

## **The Equal Rights Trust**

Submission to the Human Rights Council at the 21<sup>st</sup> Session of the Universal Periodic Review

### **Guyana**

1. ERT has been actively involved in Guyana since 2010, working in partnership with the Society Against Sexual Orientation Discrimination (SASOD) on a number of projects designed to strengthen civil society efforts to combat discrimination, with a particular focus on discrimination on the basis of sexual orientation and gender identity. In 2013, ERT formed a second partnership, with the Justice Institute of Guyana.
2. In the course of its work in Guyana, ERT has undertaken extensive research on equality and non-discrimination in the country, in preparation for the publication of the first ever comprehensive report on discrimination and inequality in Guyana. ERT has coordinated and conducted field research on discrimination on various grounds and undertaken interviews with academics, lawyers, journalists and other human rights defenders. ERT has also conducted independent secondary research on patterns of discrimination and inequality and on the legal and policy framework in place to prevent discrimination and promote equality.
3. This submission is based on the findings of this research. It responds to the express wish of the Human Rights Council that “[t]he second and subsequent cycles of the review should focus on, inter alia, the implementation of the accepted recommendations and the developments of the human rights situation in the State under review”.<sup>1</sup> This submission focuses on two of the three recommendations made at the last review of Guyana in 2010, on which the state promised to undertake consultation: (1) the decriminalisation of legal provisions criminalising same-sex sexual activity; and (2) the prohibition of corporal punishment against children.

### **Decriminalisation of Legislative Provisions Criminalising Same-Sex Sexual Activity**

4. At Guyana’s first UPR in May 2010, six states made recommendations that Guyana repeal its legislative provisions which criminalise consensual same-sex sexual

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<sup>1</sup> Human Rights Council, *Resolution 16/21: Review of the work and functioning of the Human Rights Council*, A/HRC/RES/16/21, April 2011, Annex 1, Para 6, available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/126/78/PDF/G1112678.pdf?OpenElement>.

activity.<sup>2</sup> Initially, Guyana neither accepted nor rejected these recommendations, instead opting to examine them and provide a response at a further date. In September 2010, Guyana stated that there was “no discrimination by the state against persons based on their sexual orientation”<sup>3</sup> but that it would nevertheless hold consultations on the issue of decriminalisation “over the next 2 years”.<sup>4</sup>

5. In 2012, the Parliament of Guyana passed Resolution No. 23 of 2012 which established a Special Select Committee to consult, *inter alia*, on the decriminalisation of same-sex sexual activity. The Special Select Committee has chosen to consult on the three issues within its remit (the other two being the abolition of corporal punishment of children and of the death penalty) sequentially, with consideration of decriminalisation of same-sex sexual activity coming last. As of June 2014, the Special Select Committee is still consulting on the first issue (the abolition of corporal punishment of children). No date has yet been set on when the Special Select Committee will consult, let alone make a recommendation or decision on whether to decriminalise same-sex sexual activity.
6. As such, legislative provisions criminalising consensual same-sex sexual activity remain in force. The Criminal Law (Offences) Act 1894 includes a number of offences concerning sexual activity between men. Section 352 states that any:

*[M]ale person who, in public or private, commits, or is a party to the commission, or procures or attempts to procure the commission, by any male person, of any act of gross indecency with any other male person shall be guilty of a misdemeanour and liable to imprisonment for two years.*

7. Section 354 makes “buggery” a specific offence punishable by life imprisonment, while under section 353, the offences of “attempted buggery”, “assault with the intent to commit buggery” and, being a male, indecently assaulting another male are all subject to imprisonment of ten years.
8. The criminalisation of consensual same-sex sexual activity has been recognised as a violation of international human rights law for over 20 years. In *Toonen v*

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<sup>2</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Guyana*, UN Doc. A/HRC/15/14, 21 June 2010, Paras 70.47, 70.49, 70.50, 70.51, 70.52 and 70.53 respectively).

<sup>3</sup> Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Guyana: Addendum*, UN Doc. A/HRC/15/14/Add.1, 13 September 2010, Para 77.

<sup>4</sup> *Ibid.*, Para 69.

*Australia*,<sup>5</sup> decided in 1994, the Human Rights Committee (HRC) considered such criminalisation as a violation of Articles 2(1) (non-discrimination in the enjoyment of all rights under the Covenant) and 17(1) (privacy) of the International Covenant on Civil and Political Rights (ICCPR). Guyana signed the ICCPR in 1968 and ratified the Covenant in 1977. The HRC has repeatedly expressed its concern that laws criminalising same-sex sexual relations between consenting adults constitute both a violation of the right to privacy and the right to non-discrimination as provided in the ICCPR.<sup>6</sup> As such, the continued criminalisation of same-sex sexual activity puts Guyana in clear violation of its commitments under international human rights law.

9. ERT's research in Guyana has demonstrated that these provisions, while not recently enforced through prosecution, are the basis for widespread extortion and police harassment of openly gay men, and are a contributing factor in preventing many gay men from being open about their sexuality. This, combined with the continuation in force of the laws themselves, contradicts Guyana's assertion that there is "no discrimination by the state against persons based on their sexual orientation".<sup>7</sup>
10. In addition to the aforementioned provisions, the Summary Jurisdiction (Offences) Act 1894 contains an offence which discriminates against transgender persons. Section 153(1)(xlvii) creates a summary offence, which attracts a fine, of dressing in the attire of the opposite gender in a public place for an improper purpose. The Yogyakarta Principles call on states to repeal laws which criminalise the expression of gender identity, including through choice of dress.<sup>8</sup>
11. In February 2009, seven transgender persons were charged and fined under section 153 of the Summary Jurisdiction (Offences) Act 1894. They reported to SASOD that they were photographed, told to remove their "female clothes" in front of several police officers and then ordered to put on "men's clothing". Falatama, one of the persons arrested, said: "It was one of the most humiliating experiences

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<sup>5</sup> *Toonen v Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994).

<sup>6</sup> See for example, Human Rights Committee, *Concluding Observations: Chile*, UN Doc. CCPR/C/79/Add.104, 1999, Para 20; Human Rights Committee, *Concluding Observations: Cyprus*, UN Doc. CCPR/C/79/Add.88, 1998, Para 11.

<sup>7</sup> See above, note 2.

<sup>8</sup> Yogyakarta Principles: The Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, Principle 6, available at: <http://www.yogyakartaprinciples.org/>.

of my life. I felt like I was less than human.”<sup>9</sup> Police officers kept five of the arrested persons in solitary confinement until their appearance before a magistrate,<sup>10</sup> contending that it was for their safety. In court, when handing down the sentences, the then Acting Chief Magistrate, Melissa Robertson, told the detainees they were not women but men, and exhorted them to “go to church and give their lives to Christ”.<sup>11</sup> On 19 February 2010, SASOD filed a motion before the Supreme Court of Judicature challenging section 153. The motion sought to have section 153(1)(xlvii) of the Summary Jurisdiction (Offences) Act invalidated as irrational, discriminatory, undemocratic, contrary to the rule of law and unconstitutional; however, in September 2013, the Supreme Court of Judicature upheld the constitutionality of section 153(1)(xlvii) and it remains in force.

12. A 2006 study undertaken for the Pan-American Health Organisation and the Canadian Society for International Health found that in Georgetown, 40% of men who have sex with men (MSM) experienced some form of police harassment.<sup>12</sup> These findings were corroborated by testimony collected by ERT, which confirmed that both gay men and transgender persons suffer police harassment. Melissa, a transgender person interviewed for this report, testified that:

*A friend and I were waiting on a car on the road when a police van passed and put their lights in my face and started to laugh at me. My friend ran away. The police told me to take my clothes off. I said “no” and they told me that they would lock me up for buggery and that they would make sure it’s all over on the TV and newspaper. I started to cry and ask them what I can do. They talked among themselves for a while and then told me to pay them \$10,000. I said ok. I told them I have to go home for the money. They threw me in their van and took me home. One of the police took my cell phone and told me that I had to come back outside or they would break my door down. I ran upstairs, got the money and came back down give it to them. I got my cell phone back and they told me next time it would not be so easy.*<sup>13</sup>

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<sup>9</sup> SASOD, *Marking World Day of Social Justice, Transgender citizens, supported by SASOD, move to the courts to challenge Guyana’s law against ‘cross-dressing’*, 22 February 2010, available at: <http://sasod.blogspot.com/2010/02/marking-world-day-of-social-justice.html>.

<sup>10</sup> Depending on the time of arrest the five persons were held between two and three days.

<sup>11</sup> See above, note 9.

<sup>12</sup> Terborg, J., *Study on Perceptions and Behaviour Regarding HIV/AIDS Prevention and Care Among Female Sex Workers (FSW) and Men Who Have Sex With Men (MSM) in Georgetown, Guyana*, 2006, p. 61.

<sup>13</sup> ERT Interview conducted by GuyBow with Melissa in Georgetown, Guyana, September 2011.

13. Similarly, B Gomes told ERT's research team about a physical attack by the police:

*I went to visit a friend on my birthday and we were standing on North Road by the St. George's Cathedral when the police drove up and started beating and kicking us. They didn't stop until we repeated after them saying "we are females".<sup>14</sup>*

14. Further testimony reveals the homophobic nature of police attitudes towards LGBT persons, and the risks which this creates when they are in police detention. Isabella, one of the transgender persons interviewed told ERT's research team that after being arrested, she had been placed in a cell with other inmates, who were instructed to rape her. She told ERT: "Two of the prisoners did rape me and when I cried out for help no one came to my rescue. I was released some hours later."<sup>15</sup>
15. Those interviewed also attested to discriminatory treatment by the police when they report crimes committed against them. A., a lesbian, told ERT's research team that when she attended a police station to report an attack by the boyfriend of a woman she was dating, the police "just laughed and made a mockery of the situation; it was like entertainment to them".<sup>16</sup> T. also had negative experiences and told ERT that she had been repeatedly threatened by the police, but that there was no point in reporting those responsible because "they're all friends, they're not going to do anything for you".<sup>17</sup> E. Richardson, a gay man interviewed by ERT, recounted his experiences in making police reports, providing a good insight into the treatment to which lesbian, gay, bisexual, transgender and intersex (LGBTI) persons are exposed when dealing with the police:

*After a series of reports to the police I have no faith in the justice system in this country. Discrimination begins when you enter the police station with derogatory questions like: "Are you a real woman or a mama-man?" Before I can make my report, I am often grilled about my feminine manner of dress. Then there is always a shortage of personnel to record my report. In fact it has taken hours on occasions to be acknowledged. I was approached and threatened*

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<sup>14</sup> ERT Interview conducted by GuyBow with B. Gomes in Georgetown, Guyana, September 2011.

<sup>15</sup> ERT Interview conducted by GuyBow with Isabella in Georgetown, Guyana, September 2011.

<sup>16</sup> ERT Interview conducted by Shelina Nageer with A., in Georgetown, Guyana, September 2011.

<sup>17</sup> *Ibid.*

*by the police on the streets of the village where I reside. I have had no response to my reports, they are all in vain.*<sup>18</sup>

16. These testimonies clearly indicate that, while laws criminalising same-sex conduct between men are not actively enforced, they contribute to a climate of repression, discrimination and violence against LGBT people. In addition to these cases, ERT also found evidence of discrimination on the basis of sexual orientation and gender identity in employment, education and healthcare, all legitimised by continued criminalisation.
17. ERT urges states involved in the review of Guyana (a) to repeat recommendations that Guyana, as a matter of urgency, repeal legislative provisions criminalising consensual same-sex sexual activity; (b) to make recommendations that Guyana repeal legislative provisions criminalising cross-dressing and other forms of expressing gender identity; and (c) to amend the Prevention of Discrimination Act 1997 to include sexual orientation and gender identity as protected characteristics.

### **Prohibition of Corporal Punishment against Children**

18. At the UPR of Guyana in May 2010, five states (Spain, Uruguay, Chile, Slovenia and Brazil) made recommendations that Guyana prohibit all forms of corporal punishment against children.<sup>19</sup> As with the above recommendation, Guyana neither accepted nor rejected these recommendations, instead opting to examine them and provide a response at a further date. In September 2010, Guyana stated that: “Corporal punishment is an issue which evokes strong views in the public”<sup>20</sup> and that consultations were “ongoing”.<sup>21</sup>
19. In 2012, the Parliament of Guyana passed Resolution No. 23 of 2012 which established a Special Select Committee to consult, *inter alia*, on the decriminalisation of corporal punishment of children (see above, Paragraph 5). The Special Select Committee chose to consult on the abolition of corporal punishment of children first, with evidence invited from stakeholders by May 2013 and oral presentations made to the Special Select Committee in November

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<sup>18</sup> ERT Interview conducted by GuyBow with E. Richardson in Georgetown, Guyana, September 2011.

<sup>19</sup> See above, note 1, Paras 70.36, 70.37, 70.38, 70.39, 70.40 and 70.41.

<sup>20</sup> See above, note 2, Para 53.

<sup>21</sup> *Ibid.*, Para 54.

2013. As of June 2014, however, the Special Select Committee has yet to report on the issue.

20. As such, legislative provisions permitting corporal punishment of children remain in force. Section 9 of the Criminal Law (Offences) Act 1894 and section 7 of the Summary Jurisdiction (Offences) Act 1894 confirm “the right of the guardian or teacher of a child to administer reasonable and proper punishment to the child”.
21. According to the report *The State of the World’s Children 2014 in Numbers*, produced by UNICEF, in the period 2005 to 2012, 76% of children between the ages of 2 and 14 years old had experienced some form of violent discipline (including both psychological aggression and physical punishment).<sup>22</sup> In the course of its independent research, ERT has been told by a number of Guyanese commentators that corporal punishment is prevalent in schools.
22. The Convention on the Rights of the Child (signed by Guyana in 1990 and ratified in 1991), as interpreted by the Committee on the Rights of the Child (CRC), is clear that corporal punishment of children constitutes a violation of the rights of the child. In its *General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, the CRC has explicitly stated that corporal punishment violates the rights of the child under Articles 19, 28(2) and 37 of the Convention.<sup>23</sup>
23. ERT believes that these provisions also violate the rights to equality and non-discrimination as protected under other international human rights instruments. Both the Criminal Law (Offences) Act 1894 and the Summary Jurisdiction (Offences) Act 1894 permit corporal punishment only of “the child”. “Child” is defined in both Acts as a person under the age of fourteen years.<sup>24</sup> Thus the legislation permits physical punishment of persons under the age of fourteen years which would otherwise be prohibited were the person aged fourteen years or older.
24. Article 7 of the ICCPR prohibits torture and cruel, inhuman and degrading treatment or punishment. Article 7 is absolute and cannot be subject to limitations or justifications. Article 2(1) requires States Parties to ensure that the rights in the Covenant – including Article 7 – are respected and ensure to *all* individuals within

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<sup>22</sup> UNICEF, *State of the World’s Children 2014 in Numbers*, 2014, Statistical Tables: Table 9 (Child Protection), p. 79, available at: <http://www.unicef.org/sowc2014/numbers/>.

<sup>23</sup> Committee on the Rights of the Child, *General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, UN Doc. CRC/C/GC/8, 2 March 2007.

<sup>24</sup> Section 2 of both Acts.

its territory without distinction of any kind. Article 2(1) includes a list of grounds upon which discrimination in the enjoyment of rights is prohibited, and includes the phrase “or other status”. In *Love v Australia*, the HRC concluded that “other status” includes age.<sup>25</sup> As such, States Parties must ensure that the right to be free from torture and cruel, inhuman and degrading treatment or punishment is respected and enjoyed by all individuals in Guyana and that this right cannot be limited on grounds of age. The legislative provisions permitting corporal punishment of children thus constitute a violation of Articles 2(1) and 7 of the Covenant taken together, by permitting cruel, inhuman or degrading treatment or punishment of persons aged under fourteen years, but not those aged fourteen years or older.

25. Article 26 of the Covenant provides an autonomous right to non-discrimination which “prohibits discrimination in law or in fact in any field regulated and protected by public authorities”.<sup>26</sup> The term “other status” referred to in Article 26 has an open-ended meaning; some grounds not explicitly mentioned, such as age, gender, disability, nationality and sexual orientation could also be considered prohibited grounds. The provisions permitting corporal punishment clearly constitute different treatment on grounds of age, in that they allow the corporal punishment of persons aged under fourteen years but not those aged over.
26. The HRC has stated that different treatment can only be justified (and therefore not amount to discrimination in violation of Article 26) if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.<sup>27</sup> ERT cannot conceive of any purpose which is legitimate under the Covenant which would be achieved by permitting the corporal punishment of children. Indeed, the CRC explicitly rejected a number of purported justifications for permitting corporal punishment of children in its General Comment No. 8 including: that some level of “reasonable” or “moderate” punishment is in the best interests of the child; that parents have duties to provide appropriate direction in the exercise of the rights of the child; and that religious texts require or permit corporal punishment.<sup>28</sup> The legislative provisions permitting corporal punishment of children thus constitute a violation of Article 26 by discriminating on grounds of age with no reasonable or objective justification and with no aim which is legitimate under the Covenant.

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<sup>25</sup> *Love et al v Australia*, Communication No. 983/2001, UN Doc. CCPR/C/77/D/83/2001 (2003).

<sup>26</sup> Human Rights Committee, *General Comment No. 18: Non-discrimination*, 1989, Para 12.

<sup>27</sup> Human Rights Committee, *General Comment No. 18: Non-Discrimination*, UN Doc. HRI/GEN/1/Rev.1 at 26, 1994, Para 13.

<sup>28</sup> See above, note 23, Paras 26, 28 and 29.



27. ERT urges states involved in the review of Guyana to repeat recommendations that Guyana, as a matter of urgency, should prohibit all forms of corporal punishment against children.