



# KNOW YOUR RIGHTS

## TRANS PERSONS AND THE LAW

*(Extracted from Legal Literacy Trainers' Manual)*

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**ROBERT  
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## A. KEY LEGAL ISSUES AFFECTING TRANS PERSONS IN JAMAICA

### SOME KEY LEGAL ISSUES AFFECTING TRANS PERSONS IN JAMAICA

The gender identity of person who identify as transgender is not recognized under the laws of Jamaica. Consequently, a person born male who now identifies as female is not legally able to change her gender marker on her birth certificate or other identifying documents such as her passport.

Policies and national plans governing gender, violence, and health do not account for trans persons as a unique population. There is no constitutional or statutory protection from discrimination on the basis of gender identity, gender expression or sexual orientation. Within the education and state care systems, there is no formal recognition of youths who may identify as transgender and there is no policy or law which protects such youth from being discriminated against in their access to education and in the care they receive from the State.

## B. LAWS, WHICH SPECIFICALLY APPLY TO TRANS PERSONS

There are countries in which cross dressing is criminalized, for example in Guyana where cross dressing in public for an improper purpose is a crime. In Jamaica, there are no laws that criminalize gender expression or the expression of a trans gender identity. There are no laws, which prohibit cross dressing. However trans persons are disproportionately criminalized under other laws related to sex work and vagrancy.

### LAWS GOVERNING SEX WORK, VAGRANCY AND LOITERING

Also of relevance are the laws governing sex work wherein there are offences such as solicitation, procurement and loitering. The wide discretion of the police to arrest without warrant for vagrancy and loitering offences make transgender persons in particular those who are homeless, those who use drugs or those who engage in sex work vulnerable to detention. Within this context, they may be subjected to violence and deprived of their due process rights. The content of these laws which authorise the police to arrest without a warrant was explored in the Module dealing with Interactions with Law Enforcement Officials. The vagrancy and loitering offences are set out in the Towns and Communities Act and the

Offences against the Offences Act and include:

- a. Where persons have committed certain minor offences in their view or in the view of some other credible person<sup>106</sup>
- b. Where a person is loitering between 7pm and 6am and the police has good case to suspect that this person has committed or is about to commit an felony<sup>107</sup>
- c. Where a person is a drunk, loose or disorderly person who is disturbing the public peace or who loiter at certain times and are unable to give a satisfactory account of himself<sup>108</sup>
- d. Where a person loiters in any public place and solicit any person for the purpose of prostitution<sup>109</sup>

These laws are specifically important to trans because of the wide discretion which the police has in arresting trans persons especially those who engage in sex work. The Inter-American Commission on Human Rights have noted that these laws which are also 'used as a pretext by the police to detain men who do not conform to gender roles'. Taken together all of the laws which apply to trans persons help to create or support an environment which is discriminatory against trans persons and one in which violence against them may be facilitated. Also of importance is the finding that because of the high rates of homelessness and poor job opportunities and disenfranchisement, trans persons face high rates of criminalization under these laws.<sup>110</sup>

### **ANAL SEX AND GROSS INDECENCY UNDER THE OFFENCES AGAINST THE PERSON ACT**

The Offences against the Person Act criminalizes buggery, which is anal intercourse or penile penetration of the anus. The offence carries a maximum penalty of ten years imprisonment at hard labour. An attempt to commit the offence carries a penalty of seven years imprisonment at hard labour. There is also the offence of gross indecency, which carries a penalty of up to two years imprisonment. Gross indecency captures sexual acts between males, which do not include penile-anal penetration. These laws which criminalize consensual anal intercourse and other forms of sexual intimacy between males may be applicable to trans women if their sexual partner is male.

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<sup>106</sup>Towns and Communities Act, section 4

<sup>107</sup>Offences Against the Person Act, section 80

<sup>108</sup>Towns and Communities Act, section 7

<sup>109</sup>Towns and Communities Act, section 3 (r)

<sup>110</sup>See Christopher Carrico, Collateral Damage: The Social Impact of Laws affecting LGBT Persons in Guyana, 2012 available at <http://www.u-rap.org/web2/index.php/2015-09-29-01-14-11/u-rap-reports/item/54-carrico-collateral-damage-the-social-impact-of-laws-affecting-lgbt-persons-in-guyana>

## C. POSITION OF INTERNATIONAL HUMAN RIGHTS BODIES

At the international level, the discriminatory nature and dehumanizing effect of the criminalization of sexual acts and intimacy between consenting adults has been raised and the obligation of states to protect against discrimination on the grounds of gender identity has been affirmed.<sup>111</sup> The Human Rights Committee which is the treaty monitoring body for the International Covenant on Civil And Political Rights expressed that Jamaica should amend its laws with a view to prohibiting discrimination on the basis of gender identity.<sup>112</sup>

The treatment of transgender persons in Jamaica has been considered by the Inter-American Commission on Human Rights. In 2012, the Inter-American Commission on Human Rights produced a report on Jamaica after conducting a country visit in 2008. The 2012 report highlighted that widespread discrimination based on gender identity, and gender expression is widespread throughout Jamaica and pointed out that persons who do not identify as cisgender face political and legal stigmatization, police violence, an inability to access the justice system, as well as intimidation, violence, and pressure in their homes and communities.<sup>113</sup>

Also of note is the 2012 Report of the Office of the High Commissioner for Human Rights called which grounds the equal enjoyment of rights of trans gender persons in core principles of equality and non-discrimination. The Report highlights how international human rights law secures protection of the rights of persons based on the gender identity.<sup>114</sup>

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<sup>111</sup>General Assembly. Human Rights Council, Nineteenth session, Agenda items 2 and 8, Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity A/ HRC/19/41, November 2011

<sup>112</sup>Human Rights Committee, Concluding Observations for Jamaica 2011

<sup>113</sup>IACHR, Report on the Situation of Human Rights in Jamaica, 2012

<sup>114</sup>United Nations Human Rights Office of the High Commissioner, Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law, 2012 available at <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>



## MY RIGHTS

“ I am entitled to fair and professional treatment by you and you are required to give full respect to my human rights and dignity both in the Constitution and echoed in the Diversity Policy.

“ I have the right not to be arbitrarily arrested and deprived of my liberty,  
“ If I am detained or arrested:

- I have the right to communicate with my family, my partner, my religious counsellor and a medical practitioner of my choice.
- I have the right to be informed of the nature of any charge against me and in a language that I understand.
- I have the right to communicate with and retain an attorney-at-law.
- I have the right to accept assistance from the Duty Counsel.
- I am entitled to bail and should be brought before the court within a reasonable time.
- I should be treated humanely and with respect for the inherent dignity of the person.