent forms of discipline as alternatives to corporal punishment (see State party report, para. 141). What steps are being taken to prohibit corporal punishment of minors in educational institutions and family settings?*

Corporal punishment of children in educational institutions and family settings is still lawful. The State party has resisted addressing this violation of its obligations both under this Covenant and a range of other instruments.

Under the common law in Jamaica, there is a right to inflict “reasonable and moderate” punishment on a child.⁶⁵ The *Child Care and Protection Act* punishes “cruelty to children” inclusive of assault and physical or mental ill-treatment “in a manner likely to cause that child unnecessary suffering or injury to health”, but it does not prohibit all forms of corporal punishment and allows by inference, the infliction of “necessary” suffering. Furthermore, while it outlaws corporal punishment for early childhood education facilities and for government institutions such as children’s homes and places of safety, public schools are not included. This inherently creates ambiguity among Ministry of Education, Youth and Information officials and local school personnel as to acceptable forms of discipline. The failure of the State Party to take corrective legislative action leaves important gaps in the fulfilment of its international obligations.

The State party alleges the creation of a School Safety Policy which expresses a clear position on Corporal Punishment. This is factually disputable, but irrelevant. A Safe Schools Policy has no force of law and is silent on corporal punishment in family settings. **Law reform to prohibit corporal punishment should aim to ensure that children are legally protected from assault just as adults are.**

Impact of the Safe Schools Policy

The State party indicates in its National Report that it has established a Safe School Policy for Jamaican schools which includes provisions to abolish corporal punishment and the promotion of positive and progressive forms of discipline and intervention alongside support for children experiencing social and emotional behavioural problems.⁶⁶ This is not the case. No truthful reading of that document could suggest that.

A part of their mandate is a comprehensive document detailing security and safety policy guidelines. However, within that medium, the common law position is reaffirmed. It reads that “a principal or teacher may be justified in committing a trespass against a student where the action in question is reasonably necessary for the maintenance of discipline or for preserving that student’s welfare. The authority of the schoolmaster is, while it exists, the same as that of the parent. A parent when he places his child with a schoolmaster delegates to him all his own authority so far as it is necessary for the welfare of the child.”⁶⁷ This position, though addressing the powers of search in an educational institution, indirectly transcribes the common law powers of a parent concerning the management and corrective discipline of a minor.

⁶⁵ Ryan v Fildes and Others [1938] 3 KBD

⁶⁶ Government of Jamaica. *Fourth Periodic Report*, para 134

⁶⁷ Ministry of Education, Security and Safety Policy Guidelines: Promoting a Culture of Security and Safety in Schools, 11

Furthermore, while the theoretical position of the State party appears to be one towards the dismantling of corporal punishment, it is to be noted that in public schools, corporal punishment is in fact lawful. There is no provision in the Education Act 1965 or Education Regulations 1980, but under the common law, a teacher may be justified in administering “moderate and reasonable” punishment.

While the State has been adamant in their position to abolish corporal punishment in schools and has instructed schools to do it, there has been no legislative reform and therefore no weight and authority of the law in support of such a position.

Currently, corporal punishment of children in Jamaica is unlawful in the penal system, alternative care settings and early childhood institutions, but is not prohibited in schools nor the family setting. Furthermore, despite the State’s assertion that Corporal Punishment is limited to specific levels of the Jamaican School System, reports of abuse continue to be widespread. Students are still subjected to traditional means of discipline contrary to General Comment No 8. Students are still forced to stand for prolonged periods of time, slapped with sticks, belts, canes and rulers among other things as a form of punishment. Furthermore, the definition of Corporal Punishment recognizes that there are non-physical forms of punishment that are also cruel and degrading and therefore incompatible with the Convention on the Rights of the Child. Punishment⁶⁸ which embarrass, belittle, humiliate, denigrate, scare or ridicule a child should also be explicitly prohibited. Violence against children in the education system and elsewhere cannot be abolished whilst some levels of it remain legally and socially accepted.

Effects of Corporal Punishment

The effects of corporal punishment can impair a child’s lifelong physical and mental health. Physical punishment, however mild or light, also carries an inbuilt risk of escalation. This risk of escalation is oftentimes increased by the fact that adults who inflict physical punishment are angry.⁶⁹ Furthermore, mentally, corporal punishment is an emotionally daunting method of correction and its connection to a child experiencing poor mental health is clear. The reality of corporal punishment is often associated with a decline in a child’s mental health which usually has the child exhibiting clear signs of behaviour disorders, anxiety, depression and hopelessness.⁷⁰

Corporal punishment breaches a child’s right to physical integrity, respect for their human dignity and equal protection under the law. Whilst discordant policy statements have been made from time to time discouraging corporal punishment, these are **undermined by a legal standard which condones it, absent corrective legislation.**

RECOMMENDATIONS

The Committee should express concern about the serious delay in amending the Child Care and Protection Act to better comport with the provisions of the Covenant by *inter alia*, by prohibiting corporal punishment, removing the possibility of incarcerating a child in adult institution or on the basis of being “beyond parental control.” It should recommend the following: **expeditiously amend the Child Care and Protection Act to *inter alia* fully comply with international standards for juvenile justice**, repeal the common law right to inflict “reasonable and moderate” punishment, and explicitly prohibit all forms of corporal punishment.

H. FREEDOM OF EXPRESSION AND HUMAN RIGHTS DEFENDERS (ARTS. 6, 19 AND 22)

⁶⁸ Committee on the Rights of the Child, General Comment No 8 2006 para 11 (*supra*)

⁶⁹ Durrant, J. E. et al (2004), Joint Statement on Physical Punishment of Children and Youth, Ottawa: Coalition of Physical Punishment of Children and Youth

⁷⁰ Gershoff, E. T. (2002), “Corporal punishment by parents and associated child behaviors and experiences: A meta-analytic and theoretical review”, *Psychological Bulletin*, 128(4), 539-579; see also Gershoff, E.T. (2008),

Issue 23 in Lol: *Please provide information on the steps taken to improve national implementation of the Access to Information Act, including on training of officials and national awareness-raising efforts.*

The State party has instituted a commendable law. Regrettably, its officials continue to undermine its potential national impact by systematically breaching its provisions. Access Officers habitually violate the Act's provisions regarding timelines and manner for response to requests. Moreover, in this coalition's collective experience, they exhibit alarmingly low knowledge of the Act's provisions, despite being responsible for administering them. Furthermore, the Appeals Tribunal, is an inaccessible procedure faced with inordinate delays that effectively frustrate any attempt to hold public authorities accountable for breaches.

The State party engaged in a lengthy review of the Act, via parliamentary committee on which it is yet to act. Many of the changes contained in the Joint-Select Committee to Review the Access to Information Act, would vastly improve the national implementation of the Act, and deepen the access of persons to seek and receive information.