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5559173. Charity number
1113288.

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Parallel report submitted to the 52nd session of the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) in relation to the combined sixth and seventh periodic reports submitted by:

Jamaica

June 2012

Statement of Interest

1. The Equal Rights Trust (ERT) submits this parallel report to the United Nations Committee on the Elimination of Discrimination Against Women (the Committee) for the review of the combined sixth and seventh periodic reports by Jamaica under Article 18 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (the Convention).
2. ERT is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. Established as an advocacy organisation, resource centre and think tank, it focuses on the complex relationship between different types of discrimination and inequality, developing strategies for translating the principles of equality into practice.
3. In the course of its mission, ERT undertakes research on the patterns of discrimination and inequality – including discrimination and inequality affecting women – which prevail in different states, and of the adequacy of domestic legislation and policy to address these forms of discrimination and disadvantage. In respect of Jamaica, ERT has undertaken research on the major patterns of discrimination in the country and on the legal and policy framework designed to provide protection from discrimination in the course of its global research and advocacy efforts.

Executive Summary

4. This present parallel report draws on ERT's research on discrimination and inequality in Jamaica. In the light of this information, it seeks to assess the adequacy and effectiveness of legal provisions designed to provide protection from discrimination against women. This report seeks to highlight some areas of concern and to make recommendations to inform the effective implementation of the Covenant. In this respect, this report focuses on two types of problem which ERT believes should be addressed: (i) Gaps, inconsistencies and exceptions in the legal framework which limit Jamaica's ability to comply with its obligations arising under Article 2 of the Convention; (ii) Problems with implementation and enforcement of laws which exist to provide protection from some forms of gender discrimination. The report finds that the lack of comprehensive anti-discrimination legislation in Jamaica represents a failure by the state party to meet its specific obligation under Article 2(b) and means that Jamaica is ill-equipped to meet its obligations under Article 2 (c) and (e).
5. The assessment of Jamaica's obligations in respect of the right to non-discrimination is informed by the Committee's elaboration of state obligations under Article 2 in its *General Comment 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women* (General Comment 28) and by the Declaration of Principles on Equality (the Declaration), a document of international best practice on equality. The Declaration was drafted and adopted in 2008 by 128 prominent human rights and equality advocates and experts, and has been described as "the current international understanding of Principles on Equality".¹ It has also been endorsed by the Parliamentary Assembly of the Council of Europe.²
6. Basing its analysis on these two documents, ERT recommends that the government of Jamaica takes steps to improve the legal protection from discrimination in Jamaica. It recommends amendments to Section 13(3)(i) of the Constitution of Jamaica, as recently amended by the *The Charter of Fundamental Rights and Freedoms (Constitutional Amendments Act) 2011*. It urges the Committee to call on Jamaica to improve its legislation on equality and non-discrimination, in particular through developing comprehensive anti-discrimination legislation in order to meet its obligations under Article 2. Finally, it recommends that the government ensures it fulfils its obligations through: the establishment of an effective and independent National Human Rights Institution with a mandate including equality and non-discrimination; and the development and implementation of positive action measures. It also recommends that the government ensures the effective implementation of provisions designed to prohibit discrimination.

Article 1 – Discrimination

7. ERT notes the recent adoption of *The Charter of Fundamental Rights and Freedoms (Constitutional Amendments Act) 2011* (the Charter) which amends the Constitution of Jamaica to include a new Charter of Fundamental Rights and Freedoms. We welcome the Charter as a significant improvement on the human rights provisions in the original Constitution. ERT notes that section 13(3)(i) of the Charter provides a right to non-discrimination on a number of grounds including "on the ground of being male or female". We also note and welcome the fact that section 13(3)(i) omits a number of important exceptions found in its predecessor under the Constitution before its amendment, which had substantially restricted the scope of the right to non-discrimination.
8. However, we have a number of concerns about the right to non-discrimination provided under

¹ *Naz Foundation v. Government of NCT of Delhi and Others* WP(C) No.7455/2001, Para. 93.

² Parliamentary Assembly of the Council of Europe, *Resolution and Recommendation: The Declaration of Principles on Equality and activities of the Council of Europe*, REC 1986 (2011), 25 November 2011, available at: http://assembly.coe.int/ASP/Doc/ATListingDetails_E.asp?ATID=11380.

the Constitution as amended by the Charter. In particular, ERT is concerned that there is no legal definition of discrimination against women in either the Constitution or elsewhere in Jamaican law. ERT is concerned that without such a definition, the Constitution will be interpreted narrowly and that the Constitution will thus be insufficient to address all forms of discrimination, including indirect discrimination and harassment in particular.

9. ERT therefore calls on the Committee to urge the government of Jamaica to amend Article 13(3)(i), in order to ensure that the right to non-discrimination therein reflects the formulation in Article 1 of the Convention.

Article 2 – Policy Measures

10. Under Article 2 of the Convention, State Parties undertake to “condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women” and to “embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle”. The Committee, in its General Comment 28, has elaborated on the nature of states’ obligation arising under Article 2, stating that:

*Article 2 is crucial to the full implementation of the Convention since it identifies the nature of the general legal obligations of States parties. The obligations enshrined in article 2 are inextricably linked with all other substantive provisions of the Convention, as States parties have the obligation to ensure that all the rights enshrined in the Convention are fully respected at the national level.*³

11. Expanding on this statement, the Committee has confirmed that the obligation on state parties under Article 2 has three elements. States are required to *respect* the right to non-discrimination by refraining from “making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights”;⁴ to *protect* the right by “protect[ing] women from discrimination by private actors and tak[ing] steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes”;⁵ and to *fulfil* the right by adopting a “wide variety of steps to ensure that women and men enjoy equal rights de jure and de facto, including, where appropriate, the adoption of temporary special measures”.⁶
12. As stated above, in ERT’s view, section 13(3)(i) of the Charter is insufficient to ensure that Jamaica’s obligations to *respect* and *protect* women’s right to non-discrimination in respect of human rights and fundamental freedoms in all areas of public and private life are met. Furthermore, the absence of either comprehensive or specific anti-discrimination law means that the state party falls short of its obligation to *protect* the rights of women and is inadequately served in its attempts to *fulfil* the rights of women to non-discrimination.

³ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the core obligations of States parties under article 2*, CEDAW/C/GC/28, 2010, Para 6.

⁴ *Ibid.*, Para 9.

⁵ *Ibid.*

⁶ *Ibid.*

Constitutional Provisions

13. As the Committee has stated, “states parties have an obligation not to cause discrimination against women through acts or omissions”,⁷ which arises under Article 2(d) in particular. This is an essential element of the state's obligation to respect the right to non-discrimination by refraining from discrimination in law and action. States also have an obligation to provide effective protection from discrimination by agents of the state, as well as private actors. Meeting these twin obligations requires, at minimum, a clear prohibition on discrimination in a state's Constitution, and measures to ensure that state actors act in accordance with this prohibition.
14. As noted above, the recent amendment of the Constitution of Jamaica has introduced a number of important reforms which extend the legal rights available to people in Jamaica and bind the state and its agents. Section 13(3)(i) of the Constitution of Jamaica, as amended by the Charter, establishes “the right to freedom from discrimination on the ground of (i) being male or female”.⁸ Section 13(4) states that the provisions of the Charter apply “to all law and binds the legislature, the executive and all public authorities”. In essence therefore, section 13(3)(i) both provides a framework to meet the obligation to refrain from discrimination, and meets the obligation to provide protection from discrimination by state actors.
15. In a number of important ways, section 13(3)(i) of the Charter represents an improvement on the provision which it replaced in the unamended Constitution. Notably, it omits a number of exceptions contained in subsections (4) to (8) of the unamended Constitution. The exceptions in subsections (4) to (6) limited the application of the right to non-discrimination such that it did not apply with respect to, *inter alia*, non-citizens, laws related to “adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law”, measures taken by the government in respect of taxation or appropriation of revenue and qualifications required for positions in employment in the service of the state. Of particular concern, subsection (7) excluded the application of limitations on a number of civil and political rights from the scope of the prohibition on discrimination, while subsection (8) excluded the exercise of “any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings” from this prohibition. Taken together, these exceptions provided substantial scope for the state to engage in the adoption of discriminatory laws or the implementation of discriminatory actions. The result was a large area of impunity for the state in respect of discriminatory acts against particular groups or individuals. Thus, the fact that section 13(3)(i) of the Charter does not reproduce these provisions is welcome.
16. However, there remain a number of problems with the scope and application of the protection from discrimination provided under Article 13(3)(i). First, the provision does not explicitly prohibit the different forms of discrimination which are accepted as essential elements of a modern equality guarantee. Thus, it does not refer to direct and indirect discrimination, as required by the Committee in its General Recommendation 28.⁹ In addition, the Constitution does not explicitly prohibit discrimination by association, segregation or harassment. The Declaration of Principles on Equality includes all these forms of discrimination in its definition of discrimination.¹⁰ In the view of ERT, the fact that Article 13(3)(i) does not explicitly cover these forms of discrimination represents a failure of the state party to ensure that its Constitution effectively prohibits all forms of discrimination and provides for substantive, rather than solely formal equality, in accordance with current best practice.

⁷ See above, note 3, Para 10.

⁸ The Constitution of Jamaica, Chapter III, Section 13(3)(i), as amended by The Charter of Fundamental Rights and Freedoms (Constitutional Amendments) Act, 2011

⁹ See above, note 3, Para. 16.

¹⁰ *Declaration of Principles on Equality*, published by The Equal Rights Trust, London 2008, Principle 5.

17. There are also a number of problems posed by the list of prohibited grounds of discrimination provided in Article 13(3)(i). While the Charter, by prohibiting discrimination “on the ground of being male or female” should provide effective protection from discrimination which arises on the basis of both biological sex and socially-defined gender, the list of grounds is restrictive in such a way as to limit the scope of protection available to women. In particular, we note that the inclusion of “pregnancy or maternity” and “civil, family and carer status” as protected grounds would substantially increase the protection which women enjoy. Moreover, the Committee has stressed the obligation for state parties to adequately prohibit discrimination on other grounds which may affect women as an inherent element of state obligations under Article 2.¹¹ Thus, the absence of “age”, “disability”, “sexual orientation” and “gender identity” from Articles 13(3)(i) – all of which are acknowledged grounds in a range of jurisdictions and international instruments¹² – represents a cause for concern.
18. Further to these concerns, ERT notes the use of a “closed list” of grounds in Article 13(3)(i), limiting the protection from discrimination to only the grounds of “being male or female” and “race, place of origin, social class, colour, religion or political opinions”. This restrictive approach denies the Jamaican courts the opportunity to add new grounds – including those referred to in General Comment 28,¹³ but also emerging grounds, such as fertility status – which are analogous to those explicitly listed. The effect is that women who face discrimination on any ground other than those listed in the Constitution will not be protected. The drafters of the Declaration of Principles on Equality regarded the use of a “conditionally open” list of grounds – which provides a test to establish the admission of new grounds as the best approach to determine whether new grounds should be incorporated; ERT would recommend this as a best-practice approach to this question.¹⁴
19. The impact of the lack of protection from discrimination on a broader list of grounds is further exacerbated by the lack of provision for multiple, including intersectional discrimination, as mentioned above. In General Recommendation 28, the Committee has explicitly stated that “[i]ntersectionality is a basic concept for understanding the scope of the general obligations of states parties contained in article 3” and as such, both the restricted and restrictive list of grounds and the absence of multiple discrimination provisions in the Charter are a cause for concern.¹⁵
20. ERT is concerned that the scope and definition of the right to non-discrimination provided in section 13(3)(i) of the Charter of Fundamental Rights and Freedoms is inconsistent with the requirements placed on states by Article 2, as elaborated by the Committee in General Recommendation 28. ERT therefore calls on the Committee to urge the government of Jamaica to amend Article 13(3)(i), in particular by ensuring that the constitutional provisions on the rights to equality and non-discrimination:
- a. Define the right to non-discrimination in such a way as to meet the requirements of Article 1 of the Convention;
 - b. Explicitly prohibit direct and indirect discrimination, multiple discrimination, discrimination by association, segregation and harassment and make provision for the achievement of substantive equality;

¹¹ See above, note 3, Para. 18.

¹² See, for example, Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2009, Paras 18 – 35.

¹³ See above, note 3, Para. 18.

¹⁴ See above, note 10, Principle 5.

¹⁵ See above, note 3, Para. 18.

- c. Explicitly prohibit discrimination on grounds of pregnancy or maternity, civil, family or carer status, age, disability, sexual orientation and gender identity, in addition to those grounds currently protected;
- d. Provide a test for the incorporation of new grounds of discrimination in line with that recommended in the Declaration of Principles on Equality.

Other Measures to Protect the Right to Non-discrimination

21. In addition to its obligation to respect the right to non-discrimination by refraining from discrimination in laws or actions of the state and its agents, Jamaica has “a due diligence obligation [...] to prevent discrimination by private actors”.¹⁶ The Charter - in addition to providing protection from discrimination from state actors - meets this obligation to a limited extent: section 13(5) states that each provision of the Charter, including the right to non-discrimination provided under section 13(3)(i), “binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right”.
22. As has been noted above however, despite improving on its predecessor, section 13(3)(i) is problematic in a number of ways, providing inadequate protection from discrimination, both in respect of the forms of discriminatory conduct which are explicitly covered and the grounds on which discrimination is prohibited.
23. Moreover, the Convention, the Committee, other treaty bodies such as CESCR,¹⁷ and the authors and signatories of the Declaration,¹⁸ have all recognized that in order to provide effective protection from discrimination, states are required to go beyond a prohibition of discrimination in their Constitution, and must also adopt specific anti-discrimination legislation. Thus, Article 2(b) of the Convention specifically requires states to “adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women”, while the Committee has stated that states must “enact legislation that prohibits discrimination in all fields of women’s lives under the Convention and throughout their lifespan.”¹⁹
24. Jamaica has only limited legislation prohibiting discrimination against women. The *Employment (Equal Pay for Men and Women) Act 1975* states that employers who fail to provide equal pay for equal work discriminate between male and female employees and are subject to penalty. Thus, it discharges one aspect of Jamaica’s obligation to provide protection from discrimination in respect of women’s participation in employment, that required by Article 11(d) of the Convention. In addition, the *Domestic Violence (Amendment) Act 2004* and the *Sexual Offences Act 2011* provide protection from different forms of gender-based violence. Each of these Acts, discussed in more detail below, provides some minimal measure of legislative protection from gender discrimination for women in Jamaica, though significant gaps in the legal protection for women remain.
25. As is clear from Article 2(b) of the Convention, to make the right to non-discrimination effective in practice, specific, detailed legislation is necessary to define and prohibit all of the different forms of discrimination against women. This view is further endorsed in the Declaration, Principle 15 of which states that “[t]he realisation of the right to equality requires the adoption

¹⁶ See above, note 3, Para 13.

¹⁷ See above, note 13, Para 37.

¹⁸ See above, note 10, Principle 15.

¹⁹ See above, note 3, Para 31.

of equality laws and policies that are comprehensive and sufficiently detailed and specific to encompass the different forms and manifestations of discrimination and disadvantage”.²⁰ Such anti-discrimination legislation should apply to both state and non-state actors; prohibit discrimination in all areas of life governed by law; and define and prohibit direct discrimination, indirect discrimination and harassment in accordance with definitions accepted by the Committee. The absence of non-discrimination provisions in the aforementioned areas therefore represents a failure by the state party to meet its obligations under Article 2.

26. ERT is also concerned that, in the absence of such legislation, provisions to ensure access to justice, such as provisions for the transfer of the burden of proof in civil cases and measures to ensure standing by associations or other interested parties, which are necessary for the effective protection of the right to equality, are absent from Jamaica’s legislative framework. Again, the Declaration of Principles on Equality provides a clear guide to best practice in this area, which ERT would recommend as a guide to how Jamaica can effectively meet its obligations in this regard.²¹ ERT is concerned that the absence of anti-discrimination legislation containing these provisions means that, in addition to failing to meet its obligations under Article 2(b), Jamaica is also ill-equipped to meet its obligations under Article 2(c) which requires it to ensure “through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”. Without law establishing these critical principles regarding effective access to justice, Jamaican courts will lack the necessary legal tools to ensure women have effective protection from discrimination.
27. ERT is firm in its opinion that the Constitution alone is insufficient to meet Jamaica’s obligations to protect and fulfil the right to non-discrimination arising under Article 2(a), (b), (c) and (e), and believes that these obligations can only be properly met by the enactment of equality legislation. Further, given the importance of protecting women from discrimination on all grounds, and the Committee’s emphasis on the obligation to protect from inter-sectional discrimination, we believe such legislation should be comprehensive, covering a potentially open and extensive list of protected grounds.²² We therefore call on the Committee to urge the government of Jamaica to enact comprehensive equality legislation, ensuring that it:
- a. Prohibits discrimination in all areas of life governed by law, including but not limited to: education, employment, social security (including pensions), health, housing, provision of goods and services (including public services), clubs and associations;
 - b. Prohibits direct and indirect discrimination, harassment, discrimination on the basis of perception and discrimination by association;
 - c. Provides measures for legal aid provision, the transfer of the burden of proof in civil proceedings, the standing of interested parties in cases related to discrimination and other measures necessary to ensure adequate access to justice for victims of discrimination;
 - d. Provides sanctions which are effective, proportionate and dissuasive and which provide appropriate remedies for those whose right has been breached; and
 - e. Requires the state to take all necessary measures to eliminate discrimination and promote

²⁰ See above, note 10, Principle 15.

²¹ See above, note 10, Principle 18 (Access to Justice), Principle 21 (Evidence and Proof), Principle 20 (Standing), and Principle 22 (Remedies and Sanctions).

²² In the view of ERT, in order to provide comprehensive protection for women, such legislation should cover all grounds specified in Principle 5, *Declaration of Principles on Equality*: race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness.

equality, including through the adoption of special measures, and sets out conditions for the appropriate implementation of such measures.

Measures to Fulfil the Right to Non-discrimination

28. In addition to refraining from discrimination in law and actions of the state, and providing protection from discrimination by both public and private actors, state parties to the Convention must ensure that the right to non-discrimination is fulfilled by ensuring its enjoyment in practice. As the Committee has noted, Article 2(e) of the Convention gives rise to an obligation to take a “wide variety of steps to ensure that women and men enjoy equal rights de jure and de facto”.²³ The Committee has recommended that such measures might include *inter alia* the establishment of national human rights institutions, measures to ensure women’s participation in policy formulation, and measures to promote education on the Convention and its goals.²⁴ ERT’s research to date does not permit a full analysis of Jamaica’s performance in all of these areas. As such, in the following paragraphs we select two specific areas of concern with respect to Jamaica’s compliance with its obligation to fulfil the right to non-discrimination: (1) Positive action (the adoption of temporary special measures); (2) The establishment of mechanisms and institutions.
29. As the Committee has noted, the obligation to fulfil the right under Article 2 “encompasses [...] the adoption of **temporary special measures** in accordance with article 4”.²⁵ Elsewhere, the Committee has stated that “States parties should ensure that such temporary special measures are specifically permitted under anti-discrimination legislation or other constitutional guarantees of equality”.²⁶ The Declaration goes further, stating that positive action is required to give effect to the right to equality.²⁷ The government of Jamaica has provided the Committee with some examples of positive action measures it has taken which are consistent with the requirement under the Convention. For example, the government highlights the establishment of the “the Social Protection Project (SPP), as a short-term measure designed to place emphasis on job creation, income support, provide options for further skills training and increased involvement of women”.²⁸ While such measures are to be welcomed, ERT again submits that the absence of a legislative framework governing these activities is likely to limit their effectiveness, reducing such measures to policy aspirations rather than substantive legal obligations.
30. The Committee has noted that states must provide for the establishment of **mechanisms and institutions to address discrimination**, including both “strong and focused bodies [...] within the executive branch of Government” and “independent monitoring institutions”.²⁹ ERT notes that Jamaica has an Office of the Public Defender which has certain investigative powers in relation to constitutional rights.³⁰ We note with concern however that this institution has not been accredited by the International Coordinating Committee of National Institutions for the

²³ See above, note 3, Para 9.

²⁴ See above, note 3, Para. 36.

²⁵ See above, note 3, Para. 20.

²⁶ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 23 on Article 7 (Political and Public Life)*, 1997, Para 33.

²⁷ See above, note 10, Principle 3.

²⁸ Government of Jamaica, *Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Combined sixth and seventh periodic report of States parties: Jamaica CEDAW/C/JAM/6-7*, 2011, Para 86.

²⁹ See above, note 3, Para 28.

³⁰ Public Defender (Interim) Act, 1999.

Promotion and Protection of Human Rights.³¹ ERT submits that a National Human Rights Institution which complies with the Paris Principles is necessary if Jamaica is to effectively fulfil its obligations in respect of the Convention and the rights to equality and non discrimination generally.

31. ERT calls on the Committee to recommend that the government of Jamaica takes measures to give effect to the right to non-discrimination in practice, including by:
- (a) Ensuring, in line with the recommendation at paragraph 27(e) above, that comprehensive anti-discrimination legislation expressly provides for positive action.
 - (b) Enacting legislation which establishes “national women’s machinery within the executive branch of the Government that will take initiatives, coordinate and oversee the preparation and implementation of legislation, policies and programmes necessary to fulfil the obligations of the State party under the Convention”.³²
 - (c) Enacting legislation which establishes a National Human Rights Institution, with a mandate including the right to non-discrimination and the right to equality, which meets all of the requirements of the Paris Principles.

Enforcement of Protective Legislation

32. As highlighted in paragraph 24 above, Jamaica has enacted legislation which provides protection for women in two areas: gender-based violence and equal pay. ERT is concerned by evidence that these legal protections are not effectively enforced, meaning that, irrespective of legislative protection available, women’s rights in these areas are not substantively realised. These concerns are discussed below.

Gender-based Violence

33. As the Committee noted in its General Recommendation 19, gender-based violence “seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men” and is “discrimination within the meaning of article 1 of the Convention”.³³ The Committee has clarified the State’s duty to eliminate gender-based violence and to provide redress, stressing in particular that state parties “may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”.³⁴
34. Two pieces of legislation in Jamaica prohibit gender-based violence and provide redress for victims. The *Domestic Violence Act* creates a regime of Protection Orders and Occupation Orders. Section 4 states that applications may be made for a protection order to prohibit another person from entering or remaining in specific locations and from various acts of harassment. Courts are empowered to make a protection order where they are satisfied that the respondent used or threatened violence or caused physical or mental injury, and is likely to do so again. Section 5(1) states that contravention of a protection order constitutes an offence punishable by a fine of 10,000 dollars or imprisonment for up to six months; section 5(2) provides a power of arrest

³¹ International Coordinating Committee Of National Institutions For The Promotion And Protection Of Human Rights, *Chart of the Status of National Institutions*, December 2011, available at: [http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NHRI%20\(DIC%202011\).pdf](http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NHRI%20(DIC%202011).pdf).

³² See above, note 3, Para 28

³³ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19 on Violence Against Women*, 1992, Paras 1 and 7.

³⁴ *Ibid.*, Paras 10 and 9.

without warrant for the police, where they have reasonable cause to suspect breach of the order. Section 7, coupled with section 9, provides the court with power to grant the applicant an occupation order which entitles the applicant, to the exclusion of the respondent, to occupy a specified residence.

35. The *Sexual Offences Act* proscribes rape and grievous sexual assault, together with a range of other offences. Section 4 states that grievous sexual assault is committed in a number of circumstances, including penetration of the vagina or anus with a body part other than the penis, or another object, oral penetration and causing of another person to undertake such actions. In respect of both rape and grievous sexual assault, the offence is committed where the act is undertaken without consent and where the person undertaking the act either knows that the victim did not consent, or recklessly does not care. Elsewhere, the Act provides that evidence of the previous sexual activity of the victim is only permissible where the leave of the Judge is obtained,³⁵ and protects the anonymity of the complainant.³⁶
36. Section 5 of the *Sexual Offences Act* establishes an offence of marital rape. However, section 5(3) provides a list of circumstances which must exist in order for the offence of marital rape to have been committed. This list is restricted to cases where: (i) spouses have separated; (ii) there is a separation agreement in writing between the spouses; (iii) proceedings for dissolution or decree of nullity have been instituted; (iv) an order for non-cohabitation, non-molestation or ouster from the matrimonial home has been issued against the husband; or (v) the husband knows himself to be suffering from sexually transmitted infection. Thus, the protection from marital rape is severely limited; indeed, it is limited in such a way as to negate the notion that non-consent is the key factor in establishing whether rape has occurred. In cases where spouses are not separated or in the process of separation, the wife has not sought a protection order or similar under the Domestic Violence Act, and where the husband is not suffering from a sexually transmitted disease, women have no protection from marital rape.
37. Aside from this serious problem with the *Sexual Offences Act*, there appears to be a wider problem with the enforcement of both of these laws. Thus, despite the adoption of these pieces of legislation, Jamaica has itself acknowledged that violence against women and children is at unacceptably high levels,³⁷ while Amnesty International, focussing on sexual violence against women, has stated that it remains “widespread” and under-reported.³⁸ These findings indicate that enforcement of the *Domestic Violence Act* and *Sexual Offences Act* is weak. Furthermore, as the UN Country Team has concluded, gender-based violence is not always “viewed as a ‘crime’, but rather as an accepted cultural practice, partially driven by the females’ lower social status and power base in society and there is an “apparent societal acceptance of a man’s right to beat women”.³⁹
38. ERT calls on the Committee to recommend that the government of Jamaica takes measures to improve protection from gender-based violence, including by:
 - a. Amending the *Sexual Offences Act* (last amended 2011) to criminalise all forms of rape equally, by removing the circumstances which define marital rape from section 5 (1) the

³⁵ Sexual Offences Act, section 27.

³⁶ *Ibid.*, section 28.

³⁷ See, for example, Government of Jamaica, *Implementation of the International Covenant on Economic, Social and Cultural Rights: Combined third and fourth periodic reports: Jamaica*, E/C.12/JAM/3-4, 2011, Para 87.

³⁸ Amnesty International *Annual Report 2011: The State of the World’s Human Rights: Jamaica*; Freedom House, *Freedom in the World 2011: Jamaica*.

³⁹ United Nations Country Team and the Government of Jamaica, *United Nations Commons Country Assessment for Jamaica 2006 – 2010*, pp. 9 and 58.

phrase “in any of the circumstances specified in subsection (3)” and also removing the subsection 5(3);

- b. Developing and implementing a comprehensive strategy to combat and eliminate gender-based violence. This should include at least: (i) instituting a programme of public awareness-raising and education aimed at improving societal attitudes towards gender-based violence and increasing awareness of legislation and reporting mechanisms; (ii) ensuring that adequate refuges, shelters or safe housing are available to victims of domestic violence.

Equal Pay

39. Article 11(d) of the Convention provides “[t]he right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value”. The government of Jamaica has adopted *The Employment (Equal Pay for Men and Women) Act* in order to address this issue. Section 3 prohibits employers from discriminating by failing to provide equal pay for equal work.⁴⁰ Equal work is defined in the Act as any work in which “(a) the duties, responsibilities or services to be performed are similar or substantially similar in kind, quality and amount; (b) the conditions under which such work is to be performed are similar or substantially similar; (c) similar or substantially similar qualifications, degrees of skill, effort and responsibility are required; and (d) the differences (if any) between the duties of male and female employees are not of practical importance in relation to terms and conditions of employment or do not occur frequently”.⁴¹ Failure to act in accordance with the equal pay requirement is an offence under the Act, which attracts a fine or prison sentence of up to 12 months, and which can require payment of damages.⁴² ERT is concerned that the penalties for violation of the Act are not proportionate; we believe that imprisonment is an excessive punishment for failure to ensure pay equality.
40. In its report to the Committee, the government has expressed its confidence that, as a result of the Act’s introduction, “there is no overt discrimination in pay for equal work done by women and men”.⁴³ However, there is evidence which reveals that, in practice, women earn less than their male counterparts. The World Economic Forum’s *2011 Global Gender Gap Report* indicates that women in Jamaica earn 37 percent less than men for comparable work.⁴⁴ While the pay gap cannot be entirely put down to discrimination, its width in Jamaica is suggestive of the role played by employment discrimination. Moreover, the government’s assertions are called into question by the fact that government statistics on pay are not disaggregated by gender. ERT is therefore concerned that, whilst legislation provides formal protection, a significant disparity in pay between men and women appears to exist. ERT is further concerned that the State is not collating data on pay which is disaggregated by gender, thereby limiting its ability to establish whether the Act is being properly enforced and implemented.
41. ERT calls on the Committee to recommend that the government of Jamaica takes measures to improve enforcement and implementation of the *Employment (Equal Pay for Men and Women) Act*, and to collect data on remuneration levels which is disaggregated by gender.

⁴⁰ The Employment (Equal Pay for Men and Women) Act (1975), Section.3 (1): “no employer shall, by failing to pay equal pay for equal work, discriminate between male and female employees employed by him in the same establishment in Jamaica”

⁴¹ *Ibid.*, section 2(1).

⁴² *Ibid.*, section 3(2) and 3(3)

⁴³ See above, note 28, Para 71.

⁴⁴ The World Economic Forum’s *2011 Global Gender Gap Report*, available at <http://www.weforum.org/reports/global-gender-gap-report-2011>.

Conclusion

42. The amendment of the constitution through *The Charter of Fundamental Rights and Freedoms (Constitutional Amendments) Act 2011* represents a positive step towards improved protection from discrimination against women in all areas of life in Jamaica. However, as this report makes clear, Jamaica must go further if it is to ensure that it meets its obligations under the Convention and effectively respects, protects and fulfils the right to non-discrimination.
43. ERT recommends that the government of Jamaica must amend or repeal any discriminatory legal provisions and undertake further reform of its constitution. It recommends that Jamaica enacts comprehensive equality legislation providing protection from all forms of discrimination on all grounds and in all areas of life governed by law. Further, ERT recommends that Jamaica must also establish a National Human Rights Institution with a mandate covering the rights to equality and non-discrimination and establish appropriate positive action measures.
44. These recommendations are offered in order to assist the state party in ensuring that the improvement in protection from discrimination provided as a result of the adoption of the Charter become effective in practice, that the spirit of the Charter is realised and that Jamaica brings its system of constitutional, legislative and policy measures into line with its obligations under the Convention.