

Transgender Rights in Swaziland

Rights under the Constitution of Swaziland

Section 14 sets out the protection of fundamental rights and freedoms. There is no reference to the sex of a person or to sexual orientation. However there is reference to “gender”. This should be interpreted to include protection from discrimination based on gender identity – which is a prohibited ground in international law.

Fundamental Human Right	Where is it in the Constitution?
Fundamental rights and freedoms	Section 14
Right to life	Section 15
Personal liberty	Section 16(1)
Dignity	Section 18(1)
Freedom from torture, inhuman or degrading treatment	Section 18(2)
Right to equality	Section 20
Right to a fair hearing	Section 21
Protection from arbitrary search	Section 22
Freedom of expression	Section 24
Freedom of association	Section 25
Right to privacy	Section 22

Changing your Gender Marker

There is no law in Swaziland that specifically allows transgender people to change the gender marker in legal documents.

Provisions of the **Births, Marriages and Deaths Registration Act 5 of 1983** could possibly be used to bring an application:

- **Section 8(1)** provides for the alteration of a forename/s in the births register. A person can apply on their own if they are 21 years of age.
- **Section 8(2)** allows for a surname to be altered in the births register.
- **Section 8(3)** provides that:

“...if after registration of birth, the change in any other particular of a person not provided for in this section has occurred, he, if he is 21 years of age, may apply to the Registrar directly or through respective district registrar or assistant district registrar for alteration of such a particular in the births register. Thereupon the Registrar shall, if satisfied that the applicant is competent to make the application and on production of documentary proof (in case of change of sex of the child a medical certificate from the medical practitioner shall be produced) and on payment of the prescribed fee, cause the said particular of the person to be altered in the original birth information form filed in his office, but without erasing the original entry.”

It is not clear if transgender persons could use this provision, or if any have used this provision to change the gender marker in their birth certificates.

Applicants should also rely on their fundamental human rights that are guaranteed under the Constitution.

Your Rights in the Workplace

The **Employment Act 5 of 1980** prohibits discrimination on the basis of sex in terms of **section 29**. There is no reference to discrimination based on gender or sexual orientation. **Section 35(3)(d)** states that the termination of employment on the basis of a person's sex is unfair.

The **Industrial Relations Act 1 of 2000** defines “automatically unfair dismissal” to include where an employer unfairly discriminated against an employee based on their gender or sex.²⁷

- **Section 16(3)** sets out remedies for automatically unfair dismissal. It states that a court would first consider an order for reinstatement.
- **Section 16(7)** provides that compensation for an automatically unfair dismissal must be just and equitable – but not more than 24 months' remuneration calculated based on the employee's remuneration on the date of dismissal.

Criminalisation and Harassment

Consensual sex between men is criminalised as sodomy under the **common Law** and **section 185(5)** of the **Criminal Procedure and Evidence Act**. The law is silent about WSW. Same-sex practices are also charged as *indecent acts* or a *public nuisance* under the **common law**.

The government must be able to justify, in terms of the law, any discriminatory treatment of transgender people – otherwise acts by its officials will be arbitrary and illegal.

Access to Sexual and Reproductive Health

The **extended National Multi-sectoral HIV and AIDS Framework (eNSF) 2014-2018** includes MSM in the list of key populations, but does not address WSW, lesbians, transgender or intersex individuals. There is widespread stigma and discrimination relating to LGBTI people by healthcare workers and practitioners. Many transgender people do not access health facilities for this reason.

²⁷ Section 2(f).

There is no access to gender reassignment surgery or hormone replacement therapy in Swaziland. Some transgender people go to South Africa to access these services but the high cost of treatment may prevent this option.