



MEMORANDUM

To: Mr. Victor Madrigal-Borloz, Independent Expert on sexual orientation and gender identity

From: Khaleem Ali, Youth Advocate, and Nathan Madson, Staff Attorney at The Advocates for Human Rights

Date: 26 May 2023

Re: Call for inputs on colonialism and SOGI

Founded in 1983, **The Advocates for Human Rights** (“The Advocates”) is a volunteer-based non-governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact-finding, direct legal representation, education and training, and publications. The Advocates is the primary provider of legal services to low-income asylum seekers in the Upper Midwest region of the United States, including LGBTIQ+ individuals who have experienced discrimination and violence based on sexual orientation, gender identity and expression, and sex characteristics.

Khaleem Ali is a 24-year-old law graduate from the University of the West Indies and a youth activist for the past decade at various levels. He attended the 137th session of the United Nations Human Rights Council in Geneva and the 52nd meeting of the UN Human Rights Committee (ICCPR) as an expert on human rights issues in the Caribbean Region. He has subsequently been appointed to working groups at the World Coalition Against the Death Penalty in France and as a consultant on Youth, Peace, and Security for the UNESCO Support Group (Eastern Caribbean). Khaleem serves as the Deputy CARICOM Youth Ambassador for Trinidad, the Director and Chief Operations Officer of Youth Votes Matter, and an Executive Member of the Greater Caribbean for Life.

Executive Summary

1. One of the primary impacts of colonialism on lesbian, gay, bisexual, transgender, and queer (LGBTQ)¹ Trinidadians and Tobagonians have been both a series of laws that discriminate against LGBTQ people and a system that severely restricts them from changing these colonial-era laws.
2. As Commonwealth Caribbean countries declared their independence, many of them adopted constitutions that included "savings laws" clauses. These clauses protected colonial laws from constitutional challenges and preserved pre-independence laws.
3. While initially helpful in transitioning from British colonies to independent countries, these clauses have prevented updates to laws and punishments in the 40-60 years after independence.
4. Consequently, outdated laws have remained unchanged and unaffected by evolving understandings of fundamental rights for LGBTQ people.

Savings Law Clause and Saved Laws

5. Trinidad and Tobago,² like several other Commonwealth Caribbean countries, still maintains a general savings law clause, which is the most controversial and widespread type of savings law clause. For Trinidad and Tobago, all laws prior to adoption of the republican constitution in 1976 are saved without exception.
6. Countries like Belize, however, previously had a general savings clause, but the government limited its duration to five years after independence, so the protections no longer apply.
7. Initially, the savings law clause was based on the assumption that laws enacted prior to 1976 formed the foundation of fundamental rights, and the scope of the Bill of Rights would only apply to future laws, not past ones.³ As a result, the clause historically held significant normative value.
8. In the context of colonialism and sexual orientation, gender identity, and gender expression (SOGIE), many of the discriminatory laws against LGBTQ individuals in Trinidad and

¹ Although intersex, asexual, and other sexual and gender minorities are often included in longer acronyms for the LGBTQ community, this submission does not address these specific subsections of the community and, thus, our exclusion of "IA+" from the LGBTQIA+ acronym is intentional.

² Section 6 of the Constitution of Trinidad and Tobago states: "6. (1) Nothing in sections 4 and 5 shall invalidate— (a) an existing law; (b) an enactment that repeals and re-enacts an existing law without alteration; or (c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right. 6.(2) Where an enactment repeals and re-enacts with modifications an existing law and is held to derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right then, subject to sections 13 and 54, the provisions of the existing law shall be substituted for such of the provisions of the enactment as are held to derogate from the fundamental right in a manner in which or to an extent to which the existing law did not previously derogate from that right. 6.(3) In this section— "alters" in relation to an existing law, includes repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it; "Existing law" means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1); "right" includes freedom."

³ Refer to DPP v Nasralla (1967) 2 All ER 161 where the normative value of these rights are discussed against the idea that pre-existing laws were presumed to respect these rights initially.

Tobago were enacted by the colonial government and are therefore protected from judicial review by virtue of the savings law clause. These include laws that criminalize consensual same-sex sexual activity between adult men, restrictions on immigration, and lack of recognition in family law, among others.

9. In 2022, the Judicial Council of the Privy Council, the highest court in Trinidad and Tobago, ruled in *Jay Chandler (No. 2) v Attorney General of Trinidad and Tobago*⁴ that the courts could not displace saved laws because of the separation of powers doctrine. Rather, the court affirmed that it was only Parliament that could overturn saved laws by passing legislative amendments.
10. Trinidad and Tobago follows a bi-cameral parliamentary system with a lower House of Representatives and an upper Senate. In order to amend a saved law, a special majority⁵ from both houses is required, which necessitates support from both the governing coalition and the opposition.
11. To remove the savings clause through a constitutional amendment, a supermajority⁶ of both houses is needed.
12. To date, the Executive Government (Cabinet)⁷ and Parliament of Trinidad and Tobago have not taken proactive steps to reform laws or provide protections for LGBTQ individuals.
13. They argue that the savings law clause prevents them from doing so, despite the court's rulings that only Parliament has the authority to create new laws or amend the savings clause.⁸
14. Further, collaboration between the two historically non-collaborative parties in parliament is unlikely, making it challenging to meet the required threshold of votes necessary to amend saved laws or the savings clause itself without significant pressure.
15. Additionally, Trinidad and Tobago does not have a mechanism for a popular vote through a referendum.
16. The savings law clause and Parliament's unwillingness to amend either saved laws or the savings law clause has had serious impacts on the LGBTQ community.
17. For example, in 2018, a local court struck down a law that criminalized consensual same-sex sexual conduct between adult men.⁹ The judge amended the law to criminalize only non-consensual acts of buggery, respecting the equality and privacy of gay, bisexual, and queer men.
18. The government has appealed this decision to the Privy Council, citing the need for a final resolution on the matter. If the government had not appealed, the court's decision would have been final.

⁴ The Judicial Council held that the death penalty could not be abolished by the courts because the death penalty was a saved law and that only the Parliament had the power to modify or repeal saved laws.

⁵ Two-Thirds of all the members of each House. 28 members voting for in the House of Representatives and 21 members voting for in the Senate.

⁶ Three-Fourths of all the members of each House. 31 in the House of Representatives and 24 in the Senate.

⁷ References to 'government' in this submission refer to the Executive Branch of the State comprising the Prime Minister and his Cabinet Ministers who are responsible for the day-to-day management of the affairs of The Republic of Trinidad and Tobago. The government is formed from members of the party which won the most constituency seats at the National Elections.

⁸ *Jay Chandler (No.2) v Attorney General of Trinidad and Tobago*; *Mathew v State* [2004] UKPC 33.

⁹ The saved law in question is The Offences Against the Person Act, Act No. 10 of 1925.

19. Based on the decision in *Jay Chandler (No.2) v Attorney General of Trinidad and Tobago*, it is highly probable that the Privy Council will reach a similar conclusion based on the doctrine of stare decisis.¹⁰ This could result in the recriminalization of consensual sexual activities between adult gay, bisexual and queer men.
20. Other examples of saved laws which directly exclude protections and equality for members of the LGBTQ community include, but are not limited to: immigration, marriage, adoption, survivorship and probate, domestic violence, equal opportunities, privacy, and equality.
21. *The Immigration Act, Act No. 41 of 1969*, for example, identifies “homosexuals” and “persons living on the earnings of homosexuals” as prohibited classes restricted from entering Trinidad and Tobago¹¹ unless issued an exemption certificate from the Minister of National Security.
22. In practice, this gives immigration officers discretionary power to presume a person’s sexual orientation on appearance and manner alone and then deny them entry.
23. In 2007, Sir Elton John had to request permission to enter Trinidad and Tobago with his partner to perform at a local music festival.¹²
24. *The Marriage Act, Act No 13 of 1923* does not recognise same-sex marriages, defining marriage as only between “males” and “females,” which the government interprets as biological sex (see below). This also applies to religious marriage Acts for Islamic, Hindu, and Orisha marriages and divorces.

Non-Saved Laws

25. Laws enacted after 1976 continue to target LGBTQ people and, while they are not saved laws, they are built on the definitions and restrictions found in saved laws. New laws cannot guarantee new rights to LGBTQ people because it would contravene saved laws.
26. *The Constitution of the Republic of Trinidad and Tobago*, while not a direct remnant of colonialism, reflects its influence. It was drafted and enacted by British colonial authorities and, unfortunately, perpetuates discrimination.
27. The constitution does not provide protections against discrimination based on gender or gender identity, although it does prohibit discrimination on the basis of sex.
28. Local interpretations of sex, however, are narrow and limited to “biological male” and “biological female.” These restrictive interpretations have also been adopted in the *Equal Opportunities Act, Act No.69 of 2009*, which prohibits discrimination in employment.
29. Further, the Equal Opportunities Commission and Tribunal do not expressly prohibit discrimination based on sexual orientation and, thus, are unable to address LGBTQ discrimination claims.
30. With the goal of amending the Equal Opportunities Act so as to prevent discrimination on the basis of gender, sexual orientation, gender identity, gender expression, and sex characteristics, a consortium of local NGOs have initiated the “Add All 3” campaign,¹³

¹⁰ Stare decisis is a common law doctrine that states a court’s previous judicial decisions are binding on that court and lower courts and can only be overturned if there is a strong, compelling reason to do so.

¹¹ Section 8(1)(e) of the Immigration Act, Act No. 41 of 1969.

¹² Trinidad and Tobago News, “Elton Got ‘Special Permit’ for Jazz Fest, accessed May 26, 2023, <http://www.trinidadandtobagonews.com/blog/?p=240>.

¹³ CAISO: Sex and Gender Justice, “Add All Three: Amend the EOA,” accessed May 26, 2023, <https://caisott.org/add-all-three-campaign#:~:text=About%20the%20Campaign,made%20similar%20recommendations%20since%202011.>

which calls on the government to prevent discrimination on the basis of sexual orientation and gender, HIV status, and disability.

31. The coalition has drafted the required amendments to the law and submitted them to the Attorney General's (AG) Office. The AG's Office has not yet taken action on the matter.
32. **The Interpretation Act of Trinidad and Tobago, Act no. 2 of 1962** expressly defines a "person" as biologically male or female and does not consider gender expression or identity. This legislation guides interpretation of all laws in Trinidad and Tobago, including all future laws. It, thus, ensures continuous discrimination against and unrecognition of transgender and gender non-conforming people. It also presents problems for recognition of intersex people.
33. **The Matrimonial Proceedings and Law of Property Act, Act No. 2 of 1972** deals with divorce, nullity of marriage, and property settlement in the breakdown of a relationship. Same-sex marriages –performed both in Trinidad and Tobago and abroad – are not recognised by the Marriage Act. This means that individuals in same-sex partnerships or in marriages performed abroad lack access to divorce proceedings and have no settlement procedure to equitably distribute marital assets.
34. **The Succession Act, Act No. 27 of 1981** deals with the law of succession for property and assets owned. A "spouse" is one of the beneficiaries who may inherit assets when an individual dies without a will. Because "spouse" is defined as it is done in the saved **Matrimonial Proceedings Act**, a same-sex partner is unable to inherit as a different-sex spouse would be able to.
35. Should an individual wish to leave their property and assets to a same-sex partner, they can only do so if they die with a will that expressly names their partner as their beneficiary.
36. Despite not being a saved law, **The Domestic Violence Act, Act No. 18 of 2020** is heavily influenced by saved laws. For example, though the law expands protections against domestic violence to cohabitational and visiting relationships, it does not extend to LGBTQ relationships.
37. This is, in large part, to saved laws which expressly define romantic and sexual relationships as consisting between a "biological male" and "biological female." Therefore, LGBTQ people in same-sex relationships have no recourse under domestic violence laws if they experience intimate partner violence.
38. Though this submission focused on Trinidad and Tobago. The issues remain the same across the Commonwealth Caribbean for islands that still accept the Judicial Council of the Privy Council as their final court of appeal. Wherever there is a savings law clause, the issues will be similar.