

Sexuality, Gender, HIV Vulnerability & Human Rights in Grenada

A Shadow Report to the United Nations Human Rights Committee

by

**Grenada Caribbean HIV/AIDS Partnership (GrenCHAP)
Hope Pals Foundation and the
Grenada Human Rights Desk**

with

**Caribbean Forum for Lesbians, All-sexuals & Gays (C-FLAG),
Caribbean Vulnerable Communities Coalition (CVC) and the
Caribbean Coalition of National AIDS Programme Coordinators (CCNAPC)**

and

**Global Rights and the International Gay and Lesbian Human Rights Commission
(IGLHRC)**

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Introduction

Human rights are the building blocks of a just and functional society. They are the concepts through which we describe and lay claim to the importance of our needs and desires, while balancing them with the claims of others. Human rights are universal and can only be abrogated under specific circumstances that are carefully defined by the various international and regional human rights treaties to which...governments have agreed. A state has three duties with regard to human rights:

- it must respect rights, meaning a government cannot violate human rights directly in laws, policies, programs, or practices;
- it must protect rights, by preventing violations by other states and by non-state actors and provide affordable and accessible redress; and
- it must fulfill the promise of rights through affirmative policies and practices, including funding measures.

Cary Alan Johnson, "Off the Map: How HIV/AIDS Programming is Failing Same-Sex Practising People in Africa" (April 30, 2007), an International Gay & Lesbian Human Rights (IGLHRC) publication, p. 43¹

Grenada acceded to the International Covenant on Civil and Political Rights (ICCPR) on December 6, 1991 without reservation or declaration. However the state is yet to submit its initial ICCPR state party report, which became due in May 1992,² or any of the subsequent periodic reports. In fact, the state currently has a total of ten United Nations treaty body reports overdue.³

Through the submission of this shadow report to the UN Human Rights Committee (in conjunction with its review of Grenada's ICCPR obligations at its 90th session in July 2007), a diverse group of institutional and grassroots international, regional and domestic civil society organisations have come together in an effort to strengthen engagement with human rights bearing on sexuality, gender and HIV vulnerability on the part of both the state of Grenada as a duty-bearer and all its citizens as rights-holders. The report seeks to illuminate for the Committee ways in which by themselves, and in intersection and interaction, sexuality, gender and HIV vulnerability exacerbate the violation of human rights in Grenada. Our goal is, thereby, to strengthen and deepen protection of such rights by all human rights defenders. The report suggests ways in which Grenada might improve the exercise of its state party obligations to enforce such rights. Our hope is that the contents of the report will be useful to the Human Rights Committee and serve as a catalyst for future advocacy efforts. We hope the report bolsters the state's actions to protect and defend those made vulnerable by sexuality, gender and HIV vulnerability, in a manner that is respectful and promotes equality throughout the society.

The ways in which the sexual agency of same-sex practicing people is denied and controlled by governments or by their inaction run parallel to the disenfranchisement and denial of a basic set of human rights to people in sex work, people living with HIV, and anyone else whose claim to sexuality or the freedom to express gender differently challenges the dominant discourse. Similar legal, political and economic inequalities lead to an inability of all these groups to control and

¹ <http://www.iglhrc.org/files/iglhrc/otm/Off%20The%20Map.pdf>. Accessed 7 July, 2007.

² <http://www.unhchr.ch/tbs/doc.nsf/5038ebdcb712174dc1256a2a002796da/80256404004ff315c125638c005d92bb?> Accessed 7 July, 2007.

³ <http://www.unhchr.ch/tbs/doc.nsf/NewhvVAllSPRByCountry?OpenView&Start=1&Count=250&Expand=69.1#69.1>. Accessed 7 July, 2007.

protect their lives and bodies, their partners and families, and to express agency. Social vulnerability of same-sex practicing and gender non-conforming men and women as a result of their sexual and gendered behavior and identity drives an interlocking set of human rights violations and social inequalities. These factors heighten HIV risk and produce disproportionate HIV prevalence, as individuals lack the power to minimize or modulate their risk; and infection with HIV or the perception as being likely to be infected in turn results in legal, social and economic discrimination. Violations of human rights resulting from one area of vulnerability expose individuals to increased risk for the abrogation of rights in others.

The report draws considerably on two prior frameworks: a shadow report on lesbian, gay, bisexual and transgender rights under the ICCPR in Barbados⁴ coordinated by Global Rights and the University of Virginia School of Law International Human Rights Law Clinic and a detailed report on how HIV/AIDS programming is failing same-sex practicing people in Africa⁵ by Cary Alan Johnson of the International Gay & Lesbian Human Rights Commission.

⁴ http://www.iglhrc.org/files/iglhrc/program_docs/Shadow_Report_Barbados.doc. Accessed July 7, 2007.

⁵ Ibid, fn 1.

Substantive Violations of the International Covenant on Civil and Political Rights

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

Articles 2(1) and 26 of the ICCPR prescribe the non-discrimination standards to which state parties must uphold. 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*,⁶ 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 ICCPR. 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.

The existing legislation in Grenada that criminalizes consensual same-sex intimacy is the Criminal Code, CAP. 76, 1958 Revised Edition. The Criminal Code, CAP. 76, in respect of sexual offences, is a development of the law which previously was found in the older Criminal Codes. The older Criminal Codes can be traced back to as early as 1897. The Criminal Codes since 1897 have been amended on many occasions. However, the amendments have not affected the substance of the offences concerned with here. Therefore, such offences have remained unchanged since the Criminal Code, Ordinance No. 2 of 1897.

Under section 435 of the Criminal Code, CAP. 76 (see Annex), the offence of “unnatural crime” is committed by way of sexual intercourse *per anum*, i.e., anal penetration. Such offence is punishable by imprisonment for ten years. The Criminal Code does not specify the ‘penetrating’ object. Through reliance on the common law; the “penetrating” object is the male sexual organ. The offence is committable by, (1) male person with/to male person and/or, (2) male person with/to female. The offence cannot be committed by two female persons. There is no requirement for lack of consent or use of force. By implication, the consensual act between two adults (same-sex or opposite-sex) is criminalised. The use of the word “unnatural” in the definition of the crime parallels the statute at issue in *Toonen* that outlawed “intercourse against nature.”⁷ These laws are 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 “unnatural” 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

⁶ *Toonen v. Australia*, Communication no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

⁷ *Toonen v. Australia*.

rights guaranteed to them under the ICCPR.⁸ 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. Grenada's law criminalizing sodomy reinforces the animus that enables these violations to occur. Repealing these provisions would be an affirmative and much-needed step, in ending discrimination on the basis of sexual orientation and gender identity in Grenada.

Notably, the law criminalizing sodomy is also detrimental to Grenada's efforts toward HIV/AIDS education, prevention, treatment 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."⁹ 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."¹⁰ In fact, failure to address anti-gay discrimination contributes not only to the HIV vulnerability of same-sex practicing people, but to their heterosexual partners as well.

The Constitution of Grenada is one of the strongest sources of support for the repeal of the anti-sodomy law. Section 13(1) of the Grenada Constitution (see Annex) provides that "no law shall make any provision that is discriminatory either of itself or in its effect" and the section following (13(2)) that "no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority". "Discriminatory" is defined by article 13(3) as any "different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description". In *Toonen v. Australia*, the Committee has interpreted "sex" to including sexual orientation.¹¹ Section 435 of the Criminal Code, CAP. 76, therefore appears to be inconsistent with section 13(1) of the Constitution as laws that are *ex facie* discriminatory and which have a discriminatory effect upon homosexuals.

Grenada should therefore re-examine whether section 435 of the Criminal Code, CAP. 76 is in conflict with its Constitution and the international obligations of the country and repeal them wherever they are found to be discriminatory.

⁸ 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."

⁹ *Toonen v. Australia*, Communication no. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

¹⁰ *Id.*

¹¹ *Toonen v. Australia*, at 8.7

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.¹² Lesbians, transgender persons, and others who live outside of heterosexual and gender conventions are often at risk of violence, rape, and other forms of discrimination, harassment and abuse, often from those who see their actions as providing punishment and “cures” for non-conforming behavior.

While statistics are generally unavailable regarding discrimination against lesbian women in Grenada, wherever discrimination against homosexuals exists generally, as in Grenada, 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.

In Grenada, as elsewhere, individuals who do not conform to conventions for the expression of gender report experiencing discrimination in employment, education and housing. Such discrimination has led biological males who do not conform to conventional gender expression into disproportionate involvement in sex work which, compounded by their economic marginalization, places them in a particularly vulnerable relationship to the state and to laws that stigmatise and criminalise consensual intimacy as against morality and nature. Such laws confer a stigma on their entire humanity as “unnatural.”

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 which specifically addressed this issue. The report showed that sexual minorities are disproportionately affected by torture because they do not conform to expected gender roles or identities.¹³ 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. To the extent that the existence of laws that criminalises consensual same-sex intimacy in Grenada puts people who engage in such intimacy in constant fear of falling afoul of the law, criminal prosecution, social stigma and discrimination, the issue of cruel and degrading treatment is duly raised as an abuse of Article 7 of the ICCPR.

¹² 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).

¹³ 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).

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 in Grenada, the legal landscape suggests that there may be biased policing and criminalization of LGBT persons.

Same-sex intimacy is unfairly criminalized under Grenada's 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)

There are inadequate protections from non-consensual sexual contact in place for individuals incarcerated by the state. Grenada's prison is old and overcrowded. Constructed to hold 130 inmates, at mid-2006 census, it was reported to house 334 inmates.¹⁴ Formerly incarcerated persons interviewed in 2007 reported hearing screams from adjacent cells and concluded that anal rape was occurring. The same informants reported that guards share this conclusion but fail to confirm their belief, or to respond to such screams. Incidents like this, while not frequent, were also not occasional; and such incidents are neither reported to nor investigated by prison authorities. Condoms are not available in the prison, and therefore protection from the transmission of HIV and other sexually transmitted infections (STIs) during sexual intercourse, regardless to its consensual or non-consensual nature, is also inadequate. Medical personnel report the occasional treatment of STIs by the prison infirmary.

Given the overcrowding, men who are weak and those perceived to either not be heterosexual or not conform to gender expectations are vulnerable in such a climate to both generalised violence and sexual violence, increasing the risk of HIV and STIs. Such violence appears both underreported and inadequately addressed by prison officials. While grievance procedures are in place, it is unrealistic, given the stigma associated with male on male rape and the inability to provide physical protection for inmates in the overcrowded conditions, that an inmate would bear the burden of reporting such incidents to the prison authorities. Failure to protect prisoners from rape and to ensure the safety and confidentiality of those who have been raped constitute violations of rights enumerated in this Article.¹⁵

Concluding Notes

- The buggery laws of Grenada effectively criminalize consensual homosexual relations, providing for up to 10 years of imprisonment. Beyond establishing a legal ground for the deprivation of life, liberty, health and opportunity, these laws preserve ingrained stereotypes about homosexuals and, in effect, serve to strengthen social stigmas against them.

¹⁴ http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/caribbean_records.php?code=64. Accessed July 7, 2007.

¹⁵ Confidential communication on file with Global Rights, LGBTI initiative.

Ultimately, these laws are in conflict with the constitutional prohibition against discrimination in Grenada, as well as Articles 2(1) and 26 of the ICCPR.

- The discriminatory culture and legal sanctioning of discrimination against LGBT individuals in Grenada stymies the state party's efforts to provide effective education, prevention, treatment and care programs to those who are especially vulnerable to HIV and AIDS.
- The failure of the criminal justice system to effectively investigate and prevent sexual violence against persons detained in government correctional facilities reflects the larger culture in support of homophobic violence in Grenada. 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 inmates because they place the entirety of the reporting burden on them. 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.

Proposed Recommendations for the State Party

- Repeal section 435 of the Criminal Code as far as it criminalises consensual non-reproductive sexual and same-sex conduct in keeping with international human rights law. These laws contribute to the HIV vulnerability of same-sex practicing people by marginalizing and driving them underground.
- Prosecute physical and verbal attacks and other forms of harassment, persecution, and abuse of LGBT Grenadians.
- Extend the equality provisions of national constitutions to include sexual orientation.
- End impunity of law enforcement officials and private individuals for homophobic discrimination and violence.
- Send a strong message to law enforcement officials that extortion—including the extortion of gay and lesbian people—is a crime.
- Build relationships with local LGBT and sexual rights organizations and provide funds for the scaling-up of successful HIV prevention, VCT, treatment, and care programs for same-sex practicing people through direct government grants and contracts. Work collaboratively with organizations that have experience implementing such programs in Grenada.
- Appoint specialists in same-sex HIV issues—including gay men, lesbians, bisexuals and transgenders—to Global Fund Country Coordinating Mechanisms, the National AIDS

Directorate, and other planning and grant-making bodies. Provide these individuals with the support they need to fulfill their responsibilities.

- Make condoms, dental dams, and latex-compatible lubricants available in jails and prisons; offer comprehensive HIV prevention education (which includes education about same-sex sexual behaviours) to people who are incarcerated in Grenada.
- Ensure that government-sponsored HIV prevention messages on radio, television, billboards, print media, etc. reflect diverse sexual identities and attend to the prevention needs of same-sex practicing people, in a manner that is accurate, respectful, and promotes equality in Grenada.

Proposed Questions for the Government Delegation

- Has the government considered eliminating the buggery law so that policing of that crime will not have a disproportionate burden on homosexuals?
- 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 individuals who may not currently have real access to these mechanisms?
- Is the government providing HIV/AIDS education targeted to homosexual as well as heterosexual citizens?
- Has the government inquired into the issue of discrimination against those affected by HIV/AIDS?
- Has the government inquired into the issue of discrimination based on sexual orientation or gender expression?