



**BACKGROUND. OPTIONS FOR  
GENDER RECOGNITION.  
TAKING STOCK.**



# TransWave

JAMAICA



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# Background. Options for gender recognition. Taking stock.

## I. Background

Recent research demonstrates while there is shared vulnerability within the lesbian, gay, bisexual and transgender (LGBT) community in Jamaica, that there are particular nuances and challenges faced by the subset of trans and gender non-conforming (GNC) persons. Many of these challenges were enumerated within both the 2020 Trans Health Needs Assessment Report<sup>1</sup> and the 2019 Jamaican LGBT Community Experience and Needs Assessment Survey Report<sup>2</sup> Among these issues are the trans community's disproportionate experience of homelessness, limited access to employment opportunities, high levels of violence meted out against them and experiencing barriers when accessing healthcare. In response to these issues, TransWave Jamaica, currently the only civil society organization that is trans-led and focused on the health and wellness of the trans community in Jamaica, has produced a Transgender and Gender Non-Conforming Health Strategy for Jamaica (Trans Health Strategy) to "drive the strategic direction of the country with regard to the health and well-being of the trans community."<sup>3</sup> Under Strategic Area One of the Trans Health Strategy around Legislation, Policy, Access to Justice, Enabling Environment and Human Rights, the first specific objective of the strategy is that 'Jamaica has gender recognition legislation, policies and systems for trans and gender nonconforming Jamaicans established across all sectors by 2025.'<sup>4</sup> This paper is being produced against the backdrop of the aforesaid to identify the advocacy steps that need to be taken to move Jamaica on a path to realizing this vision. Legal gender recognition is understood as merely referring to "laws, policies or administrative procedures and processes which set out how trans and gender diverse people can change their sex/gender marker and names on official identity documents."<sup>5</sup>



# I. Options for Gender Recognition

Internationally, approaches to gender recognition have varied with differing perspectives on the value of these different approaches. In this section, consideration will be placed on the key features noted in the different models which shaped the local conversations that were had. A fulsome analysis of all approaches is beyond the scope of this paper, however the 2019 Trans Legal Mapping Report of ILGA World provides a useful resource for consideration.<sup>66</sup> This section summarizes the content of the different approaches and provides examples of same and their assessment in a way that centres the voices of the local trans and GNC community and the advocates that represent them.

## The Recognizing Authority

Three major approaches have been noted as it relates to which authority is the custodian of the gender recognition process. The 'Administrative Approach' occurs whereby the person engages the process through a national or sub-national civil registry or other government ministry, department or agency. An example of this occurs in Denmark whereby the civil registration system managed by the Economy and Domestic Ministry is where a person goes to have a new social security number issued.<sup>67</sup> The 'Judicial Approach' entails an individual seeking a court order to have the change of gender effected. An example of this is in Malaysia where individuals go to the civil courts to have their ID cards and sometimes, birth certificates changed.<sup>68</sup> The 'Health Institution Approach' is a niche approach that is only done in a few territories whereby a health department issues a certificate that initiates the process. In the state of California in the United States of America, this has been done through their Department of Public Health which issues the certificate on submission of an affidavit.<sup>69</sup>

The general perspective within the focus groups held was in favour of the administrative approach within the Jamaican context. One trans woman respondent was in favour of a health institution approach and a small number of respondents (4) felt that a new institution altogether should be established to facilitate the process of gender recognition. There were also suggestions of a mixed approach between health institutions and the existing Registrar General Department, given concerns about discriminatory attitudes from the latter – so the former would initiate the process. Three of the trans women respondents suggested that support come from civil society organisations who frequently engage the trans and GNC community to help community members navigate the experience of changing their gender markers. Notably, no one was in favour of a judicial approach – as most found this to be prohibitive and costly.

## Standard of Proof

Similarly, there are three general approaches for the standard of proof required for trans and GNC persons when trying to have their gender markers changed. The ‘Surgical Approach’ exists in several countries whereby some measure of surgical intervention (including sterilization) exists as a prerequisite to having the markers changed. In Hong Kong, both proof of a gender-affirming surgery and sterilization is required for an individual to have the change registered on their identity card.<sup>70</sup> The ‘Biomedical Approach’ is similar to the surgical approach however the prerequisite is either proof of hormone replacement therapy or other medical intervention or some psychological evaluation being done. In the United Kingdom, there must be a diagnosis of gender dysphoria from two medical experts as well as planned or completed medical interventions.<sup>71</sup> The ‘Self-Determination Approach’ focuses on the identity as determined by the trans or GNC person without any requirement for external corroboration. A good example of this is in Argentina where anyone 18 or older can complete an administrative application to have their gender markers changed on their birth certificate and identity card.<sup>72</sup>

Views from the Jamaican community and advocates were nuanced on the issue of the standard of proof. The consensus among trans men respondents were that there should be a biomedical approach – though not necessarily one that mandated hormone replacement therapy but a letter from a letter doctor would suffice. By contrast, the consensus among gender non-conforming persons was in favour of a self-determination approach, though they were open to having letters from organisations and friends be used as corroborating evidence. Among trans women, a few were in favour of self-determination (with the possibility of a letter from a friend) while others were in favour of the biomedical approach because they were of the view that the latter would engender greater public support. Key informants were similarly split between the self-determination and biomedical approach. The general view was that the self-determination approach was the ideal however a letter or statement from a doctor, psychologist or other specialist would have greater public support. None of the focus group participants nor the key informants were in favour of the surgical approach or a biomedical approach that required hormone replacement therapy or similar intervention. These were generally considered too prohibitive.

Outside of these general approaches, some countries have additional proof requirements, examples of which are discussed hereafter. The United Kingdom, for example, requires a person be “living in the gender” for two years before the marker can be changed.<sup>73</sup> In Japan, the law requires that person have no children who are minors.<sup>74</sup> In the People’s Republic of China, there must be a written agreement from your family or work unit to qualify for the surgery needed to register the change.<sup>75</sup> In South Korea, one must be unmarried in order to

have their markers changed.<sup>76</sup> In Iceland, there is a requirement that the person be covered under health insurance.<sup>77</sup>

There was generally no support among focus group participants or key informants for the additional proof requirements, with the small exception that two trans men indicated an interest in the requirement for health insurance – but that was seemingly more connected to the general provision of health insurance rather than its use as a prerequisite for gender marker changes. Additionally, one key informant thought the health insurance requirement may be useful if surgery was prerequisite or to support trans and GNC persons who presented with mental health issues, though it was clarified that this was not to be used as a bar to changing the marker. Another key informant was curious about the requirement that individuals not have children who are minors – noted in Japan – and wondered whether the impact of the process on families merited investigation.

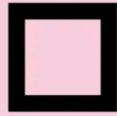


## Limits on Age & Citizenship

There are varying approaches to the age at which gender recognition is accessible. In Luxembourg, for example, a parent can apply to have their child's markers changed from the age of five years old.<sup>78</sup> In Sri Lanka, a person below 21 requires the support of their parents and can have their markers changed at 16.<sup>79</sup> As for the issue of citizenship, there are countries – like Germany – which allow for permanent residents and refugees (who are from a country which do not have a law which allows their markers be changed) to access the service.<sup>80</sup>

On the question of age, the general view was that a person who is 18 should be able to register a change of their gender marker, with one trans woman being of the view that the age requirement should be set at 21 or 22 years. Among persons who identify as GNC, the general view that the age of consent in Jamaica – 16 – should be the age at which an individual should be able to change their markers. There were a range of views among key informants who either felt that there should be some level of parental involvement for persons 16 and 17 or none at all. The lowest age that persons felt that the process should be available to (even with parental consent) was age 12. On the question of citizenship, there was consensus that all citizens at the whichever age established should have access, with some key informants opining that the process should also be accessible to permanent residents and refugees, regardless of the nature of the law where they were from.

M



F



X



## Gender Marker Options

There is also a variety of approaches taken to the question of what a person should be able to have their markers changed to. In its Gender Recognition Act of 2015, Ireland only allowed binary options.<sup>81</sup> In India, only a certificate of transgender status is available unless there is proof of a gender-affirming surgery.<sup>82</sup> In Malta, there are both binary and third gender options.<sup>83</sup> In Canada, there are provinces where gender markers can be removed altogether.<sup>84</sup> In countries like the United Kingdom, a person can only have their marker change once and so they must demonstrate an intention to live with the chosen gender marker permanently.

The majority view among the focus group participants and key informants was that there should be both binary and non-binary options available. One key informant felt that it would be best to start with binary options only and then go from there. Another key informant felt that there should be a distinction made on the birth certificates between sex and gender so that gender was capable of being changed. There were two key informants who felt the ideal option was to remove gender options altogether, however this was challenged by a third who felt that removing such markers would have data implications for tracking gender-related issues such as the quota of women on boards, women's experience with violence which are a requirement under various international and regional treaties.

On the question of whether a person should be able to revert to their original gender markers and the possibility of limits (procedural or otherwise) on same, there was much divergence between groups. GNC persons were in consensus that persons should be able to change their markers without any limits placed thereon whereas the consensus among trans men was that while reverting should be possible, there should be limits placed on the number of changes to the markers that can be registered. One trans woman felt that there should be no possibility of reverting at all. Among key informants, there were a range of views – including the imposition of a limit of two or three changes or making it procedurally more difficult for the second or third change. One key informant suggested that a person changing their markers often may be indicative of the need for psychosocial support and so the persons should be so connected as part of the process.



## **Documents to be Changed**

Finally, there is no consensus on which set of documents should be capable of being changed – given that identity documents vary from country to country. In some countries, it is not possible to change birth certificates, while others it is the central document that is capable of being altered. The range of documents include birth certificates, national ID cards, driver’s licences, passports, tax identification documents, social security documents etc.

The consensus among focus group participants and key informants was that all documents hitherto discussed within the Jamaican landscape should be capable of having the gender marker changed. Three key informants noted that there would be no need to have a slightly different approach to changes to the birth certificate – whether it be through adding notations, or having it reflect both sex and gender or it being the document that had to be changed first – it was recognized that the birth certificate had a differential place among the other identity documents.

## **Gender Recognition through Strategic Litigation**

In several countries where there are no specific gender recognition laws, attempts have been made to carve out a process using the existing national identification legislation. In Botswana, the landmark case of *ND v Attorney General*<sup>85</sup> has created precedence in this behalf. Section 16(1) of the National Registration Act 1986 provides that “[w]here the registrar is of the opinion that any change in the particulars relating to a registered person materially affects his registration, he shall record the change and notify the Registrar of National Registration of the circumstances and recommend that the person concerned should be issued with a new identity card.” Using this provision, the applicant, a trans man, challenged the refusal of the registrar to make changes to his gender markers on his national identity card. The High Court accepted that in the circumstances the refusal was an unjustifiable violation of his rights to dignity, privacy, freedom of expression, equality before the law, freedom from discrimination and freedom from torture, inhumane and degrading treatment. It is notable that in the case of ND, the applicant had undertaken both medical and surgical interventions and presented evidence of same to the Court as part of his arguments. The Court set aside the decision of the Registrar and required that new identity documents be issued to ND.

When asked about their feelings about using strategic litigation as a tool for gender recognition, there were immediate challenges. Among focus group participants, not all persons understood the nature of the question, however, the majority of focus group

participants and all key informants understood and were generally against this approach because of the inherent uncertainty within the process. Strategic litigation does not establish a clear procedure for gender recognition, and as it is done a case-by-case basis – this means that the standard of proof used in the successful case may end up being the standard of proof required in all cases. By way of an example, the applicant ND had already undergone both medical and surgical intervention, which may very well mean that for trans persons in Botswana, they would have to follow suit in order to have their markers change or do further litigation to have the rule changed. This ends up being an indirect judicial approach which is considered costly and prohibitive.

### **Beyond Gender Markers**

- Though ILGA World defined gender recognition exclusively with reference to changing markers on identity documents, focus group participants and key informants were asked to enumerate other issues that should be addressed by the legislation. They opined the following:
  - Access to insurance for trans persons
  - Access to healthcare
  - A requirement for public & private sector organisations to promote inclusion
  - The prohibition of discrimination in all sectors
  - The prohibition of misgendering
  - A broad definition of gender recognition
  - Guidance on the use of honorifics for trans and gender non-conforming persons
  - Provision of a conceptual understanding of gender
  - A section requiring key persons be sensitized on trans issues
  - Prescribing penalties for persons and entities who do not facilitate trans recognition
  - Address how trans people are treated in law generally
  - Provide for how trans persons are to be treated in various spheres of life such as penal institutions, hospitals etc.

Importantly, the effect of *R v Tan and Others*<sup>86</sup> must be reiterated. A trans woman is legally considered a man in all areas of law – regardless of whether she has undergone gender affirming surgeries. This means if she is raped vaginally, the Sexual Offences Act 2009 does not consider this as legally constituting rape, buggery or grievous sexual assault – the three major offences. At best, it may be considered an indecent assault which has significantly less harsher penalties. The law will have to account for all the ways in which trans and GNC people are challenged by the cisnormative underpinnings of our legal system and provide guidance in that behalf.

## II. Taking Stock

Taking account of the desires of local trans and GNC community, the ideal Gender Recognition Legislation for Jamaica has the following features:

1. It takes an administrative approach, using the Registrar General Department to affect changes.
2. The standard of proof is on the basis of self-determination, with the possibility of requiring community members to provide a letter or statement from medical or psychological professionals, attesting to their trans identity.
3. It avoids all the additional proof requirements that would make it prohibitive
4. It facilitates in, some measure, the ability to change gender markers two-three more times after the first change.
5. It is accessible to all citizens, permanent residents and refugees who are over 18 years of age.
6. It provides for binary and non-binary gender options.
7. It amends the Registration (Births & Deaths) Act so that – at least – the trans and GNC Jamaican will have a birth certificate that can be used to have all their other identity documents changed
8. It amends the Passport Act 1962, the Road Traffic Act 2018 and the Representation of the People Act 1944 to create process to have the gender markers on those documents adjusted to align with the identity of trans and GNC Jamaicans.
9. It harmonizes the collection of sex and gender information across all identity legislation using the NIDS framework.
10. It prohibits misgendering and discrimination on the basis of gender identity.
11. It places a duty on the government to sensitize all public sector workers around trans issues and prescribes penalties for failure to register changes of gender.
12. It establishes the positions of trans and GNC persons vis a vis other areas of law such as sexual offences, family law and prescribes how they are to be treated across spheres of life such as penal institutions, hospitals etc.

The three semi-structured interviews held with political actors indicate that we are decades away from this ideal. For example, one of the interviewees who was in favour of gender recognition legislation felt that the best approach was a judicial one, even though this is the only approach that no community member was interested in, reasoning that this approach would carry more weight once court orders are presented to civil servants. The interviewee agreed with the ideal of the self-determination approach but felt that this approach mixed with one of the others would be most effective. There was also support for access to the

gender marker process at 16 years and open to citizens, permanent residents and refugees. The interviewee felt that the third gender only option was best – which though according with one trans man’s view did not reflect the majority opinion of community members engaged. The interviewee felt that the birth certificate should have an addendum which would be used to affect the change across other identity documents.

Already there are some glaring differences between the perspective of this interviewee and community consensus that need to be worked through. Interestingly, all three interviewees felt that anti-discrimination legislation would have to be a precursor to gender recognition legislation. The other two interviews felt that much more work would be needed to convince the wider public to care about gender recognition which means sensitization of the public is critical component. In suggesting the way forward, one of the interviewees said this:

*You have to find a way to make their story seem real. Visibility campaigns are useful, but in a way that people can feel your issue, feel your story. People need to know why it is so important in the Jamaican context. [Trans people] need a bigger community to help them to push this law. They need to see that it’s not just five people. An argument that I’d make is showing how me wanting to do this will affect their daily lives – Legislator*

If the purpose of gender recognition is to reduce the experiences of violence, discrimination and harassment faced by trans and GNC Jamaicans noted in section three, then the researcher submits that gender recognition legislation should not be treated as goal in and of itself, but as one legal procedure to be used alongside a range of ongoing actions to push for greater inclusion of trans and GNC Jamaicans. It is critical that we ask ourselves whether presently a focus on gender recognition laws will address the real and present needs and challenges of the trans community, whatever form that model of recognition takes, or whether the community is better served by prioritizing a push for a comprehensive response to their experiences of homelessness, violence, discrimination and exclusion – regardless of what their identity documents say.

