

December 12, 2023

Re: Case N° 15.097
Alexa Hoffmann et al.
Barbados
Inter-American Commission on Human Rights

Additional Observations on the Merits by Petitioners Alexa Hoffmann, S.A. & D.H.:
Submitted pursuant to art. 37 of the Inter-American Commission on Human Rights’ Rules
of Procedure

The petitioners in the above-referenced file (N° 15.097) welcome the opportunity provided by the Inter-American Commission on Human Rights (“the Commission”) to make further submissions with respect to the merits of their case. The initial petition was filed with the Commission on June 6, 2018. On September 26, 2022, the petition was deemed admissible pursuant to article 46 of the *American Convention on Human Rights* (“the Convention”). In light of the time that has elapsed since the petition was filed, the petitioners wish to draw to the Commission’s attention a number of relevant developments which warrant consideration in the examination of the merits of this case.

2022 Ramirez decision – High Court of Barbados

In December 2022, the High Court of Barbados issued an oral judgment in the matter of *Ramirez and others v. Attorney General*, declaring that sections 9 and 12 of the 1992 Sexual Offences Act (“SOA”), which respectively criminalized “buggery” and “serious indecency” and operated to criminalize consensual same-sex intimacy, were null and void, and of no force or effect.¹ The High Court released a formal written judgment in this matter on May 25, 2023. In coming to this decision, the High Court found that sections 9 and 12 of the SOA contravened the claimants’ fundamental rights, namely the rights to liberty (section 11a of the Constitution), privacy (section 11b), equal protection of the law and freedom from discrimination (section 11c), freedom of expression (section 11d), and the right not to be hindered in the enjoyment of freedom of expression (section 20). Crucially, the High Court concluded that sexual orientation is a distinct standalone ground of discrimination which benefits from equality protections under section 11 of the Constitution, despite not being explicitly mentioned in its text.² As well, the High Court determined that Barbados had “failed to meet its international obligations regarding the criminalization of consensual relations between adults of the same sex by retaining Sections 9 and 12 in the SOA”.³ Consequently, the High Court deemed these provisions to be

¹ *McLean-Ramirez and Ors v The Attorney General of Barbados*, High Court, Civil Division of the Republic of Barbados, No. CV 0044 of 2020, 25 May 2023, online: <https://www.humandignitytrust.org/wp-content/uploads/resources/RAMIREZ-FINAL.pdf>.

² *Ibid* at paras 160-165. As the High Court put it, the Constitution must be interpreted in a manner that accounts for social and societal developments, and this includes when it comes to acknowledging the discrimination faced by Barbadians based on their sexual orientation.

³ *Ibid* at paras 115-120. Specifically, the High Court accepted the views of the United Nations High Commissioner for Human Rights and the arguments made by the claimants that these provisions violated international human rights

unconstitutional, null and void and of no effect to the extent that they applied to consensual sexual intercourse between persons of sixteen years of age or more in private.

The Commission publicly welcomed the High Court's ruling in its own press release on June 19, 2023, noting that the criminalization of consensual same sex relations has pervasive effects in society, serving to legitimize and reinforce prejudices against LGBT persons and sending a message to the public that discrimination and violence against these groups is condoned or tolerated.⁴ Furthermore, the Commission reiterated that laws of this nature violate the principle of equality and non-discrimination and the rights to privacy and human dignity. Crucially, the Commission also called on all states to "take positive action to create a legal framework to protect LGBTI persons from all forms of violence and discrimination".

The crux of the present petition is closely intertwined with the issues raised and addressed by the High Court in the *Ramirez* decision, namely the violations of fundamental rights – both under the Constitution of Barbados and the Convention – engendered by sections 9 and 12 of the SOA. However, the facts and human rights violations alleged in the present petition go beyond the sole existence and operation of these legal provisions.

These provisions codify and contribute to hatred against the LGBT community in Barbados. The allegations advanced by the petitioners demonstrate how the criminalization of "buggery" and "serious indecency" contribute to hostile attitudes, widespread homophobia and transphobia, and legitimize broader abuses and pervasive discrimination and violence against members of the LGBT community in Barbados. In particular, section 3 of the original petition ("Facts demonstrating violations of petitions' human rights under the Convention") documents numerous attacks against LGBT individuals in Barbados, as well as a pattern of anti-LGBT attitudes amongst members of law enforcement in Barbados, including police harassment of LGBT individuals and pervasive inaction in providing redress to LGBT individuals who are victims of crimes and/or human rights violations.⁵ Furthermore, sections 9 and 12 of the SOA fuelled a climate of stigma and discrimination against LGBT individuals in Barbados that is also directly linked to the exacerbation of public health challenges posed by HIV, and which undermines the right to the highest attainable standard of health. All of these manifestations of prejudice are separate and distinct human rights violations from those directly engendered by the operation of the offending provisions of the SOA. These facts have not vanished by the simple declaration of constitutional invalidity granted by the High Court.

Ultimately, the petition highlights the continued inadequacies of Barbados' policies and legal frameworks concerning equality and anti-discrimination and the failures of public authorities to

law, namely the rights to privacy and non-discrimination under the *International Covenant on Civil and Political Rights*.

⁴ Inter-American Commission on Human Rights, "IACHR welcomes decision declaring criminalization of consensual same-sex relations unconstitutional in Barbados", 19 June 2023, online: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/media_center/PReleases/2023/126.asp.

⁵ See also the specific factual allegations relayed by each individual petitioner in section 3 (subsection 5) of the original petitioner. These allegations involve many instances of discrimination, abuse, and violence on the basis of sexual orientation and/or gender identity, which may find their roots in part from a discriminatory legal context exemplified by sections 9 and 12 of the SOA, but which constitute broader human rights violations that have not been fully addressed by the *Ramirez* decision.

take the necessary steps to halt harassment and discrimination and to investigate alleged human rights abuses against LGBT people.⁶ This has led to a situation where members of Barbados' LGBT community face persistent threats of violence, harassment, and abuse from private actors, who operate in relative impunity given the failure on the part of state actors to protect against such abuse.⁷ Until concrete measures are taken to remedy this situation, Barbados will have failed to live up to its obligations to guarantee the equal protection of LGBT people and to allow them to exercise their right to freely express their sexual orientation or gender identity.

Moreover, the relief requested in the present petition from the Commission extends beyond a mere recommendation that sections 9 and 12 of the SOA be repealed. Just as the Commission itself reiterated the need for states to take proactive measures to fulfill their positive obligations under the Convention, so too does this petition call on the Government of Barbados to adopt all the measures necessary to address stigma, discrimination, and violence against LGBT persons – measures that Barbados is legally required to take to comply with its human rights obligations and to guarantee the rights of members of the LGBT community.⁸ In particular, the following grounds of relief sought in the petition to the Commission were not addressed in the High Court's decision in *Ramirez*, and therefore, remain live issues that warrant the Commission's continued attention:

- The Government of Barbados must condemn and monitor serious human rights violations, including discrimination and hate speech, as well as incitement to violence and hatred, on the grounds of sexual orientation and gender identity in accordance with its international commitments, including the Convention;
- The Government of Barbados must ensure that all allegations of excessive use of force and other human rights violations by law enforcement officials based on real or perceived sexual orientation and gender identity or expression are investigated promptly and thoroughly;

⁶ The original petition invokes various examples from the jurisprudence of the Inter-American Court of Human Rights that clearly set out a number of positive obligations incumbent upon states to guarantee the rights of their citizens. Under Articles 8 and 25 of the Convention, the Court has established there is a positive obligation on the State to not only prevent violations of human rights, but to diligently investigate alleged violations as well, in an attempt to avoid impunity and the repetition of human rights violations. See for instance, *Vélez Restrepo and family v Colombia*, IACtHR, 2012, Series C, no. 248, at 247; and *Barrios family v Venezuela*, IACtHR, 2011, Series C, no. 237, at para 176.

⁷ The obligation to investigate alleged human rights violations exists even if the perpetrator is a private individual, because, if "their acts are not investigated genuinely, they would, to some extent, be assisted by the public authorities". *Barrios family v Venezuela* at para 177; see also: *Baldeón García v Peru*, IACtHR, 2006, Series C, no. 147, at paras 147-148.

⁸ Article 1(1) of the Convention imposes a positive obligation on Barbados to ensure that all individuals under its jurisdiction are able to fully and freely exercise the rights guaranteed to them by the Convention without discrimination. Moreover, the obligation imposed by Article 13 of the Convention on Barbados extends beyond merely refraining from direct interference with the Petitioners' right to free expression. Barbados must take measures to relieve *de facto* conditions contributing to the Petitioners' increased vulnerability and take further measures to prevent and redress violations of their rights.

- The Government of Barbados must train all law enforcement and criminal justice officials on international human rights standards and non-discrimination, including on the grounds of sexual orientation and gender identity;
- The Government of Barbados must conduct awareness-raising programs, especially through the education system, to address social stigma and exclusion of individuals and communities on grounds of their sexual orientation and gender identity and expression, and respect for the human rights of all Barbadians, including the obligation not to discriminate against LGBT people;
- The Government of Barbados must facilitate access to social services, and especially health services, regardless of the individual's sexual orientation, gender identity and expression, and/or HIV status; and
- The Government of Barbados must enact legislation that specifically prohibits discrimination based on sexual orientation and gender identity, in keeping with its obligations under Article 1 of the Convention.

Consequently, the petitioners call on the Commission to remain seized of the present case and proceed with an examination of the merits in order to address the full gamut of ongoing human rights violations faced by members of the LGBT community in Barbados, including the following *prima facie* violations of the Convention alleged and expanded upon in the originally filed petition: right to non-discrimination (Article 1) and rights to equality before the law and equal protection of the law (Article 24); right to privacy (Article 11); right to respect for physical, mental and moral integrity (Article 5); right to freedom of expression (Article 13); right to family (Article 17); right to a hearing for the determination of rights (Article 8); and right to judicial protection (Article 25).

Barbados' Employment (Prevention of Discrimination) Act, 2020

The petitioners acknowledge the enactment of the *Employment (Prevention of Discrimination) Act, 2020* ("EPDA") in August 2020 by the Government of Barbados, purportedly seeking to prevent discrimination in the employment context, including in the hiring process and during the course of employment.⁹ The EPDA provides legal safeguards to combat workplace discrimination and sets out procedures for dealing with acts of discrimination when they occur.

The petitioners recognize and welcome the inclusion of "sexual orientation" as a prohibited ground of discrimination by section 3(2)(h) of the EPDA. Anti-discrimination legislation is an essential part of upholding equality rights for all members of Barbadian society, including LGBT persons. However, this positive development is nevertheless deficient in two respects: 1) the EPDA is limited to the employment context; 2) the EPDA is under-inclusive, as it does not include protections for trans and gender-diverse persons on the basis of their gender, gender identity, and/or gender expression. In its current form, the EPDA fails to recognize the ways in which prejudice and discrimination against people on the basis of their gender identity and

⁹ *Employment (Prevention of Discrimination) Act, 2020*, Parliament of Barbados, available online at: https://www.pgaction.org/pdf/2020/Barbados_Employment_Act_2020.pdf.

expression continue to impact LGBT Barbadians in their access to, and experiences in, employment.

The Inter-American Court on Human Rights established in *Atala Riffo and Daughters v Chile* and *Advisory Opinion OC-24/17* that gender identity is a category protected by Article 1(1) of the Convention.¹⁰ As a result, the EPDA does not meet Barbados' combined obligation under Articles 1(1) and 24 "to take affirmative action in order to reverse or change any discriminatory situations in their societies that prejudice a specific group of persons".¹¹ Indeed, the EPDA does nothing to prevent the employment discrimination encountered by Petitioner Hoffmann:

In or around June 2014, I applied to a local car dealership for a sales representative position. During the job interview, I revealed I was transgender and the tone of the interview changed drastically in a negative manner, with the interview ending shortly after. Two weeks later, I received a letter from the dealership stating that "while they were impressed with [my] qualifications, [I] did not meet the criteria for the position." When I questioned the criteria, the dealership's human resources department refused to discuss the unknown criteria and stated "the answer is no."

Moreover, it is noteworthy that part 3 of the EPDA provides for several ambiguously worded exceptions to the general rule prohibiting discrimination, which, if interpreted expansively, risk undermining the equality rights of Barbadians.

The petitioners therefore reiterate their call for the Commission to recommend that the Barbadian government take adequate measures to fully implement its human rights obligations under the Convention towards all members of the LGBT community in all spheres of society, by adopting inclusive anti-discrimination legislation that extends beyond the employment context. In addition, the petitioners stress that any legislative measures taken by the Government of Barbados to address discrimination must be accompanied by a full range of measures to ensure meaningful implementation in practice and effective remedies/opportunities of redress for people who nevertheless continue to face discrimination. On this note, the petitioners wish to underline the relevance of the following grounds of relief that are sought in their petition:

- The Government of Barbados must conduct awareness-raising programs, especially through the education system, to address social stigma and exclusion of individuals and communities on grounds of their sexual orientation and gender identity and expression, and respect for the human rights of all Barbadians, including the obligation not to discriminate against LGBT people;
- The Government of Barbados must enact legislation that specifically prohibits discrimination based on sexual orientation and gender identity, in keeping with its obligations under Article 1 of the Convention.

¹⁰ *Atala Riffo and Daughters v. Chile* at para 91; Inter-American Court of Human Rights, *Gender Identity, and Equality and Non-Discrimination with regard to Same-Sex Couples*, Advisory Opinion OC-24/17, Series A, No. 24 (Nov. 24, 2017) at paras 78-79.

¹¹ *Nadege Dorzema et al. v. Dominican Republic* at para 236.

Inter-American Commission on Human Rights – Jamaica Report on the Merits (2020) – T.B. & S.H.

The petitioners wish to highlight the relevance and utility of the Commission’s reports on the merits in the case of *T.B. and S.H. v. Jamaica* (2020) to the examination of the present case.¹² The Commission’s decision in the Jamaican case was its most recent pronouncement on the criminalization of same sex relations. It concluded that legal provisions of this nature violate a number of rights under the Convention. Notably, the Jamaican case mirrors the present petition as it was not limited to impugning the legal provisions that criminalize buggery and gross indecency and also laid out human rights violations stemming from the adverse social context for LGBT persons that is fuelled by the ongoing criminalization of same sex intimacy.

In light of the close parallels between the two cases, the petitioners invite the Commission to take heed of these recent pronouncements and to be guided by its analysis in the Jamaican case as it examines the present petition on the merits.

The Commission made the following findings of fact in the Jamaican case which are relevant to the present petition:

- The existence of laws that criminalize consensual sexual relations between adults of the same sex in private contributes to a hostile environment where violence, discrimination and serious human rights violations against LGBT persons are normalized;¹³
- The claimants experienced homophobia, transphobia, discrimination, violence, and abuse in Jamaica, stemming from the anti-sodomy laws;¹⁴
- Laws that criminalize homosexuality contribute to stigma and discrimination which hinder effective public health responses to the HIV epidemic and impact upon the enjoyment of the right to health.¹⁵

The Commission also made several legal findings in its analysis of the Jamaican case which are relevant to the present petition:

- The principle of equality and non-discrimination is a central and fundamental pillar of the Inter-American human rights system. Both the Inter-American Court and the Commission have determined that criminalizing same sex consensual relationships violates this principle, as well as the right to privacy;¹⁶
- Sexual orientation is a prohibited ground of discrimination, per the Inter-American Court’s jurisprudence. As well, the “scope of the right to non-discrimination due to

¹² *T.B. and S.H. v. Jamaica*, IACHR, Report No. 401/20, December 31, 2020. See also *Gareth Henry & Simone Edwards v. Jamaica*, IACHR, Report No. 400/20, December 31, 2020.

¹³ *Ibid* at paras 47-54.

¹⁴ *Ibid* at paras 55-57.

¹⁵ *Ibid* at paras 58-60.

¹⁶ *Ibid* at paras 63-64, 71-73.

sexual orientation is not limited to the fact of being a homosexual per se, but includes its expression and the ensuing consequences in a person's life",¹⁷

- International human rights bodies and experts have concluded that the criminalization of homosexuality and other forms of sexual and gender diversity is linked to pervasive human rights violations, in breach of international human rights law. In particular, there is a clear recognition that State-sanctioned punishment of homosexuality is linked to homophobic crimes, the reinforcement of stigma and prejudice, the legitimization of violence from private actors, police abuse and brutality, as well as an overarching climate of impunity;¹⁸
- Anti-sodomy laws have a disparate impact on LGBTI persons, including all individuals who defy traditional norms of sexual orientation, identity and expression of gender and bodily diversity, or who represent sexualities and non-normative identities. This includes gay men and other men who have sex with men, as well as trans persons and gender-diverse non-conforming persons;¹⁹
- The Commission formally recognized "that there is a link between sodomy laws and human rights abuses against LGBTI persons inasmuch as said laws condone discrimination, stigmatization and violence by providing a social sanction for abuse and contributes to the occurrence of homophobic and transphobic crimes as well as to other abuses";²⁰
- The Commission further concluded that laws, practices or policies that criminalize consensual same sex relations affect the enjoyment of the right to health in a serious and discriminatory fashion, by creating barriers to accessing health services tailored to the needs of LGBT persons and exposing individuals to discrimination, stigma and hostility.²¹

Finally, the Commission's treatment of the Jamaican case is instructive to the determination of the present petition, specifically in regard to the varied recommendations that it issued to the Jamaican government, which included calling for economic compensation, measures of satisfaction, and measures of non-repetition. The present petition seeks several grounds of relief which are of a similar nature to the recommendations made by the Commission in the Jamaican case, and which remain appropriate notwithstanding the repeal of sections 9 and 12 of the SOA following the *Ramirez* decision. These include recommendations to:

- Adopt legal frameworks that specifically prohibit discrimination based on sexual orientation and gender identity;

¹⁷ *Ibid* at paras 66-67.

¹⁸ *Ibid* at paras 76-79.

¹⁹ *Ibid* at para 90.

²⁰ *Ibid* at para 97.

²¹ *Ibid* at para 112, 115-118.

- Conduct training activities for public authorities, including law enforcement and criminal justice officials, on international human rights law, sexual orientation and gender identity;
- Deliver public education programs designed to combat stereotypes and address social stigma, prejudice and exclusion on the basis of sexual orientation and gender identity;
- Adopt the necessary measures to ensure effective access to health and social services without discrimination on the basis of an individual's sexual orientation, gender identity and expression;
- Take adequate measures to prevent, investigate and punish allegations of violence against individuals on the basis of their sexual orientation or gender identity.

McEwan et al v. Attorney General of Guyana – 2018 – Caribbean Court of Justice

Finally, the petitioners consider it appropriate to include in these additional submissions a mention of the *McEwan* decision issued by the Caribbean Court of Justice (“CCJ”) in 2018, months after the filing of the original petition.²² The *McEwan* case originated from Guyana, and concerned challenges to the laws criminalizing cross-dressing (section 153 of the *Summary Jurisdiction (Offences) Act*, prohibiting cross-dressing in a public place for an improper purpose). The claimants in that case were four trans individuals who had been targeted by law enforcement, facing repeated arrest, harassment, and arbitrary detention for alleged infractions of this provision.

Ultimately, the CCJ declared the impugned provision to be unconstitutional, finding that it was unduly vague, violated the right to freedom of expression, and crucially, that it violated articles 149 (non-discrimination) and 149D (equal protection of the law) of the Guyanese Constitution, in that it discriminated against and had disproportionately adverse impacts on transgender individuals.²³ The CCJ acknowledged that these laws criminalizing individuals on the basis of their gender identity exposed members of the LGBTI community to increased risks of harassment, which ultimately fuelled further humiliation, hate crimes, and other forms of violence, all of which are at odds with the values of equality enshrined in the Guyanese Constitution:

[70] A society which promotes respect for human rights is one which supports human development and the realisation of the full potential of every individual. **The hostility and discrimination that members of the LGBTI community face in Caribbean societies are well-documented. They are disproportionately at risk for discrimination in many aspects of their daily lives, including employment, public accommodation, and access to State services.**

[71] The 1st - 4th named appellants here, by choosing to dress in clothing and accessories traditionally associated with women, are in effect expressing their identification with the female

²² *McEwan et al v Attorney General of Guyana*, [2018] CCJ 30 (AJ), online: www.humandignitytrust.org/wp-content/uploads/resources/MC-EWAN-et-al-v-AG-OF-GUYANA-Copy.pdf.

²³ *Ibid* at para 72.

gender. **And the expression of a person's gender identity forms a fundamental part of their right to dignity. Recognition of this gender identity must be given constitutional protection.**

[72] Although it is true that cross dressing is practiced by persons of several types of sexual orientation, both on its face and in its application, **section 153(1)(xlvii) has a disproportionately adverse impact on transgendered persons, particularly those who identify with the female gender. It infringes on their personal autonomy which includes both the negative right to not be subjected to unjustifiable interference by others and the positive right to make decisions about one's life.** The formulation and operation of section 153(1)(xlvii) also reinforce stereotyping. **The section conduces to the stigmatisation of those who do not conform to traditional gendered clothing.** But most of all, **the fact that it criminalizes aspects of their way of life, thus enabling the State to unleash its full might against them, cannot, in all the circumstances, be reasonably justified. It is therefore, in our view, that section 153(1)(xlvii) violates Articles 149(1) and 149D of the Constitution.**

[...]

[79] **No one should have to live under the constant threat that, at any moment, for an unconventional form of expression that poses no risk to society, s/he may suffer such treatment.** But that is the threat that exists in section 153(1)(xlvii). It is a **threat particularly aimed at persons of the LGBTI community.** The section is easily utilised as a convenient tool to justify the harassment of such persons. **Such harassment encourages the humiliation, hate crimes, and other forms of violence persons of the LGBTI community experience.** This is at **complete variance with the aspirations and values laid out in the Guyana Constitution** and referred to at [62] above.

[Emphasis added].

In conclusion, the *McEwan* case is particularly relevant to the examination of the present petition, which includes several allegations relating specifically to the discrimination, harassment, and violence faced by trans and gender-diverse individuals in Barbados. The CCJ decision is a clear affirmation of the importance of equality rights and non-discrimination on the basis of gender identity in the Caribbean context, which is relevant to the present petition from Barbados, and should be considered by the Commission in its examination of the case on the merits.

All of which is respectfully submitted.

The petitioners remain available to provide additional information and submissions, if the Commission requires further guidance in the examination of this petition.