



INTERNATIONAL & REGIONAL NORMS ON GENDER RECOGNITION

The Jamaican legal situation





Copyright © 2021 by TransWave Jamaica.

This book or any portion thereof may not be reproduced or used in any manner whatsoever without the express written permission of the publisher except for the use of brief quotations in a book review.

Follow us
[@transwaveja](https://www.instagram.com/transwaveja)

Email us
hello@transwaveja

Visit our website
www.transwaveja.org

While there is common vulnerability across the lesbian, gay, bisexual, and transgender (LGBT) population in Jamaica, recent studies show that the subset of trans and gender non-conforming (GNC) people confront unique characteristics and obstacles. Chief among these challenges are the trans community's disproportionate experience of homelessness, limited access to employment prospects, high levels of violence directed against them, and impediments to healthcare access are among these challenges.

According to the United Nations Development Programme (UNDP), the lack of legal gender recognition is one of the most challenging barriers to trans and gender-diverse people's social inclusion. Trans people are confronted on a daily basis with the reality of the lack of gender recognition under Jamaican law. There is no legislative or policy framework that allows trans people to have their gender identities formally recognized through changes on their birth certificates and other forms of identification.



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;

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

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.



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

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



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 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

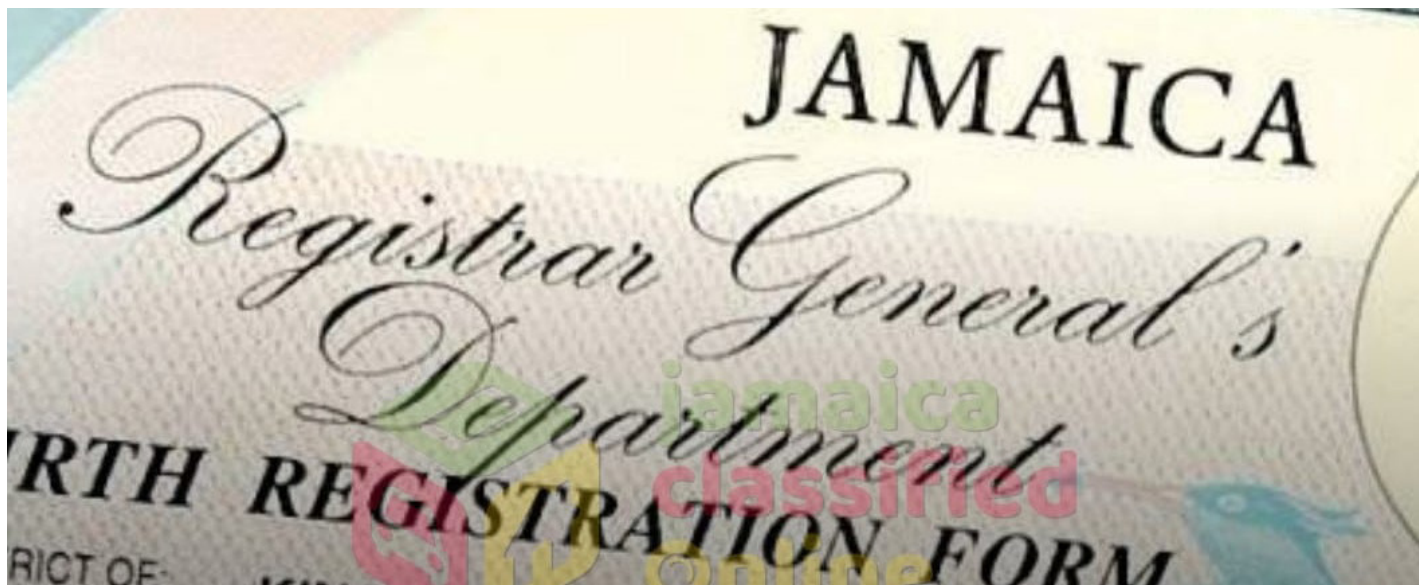
This piece of legislation governs the production of Driver's Licenses. Section 21(1) of the 2018 Act makes reference to an unspecified "prescribed" form that an applicant has to fill out and section 21(4) gives the Authority the power to require additional documents. Applications for a learner's permit 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) of the 1938 Act makes reference 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.

In order 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) 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.



Follow us
[@transwaveja](#)

Email us
hello@transwaveja

Visit our website
www.transwaveja.org