



Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in BARBADOS

A Shadow Report

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Global Rights

International Gay and Lesbian Human Rights Commission

Introduction

Barbados ratified the ICCPR on March 23, 1976 and will present their regular report to the UN Committee that monitors the ICCPR on March 21, 2007. The University of Virginia Human Rights Advocacy Seminar is honored to have the opportunity to participate in the production of this shadow report on the status of lesbian, gay, bi-sexual, transgender, and intersex (LGBT) individuals in Barbados. Working in cooperation with Global Rights and their contacts in Barbados, we gathered information in this report and now present it as a starting point for advocacy of greater protection and promotion of the rights of LGBT persons in Barbados.

We hope that the findings in this report will be useful to the Human Rights Committee and serve as a catalyst for future advocacy efforts.

Dania Davy (J.D. expected '08)
daniad@virginia.edu

Kathryn Finley (J.D. expected '09)
kbf7c@virginia.edu

Jeremy Merkelson (J.D. expected '09)
jbm8w@virginia.edu

Professor Deena Hurwitz
Professor, Human Rights Advocacy
deena@virginia.edu

Mark Bromley
Director of External Relations and Policy, Global Rights
MarkB@GlobalRights.org

Stefano Fabeni
Director, LGBTI Initiative, Global Rights
StefanoF@GlobalRights.org

Executive Summary

Section 23 of the Barbados Constitution provides that “no law shall make any provision that is discriminatory either of itself or in its effect” and that “no person shall be treated in a discriminatory manner by any person by virtue of any written law or in performance of the functions of any public office or any public authority.”¹ Despite such a resounding proclamation against discrimination, LGBT individuals in Barbados face an ongoing battle for basic human rights which are denied on the basis of their sexual orientation and gender identity.

The central, most egregious violation of LGBT rights in Barbados is the state’s criminalization of same sex sexual activity. The buggery laws, as they are known, typically apply in an arbitrary fashion only to homosexuals, reflecting a wider cultural consensus regarding the immorality of non-heterosexual human relationships. These discriminatory state sanctioned provisions serve as the foci around which other substantive violations of the ICCPR occur in Barbados. Such violations include the arbitrary detention and imprisonment of LGBT persons, degrading treatment and punishment, deprivation of liberty, and capricious withholding of benefits to de facto same-sex couples.

Despite numerous instances of discrimination against LGBT individuals in Barbados, such as those chronicled in this report, and the fact that the ICCPR clearly prohibits such conduct, the Government of Barbados did not see fit to mention the need to protect LGBT rights among its priorities in its most recent periodic report to the Human Rights Committee.² Despite such lack of attention, Barbados continues to have an obligation under the ICCPR to guarantee fundamental human rights to all persons, including LGBT individuals.

This shadow report is designed to highlight a variety of substantive violations of the Convention, followed by a series of questions geared towards helping the Committee better understand the steps the state government is taking to ensure that LGBT human rights are protected in Barbados.

¹ The Constitution of Barbados, §23, para. 1.

² Initial Report Submitted by Barbados to the Human Rights Committee, U.N. Doc CCPR/C/BRB/2006/3, September 25, 2006.

Substantive Violations of the Convention

Articles 2(1) and 26 (Non-discrimination)

Articles 2(1) and 26 of the ICCPR set out the non-discrimination standards to which signatories will be held. Under Article 2(1), a state party “undertakes to respect and to ensure to all individuals within its territories and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.” Article 26 recognizes that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law,” prohibiting “any discrimination,” and “guarantee(s) to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.”

In *Toonen v Australia*,³ the Human Rights Committee considered the criminalization of private sexual activity between consenting same-sex adults and found that such laws violated Articles 2(1), 17, and 26 of the Covenant. That decision has been referenced many times by the Committee, by other treaty bodies, and by the UN special procedures when affirming that Articles 2(1) and 26 of the Covenant prohibit discrimination based on sexual orientation.

Chapter 154, §9 of the Laws of Barbados, defines the sexual offence of “buggery” and provides for punishment: “A person who commits buggery is guilty of an offense and is liable on conviction on indictment to imprisonment for life.” Barbados’ criminalization of sodomy has the effect of amounting to *per se* discrimination against homosexuals, as is discussed below.

Similarly, §§11-12 of the Laws of Barbados (attached), which define and proscribe the crimes of “Indecent Assault” and “Serious Indecency”, are troublesome because of their vague definition of “serious indecency” as “an act, whether natural or unnatural by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.” The use of the word “unnatural” in the definition of the crime parallels the statute at issue in *Toonen* that outlawed “intercourse against nature.”⁴ These laws can be easily engineered to target and prosecute homosexuals and, more generally, all non-reproductive sexual behavior.

The effect of having legal penalties for sodomy and for vaguely defined “indecent” acts is that even when they are not enforced, these laws strengthen social stigma against homosexuals. That stigma, in turn, can be even more effective than legal penalties in stripping individuals of the economic, social, and political rights guaranteed to them

³ *Toonen v. Australia*, Communication no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

⁴ *Toonen v. Australia*.

under the ICCPR.⁵ When a homosexual person cannot find employment, secure adequate housing, or get proper medical treatment because of social stigma, these difficulties amount to deprivations of life, liberty, health and opportunity on the basis of sexual orientation. Barbados' law criminalizing sodomy reinforces the animus that enables these violations to occur.

The U.S. State Department Country Report for Barbados in 2005 states that although no statistics were available, anecdotal evidence suggests that societal discrimination against homosexuals occurred.⁶ The continuing existence of discrimination against homosexuals reinforces the need for the state to end the prohibition against private homosexual behavior embodied in §§9, 11 and 12 of the Laws of Barbados. Repealing these provisions would be an affirmative and much-needed step, in ending discrimination on the basis of sexual orientation and gender identity in Barbados.

Notably, the law criminalizing sodomy is also detrimental to Barbados' efforts toward HIV/AIDS education, prevention and care. In *Toonen v Australia*, the Human Rights Committee noted that the criminalization of homosexual practices "could not be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS."⁷ In fact, as the State party in that case commented, "'statutes criminalizing homosexual activity tend to impede public health programmes by driving underground many of the people at the risk of infection.'" The Committee concluded in *Toonen* that "(c)riminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus."⁸

In September 2006, the Minister of State for the Ministry of Foreign Affairs and Trade in Barbados said in a speech given at the Fifth Caribbean Chiefs of Mission Conference on HIV/AIDS that HIV/AIDS "poses the single greatest threat to the region's security."⁹ A UNAIDS report similarly finds that AIDS-related illnesses are the leading cause of death for people ages 15-44 in the Caribbean.¹⁰

The U.S. State Department Report¹¹ described efforts by the government of Barbados to institute programs to discourage discrimination against HIV/AIDS infected persons.

⁵ See, J.S. Mill, *On Liberty*. "(T)he chief mischief of the legal penalties is that they strengthen the social stigma. It is that stigma which is really effective... (it) is as efficacious as law; men might as well be imprisoned, as excluded from the means of earning their bread."

⁶ U.S. State Department Country Conditions Report on Barbados 2005 (March 8, 2006, hereafter "State Department Report on Barbados"), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61715.htm>.

⁷ *Toonen v. Australia*, Communication no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

⁸ *Id.*

⁹ Global Health Reporting.org, *HIV/AIDS in Caribbean Is "Single Greatest Threat" to Region's Security; More U.S. Funding Is Needed, Official Says*, (Sept. 28, 2006), available at: http://www.kaisernetwork.org/daily_reports/rep_index.cfm?hint=4&DR_ID=40097.

¹⁰ *Id.*

¹¹ US State Dept Report 2005.

While this is a positive step, it also underscores the continuing problem of discrimination against HIV/AIDS infected persons.

The 2006 UNAIDS report states that in Barbados, significant at-risk groups for HIV include homosexual and bisexual persons as well as sex workers.¹² These groups, the report finds, tend to be mainly inaccessible due to the stigma and discrimination stemming from cultural, religious, and social taboos and beliefs. Preliminary evidence also indicates that the growth of the AIDS epidemic is fastest within these groups.¹³ A positive finding of the report was that baseline studies to identify prevalence of HIV and AIDS among homosexuals, bisexuals, and sex workers in Barbados are presently underway and being executed by the NHAC, Ministry of Health, and other NAP partners.¹⁴

The Constitution of Barbados itself is one of the strongest sources of support for the repeal of the anti-sodomy law. The State Party Report submitted to the Human Rights Committee by Barbados on July 10, 2006 reports that §23(1) of the Constitution has three basic effects. It makes unconstitutional (i) any laws which are *ex facie* discriminatory; (ii) any laws which are discriminatory in their effect upon persons; and (iii) any discriminatory action by the State in the exercise of its administrative, judicial and executive functions.¹⁵

Under this constitutional interpretation, as applied by the state party itself, Chapter 154, §§ 9, 11, and 12 of the Laws of Barbados, as laws that are *ex facie* discriminatory and which have a discriminatory effect upon homosexuals, appear to be inconsistent with the §23(1) of the Constitution.

The logical next step, then, is for Barbados to reexamine whether §§ 9, 11-12 of the Laws of Barbados are in conflict with the Constitution and the international obligations of the country and repeal them wherever they are found to be discriminatory.

Article 3 (Gender Equality)

The U.N. Special Rapporteur on Violence Against Women considered in her 2005 report the extent to which sexual orientation is a ground of inequality that specifically affects women.¹⁶ Lesbians, transgendered persons, and others who live outside of heterosexual norms are often at risk of violence, rape, and other forms of discrimination, harassment and abuse.

¹² United Nations General Assembly Special Session HIV/AIDS Country Report for Barbados, available at: http://data.unaids.org/pub/Report/2006/2006_country_progress_report_barbados_en.pdf.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Consideration of Report Submitted by Barbados to the Human Rights Committee, UN Doc. CCPR/C/BRB/3, September 25, 2006.

¹⁶ Report of the UN Special Rapporteur on Violence Against Women, Yakin Erturk, "Integration of the Human Rights of Women and the Gender Perspective", p. 50, para. 179, UN Doc. E/CN.4/2005/72/Add.1 (March 18, 2005).

While statistics are generally unavailable regarding discrimination against lesbian women in Barbados, wherever discrimination against homosexuals exists generally, as in Barbados, lesbian women are a population in need of special protection, given the potential difficulties they may face as women and also as persons living outside of traditional heterosexual norms.

Article 7 (Freedom from Torture and Cruel, Inhuman and Degrading Treatment or Punishment)

Given the widespread incidence of violence against LGBT persons, the international community has started to pay attention to the specific violations of Article 7 with respect to these individuals. The UN Special Rapporteur on the Question of Torture and other Cruel, Inhuman, or Degrading Treatment published a report in 2001 that specifically addressed this issue. The report showed that sexual minorities are disproportionately affected by torture because they do not conform to expected roles or identities.¹⁷ The report summarized that these violations are fundamental breaches of respect for these individuals' humanity which is a clear violation of Article 7 of the ICCPR.

The US State Department Country Conditions Report, published in 2005, reported that while there was no evidence that the government or its agents committed politically motivated killings, there were at least two deaths in the nation's temporary detention facility. The authorities officially charged an inmate with the killing of Junior Boyce and an investigation was opened into the role of the police in shooting inmate Dwayne O'Brian Harding.¹⁸ The inmates had been transferred to the temporary facility after the nation's only correctional facility, Glendairy Prison, was destroyed by fire. In 2006, an article published in the *Barbados Nation News* suggested that there may be a link between rape, prison guard indifference toward this practice among inmates, and the setting of the fire.¹⁹

A preliminary investigation into the fire revealed that inmates believed it was started because one prisoner attempted to force himself on another.²⁰ While this investigation has yet to be concluded, it appears to suggest that LGBT individuals may be attacked or victimized because of the perceived sexual orientation about who is committing these rapes. Officer indifference to this problem may also be characterized as unusual punishment given the unique status of LGBT individuals in prisons.

NGOs have collected stories of various incidents of torture against LGBT persons. One organization, United Gays and Lesbians Against AIDS Barbados (UGLAAB), reports that for a long time "gay-bashing" has been a part of the "party culture" in Barbados.²¹

¹⁷ Report of the UN Special UN Special Rapporteur on the Question of Torture and other Cruel, Inhuman, or Degrading Treatment, Nigel Rodley, p. 6 (UN Doc. A/56/156. July 3, 2001).

¹⁸ US State Dept. Report 2005.

¹⁹ Sanka Price, Is Rape a Major Issue in Prison?, *Barbados Nation News*, March 26, 2006.

²⁰ *Id.*

²¹ "Gays Justice Done" *Barbados Nation News*, February 17, 2007.

These unofficial reports, together with official documentation, suggest that torture and other forms of unusual treatment are not being adequately addressed by the government.

Article 9 (Right to Liberty and Security of Person)

Many of the violations already noted above can properly be characterized as violations of the right to security of person. Article 9 prohibits arbitrary arrests and unjustified detention and prosecution. While there are few official reports of arbitrary arrests, the legal landscape suggests that there may be biased policing and criminalization of LGBT persons.

As previously noted, Ch. 154, §9 of the Barbados Code on Sexual Offenses prohibits buggery. The offense is punishable up to imprisonment for life.²² The offense is not clearly defined, but case law suggests that buggery involves at least one form of same-sex intercourse. In 2002, the court in *Hunte v. The Queen* overruled the conviction of a man who was prosecuted under this law.²³ While the outcome was favorable, this prosecution shows that the law is still active and continues to carry the potential for criminalizing homosexuality in Barbados. This law appears to give police broad discretion in determining what is included under the definition of buggery. However, in its application, the evidence suggests that it is only being applied to same-sex sexual behaviors. Furthermore in *Toonen*, the court held that a similar law that was not even being enforced violated the ICCPR.²⁴

LGBT sex is unfairly criminalized under Barbados' buggery statute, which is arbitrarily applied to discriminate against persons who do not subscribe to traditional heterosexual norms. Such laws pose the added risk of perpetuating existing cultural stereotypes and, ultimately, justifying violence against people based on their sexual orientation and gender identity.

Article 10: Treatment of Individuals Deprived of Their Liberty

As discussed earlier, LGBT persons face specific dangers in the prison context. While some effort has been made to address the problem of rape in the prisons, it appears that this violence may be underreported and not adequately addressed by prison officials.

A 2006 article published in the *Barbados Nation News* acknowledges that the worldwide phenomenon of homosexuality in prisons is also prevalent in Barbados. It further reports that same-sex intercourse is often rape rather than consensual.²⁵ In the article, prison officials argue that there are reporting mechanisms that could remedy the situation. However, even they admit that men generally under-report rape in the prison context.²⁶ Placing the reporting burden on inmates may have a disproportionate impact on persons

²² Barbados Code on Sexual Offenses Ch. 154, §9

²³ *Hunte v. The Queen*, Supreme Court of Judicature, Barbados (2002).

²⁴ *Toonen v. Australia*, Communication no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

²⁵ Sanka Price, Is Rape a Major Issue in Prison?, *Barbados Nation News*, March 26, 2006.

²⁶ *Id.*

abused on grounds of their real or perceived sexual orientation or gender identity. It appears to be minimizing the role of the government and police guards in eliminating rape and violence in prison.

After the Glendairy fire, one inmate, Keith Fields, held at the temporary prison while awaiting trial, told a judge that conditions at the prison were dangerous. He reported that he had to be hospitalized after being beaten and stabbed by other inmates.²⁷ This is significant for many reasons, not the least of which is because of the perception of who is committing these rapes. If inmates believe that homosexuals in prisons are potential rapists, animosity toward people suspected of being homosexual may drive the violence within the prisons.

Thus, LGBT persons are uniquely at risk of this kind of violence given their perceived role in prison rapes. Even if there are complaint mechanisms in place, access to complaint procedures is limited because of the unique nature of the status of LGBT persons in prisons.²⁸

Article 23 (Family Life)

The right to same-sex marriage is not officially recognized under the ICCPR. In *Joslin v. New Zealand*,²⁹ the Human Rights Committee held the refusal of a state party to allow same-sex couples to marry was not a violation of Article 23, because paragraph 2 clearly refers to “a man and a woman” with respect to the right to marry. This designation, the Committee found, was consistent not only with practices around the globe, but also with the nature of marriage as recognized by Article 16 of the Universal Declaration of Human Rights.³⁰ Two concurring Commissioners noted, however, that the Committee’s conclusion should not be read as a general statement that differential treatment between heterosexual and same-sex couples would never amount to a violation of Article 26. Just one year later, the Committee’s jurisprudential interpretation of Article 26 evolved to reflect this proposition. In *Young v. Australia*, the Human Rights Committee held that a state party’s failure to grant de facto same-sex couples benefits available to de facto couples of the opposite sex violates Article 26.³¹ This ruling may ultimately have an impact on the protection of family life under Article 23, especially in nations where there is a simultaneous ban on same-sex marriage and a refusal to grant same-sex couples benefits otherwise available to non-married heterosexual couples.

In Barbados, same-sex marriages are prohibited by law. Under the Family Law Act, marriage is recognized as the exclusive union of a man and a woman “to the exclusion of

²⁷ US State Dept. Report 2005.

²⁸ Report of the UN Special UN Special Rapporteur on the Question of Torture and other Cruel, Inhuman, or Degrading Treatment, Nigel Rodley, p. 6 (UN Doc. A/56/156. July 3, 2001).

²⁹ Communication No. 901/1999.

³⁰ *Id.*, citing the Universal Declaration of Human Rights of 1948.

³¹ Communication No. 941/2000 (a government may not refuse to grant pension benefits to homosexual couples when such benefits are made available to heterosexual couples).

all others.”³² At the same time, common law unions are recognized under the Act as a de facto relationship established solely between a man and a woman.³³ The law provides benefits for both married and unmarried heterosexual couples, but does not provide any shelter for de facto same-sex couples. Alas, Barbados appears to be doing exactly what was prohibited in *Young*: preserving legally sanctioned provisos against equal benefits for unmarried same sex and heterosexual couples. Such a law is not merely indicative of a set of cultural preferences regarding family life; it legitimizes systematic oppression against and differential treatment of same sex couples.

Concluding Notes

- The buggery laws of Barbados effectively criminalize consensual homosexual relations, providing for the possibility of life imprisonment. Beyond establishing a legal ground for the deprivation of life, liberty, health and opportunity, these laws preserve ingrained stereotypes about LGBT individuals and, in effect, serve to strengthen social stigmas against them. Ultimately, these laws are in conflict with the constitutional prohibition against discrimination in Barbados, as well as Articles 2(1) and 26 of the ICCPR.
- The discriminatory culture and legal sanctioning of discrimination against LGBT individuals in Barbados stymies the state party’s efforts to provide effective education, prevention and care programs to individuals with HIV/AIDS.
- The failure of the criminal justice system to effectively investigate and prevent violence against persons detained in government correctional facilities because of their real or perceived sexual orientation reflects the larger culture in support of “gay bashing” in Barbados. Such failure suggests that torture and other forms of unusual treatment are not being adequately addressed by the government.
- The current reporting mechanisms for violence in prison facilities are not adequately tailored to meet the needs of LGBT inmates because they place the entirety of the reporting burden on inmates. The expansion of the reporting burden to government correctional workers and prison guards, in addition to inmates, would help relieve the problem of underreporting of prison rapes and, ultimately, allow the government to more effectively assess and relieve the problems associated with sexually motivated prison violence.
- The Family Law Act preserves benefits for heterosexual couples both married and in common law relationships. Yet such benefits are not available to unmarried de facto same sex couples. Such differentiation with respect to government benefits is not only ex facie discriminatory, but also helps legitimize systematic oppression against and differential treatment of LGBT individuals in Barbados.

³² Family Law Act of Barbados, Cap. 214, para. 388. *See also* Initial Report Submitted by Barbados to the Human Rights Committee, U.N. Doc CCPR/C/BRB/2006/3, September 25, 2006.

³³ *Id.*, at para. 399.

Proposed Questions for the Government Delegation

- Has the government considered eliminating the buggery laws so that policing of that crime will not have a disproportionate burden on LGBT persons?
- Have prison officials made any efforts to ensure that the reporting mechanisms currently in place for reporting violence and rape among inmates is tailored to meet the unique needs of LGBT individuals who may not currently have real access to these mechanisms?
- Why hasn't the government conducted a thorough investigation into the many allegations of the role that violence against LGBT persons play in the nation's "party" culture? What efforts are being made to eliminate the random acts of violence that are reportedly occurring against LGBT persons as a part of the nation's "party culture"?
- What steps is the Government taking to ensure that the Family Law Act does not institutionalize differential treatment between de facto same-sex and heterosexual couples?
- Is the government providing HIV/AIDS education targeted to same sex as well as heterosexual citizens?
- Has the government inquired into the issue of discrimination against those affected by HIV/AIDS?