

**CARICOM Model Legislation on Violence against  
Women in the Areas of Sexual Offences, Domestic  
Violence and Sexual Harassment: Comparison with  
International Standards and Existing Commonwealth  
Caribbean Legislation**

# **CARICOM Model Legislation on Violence against Women in the Areas of Sexual Offences, Domestic Violence and Sexual Harassment: Comparison with International Standards and Existing Commonwealth Caribbean Legislation**

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## **Developments at the international level**

Universal acclaim for the principle of equality of men and women has been recognised by the United Nations since the adoption of its Charter, which includes in its preamble the goal "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women".<sup>1</sup> Since then, many resolutions, declarations and conventions have been adopted by the General Assembly of the United Nations in relation to the status of women and the girl-child, the most important being the Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW Convention),<sup>2</sup> which was adopted on 18 December 1979, and the Convention on the Rights of the Child (CRC),<sup>3</sup> which was adopted on 20 November 1989.

Article 2 of the CEDAW exhorts States parties "to condemn discrimination against women in all its forms and to pursue by all appropriate means and without delay a policy of eliminating discrimination against women". In article 19 of the CRC States parties are exhorted "to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse". It is to be noted that both the CEDAW and the CRCs impose on States parties obligations to undertake all appropriate legislative and other measures to ensure the implementation of the rights recognised in those Conventions. The concern for the human rights of women and the girl-child was also

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<sup>1</sup> Charter of the United Nations, adopted on 26 June 1945, entered into force 24 October 1945.

<sup>2</sup> 1249 UNTS 13, adopted 1 March 1980, entered into force 3 September 1981.

<sup>3</sup> GA Res 44/25, UN Doc A/44/49 (1989) at 166, reprinted in 28 ILM 1448 (1989).

addressed and reiterated in the Platform for Action emanating from the Beijing Conference in 1995.<sup>4</sup>

### **Developments at the regional level**

The framers of the Treaty establishing the Caribbean Community (CARICOM),<sup>5</sup> which was signed on 4 July 1973, were cognisant of the status of women in the Caribbean and it is worth noting that one of the areas of functional co-operation listed in the Schedule to the Treaty is "The Position of Women in Caribbean Society". This provision in the Treaty was certainly demonstrative of an early appreciation of, and commitment to, a regional approach to improving the position of women in the Caribbean society.

Government ministers with responsibility for the integration of women in development sought to implement the provision of the Treaty, at their meetings in 1981 and 1983, by requesting that the CARICOM Secretariat monitor the status of the CEDAW Convention in CARICOM member states. In response to this mandate, the CARICOM Secretariat engaged the services of a consultant to undertake an examination of the constitutions and other legislation of CARICOM states in order to identify those provisions in their laws which discriminated against women, as well as areas of omission in national constitutions and other legislation in relation to which action should be taken.

Based on the results of this study and also on the priority areas that were identified by the governments of CARICOM States as requiring urgent attention, several drafts of model legislation were prepared for consideration and adoption by them. These were in relation to citizenship, sexual offences, domestic violence, sexual harassment, inheritance, equal pay, equal opportunity and maintenance. These models are drafted in gender-neutral language.

CARICOM member States recognised that there was an upsurge in violence against women – physical, psychological and sexual – and, in the case of the girl-child, sexual abuse and incest and also that there were increasing reports of sexual harassment, especially in employment. They therefore included these as critical areas to be addressed.

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<sup>4</sup> Beijing Declaration and Platform for Action, in *Report of the Fourth World Conference on Women*, Beijing September 1995, UN Doc A/CONF.177/20 (17 October 1995), 35 ILM 401.

<sup>5</sup> Treaty establishing the Caribbean Community (CARICOM), 947 UNTS 17, 12 ILM 1033, adopted 4 July 1973, entered into force 1 August 1973. See generally <http://www.caricom.org>.

## **CARICOM model legislation**

### *Sexual offences*

The model legislation on sexual offences was prepared in the form of a separate draft statute, thus departing from the position in most CARICOM States where offences of this nature were included in the general law relating to offences against the person.<sup>6</sup>

It was recognised that victims of sexual offences were very reluctant to report the matter to the police, not only because of the nature of the offence but also because of the stigma attached to it and the traumatic experience which the victim suffered, especially in attending court to give evidence and the publication of the details in open court and in the media. In some cases, the complainant failed to attend court and sometimes opted to settle the matter out of court by accepting payment from the offender.

The model legislation sought to effect some solution to the problems concerning the prosecution of offences of this nature. Hence, the following provisions were included:

- Provision for *in camera* hearings sought to encourage more victims to report offences of this nature and attend court for the trial of offenders.<sup>7</sup> The model legislation provides for the public to be excluded during such hearings. An exception is made, so that the judge may permit the presence of any member of the public whose presence is requested by the complainant or the accused.<sup>8</sup>
- The model legislation provides for restrictions on reports of the identity of an accused or complainant after a person has been charged with an offence, except on the application of the complainant or accused to the court to permit such publication or, in the case of the accused, after the person has been tried and convicted of the offence.<sup>9</sup> Thus, the model legislation provides for the passing of sentence to take place in public so that the identity of the accused may be disclosed at this stage. Any person who discloses the identity of the accused or complainant after the accused is charged with the offence is liable on conviction to a fine or a term of imprisonment.

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<sup>6</sup> Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual offences*.

<sup>7</sup> *Id.*, clause 21.

<sup>8</sup> *Id.*, clause 21(2).

<sup>9</sup> *Id.*, clauses 25 and 26.

This is indeed a very important provision in view of the fact that in Guyana the media, from time to time, unwittingly discloses the identity of the accused is published. For example, it may be stated in the media that the accused is the stepfather of the child or the neighbour of the child and the address of the accused is published. Thus, even though the name of the complainant is not mentioned, invariably the public is led to recognise that person's identity.

- The model legislation restricts the adducing of evidence as to the sexual history of the complainant.<sup>10</sup>
- The model legislation empowers the court to forbid the publication of reports of certain details of the alleged act.<sup>11</sup> The breach of an order of the court forbidding publication of such report or account giving details of the criminal act alleged to have been performed on the complainant may be dealt with as contempt of court.

By 1997, five CARICOM countries had enacted legislation based on the model legislation. They were Antigua and Barbuda; the Bahamas; Barbados; Dominica; and Jamaica. In the case of Guyana, the Criminal Law (Amendment) Act 1991 amended the Criminal Law (Offences) Act to provide for *in camera* trials unless the court orders otherwise.

<i>Member States</i>	<i>Legislation enacted</i>
Antigua and Barbuda	Sexual Offences Act 1995
The Bahamas	Sexual Offences and Domestic Violence Act 1991 (The Bahamas has combined sexual offences and domestic violence under one Act)
Barbados	Sexual Offences Act 1992
Dominica	Sexual Offences Act 1995
Guyana	Criminal Law (Amendment) Act 1991 (This Act amended the Criminal Law (Offences) Act and the Criminal Law (Procedures) Act. The amendment to the Criminal Law (Offences) Act provides for proceedings to be held <i>in camera</i> unless the court otherwise

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<sup>10</sup> *Id.*, clause 23.

<sup>11</sup> *Id.*, clause 25.

orders. The Magistrate is therefore given a discretionary power. The Chancellor of the Judiciary, at a meeting held on 5 April 1997 with the Magistracy, reminded them of the amendment to the Criminal Law (Offences) Act.)

### ***Domestic violence***

The model legislation with regard to domestic violence was prepared on the basis that there was a perceived need for legislation dealing exclusively with the matter of domestic violence and to provide remedies which are intended to mitigate the effects of domestic violence.<sup>12</sup> The model, therefore, attempts to provide legal protection to persons who are victims of domestic violence.

The main categories of persons falling within the ambit of the legislation are men and women who are, or have been, married to each other or who are, or had been, living together as man and wife<sup>13</sup> and children; "child" being defined in the model legislation as a child of both parties to a marriage, or a child of an unmarried couple, or a child who has been accepted as a member of the family or of the couple's household.<sup>14</sup> The definition of a child includes a child who resides in a household on a regular basis or who is under the guardianship of a man or woman.

The scope of remedies provided in the model legislation covers the granting of a protection order,<sup>15</sup> occupation order<sup>16</sup> or tenancy order.<sup>17</sup>

### ***Protection order***

A protection order prohibits the respondent from:

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<sup>12</sup> Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to domestic violence*.

<sup>13</sup> *Id.* clause 2.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Id.* clauses 4, 5 and 6.

<sup>16</sup> *Id.* clauses 7, 8, 9 and 10.

<sup>17</sup> *Id.* clauses 11, 12, 13 and 14.

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- entering or remaining in the household residence of any prescribed person. (The model legislation defines "prescribed person" as being the spouse of the respondent, or a parent or a child or dependent of that person);<sup>18</sup>
- entering or remaining in any area specified in the protection order, being an area in which the household residence of a prescribed person is located;
- entering the place of work or education of any prescribed person;<sup>19</sup>
- entering or remaining in any place where a prescribed person happens to be;<sup>20</sup>
- molesting a prescribed person by:
  - watching or besetting the prescribed person's household residence, place of work or education;
  - following or waylaying the prescribed person in any place;
  - making persistent telephone calls to a prescribed person; or using abusive language to or behaving towards a prescribed person in any other manner which is of such nature and degree as to cause annoyance to or result in ill-treatment of the prescribed person.<sup>21</sup>

The court may make a protection order if it is satisfied that:<sup>22</sup>

- the respondent has used or threatened to use violence against or caused physical or mental injury to a prescribed person and is likely to do so again; or
- having regard to all the circumstances, the order is necessary for the protection of a prescribed person and the court may, if it thinks fit, attach a power of arrest to the order.

A protection order may be made on an *ex parte* application if the court is satisfied that the delay that would be caused by proceeding on notice would or might entail:<sup>23</sup>

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<sup>18</sup> *Id.*, clause 2.

<sup>19</sup> *Id.*, clause 4(a) and (b).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Id.*, clause 4(e).

<sup>22</sup> *Id.*, clause 4(2).

<sup>23</sup> *Id.*, clause 5(1).

- risk to the personal safety of a prescribed person; or
- serious injury or undue hardship.

The person who breaches such an order is liable on conviction to a fine or imprisonment.<sup>24</sup> Provision is also made in the model legislation for a constable to arrest a person who breaches such an order if the constable has reason to believe that the arrest is reasonably necessary for the victim's protection.<sup>25</sup>

### ***Occupation order***

An occupation order is intended to grant the prescribed person named in the order the exclusive right to live in the household residence.<sup>26</sup> The order may be granted by the court if the court is satisfied that it is necessary for the protection of the prescribed person or that it is in the best interests of a child. Before making an occupation order, the court is obliged to direct that notice be given to any person having an interest in the property who would be affected by the order, for example a landlord. That person also has the right to appear before the court and be heard in the matter of the application for the occupation order.<sup>27</sup>

Where such an order is made the prescribed person to whom it relates is entitled, to the exclusion of the respondent, personally to occupy the household residence to which the order relates.<sup>28</sup>

### ***Tenancy order***

A tenancy order is applicable in cases where the respondent is either the sole tenant of the household residence or holds the tenancy jointly or in common with the applicant.<sup>29</sup> "Applicant" is defined in the model legislation to mean any person who applies, or on whose behalf the application is made, for an order.<sup>30</sup>

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<sup>24</sup> *Id.* clauses 5(2)-(5).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Id.* clause 7.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Id.* clause 9.

<sup>29</sup> *Id.* clause 11.

<sup>30</sup> *Id.* clause 2.

The effect of a tenancy order is to vest the tenancy in the applicant to the exclusion of the respondent.<sup>31</sup> The applicant is, however, bound by any terms and conditions of the tenancy in force at the time when the order is made.<sup>32</sup> A tenancy order may be made if and only if the court is satisfied that it is necessary for the protection of the applicant or that it is in the best interests of a child of the family.<sup>33</sup>

In relation to occupation orders and tenancy orders, the court is also empowered to make ancillary orders granting the applicant the use of all or any of the furniture, household appliances or household effects in the residence to which the tenancy order or occupation order relates.<sup>34</sup>

The model legislation also contains provisions restricting the persons who may be present at any proceedings (other than criminal proceedings) in connection with applications under the Act.<sup>35</sup> The leave of the court is also required for the publication of any report of the proceedings.<sup>36</sup> This restriction does not apply to publications which are bona fide technical or professional reports or which are intended for circulation among members of certain professions specified. The restrictions outlined above are intended to be for the protection of the applicant.

### ***Counselling***

An important feature of the model is the power of the court to recommend that either or both parties participate in counselling. The court would specify the nature of the counselling recommended.

### **Legislation enacted following the CARICOM model legislation on sexual offences and domestic violence**

All CARICOM states, with the exception of Grenada, St Kitts and Nevis, and Suriname, have either enacted legislation or are in the process of doing so. The following CARICOM states have enacted legislation based generally on the CARICOM model legislation:

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<sup>31</sup> *Id.*, clause 11.

<sup>32</sup> *Id.*, clause 13(3)(a).

<sup>33</sup> *Id.*, clause 11(2).

<sup>34</sup> *Id.*, clause 16.

<sup>35</sup> *Id.*, clause 18(d).

<sup>36</sup> *Id.*, clause 21.

*CARICOM model legislation in comparative perspective*

<i>Member States</i>	<i>Legislation enacted</i>
Bahamas	Sexual Offences and Domestic Violence Act 1991 (Sexual offences and domestic violence have been combined under one Act)
Barbados	Domestic Violence (Protection Orders) Act 1992 (Requirement of corroboration in rape cases has been abolished)
Belize	Domestic Violence Act 1992
Guyana	Domestic Violence Act 1996
Jamaica	Domestic Violence Act 1995
St Lucia	Domestic Violence (Summary Proceedings) Act 1995
St Vincent and the Grenadines	Domestic Violence (Summary Proceedings) Act 1994
Trinidad and Tobago	Domestic Violence Act 1991

The British Virgin Islands, an Associate Member of the Caribbean Community, has enacted the Domestic Violence (Summary Proceedings) Act 1996. Antigua and Barbuda, Dominica and Montserrat are in the process of enacting legislation.<sup>37</sup>

**The impact of legislation enacted in relation to domestic violence**

Since legislation has only recently been enacted in CARICOM states, it is perhaps too soon to arrive at an accurate assessment of the impact of this legislation. However, at this stage one can be guided by the comments received from member states.

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<sup>37</sup> As of 2 September 1998, Antigua and Barbuda, Dominica and Montserrat had not yet enacted legislation. The matter is still under consideration by the relevant authorities.

St Lucia has reported that persons have been applying for Protection Orders under the Domestic Violence (Summary Proceedings) Act 1995 but statistics are not yet available.

In Trinidad and Tobago, many persons have sought remedies under the Domestic Violence Act 1991. However, the Act is presently under review because it has been shown to be ineffective in offering complete relief to victims of domestic violence. Areas of concern regarding the 1991 Act in Trinidad and Tobago have been expressed by the Women's Desk in government.<sup>38</sup> They are as follows:

- the need for the establishment of family courts in all magisterial districts as an integral part of the support system for the Domestic Violence Act;
- the powers of the police as regards the arrest and removal of the perpetrator from the location;
- the duration of the protection order;
- police procedures when a domestic violence complaint is lodged at a police station;
- counselling for victim and perpetrator should be mandatory;
- support services for the Domestic Violence Act; and
- legal aid for victims of domestic violence.

Belize has commenced a pilot study and the preliminary observations suggest that:

- the Act has facilitated the legal process;
- women and service providers look forward to positive changes as a result of attitude changes and the legislation that is in place;
- however, some providers were of the view that women are still not safe with the issuance of a protection order; and
- the system is not sufficiently confidential or private.

From the preliminary observations of the Belize pilot study and the concerns expressed by the women's desk in Trinidad and Tobago, it would appear that the Domestic Violence Act has improved the social and legal status of women. Nevertheless, it is apparent that much more needs to be done to make the Act more

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<sup>38</sup> Communication from the Women's Desk to the Women's Affairs Officer of the CARICOM Secretariat.

effective. Perhaps there is a need to review the legislation, though only after a proper analysis and evaluation of the impact of the legislation has been undertaken.

### **Sexual harassment**

CARICOM has also proposed model legislation to provides protection to persons who suffer discrimination arising from acts of sexual harassment.<sup>39</sup> The model addresses sexual harassment in employment, in educational institutions and when seeking accommodation.

"Sexual harassment" is defined as conduct which involves an unwelcome sexual advance or unwelcome request for sexual favours or other unwelcome conduct of a sexual nature, by one person to another.<sup>40</sup> Such conduct falls within the ambit of the legislation if the person who is harassed has reasonable grounds for believing that he or she will suffer some disadvantage as a result of his or her rejection of the sexual advances of the other person, or if such disadvantage is actually suffered by him or her as a result of such rejection.<sup>41</sup>

The remedies contemplated do not provide for criminal sanctions but for the hearing of civil complaints by a tribunal.<sup>42</sup> Two options are proposed in the model legislation.<sup>43</sup> The first option provides for the establishment of a permanent tribunal, while the second option provides for the setting up of an *ad hoc* tribunal where costs are most likely to be reduced. The procedure for filing complaints is set out in the model legislation.

With the exception of Belize, legislation in relation to sexual harassment has not yet been enacted by member states. Belize has enacted the Protection Against Sexual Harassment Act 1996 and St Kitts and Nevis is presently addressing this matter in their law reform programme.<sup>44</sup>

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<sup>39</sup> Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual harassment*.

<sup>40</sup> *Id.*, clauses 2(2), 3, 4 and 5.

<sup>41</sup> *Id.*, clauses 3(4) & 4(2).

<sup>42</sup> *Id.*, clause 6.

<sup>43</sup> *Ibid.*

<sup>44</sup> As of 2 September 1998, legislation on sexual harassment had not yet been enacted in St Kitts and Nevis.

## **Conclusion**

In concluding, while it is recognised that legislation is an important vehicle to initiate change, legislation in itself is not enough, but must be complemented by effective policies intended to change stereotyped attitudes, to educate persons about gender sensitivity and to introduce support services and measures such as the Help and Shelter Service in Guyana. These measures should not, however, be the responsibility of the governments alone but must also be borne by non-governmental organisations and the community as a whole.

# **Violence against Women in the Commonwealth Caribbean – CARICOM Model Legislation in areas of Sexual Offences, Sexual Harassment and Domestic Violence – Their Use in the Framing of National Legislation and a Comparison with International Standards**

*Margarette May Macaulay\**

## **Introduction**

This paper attempts to give the NGO perspective on the national positions on these legislative provisions. I must, of necessity, give more details on the Jamaican position and a mere gloss in relation to the other countries herein mentioned.<sup>1</sup>

## **Sexual offences**

Jamaica still operates under the Offences against the Person Act 1864 for the prosecution of perpetrators of violence against women. A Sexual Offences Bill was put aside some years ago following great public outcry against the proposal to decriminalise homosexual acts in private between consenting adults which, in the Offences against the Person Act, is described as "outrages on decency".

In 1996, Government laid before Parliament two Bills. The first proposed to amend the sections in the Offences against the Person Act relating to sexual offences, and the second was the Incest (Punishment) Act. As of April 1997, these Bills were still before the Joint Select Committee of Parliament since its sittings on them had been adjourned the previous year for lack of a quorum.

The proposed amendments seek to make the offence of rape gender-neutral and enlarge its definition to include sexual violation by means other than vaginal penetration by the penis. In this regard, this proposal goes beyond the provision on rape in the Caribbean Community (CARICOM) model legislation with regard to sexual offences, which confines rape as hitherto to vaginal penetration by a male

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<sup>1</sup> I am indebted to the national Caribbean Association for Feminist Research and Action (Cafra) groups of Trinidad and Tobago, St. Vincent and the Grenadines, Guyana and Dominica, and in particular to Cathy Shepherd of Trinidad and Tobago, Josephine Whitehead and Doreen Holder of Guyana, Nelcia Robinson of St. Vincent and the Grenadines, and Christene and Irma Loford of Dominica for their assistance.

person.<sup>2</sup> If the amendments are passed, the offence of rape in Jamaica will apply to women and men, and will encompass the use of any part of the body or any implement to penetrate any opening in the body. To fit the Jamaican situation, but in keeping with the CARICOM model legislation, it also creates the legislative offence of marital rape when a decree nisi has been granted, when the parties are living separate and apart (with or without a separation agreement), there is in existence an order restraining contact between the parties or if the act occurs with the use of violence or force.

The draft legislation proposes to repeal the common law presumption that a boy under the age of 14 is incapable of rape. The presumption is retained in the CARICOM model legislation.<sup>3</sup> The Jamaican proposal is considered necessary because of many reported incidents of rape by boys under the age of fourteen.

There is notably absent from the Jamaican proposed amendment any provision relating to sexual conduct with a minor employee.<sup>4</sup>

The amendments also propose to abolish the technical necessity for a judge to warn a jury that it is dangerous to convict on a complainant's uncorroborated evidence of rape.

The Bill proposing amendments to the Offences against the Person Act also introduces provisions to regulate the use in evidence of a complainant's sexual history. It provides, *inter alia*, that no questions about previous sexual history shall be asked of a complainant, except with the consent of the judge. The CARICOM model legislation however provides for a complete ban on such evidence being adduced by or on behalf of the accused.<sup>5</sup>

In addition, the Bill prohibits the publication of a complainant's identity (but not the accused's) and of details of the proceedings in the case. It also provides for the offences of carnal abuse, indecent assaults, procurement, abduction, procuring defilement gross indecency.

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<sup>2</sup> Commonwealth Secretariat and CARICOM Secretariat, Commonwealth Fund for Technical Cooperation, *CARICOM model legislation with regard to sexual offences, clause 4(2)*.

<sup>3</sup> *Id.*, clause 3(3).

<sup>4</sup> See *Id.*, clause 11, which "provides for an offence where an adult has sexual intercourse with a minor who is in the adult's employment, or who, by virtue of the employment is subject to the adult's direction or control or receives salary or wages directly or indirectly from the adult." Commonwealth Secretariat, CARICOM Secretariat, *Explanatory memorandum on model legislation with relation to sexual offences*, at 3.

<sup>5</sup> *Supra* note 3, clause 23.

*CARICOM model legislation: use in the framing of domestic legislation*

The non-governmental organisation (NGO) response by Awoja's Legal Committee<sup>6</sup> supported the proposed amendments and stated some concerns. We opposed and still oppose the inclusion of the requirement that the Director of Public Prosecutions consent to any prosecution for marital rape. We fail to recognise any logical reason for this requirement and hold the view that:

- (i) the circumstances in which a husband may be convicted of the rape of his wife are so detailed in the Bill as to provide sufficient checks and balances;
- (ii) this requirement reflects the mistrust of women which gave rise to the need for corroboration;
- (iii) it is a continuation of the paternalistic attitude towards married women; and
- (iv) it may re-enforce the tendency of women to refrain from reporting marital rape, a consequence which is most undesirable.

We also submitted that the use of the words "idiot" and "imbecile" in the Bill was inappropriate and should be deleted and replaced by the term "persons with severe intellectual disabilities" or as in the CARICOM model legislation "mentally incapacitated person". In our view, these words are archaic and vague and derogatory. Our submission on this resulted from consultation with the Combined Disabilities Foundation. It was their view that persons with mild to moderate intellectual impairment have the same rights to enjoy normal sexual relations and the criminal sanction as drafted puts a blanket prohibition on such intercourse. In the Foundation's view, these persons are usually able to give or refuse consent, and ought to fall under the provisions related to rape.

The offence of procurement applies where anyone "procure[s] or attempt to procure" a person, under 18 years and "not being a prostitute or person of known immoral character", to have sexual intercourse with another. We recommend that the exception "not being a prostitute or person of known immoral character" be omitted because it ought to be an offence for anyone to "procure or attempt to procure" a person. It is our view that the retention of the statutory exception in the Offences against the Person Act in relation to prostitutes and persons of "known immoral character" could have the following effect:

- (a) it may encourage accused persons to defend themselves by smearing the reputation of the complainant by trying to bring them within these categories;

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<sup>6</sup> Awoja is an umbrella women's NGO in the Caribbean region.

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- (b) it may introduce a subjective element (that of morality) into criminal proceedings;
- (c) it may exclude from the protection of the law some young Jamaicans who are potential victims of this type of procurement; and
- (d) it establishes an underlying assumption that persons of lax sexual conduct have no right to the protection of the law.

We also criticised the fact that, though provision is made for the abduction of minors, none is made for the abduction of adults; and we considered that there ought to be such provision.

We also recommended that the offence of soliciting or living off the earnings of prostitution, which carries a sentence of imprisonment, also ought to be subject to the imposition of fines because of their economic nature. In this way, the punishment could to some extent be made to fit that part of the crime.

The second Bill (entitled "an Act to amend the Incest (Punishment) Act") extends the definition of incest and the category of persons who can commit the offence to include persons in "step" relationships to the victims and other persons *in loco parentis* to the victim. It also extends the definition of sexual intercourse, in the manner described above, and increases the penalty for incest to a maximum of life imprisonment. These proposed amendments are similar to provisions for incest found in the CARICOM model legislation.<sup>7</sup>

Trinidad and Tobago has a Sexual Offences Act 1986. It provides, *inter alia*, in Part 1 for the indictable offences of rape, sexual assault by a husband in certain circumstances; sexual intercourse with a female under 15; sexual intercourse with a female between 14 and 16; sexual intercourse with males under 16; incest; sexual intercourse with an adopted minor; sexual intercourse with a minor employee; sexual intercourse with a mentally-subnormal person; buggery; serious indecency; procurement; procuring defilement of a person; detention of a person; abduction of a female householder; permitting defilement of a minor under 16 and suppression of brothels. Part 2 contains supplementary provisions and offences relating to living on earnings of prostitution; aiding in prostitution; sexual intercourse; age; divestment of authority; consent; hearings in camera; evidence concerning sexual activity and sexual reputation; recent complaint; anonymity of complainants in committal proceedings; and alternative verdict.

This Act was not, I understand, based on the CARICOM model legislation. Nonetheless, there seem to be similarities between some of the provisions in the Trinidad and Tobago Act and those in the CARICOM model legislation.

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<sup>7</sup> *Supra* note 3, clause 7.

### ***CARICOM model legislation: use in the framing of domestic legislation***

St Vincent and the Grenadines deals with rape and sexual assaults and attendant offences in its general criminal provisions. Guyana has no Sexual Offences Act and the law relating thereto can be found in the Criminal Law Act.

In the Bahamas, sexual offences and domestic violence are dealt with together in one Act, the Sexual Offences and Domestic Violence Act 1991. This Act is gender-neutral in its provisions. It provides for corroboration for the charge of procurement and for the charges of soliciting, living on the earnings of prostitution and for non-disclosure of AIDS.

The provision regarding AIDS makes it an offence for a person infected with a virus causing or known to cause AIDS, to knowingly have sexual intercourse with a consenting partner without disclosing the fact of infection to such partner. The penalty on conviction is 5 years' imprisonment.

It is a defence to the charge, if it is shown that the other person knew or had reasonable cause to believe, before the sexual connection, that the accused was so infected. At this time, the Bahamas stands alone in the region in having the provision relating to AIDS and sexual harassment as a criminal offence.

In other respects, the Bahamas legislation seems to have incorporated the provisions in the CARICOM model legislation. It also provides that sexual harassment by a prospective or actual employer or a person in a position of authority in any place of employment or an institution or co-worker is an offence punishable by a fine of \$5,000 or imprisonment for two years or both.

#### **Sexual harassment**

As of April 1997, there was no legislation addressing sexual harassment in Jamaica, Guyana, St. Vincent and the Grenadines, or Trinidad and Tobago. All these countries, however, have plans afoot for the drafting of such legislation and to base it on the CARICOM model legislation. It is reported that the governments have, in some cases expressly and in others tacitly, recognised the need for such legislation.

In fact, on 8 March 1997, International Women's Day, the Minister of Legal Affairs and Attorney-General of Jamaica publicly stated at the ceremony held for that day, that drafting instructions would soon be given for the drafting of a Sexual Harassment Bill.

## **Domestic violence**

In St Vincent and the Grenadines there is a Domestic Violence (Summary Proceedings) Act. In the Bahamas, domestic violence is dealt with in Part II of the Sexual Offences and Domestic Violence Act 1991. In Barbados, it is dealt with in the Domestic Violence (Protection Order) Act 1992. Trinidad and Tobago passed its Domestic Violence Act in 1991; it was assented to on the 16 August 1991. In Jamaica the Domestic Violence Act was passed in March and assented to in April 1995, but was put into operation on 6 May 1996. Guyana's Domestic Violence Act was passed on 31 December 1996. I understand that, though the CARICOM model legislation was used in the drafting of the Guyana Act, the final product was largely based on the legislation in Belize.

It seems clear from the provisions of the Acts of the other countries referred to that the CARICOM model legislation was used as a basis for framing their legislation. There are, however, expansions and/or additions in most instances in the Acts passed to provide for national needs.

On the other hand, Jamaica's Domestic Violence Act closely mirrors the CARICOM model legislation without taking into account conditions peculiar to the country. As a result of this, many persons are left unprotected by the Act. The NGO Awoja again made submissions recommending amendments to the Bill in order to make it more effective. The Bill was, however, passed without these changes, except in relation to the issue of the standard of proof, which had not been provided for in the Bill. The Prime Minister has, however, directed that consultations be held with the government and other interested and qualified persons, with a view to effecting necessary amendments. The amendments recommended, *inter alia*, were that:

- the definition of "household residence" be extended to include single parent households, those shared by siblings or unrelated persons;
- that the court be empowered to make financial provision orders at the same time as it grants a protection and/or occupation order; and
- that the persons who may make applications on behalf of children be extended to include the medical profession (and that there is a legal obligation in the medical profession to report incidents of abuse), teachers, guidance counsellors, other family members and neighbours.

It was also recommended that the conduct against which protection is available should also include damage to, destruction or prevention of the use of personal property, and that spouses should be "compellable" witnesses against each (other than in relation to child abuse). We recommend that the definition of spouse as it relates to common-law unions should specify a qualifying time for a person to be defined as a "spouse" and that concurrent jurisdiction be given to the Supreme Court. We were of the view that there ought to be public proceedings in the name of the defendant but

not of the victim-complainant disclosed. This can be a deterrent and a means of effectively educating the public about the types of conduct which fall foul of the law.

The provisions in the various Acts of these countries empower the courts to grant speedy redress for acts of domestic violence, being actual or threatened physical injury or mental injury by granting protection and/or occupation orders. The courts are also empowered to grant *ex parte* orders where the circumstances so warrant and can order the parties to receive counselling. Property interests are protected despite the making of occupation orders.

### **International standards**

The Declaration on the Elimination of Violence against Woman, adopted by the General Assembly in 1993,<sup>8</sup> emphasises that violence against women is a violation of human rights and recommends strategies to be employed by member states to eliminate it.

We feel that without an Optional Protocol establishing a process for redress in the international arena, the Convention on the Elimination of All Forms of Discrimination Against Women<sup>9</sup> will not be of practical assistance to women in the Caribbean.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará)<sup>10</sup> has been ratified by Bahamas; Barbados; Dominica; Guyana; St. Kitts and Nevis; St. Lucia; and Trinidad and Tobago. As of mid-1997, it had not been ratified by Antigua, Barbuda, Belize, Grenada, Jamaica or St Vincent and the Grenadines. Article 1 states:

"For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death, or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere."

By and large, the legislative provisions existing in the region do seek to grant protection and redress in keeping with this article.

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<sup>8</sup> GA Res 48/104, (1994) 1 IHRR 329.

<sup>9</sup> 1249 UNTS 13.

<sup>10</sup> Opened for signature 9 June 1994, entered into force 5 March 1995, 33 ILM 1534. The text of the Convention is available on the website of the Organization of American States. Inter-American Commission on Human Rights at <http://www.oas.org/EN/PROG/ichr/enbas7.html>.

Article 2 specifies that:

"Violence against women includes physical, sexual and psychological violence:

- a. that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;
- b. that occurs in the community and is perpetrated by any person, including rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health or any other place; and
- c. that is perpetrated or condoned by the state or its agents regardless of where it occurs."

The legislative provisions existing in the region have fallen short of this article, in the restrictive definitions of dwellings and the exclusion of other inter-personal relationships, whether or not the parties share or have ever shared the same residence and the failure of too many countries to pass sexual harassment legislation. Articles 3<sup>11</sup> and 4<sup>12</sup> have largely been implemented in existing legislative provisions. Articles 5<sup>13</sup> and 6<sup>14</sup> which recite the right of women to the free and full exercise of civil,

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<sup>11</sup> Article 3 provides: "Every woman has the right to be free from violence in both the public and private spheres."

1. <sup>12</sup> Article 4 provides: "Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, amongst others:

- a. The right to have her life respected;
- b. The right to have her physical, mental and moral integrity respected;
- c. The right to personal liberty and security;
- d. The right not to be subjected to torture;
- e. The rights to have the inherent dignity of her person respected and her family protected;
- f. The right to equal protection before the law and of the law;
- g. The right to simple and prompt recourse to a competent court for protection against acts that violate her rights;
- h. The right to associate freely;
- i. The right of freedom to profess her religion and beliefs within the law; and
- j. The right to have equal access to the public service of her country and to take part in the conduct of public affairs, including decision-making."

<sup>13</sup> Article 5 provides: "Every woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights. The States Parties recognize that violence against women prevents and nullifies the exercise of these rights."

<sup>14</sup> Article 6 provides: "The right of every woman to be free from violence includes, among others:

- a. The right of women to be free from all forms of discrimination; and
- b. The right of women to be valued and educated free of stereotyped patterns of behavior

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political, economic, social and cultural rights, to be free of all forms of discrimination, and to the full protection of these rights as embodied in regional and international instruments on human rights, are still largely hopeful goals.

The failure of states to undertake education programmes in keeping with article 8 to ensure their citizens' full understanding of their human rights, derogates from the enjoyment of those rights and prevents the seeking of redress for breaches of those rights. Educational programmes on legislation and human rights conventions have largely been left on the shoulders of the NGO community. These organisations, in all the countries referred to in this paper, have been engaged in public education campaigns in the media, in their workshops and seminars, and in the production and distribution of brochures and pamphlets on the various legislative provisions.

It is the opinion of the NGO community, that there ought to be put in place a mechanism to sanction those states which fail to ratify international instruments for the protection of women against violence, as well as those who do ratify but take no step to give effect to them by passing protective provisions in their national laws.

On this point I make special mention of Dominica which ratified the Belém do Pará Convention on 6 June 1995. CAFRA Dominica is extremely concerned that the Government of Dominica has given no indication of its intent to pass legislation addressing domestic violence, sexual harassment or update its sexual offences law. They state that incest is rampant there and that sexual violation of young girls often goes unprosecuted, and that cases remain untried for years. The following are two examples as reported to me:

- (1) A 17-year old girl was raped by her father at gun-point. The Director of Public Prosecution ruled that he could not prosecute the father as he would also have to charge the girl since the violation occurred after her 16th birthday. The girl became pregnant as a result.
- (2) A 12-year old girl was raped by three men and that though she has identified her assailants, indeed she faints whenever she sees them, the men have never been arrested or charged.

I am informed that they have had in Dominica a draft Sexual Offences Bill for some time and, despite the strenuous lobbying of the women's groups there, nothing has been done to effect its passage into law.

This naturally leads me to examples of judicial insensitivity following the Dominican case.

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and social and cultural practices based on concepts of inferiority or subordination."

*Guyana:* I was supplied with reports of sentencing by two judges of men who had killed their female partners. In both cases the men pleaded guilty to manslaughter, a plea which was readily accepted and they were both sentenced to five years' imprisonment.

*Trinidad:* Senator Diana Mahabir-Wyatt, in an article in the *Trinidad Guardian* on 1 July 1994, stated that in five recent cases of murder by men of their wives, the tendency was to replace the murder charge with that of manslaughter and to give sentences of from five to twelve years.

An accused who killed his eight months pregnant wife was sentenced to 12 years. Another was sentenced to five years for killing his wife who was six months pregnant at the time of her death. In another case, a husband killed his wife and attempted to kill his two children – he was sentenced to five years for the killing of his wife and six years for the killing of his children.

The Senator pointed out that in Trinidad, one is liable to a sentence of 14 years under the law for the charge of forging a baptismal certificate. This, she said, demonstrates the relative value given in the legal system to the lives of women and children.

She also referred in her article to the adverse position of a wife found guilty of killing her husband whom she had found committing adultery in their home with her younger sister. She was charged with and tried for murder and on conviction sentenced to death. We in the NGO community join her in her condemnation of this diminution of the value of a woman's life as reflected in such sentences and their effect on the status accorded to women within the society.

*Trinidad and Tobago:* There have been several cases of murder committed after the issuance of occupation and/or protection orders under the Domestic Violence Act. There have been some reports in the media that men are aggrieved by the Act and the killings have occurred because of the Act. It is interesting to note that this has also occurred in Puerto Rico and the cry to repeal the legislation is being strenuously resisted by the women's movement there.

*Jamaica:* There have been no reported killings or acts of violence after the grant of orders under the Domestic Violence Act. Murder by both men and women of their partners tried and charged as murder when the circumstances so warrant. In Jamaica, following legislative amendment murder may be capital and non-capital murder. The mandatory penalty for murder was hitherto death, and both sexes were likewise sentenced to death. However, women have never been executed in Jamaica. Their sentences are generally commuted to life as a matter of practice. A singular example of discrimination in favour of women some say. There has, however, been an NGO and public outcry over recent sentences imposed for carnal abuse, for instance, the sentence of a J\$5000.00 fine (approximately US\$120.00) for the carnal abuse of a three-year old disabled child, or a suspended sentence of two years for the abuse of the eldest child to enable the father to return home, as he was married to the mother

who had two younger daughters with her, he had promised to pay for the treatment she may need, and it was reported that he was quiet and hard-working.

## **Conclusions**

We are of the firm view that our governments do not adhere to their obligations under the international instruments on human rights for the protection of women from violence though they talk a good game. Their failure to pass national legislation quickly and to establish and undertake the training of our judges, police and other personnel who have to deal with victims and perpetrators of violence is evidence of their actual lack of interest. They must undertake gender education in schools from the earliest age and change the curriculum of schools. The services of experts on trauma and its effects are generally neither used during the drafting nor in the application of legislation relating to various forms of violence. In most of our countries there is no provision for treatment for the victims nor are there any mechanisms put in place to provide for them. It is clear to us that for women in the region to realise the standards contained in international instruments, a great deal has to be done and a change in the mental and social attitudes of all must be effected through a close working relationship between the sexes.

The NGO community feels the burden of continuous lobbying for legislation and the establishment of mechanisms, facilities and programmes to ensure the protection of women in our societies and enable them to enjoy the place and position of true partners of their menfolk. It is clear that in order to effectively discharge this burden women must be equally involved in the decision-making process in all countries in the region.