



GENDER RECOGNITION LEGISLATION

AN APPROACH TO ADVOCACY

DEVELOPED BY
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Gender Recognition Legislation:
An Approach to Advocacy

Background

Recent research demonstrates that while there is shared vulnerability within the lesbian, gay, bisexual, and transgender (LGBT) community in Jamaica, there are 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 Report¹ and the 2019 Jamaican LGBT Community Experience and Needs Assessment Survey Report.² 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."³ 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.'⁴ 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."⁵

Inclusive of this section, the paper is divided into eight (8) sections aimed presenting a clear image of what the current legal situation is for trans and GNC Jamaicans, what

¹ Emme Kristi, *Trans Health Needs Assessment Report* (TransWave Jamaica, 2020)

² Carla Moore, *The Jamaican LGBT Community Experience and Needs Assessment Survey Report* (J-FLAG, 2020)

³ TransWave Jamaica, *Transgender & Gender Non-Conforming National Health Strategy for Jamaica* (TransWave Jamaica, 2020) 20

⁴ *ibid*

⁵ Zhan Chiam et al, *Trans Legal Mapping Report 2019: Recognition before the law* (ILGA World, 2020)

is possible for them as far global approaches to gender recognition, the specific desires of some community members and the advocates that represent them and practical steps that need to be taken to advance the goal of gender recognition legislation. Following this introductory section, there is a discussion of the methodologies used for the development of this paper and the limitations inherent therein. After which, there is a summary of existing literature on the experiences of trans and GNC Jamaicans underscoring the need for legislative protection. The fourth section will consist of a review of literature surrounding international and regional human rights norms on gender recognition and the role of gender recognition laws in protecting and promoting the rights, well-being and livelihood of trans and GNC people globally. The fifth section presents the nuanced legal situation of gender recognition in Jamaica considering the provisions of existing and upcoming legislation. The sixth section of the paper considers different framework for gender recognition that exist globally, assessing the problems that inhere with the varying approaches within full view of the actual desires of some trans and GNC Jamaicans and the advocates that represent.

The seventh – eighth sections have a practical outlook. The seventh section considers the views of a few political actors on the current landscape of Jamaica and the feasibility of gender recognition legislation. The final section of the paper, in full view of the varying views presented prior, recommends an approach to advocacy that outlines which laws would need to be amended, alongside other action that would need to be taken to advance such a legislative agenda.

Methodology

A mixed methods approach was used for this research paper given its focus on legal analysis and the suitability of a specific framework of gender recognition for the Jamaican legal and socio-cultural landscape. The legal methods of review of primary and secondary legal sources was done as part of identifying the different approaches to gender recognition globally, the local legal context and international and regional human rights norms for gender recognition. This was done to situate the Jamaican situation within the wider regional and international context as well as inform the creation of data collections for the purposes of the conduct qualitative data collection.

In order to facilitate the inclusion of the voices of trans and GNC persons who are often left out of the conversations concerning the laws that affect them, a simple PowerPoint presentation was prepared summarizing the varying international approaches to gender recognition – given the technico-legal nature of this subject area and the relative lack of understanding not only among community members, but advocates, legal practitioners and political actors. Using this presentation, three focus group discussions were held with fifteen (15) members of the trans and gender non-conforming community to establish which features of gender recognition they were interested in. Of note, the focus groups were separated according to persons who identified as trans women, trans men and gender non-conforming or gender-fluid, to make note of any specific trends that emerged within those groups. In addition, eight (8) key informant interviews were held with advocates and activists who represent the trans and GNC community in various spaces, to ascertain their own perceptions of the ideal model of gender recognition. Finally, though ten were sought, only three (3) political actors were willing to participate in semi-structured interviews around the political landscape and potential willingness of parliamentarians to support law reform.

Given the qualitative nature of this primary data collection exercise, none of the findings are generalizable to community of trans and GNC persons on a whole or civil society and political actors, however they are able to provide insight on the needed advocacy work around this issue given the different positions they occupy. Another limitation for this research paper was the general lack of awareness around gender

recognition among all the stakeholders engaged, which meant the researcher had to explain several of the legal issues therein. Though a concerted effort was made to remove researcher bias, there is a small possibility that said bias or preference for a particular model may have come out in explanations given to focus group participants and interviewees. It is recommended that greater sensitization is done prior to any consultations that may occur as part of implementing some of the recommendations in the Advocacy Roadmap to ensure that community voices are being heard, free from influence.

Summary of Situation for Trans & Gender Non-Conforming Jamaicans

Housing

According to preliminary data coming out of the 2017 Point-In-Time Survey (PITS) done by the Ministry of Local Government & Rural Development, there were 1935 homeless Jamaicans at that time.⁶ They described as homeless any person who “resides in a care facility for the homeless or in places not meant for human habitation, such as cars, parks, sidewalks and abandoned buildings.”⁷ The 2019 Needs Assessment which surveyed of 301 LGBT Jamaicans, had 20.9% or 61 persons stating that they had been homeless at some point in their life.⁸ Of those persons, 73% were displaced because of homophobia or transphobia within their families or communities.⁹ More than half of the trans women and trans men who responded had been homeless or displaced which is higher than for any other group.¹⁰ Non-binary persons also had higher than average experiences of homelessness at almost 45%.¹¹ The largest cohort of persons who experienced displacement for a few months (30%), with the next largest experiencing it for a few days (23%).¹² Trans men seemed likely to be displaced for longer with no respondents being displaced for less than a few months.¹³ Around 84% of respondents did not feel safe in non-LGBT spaces like shelters and drop-in centres.¹⁴ Of those that did feel safe, none were trans men or gender fluid.

While it cannot be argued, due to lack of data around the population size, that LGBT persons disproportionately experience homelessness and displacement, it is undeniable that there is an added vulnerability to homelessness because of negative attitudes towards the LGBT community. Of note, hatred for and rejection of LGBT people remains high in Jamaica at 57%.¹⁵ In the 2019 Awareness, Attitude &

⁶ Board of Supervision, *Response to Query from J-FLAG on Homelessness* (2020)

⁷ *ibid*

⁸ Moore (*supra* note 2) 46

⁹ *ibid* 47

¹⁰ *ibid* 46

¹¹ *ibid*

¹² *ibid* 47

¹³ *ibid*

¹⁴ *ibid* 48

¹⁵ J-FLAG, *Awareness, Attitude & Perception Survey About Issues Related to LGBT People in Jamaica* (2019)

Perception Survey, 46% of 1043 members of the general public who were surveyed disagreed with the statement that they would allow their child to still live in their house if they found out they were a part of LGBT community.¹⁶ 63% of the respondents agreed with the statement that they would feel uncomfortable living with someone who is a part of the community.¹⁷ In addition, 13.2% of the 68 members who were surveyed for Trans Health Needs Assessment conducted with the trans and GNC identified as being homeless.¹⁸

Employment

Beyond homelessness, there are other critical issues faced by members of the trans and GNC community. In the context of employment, 51% of the respondents to the 2019 Needs Assessment felt that being open about their identity affected their ability to get jobs.¹⁹ The overwhelming majority of trans men and trans women answered yes to this question, in a proportion much higher than other gender identities.²⁰ In fact, 47.1% of respondents in the Trans Health Needs Assessment were unemployed at the time of the survey.²¹ By comparison, the national unemployment rate is at 8.5% as at July 2021.²² Of those employed, 77.9% were earning 30,000 JMD or less monthly.²³ According to the 2019 LGBT Community Needs Assessment, while 21.6% of respondents were making between 31,000 JMD and 60,000 JMD monthly, no trans women earned above \$61,000 - \$100,000 JMD per month and no trans men earned over \$101,000 - \$150,000 JMD per month.²⁴

Education

¹⁶ *ibid* 16

¹⁷ *ibid*

¹⁸ Kristi (*supra* note 1) 9

¹⁹ Moore (*supra* note 2) 29

²⁰ *ibid*

²¹ Kristi (*supra* note 1) 6

²² Statistical Institute of Jamaica, 'Labour Force: Main Labour Force Indicators' <<https://statinja.gov.jm/LabourForce/NewLFS.aspx>> accessed 12 September 2021

²³ Kristi (*supra* note 1) 6

²⁴ Moore (*supra* note 2) 11

Concerning education, in the 2019 Needs Assessment, while 50% of the 301 persons surveyed had undergraduate education as their highest level of education achieved, trans women were most likely to report secondary school as their highest level of education.²⁵ Trans men were just as likely to report undergraduate education or secondary school as their highest level of education.²⁶ Gender-fluid persons were represented across secondary and undergraduate categories.²⁷ For the Trans Health Needs Assessment, the larger majority of respondents had some secondary level (64.7%) or some post-secondary (16.2%) as their highest level of education.²⁸ There were 13.2% of respondents who had some level of tertiary education as their highest level of education.²⁹ This is a slight difference from the 14.5% of persons aged 19-24 and 18.2% of persons aged 17-18 who were enrolled in a tertiary institution according to the 2018 Survey of Living Conditions.³⁰ An important note here is that the 2019 Needs Assessment highlights that 42.5% indicated being bullied in school because of their real or perceived membership in the LGBT community with 88.4% noting that the bullying occurred in high school.³¹

Healthcare

On the issue of healthcare, the 2019 Needs Assessment noted that respondents were most likely to be comfortable disclosing their gender identity in private facilities (43%) and most likely to be uncomfortable in public facilities (46%).³² They were about as likely to be comfortable (32%) and uncomfortable (30%) with NGO and CSO partners.³³ In addition, 68% of respondents did not know how easy or hard it was to access trans specific health care in Jamaica while 25% thought it was at least difficult.³⁴ When asked whether they changed their gender expression, 49% of respondents did not while 10% did.³⁵ No trans men reported changing their gender

²⁵ *ibid* 9

²⁶ *ibid*

²⁷ *ibid*

²⁸ Kristi (*supra* note 1) 5

²⁹ *ibid*

³⁰ Planning Institute of Jamaica and Statistical Institute of Jamaica, *Jamaica Survey of Living Conditions* (2018) 4.2

³¹ Moore (*supra* note 2) 30

³² *ibid* 37

³³ *ibid*

³⁴ *ibid* 38

³⁵ *ibid*

expression; about 50% of trans women did and most gender fluid persons did not.³⁶ The Trans Health Needs Assessment indicated that 59% of respondents (at least sometimes) changed their gender expression when accessing health services.³⁷ 57.4% of respondents indicated experiencing barriers when seeking to access healthcare, discrimination being chief among them – especially for trans women.³⁸ By comparison, the majority of persons who were ill or injured and did not seek care cited financial reasons or their perceptions related to the minor severity of their health condition in the 2018 Survey of Living Conditions.³⁹ Finally, according to the 876 Study, HIV prevalence among trans women, was noted at 51%.⁴⁰ In the Trans Health Needs Assessment, just over 30% of respondents openly identified as being HIV positive.⁴¹

Experiences of Violence

On the issue of violence, the 2019 Needs Assessment revealed that 72.3% of respondents had experienced violence (physical, verbal, sexual etc.) at some point in their lifetime; 78.1% of whom noted that this violence was linked to their LGBT identity.⁴² All trans men and trans women surveyed had experienced violence in their lifetime and the vast majority of non-binary persons had experienced violence as well.⁴³ For an effective comparison, 26.9% of respondents reported experiencing rape or sexual assault and 24% reported experiencing physical assaults in the 2019 Needs Assessment;⁴⁴ while the results of the 2016 National Crime Victimization Survey demonstrate that 2.2% and 3.0% of respondents report experiencing physical assault with and without a weapon, respectively, at least once in their lifetimes and 1.1% of respondents report experiencing sexual assault at least once in their times lifetimes.⁴⁵

³⁶ *ibid*

³⁷ Kristi (*supra* note 1) 16

³⁸ *ibid* 10, 11

³⁹ PIOJ and STATIN (*supra* note 30) 3.11. Of note, 13.6 had cited “Other reasons” but these were not enumerated.

⁴⁰ Ministry of Health and Wellness, *The 876 Study: Integrated Biological and Behavioral Surveillance Survey with Population Size Estimation Among Men who have Sex with Men and Transgender Persons in Jamaica* (2018) 34

⁴¹ Kristi (*supra* note 1) 12

⁴² Moore (*supra* note 2) 20

⁴³ *ibid*

⁴⁴ *ibid* 21

⁴⁵ Annmarie Barnes et al, *National Crime Victimization Survey 2016* (Government of Jamaica, 2016) 67, 68

Conclusion

The cumulative effect of these experiences for trans and gender non-conforming Jamaicans is noted in the 2019 Needs Assessment with 64.1% of respondents indicating an interest in leaving Jamaica linked to their LGBT identity.⁴⁶ All trans women respondents indicated a desire to leave Jamaica, with one noting the rationale was not linked to her identity; all trans men indicated that their desire to leave Jamaica was linked to their sexual orientation or gender identity.⁴⁷ The question then becomes, what is the extent to which gender recognition legislation can have a positive impact on this complicated reality for trans and GNC Jamaicans.

⁴⁶ Moore (*supra* note 2) 49

⁴⁷ *ibid*

International & Regional Norms on Gender Recognition

The UN System

Jamaica has ratified the International Covenant on Civil and Political Rights, 1966 (ICCPR) and is therefore bound by its provisions including article 16 which provides that “[e]veryone shall have the right to recognition everywhere as a person before the law.” This provision has been interpreted by several human rights experts to require states to provide for gender recognition laws. Specifically, the Yogyakarta Principles plus 10 have opined in Principle 31 that “[e]veryone has the right to change gendered information in [identity] documents while gendered information is included in them.”⁴⁸ They go further to put forward that States have the following obligations, to:

- Ensure that official identity documents only include personal information that is relevant, reasonable and necessary as required by the law for a legitimate purpose, and thereby end the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licences, and as part of their legal personality;
- Ensure access to a quick, transparent and accessible mechanism to change names, including to gender-neutral names, based on the self-determination of the person;

While sex or gender continues to be registered:

- Ensure a quick, transparent, and accessible mechanism that legally recognizes and affirms each person’s self-defined gender identity;
- Make available a multiplicity of gender marker options;
- Ensure that no eligibility criteria, such as medical or psychological interventions, a psycho-medical diagnosis, minimum or maximum age, economic status, health, marital or parental status, or any other third party opinion, shall be a prerequisite to change one’s name, legal sex or gender;

⁴⁸ *The Yogyakarta Principles plus 10: Additional Principles and State Obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles* (2017) 9

- Ensure that a person’s criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender.⁴⁹

The UN Office of the High Commissioner for Human Rights underscores the importance of laws which recognizes the gender identity of transgender persons by stating that such laws are “important in relation to protection from violence, torture and ill-treatment, discrimination, rights to health, education, employment and housing, access to social security, political participation and freedom of movement.”⁵⁰ It goes further to state that:

States should respect the physical and psychological integrity of transgender persons and legally recognize their self-identified gender without additional requirements that may violate human rights. States should provide for a simple administrative process, allow for recognition of non-binary identities, and give minors access to recognition of their gender identity.⁵¹

Inter-American System

Similarly, Jamaica has ratified the American Convention on Human Rights, 1969 (ACHR). Article 3 similarly provides for the right of all persons to be recognized as a person before the law. Moving beyond this provision, the Inter-American Court of Human Rights in an advisory opinion made clear that the promulgation of gender recognition legislation is a state obligation borne out of several human rights protected by the ACHR.⁵² The Court articulated the following:

The change of name, the rectification of the image and the rectification of the sex or gender in the public records and identity documents, so that they correspond to the self-perceived gender identity is a right protected by Article 18 (Right to a Name), but also by Articles 3 (Right to Recognition of Juridical Personality), 7(1) (Right to Personal Liberty), and 11(2) (Right to Privacy) of the American Convention. Consequently, pursuant to the obligation to respect and ensure rights without any discrimination (Articles 1(1) and 24 of the Convention), and the obligation to adopt domestic legal provisions (Article 2 of the Convention), States are obliged to recognize, regulate and establish the appropriate procedure to this end.⁵³

⁴⁹ *ibid*

⁵⁰ United Nations Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristic in International Human Rights Law* (2nd edn, 2019) 67

⁵¹ *ibid* 68

⁵² Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples (Arts. 1(1), 3, 7, 11(2), 13, 17, 18 and 24 American Convention on Human Rights), Advisory Opinion, OC-24/17, Inter-Am. Ct. H. R. (ser A)

⁵³ *ibid* No. 52, ¶ 116

Caribbean Court of Justice

Finally, in its appellate jurisdiction, the Caribbean Court of Justice has made clear that trans persons should be afforded constitutional protection. In the seminal case of *Quincy McEwan et al v The Attorney General of Guyana*,⁵⁴ they clarified the constitutional position of trans person as follows:

The 1st - 4th named appellants here, by choosing to dress in clothing and accessories traditionally associated with women, are in effect expressing their identification with the female gender. And the expression of a person's gender identity forms a fundamental part of their right to dignity. Recognition of this gender identity must be given constitutional protection.⁵⁵

The international and regional human rights norms all point to gender recognition as an emerging, if not established, human rights standard. The following section will examine the legal situation of Jamaica so as to locate its laws from the ideal position of gender recognition.

⁵⁴ [2018] CCJ 30 (AJ)

⁵⁵ *ibid* [71]

The Jamaican Legal Situation

The 2011 Jamaican Charter of Rights does not enshrine the right to be recognized as a person before the law in the manner that the ICCPR and ACHR do nor is there a general right to dignity. However, the right to respect for and protection of private and family life is guaranteed in section 13(3)(j)(ii) of our Constitution, alongside the general provision of equality before the law in section 13(3)(g) and equitable and humane treatment by a public authority in the exercise of its functions in section 13(3)(h). Based on the view expressed by the Inter-American Court of Human Rights, these rights arguably form the basis of the state obligation to establish a procedure for the change of identity information in public records, including name, sex and gender.

At present, there is no legislation establishing the aforesaid procedure and the local laws are generally silent on this matter. It has been assumed by Murray et al⁵⁶ that the position for trans and GNC persons in Jamaica is that which is established by the British common law cases of *Corbett v Corbett*⁵⁷ and *R v Tan and Others*.⁵⁸ The effect of these cases have been to state definitively that for the purposes of marriage law (at first) and all other areas of law (thereafter), that one's position as a man or woman in law would be determined on the basis of biological factors.⁵⁹ What has been made clear is that British courts formed the view that any efforts to address the position of trans and GNC persons would have to be addressed by Parliamentary intervention, as noted in the cases of *Bellinger v Bellinger*,⁶⁰ where the Court of Appeal acknowledged that gender went beyond biological factors but deferred to Parliament. Note should be taken here that the United Kingdom operates on the basis of Parliamentary Sovereignty with an unwritten constitution, whereas Jamaica has written a Constitution with the principle of Constitutional Supremacy well established. The implication of this will be discussed in the following this.

⁵⁶ Glenroy Murray, Monique Long & Noelle Nelson, *Diversifying LGBT Rights Advocacy: A Legal Review* (2017) 12, 13

⁵⁷ [1970] 2 All ER 33

⁵⁸ [1983] QBD 1053

⁵⁹ Murray et al (*supra* note 56)

⁶⁰ [2001] EWCA Civ 1140

Existing Legislation

There are currently no unifying identification laws. The approach taken under each piece of legislation will be assessed separately for its impact on members of the trans and GNC population.

Registration (Births and Deaths) Act 1881

This piece of legislation governs the Registrar General Department and establishes procedures for the registration of the birth and deaths of all persons born in Jamaica and the production of Birth & Death Certificates. Section 11 of the Act requires that all births are recorded using the form stipulated in the First Schedule of the Act – Form A. This form requires that newborn’s sex (not gender) is recorded. Similarly, section 23 requires that all deaths are registered using the prescribed form – Form B, which also requires that sex (not gender) is recorded. Section 55(2) requires that the certified copy of the Birth Certificate that is given to persons registered contains sex on it. The law does not currently contemplate a process for changing information on the Birth or Death Certificate outside of making corrections in the margins of the Certificate provided that proof of an error is given to the Registrar.⁶¹ A person who has been legitimated – legally recognized as the child of an identified man after registration – can be re-registered.⁶² There are no references within the Act related to the procedures for having one’s name changed. The cost of drafting the Deed Poll is noted in the Second Schedule. There are no established legal barriers for changing one’s name to one which affirms one’s gender identity.

Passport Act 1962 & Passport Regulations 1962

This piece of legislation governs the production of passports. Regulation 9 requires applicants to fill out the required form and empowers the Passport, Immigration and Citizenship Agency (PICA) to request any identity document. It does not explicitly require the collection of sex or gender but gives them the power to do so. There is no

⁶¹ Registration (Births And Deaths) Act 1881, s 51

⁶² *ibid* s 52

prescribed form for the look of the Passport. Regulation 19 which governs certificates of identity for non-nationals, does not require the display of sex/gender. Any decision to collect and/or display sex/gender is being done by virtue of the discretion of the authority. Regulation 15 only makes reference to the ability to change a person's name in the Passport. There is no process contemplated for changing any other information.

Road Traffic Acts 1938 & 2018

This piece of legislation governs the production of Driver's Licenses. Section 21(1) of the 2018 Act refers to an unspecified "prescribed" form that an applicant has to fill out and section 21(4) gives the Authority the power to require additional documents. Applications for a learner's permit do not require information on sex/gender. The Birth Certificate is provided for the license. As far as displaying sex/gender on the license, section 16(5) or the 1938 Act refers to an unspecified "prescribed" form. There is no explicit requirement in the 2018 Act to have sex/gender displayed. Any decision to collect and/or display sex/gender is being done by virtue of the discretion of the authority. There is no process contemplated for changing any identity information on the Driver's License.

Representation of the People Act 1944

This piece of legislation governs the production of the Voter's ID. Section 10 empowers the Chief Electoral Officer to require any information necessary to have them registered as a voter. Form 16 requires that sex (not gender) be collected. Section 9 requires the issuance of ID cards however Form 17 does not require sex/gender be placed on the card. Any decision to display sex/gender is being done by virtue of the discretion of the authority. Rule 34C of the Regulations that form a part of the Act requires the publication of the Voter's List and allows persons to apply to have information altered but it is not clear whether sex/gender is shown on the list. Beyond this, there is no process contemplated for changing any identity information on the Voter's ID or Voter's List.

The Revenue Administration Act 1985 & The Revenue Administration (Taxpayer Registration) Regulations 1996

This piece of legislation governs the production of the Tax Registration Number (TRN) Card. Section 17D(2) requires the registration of all persons liable to pay taxes and subsection (3) empowers Tax Administration Jamaica to require any information necessary to have them so registered. Regulation 3(2) requires applicants to use the specified form – Form 1 – which requires sex (not gender) be provided. Regulation 6(a) requires the issuance of the TRN Card in the specified Form – Form 3 – which does not require sex/gender be provided. Section 17D(7) contemplates the possibility of information required by the authority changing and requires that the person informs the body of such changes as soon as is practicable. There is not procedure outlined for same.

The 2021 National Identification and Registration Bill

At the time of writing, the NIRA Bill has not been assented to by the Governor General however, it aims to consolidate the various existing identification systems through the creation of the National Identification and Registration Authority, within which the Registrar General will be housed. The provision of its most recent formulation is therefore critical for our consideration of situation of trans and GNC Jamaicans. The NIRA Bill creates a voluntary electronic ID system which allows for accredited third parties to verify the identity information contained within.⁶³ Identify information as defined by clause 11 of the Bill, includes whether a person is male, or female as recorded on their Birth Certification.

To enroll within the National Identification System (NIDS) and obtain a National Identification Number and Card (NIN and NIC, respectively), clause 11(3)(a)(v) requires that whether a person is male, or female as recorded on their birth certificate be collected. This information will be displayed on the back of the NIC.⁶⁴ Clause 9(6)

⁶³ National Identification and Registration Authority Bill 2021, c 25(1)

⁶⁴ *ibid* c 19(1)(b)(v)

contemplates a process for altering identity information collected, broadly defined. However, as the information is explicitly tied to what is on the birth certificate, the possibility of gender recognition of trans and GNC Jamaicans through this measure is limited. It must be noted that in the 2020 version of the NIRA Bill, there was no reference to sex or gender being displayed on the card however that was changed following the inclusion of a recommendation from the Joint Select Committee reviewing the 2020 Bill to add “sex” to the card.⁶⁵ The current formulation in the 2021 Bill, however, represents a deliberate attempt to avoid the language of sex or gender as was seen in the Charter of Rights.

Conclusion

Across the older legislation, there is seeming ambivalence around the collection of ‘sex’. There is no provision related to collecting gender – which may reflect the times within which some of the legislation was promulgated. Interestingly, the display of this information is consistent across all forms of identification except for the TRN card whose prescribed form does not include it. This begs the question why varying agencies have taken it as a given that the information related to ‘sex’ ought to be displayed. Beyond this, there is also little room for the updating of information on the cards, with the exception of the TRN and NIDS which contemplates such a process – though it does not establish any proof requirements.

What is clear is that the birth certificate is a central document to accessing all forms of identification for Jamaican citizens and as such a procedure for amending the description or facilitating the inclusion of gender on the birth certificate and having gender displayed across the varying forms of identification may provide the greatest opportunity for recognition for trans and GNC persons.

⁶⁵ Houses of Parliament Jamaica, *Report of the Joint Select Committee on its deliberations on the Bill entitled “the National Identification and Registration Act, 2020”* (Houses of Parliament, 2021) 12

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.⁶⁶ 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.⁶⁷ 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.⁶⁸ 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.⁶⁹

⁶⁶ Chiam et al (*supra* note 5)

⁶⁷ *ibid* 129

⁶⁸ *ibid* 87

⁶⁹ *ibid* 227

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.⁷⁰ 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.⁷¹ 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.⁷²

⁷⁰ *ibid* 73

⁷¹ *ibid* 175

⁷² *ibid* 180

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 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.⁷³ In Japan, the law requires that person have no children who are minors.⁷⁴ 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.⁷⁵ In South Korea, one must be unmarried in order to have their markers changed.⁷⁶ In Iceland, there is a requirement that the person be covered under health insurance.⁷⁷

⁷³ *ibid* 175

⁷⁴ *ibid* 80

⁷⁵ *ibid* 98

⁷⁶ *ibid* 100

⁷⁷ *ibid* 138

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.⁷⁸ In Sri Lanka, a person below 21 requires the support of their parents and can have their markers changed at 16.⁷⁹ 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.⁸⁰

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

⁷⁸ *ibid* 145

⁷⁹ *ibid* 103

⁸⁰ *ibid* 135

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.

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.⁸¹ In India, only a certificate of transgender status is available unless there is proof of a gender-affirming surgery.⁸² In Malta, there are both binary and third gender options.⁸³ In Canada, there are provinces where gender markers can be removed altogether.⁸⁴ 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

⁸¹ *ibid* 139

⁸² *ibid* 74

⁸³ *ibid* 146

⁸⁴ *ibid* 226

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*⁸⁵ has created precedence in this behalf. Section 16(1) of the National Registration Act 1986 provides

⁸⁵ (unreported) High Court, Botswana MAHGB 00049-15 (2017)

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, most 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*⁸⁶ 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.

⁸⁶ (*supra* note 58)

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 effect 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 – though this, according to one trans man, 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 effect 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.

The Advocacy Road Map

Step 1 – Build Community Consensus

The sample used for this research exercise was very limited and yet within that limited pool, there was very little knowledge and awareness around the value that gender recognition laws can add to the lives of trans and GNC Jamaicans. It is therefore critical that regular sensitization sessions are held within the community of trans and GNC persons around this and other legal and policy issues that affect so that the community can articulate clearly what their desired policy and legal goals are – including the features of their ideal gender recognition framework.

Step 2 – Situate Trans Advocacy in a Jamaican Context

Based on the feedback of one of the semi-structured interviews, trans advocacy is still seen as frivolous and the general populace does not care. Messaging and strategies should be developed to construct Trans & GNC Jamaicans as Jamaicans first who mean no harm to the wider Jamaican society. Your advocacy goals should not seem as if you intend to upend society but rather, to find your place in it. Incorporating Jamaican Language, using colloquial terms such as – being “pon di borderline” – might be helpful in developing a relatability and connectedness to your issues in a way that is also non-threatening.

Step 3 – Support Broader Human Rights & National Development Issues

Trans Jamaicans, not just the advocates that represent them, should be trained and empowered to take up space in various sectors and speak on a wide range of issues to diversify the image of the trans & GNC community. This may mean supporting broader goals such as poverty reduction, homelessness, minimum wage, environmental protection and stimulating the economy. The more trans people show up outside of the spaces and frames they are traditionally seen in, the better it is for their calls for inclusion.

Step 4 – Mainstream Calls for Gender Recognition

Treating gender recognition as a stand-alone issue will only do more harm than good. In order for members of the wider public and other civil society actors to support, they must understand how gender recognition benefits them, if even indirectly. Having built social capital as people who care about Jamaica broadly, the argument for gender recognition can be more readily framed around issues such as a response to the brain drain of talented trans and GNC persons who frequently look for better opportunities. Gender recognition must benefit society, as a whole, so that a wider cross-section of actors can support it.

Step 5 – Maintain Healthy Relationships with Key Decision-Makers

Parliamentarians, policymakers, business leaders and other key decision-makers need a direct relationship with the trans and GNC community and the advocates that represent them. As part of step 2, they must be engaged to develop an understanding of the issues that affect the community through the development of issue briefs, policy briefs and tailored communication materials based on their field. Gender recognition should not be the first point of advocacy but introduced later a solution to some of the issues that have already been shared.

Step 6 – Prioritize Comprehensive Anti-Discrimination Laws & Policies

Given the impact of stigma and discrimination on the lives and livelihood of trans and GNC Jamaicans, a more tangible legislative goal is the promulgation of anti-discrimination laws and policies in both public and private sector spaces. Building support through established networks for these laws and policies mean that even as stakeholders grapple with the implications of gender recognition, they have something they can more readily action that can be used to change the lives of trans and GNC people around them.

Step 7 – Strengthen Local Systems to Provide for Trans Healthcare

While not all trans & GNC persons want to access medical and surgical interventions to affirm their identities, collaborating with stakeholders to make this reality for those that do will also be beneficial as those persons can best exemplify the challenges with non-recognition as their identity documents and their presentation are visibly at odds, underscoring the need for gender recognition laws.

Step 8 – Agitate for Gender Recognition Laws

Using established networks, relationships, visible trans advocates, activities and community members – public and privately agitate for gender recognition based on the consensus arrived at in step one. All players need to be collectively asking for a clear model of recognition that can be supported.

...tempted to go ...ing ...
...the major health insurance agencies. As someone who identifies
... — which means I was assigned female at birth but identify as a man — to see that the
...encountered some roadblocks that were particularly troubling ... stage their second annual TransWave Jamaica - Tr
...ference at a popular hotel in “broad daylight”.

...individual health insurance ... with the agents made it clear that there wa
...insurance agencies. As someone who identifies bodies, in general. A
...assigned female at birth but identify as a man ... been removed,) bu
...ks that were particularly troubling for me. ... p smears. I)... discuss research, media and visibility, trans-incl
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...agents made it clear that there wa
...or to trans bodies, in general. A trans ma
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...a range of services that she might need, including a prostate
...need. There exists in Jamaica a diverse group of people who are t
...and currently the service offering f

...ledgement of gender identity on these forms, wh
...distinguish between sex and gender. For a trans w
...ed male at birth but identifies as a woman — who
...ver surgery where she now has a vagina) and se
...nce application form, the system will automatica
...including a prostate exam.

...erse group of people who are trans-identifying
...d currently the service offering falls short
...possibly detrimental decisions about the
...here in Jamaica, there are a growing number of visible trans
...onforming individuals who are reclaiming spaces and integra
...ation-building.
...OR, Sir:
...trans people are just like everyone else. We have families and we ha
...school and are as good at doing anything an average human being can. We
...moms, sisters and brothers, neighbours and law-abiding citizens who traver
...country just like everyone else. Unlike the average Jamaican, transgender p
...marginalised in Jamaican society and face isolation, harassment and abusiv
...reatment – including physical and sexual violence.

Trans masculine po



Trans masculine po

Trans people are just like everyone else. They go to school and are as good at their jobs as anyone else. They have moms, sisters and brothers. They live in their country just like everyone else. But in Jamaica, trans people are marginalised in Jamaican society and face isolation, harassment and abusive treatment – including physical and sexual violence.