

# Constitutional challenge to Dominica's laws criminalising LGBTQ people: Questions & Answers



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A gay man has filed a case in the High Court of Justice in Dominica challenging the country's laws criminalising "buggery" and other sexual activity between consenting partners, including and in particular partners of the same sex, as violating numerous rights guaranteed in the *Constitution of Dominica*. This backgrounder answers some key questions related to this case.

## 1. Which laws are being challenged?

The claimant is challenging two sections of the *Sexual Offences Act* (SOA) of Dominica.

- **Section 16** criminalises "**buggery**" — which the Act defines as anal sex between two men or between a man and a woman. The maximum penalty is 10 years' imprisonment plus the possibility of forced psychiatric confinement. (*Attempted* buggery is also a crime, punishable by four years in prison and possible psychiatric intervention.) Although seemingly gender neutral, this section was historically used to target gay men and is widely understood as criminalising sex between men.
- **Section 14** is a sweeping law criminalising "**gross indecency**," which is defined as any act (other than penile-vaginal sex) by anyone "involving the use of the genital organs, breasts or anus for the purpose of arousing or gratifying sexual desire." The maximum penalty is 12 years in prison (if the act is committed with a person aged 16 or older). This section explicitly excludes from prosecution private acts of gross indecency between consenting heterosexual adults. Any other sexual act, including consensual ones, remains criminal in Dominica. In other words, this law outlaws any sexual activity between men or between women.

These prohibitions were first enacted in 1873, when Dominica was under British colonial rule. Although Dominica achieved independence in 1978, it has kept these offences in its criminal law. In fact, both provisions were amended in 2016 to make the penalties harsher.

## 2. Why are these laws being challenged?

These laws violate multiple fundamental rights of all people in Dominica, and in particular the rights of lesbian, gay, bisexual and transgender (LGBT) people. Such violations also undermine an effective response to HIV among gay men and other men who have sex with men (MSM). Changing these laws is a human rights and public health imperative.

- The offence of “gross indecency” is extremely broad; on its face, it captures any consensual sexual activity (other than penile-vaginal sex) by any non-heterosexual couple that involves the genitals, breasts or anus. Of course, it is the sexuality and sexual activity of LGBT people that are far more commonly considered to be indecent because these differ from dominant norms.
- The law against “buggery” inherently criminalises sex between men and is widely understood as existing for this purpose, even if it also extends to prohibiting anal sex between a man and a woman. Gay men and (some) trans women are directly criminalised by the buggery law.
- Because the anti-buggery law turns gay men and (some) trans women into presumed criminals, and the gross indecency law extends the potential criminality to all LGBT people, these sections of the SOA send a powerful message that people — whether state agents such as the police or private individuals — are entitled to discriminate and commit other human rights abuses against LGBT people (and those perceived to be LGBT).
- The gross indecency law criminalising any consensual sexual activity between two men or two women and the anti-buggery law criminalising anal sex between men create a hostile climate for LGBT Dominicans who seek health services, particularly sexual health services. Among other things, such laws, and the stigma and discrimination they contribute to, deter trans people, gay men and other MSM from seeking critical HIV services, including testing, treatment, care and support services. This undermines an effective national response to the epidemic.

### 3. Why is this claimant bringing this case?

The claimant, a citizen of Dominica, is directly at risk of criminal prosecution for “gross indecency” and “buggery” as a result of the expression of his sexuality with consenting partners.

The claimant is a gay (cisgender) man. His sexual activity with male partners may include anal sex — prohibited as “buggery” by SOA section 16 — and he could be incarcerated for 10 years for private sexual intercourse with consenting same-sex partners who are of the age of consent established elsewhere in the law. Under section 14 of the SOA, he could also be subject to prosecution and imprisonment for “gross indecency” for any consensual sexual act with a male partner.

Beyond the risk of criminal sanction, the claimant has experienced homophobic hostility, discrimination, harassment, threats on multiple occasions, and physical and sexual assaults that are encouraged by these SOA provisions. In cases of physical violence, too often Dominican police fail to adequately assist and protect, at times ignoring or failing to effectively investigate attacks against LGBT people. For example, the claimant was savagely attacked in his home, yet the police refused to investigate, despite repeated requests by the claimant, and allowed his attacker to remain free. These experiences are not unique to the claimant, but have been faced by many other LGBT people in Dominica.

In light of his clear legal jeopardy under the SOA provisions, and his experience of other human rights abuses in a climate of anti-LGBT hostility created in part by the SOA provisions, the claimant has filed a claim before the High Court of Justice asking for a review of Dominica’s laws that effectively criminalise the sexuality and gender identity of LGBT people as breaching various rights under the *Constitution of the Commonwealth of Dominica* (the Constitution).

#### 4. How do these laws violate the *Constitution of the Commonwealth of Dominica*?

The two SOA provisions that are being challenged violate numerous rights guaranteed by Dominica's 1978 Constitution.

- The risk of imprisonment and involuntary psychiatric confinement for consensual sexual activity — whether anal sex criminalised as “buggery” or any other act between men or between women criminalised as “gross indecency” — violates the right to personal *liberty*, denying the autonomy of each person over their own body.
- Such legal punishment, or the threat of it, also violates the right to *security of the person* (i.e. physical and mental integrity) and in particular the right to *freedom from inhuman or degrading punishment or other treatment*. The harassment and violence against LGBT people that such laws encourage also further violate their security of the person and amount to inhuman and degrading treatment — treatment that is then often ignored or dismissed by police when reported.
- The right to *freedom of expression* is violated when the law criminalises the expression of intimacy and pleasure with a consenting sexual partner. Similarly, being branded criminals and social deviants by the gross indecency and anti-buggery laws means that LGBT people are subjected to or risk discrimination, harassment and violence simply for expressing their identity; this, too, is an unacceptable violation of free expression, to which the government contributes by maintaining these anti-LGBT laws.
- Criminalising people for entering into consensual sexual relationships also violates their right to *freedom of assembly and association*. Furthermore, aside from associating for purposes of consensual sexual interaction, everybody should enjoy the right to gather together and associate peaceably with others without fear of physical assault. Yet the criminalisation of consensual same-sex sexual activity under sections 14 and 16 of the SOA engender widespread hostility — leading regularly to harassment and to threats and acts of physical violence — against those who are, or are perceived to be, LGBT people, both publicly and in private. The state contributes to such denial of human rights by criminalising LGBT people under the gross indecency and anti-buggery laws.
- Dominica's Constitution guarantees the right to *protection of the privacy of one's home*, including the *right to protection from entry by others into one's own premises without consent*. Yet the claimant in this case has experienced home invasions, physical and sexual assault in his own home, and repeated instances of harassment while in his home, motivated and enabled by the anti-LGBT hostility that the SOA reflects and perpetuates by criminalising all consensual sexual activity between two people of the same-sex and “buggery.”
- Finally, these laws both embody and encourage *discrimination* particularly against LGBT people. The gross indecency law explicitly exempts heterosexual couples from prosecution (for acts in private), while criminalising any consensual acts between men or between women. It is blatantly discriminatory. Meanwhile, the anti-buggery law appears to be neutral regarding sexual orientation, in that it criminalises anal sex not just between men but also between a man and a woman. However, it is rooted historically in colonial-era laws primarily aimed at criminalising consensual anal sex between men, and it is predominantly understood as a law against anal sex between men. Furthermore, consensual sexual intercourse between two male partners consists of anal sex; the prohibition in SOA section 16 inherently discriminates against gay men and other MSM who engage in consensual intercourse, as well as (some) trans

women. Finally, both the gross indecency and the anti-buggery laws encourage continued anti-LGBT hostility in society as a whole, resulting in discrimination.

Dominica has recognised the human rights outlined above, both in its own constitution and in international human rights treaties it has ratified. The infringement of these rights is indefensible. Such human rights violations are not justifiable in order to “respect the rights and freedoms of others,” nor as being in the “public interest,” which are the two grounds on which rights may be limited under Dominica’s constitution.

## **5. How do these laws fuel the HIV epidemic in Dominica?**

As has been widely and repeatedly recognised, including by such bodies as the Joint UN Programme on HIV/AIDS (UNAIDS), the UN Development Programme (UNDP), the Pan Caribbean Partnership Against HIV/AIDS (PANCAP), the Inter-American Commission on Human Rights and the Global Commission on HIV and the Law, a legal environment that directly or indirectly criminalises and stigmatises LGBT people undermines effective responses to HIV.

Such laws create apprehension among LGBT people, who fear that even the mundane activities of daily life will lead to accusations of criminal acts or provoke discriminatory or abusive treatment. For example, a man seeking HIV testing or visiting the doctor for a check-up who indicates he is sexually active with a male partner or partners is confessing to a crime. More generally, open and non-judgmental discussion about sex between persons of the same sex, including safer sex education for purposes of HIV prevention, is more difficult in a climate where anal sex or other acts of intimacy between same-sex couples are crimes, and anyone identified as an LGBT person risks discrimination, harassment, violence or possible prosecution.

This complicates and undermines HIV-related programmes (outreach, testing, support, treatment, care) by government agencies that target MSM. The result is the creation of significant barriers to effective HIV and AIDS health programs. Partly as a result of this environment, Dominica is in the midst of an ongoing HIV crisis: about 26% of all MSM are living with HIV, according to most recent estimates from UNAIDS (in 2017).

## **6. Why is a legal challenge necessary?**

For many years, evidence has been mounting of the harms caused to Dominicans by criminalising LGBT people, including the stigma, discrimination and violence encouraged by such laws. The continued criminalisation of consensual sex by LGBT people through the gross indecency and anti-buggery laws, and the broader abuses against LGBT Dominicans to which such criminalisation contributes, have damaged too many lives — and continue to do so every day. These are the lives not only of LGBT Dominicans, but also of their family members and friends who have lost loved ones to violence or AIDS, or when those facing persecution have sought asylum elsewhere.

Domestic and international bodies have repeatedly called for the repeal of the gross indecency and anti-buggery laws, yet successive governments have steadfastly refused. Instead government officials have prioritised the views of conservative religious groups over the lives of LGBT citizens. Furthermore, there is no likelihood that, within any reasonable time frame, a sufficient number of Parliamentarians will support legislative reforms abolishing these laws. Any proposal for decriminalisation encounters substantial backlash and hostility.

But it is the mark of a free and democratic society that fundamental rights and freedoms are to be universally enjoyed by all persons. Respect for human rights cannot depend upon the approval of a majority, or else the rights of any person or community are at risk. The Constitution is an essential

manifestation of Dominica's commitment to basic democratic principles, and the rights it protects must be guaranteed for all Dominicans.

**7. How can these laws be challenged?**

The *Constitution of Dominica* provides that any person whose constitutional rights have been, are being or are likely to be violated may bring a claim before the courts for the law to be reviewed. The courts can make binding decisions obliging the state to end any breach of the Constitution, including by changing its laws.

**8. What is the ultimate goal of this claim?**

The goal of this claim is to end the criminalisation of any consensual sexual activity between persons above the age of consent, in particular the criminalisation of consensual sex between partners of the same sex.

The claimant argues that, in order to comply with the Constitution, Dominica should repeal the criminal prohibitions on "gross indecency" (SOA section 14) and "buggery" (SOA section 16) in their entirety, so as to decriminalise consensual sexual activities among persons above the age of consent (established as 16 elsewhere in the SOA).

The law would continue to criminalise *non-consensual* sexual contact of any kind (including anal sex). Section 3 of the SOA prohibits "rape," which is limited specifically to penile-vaginal penetration without consent. Section 4 prohibits "unlawful sexual connection," which covers any other non-consensual vaginal or anal penetration or oral/genital contact. These are appropriate uses of the criminal law.

**9. What is the likely timeline for the claim?**

It is impossible to say with certainty. Constitutional claims should be given priority by the court as they concern fundamental rights and freedoms. Furthermore, these rights continue to be violated each day the criminal prohibitions remain in effect, along with the continued encouragement of stigma, violence and abuse against LGBT people.

However, it is very possible that any decision of the court of first instance would be appealed. Currently Dominica has two levels of appeal: first to the Eastern Caribbean Court of Appeal and then to the Caribbean Court of Justice. These appeals can take years before the matter is resolved.

**10. What does such a challenge mean for people of faith? What about marriage rights for same-sex couples?**

It is regrettable that proposals for repealing Dominica's discriminatory laws have encountered opposition from some vocal, organised religious leaders who continue to foment misinformation, widespread homophobia and support for maintaining these criminal laws. Fortunately, a growing number of leaders, from various religious traditions, including the Catholic Bishop of Roseau, have begun speaking out against such discrimination and challenging the misinterpretation and misuse of religious teachings to justify criminalisation and discrimination. They have begun to articulate a vision of a more respectful society, which is also based on the core values of their own faith tradition.

Some religious leaders have attempted to conflate calls for decriminalising consensual sexual activity by LGBT people with legalising same-sex marriage. This position is misguided and illogical. This claim challenges the unjustifiable criminalisation and punishment of consensual sex between people above the age of consent. Nothing in the claim addresses the question of granting marriage

rights to same-sex couples. Decriminalising LGBT people (and indeed heterosexuals who also engage in consensual anal sex) does not mean legalising same-sex marriage in Dominica, nor does it compel religious leaders or organisations to perform or recognise such marriages.

Nor does decriminalising consensual sex between those who are above the age of consent interfere with other people's freedom of opinion or belief — in a free and democratic society, people are free to hold their own views, religious or otherwise. This claim is about whether the state has any business policing the sex lives of consenting partners — a matter of respect for privacy, dignity and equality that is important not just for LGBT people, but for all Dominicans. Realising the human rights guaranteed in the Constitution is of benefit to all and is part of the larger project of ensuring that fundamental human rights are universally respected and protected.

#### **11. Who is supporting this legal challenge?**

Widespread homophobia makes it very difficult to find local support in Dominica to pay lawyers and to provide technical assistance for such a legal challenge. This claim is being brought by a Dominican gay man, with support from groups and advocates both in Dominica and elsewhere — including Minority Rights Dominica, the Canadian HIV/AIDS Legal Network, the University of Toronto's International Human Rights Program and Lawyers Without Borders, organisations that are committed to advancing human rights as a matter of basic principle and as an essential aspect of responding effectively to the HIV epidemic.