

Wednesday September 13, 2017

Georgetown, Guyana

PAN CARIBBEAN PARTNERSHIP AGAINST HIV & AIDS

CHAMPIONS FOR CHANGE IV



The Rationale for
Champions

About U-RAP

Caribbean Sexual and
Gender Rights
Litigation Program

'Getting to Zero': U-
RAP/CVC collaboration
on Human Rights
Advocacy

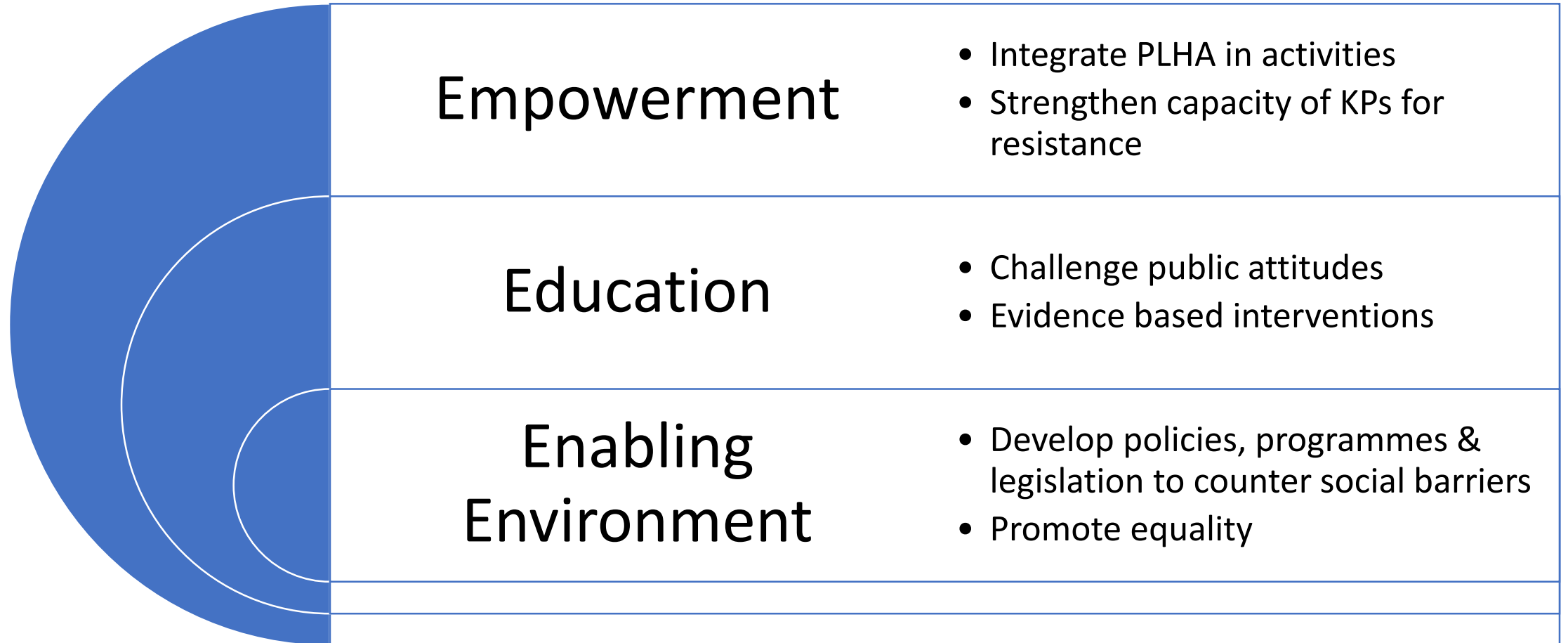
Postscript: challenges
ahead

Agenda

Rationale

- Stigma and discrimination considered by many experts to be the greatest barrier in preventing the spread and impact of HIV

PANCAP regional policy on HIV-related S&D



About U-RAP



L-R: WJ, TR, JM & AB (Havana, Cuba, 2012)

Established as a project of the Faculty of Law in 2008

U-RAP's mission is to promote human rights and social justice in the Caribbean by undertaking and participating in strategic litigation, socio-legal research and legal education in collaboration with Caribbean lawyers, scholars and civil society organisations and by working with students of the Faculties of Law

Tracy Robinson (Mona) – Joint coordinator

Arif Bulkan (St Augustine) – Joint coordinator

Westmin James (Cave Hill) – Litigation Specialist

Janeille Matthews (Mona) – Research Coordinator

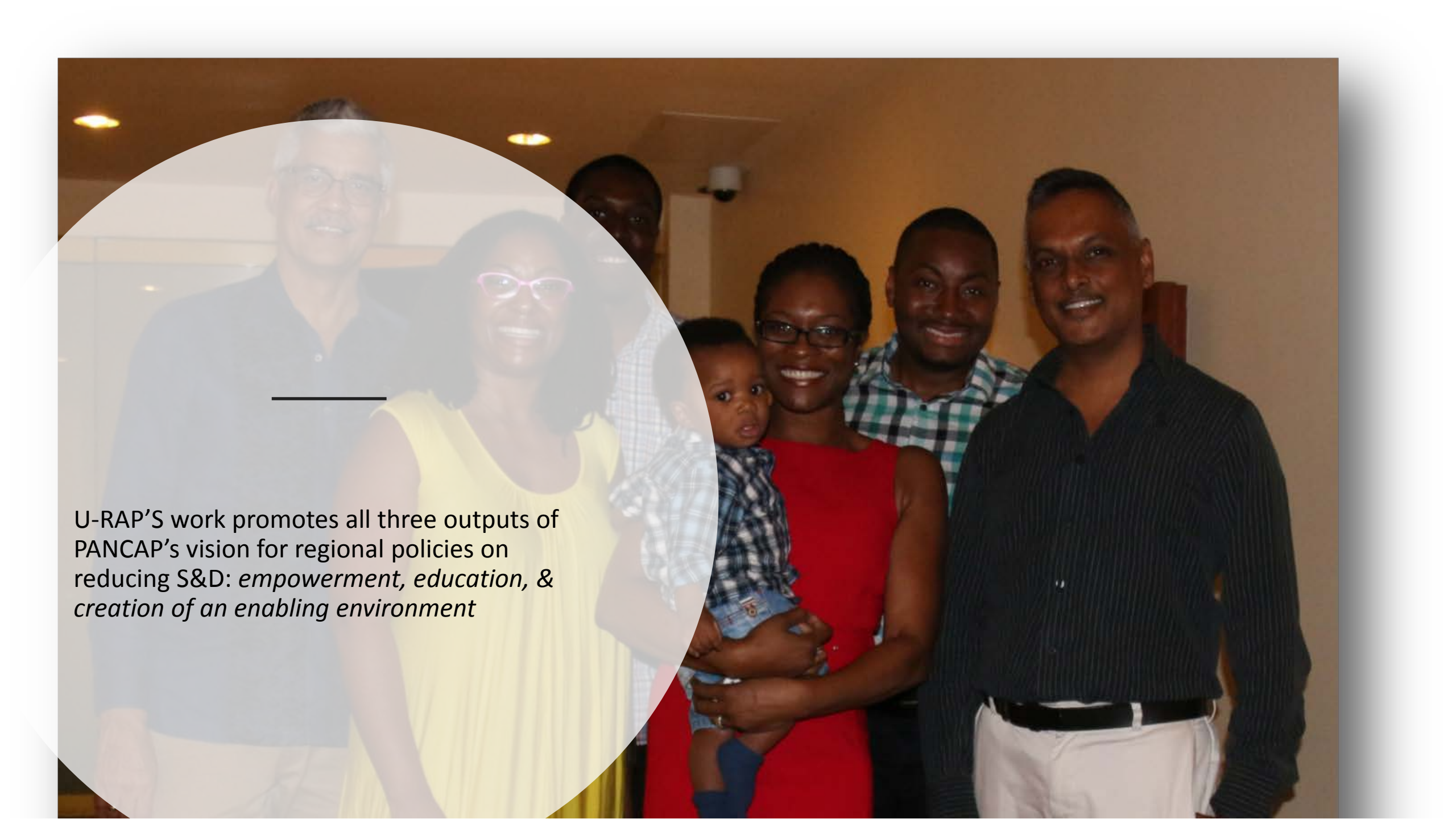
Jewel Amoah (STA) – Public and Legal Education

Ramona Biholar (Mona)

Douglas Mendes S.C. – Adviser

Andrew Hutchinson (Mona) - Administrator

Membership



U-RAP'S work promotes all three outputs of PANCAP's vision for regional policies on reducing S&D: *empowerment, education, & creation of an enabling environment*

McEwan & others v AG of Guyana

- challenges the constitutionality of the summary offence of cross-dressing in public for an improper purpose
- Appeal pending to the CCJ

Orozco v AG of Belize

- challenges constitutionality of the offence of 'carnal intercourse against the order of nature'
- Decision in favour of the claimant in August 2016; appeal filed by defendants

On August 10 Benjamin CJ ruled that s 53, 'carnal intercourse against the order of nature' is inconsistent with the Belize Constitution to the extent that it makes acts of consensual sex between adults a crime.

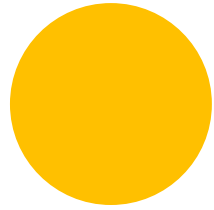
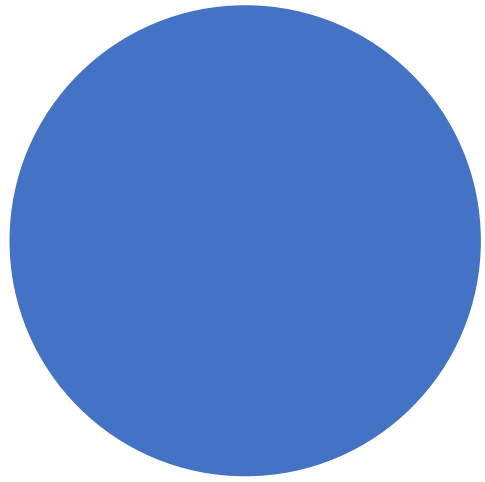
The CJ said the law infringed the right to

- human dignity (s 3),
- privacy (s 3, 14),
- freedom of expression (s 12) and
- equality before the law (s 6) and

He dismissed the argument that limiting rights was required for public morality or public health

He seemed to accept the expert evidence that the law was more likely to impede HIV/AIDS prevention and response

Orozco: The August 10 Ruling



Countering legal barriers and
fostering an enabling
environment

The value of the
Orozco decision of
August 10, 2016

It can create change and hope that is difficult to realise through legislation

- In civil law countries, sodomy laws were revoked by parliaments/legislatures 97% of the time,
- in common law (former British) countries, 6 of every 10 repeals of such laws were through the courts, as in Orozco.
- ‘Courts of last resort are less constrained by the legal status quo than other political and legal actors.’
- Udi Sommer, Victor Asal, Katie Zuber, Jonathan Parent, ‘Institutional Paths to Policy Change: Judicial Versus Nonjudicial Repeal of Sodomy Laws’ (2013) 47 Law and Society Review 409-439.

It may be very useful in creating change where there is an impression of widespread public support which is not wholly justified

Sodomy laws thus have a far-reaching and self-reinforcing effect: they create the sense that criminal prohibition reflects widespread societal interests even though

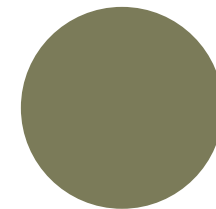
- (1) those interests may only represent a small minority, and
- (2) those interests may be partly constituted by the law itself.

- Professor Ryan Goodman 2003

in countries with a “highly unequal social profile” judges play an even more important role in protecting the interests “of those who do not have a voice in the political system and do not have the means or information to move the Courts.”

- Chief Justice of India, KG Balakrishnan

Public interest litigation can protect those who don't have a voice in highly unequal societies





‘The lawyers don’t
want to represent
people like we’

Getting to Know your Rights
Workshop with Guyana Trans
United and U-RAP

Monday, August 21, 2017

Georgetown, Guyana

It gives hope
in the
Caribbean:
creates a new
highwater
mark

Rosamund
King, Small
Axe

The Belizean case had none of the equivocation found in the other rulings (Tomlinson, McEwan).....

Laverack,
European
Human
Rights Law
Review

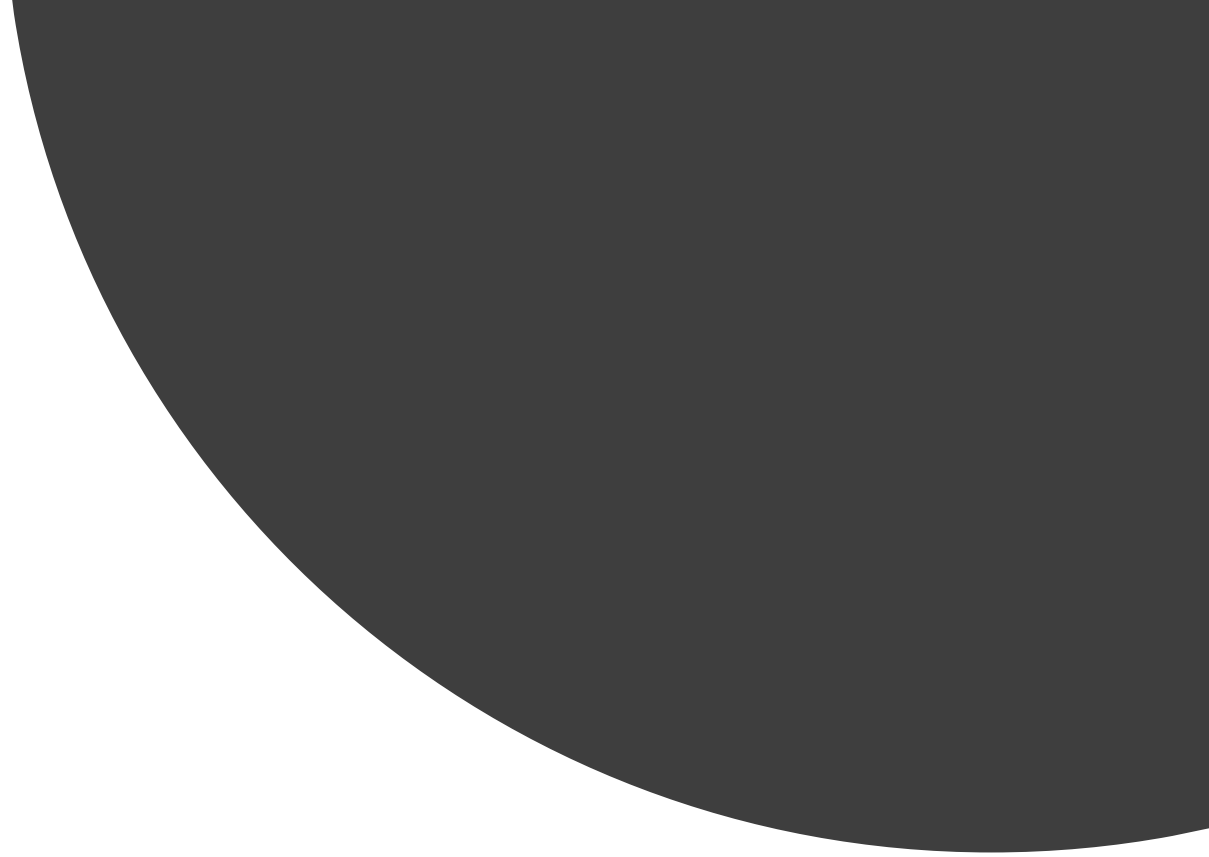
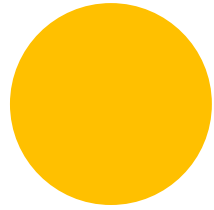
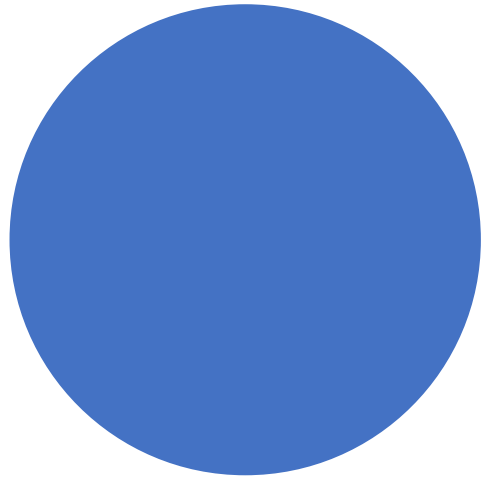
The judgment of Chief Justice Kenneth Benjamin provides the current high-water mark for the constitutional protection of LGBT people from criminal sanctions, and demonstrates how far the tide has risen in favour of LGBT people since earlier judgments on this subject. The judgment is particularly uplifting, as it comes from the Caribbean region where all English-speaking countries, except the Bahamas and now Belize, criminalise homosexuality.

Derek
O'Brien

In a compendium of decisions of Constitutional Courts and international human rights tribunals regarding the incompatibility with human rights norms of laws that criminalise homosexuality, the judgment of the Belize Supreme Court in *Orozco* would appear fairly unremarkable. However, in the context of the Commonwealth Caribbean it is groundbreaking...

Hope for the region
that the work of
activists and the
community can
create change

- *“this case is an important part of the march forward in Belize and the Caribbean towards dignity and respect for the human rights of all. Decisions throughout Caribbean history that have had advanced human rights have not been decisions arrived at easily or quickly.”*
- --Simone Hill, August 10, 2016



Empowerment of key populations
Creating an enabling environment

McEwan v AG

Recognition of SOGI	
Impetus for organising of trans community in Guyana	
International recognition	

Impacts of litigation by McEwan and others

“It is instructive to note that it is not a criminal offence for a male to wear female attire and for a female to wear male attire in a public way or place under section 153(1)(xlvii). It is only if such an act is done for an improper purpose that criminal liability attaches. **...it is not criminally offensive for a person to wear the attire of the opposite sex as a matter of preference or to give expression to or to reflect his or her sexual orientation.**”

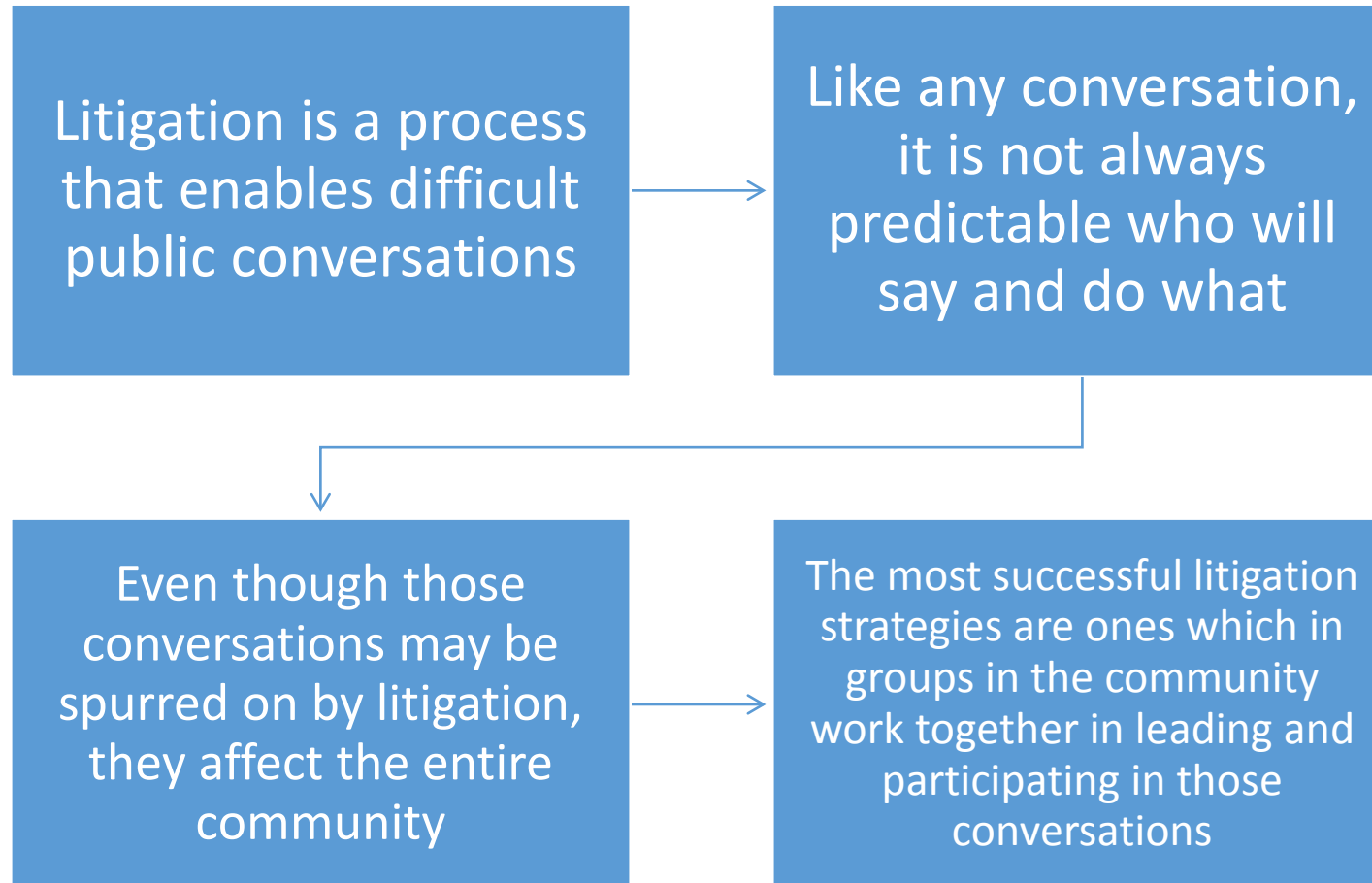
“Section 153(1)(xlvii) of the Summary Jurisdiction (Offences) Act therefore does not proscribe trans-gender dressing per se (where such conduct is not for an improper purpose).”

Chang C.J. in
2013:
Enabling
Environment

Empowerment: *impetus for organising by trans community*



Litigation happens in court but more important public conversations happen out of court which involve the entire community





- Protests outside the court including not LGBT social justice advocates
- Joint press release with GTU SASOD U-RAP
- Letter to the Chancellor by lawyers in McEwan case
- Amicus appearance by Gino Persaud for Twinkle, counsel of record in McEwan, before the magistrate to explain why exclusion is wrong
- Complaint to the Judicial Service Commission and follow up

Ownership by the Community and Joint Actions: Rallying around Petronella and Twinkle

Gulliver McEwan (first named litigant, Founder and leader of GTU) standing beside Twinkle Bissoon, now of GTU

- <https://www.youtube.com/watch?v=9ltKGuD0J18>
- “this is violation to my human rights, of course. And if I respect the magistrate on his bench, I do think the magistrate should also respect me as a human being. It does not matter how I am dressed, or my lifestyle is not the case, it is that I have matters there, and he should listen to my matters...We will stand up for who we are”
- Twinkle Bissoon

“The Commission, after hearing Magistrate’s Bess’ account of what transpired in court, and taking into account your complaint, found that there was a denial of access to justice.



The members of the Commission are strongly of the view that access to justice is an important and necessary component of the administration of justice and any denial of it is not to be condoned. The Commission holds firm to the belief that depriving a litigant access to court or the means to defend his or her right, constitutes an impermissible interferences with the right to access justice.”



International recognition

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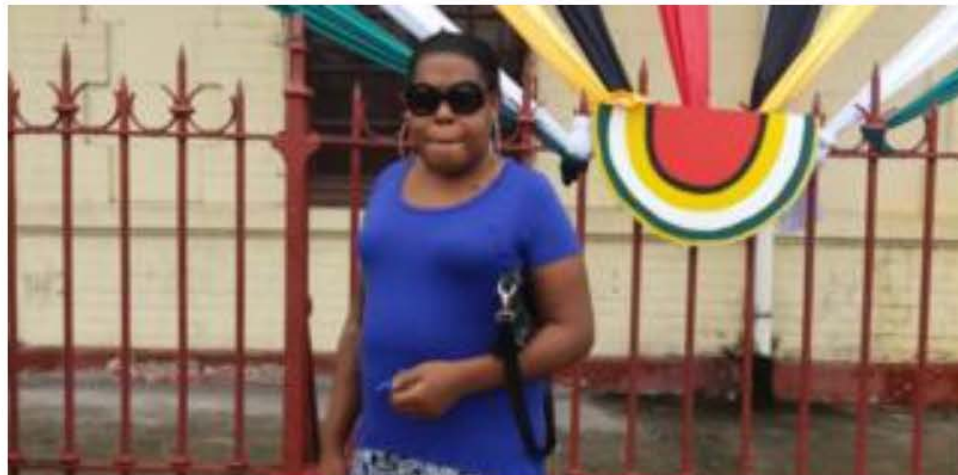
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Guyana's transgender activists fight archaic law

By Carinya Sharples
Georgetown, Guyana

26 March 2017 | [Latin America & Caribbean](#)

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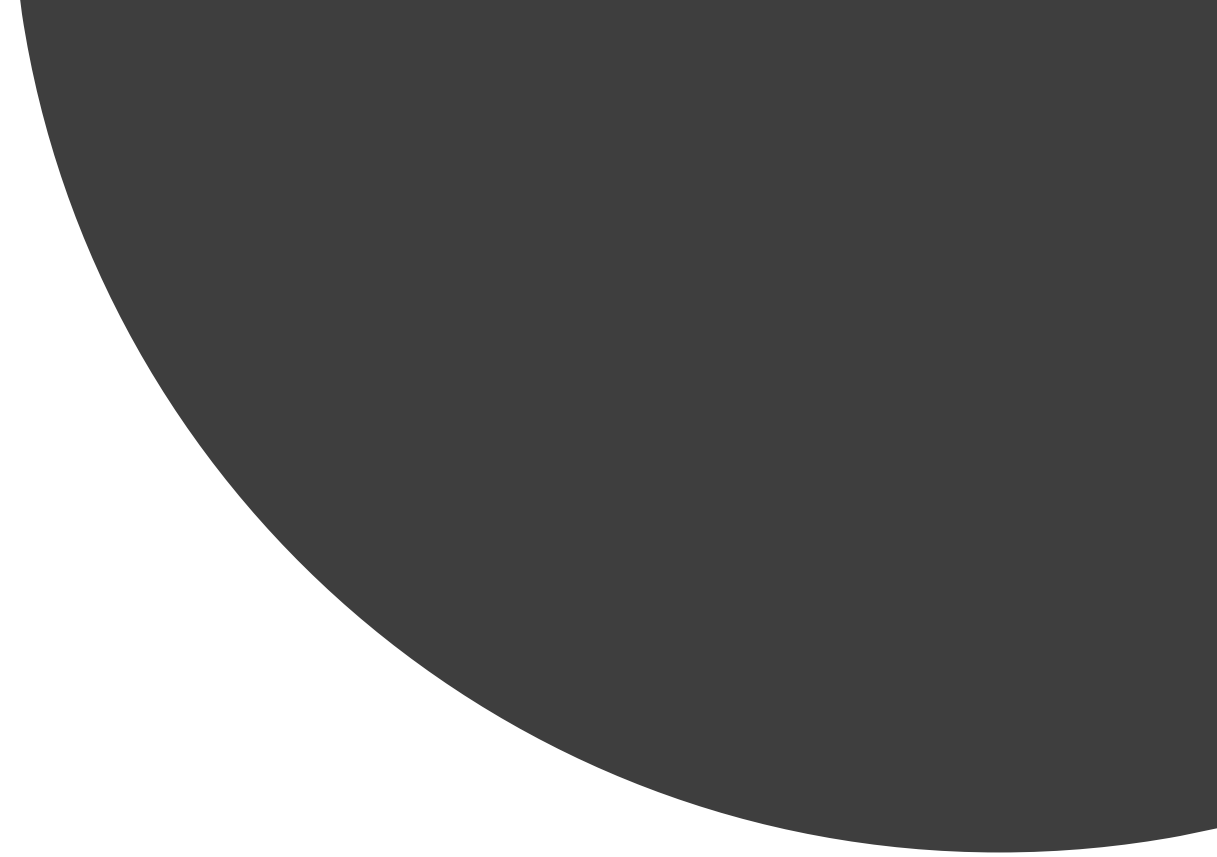
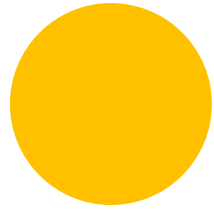
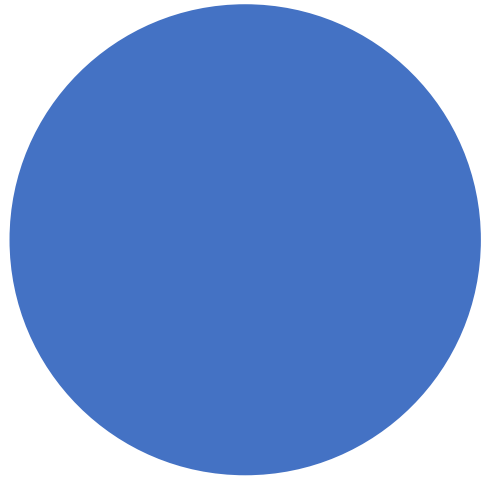
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Features



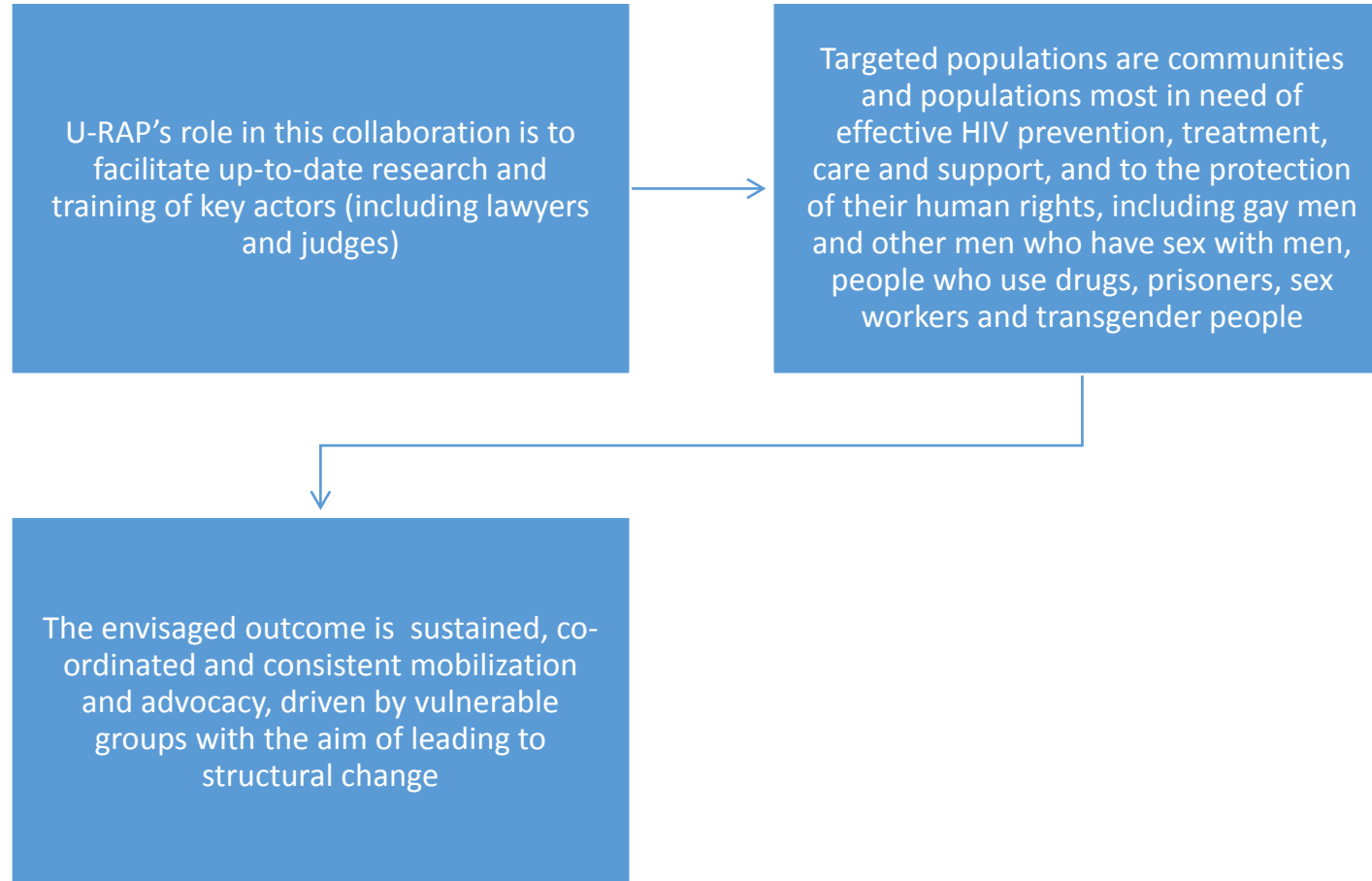
Why firms are spending big to win



Getting to Zero: Human Rights Advocacy

U-RAP/CVC
collaboration

Human Rights Advocacy



Deliverables

Legal literacy

- Manual for Jamaica prepared in January 2017 by Tenesha Myrie under U-RAP's supervision
- Report by Andrew Welch on periodic reporting to international HR bodies (able to function as a reference guide) prepared in January 2017

Training of lawyers

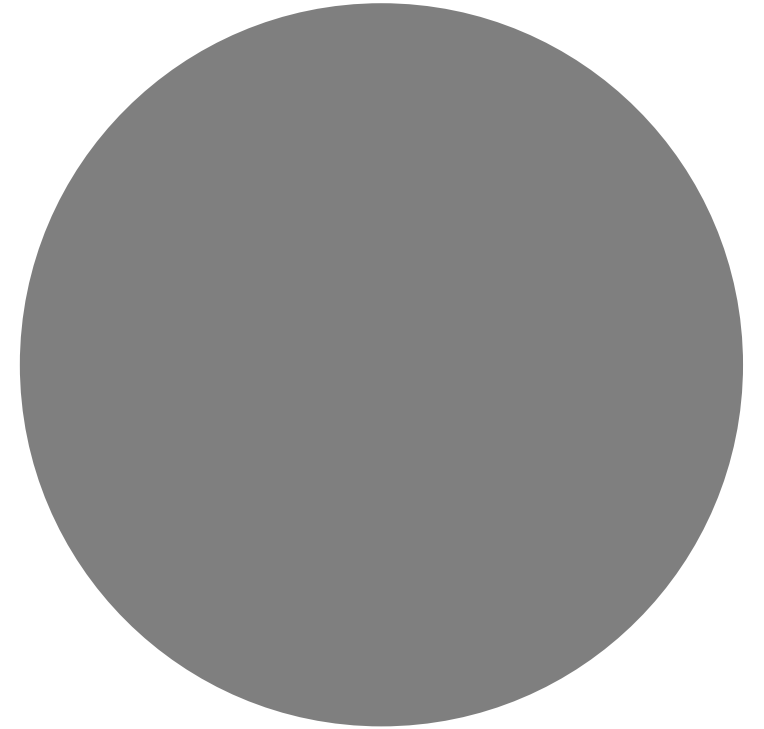
- Caribbean Social Justice and Pro Bono lawyers group (Dec 2016): building a community of informed, educated and socially conscious lawyers
- Publication of a bi-annual bulletin which informs as to current legal development (ongoing education)

Judicial sensitisation and training

- Providing current legal training, including on implicit bias and reducing barriers to accessing justice by marginalised groups (Dec 2017)

Postscript

The challenges ahead



Entrenching discrimination in
our laws

Conservative judiciaries

Pervasive bias in key
institutions, both state and
non-governmental

Significant
challenges
ahead

Changes to Caribbean laws since 1986

- Higher penalties for buggery/sodomy
- Gross indecency (a crime between males) became serious indecency, gender neutral—the use of genitals for sexual pleasure
- Some exceptions created for ‘serious indecency’ by heterosexuals
- Failed to fully criminalise marital rape
- Increased criminalisation of sex work
- Criminalisation of HIV/AIDS transmission

Trinidad and Tobago 1986, 2000

- 5 – 10 – 25 years for buggery
- Gross – serious indecency, 2 – 5 years for consenting adults
- Exceptions for married couples and hetero couples over 16

Bahamas 1991

- Decriminalised the ‘unnatural crime’ in private
- Criminalised sex between two women as ‘unnatural’ in public

Barbados 1992

- Buggery has sentence of max imprisonment for life
- Gross indecency to serious indecency, gender neutral, penalties moved from 2 – 10 years for persons over 16

Antigua and Barbuda 1995

- Sentence for buggery increased from 10 years to 15 years

St. Lucia 2004

- Anal sex between males and females decriminalized

Doubling down

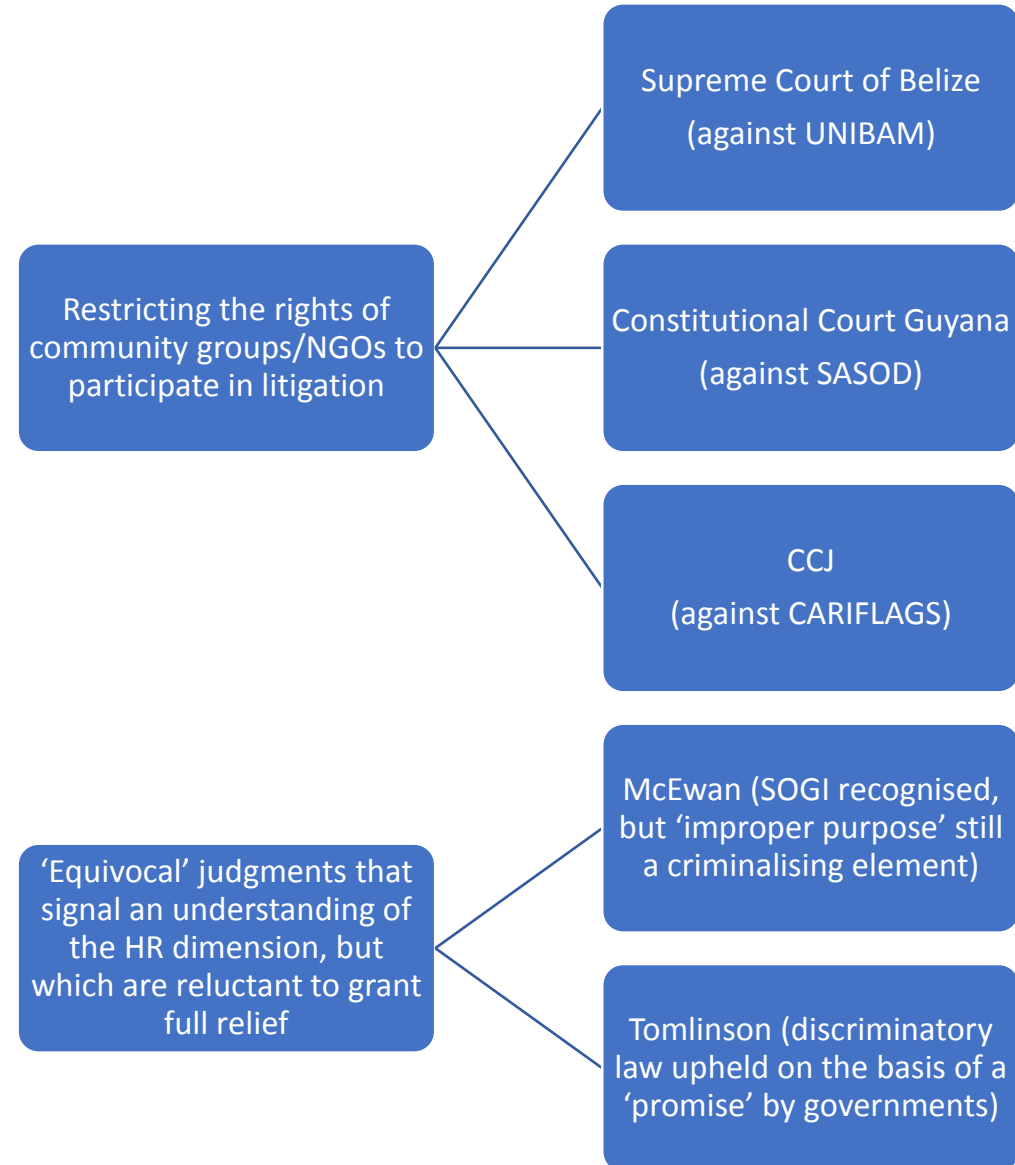


- Equal Opportunity Act
- Children Act

- Revised Charter of Fundamental Rights and Freedoms in 2011 with sinister roll-back of rights against key populations

- New constitutions with provisions defining marriage

Conservative Judiciaries? A slew of troubling decisions



Pervasive Bias:
State & Non-state actors

- One study in Trinidad and Tobago, involving exhaustive data collection over 24 months (but still unreleased and shared in confidence with U-RAP), uncovered three elements of the judiciary in T&T:
 - Implicit bias of Judges and Magistrates
 - Low levels of public trust and confidence in the Judiciary
 - Significant challenges of access to justice

The active role of churches and religious groups in 'responding' to litigation

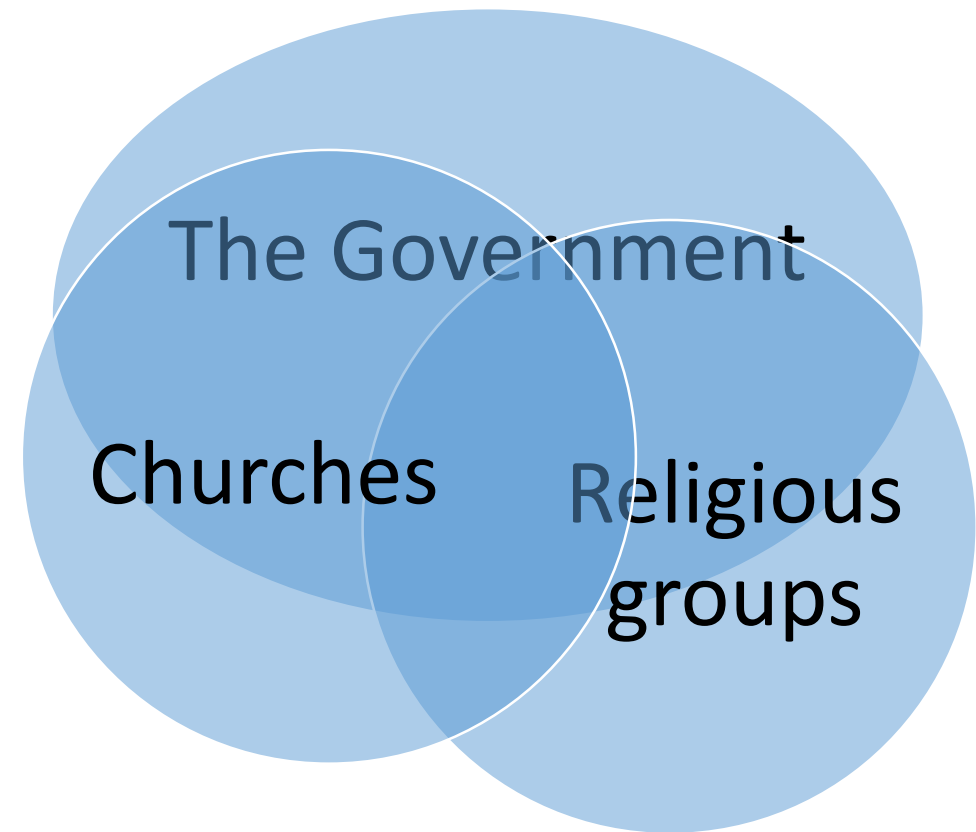
Churches are being given wide standing as 'interested parties' to oppose human rights litigation

Sometimes the churches have been given standing in the same cases that LGBT organisations or institutions supporting their cases have been excluded or given limited standing (Orozco, Tomlinson)

Sometimes the churches almost supplant the role of state in the litigation

The appeal by the RCC exceeds well beyond that of the Govt

Note the RCC is appealing the award of costs against the Government but the Government is not appealing this point!



Thank You

<http://www.u-rap.org/web2/>

