

**PETITION TO THE HONOURABLE MEMBERS OF THE  
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,  
ORGANIZATION OF AMERICAN STATES**

**REQUEST BY PETITIONERS HOFFMANN, “S.A” AND “D.H.”**

**FOR A DECISION RECOMMENDING**

**REPEAL OF SECTIONS 9 AND 12 OF  
BARBADOS’ *SEXUAL OFFENCES ACT***

**SUBMITTED UNDER ARTICLE 44 OF THE  
AMERICAN CONVENTION ON HUMAN RIGHTS AND  
ARTICLE 23 OF THE COMMISSION’S RULES OF PROCEDURE**

**June 6, 2018**

## EXECUTIVE SUMMARY

Section 9 of the *Sexual Offences Act* of Barbados (the “SOA”) criminalises the act of “buggery”, which the Barbadian courts have confirmed means anal sex, between men and also between a man and a woman. Section 12 criminalises “serious indecency,” which is sweepingly defined as any act by anyone “involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.” These acts are criminalised notwithstanding the consent of the participants. The maximum penalty for buggery is life imprisonment; the maximum penalty for an act of serious indecency (involving a partner above the age of 16) is 10 years in prison.

Both of these prohibitions cause harm to members of the lesbian, gay, bisexual and transgender (LGBT) community in Barbados, including violations of multiple rights guaranteed by the *American Convention on Human Rights* (“the Convention”) and other international treaties.

By criminalising a wide array of consensual sexual conduct between persons of the legal age of consent established elsewhere in the SOA, these provisions violate the fundamental rights of all sexually active (or potentially active) people in Barbados, such as the right to privacy and the right to freedom of expression.

However, in addition, while these laws appear to be neutral regarding sexual orientation and gender identity, *de facto* they also both embody and encourage discrimination and abuse particularly against LGBT people, in various ways.

Section 9’s criminal prohibition on “buggery” necessarily criminalises intercourse between two men and between (some) trans women and their male partners, and even when seemingly neutral, there is a long history of indecency laws such as section 12 being used to target same-sex intimacy. Aside from criminalising consensual sexual conduct between LGBT people, sections 9 and 12 of the SOA help legitimize broader abuses against those who are, or are perceived to be, LGBT by turning them into presumed criminals in the eyes of other citizens. In the words of the Inter-American Commission on Human Rights (“IACHR” or “the Commission”):

[T]his type of legislation contributes to an environment that condones discrimination, stigmatization, and violence against LGBT persons. The IACHR understands that the existence of ‘buggery’ laws is used as a mechanism for social control and domination that enables states to legitimize and contribute to the stigma of LGBT persons as “immoral” individuals. Moreover, such laws have been used to justify the arbitrary arrests, detention and even torture of LGBT people.<sup>1</sup>

The continued criminalisation of LGBT people under SOA sections 9 and 12 also has other harmful effects. Laws that criminalise same-sex conduct create a hostile climate for LGBT people who seek any kind of health services, particularly sexual health services. Among other

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<sup>1</sup> IACHR Welcomes Decision to Decriminalise Consensual Sexual Relations between Same Sex Adults in Trinidad and Tobago available at: [http://www.oas.org/en/iachr/media\\_center/PReleases/2018/088.asp](http://www.oas.org/en/iachr/media_center/PReleases/2018/088.asp).

things, such laws, and the stigma and discrimination to which they contribute, undermine the access of transgender people, gay men and other men who have sex with men (MSM) to critical HIV services, including for testing, treatment, care and support. This undermines an effective national response to the HIV epidemic, especially affecting the health of trans and gay Barbadians.

Sections 9 and 12 of the SOA are a toxic vestige of British colonial rule. The criminal prohibition on buggery (section 9) was first enacted in 1868, but has been defended by successive Barbadian governments since independence in 1966. It appears to be immunized from domestic constitutional review because of a “saving clause” in the *Constitution of Barbados* (section 26) adopted at that time. The criminalisation of “serious indecency” in some form first appeared in Barbadian law in 1978, but its antecedents date back to colonial Britain. Given that domestic courts of Barbados are prevented from subjecting the buggery provision to the rights provisions of the country’s Constitution, it does not appear that an adequate, effective remedy for Barbados’ continued criminalisation of consensual same-sex activity can be obtained from its domestic courts.

The Petitioners therefore seek a remedy via petition to the Commission (and if necessary the Inter-American Court of Human Rights), pursuant to the Convention. Barbados ratified the Convention in 1981 and has accepted the jurisdiction of both the Commission and the Court to consider the Petitioners’ claim that their rights under the Convention have been, and are being, breached by Barbadian law.

The three Petitioners in this action are Barbadian citizens who are members of the LGBT community in Barbados. Petitioner Hoffmann is a transgender woman who is sexually attracted to men. As Barbados does not provide legal recognition of her female identity, she is legally a man who is sexually attracted to other men. Petitioner “S.A.” is a lesbian. Petitioner “D.H.” is a gay man. The Petitioners experience frequent stigma and discrimination due to their sexual orientation and/or gender identity, as well as threats of violence. Petitioners Hoffmann and S.A. have also suffered physical violence as a result of their sexual orientation or gender identity. Petitioner Hoffmann’s efforts to report these crimes to the police have resulted in inaction or delayed action accompanied by discriminatory treatment because of her gender identity.

The Petitioners assert that sections 9 and 12 of the SOA both violate, and encourage violations of, the following rights of the Petitioners and of other LGBT people in Barbados, in breach of multiple provisions of the Convention:

- the rights to **non-discrimination in enjoyment of Convention rights** (Article 1) and to **equality before the law and equal protection of the law** (Article 24);
- the right to **privacy** (Article 11);
- the right to **physical, mental and moral integrity** (Article 5);
- the right to **freedom of expression** (Article 13);
- the rights of the **family** (Article 17); and
- the right to **judicial protection** (Articles 8 and 25)

It is also worth noting that Sections 9 and 12 of the SOA also contravene other international human rights treaties ratified by Barbados, including:

- the *International Covenant on Civil and Political Rights* (the "ICCPR");
- the UN *Convention on the Elimination of all Forms of Discrimination against Women* ("CEDAW") and the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women* ("Convention of Belém do Pará");
- the *Convention on the Rights of the Child* ("CRC"); and
- the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR").

Finally, the continued criminalisation of “buggery” and “serious indecency” by Barbados is also at odds with jurisprudence from the European Court of Human Rights, as well as jurisprudence from courts in other countries in the Americas (throughout which the *American Convention* applies), in which courts have concluded that similar provisions in the law of those countries amount to a breach of fundamental human rights such as those included in this petition. (This includes recent judgments from other countries in the Caribbean, specifically in Belize and in Trinidad and Tobago.<sup>2</sup>)

In sum, sections 9 and 12 of the SOA directly violate the rights of all sexually active people in Barbados, including those whose partners are of the same sex, and in practice have an additional, broader harmful impact on numerous rights of LGBT people in particular. These provisions must be repealed so as to decriminalise consensual sexual conduct between those of the legal age to consent under Barbadian law.

The Commission should also recommend other, proactive measures to be taken by the Government of Barbados to address the stigma, discrimination, violence and other abuse that LGBT people in Barbados experience as a result of the homophobia and transphobia to which such criminal laws have contributed, including the following:

- condemn and monitor serious human rights violations, including discrimination and hate speech, as well as incitement to violence and hatred, on the grounds of sexual orientation and gender identity in accordance with its international commitments, including the Convention;
- ensure that all allegations of excessive use of force and other human rights violations by law enforcement officials based on real or perceived sexual orientation and gender identity or expression are investigated promptly and thoroughly;

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<sup>2</sup> E.g., *Orozco v. Attorney General of Belize* (10 August 2016), Claim No. 668 of 2010 (Supreme Court of Belize); *Jones v. Attorney General of Trinidad and Tobago* (12 April 2018), Claim No. CV2017-00720 (High Court of Justice, Republic of Trinidad and Tobago).

- train all law enforcement and criminal justice officials on international human rights standards and non-discrimination, including on the grounds of sexual orientation and gender identity;
- conduct awareness-raising programs, especially through the education system, to address social stigma and exclusion of individuals and communities on grounds of their sexual orientation and gender identity and expression, and respect for the human rights of all Barbadians, including the obligation not to discriminate against LGBT people;
- facilitate access to social services, and especially health services, regardless of the individual's sexual orientation, gender identity and expression, and/or HIV status; and
- enact legislation that specifically prohibits discrimination based on sexual orientation and gender identity, in keeping with its obligations under Article 1 of the Convention.