



A LEGAL GAP ANALYSIS OF LAWS AFFECTING THE RIGHT TO MENTAL HEALTH FOR GIRLS, WOMEN AND LGBT PERSONS IN THE EASTERN CARIBBEAN

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This work has been commissioned by the Equality and Justice Alliance, the Eastern Caribbean Alliance for Diversity and the Sweet Water Foundation.

About the Equality & Justice Alliance

The Equality & Justice Alliance is a consortium of international organisations with expertise in advancing equality, addressing the structural causes of discrimination and violence, and increasing protection to enable strong and fair societies for all Commonwealth citizens, regardless of gender, sex, sexual orientation, or gender identity and expression. The members of the Alliance are the Human Dignity Trust, Kaleidoscope Trust, Sisters for Change, and the Royal Commonwealth Society.

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The Sweet Water Foundation, based in Grenada, is dedicated to the worldwide healing of Child Sexual Abuse. The SWF advocates for child protection with a special focus on the Caribbean, on Indigenous populations, and on the LGBTI and other vulnerable communities. The SWF conducts research, publishes findings, develops policy and practices recommendations, provides psychological treatment programmes, and designs training in psychological approaches to ending gendered inequalities and violence. The SWF incorporates climate change awareness and environment protection in all of its group programming.

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Established in 2011, Kaleidoscope Trust works to uphold the human rights of lesbian, gay, bisexual and transgender (LGBT+) people in countries around the world where they are discriminated against or marginalised due to their sexual orientation, gender identity and/or gender expression. Since 2013, our organisation has hosted the Secretariat of the Commonwealth Equality Network (TCEN), which provides a unique space for LGBT+ advocates to challenge inequality in the Commonwealth, including by advocating for better national and regional policies, laws, and priorities of Commonwealth governments. To date, TCEN consists of 56 member organisations from all five regions of the Commonwealth. Kaleidoscope Trust is also civil society Co-Chair of the Equal Rights Coalition, which works to advance the human rights of LGBT+ people and promote inclusive development of LGBT+ persons globally.

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About the Eastern Caribbean Alliance for Diversity and Equality (ECADE)

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A Legal Gap Analysis of Laws Affecting the Right to Mental Health for Girls, Women and LGBT+ People in the Eastern Caribbean

Richie J Maitland

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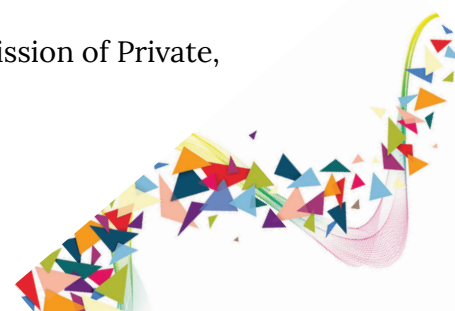
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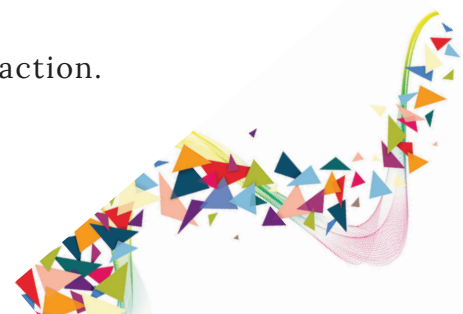
AUTHOR'S NOTE

This paper is one small part of a larger project by the Equality and Justice Alliance ('EJA'), to identify and reform laws which discriminate against girls, women and LGBT people (together 'the Focus Populations') in Barbados and select Eastern Caribbean countries (Antigua and Barbuda, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines (together 'the Reviewed Countries')). The larger project covers three (3) thematic areas, in relation to the Reviewed Populations, namely; 'Anti-Discrimination', 'Sexual and Reproductive Health ('SRH') Rights', and 'Mental Health and Well-Being' (together 'the Thematic Areas'). This paper comes under the last category, being a legislative review of laws in the Reviewed Countries, affecting the mental health rights of the Reviewed Populations. It is administered and facilitated regionally by the Eastern Caribbean Alliance for Diversity & Equality ('ECADE') and nationally by the Sweet Water Foundation in Grenada.

I am grateful to the EJA for appreciating the need to fund and commission this paper. Also, to Kenita Placide, executive director of ECADE and Hazel Da Breo, president of the Sweet Water Foundation who have supervised this paper and administered the project at the regional and national level respectively. I am especially grateful for their patience in extending the deadlines for this paper in extenuating circumstances, including resource and scheduling constraints imposed by virtue of a limited state of emergency and national lock-down in my home country Grenada, as a response to the COVID-19 pandemic.

On a separate note, the substantive aspects of the paper itself, are structured and headed according to the Focus Populations, with the relevant laws of all the Reviewed Countries discussed as pertinent to the Focus Population heading. I do not mean to imply from this arrangement that the Focus Populations are mutually exclusive, or that the issues discussed under their headings are exclusive to them. Indeed, it seems obvious that there must be intersections, both in the groups and the legislative issues they face. For example, lesbian women face issues affecting both women and LGBT persons. Similarly, both girls and women through shared experience as females, face similar issues.

I hope that this paper will help move our legislators into necessary action.



KEY TERMS

Child Care Service – any service (accommodation, counseling, etc.) provided to children ‘in need of protection’ howsoever legislatively defined, by persons or institutions licensed by a relevant body pursuant to Child Protection Legislation.

Comprehensive Child Protection Legislation – legislation which in respect of children:

- Establishes a national authority responsible for the care and protection of children.
- Provides that authority with wide-ranging powers to: (1) investigate potential cases of child abuse, and (2) take interim and final measures in respect of any child in need of protection, including removing and re-housing the child.
- Provides for the establishment, licensing and oversight of facilities to accommodate children in need of care.
- Defines child abuse expansively, to include, physical and sexual abuse, emotional abuse and neglect.

Comprehensive Domestic Violence Legislation – legislation and related amendments and regulations, which, in respect of domestic violence:

- Provides an expedited, simplified and inexpensive process for victims of domestic violence or persons on their behalf, to obtain interim and final wide-ranging protective orders, against abusers.
- Defines Domestic Violence expansively, to include aspects of physical, sexual, emotional, psychological and financial abuse, as well as harassment and intimidation.
- Defines a victim who may apply expansively to include not only spouses, but former spouses, family members, cohabitants and various forms of intimate partners.
- Provides enhanced powers of arrest to police officers, in relation to incidences of Domestic Violence.

Comprehensive Sexuality Education – education on and around sex, forming part of the formal curriculum at the appropriate levels, which conforms with the UNESCO Technical Guidance on Sexuality Education.[1]



Intimate Partner Violence – Physical violence or other forms of abuse, perpetrated by one party in an intimate relationship, against the other party in that relationship.

Prohibition – A legislative penal sanction against certain actions.

Protection – A legislative safeguard against certain actions or consequences, accessible to a victim or potential victim.

Savings Law Clause – Constitutional provisions, which immunize from constitutional challenge, legislated forms of punishment that existed prior to the coming into effect of the respective constitutions.

Sex Offender Registry – A globally freely accessible register established in law, noting the identity and conviction details of sex offenders or specified categories of sex offenders, and providing for the publication of that register.

Sexual Violence – Any physical assault of an individual which carries a sexual dimension, including being done with the intention of the perpetrator to be sexually gratified, or to demean the victim by interfering with the victim's body or state of mind in a manner referent to sexual body parts or sexual behaviours.

Spousal Defence – The possible preclusion of conviction of a perpetrator, pursuant to an offence, because said perpetrator is the spouse of the victim, in circumstances where the 'Spousal Defence Exceptions' do not apply.

Spousal Defence Exception(s) – A circumstance or circumstances, existing between a spousal perpetrator and a victim, nullifying an otherwise available Spousal Defence. Typically, the existence between the parties of: (1) a decree nisi of divorce, (2) a decree or agreement of separation, or (3) a non-molestation order.

Spousal Immunity – The preclusion of prosecution of a perpetrator, pursuant to an offence, because the offence by definition cannot be committed by a spouse of the victim.

Spousal Limitation – A legislative contraction of the elements of an offence required to establish conviction, for the benefit of a spousal perpetrator, such that conviction of a spouse may only be secured in circumstances which are more restrictive than if the perpetrator was not a spouse.

Spousal Penal Concession – An automatic reduction of the maximum sentence applicable to a convicted perpetrator, because said perpetrator is the spouse of the victim.



INTRODUCTION & OVERVIEW

Latin America and the Caribbean as a region, has the global second highest rate of adolescent pregnancies[2]. These pregnancies bear not only physical implications, but also negative mental health outcomes, including anxiety, depression, post-traumatic stress, and suicidal ideations[3]. These outcomes relate to the fact that adolescent pregnancy is a major contributor to poverty. In a poverty assessment done in Grenada, 40.3 % of the impoverished female participants reported bearing their first child between the ages of 15 and 19[4]. Also, adolescent mothers are regularly prevented from returning back into the formal education[5] system or face hostility from school administrators upon such return[6].

Besides adolescent pregnancies, the Caribbean has the earliest age of sexual debut in the world. That is with the highest rate of sexual activity involving minors below 13 years[7], often involving force. A significant portion of the victims (mostly girls) experience depression and suicidal ideation[8]. The high prevalence of sexual abuse of girls leading to negative mental outcomes is partly driven by the fact that many of the Reviewed Countries do not feature comprehensive sex education as part of the formal education system.

Further, girls (like boys) in the Reviewed Countries are susceptible to the violence of corporal punishment, at school, at home and in the justice system. In the Reviewed Countries, like their male counterparts, girls are subject to corporal punishment both at home and in education institutions. Studies, conducted in the Reviewed Countries among others, correlate corporal punishment with negative mental outcomes[9]. Corporal punishment remains popular in the Reviewed Countries[10], with an average 85.43% of teachers in Grenada, St. Kitts and Nevis and St. Lucia reporting administering corporal punishment[11], and 97.1% of said teachers deeming it 'necessary' for discipline[12].



Teachers also reported that they felt enabled by laws asserting their right to apply corporal punishment[13]. It is not surprising therefore, that a 2009 WHO health survey of minor students in the Eastern Caribbean revealed “high rates of mental health challenges”. In Dominica 25% of the girls reported seriously considering suicide within the year prior to the survey, while 16% reported attempting suicide within that period[12].

For women, Intimate Partner Violence is the most significant and common danger facing them[13] and is prevalent in the Eastern Caribbean sub-region[14]. For example, Intimate Partner Violence in its various forms is the most reported crime in Montserrat. Said violence also correlates with negative mental outcomes[15]. Other significant experiential impediments to the mental health of women include sexual harassment[16], sexual violence[17] and sex/gender-based inequalities including unequal access to employment and gender-stereotypical expectations[18]; as well as limited access to sexual and reproductive health services[19].

Both women and girls in the Reviewed Countries are negatively affected by criminal prohibitions on terminations of pregnancy. These prohibitions force women and girls into unsafe abortions, causing medical complications leading to sickness and death[20]. In some Caribbean countries complications from unsafe abortions is the leading cause of maternal deaths, especially amongst adolescent girls[21]. The prohibitions also impede on the ability of women to plan their families, which bears financial and mental-health implications.

LGBT people in the Reviewed Countries face extreme levels of stigma and discrimination; including violence, harassment, social exclusion and psychological abuse. This too correlates with negative mental health outcomes within that demographic. These negative outcomes are exacerbated by the lack of mental health support for said demographic[22] and their susceptibility, homophobia from health service providers[23] and vulnerability to prosecution for private consensual sexual behaviours. These laws criminalizing said behaviors **“help create a context in which hostility and violence directed against LGBT people is legitimized, operating as an effective tool to ostracize and single out a vulnerable sector of the population.”**[24]

Lesbian and bisexual women are susceptible to forms of abuse and psychological stress specific to them[25]. It is no surprise therefore that a Grenada study found noted that LGBT people experienced **“high rates of episodic and chronic mental illness, long-term depression and anxiety and post traumatic stress”** as a result of stigma and discrimination, social isolation, emotional and physical violence, also that they were more prone to drug abuse as a coping mechanism for these issues.[26]



Teachers also reported that they felt enabled by laws asserting their right to apply corporal punishment[27]. It is not surprising therefore, that a 2009 WHO health survey of minor students in the Eastern Caribbean revealed “high rates of mental health challenges”. In Dominica 25% of the girls reported seriously considering suicide within the year prior to the survey, while 16% reported attempting suicide within that period[28].

Besides these historical issues, there are also recently emergent issues affecting the Focus Populations. For example, the ubiquity of social media has created a platform for the easy distribution of sexual videos and images which identify the participants. No statistics were found for the Reviewed Countries, of the prevalence or effects of such distribution, or the affected demographics. Nonetheless, prevailing socio-cultural gender norms and attitudes suggest that women and girls stand to suffer the most. These points are illustrated in a sensational High Court case from Trinidad and Tobago, in 2014. In that case, the claimant, an ex-partner of the defendant who was a cricketer on the West Indies team, sued him for distributing photographs depicting and identifying her in sexual acts.

These photos had been privately shared between them during their relationship, and were distributed by the Defendant maliciously, after the relationship ended. Trinidad and Tobago did not and still does not have cyber-crime legislation, prohibiting and protecting against such malicious distribution of private personal content. Consequently, the claimant was forced to sue in civil court, relying on ‘Breach of Confidence’, an old cause of action not typically applied in those circumstances. Justice Frank Seepersad (‘Seepersad J.’) who rendered the decision, lamented the absence of legislative protections for victims like the claimant, whose privacy was violated.

Seepersad J. noted among other things, that in the sub-optimal circumstances of lack of adequate protections, the law had to be dynamic and mould existing principles to provide the said protections. Further, that:

“It is unfortunate that as a society we have not been proactive and that we are burdened with so many archaic laws that predate our independence. The impact of social media and its consequent effect on our individual and collective privacy has to be acknowledged and addressed.”

In ruling for the claimant, Seepersad J. accepted that the distribution of private photographs as had happened, could inflict emotional pain. Also, that the claimant had indeed suffered distress and susceptibility to public ridicule, referring to the claimant’s evidence that she had felt ashamed, embarrassed and suicidal.



Importantly, Seepersad J. applied a gender analysis to the defendant's actions, contextually situating those actions in the broader reality that “[in *Trinidad and Tobago*] *women are often treated as second class citizens and as being inferior to their male counterparts*[29].”

As much as the decision may be progressive, the reality remains that high court litigation is expensive and cost-prohibitive to many persons who may be similarly affected. This is why many countries have enacted criminal prohibitions, with provisions for financial compensation to victims by the perpetrators, on sentencing. This removes the financial and administrative burden on the victim, which burdens are assumed by the state.

These realities present legislative opportunities for the Reviewed Countries to address the issues affecting the Focus Populations, thereby guaranteeing and facilitating the rights of these populations to the highest attainable levels of mental health. Each of the Reviewed Countries has room for improvement. In that regard, this paper examines the relevant legislative gaps, and makes recommendations accordingly.



FRAMEWORK OF THE 'RIGHT TO MENTAL HEALTH'

The right to mental health is part of a broader right to health, guaranteed pursuant to various international instruments to which all of the Reviewed Countries are signatories. These instruments include the International Covenant on Economic, Social and Cultural Rights ('ICESCR'), the International Convention on the Rights of the Child ('CRC'), the International Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW') and the Inter-American Convention on Human Rights ('IACHR'). By virtue of these instruments, Reviewed Countries have committed to taking the necessary measures, including legislative measures so that Focus Populations may attain the highest achievable levels of mental health.

Some instruments do not textually specify the right to mental health for Focus Populations. However, the international committees and commissions responsible for overseeing the enforcement of these instruments and for adjudicating the rights asserted therein, have through pronouncements and decisions expounded on the substance of these rights, affirming their application to Focus Populations. Also, beyond asserting the right to health specifically, which as explained includes the right to mental health, the instruments also guarantee other rights which affect the right to mental health. This is illustrated below:

ICESCR

The ICESCR asserts the right of all persons to the highest attainable standard of physical and mental health[30]. Committee on Social Economic and Cultural Rights noted in a General Comment that, "the right to health is "closely related to and dependent upon" the realization of other rights including the rights to human dignity, non-discrimination, equality and privacy[31]. The Committee described these other rights as being "integral components of the right to health"[32], noting that the right extended beyond a simple right to health care, to also include a consideration of socio-economic factors that promote conditions for a healthy life[33].



CRC

The CRC asserts the right of all children to the highest attainable standard of health, to protection against sexual abuse [34], and to freedom from physical and mental violence[35] including from forms of discipline in schools which violate the CRC[36]. In 2006, the Committee on the Rights of the Child noted that corporal punishment was a degrading form of violence which compromised the human dignity of children. Also, that only a clear legislative prohibition on all forms of corporal punishment would conform with the CRC[37].

CEDAW

The CEDAW asserts the right of all women to the protection of health[38] access to health services including family planning services[39] freedom from discrimination in employment[40] healthcare[41] and in other forms of economic and social life[42]. The CEDAW Committee notes that the right to freedom from discrimination asserted in the CEDAW, includes the right to the highest standard attainable of physical and mental health[43]

IACHR

The American Declaration of the Rights and Duties of Man asserts the right of every person to the preservation of their health, including through social measures[44]. This declaration, being the normative foundation of the Inter-American Convention on Human Rights, has been accepted as legally binding by the Inter-American Commission on Human Rights as well as the Inter-American Court of Human Rights[45]. The Court notes that the Right to Health outlined above, includes not only the absence of disease or infirmity, but also “a complete state of physical, mental, and social well-being, derived from a lifestyle that allows people to achieve a comprehensive balance[46].” Also, that discrimination against LGBT people is a violation of that right[47].

We see therefore that the Right to Mental Health inures for the benefit of the Focus Populations in the Reviewed Countries.



GIRLS' RIGHT TO MENTAL HEALTH

The introduction presages some of the major issues affecting girls in the Reviewed Countries, namely:

1. High prevalence of sexual abuse
2. General early onset of sexual debut
3. Limited access to SRH medical services and contraceptive products
4. High prevalence of adolescent pregnancy
5. Formal or informal expulsion of adolescent mothers, from formal education institutions
6. Physical violence through corporal punishment

The laws relating to these categories in the Reviewed Countries are discussed below.

PROTECTIONS AND PROHIBITIONS AGAINST CHILD SEXUAL ABUSE

All of the Reviewed Countries have broad criminal prohibitions on sexual engagements with minors, including minor girls[48]. Also, all of the Reviewed Countries also have Child Protection Legislation[49], albeit not altogether equally comprehensive. Nonetheless, these prohibitive and protective laws are deficient in that, of the eight (8) Reviewed Countries:

- I. None of the Reviewed Countries have legislation concerning the establishment and publication of a Sex Offender's Registry.
- II. Five (5)[50] carry spousal immunity for offences related to sex or sexual engagements with minors.
- III. Only one (1), Dominica, criminally prohibits grooming generally; that is, grooming in any context, not exclusively restricted to cyber-grooming. Even so, the offence of grooming in Dominica is restricted by the fact that it not only requires at least two (2) prior instances of communication between the victim and perpetrator, but also that the perpetrator must have met the victim, or must have traveled with the intention of meeting the victim.
- IV. Two (2)[51] only prohibit cyber-grooming.



- V. Four (4)[52] only prohibit the procurement or inducement of a minor to sexual activity, which carry a higher evidential threshold to grooming and are more difficult to successfully prosecute. This is because for these offences, there must be specific evidence of solicitation or persuasion for sexual activity, by the perpetrator. Alternatively, for grooming, there need not be specific evidence of such solicitation or persuasion; only that they befriended or developed an emotional relationship with a minor, with the intention of committing a sexual act. The key difference is that for grooming, this intention (of committing a sexual act) may be inferred from the circumstances and does not require specific evidence of an indication of sexual desire.
- VI. One (1), St. Kitts and Nevis, prohibits neither grooming (electronic or otherwise), nor inducement or procurement.
- VII. Three (3) lack criminal prohibitions on child pornography[53]; Dominica being among them, which lacks prohibitions on electronic crimes.

Also

- VIII. The age of sexual consent in St. Vincent and the Grenadines (15 years), is oddly below that of the other Reviewed Countries (16 years).
- IX. Barbados and Dominica lack provisions mandating the reporting by specified categories of people, of suspected cases of child sexual abuse.
- X. Dominica's Child Protection Legislation is not comprehensive. That is, it lacks important features extant in the other Reviewed Countries. For example:
- a. The definition of a child in need of protection is limited and does not include children experiencing or vulnerable to emotional abuse, or children exposed to domestic violence between other members of the household.
 - b. The relevant authority lacks enhanced powers of investigation, including powers to: (1) enter a household, (2) mandatorily subject a child or family member to interviews, (3) subpoena the medical, educational or social records of a child, (4) mandate via court order that a child or parent be examined to assess their mental or emotional health.
 - c. The relevant authority also lacks emergency powers of entry into a household, and removal of a child deemed to be in need of protection.
 - d. The rights of the child are not enunciated, including the right to provide input and to participate in relevant decisions.



PROTECTION OF ACCESS TO COMPREHENSIVE SEX EDUCATION

Defective Sex Education has been noted as one of the drivers of child sexual abuse and adolescent pregnancy in the region[54]. It follows that effective, that is 'comprehensive' sex education can drive reduction in said abuse and pregnancy. All of the Reviewed Countries have Education Acts, which impliedly assert the Right to Education. This right accrues by virtue of various provisions compelling the education of all persons between the ages of 5 and 16 and requiring the respective countries to provide adequate facilities and resources for a good education[55]. Besides this broad Right to Education, Reviewed Countries have specifically regionally committed to implementing Comprehensive Sexuality Programs, to reduce the prevalence of both HIV/AIDS and adolescent pregnancy[56].

Despite these commitments, the Committee on the Rights of the Child has emphasised the neglect of adequate sex education among the Reviewed Countries.[57] For example, a 2012 study concluded that sex education in Grenada was limited in scope, by religious conservatism, as well as sexist[58]. Notably, none of the Reviewed Countries have legal provisions mandating the provision of Comprehensive Sex Education.

PROTECTION OF THE RIGHT OF PREGNANT AND MATERNAL ADOLESCENTS TO REMAIN IN AND/OR REINTEGRATE INTO FORMAL EDUCATION

Despite Right to Education outlined above, legislated in the Reviewed Countries, pregnant or maternal adolescents are often forced out of their institutions of formal education, and prevented from returning.[59] Attempts to return and reintegrate are often met with hostility by school administrators.[60] This situation is facilitated by the absence of legislative provisions specifically asserting and providing for the right of pregnant or maternal adolescents to remain or reintegrate.



PROTECTION OF AUTONOMOUS ACCESS TO SRH MEDICAL SERVICES

Six of the Reviewed Countries lack legislation which designates the age at which children may access medical SRH services[61]. St Lucia and St Vincent and the Grenadines[62] designates that age as sixteen years. Further, some of the Reviewed Countries like Grenada and St. Vincent and Grenadines require prescriptions for emergency contraception[63]. This lack of legislative designations fosters an environment in which public health facilities deny children medical SRH services without parental consent, in the face of uncertainty[64].

Some countries outside of the Caribbean have redressed this issue by implementing a 'Competency Test' standard for providing medical SRH services to children without parental consent. For example, in the United Kingdom, that standard permits said provision of services where the medical professional can determine that the child (including children below 16 years):

1. Will understand the medical advice provided
2. Cannot be persuaded to inform their parents of their seeking SRH medical services
3. Is very likely to begin or to continue having sexual intercourse with or without contraceptive treatment;
4. Is likely to suffer (mentally, physically or both) unless they receive contraceptive advice or treatment, and (5)
5. Requires contraceptive advice, treatment or both without the parental consent, in order to fulfill their best interest[65].

The Committee on the Rights of the Child has noted repeatedly that the Competency Test approach for medical SRH services, best conforms with the undertakings and responsibilities of the Reviewed Countries, under the CRC.

PROTECTIONS AND PROHIBITIONS AGAINST CORPORAL PUNISHMENT

All of the Reviewed Countries permit the application of corporal punishment to minors, to varying degrees. This right first applied from English Common Law ('the Common Law'), which historically applied to the Reviewed Countries during the colonial era and was retained by these countries upon independence. The common law permitted any parent, teacher or guardian of a child, to apply 'reasonable chastisement'. That right remains, except that it is curtailed by legislation in some of the Reviewed Countries, prohibiting corporal punishment on any child of 'tender age' (typically 4 years or less)[66] in a 'child-care service'[67], or on any child above 16[68].



Besides the common law right as outlined above, all the Reviewed Countries have legislation specifically permitting corporal punishment on children, by parents and guardians[69] school educators[70] and to the judiciary as criminal punishment[71]. All the Reviewed Countries have constitutions affirming the right of anyone to freedom from cruel, inhumane or degrading punishment, such as corporal punishment, as asserted is deemed by judicial bodies globally.

The constitutions of these Reviewed Countries also contain redress mechanisms, allowing persons to challenge and nullify legislative violations of constitutional rights. However, said constitutions contain Savings Law Clauses, immunizing all forms of punishment permitted by law before the constitutions took effect. These Savings Law Clauses are a significant, possibly absolute hindrance to anyone wishing to constitutionally challenge laws permitting corporal punishment.

RECOMMENDATIONS

To the extent of legislative absence, Reviewed Countries should enact legislation:

1. Establishing a Sex Offender Registry
2. Removing all spousal defences or immunities applying to sexual offences against minors
3. Prohibiting corporal punishment absolutely
4. Ensuring the right of reintegration for pregnant or maternal adolescents, as well as mandating the provision of comprehensive sex education in public institutions
5. Ensuring that the age of sexual consent meets at least the average global minimum threshold of 16 years
6. Ensuring the prohibition of all forms of grooming and child pornography



WOMEN'S RIGHT TO MENTAL HEALTH

The introduction presages some of the major issues affecting women in the Reviewed Countries, namely: high prevalence of Intimate Partner Violence, Sexual Violence and Harassment; gender and/or sex-based discrimination, violations of privacy through unauthorised sharing of personal sexual material and limited access to terminations of pregnancy. The laws relating to these categories in the Reviewed Countries are discussed below.

PROHIBITIONS AGAINST SEXUAL VIOLENCE

As for girls, all of the Reviewed Countries have legislated criminal prohibitions on sexual offences against women. However, again as for girls, many of these prohibitions (including prohibitions against rape) are subject to spousal immunities[72], spousal defences[73], spousal limitations[74] and spousal penal concessions[75]. These immunities, defences and concessions are problematic in their own right, in their condonation or belittling of sexual offences committed by spouses. They are also problematic in their perpetuation of old sexist ideas like 'coverture' which in principle and practice meant that a woman lost all legal right upon marriage, which rights were assumed by her husband.

PROTECTIONS AGAINST DOMESTIC VIOLENCE

All of the Reviewed Countries have enacted Comprehensive Domestic Violence Legislation with varying degrees of protective power. Only the Barbados legislation affords protection against the unauthorised access of a victim's private communications.

PROTECTIONS AND PROHIBITIONS AGAINST SEXUAL HARASSMENT

None of the Reviewed Countries have legislation specifically prohibiting sexual harassment generally. Some have one or more of the legal prohibitions and/or protections outlined below, relating to specific forms of sexual harassment. These are as follows:

- I. Vague criminal offences not specific to sexual harassment, but which are defined broadly enough to possibly capture certain acts of sexual harassment[76]. For example, the offence of 'sexual assault in Dominica includes the intimidation of a victim, for the purpose of procuring sexual intercourse[77]. Further, St. Kitts and Nevis has an offence which prohibits among other things, molesting or intimidating any person in a manner which would justify a magistrate banning the perpetrator from committing the offensive actions[78].



- II. Criminal prohibitions on forms of electronic sexual harassment[79].
- III. Protection to victims of electronic forms of harassment through injunctive orders etc., falling short of criminal penal sanctions against the perpetrator[80].
- IV. Protections to victims, against employment-related sexual harassment[81] through compensatory, mandatory, injunctive and punitive orders.

Women in the Reviewed Countries may sue employers for sexual harassment or for failing to protect against sexual harassment, on the basis that it represents a breach of the employers' legal duties. However, the cost-prohibitive nature of legal fees limits access to this option for many women.

PROTECTIONS AND PROHIBITIONS AGAINST SEX-RELATED DISCRIMINATION

Except Barbados, all of the Reviewed Countries have constitutional prohibitions against discrimination on the ground of sex. All of the Reviewed Countries have legislation prohibiting employment-related discrimination on the ground of sex, although in St. Kitts, the prohibition is only against termination of employment on the ground of sex[82] and does not protect against other forms of discrimination not involving the termination. None of the Reviewed Countries has legislation protecting against general forms of sex-related discrimination, such as in the context of housing, education, etc.

PROTECTION OF ACCESS TO TERMINATION OF UNWANTED PREGNANCIES

All of the Reviewed Countries criminally prohibit various offences related to abortion[83]. Although legislative exceptions to these prohibitions exist to varying degrees, the exceptions are restricted, in that they only apply in one or more of the following circumstances; that is, the procedure is done:

- I. To preserve the life of the mother[84]
- II. To preserve the mental or physical health of the mother[85]
- III. To preserve the mental or physical health of the mother, if the pregnancy resulted from rape or incest if substantiated by an official police report[86]
- IV. To preserve the mental or physical health of other children or members of the family



- V. Where the fetus will be born with physical or mental abnormalities[87]
- VI. If done in an approved institution by a medical professional[88]
- VII. If done within a specified gestational period[89]
- VIII. If done after a mandatory waiting period between the request for and performance of the procedure[90]
- IX. If done after counselling was mandated or suggested[91]

PROHIBITIONS AND PROTECTIONS AGAINST UNAUTHORISED DIGITAL TRANSMISSION OF PRIVATE, PERSONAL SEXUAL MATERIAL

Four of the Reviewed Countries[92] prohibit the unauthorised digital transmission of private, personal sexual material, while the other four[93]do not.

PROHIBITIONS AGAINST UNAUTHORIZED ACCESS TO PRIVATE DIGITAL DATA

Six of the Reviewed Countries prohibit the unauthorized access to someone's private digital data[94], including communications and images. Dominica and Montserrat do not.

RECOMMENDATIONS

To the extent of legislative absence, Reviewed Countries should enact legislation:

- I. Removing all spousal defences or immunities applying to sexual offences
- II. Ensuring wide-ranging prohibitions against sex-related discrimination in every facet of life where just and applicable
- III. Prohibiting all forms of Sexual Harassment
- IV. Prohibiting the unauthorised access or surveillance of private digital data, including communications and images
- V. Prohibiting the unauthorised transmission of private digital data, including personal sexual material
- VI. Permitting unrestricted access to terminations of unwanted pregnancies



LGBT PEOPLE — RIGHT TO MENTAL HEALTH

The introduction presages some of the major issues affecting LGBT People in the Reviewed Countries, namely, high levels of stigma, discrimination, violence and social exclusion. The laws relating to these categories in the Reviewed Countries are discussed below.

PROTECTIONS AND PROHIBITIONS AGAINST DISCRIMINATION ON THE GROUND OF SEXUAL ORIENTATION/GENDER IDENTITY OR EXPRESSION

None of the Reviewed Countries have constitutional or civil protections against discrimination on the grounds of sexual orientation, or gender identity or expression. Notable legal decisions from other Caribbean countries have inferred such prohibitions in their respective constitutions by: (1) extending the meaning of ‘sex’ as a prohibited category, to include sexual orientation[95] and (2) by interpreting the ‘right to freedom of expression’ as including gender[96] as well as sexual[97] expression. However, these decisions emanate from courts outside of the legal systems of the Reviewed Countries, and do not bind their courts. Consequently, while the cases augur hope for the Reviewed Countries, through their power to potentially persuade courts in the Reviewed Countries, they cannot be said to reflect the state of law for those countries.

The lack of clear constitutional prohibitions on discrimination on these bases, facilitates the enactment and continuation of laws which discriminate against this Focus Population. Such discriminatory laws in the Reviewed Countries include:

1. Domestic Violence Legislation, worded so as to exclude same-sex partners from protections
2. Laws prohibiting same-sex marriages
3. Laws denying same-sex partners spousal rights of intestacy, survival or guardianship, and
4. Laws applying indiscriminate blanket prohibitions to sexual behaviours between same-sex person

Two Reviewed Countries prohibit employment-related discrimination on the ground of sexual orientation[98]. Although in one of those countries, St. Lucia, the prohibition applies only against unfair dismissal or unfair disciplinary action.



PROTECTION AGAINST CRIMINALISATION OF CONSENSUAL SEXUAL BEHAVIOURS BETWEEN CONSENTING ADULTS IN PRIVATE

Except for Montserrat which has enacted exemptions for acts done in private between adult homosexuals, all the Reviewed countries prohibit in a blanket, indiscriminate manner both anal sex[99], common among men who have sex with men ('MSM'), though not exclusive to them, as well as other sexual behaviours, including non-penetrative intimacy like kissing and petting, committed between persons of the same sex[100].

It must be noted that while Montserrat is more progressive in this regard, the applicable legislation still discriminates against homosexuals since it sets the age of sexual consent for them, at 18 years, rather than 16 years as otherwise applied (to heterosexual partners). Similar provisions in the United Kingdom and elsewhere were deemed to be in violation of the respective rights to protection from discrimination, as well as the right to privacy. Also the definition of 'in private' is more restrictive for homosexuals than for heterosexuals. That is, sexual behaviours between homosexuals do not count as being in private if: (1) more than two persons (the participants) are present, even if occurring in private residences, or (2) said behaviours occur in the lavatory of a public building. These restrictions do not apply to heterosexuals.

RECOMMENDATIONS

To the extent of legislative absence, Reviewed Countries should enact legislation:

1. Repealing all prohibitions on sexual behaviours done in private between consenting adults
2. Repealing legislative provisions which discriminate against LGBT people
3. Enacting Anti-Discrimination Legislation which specifically prohibits discrimination on the bases of sexual orientation and gender identity and expression, in all facets of life, where just and applicable
4. Prohibiting corporal punishment absolutely



CONCLUSION

The fact that I have indicated recommendations at the end of the various Focus Population sections, obviates the need for any replication here. Consequently, in concluding I wish to make a few points which I view as salient.

First, the WHO has noted that globally, stigma towards mental illness or affliction is the single most significant impediment to mental health[101]. I suggest that the Caribbean is no exception. If so, it means that advancing the Right to Mental Health of persons in the Reviewed Countries requires tackling socio-cultural attitudes. Legislation is certainly a powerful instrument in that undertaking, but one tool nonetheless, which alone can only achieve so much. However, the impact of legislation can be greatly amplified by supporting policy intervention, which by its more informal nature may be better suited to tackle the socio-cultural norms, attitudes and practices impeding the Right to Mental Health. These impediments include hetero-patriarchy, homophobia, predatory masculinity and a perception of children as being undeserving of the full measure of human rights.

That being said, it must be noted that draft legislation to remedy the impediments on the Right to Mental Health (in so far as legislation may be useful), already exists. Not only in countries outside of the Caribbean, but also here in this region. For example, legislation in Guyana concerning the termination of unwanted pregnancies has been globally lauded for its comprehensive, human-rights-based approach to the issue. Also, our very own CARICOM has commissioned and published, or accepted, draft legislation on sexual harassment, sexual offences, labour, privacy and data protection. Indeed, the Comprehensive Domestic Violence and Child Protection Legislation now enacted throughout the region, all have their genesis in CARICOM draft model legislation on those issues.

In the circumstances, the failure of Caribbean legislators to update, repeal or enact legislation advancing human rights, including the right to mental health, may only be adequately explained as an absence of political will. My hope is that this paper will help to create or catalyze that will in any way possible.



APPENDIX A

Comprehensive Sex Education:

Preparatory Phase

1. Involves experts on human sexuality, behaviour change and related pedagogical theory
2. Involves young people, parents/family members and other community stakeholders
3. Assesses the social, SRH needs and behaviours of children and young people targeted by the programme, based on their evolving capacities
4. Assesses the resources (human, time and financial) available to develop and implement the curricula.

Content Development

5. Focus on clear goals, outcomes and key learnings to determine the content, approach and activities.
6. Covers topics in a logical sequence
7. Designs activities that are context-oriented and promote critical thinking
8. Addresses consent and life skills
9. Provides scientifically accurate information about HIV and AIDS and other STIs, pregnancy prevention, early and unintended pregnancy and the effectiveness and availability of different methods of protection
10. Addresses how biological experiences, gender and cultural norms affect the way children and young people experience and navigate their sexuality and their SRH in general
11. Addresses specific risk and protective factors that affect particular sexual behaviours
12. Addresses how to manage specific situations that might lead to HIV infection, other STIs, unwanted or unprotected sexual intercourse or violence
13. Addresses individual attitudes and peer norms concerning condoms and the full range of contraceptives



FOOTNOTES

- [1] See Appendix A
- [2] <https://iris.paho.org/bitstream/handle/10665.2/34493/9789275119761-eng.pdf?sequence=1&isAllowed=y&ua=1---> preface
- [3] <https://lac.unfpa.org/sites/default/files/pub-pdf/Accelerating%20progress%20toward%20the%20reduction%20of%20adolescent%20pregnancy%20in%20LAC%20-%20FINAL.pdf>
- [4] EJA – Child Sexual Abuse
- [5] https://www.unicef.org/Children_and_Families_in_Transition_update.pdf
- [6] https://www.unicef.org/Children_and_Families_in_Transition_update.pdf
- [7] <http://documents.worldbank.org/curated/en/499971468743177906/pdf/multi0page.pdf>
- [8] in the Eastern Caribbean The report of a study carried out across the Eastern Caribbean during the period October 2008 to June 2009
- [9] Social and Economic Studies 63: 3&4 (2014): 207–233, Corporal Punishment in the Caribbean; Attitudes and Practices, Corine Bailey, Tracy Robinson, Charlene Coore-Desai See also: EJA – corporal punishment
- [10] A Child’s Right to Health in the Caribbean’
- [11] EJA – Corporal Punishment
- [11] EJA – Corporal Punishment
- [12] EJA – Corporal Punishment
- [13] http://www.undp.org/content/dam/barbados/docs/legal_framework/UNSubregional_Analysis_Barbados_OECS.pdf
- [14] Source: Crime, Violence, and Development: Trends, Costs, and Policy Options in the Caribbean. The United Nations Office on Drugs and Crime and the World Bank 2007
- [15] https://www.unicef.org/SITAN_Bdos.pdf
- [17] CASE STUDY THE ANGLOPHONE CARIBBEAN: A REGIONAL APPROACH TO A REGIONAL PHENOMENON. Regional Evaluation on Access Justice as a preventive mechanism to end violence against women 2011-2015 UN WOMEN
- [18] EJA Model 1
- [19] http://www.undp.org/content/dam/barbados/docs/legal_framework/UNSubregional_Analysis_Barbados_OECS.pdf
- [20] CDB Gender Analysis Synthesis Report. See also https://www.who.int/mental_health/prevention/genderwomen/en/
- [21] http://www.undp.org/content/dam/barbados/docs/legal_framework/UNSubregional_Analysis_Barbados_OECS.pdf
- [22] abortion paper
- [23] abortion paper
- [24] https://www.hrw.org/sites/default/files/report_pdf/easterncaribbean0318_web_0.pdf
- [25] https://www.paho.org/hq/index.php?option=com_content&view=article&id=12829:lgbt-advocates-say-stigma-and-discrimination-are-major-barriers-to-health&Itemid=1926&lang=en



FOOTNOTES

- [26] https://www.hrw.org/sites/default/files/report_pdf/easterncaribbean0318_web_web_0.pdf
- [27] HDT LBT Report
- [28] https://caribbean.unfpa.org/sites/default/files/pub-pdf/RAPID_ASSESSMENT_OF_SEXUAL_AND_REPRODUCTIVE_HEALTH_AND_HIV_POLICIES_SYSTEMS_AND_SERVICES_IN_GRENADA.pdf
- [29] *Therese Ho v Lendl Simmons*, para 47
- [30] ICESCR art. 12
- [31] E/C.12/2000/411 August 2000
- [32] E/C.12/2000/411 August 2000
- [33] E/C.12/2000/411 August 2000
- [34] CRC Article 24
- [35] CRC art. 19
- [36] CRC art. 28.
- [37] *EJA – Corporal Punishment*, pp. 210 and 211
- [38] CEDAW 11(1)(f)
- [39] CEDAW 12(1)
- [40] CEDAW art. 11
- [41] CEDAW art. 12
- [42] CEDAW art. 13
- [43] General Recommendation No. 19 (11th session, 1992), 7(g)
- [44] American Declaration, art. XI
- [45] <http://www.oas.org/en/iachr/reports/pdfs/LGBTI-RecognitionRights2019.pdf>
- [46] <http://www.oas.org/en/iachr/reports/pdfs/LGBTI-RecognitionRights2019.pdf>
- [47] <http://www.oas.org/en/iachr/reports/pdfs/LGBTI-RecognitionRights2019.pdf>
- [48] See: **Antigua and Barbuda**, Sexual Offences Act No. 9 of 1995, sections. 5(1), 6(1), 6(2)(b), 14(1) & (2), 15, 15(2), and 16; **Barbados**: Sexual Offences Act CAP 154, sections. 4(1), 6, 7 and 13; **Dominica**, Sexual Offences Act No. 1 of 1998, sections. 7(1), 4(1), 4(1)(a), 9, 10, 10(2), 13, 3(1), 3(b)(iv), 18 Sexual Offences (Amendment) Act No. 9 of 2016, s. 10; **Grenada**, Criminal Code Amendment Act No. 29 of 2012, sections. 19, 9, 6, 22, 24 & 25; **Montserrat**; Penal Code CAP 04.02, sections. 135, 136, 137, 138, 139, 140, 154 & 157; **St. Kitts and Nevis**, Criminal Law Amendment Act CAP 4.05, sections. 3 & 4 Offences Against the Person Act CAP 4.21, sections. 47(1); **St. Lucia**, Criminal Code CAP 3.01, sections. 87 to 93; **St. Vincent and the Grenadines**, Sexual offences Act CAP 171, sections. 123 to 129 and 42



FOOTNOTES

- [49] See: **Antigua and Barbuda**, Child Care and Protection Act No. 29 of 2003; Domestic Violence Act No. 27 of 2015, s. 4; **Barbados**, Protection of Children Act CAP 146A; Prevention of Cruelty to Children Act CAP 145; Child Care Board Act CAP 381; Domestic Violence Act CAP 130A, s. 4(1)(e); **Dominica**, Children and Young Persons (Amendment) Act CAP 35.70; Domestic Violence Act No. 22 of 2001; Grenada, Child Care and Adoption Act No. 20 of 2010; **Montserrat**, Children (Care And Adoption) Act CAP 5.04; **St. Kitts and Nevis**, Children (Care and Adoption) Act CAP 12.01; **St. Lucia**, Child (Care, Protection and Adoption) Act No. 8 of 2018; **St. Vincent and the Grenadines**, Children (Care and Adoption) Act of 2011
- [50] Antigua and Barbuda, Barbados, Dominica, Montserrat and St. Lucia
- [51] Antigua and Barbuda, and Grenada
- [52] Barbados, St. Lucia, St. Vincent and the Grenadines, and Montserrat
- [53] Dominica, Montserrat and St. Lucia
- [54] Child Sexual Abuse in the Eastern Caribbean **The report of a study carried out across the Eastern Caribbean during the period October 2008 to June 2009 Adele D. Jones and Ena Trotman Jemmott**
- [55] **Antigua and Barbuda**: Education Act, No. 21 of 2008; Barbados Education Act, CAP 41; **Dominica** Education Act, No. 11 of 1997; **Grenada** Education Act, CAP 86, **Montserrat** Education Act, CAP16.0; **St. Kitts and Nevis** Education Act, No. 9 of 2005; **St. Lucia** Education Act, No. 41 of 1999; **St. Vincent and the Grenadines** Education Act, CAP 202.
- [56] CARICOM Integrated Strategy for the Reduction of Adolescent Pregnancy approved by the Twenty-seventh Meeting of the Council for Human and Social Development (COHSOD) on Education in 2015. Also Mexico City Ministerial Declaration, 'Prevention Through Education'
- [57] CRC Concluding Observations: Antigua and Barbuda 2004 para 53; CRC Concluding Observations: Dominica 2004 para 40; CRC Concluding Observations: Grenada 2010 para 45; CRC Concluding Observations: St Kitts & Nevis 1999 para 26; CRC Concluding Observations: St Lucia, 2005 para 57; CRC Concluding Observations: St Vincent and the Grenadines, 2002 para 41; Concluding Observations of the Committee on the Rights of the Child (Overseas Territories), 2000 para 37
- [58] **Let's talk about sex A qualitative study on sexual health education in Grenada**
- [59] **CHILDREN AND FAMILIES IN TRANSITION YOUNG PARENTS AND CARETAKERS IN THE EASTERN CARIBBEAN** UNICEF Office for Barbados and the Eastern Caribbean with the support of UNECLAC Subregional Headquarters for the Caribbean



FOOTNOTES

- [60] https://www.unicef.org/Children_and_Families_in_Transition_update.pdf
- [61] Antigua and Barbuda, Barbados, Dominica, Grenada, Montserrat and St. Kitts and Nevis.
- [62] Age of Majority Act Cap 164, s 4
- [63] Mok, M (supra)
- [64] CRC Concluding Observations: Antigua and Barbuda 2004 para 53; CRC Concluding Observations: Dominica 2004 para 40; CRC Concluding Observations: Grenada 2010 para 45; CRC Concluding Observations: St Kitts & Nevis 1999 para 26; CRC Concluding Observations: St Lucia, 2005 para 57; CRC Concluding Observations: St Vincent and the Grenadines, 2002 para 41; Concluding Observations of the Committee on the Rights of the Child (Overseas Territories), 2000 para 37
See Also: <https://caribbean.unfpa.org/en/news/sexual-reproductive-health-thematic-brief>
- [65] [1986] 1 AC112 p 174 D-E
- [66] Criminal Code, s. 65
- [67] Grenada Child (Protection and Adoption) (Amendment) Act 19 of 2011, s. 97J(d)
- [68] Grenada Criminal Code, s. 65
- [69] Barbados – parent teacher or other person with control of the child (Prevention of cruelty to children Act) Dominica Children and Young Persons Act, S.5(6) Montserrat Juveniles Act CAP 02.11 part 6, s.34 – parent, teacher etc. have right to apply corporal punishment; SLU – Children & Young Persons Act 1972, Part 2, s. 5(6) parent, teacher or other person with control of child may apply corporal punishment.
- [70] Antigua teacher (education Act), but parent or person with control via common law; Barbados – parent teacher or other person with control of the child (Prevention of cruelty to children Act) Dominica Children and Young Persons Act, S.5(6) Montserrat Education Act, CAP 16.01 – s.49 allows corporal; SKN education Act, s. 49
- [71] Dominica Juvenile Offenders Punishment Act, CAP 12.72s. 3 –allows whipping as punishment; SKN Corporal Punishment Act, CAP 3.09 s.3 provides for whipping of juveniles Grenada Criminal Code, s. 75
- [72] AnB SOA, s. 3(1) AnB SOA s.15(2)
- [73] Barbados SOA, s.3(4) Dominica SOA, s.3(3) Dominica SOA, s.4(4)
- [74] Barbados
- [75] Dominica SOA, s.3(1) Grenada Criminal Code Amendment Act, No. 29 of 2012, s.9
- [76] Dominica, Montserrat and St. Kitts and Nevis.
- [77] **Dominica Sexual Offences Act 175**
- [78] St. Kitts Prevention of Crimes Act, Chap. 4.20
- [79] Barbados Computer Misuse Act, s.14, SKN, ECA Unlawful communications. 13. (1)
- [80] **Antigua and Barbuda, Sexual offences Act**



FOOTNOTES

- [81] Barbados, Montserrat, St. Lucia Labour Code, s. 272
- [82] SKN Protection of Employment Act, s. 11(d)
- [83] See: Antigua and Barbuda; OAP s. 56 & 57; Infant Life Preservation Act, CAP 216, s. 2; Barbados OAP, ss 37, 38 & 39, **Medical Termination of Pregnancy Act 1983** (Barbados) Dominica OAP, s. 8(1) & s. 56.; Grenada Criminal Code, s. 234; St. Lucia 165(3) of the Criminal Code; Montserrat Penal Code, ss. 161 & 167; SKN Infant Life Preservation Act, CAP 9.11, s.
- [84] St. Kitts and Nevis, St. Lucia,
- [85] St. Vincent and the Grenadines, Montserrat, Grenada
- [86] St. Lucia
- [87] St. Vincent and the Grenadines
- [88] St. Vincent and the Grenadines, Montserrat, St. Lucia
- [89] St. Lucia
- [90] St. Lucia, Barbados
- [91] Barbados, St. Lucia
- [92] Grenada ECA, s. 10 capturing, publishing transmission of private area of a person; Antigua ECA, s. 8; Barbados Computer Misuse Act, s.14; SVG Cyber-Crime Act, s. 16
- [93] St. Kitts and Nevis, Dominica, St. Lucia, Montserrat
- [94] St. Kitts and Nevis ECA illegal interception s. 7; St. Lucia, Interception of Communications Act, No. 31 of 2005, s.3; Grenada ECA, s. 18; Barbados, Computer Misuse Act, s.3 & 6; SVG Cyber Crimes Act, ss.3, 4 & 7; Antigua ECA, s. 7
- [95] *Orozco v AG of Belize*
- [96] *McEwan v AG of Guyana, CCJ*
- [97] *Jason Jones v AG of Trinidad and Tobago*
- [98] Montserrat, Penal Code, ss.62 and 79 St. Lucia Labour Code, s. 131
- [99] Antigua and Barbuda SOA, ss. 12(1); Barbados SOA, s.9; Dominica SOA, s. 16; Grenada Criminal Code, s. 480; **SVG Criminal Code , s. 146**; SKN OAP, s. 56; SLU Criminal Code, s. 133
- [100] Antigua and Barbuda SOA, s. 15(1); Barbados SOA, s.12; Dominica SOA, s. 14; Grenada Criminal Code, s. 481; **SVG Criminal Code , s. 148**; **SKN OAP, s. 57**; **SLU Criminal Code s. 132**
- [101] World Health Organization. World Health Report 2001: Mental Health: New Understanding, New Hope. Geneva: World Health Organization; 2001.





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