



BEYOND DECRIMINALISATION

**POSITION PAPER ON LAWS &
LGBTQI+ INCLUSION & PROTECTION
IN TRINIDAD & TOBAGO**

Beyond Decriminalisation: Position Paper on Laws and LGBTQI+ Inclusion and Protection in Trinidad and Tobago

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Executive Summary

This position paper, by CAISO: Sex and Gender Justice, examines the state of LGBTQI+ inclusion and protection in Trinidad and Tobago within the context of the post-decriminalisation moment. In doing this, the paper assesses the Government of Trinidad and Tobago's responsibilities to its inhabitants and provides an analysis of the delivery of these responsibilities to LGBTQI+ people, as rights holders.

It reviews the LGBTQI+ movement in the Commonwealth Caribbean, beginning with a study of the decriminalisation judgements in Trinidad and Tobago, Barbados, Antigua and Barbuda, St. Kitts and Nevis, and Belize. Beyond the decriminalisation judgements, the paper spotlights other examples of legal action taken by LGBTQI+ people to safeguard their human rights, in different parts of the region. Using data provided from the Wholeness and Justice Programme, this paper analyses the impact of prejudicial attitudes and behaviour, structural discrimination, and the lack of legal protection and recognition on LGBTQI+ people in Trinidad and Tobago.

Based on international human rights standards, the paper provides best practice recommendations to the Government on how to mitigate the effects of LGBTQI+ marginalisation and identifies necessary steps to create an enabling and inclusive national environment for LGBTQI+ people. Through a rights-based approach, this paper seeks to inspire critical thought and analysis on the state of the law in Trinidad and Tobago against the lived experiences of LGBTQI+ people.

Introduction and Background

The 2018 judgement delivered by Justice Devindra Rampersad in **Jason Jones v Attorney General of the Republic of Trinidad and Tobago** aroused a range of reactions among sections of the population in Trinidad and Tobago and the wider Caribbean. The recognition of the unconstitutionality of Sections 13 and 16 of the **Sexual Offences Act** of Trinidad and Tobago is certainly a decisive step towards lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI+) inclusion. However, this judgement - and the Trinidad and Tobago Government's response to it - prompts a discussion on the state of the law in Trinidad and Tobago as it relates to LGBTQI+ people, especially within the context of the international human rights framework.

Trinidad and Tobago is guided by international human rights principles which were shaped by the 1948 Universal Declaration of Human Rights (UDHR). These principles are the foundation of many international human rights treaties to which Trinidad and Tobago is party and are reflected in the Constitution. They include, but are not limited to, respect for the dignity of all human beings, equality, and non-discrimination. However, in the case of LGBTQI+ people, discrimination seems to permeate many institutions and has been adopted as an acceptable practice by much of the population.

Unfortunately, these harmful attitudes are represented in legislation which invades the private and public lives of LGBTQI+ people and exposes them to insurmountable degrees of violence. This position paper intends to demonstrate how LGBTQI+ exclusion and discrimination are rooted in the legislative infrastructure of Trinidad and Tobago (T&T) - outside of the Sexual Offences Act. It also intends to show how this structural discrimination negatively impacts the lived experiences of LGBTQI+ people in T&T, both directly and through its reproduction of bias and prejudice within the general populace.

In doing this, the position paper will highlight the trends in the Caribbean region relating to judicial and legislative recognition of LGBTQI+ people. This will begin with a review of the judgement in *Jason Jones v Attorney General of the Republic of Trinidad and Tobago*. Then, the paper will clarify the Government of the Republic of Trinidad and Tobago's (GORTT) responsibility to LGBTQI+ people, based on international human rights standards. From this, it will identify the gaps in the GORTT's response to LGBTQI+ people and issues, and will provide recommendations on how the Government can create an enabling and inclusive environment for LGBTQI+ people in T&T.

A Review of the Same-Sex Sexual Conduct Decriminalisation Judgement in Trinidad and Tobago

In 2018, Justice Devindra Rampersad ruled that the criminalisation of same-sex sexual conduct, through the 'buggery' and 'serious indecency' provisions in the Sexual Offences Act, was unconstitutional in relation to the private sexual acts of consenting adults. This judgement was set to significantly affect the socio-political landscape in T&T, with expectations for the recognition and protection of LGBTQI+ people and issues, by the GORTT.

Case Summary: Jason Jones v Attorney General of the Republic of Trinidad and Tobago

This case challenged the constitutionality of Sections 13 and 16 of the Sexual Offences Act of Trinidad and Tobago 2012. The claimant argued that these sections proscribed sexual acts as buggery and serious indecency, which he, as a gay man, was likely to engage in with another consenting adult, thus violating his fundamental human rights. As offences, these acts are penalised by imprisonment for twenty-five (25) years and five (5) years, respectively. In the determination of the issue at hand, the court chronicled the long history of the buggery law and how it came to be entrenched in the Commonwealth Caribbean. It then engaged in an extensive discussion of the savings law clause which, at the time of independence, was used to save existing colonial laws from being struck down.

By doing this, the savings law clause limits these laws' ability to be consistent with an evolving society and contemporary understandings of human rights. Despite being an independent republic since 1976, this clause is a glaring legal consequence of British colonial legacy. Sections 13 and 16 of the Sexual Offences Act are often considered as saved. However, from the High Court's determination, these sections were found not to be saved. The court then went on to assess whether the claimant's constitutional rights were in fact infringed and if so, whether this infringement was "reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual", as argued by the Government.

From the onset, the court commendably set the parameters of the case as being “about the dignity of the person and not about the will of the majority or any religious debate,” quelling attempts to use arbitrary moral and religious points of view as reasonable bases for the denial of a person’s inalienable rights under the Constitution. Furthermore, it identified the relationship between human dignity and the concept of an individual’s autonomy which, ought not to be inhibited by “unreasonable intervention by the State.” According to the court, through provisions like sections 13 and 16, the State acts otherwise and therefore, “justifies in the mind of others in society who are differently minded that the very lifestyle, life and existence of a person who chooses to live in the way that the claimant does is criminal and is deemed of a lesser value than anyone else.”

Throughout the judgement, the court compared the scope of the enjoyment of the same rights in question, by a heterosexual man and the claimant. This consistent parallel illustrated how LGBTQTI+ people in Trinidad and Tobago have been limited in the exercise and enjoyment of their fundamental rights. In the end, the court found that sections 13 and 16 of the Act were in fact unconstitutional especially as they related to the right to respect for one’s private and family life; and, as such, were null and void to the extent that they criminalised consensual sexual conduct between adults.

In recommendation from the then Attorney General of Trinidad and Tobago (AG), Faris Al-Rawi, the judgement has since been submitted to the Trinidad and Tobago Court of Appeal. Al-Rawi suggested that this may ultimately be presented before the Judicial Committee of the Privy Council in the United Kingdom for a final appeal. In his words, this recommendation was for two (2) reasons:

- 1) To establish certainty on whether or not the contested provisions are covered by the savings law clause, and
- 2) To settle the law on this topic.

In his view, once these are confirmed, the Government of Trinidad and Tobago would have a clearer idea of how to move forward especially in relation to LGBTQI+ recognition and inclusion.



The Judicial Committee of the Privy Council is the final court of appeal for Trinidad and Tobago

Regional Strides: Mapping the Commonwealth Caribbean

Trinidad and Tobago is not the only country in the Commonwealth Caribbean to have presented a motion challenging the criminalisation of same-sex sexual conduct before a court of law. Over the last decade, there has been a movement within the region, led especially by civil society organisations (CSOs), to challenge harmful societal norms, attitudes and practices towards people with diverse sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC). As part of this, the constitutionality of age-old laws that criminalise same-sex activity and delegitimise SOGIESC identities, have been questioned before courts in a number of jurisdictions. Constitutional challenges and other legal challenges to laws and practices that discriminate against LGBTQI+ people are fast becoming a hallmark of this decade, within the region.





Barbados: René Holder-McClean-Ramirez et al v. The Attorney General of Barbados

Dec 2022

In this case, the High Court of Barbados was petitioned by three claimants (a gay man, a transgender woman, and an LGBTQI+ organisation) to decide on the constitutionality of Sections 9 and 12 of the Sexual Offences Act. These sections prohibited anal intercourse (with a penalty of life imprisonment) and 'serious indecency' (with a penalty of 10 years imprisonment). The court determined these sections to be an infringement of the claimants' constitutional rights and effectively declared them null and void.

In its assessment, the court had to first consider whether these laws were protected by the savings law clause. On this question, it was determined that because of the amendments and radical changes made by Parliament to these laws, over the years, the impugned sections could not be deemed to be protected by the savings law clause. Thus, establishing the court's jurisdiction to make pronouncements on the sections' constitutionality.

The court went on to emphasize the importance of State compliance with international law obligations, consistent with evolving jurisprudence, as an integral part of the rule of law.

In so doing, it engaged in a wide interpretation of the meaning of 'sex' in the Constitution as encompassing sexual orientation which, to the court, extends protections to people on the basis of sexual orientation. Further, the court affirmed that the right to privacy encompasses the dignity of human beings and applied to aspects of physical and social identity. Moreover, it declared that autonomy, personal intimacy and inherently private choices are central to the right to liberty, and as such these ought to be protected. In a similar vein, it clarified that sexual intimacy is included in human expression, therefore should be taken into consideration in the assessment of the right to expression.



Barbados amended its Employment Act in 2020 to include sexual orientation as a protected category.



St. Kitts and Nevis: *Jamal Jeffers et al v The Attorney General Of St. Christopher And Nevis*

Aug 2022

In this case, The Eastern Caribbean Supreme Court was tasked with determining the constitutionality of Sections 56 and 57 in St. Kitts and Nevis' Offences Against the Persons Act. The point of focus in this instance was the act of sodomy in relation to "consensual sexual intercourse in private between persons sixteen years of age or more," which, following an amendment to section 57 in 2012, carried with it a penalty of up to 10 years imprisonment, with or without hard labour.

The court concluded that the sections in question were not reasonably justifiable in a democratic society, thus contravening sections 3 and 12 of the Constitution of St. Kitts and Nevis (i.e., the rights to protection of personal privacy and to freedom of expression, respectively). As such, the court ordered that "consensual sexual acts between adults in private" ought to be implied as an exception in the interpretation of these sections.

It is important to note that this judgement was the second of its kind from the ECSC. This is an affirmative step in the development of contemporary jurisprudence relating to LGBTQI+ issues, which may have influence on the other countries within the court's jurisdiction.

As was done in *Orden David* case, the claimants identified clear and direct consequences of the offending sections to themselves and the communities they represented in St. Kitts and Nevis. The court determined that the evidence presented which demonstrated these consequences was "completely uncontradicted." That is to say that, in the court's view, the State could not present evidence or arguments that could have successfully refuted the experience of these impacts. These consequences included experiences of discrimination and stigma which:

- affected their access to healthcare including sexual and reproductive health and rights,
- resulted in multiple forms of violence from private persons, members of the police service, family members, and within educational institutions and workplaces and,
- negatively impacted their mental health.

In opposition to the motion, the Government of St. Kitts and Nevis presented the argument that its Constitution ought to be interpreted with consideration for the "moral and religious fibre of the country" so as not to "alter and compromise [the] survival of the culture and personality of the Federation." It further argued that this discussion ought to be left to be determined by Parliament. However, the court affirmed its duty to interpret the Constitution and invoked section 2 of the Constitution which allows it "to modify the language of any law that was in existence prior to Independence to bring it into conformity with the Constitution", within the confines of the judicial independence principle.



Antigua and Barbuda: Orden David et al v The Attorney General of Antigua and Barbuda

July 2022

In this case, the question of the constitutionality of sections 12 & 15 of Antigua and Barbuda's Sexual Offences Act was brought before the Eastern Caribbean Supreme Court (ECSC). Eventually, the court ruled that those laws which criminalised same-sex activity between consenting adults, (for instance, the section 12 provision for 'buggery' which carried a penalty of up to fifteen (15) years imprisonment) were inconsistent with sections 3, 12 and 14 of the Constitution of Antigua and Barbuda.

The claimants included a gay man and a civil society organisation who raised issues of police violence, and barriers preventing LGBTQI+ people's access to public healthcare, as direct consequences of these discriminatory laws. In its decision, the court affirmed that the rights to liberty, protection of the law, freedom of expression, protection of personal privacy, and protection from discrimination on the basis of sex were contravened. The court read sex as including sexual orientation and gender identity. It maintained that the choice of an adult's consenting intimate and/or romantic partner "is integral to self-expression" and, as such, is a private and personal choice which the State cannot abrogate.

Further, it acknowledged the Constitution as a living instrument, meaning that "the very rights [it] espouses and protects are capable of evolution since concepts, attitudes and the understanding of human rights and dignity evolve over time." It explained this by citing the European Court of Human Rights, which expands on the right to private life as "encompass[ing] physical and social identity, an individual's personal development and personal autonomy as well as their right to establish and develop relationships with other people and their social environment, including the right to establish and maintain relationships with people of the same sex."

In light of the foregoing, sections 12 and 15 of the Antigua and Barbuda Sexual Offences Act were rendered void, to the extent of their inconsistency with the State's Constitution.



Belize: The Attorney General v Caleb Orozco and Others

Dec 2019

In 2019, the Court of Appeal of Belize passed a judgement which upheld the monumental 2016 judgement by the Supreme Court of Belize in *Caleb Orozco v The Attorney General of Belize*. At the court of first instance, the constitutionality of section 53 of Belize's Criminal Code, which spoke to "carnal intercourse against the order of nature" was left to be determined. There, it was decided that this section violated a number of constitutional rights and freedoms, in relation to the private sexual activities of consenting adults. This included the rights to human dignity, privacy, equality before the law, non-discrimination on the grounds of sex, and freedom of expression. As such, it was ordered that the section should not be applied to "consensual sexual acts between adults in private" since doing otherwise could not be reasonably justified, even on the basis of public morality.

This judgement was the first of its kind in the region. In its decision, the court recognised the interpretation of section 53 - which carried with it a penalty of 10 years imprisonment - to include anal intercourse, which it noted was not gender specific, while acknowledging the "unequal application of the section to male persons" engaged in same-sex sexual activity. The case garnered relentless opposition from various representatives of Christian denominations in Belize who maintained heavy involvement in the proceedings to "preserve a moral climate for members of the society to prosper and avoid vice."

A significant part of the appeal by the Attorney General focused on the Supreme Court's reasoning (or lack thereof) for deciding that section 53 of the Criminal Code contravened sections 12 and 16 of the Belizean Constitution (dealing with protection of freedom of expression and protection from discrimination), on the basis of sexual orientation which it interpreted in the meaning of 'sex'.

Ultimately, the Court of Appeal took the view that it was appropriate to include sexual orientation in the interpretation of "sex" in sections 3 and 16 of the Constitution, as it was necessary to give a purposive and generous meaning to the word for the protection of human rights. Doing this was well in line with Belize's international treaty obligations which, via the Interpretation Act, the Court needed to consider when presented with an ambiguity. Likewise, the Court of Appeal maintained that sexual intercourse, be it heterosexual or homosexual, was a form of expression.

As such, the original judgement from the Supreme Court as it related to the unconstitutionality of section 53 of the Belizean Criminal Code stood.

Other Commonwealth Caribbean Countries



Other countries in the Commonwealth Caribbean have made steps to challenge anti-LGBTQI+ legislation. In 2019, the Eastern Caribbean Alliance for Diversity and Equality (ECADE) announced its intention to pursue legal challenges in five (5) countries within its ambit. The decisions in Antigua and Barbuda, St. Kitts and Nevis, and Barbados were a result of these efforts by ECADE and a team of lawyers from the region through the Faculty of Law UWI Rights Advocacy Project (U-RAP).

The pending constitutional challenge in **St. Lucia** is yet to be completed. In **St. Vincent and the Grenadines**, LGBTQI+ persons have filed lawsuits against the State challenging the buggery and gross indecency laws which criminalise sexual acts between consenting adults of the same sex, with a penalty of up to 10 years imprisonment. Similarly, sections 14 and 16 of **Dominica's** Sexual Offences Act, which proscribe gross indecency and buggery, are currently being challenged.

In a report published in 2020, the Inter-American Commission on Human Rights (IACHR) recommended that **Jamaica** repeal its anti-LGBTQI+ laws and take the necessary steps to protect and respond to the needs of its LGBTQI+ population. The report was a commentary on the merits of the case brought by two (2) LGBTQI+ Jamaicans, who claimed that Jamaica's anti-LGBTQI+ legislation violated their fundamental rights, which Jamaica had an international obligation to uphold. The principal legislation in question was the Offences Against the Person Act, sections 76 and 79 of which proscribes buggery and acts of gross indecency, respectively. These acts, even when committed in private by consenting adults of the same sex, carry with them a penalty of up to 10 years imprisonment and adverse social ramifications. The IACHR affirmed that the law violated human rights identified in the Inter-American Convention of Human Rights, which Jamaica ratified since 1978.

The **Caribbean Court of Justice (CCJ)** has had a meaningful impact in upholding the rule of law for LGBTQI+ people in the region. Aside from issues concerning the constitutionality of “buggery” and “indecency” laws as it relates to same-sex sexual conduct, laws governing “crossdressing”, as it were in section 153(1)(xlvi) of **Guyana's** Summary Jurisdiction (Offences) Act, are of particular concern to LGBTQI+ people. Laws like this disproportionately affect trans and gender non-conforming people by limiting their freedom to express and affirm their gender identities. Furthermore, these laws have had wide-reaching impacts on their daily experiences by exposing them to violence without State protection. These laws also affect trans and gender non-conforming people's ability to access national services, such as law enforcement, health services and education, without harassment and discrimination.

For reasons such as this, in **McEwan and others v AG of Guyana**, transgender litigants with the support of Society Against Sexual Orientation Discrimination (SASOD Guyana) argued that this law violated their constitutional rights. In its final judgement, the CCJ agreed that this law contravened their rights to equality and non-discrimination, freedom of expression, and was “unconstitutionally vague and offends the rule of law.” This decision by the CCJ has been consistently referenced by local and sub-regional judges in the determination of the decriminalisation cases presented before them, and those concerning the applicability of savings law clauses.

As seen through the decided cases above, courts throughout the Commonwealth Caribbean continue to progressively take the view that laws which proscribe the sexual conduct between consenting adults in private are in contravention of the fundamental rights guaranteed to them by their respective Constitutions. The involvement of local and regional civil society organisations (CSOs) in the furtherance of these claims before the courts must not be taken for granted. Although these decisions are definitely a step in the right direction, the creation of a more just society requires the active participation of other arms of Government.



In accordance with the separation of powers doctrine, the judiciary may only make determinations on questions of law brought before it and ought not to usurp the powers of other arms of government. In other words, it can only interpret the law, not create it, as that power is vested in the legislature.

Therefore, it is left to the legislative arm of governments throughout the region, to amend and enact laws that reflect the position taken by the courts in these landmark decisions. This requires governments to implement the necessary infrastructure to secure and protect the rights of their LGBTQI+ populations. This must be done with a view of establishing effective and long-lasting changes to policy, legislation, and even norms, attitudes, and behaviours.



Responsibilities of the Government of Trinidad & Tobago



In episode 3 of his AG Talks series - "What does the AG do?" - the former AG, Faris Al-Rawi, identified the role of the Attorney General of Trinidad and Tobago as being primarily two-fold:

- To advise the Cabinet of Trinidad and Tobago
- To make law.

In essence, the Attorney General is the chief legal adviser to the Government. The Judiciary, on the other hand, is an independent body responsible for ensuring that checks and balances are made on the Government, in the exercise of its power. This judicial responsibility is crucial to the safeguarding of fundamental rights and freedoms, and democracy in Trinidad and Tobago. Doing this prevents other arms of Government from acting beyond their legal power and from enacting and/or enforcing any laws that arbitrarily infringe on the fundamental rights and freedoms, guaranteed by the Constitution of Trinidad and Tobago. Ultimately, both the Judiciary and the Attorney General have mandates in favour of public interest.

As it relates to Jason Jones v AG of Trinidad and Tobago, the High Court determined decriminalisation to be the best resolution against competing interest. The AG, however, explained that as a matter of public interest, it was essential to query this judgement to establish legal certainty on substantive questions of law. This appeal has halted any changes in legislation that should have otherwise resulted from the 2018 judgement. In his discussion, Al-Rawi made mention of twenty-seven (27) laws that, in his view, discriminate against people on the basis of SOGIESC. According to Al-Rawi, once the judgement stands, these 27 laws would need to be re-examined, in relation to LGBTQI+ people and amended accordingly. So, with regards to LGBTQI+ rights and inclusion, the country appears to remain in 'limbo' which effectively exposes LGBTQI+ people to violence.

Former AG Al-Rawi has maintained a forward-looking perspective in his identification of the "mission in law" as focusing on "the reality that you want Trinidad and Tobago to become." Yet, when questioned about the Jason Jones case, he expressed that he was not allowed to have "too much of a personal opinion." Notwithstanding, he maintained that as the Attorney General of the Government of Trinidad and Tobago, it was his duty to uphold the Constitution, which respects equality of treatment, democracy and the rights to life, religion and freedom of expression.

Since 2018, however, the GORTT has been relatively silent on these issues, deferring any steps to amend laws pending resolution of the appeal. The Trinidad and Tobago Court of Appeal is expected to hear this matter in October 2023.

Nevertheless, there are specific conditions that the GORTT needs to operationalise as an indication of its commitment to advance the human rights of LGBTQI+ people. This requires a multi-angular approach from the Government, as identified by the United Nations Development Programme (UNDP) and Parliamentarians for Global Action (2017) in *Advancing the Human Rights and Inclusion of LGBTI People*. **According to the UNDP and PGA, to advance inclusion, States are required to:**

- Enact comprehensive legislation that specifically prohibits discrimination on the basis of a person's real (or perceived) sexual orientation, gender identity/expression, and sexual characteristics (SOGIESC).
- Prioritise access to justice, housing, employment, healthcare, education and legal recognition for LGBTQI+ people.
- Repeal laws that criminalise same-sex activity between consenting adults and laws that criminalise transgender people on the basis of their gender identity and expression.
- Protect individuals from homophobic and transphobic violence by:
 - Adopting hate crime laws that protect all individuals from violence;
 - Strengthening legislation to incorporate mechanisms for monitoring and reporting hate-motivated acts of violence, asylum and police protection.
- End impunity for acts of violence committed by anyone, be it, state actor or non-state actor.
- Enact laws that appropriately prohibit and address all forms of violence and discrimination.
- Adopt adequate regulations that ensure proper investigations and diligent prosecution of perpetrators of human rights violations, and establish judicial procedures that protect victims.
- Review domestic legislation regarding non-discrimination, with the objective to harmonise with existing regional and international obligations.

- Advocate for executive support to ratify international human rights treaties, and implement and harmonise these treaties in domestic law.
- Establish National Human Rights Institutions that include SOGIESC within their mandate and/or specific institutions with expertise on and a mandate to deal with LGBTQI+ rights and inclusion.
- Establish and consult broad-based coalitions with CSOs and LGBTQI+ people. By doing this, governments will engage in active learning of the issues that concern LGBTQI+ people and ensure vulnerable people are represented and included in law reform to address these concerns.
- Identify systemic barriers to equality created by the implementation of particular policies, plans and laws, and address them in collaboration with LGBTQI+ people and organisers.
- Remove barriers that obstruct LGBTQI+ people from accessing justice and other services they are entitled to.
- Promote equality and non-discrimination, and advocate for action on issues of concern and urgency for LGBTQI+ people.

With these in mind, it is important to evaluate the GORTT's policy position and existing laws in relation to LGBTQI+ people.



With LGBTQI+ People in Mind: An Analysis of the Law in Trinidad and Tobago

When laws are enacted, it is with the expectation that they will protect and enrich the quality of life of those whom they seek to govern. This, however, is not the experience of LGBTQI+ people in Trinidad and Tobago. In fact, several laws in Trinidad and Tobago discriminate against and fail to actively protect LGBTQI+ people from violence, stigma, and discrimination. By doing this, these laws encroach on the universal human rights of LGBTQI+ people.

To begin, the laws that even remotely consider LGBTQI+ people attempt to specifically target a cross-section of this population by criminalising aspects of their private sexual conduct via buggery, unnatural crimes, and serious and gross indecency legislation. Although these laws effectively implicate and criminalise homosexual or same-sex sexual practices, the language used does not limit their applicability to homosexuality. In practice, we see how the interpretation of these laws contributes to the stigma and discrimination faced by different LGBTQI+ people, regardless of their sexual orientation or gender identity. These often result in experiences of violence and rights violations connected to other aspects of their civil, political, social, and economic livelihood.

The codification of these sexual acts in existing Sexual Offences and Offences Against the Person Acts throughout the Caribbean, as Justice Rampersad explained, is an inheritance from Middle Age Europe, where lynchings and other forms of torture and violence were deemed acceptable punishments for various offences. Today, lynchings are internationally recognised as forms of torture which need to be eliminated. Contemporary jurisprudence continues to evolve in ways that affirm the unconstitutionality of these colonial-era laws around sexual conduct, which disproportionately impact LGBTQI+ people. For instance, present-day courts throughout the Commonwealth have progressively determined sexual conduct to be a form of expression. This position supports claims of constitutional rights infringements brought forward by LGBTQI+ people. Despite this, there are adamant efforts to maintain these laws as they are argued to be 'intrinsic' to the 'moral fibre' of the region. These arguments have perpetuated States' participation and acquiescence in the unjustifiable punishment of persons for the expression of their (real or perceived) sexuality and gender identity.

Violence against people on the basis of Sexual Orientation, Gender Identity/Expression, and Sexual Characteristics (SOGIESC) by the State transcends the criminalisation of private sex acts of consenting adults. The colonial foundation of our society ensured that our nation's systems and structures, centred heterosexuality as the norm and ideal, and all other sexual and gender expressions, as perverse. These sentiments are inherent in policy and legislation, and are reproduced within the dominant institutions and populace, resulting in the marginalisation of LGBTQI+ people.

For LGBTQI+ people, marginalisation means exposure to violence, lack of State protections, lack of legal recognition, exclusion from policy considerations, and even dehumanisation.

For instance, when we think of the way 'buggery' is positioned in the Sexual Offences Act, its juxtaposition with 'bestiality' reinforces antiquated ideas about the perverseness of anal intercourse. This devalues the human sexual expression often engaged in by consenting adults including LGBTQI+ and non-LGBTQI+ people. Further, this association causes people to regard LGBTQI+ people as hypersexual and thus unable to regulate their impulses. As such, LGBTQI+ people are often regarded as perpetrators of child sexual abuse and rape. On the surface, this is a dangerous presumption to make about an entire group of people. These prejudicial beliefs have inspired feelings of deep hatred for the community and in some instances provided arbitrary justification for people who want to exact violence on community members - as a means to deter occurrences of child sexual abuse and rape. Certainly, this is not by any standard a reliable nor an effective mechanism to identify perpetrators of these crimes or prevent these from occurring. Yet, these beliefs have material impacts on LGBTQI+ people.

The reinforcement of the [binary gender system](#) and heterosexuality in the law indicates a clear bias toward [cis-gendered](#) and heterosexual people. This effectively marginalises LGBTQI+ people who are part of the national population and ought to be protected from harm and included in law and policy. The State has a responsibility to secure the rights and freedoms of all persons, without prejudice. The marginalisation of LGBTQI+ people, signals a lack of respect for the inherent dignity of all persons. By virtue of being human, every person has dignity. This must be upheld and affirmed by the State. Without recognising this dignity, the State cannot reasonably be able to secure the rights and freedoms of LGBTQI+ people nor take action when these have been arbitrarily infringed. This also limits the efficacy of LGBTQI+ representation and impedes State response to the issues and needs presented by the community.



Binary gender system

classifies sex and gender into a pair of opposites, often imposed by culture or other societal pressures. Within the gender binary system, all of the human population fits into one of two genders: man or woman. This system is often discriminatory to those who do not fit into it and harmful to those who do.

Cis-gendered

term used in reference to persons whose gender identity corresponds with their sex assigned at birth in a binary gender-system.



About Wholeness and Justice. CAISO: Sex and Gender Justice established the Wholeness and Justice programme to expand access by diverse LGBTQI+ people in Trinidad and Tobago to wholeness, justice, and health and human services. The programme is committed to responding to violations of LGBTQI+ community members with an emphasis on trans, non-binary, gender-non-conforming, and intersex people; and to deliver clinically competent, trauma-informed interventions that enable healing and resilience.

Insights Reports are produced and published annually which summarise the issues confronted by the Programme and the experiences of diverse LGBTQI+ people in Trinidad and Tobago.

When we consider the history of the Domestic Violence Act in Trinidad and Tobago, we note the progression in the State's understanding of how violence (within the context specified by the Act) impacts people, the need for direct intervention to prevent its occurrence, and the need to protect people who have been exposed to this violence. Hence in 1991, Trinidad and Tobago enacted the Domestic Violence Act. This was the first of its kind in the CARICOM region. However, people in same-sex relationships who experienced intimate partner violence (IPV) were precluded from accessing redress through a Protection Order because the Act did not contemplate their relationship arrangements. This meant that their experiences of IPV were left unrecognised and in some cases reduced to offences such as assault, as described in the Offences Against the Person Act. Thus, domestic violence legislation not only excluded some affected persons from redress, but it also had the effect of compromising the accuracy of national domestic violence data. Without this data, the State would not have been able to devise targeted interventions to meet the real-life needs of marginalised groups within the population.

Notably, the Domestic Violence (Amendment) Act 2020, allows people in “dating relationships” to apply for Protection Orders. It describes dating relationships as one where the parties do not live together but are engaged in romantic, intimate or sexual relations. By using the word “parties”, the definition maintains

8% of Wholeness and Justice clients in 2022 experienced Intimate Partner Violence.

neutrality regarding the sex and gender of the people involved in the relationship, placing emphasis instead on the relationship context. This newly adopted definition extends protection to people in same-sex relationships who have experienced intimate partner violence and provides them with access to redress.



The Court Executive Administrator confirmed to the Programme, the Judiciary's official position on accepting applications for protection orders from persons in a same-sex dating relationship.

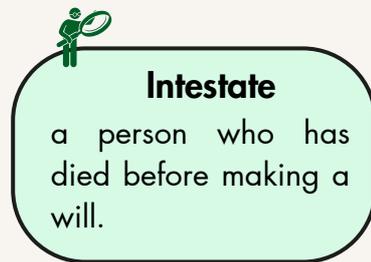
In previous iterations of the Act, the language was restrictive. The use of the word "spouse", and the definition of "visiting relationships" and "cohabitational relationships" reinforced the State's prejudice. While "spouse" in itself is not gender-specific, it is understood within the context of the Matrimonial Proceedings and Property Act. This Act connotes spouses to be "husband" and "wife" who were parties to a marriage. The definition of "visiting relationships" as non-cohabitational relationships likened to that of "husband and wife", specified an opposite-sex orientation. Similarly, the Cohabital Relationships Act only recognises cohabitation in a heterosexual context, which was applied in the Domestic Violence Act. Therefore until 2020, people in same-sex relationships who experienced violence were unable to seek protection from the State because of the use of prejudicial language in the Domestic Violence Act and related legislation.



It is important to note that some public assistance grants require people to be in opposite-sex oriented relationships to qualify. These include: those that provide for spouses like grants for people receiving Senior Citizen's Pension whose spouse is 55 years and over and unemployed, or, whose spouse is under 55 years but unable to work due to physical or mental disability. Public assistance requirements that mention cohabitation also explicitly mention the sex of those in a relationship. If you are cohabitating with a person for a period of at least three years before the latter began serving a term of imprisonment it is explicitly stated that you are only eligible for the grant if that cohabitation is with someone of the opposite sex.

While legislative change is important, it is not enough to make amendments to one statute. Statutes do not exist in isolation; our legal system comprises a collection of laws that are often read against each other. **For meaningful LGBTQI+ inclusion, there is need for legislative changes across all statutes.** The changes must be undertaken in ways that consider the rights and experiences of the community and seek to create an enabling environment for LGBTQI+ people to fully enjoy their human rights. Just as is noted with the use of "spouse" in the Matrimonial Proceedings and Property Act, the language in legislation has material implications for LGBTQI+ people. In its attribution of parental rights, the Family Law (Guardianship of Minors, Domicile and Maintenance) Act recognises the rights of a mother and father in relation to each other.

This disregards the existence of families whereby a minor is in the care of parents of the same sex with equal and concurrent responsibilities. As such, that family unit - and all the parties involved – are left more vulnerable to disruption in the event of circumstances beyond their control. In the same way the Succession Act, which speaks to how a deceased person’s estate and interests are distributed upon their death, excludes LGBTQI+ people. When a person dies intestate, the Act makes provision for their spouse. However, the Act excludes people in same-sex relationships in the same circumstances, since such partnerships are not recognised in law. Therefore, it becomes even more difficult for the surviving partner to access the rights that they would have otherwise been entitled to. In some cases, this leaves the deceased person’s interests in the hands of unaccepting family members. Anecdotal evidence in the LGBTQI+ community points to numerous cases of deceased transgender, non-binary and gender non-conforming people, who were desecrated by their family members’ refusal to acknowledge their identities, even in observing their final rites. This type of disrespect is immeasurable and amounts to violence.



The Adoption Act precludes same-sex couples from being parents to vulnerable children who need safe and loving homes. Ordinarily, the Act does not allow an adoption order to be made by more than one person for the same child except when made jointly by spouses. If LGBTQI+ persons were to attempt to surpass the limitation of the “spouse” criteria by applying as individuals, only one person in a same-sex couple would be permitted to apply, with respect to that child. If successful, this would create uneven legal parental rights, to which the other partner would not be entitled, even though both partners may share responsibility for the child’s upbringing

This is not the only way prejudicial legislation and perspectives disadvantage children. The “Romeo clause” in the Children Act seeks to decriminalise consensual sexual activity between children. However, it specifically excludes children who engage in same-sex sexual exploration from this protection. The resulting penalties for these “offences”, as outlined in sections 18 and 19 of the Act, range from imprisonment for life to a fifty-thousand-dollar (TTD50, 000) fine and imprisonment for ten (10) years. The legislation evidently recognises that teenagers under eighteen (18) years of age may engage in sexual activity with each other. So, this exclusion creates the impression that same-sex sexual activity between them is abnormal and offensive. These examples illustrate how anti-LGBTQI+ legislation does not simply criminalise sexual activity but renders entire family units and people’s lived experiences as null and void, putting children at risk.

With regards to people of trans experience, gender non-conforming, and intersex people, there is no consideration for them in legislation. For example, even in the aforementioned statutes, the language only contemplates conventional understandings of gender, that is man or woman. This further alienates people of diverse gender experience, regardless of their sexual orientation. People are expected to abide by the roles and expectations of the gender associated with the sex assigned to them at birth.

That is to say that if one is determined to be male at birth, they are expected to be and live as boys and men, and if female, girls and women. Since intersex identities are not officially recorded, definitive determinations on their sex and gender are often made for intersex children, at the point of birth. This impacts how they experience the rest of their lives, in relation to their bodies.

Equitable and comfortable access to any State services and amenities, such as healthcare, education and employment, are entirely impinged on people's adherence to these identities. When they deviate from these determinations of their gender, their identities as trans, gender non-conforming or intersex, are not recognised. **It is important for the language of laws, policy, and State processes to be gender inclusive so as to widen their scope and extend accommodations to everyone.**

Materially, people who do not identify with the sex assigned to them at birth, are unable to acquire identification documents (National Identification Cards, National Drivers' Permits, National Passports etc), that reflect and affirm their  **gender identity**. Therefore, throughout their lifetime, they are subjected to the denial of their personhood, which is a form of violence. This is in addition to other forms of violence they may face, when their gender expression does not correspond with the details on these documents or who people perceive them to be.



Gender Identity

a person's innate and essential reality understanding and knowledge of their gender. This gender can be male, female, neither or both and does not always align with the one they were given at birth. Gender identity is often supported by affirmation of desired gender expression



12% of Wholeness and Justice clients in 2022 received services to change their names via deed poll application. 100% of these clients were trans or gender non-conforming.

The lack of protective legislation to proscribe the particular kinds of violence LGBTQI+ people face, may be construed as acquiescence to that violence on the part of the State. Even when private consensual sexual activity between adults of the same sex is decriminalised, without a robust anti-discrimination infrastructure (on the basis of SOGIESC), LGBTQI+ people are unlikely to experience any material difference in their everyday lives. **Violence towards people on the basis of their (real or perceived) LGBTQI+ identities remain prevalent and the lack of a response from the State is glaring.** For example, in Trinidad and Tobago, it is normal for LGBTQI+ youth to be mistreated and displaced by their families because of intolerance, and a lack of understanding or acceptance. This leaves these youth at risk of other forms of violence, especially if they are over the age of majority (18 years), and therefore, not entitled to urgent State intervention and/or protection. Despite consistent advocacy for State intervention, no action has been taken on this.



Wholeness and Justice reported that in 2021 and 2022, displacement caused by family violence was prevalent among LGBTQI+ youth. In 2022, over 30 people contacted the Programme in need of housing with a majority of those experiencing family violence and/or challenges with rental accommodation.

Discrimination on the basis of SOGIESC is excluded from most private and public sector anti-discrimination policies. Ironically, although the Equal Opportunity Act exists to protect all persons in Trinidad and Tobago from discrimination in employment, education, accommodation, and during the provision of goods and services, it does not identify LGBTQI+ statuses as protected categories. In fact, it explicitly excludes sexual orientation in the definition of sex. As such, the Act does not extend protections and legal recourse to LGBTQI+ people when they are subject to discrimination or harassment within these contexts. Similarly, few companies in the public or private sector extend employment benefits to same-sex partners, which are accorded to their heterosexual counterparts.



CAISO: Sex and Gender Justice launched a **Model LGBTQI+ Workplace Policy** in 2021 to address this glaring gap in protection and to offer organisations a way to create an inclusive workplace. This was the result of a collaborative process which involved the Equal Opportunity Commission, Chamber business committees, civil society organisations, and other stakeholder groups.

Beyond this, the Immigration Act specifically identifies “homosexuals” as a prohibited class of people who are not allowed to enter Trinidad and Tobago. The law mandates that people who fall within this class and need to transit through Trinidad and Tobago to get to another country must be authorised, in writing, by the Minister of National Security or any person under the Minister’s direction. Other laws are not as explicit in identifying LGBTQI+ people or related activities, as this act or the Sexual Offences Act. Anti-LGBTQI+ sentiment is subsumed in other pieces of legislation and institutional practices. For example, in the Cinematograph Act, public order, public decency and public interest are identified as criteria which the Board must consider in providing approval for any film or poster. While this does not directly identify LGBTQI+ related films or imagery, it is not impractical to assume a possible correlation since these criteria are often used to justify LGBTQI+ exclusion. In a similar fashion, the Hotel Proprietors’ Act legislates against the denial of service to anyone on the basis of race, religion, and colour. However, it can be inferred that LGBTQI+ people are left vulnerable to denial on the basis of their sexual orientation or gender identity since it is not specified as a protected status in the Act. If this occurred, they would not have the support of the Equal Opportunity Act which ordinarily exists for situations like this.

When the actionable rights of LGBTQI+ people in Trinidad and Tobago are infringed, there are numerous barriers to obtaining redress and support. Even with the existence of clear procedural steps, for example in police reporting or receiving healthcare services, the beliefs and attitudes of service providers often hinder LGBTQI+ people from wanting to proceed. LGBTQI+ people have reported to CAISO and elsewhere that Police Officers refused to record their legitimate complaints and/or subjected them to humiliation and intimidation because of bias. Furthermore, the language of judicial processes and arrangements may mis-identify people of diverse gender experiences. Numerous transgender people have complained about the humiliation and mistreatment they received from some members of staff at judicial offices because of this. This type of behaviour is consistent throughout Trinidad and Tobago's national social services institutions, which is an issue that needs to be addressed before LGBTQI+ people can be said to be, in practice, meaningfully considered and included.



Anti-LGBTQI+ sentiments have been enshrined in the legislation, attitudes, and practices of many individuals and institutions in Trinidad and Tobago. These effectively prevent LGBTQI+ people from the enjoyment of the full extent of their human rights. Also, they limit their participation in civil, political, economic and social life in Trinidad and Tobago. Throughout the Commonwealth Caribbean, as was done in the Trinidad and Tobago High Court in 2018, judgements have been delivered that decriminalised same-sex sexual conduct between consenting adults. However, there is a greater responsibility upon governments to establish national infrastructure that supports LGBTQI+ inclusion

Insights from the Wholeness and Justice Programme indicate:

Structural Discrimination Inhibits LGBTQI+ People's Access to Public Services:

Structural discrimination is an active hindrance for LGBTQI+ people attempting to access public services. Homophobic and transphobic attitudes are among the accepted social and cultural norms that permeate institutions and organisations – even national services that ought to be accessible to all citizens, such as social and family services, health facilities, law enforcement and protective agencies, and judicial services.

Housing Instability, Food Insecurity, and Family Violence Remain Prevalent:

The Programme noted housing instability and food insecurity as pre-eminent social and economic issues affecting LGBTQI+ people. These are often caused and aggravated by family violence, employment issues, and job insecurity. LGBTQI+ people (especially trans and gender non-conforming people) have had challenges accessing and maintaining jobs because of prejudicial attitudes from employers and employees. This prevents them from maintaining a sustainable income to meet their basic human needs. Additionally, family violence contributes to the social and economic hardships LGBTQI+ people experience, especially with respect to housing, food, medicine, and other basic human needs. Young LGBTQI+ people are disproportionately affected by family violence. Many LGBTQI+ people between the ages of 19 and 25 have been displaced by their family members with no alternatives for support.

LGBTQI+ People Present with Multiple (and often Competing) Issues: Due to the lack of adequate protections and appropriate systems for support and redress, LGBTQI+ people are exposed to a number of intersecting legal and social issues. These include housing instability, food insecurity, family violence, employment issues, physical violence and other forms of abuse, and discrimination and harassment. Some LGBTQI+ people hesitate to take legal action, where possible, because of fear of persecution, fear of discrimination from emergency response service providers and judicial officials, and threats to their physical safety. These issues have implications on their mental and emotional wellbeing.



Policy Recommendations for the Government of Trinidad and Tobago:



The Government of Trinidad and Tobago's failure to meaningfully include and protect the LGBTQI+ community has left Civil Society Organisations (CSOs) with the responsibility of filling these gaps. CSOs are tasked with challenging legislation, transforming norms and attitudes, advocating for a more just society, and responding to the needs of LGBTQI+ people through direct (formal and informal) interventions. This responsibility is onerous considering the resource and capacity limitations of CSOs.

The Government has a responsibility to enact legislation that affirms and protects the rights of LGBTQI+ people, proscribe violence commonly experienced by the community, and ultimately to create an environment that provides LGBTQI+ people with the opportunity to maximise their potential as equal citizens of Trinidad and Tobago.

The UNDP's recommendations, the Wholeness and Justice 2022 Insights Report, and the Alliance for Justice and Diversity's 2020 LGBTI Policy Agenda inform the following recommendations to the Government of the Republic of Trinidad and Tobago and related stakeholders. Implementing these will indicate that the government, as duty bearer, respects, protects and fulfils the rights of all LGBTQI+ people, as equal rights-holders in Trinidad and Tobago. Among these rights are, the right to legal protection from arbitrary infringements of human rights, the right to equitable access to public services and the right to access redress, when an infringement occurs.





- 1) Create safe and affordable housing for LGBTQI+ people, especially youth and those who experience family violence in homes, and gender-based violence in state care.
- 2) Engage in legislative review regarding non-discrimination and enact laws that specifically prohibit discrimination based on sexual orientation, gender identity and expression, and sexual characteristics (SOGIESC). This includes making amendments to the Equal Opportunity Act to reflect this.
- 3) Update social welfare policies that limit or prevent access to services, namely the “fixed address” and “opposite-sex relationship” requirements, which discriminates against people in need of social services who do not have stable or permanent housing and those in same-sex relationships.
- 4) Support capacity-building and gender and LGBTQI+ sensitivity training for public servants (including police officers and healthcare workers) who are key stakeholders in providing social services.
- 5) Provide concrete and responsive mechanisms for complaint and redress when public servants infringe rights.
- 6) Provide continuous training of judicial officers – especially as it relates to the 2020 Amendments to the Domestic Violence Act.
- 7) Implement the Judiciary of Trinidad and Tobago’s “Gender Equality Protocol for Judicial Officers” in a way that recognises and includes LGBTQI+ people, particularly people of trans experience and gender diverse identities.
- 8) Engage meaningful dialogue with organisations working with the LGBTQI+ community – on community needs and support social services navigation.
- 9) Ensure LGBTQI+ groups and vulnerable people are represented and included in law reform to protect and promote rights and address issues that concern them.



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Websites:

Add All Three Campaign | CAISO: Sex and Gender Justice. caisott.org

LGBTI Policy Agenda | Sexual Culture of Justice Project. Knowledge Portal. portal.caribbeansexualities.org

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