



JCHS Brief

Protecting 'SOGI' - Not what Parlia'meant'

November 2016

Summary: Wedding florists,¹ cake bakers,² small hoteliers³, photographers⁴, public health experts⁵, parents,⁶ human resource managers,⁷ fire chiefs,⁸ among others have been fined, fired or jailed because they chose to affirm the distinctiveness between males and females, and that marriage was strictly between a man and a woman. They were punished through the legal system because they declined to support the claim that homosexuality was normal behaviour. In each instance, the terms 'sexual orientation' and 'gender identity' were deemed to take precedence over the exercise of freedom of conscience, expression, belief or parental rights of these persons.

However, the concepts of *sexual orientation* and *gender (identity)*, 'SOGI', are legally controversial, lack scientific support and international consensus. There exists no valid governance reasons on which to legally recognise or protect these terms on the grounds of non-discrimination. The experience in other countries has been that when accepted in policy and laws, they in time compete with and undermine the functioning of existing fundamental human rights and freedoms.

The Jamaica Coalition for a Healthy Society (JCHS) has asked the Government of Jamaica⁹ to explain the inclusion of these terms in Jamaican laws and policies despite the express decision of Parliament to reject Constitutional protection of these terms. The JCHS calls for the immediate removal of these terms from the laws and policies in which they currently have been included.

The rationale for rejecting legal or political recognition of *sexual orientation*, *gender* and *gender identity* is expounded below.

¹ The case of Baronelle Stutzman, http://www.huffingtonpost.com/2015/03/30/barronelle-stutzman-fined_n_6971122.html

² The cases of Ashers Bakery (Ireland) and Sweet Cakes (USA) <http://www.bbc.com/news/uk-northern-ireland-32808398>

³ The case of the Bulls (UK) <http://www.dailymail.co.uk/news/article-2424983/Christian-B-B-owners-refused-gay-couple-close-business.html>

⁴ The case of Elaine Huguenin, <http://www.deseretnews.com/article/865557098/New-Mexico-photographer-loses-third-round-of-gay-discrimination-case-but-attorneys-vow-fight-isnt.html?pg=all>

⁵ The case of Dr Eric Walsh, <http://www.foxnews.com/opinion/2016/04/20/fired-for-preaching-georgia-dumps-doctor-over-church-sermons.html>

⁶ The case of David Parker, <http://abcnews.go.com/WNT/story?id=1230620&page=1>

⁷ The case of Crystal Dixon, <http://www.toledoblade.com/Courts/2012/02/08/Suit-filed-by-ex-UT-official-dismissed.html>

⁸ The case of Kevin Cochrane, <http://www.usatoday.com/story/news/nation/2015/01/07/atlanta-fire-chief-fired-gay-comments-book/21378685/>

⁹ To both JLP and PNP administrations. To then Prime Minister, Mrs. Portia Simpson Miller and the Leader of the Opposition, Mr. Andrew Holness by letter dated December 8, 2015; renewed to the current JLP administration by letter to the Attorney-General dated June 6, 2016 and to the Minister of Justice, by letter dated July 1, 2016.

1. There is no scientific evidence to support legal protection of Sexual Orientation and Gender (Identity) -SOGI

The concept of **sexual orientation** is “a complex and amorphous phenomenon that often defies consistent and uniform definition.”¹⁰ Former homosexuals submitted to the US Supreme Court that “sexual orientation is a fluid, transient, personal characteristic, and that individuals can and do change their sexual orientation.”¹¹

Taken at face value, any sexual desire, including the abhorrent, may have a claim to be included as an orientation. It should be noted that steps have been taken to destigmatise pedophilia. The American Psychiatric Association’s Diagnostic and Statistical Manual (DSM) in its 5th edition, initially classified pedophilia as a sexual orientation¹², but subsequently revised this to classify pedophiles into categories of ‘sexual interest’ only as distinct from *acting* on the interest.¹³

Sexual orientation which is exhibited by behaviour, cannot be compared to such fixed, tangible characteristics as ethnicity and biological sex. Ethnicity and biological sex are fixed at conception and are immutable whereas as said before sexual orientation can change.

The term **gender** has been used to create a (false) distinction between ‘sex’, which is determined by biology, and what it means to be male or female according to social norms. The World Health Organisation has described **gender** as ‘the socially constructed characteristics of women and men – such as norms, roles and relationships of and between groups of women and men. It varies from society to society and can be changed.’ The WHO has also stated that it is important to recognise “**gender identities that do not fit into the binary male or female sex categories.**” A consequence of adopting the concept of **gender** without reference to biological features is the replacement of objective fact with subjective feeling.

The claim of identity fluidity through the term **gender identity** is in fact gender dysphoria (confusion about one’s sexuality), which is a mental disorder.¹⁴ The American Psychiatric Association notes that persons suffering from gender dysphoria ‘may cross-dress...may want to socially transition, others may want to medically transition with sex-change surgery and/or hormone treatment. Socially transitioning primarily involves transitioning into the affirmed gender’s pronouns and bathrooms.’¹⁵

The occurrence of intersex, a medical condition in which phenotypically and /or genotypically, the sex is unclear and is not to be confused with persons of a known sex, feeling that they are of the other sex.

¹⁰ Dr. Paul McHugh, Distinguished Professor of Psychiatry and Behavioural Sciences at the John Hopkins University School of Medicine, *Brief in support of Hollingsworth and Bipartisan Legal Advocacy Group addressing the merits and supporting reversal*, Supreme Court docket, Nos. 12-144. 12-307 (2012)

¹¹ Amicus Curiae Brief of Parents and Friends of Ex-Gays & Gays Supporting Respondents, NOS. 14-562, 14-556, 14-571, 14-574. April 2015. <http://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/>

¹² http://www.huffingtonpost.com/2013/11/01/dsm-pedophilia-mental-disorder-paraphilia_n_4184878.html.

Accessed June 30, 2016.

¹³ APA Paraphilic Disorder Fact Sheet. Accessed June 30, 2016.

www.dsm5.org/Documents/Paraphilic%20Disorders%20Fact%20Sheet.pdf . Last accessed September 7, 2016

¹⁴ WHO Fact sheet No. 403, August 2015. <http://www.who.int/mediacentre/factsheets/fs403/en/> . Last accessed September 7, 2016.

¹⁵ American Psychiatric Association, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>. Last accessed September 7, 2016.

There is no apparent limitation on what constitutes **gender identity**, either in law or in public usage. Facebook has made available 71 genders.¹⁶ The May 2016 directive from the US Departments of Education and Justice to schools receiving federal financial assistance, regarding treatment of transgender students, defined **gender identity** as “an individual’s internal sense of gender’ and that ‘sex’ should be read as gender identity for civil rights purposes.¹⁷

The proposal to normalize a mental disorder is unsupported by science. The report ‘Sexuality and Gender’¹⁸ 2016, comprehensively reviewed over 200 peer reviewed studies on this topics and concluded *inter alia* that:

- “The claims that sexual orientation is an innate, biologically fixed human property—that people are “born that way”—is not supported by scientific evidence.
- The claim that gender identity is an innate, fixed human property independent of biological sex—so that a person might be a “man trapped in a woman’s body” or “a woman trapped in a man’s body”—is not supported by scientific evidence.
- Longitudinal studies of adolescents suggest that sexual orientation may be quite fluid over the life course for some people, with one study estimating that as many as 80 percent of male adolescents who report same-sex attractions no longer do so as adults.”

Law requires predictability and certainty. It would be imprudent for the Jamaican legislature to entrench in law, any protection based on changeable sexual desires, thereby setting a precarious precedent. This would set the stage for the reordering of society based on faulty premises.

2. Sexual Orientation and Gender were previously rejected by Parliament

Section 13(3) (i) of the Jamaican Charter of Rights, 2011, sets out the closed category of grounds on which citizens can assert a right to freedom from discrimination. These are on the grounds of being male or female,¹⁹ race, colour,²⁰ (objective biological characteristics); place of origin, social class, religion or political opinions (objectively determined characteristics). None of these qualities are subjectively determined or behavioural traits. **Sexual orientation** and **gender** (which are subjectively determined and not behavioural traits) are not recognised nor protected in the Jamaican Constitution. **Importantly, both terms were proposed and rejected by Parliament when the Charter of Rights was being debated.** This was prior to the involvement of the “Churches” in the Charter of Rights discussions.

To the Joint Select Committee Constitutional and Electoral Reform, ‘gender’ was deemed inappropriate as it referred to the grammatical classification of nouns; whereas ‘sex’ was preferred as it specified the two categories of reproductive function. It is highly instructive that the Committee recommended a further qualification of sex to mean ‘male or female’ to ensure that the word ‘sex’ was not interpreted to include ‘sexual orientation.’²¹ The proposal to include sexual orientation by the Jamaica Forum of

¹⁶ <http://www.telegraph.co.uk/technology/facebook/10930654/Facebooks-71-gender-options-come-to-UK-users.html>

¹⁷ *Dear Colleague Letter on Transgender Students*, U.S. Department of Justice Civil Rights Division and U.S. Department of Education Office for Civil Rights, May 13, 2016 . Civil rights in education are protected under Title IX of the Education Amendments of 1972.

¹⁸ *Sexuality and Gender: findings from the biological, psychological and social sciences*. The New Atlantis: a Journal of technology and society. Fall 2016. <http://www.thenewatlantis.com/publications/executive-summary-sexuality-and-gender>. Last accessed September 7, 2016.

¹⁹ Section 13 (3) (i) (i)

²⁰ Section 13 (3) (i) (ii)

²¹ Report of Joint Select Committee Constitutional and Electoral Reform, 2001, page 28

Lesbians, All Sexual and Gays (JFLAG) was rejected by the Joint Select Committee. The Committee was concerned about the impact of such a term on the institution of marriage and on parenting.²²

It should be additionally noted that as sexual orientation can be read to encompass sexual activities that are prohibited under Jamaican law such as buggery, bestiality, incest and pedophilia. Any recognition or protection of this term would legitimize these prohibited behaviours.

3. *SOGI* is not part of international law

There is no consensus among United Nations (UN) Member States on acceptance of the terms, **sexual orientation** and **gender identity**. Many UN Member States such as the African Group of countries, the Organisation of Islamic Conference and CARICOM have continually rejected attempts by the UN Secretariat and other countries to force acceptance of controversial notions on human sexuality that do not enjoy universal recognition".²³ The African Group has recently underlined that **sexual orientation** and **gender identity** "...are not referenced under international human rights law ... are notions on which there is no international agreement, definition or consensus"²⁴

International law also does not recognize sexual rights²⁵ or protect sexual autonomy, or any kind of sexual preferences or conduct between consenting adults other than in the context of the right to freely marry and found a family between a man and a woman.²⁶

There is therefore no international obligation on States to enact laws that give individuals any special benefits or protections on the basis of their sexual preferences and behaviour or to sanction an individual's feeling about their 'gender identity'.

Sexual 'rights' activists have cited the 1997 recommendation by the UN Human Rights Committee in Toonen v Australia²⁷ which re-interpreted 'sex'²⁸ to include **sexual orientation**. The Chief Justice of Belize also cited this case in his ruling in Orozco v Attorney General of Belize, 2010.²⁹ However, UWI International Law Professor Stephen Vasciannie has pointed out that Toonen is not binding on Jamaica as UN recommendations are not binding on any country. Additionally, international law is identified by reference to treaties, custom and general principles of law recognised by 'civilised' nations. As it stands, there is no international treaty requiring Jamaica or any country to recognise buggery as lawful.³⁰

²² Report of Joint Select Committee Constitutional and Electoral Reform, 2001, page 31- 32

²³ 65th Session of UN General Assembly, UN Third Committee, 2010, <http://www.un.org/press/en/2010/gashc3987.doc.htm>, Last accessed September 7, 2016

²⁴ African Group statements (i) General Assembly, 3rd Committee, 71st session, November 21, 2016, UN meetings coverage and press release. <http://www.un.org/press/en/2016/gashc4191.doc.htm>. Last accessed November 23, 2016. (ii) 70th session of the UN General Assembly, Agenda item 67, Report of Human Rights Council, November 2015. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/367/49/PDF/N1536749.pdf?OpenElement>. Last accessed September 14, 2016.

²⁵ Mr. Richard Erdman, Senior Advisor and Acting ECOSOC Ambassador to the US Mission to the UN, New York stated that "sexual rights are not human rights and they are not enshrined in international human rights law...they are not legally binding, [the US' use of the term] does not reflect a view that they are part of customary international law." September 15, 2015. <http://usun.state.gov/remarks/6831>

²⁶ Universal Declaration of Human Rights, 1948, Article 16(1) and 16(2)

²⁷ Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

²⁸ Under the non-discrimination clauses of Articles 2 and 26 of the International Covenant Civil & Political Rights, 1966

²⁹ The case is not binding on Jamaica.

³⁰ Article to the Jamaica Gleaner, May 22, 2006,

4. Where protected, SOGI suppresses existing human rights and fundamental freedoms

The experiences of countries that have accepted *sexual orientation* and *gender (identity)* as protected categories for non-discrimination has not been equity, but discrimination against those who hold opposing views, thus depriving them of their genuine fundamental rights of freedom of speech, conscience, and parental rights.³¹ Florists,³² wedding cake bakers,³³ small hoteliers³⁴, photographers³⁵, public health experts³⁶, parents,³⁷ human resource managers,³⁸ fire chiefs,³⁹ among others have been fined, fired or jailed because they exercised their freedom of conscience and speech to affirm the distinctiveness between males and females and that marriage was strictly between a man and a woman. They did not agree that homosexuality was normal behaviour and declined the invitation to support this claim. In each instance, the legal recognition of sexual orientation was deemed to take precedence over the exercise of freedom of conscience, expression, belief or parental rights of these persons.

Conclusion

There are no sound legal or policy grounds on which to introduce ‘sexual orientation’ and ‘gender’ into the Jamaican legal and political landscape. On what basis then, have these terms been included in the below laws and policies and for what purpose? *Sexual orientation* and *gender* have been included in: The draft Data Protection Bill, 2015, the Electronic Transactions Act, 2007, the Staff Orders for the Public Service, 2004 and the Consultation Code of Practice for the Public Sector, 2005.

≈ Data Protection Bill, 2015: ‘sensitive personal data’ to include the *sexual orientation* or lifestyle of data subjects.

≈ Electronic Transactions Act, 2007: PART IV. Obligations in relation to electronic transactions for the supply of goods, services or facilities.

Section 26.-(1) This Part applies only to the formation, by means of electronic transactions, of agreements for the supply of goods, services or facilities, for sale, hire or exchange, and to the performance of such agreements...

³¹ 3 reasons why SOGI law are being defeated, Alliance Defending Freedom.

<http://www.adflegal.org/detailspages/blog-details/allianceedge/2015/04/14/3-reasons-sogi-laws-are-being-defeated>. *Liberty and SOGI laws: An Impossible and Unsustainable Compromise*, [Ryan T. Anderson](#) and [Robert P. George](#). <http://www.cnsnews.com/commentary/ryan-t-anderson/liberty-and-sogi-laws-impossible-and-unsustainable-compromise-0>

³² The case of Baronelle Stutzman, http://www.huffingtonpost.com/2015/03/30/barronelle-stutzman-fined_n_6971122.html

³³ The cases of Ashers Bakery (Ireland) and Sweet Cakes (USA) <http://www.bbc.com/news/uk-northern-ireland-32808398>

³⁴ The case of the Bulls (UK) <http://www.dailymail.co.uk/news/article-2424983/Christian-B-B-owners-refused-gay-couple-close-business.html>

³⁵ The case of Elaine Huguenin, <http://www.deseretnews.com/article/865557098/New-Mexico-photographer-loses-third-round-of-gay-discrimination-case-but-attorneys-vow-fight-isnt.html?pg=all>

³⁶ The case of Dr Eric Walsh, <http://www.foxnews.com/opinion/2016/04/20/fired-for-preaching-georgia-dumps-doctor-over-church-sermons.html>

³⁷ The case of David Parker, <http://abcnews.go.com/WNT/story?id=1230620&page=1>

³⁸ The case of Crystal Dixon, <http://www.toledoblade.com/Courts/2012/02/08/Suit-filed-by-ex-UT-official-dismissed.html>

³⁹ The case of Kevin Cochrane, <http://www.usatoday.com/story/news/nation/2015/01/07/atlanta-fire-chief-fired-gay-comments-book/21378685/>

"personal information" means information about an identifiable individual, including- (a) information relating to the race, **gender**, marital status, nationality or ethnicity, colour, **sexual orientation**, age, physical or mental health, disability, religion, social or political views, language or birth of the individual;

The Hansard records of the Parliamentary debate on the Electronic Transactions Bill indicate that there was no discussion on the contents of the Bill. Then portfolio Minister for Technology, Minister Paulwell introduced the Bill to Parliament which went through the requisite 3 readings and was passed without amendment.⁴⁰

- ≈ The Staff Orders, 2005 : Order 13.1. *Equal Opportunity*: "Employees shall be treated fairly and equitably without discrimination based on any of the following grounds: 1. Age 2. **Gender** 3. National Origin 4. Race 5. Colour 6. Religious Beliefs 7. Political Affiliation 8. Disability 9. **Sexual Orientation**.
- ≈ The Consultation Code of Practice for The Public Sector, 2005 : General Principles - *Inclusiveness and Equity*, 'Access to consultation processes and ability to participate is ensured despite race, ethnicity, religion, political affiliation, sex, disability status, **sexual orientation or any other possible basis for discrimination**.

As indicated in the above discussion, the Jamaican Parliament considered and rejected the proposals to include gender and sexual orientation in the non-discrimination clauses of the Charter of Rights.

The 1993 and 1995 Reports of the Joint Select Committee of Parliament set out the detailed public education programme conducted through multiple media and the facilitation of public input to the consultations to revise the Constitution.⁴¹ This process was duly acknowledged in the Preamble to the Charter, 2011.⁴²

For these two rejected terms to now be inserted into law and policy, without public notification, consultation or debate, treats with contempt the democratic and inclusive process undertaken during the Charter of Rights debates. To allow these terms to stand without more discussion undermines the validity and value of any Joint Select Committee procedure and public consultations. Furthermore, it calls into question the professional functioning of the Office of the Chief Parliamentary Counsel.

The Jamaica Coalition for a Healthy Society calls on the Jamaican Government to remove the terms *sexual orientation*, *gender* and *gender identity* from the above cited instruments, and to reject inclusion in any other laws and policies so to ensure conformity with the Constitution. We urge our law makers to be vigilant in protecting our values as a people from the introduction of concepts that are contrary to the philosophical basis of our laws and Constitution.



The Jamaica Coalition for a Healthy Society (2012) is a local NGO responding to social development challenges from the perspective of Judeo-Christian principles and values.

⁴⁰ The first reading of the Bill was held on October 31, 2006. The second and third readings were taken on November 14, 2006.

⁴¹ Ibid., Paras 3.4 – 4.5, and the 1995 Report paras 4, 13

⁴² "Whereas a Constitutional Commission established by Parliament recommended, after wide public consultation and due deliberation, that Chapter III of the Constitution of Jamaica should be replaced by a new Chapter which provides more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica.

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