

UNIVERSAL PERIODIC REVIEW OF JAMAICA

Submission on Human Rights Violations Against Transgender People in Jamaica

I. Introduction

This report on violations of the human rights of transgender (“trans”) people in Jamaica is submitted to the United Nations (“UN”) Human Rights Council (the “Council”) for the Universal Periodic Review (“UPR”) in anticipation of the Council’s review for the Third Cycle of UPR. This report is submitted by TransWave Jamaica.¹

The purpose of this report is to highlight and draw the Council’s attention to the ongoing violations of human rights affecting trans people in Jamaica. These violations include, but are not limited to, the following:

- A. While Jamaica has signaled a crucial step forward with regard to police responses to violence based on gender identity, more needs to be done to prevent, prosecute, and punish violent attacks against trans people, including mob violence and sexual assault, and cases where the police have stood by and allowed the attacks or even been the perpetrators;
- B. Jamaica has failed to take sufficient measures to respect and ensure the rights of people to equality under the law and non-discrimination regardless of their real or perceived gender identity; and
- C. Jamaica has failed to develop a legal system that is responsive and inclusive of the rights of trans people by repealing laws that violate their rights, amending laws to equally protect trans people, and creating legislation to address the various challenges trans people continue to experience, with particular regard to gender identity.

As this report will show, Jamaica has not amended its current laws, nor implemented new legislation, to prohibit discrimination on the basis of sex and gender identity. While, as will be noted, the State has taken some measures to promote tolerance and respect for sexual and gender minorities, much more needs to be done to protect those in the community, especially trans people.

Our report will include proposed recommendations to be made to Jamaica.

¹ TransWave Jamaica, a Jamaican NGO founded in August 2015, promotes transgender health and well being through advocacy and visibility. TransWave highlights and shares stories of transgender and gender nonconforming Jamaicans while educating the wider society about issues faced by the trans community. In addition, it focuses on building the capacity of the community to increase its involvement in advocacy and social justice throughout Jamaica.

II. Lack of Legal Protection

A. Legal Examples

Trans people in Jamaica face numerous obstacles in everyday life, from healthcare to housing to employment. When trans people have been attacked or denied access to certain facilities because of their gender identity, Jamaican law affords them no protection to seek justice. Frequent threats of violence have led to trans people to living in fear and, in some cases, to fleeing their homes. A lack of reliable reporting and statistics, often compounded by the fact that the police do not believe trans people, specifically trans women, indicates that the problems may be much larger than presently known.

Jamaica has failed to fulfil its obligation to take appropriate measures to protect trans people from discrimination and attacks on the basis of their gender identity. The rights of citizens are protected under the Charter of Fundamental Rights and Freedoms, which was enacted in April 2011.² Even though the Charter includes “the right to equality before the law,” it limits the definition for its anti-discrimination clause.³ The Charter prohibits “discrimination on the ground of – (i) being male or female; [and] (ii) race, place of origin, social class, colour, religion or political opinions.”⁴ Thus, there is no gender identity protection under the Charter. Of note is that the Charter specifies discrimination on the status of “being male or female,” compared to the more common provision, found in many other jurisdictions, on “the basis of sex.”

B. Examples and cases

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. As a result, many laws impact trans people differently due to gender-specific provisions. For instance, the Sexual Offences Act of 2009 states that only women can be victims of rape. Because Jamaica has failed to provide gender identity protections, trans women would be considered “men” under Jamaican law and thus afforded no legal protection.

A similar scenario exists in the Domestic Violence Act of 2009. The Act allows Jamaicans in married, unmarried, cohabiting, and non-cohabiting heterosexual unions to seek protection from physical and mental violence experienced at the hands of their partners. But this law explicitly

² The Jamaican Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, § 13 (3)(g) (Jam.), available at [http://www.japarliament.gov.jm/attachments/341_The%20Charter%20of%20Fundamental%20Rights%20and%20Freedoms%20\(Constitutional%20Amendment\)%20Act,%202011.pdf](http://www.japarliament.gov.jm/attachments/341_The%20Charter%20of%20Fundamental%20Rights%20and%20Freedoms%20(Constitutional%20Amendment)%20Act,%202011.pdf) [hereinafter “the Charter”].

³ *Id.* § 13 (3)(i).

⁴ *Id.*

excludes trans people from legal protections, as the Act's definitions of "spouse" and "visiting relationship" are exclusively heterosexual and cisgender. Because current Jamaican law does not recognize gender identity, a trans Jamaican is unable to seek relief for domestic violence against their partner.

Another instance of lack of protection can be found in the Rent Restriction Act, passed in 1944. While this Act protects tenants from landlord oppression, such protection is not afforded to trans people. For example, landlords may evict a tenant if the tenant is deemed to be a nuisance or annoyance to adjoining tenants. The Rent Restriction Act, detailed in depth later in the report, further writes out trans Jamaicans from the legal protections afforded others by the state.

C. Recommendation

- Amend anti-discrimination clause in the Charter of Fundamental Rights and Freedoms to include a "gender identity" clause. This would provide trans Jamaicans the right to legal protection under the Jamaican Constitution.

III. Homelessness and Poverty

A. Legal Examples

Jamaica's Constitution does not contain an explicit right to housing. Instead, as a common law country, Jamaicans rely on the legislature and judicial precedent for housing protections and guarantees. Unfortunately, the government is not implementing any type of comprehensive plan that addresses its approximately 2000 homeless residents (Muir, 2017, The Jamaica Observer). In fact, the actual number of homeless people in Jamaica is not seen as reliable.

The count relies on direct interaction between Jamaica's government agencies and the homeless population. The current process means it is especially difficult to account for homeless within Jamaica's trans community. Interactions between government agencies and homeless trans people are not accurately documented because trans people lack legal recognition under Jamaica's laws. Additionally, the criminalization of certain conduct that disproportionately affects the trans community deters direct interaction between trans people generally and the government.

The Towns and Community Act originally sought to encourage development in urban and rural areas of Jamaica, as well as maintain public order. The Act criminalizes sleeping in public places and loitering. Both of these provisions have a detrimental effect on homeless trans people.

Outward expressions of sexual orientation and gender identity often result in ostracization from families and communities. As a result, trans people find themselves in situations of outright homelessness or perpetually lacking stabling housing. The Towns and Community Act effectively

criminalizes behavior that is necessary for trans people to survive. Specifically, the Act allows for the warrantless detention of those violating the Act. This exposes trans people to discrimination and harassment because of their homelessness and gender identity.

The Rent Restriction Act has a provision that allow for discrimination against trans people, as well as contributes to homelessness among the trans community. Under the Act, landlords may evict a tenant for one of two reasons.

First, the tenant is causing a nuisance or annoyance to adjoining occupiers. Second, eviction is allowed when a tenant engages in “immoral behavior.” Nuisance, under common law doctrine, has a specific set of elements that must be proven for a plaintiff to succeed. However, “annoyance to adjoining occupiers” and “immoral behavior” are subjective standards, ripe for being used to discriminate. Expressions of a trans person’s sexual orientation or gender identity can suffice the “annoyance” or “immoral” standard. A trans person subject to eviction as a result of “immoral behavior” will most likely face some form of criminal penalty, as both sodomy and “gross indecency” are punishable with jail time.

B. Recommendations

1. Prioritize combating homelessness generally by utilizing the legislative process and instituting safe houses and programs geared towards the homeless which includes members of the vulnerable populations.
2. Pass a comprehensive, non-discrimination law that includes a specific provision that protects vulnerable populations, including lesbian, gay, bisexual, trans and queer (LGBTQ) persons.
3. The Ministry of Local Government and community development should develop protections to prevent homeless shelters from discriminating against individuals on the basis of their sexual orientation and gender identity.
4. Amend the Towns and Community Act to decriminalize sleeping in public places and loitering.
5. Remove from the Rent Restriction Act should the “annoyance to adjoining occupiers” and “immoral behavior” provisions.

IV. Harassment and Stigma

A. Legal examples

Harassment and stigmatization of trans people is a persistent problem in Jamaica. A lack of broader legal protections for trans people results in negative societal consequences. One such example is not recognizing transgender as an official identity. Institutionalizing a binary concept of gender,

either man or woman, the government re-enforces a notion of trans dehumanization. Viewing trans peoples “not people” leads to widespread harms, such as outright violence or systemic discrimination.

Jamaica also has a series of laws that reinforce transphobic attitudes and behaviors. The 1864 Offenses Against the Person Act criminalizes conduct that disproportionately discriminates against LGBT people . While the laws specifically address the conduct of men, i.e. criminalizing sodomy, allowing these laws to remain active promotes discriminatory attitudes towards all sexual minorities.

Sex work is also a criminal offense under the 1864 Act and a series of other laws. Since trans people face widespread employment discrimination, sex work may be the only source of income. The criminalization not only subjects trans people to police harassment, it also perpetuates trans people as “immoral” members of society.

B. Examples

Trans people experience harassment and stigmatization in various forms. Trans women are subject to sexual violence as a result of their gender identity and expression. However, trans women are less likely to report such crimes to the police. Trans men are also subject to corrective rape. Reporting a sexually violent crime can result in discrimination from the police, such as not investigating the offense. Reporting an offense can also subject survivors to further sexual assault from the police.

Trans people are also subject to harassment and stigmatization when seeking healthcare. In some accounts, trans people seeking treatment for HIV were verbally harassed by other patients or the doctors themselves. The harassment and stigmatization also deters safe sex practices, such as buying condoms and lubricant.

C. Recommendation

1. Repeal provisions of the 1864 Offenses Against the Person Act that discriminate against trans people, including the anti-sodomy and “Outrages Against Decency” sections.
2. Decriminalize sex work in Jamaica under the 1864 Act and other legislation such as the Towns and Communities Act.
3. In consultation with civil society organizations, enhance police trainings to better address the needs of trans people who are survivors of criminal activity; with specific sensitivity to survivors of sexual violence.

4. Implement procedures that hold police and other civil servants which also includes clinicians accountable for harassing, discriminatory, or criminal behavior.

5. Through the Ministry of Education implement anti-bullying clauses in all schools that includes protection from violence and discrimination on the basis of sexual orientation and gender identity, among others

V. Barriers to Healthcare

A. Legal examples

Trans persons face significant obstacles to receiving equal and adequate health care, necessary to sustenance of life. The Rights to Life and Health are international human rights standards enumerated in conventions that Jamaica is a party to. Overall, data collection on health disparities among trans people is virtually nonexistent, and primarily focuses on HIV/AIDS, often further pathologizing the trans community. As a result the actual health needs and disparities amongst trans persons is largely unknown, therefore leaving a large demographic medically underserved. Trans persons do not have state-provided access to hormone replacement therapy and gender-affirming surgeries (Rena Green, Associate Director, TransWave Jamaica).

Trans persons with no other option but self medication are at risk of underdosing and overdosing, which can lead to further health complications.

A 2016 study shows that 40% of Jamaican trans women have tested positive for HIV. However, because not as many trans women are regularly tested due to barriers to healthcare, the figure is likely much higher.

B. Examples and cases.

Of his time trying to get individual health insurance, TransWave's Co-founder and Executive Director, Neish McLean shares:

“My conversations with the agents made it clear that there was no policy that existed to cater to my health needs or to trans bodies, in general. A trans man might have had top surgery (where the breasts have been removed,) but might still require certain reproductive health services, including pap smears. If a trans man selects 'male' on his health insurance application the system will automatically block a range of services that he might still need.

Currently there is no acknowledgement of gender identity on these forms, which would allow trans people to distinguish between sex and gender. For a trans woman — someone who was assigned

male at birth but identifies as a woman — who might have had a vaginoplasty (lower surgery where she now has a vagina) and selects 'female' on her health insurance application form, the system will automatically block a range of services that she might need, including a prostate exam.

There exists in Jamaica a diverse group of people who are trans-identifying with varying healthcare needs and currently the service offering falls short, leaving trans people to make critical and possibly detrimental decisions about their health and well-being.” [Neish McLean’s “A Plea for Trans-inclusive Healthcare, 2018, Jamaica Observer]

C. Recommendation

1. Enact codified protections against gender and sexuality based discrimination when seeking health care services.
2. In consultation with civil society organizations working on trans issues, medical and non-medical healthcare professionals, and Court officials should undergo mandatory sensitivity and cultural competency trainings under international human rights standards, including issues of sexuality, sexual orientation, gender identity and around common health care needs, struggles and inclusive terminology for transgender or gender-nonconforming patients.
3. Train forensic medical investigators, especially on sexual offences against LGBT people.
4. Provide up-to-date information and material about the support measures available to trans persons who survive attacks.
5. To modify policies within the Ministry of Health in order to reinforce that doctor-patient confidentiality also protects trans people.

VI. Identity Documents

A. Legal examples

Jamaica’s constitution does not currently recognize the existence of trans persons or their chosen gender identities. Trans persons in Jamaica cannot change any gender markers on state-issued identification; only their names can be changed. The lack of this legal right leaves trans persons at risk in many ways: limited health care access, restricted domestic and international mobility, strained mental health, and lack of state protection from discrimination, intimidation, and violence. The state’s recognition of trans persons will presumably fill the gaps of protection for trans people

under its constitution as well as: The Sexual Offenses Act of Jamaica, 2009; The Domestic Violence Act of Jamaica, 2005; and the Jamaican Offences Against the Person Act, 1864. Without legal recognition via identity documents, Jamaica's violation of its commitment to equal protection for all its citizens is multiplicitous.

B. Recommendation

1. The government should develop and implement gender recognition legislation to ensure a quick, transparent, and accessible mechanism that legally recognises and affirms each person's self-defined gender identity.
2. Enact legislation that prohibits Government agents from breaching the privacy of trans persons who wish to change their name and gender marker on their state-issued identification.

VII. Conclusion

Under its current laws, Jamaica has failed to adequately protect the rights of trans people living in the State. Trans Jamaicans face numerous obstacles in their everyday life. Trans people fall victim to violence on the streets and in their homes. They encounter discrimination in access to education, housing, employment, and healthcare. And too often, their government fails to come to their aid.

This report seeks to highlight the current situation facing many trans Jamaicans. The current system in place fails to protect trans people, despite international pressure and recommendations to do so. This report proposes the addition of a gender identity clause to the State's constitution, which would finally provide legal protection for trans people. Such an amendment is the first step needed in protecting and affirming the rights of trans people to live freely in Jamaica.