

EO Files (March 2014)

"THINGS WE DO, PEOPLE WE MEET - Reflections in Brief"

A denial of dignity

York Chow says a proposed legal requirement for a transgender person to undergo full sex reassignment surgery before being granted the same marriage rights as others has no place in a civilised society

Last week, the Legislative Council held the first reading of the Marriage (Amendment) Bill, introduced to implement the Court of Final Appeal's order in the landmark "W" case.

After male-to-female sex reassignment surgery, "W" sought and won the right to marry her male fiancé. Addressing the issue of gender recognition for marriage, the court wrote: "We would not seek to lay down a rule that only those who have had full gender reassignment surgery involving both excising and reconstructive genital surgery qualify. We leave open the question whether transsexual persons who have undergone less extensive treatment might also qualify."

Recently, the government took the positive step of setting up a high-level interdepartmental working group to examine the issue of gender recognition more broadly. It is, therefore, hard to understand the logic of its premature attempt to close the legal door left open by the court. The bill, if passed, will require a person to undergo full gender reassignment surgery to be able to marry in his or her affirmed gender.

Passing the bill now without establishing an acceptable gender recognition procedure would undoubtedly open up more legal challenges for the government. More troublingly, in the intervening years until such a procedure can be established, many transgender people will be stranded in legal limbo, unable to marry the partner of their choice and access the related marriage rights and benefits.

Full sex reassignment surgery is invasive and normally results in sterilisation.

The problem with restricting gender recognition only to those who have had full surgery is that, for a variety of reasons, many transgender people choose not to undergo such surgery. Some may only be comfortable with undergoing hormonal treatment and physical changes to their appearance. Worse, requiring full sex reassignment surgery can also be construed as a policy of coercion: surgery and sterilisation for legal recognition and subsequent rights.

Currently, those who have not undergone full sex reassignment surgery are unable to change their identity documents, often resulting in discrimination across society.

While the bill is in line with this existing administrative practice for gender recognition, its passage would turn full sex reassignment surgery into a legislative requirement. It would be difficult to change in the future, as it would entail a legislative amendment. Furthermore, a significant percentage of transgender people prefer to have an "X" gender rather than male or female, an issue that needs to be addressed in future.

In effect, the government is making massive and invasive medical procedures a legal prerequisite for some to gain equal recognition and treatment. This is inappropriate and wrong.

The world tends to agree. The surgery requirement and resulting sterilisation contravene human rights standards. The UN has raised concerns about such requirements for transgender people being unlawful, inhuman or degrading.

Many countries, including some in the Asia-Pacific region, have abandoned such practices. It may also infringe on our domestic human rights obligations under the Bill of Rights Ordinance to be free from inhuman and degrading treatment as well as the right to privacy, family life and non-discrimination. Indeed, Hong Kong risks falling far behind. A number of countries have introduced legislation or administrative procedures that do not require sex reassignment surgery and/or sterilisation in order for a transgender person to gain legal recognition in their affirmed gender.

In the "W" judgment, the court specifically held up the UK's Gender Recognition Act as a "compelling model" for Hong Kong. That act sets up a panel of representatives from the legal and medical fields to assess applications for gender recognition by considering a number of factors, including if a person has gender dysphoria and has been living in their identified gender for a period of at least two years, but not necessitating surgery.

Clearly, a rights-based process is possible, and the Equal Opportunities Commission believes the government must move in this direction.

A progressive approach to gender recognition also matters from the standpoint of advancing freedom from discrimination. The EOC has advocated legislation in Hong Kong to specifically protect people from discrimination on the basis of sexual orientation and gender identity. In other jurisdictions, such as the UK and Australia where discrimination legislation exists, transgender people who have not undergone full sex reassignment surgery are also protected from gender identity discrimination. It is vital to ensure consistency between the criteria for protection under the anti-discrimination law and the process of changing gender and accessing related rights.

The proposed bill also does not expressly address the impact of overseas sex reassignment. If a person who has undergone full sex reassignment surgery elsewhere can marry in his or her acquired gender in Hong Kong, then what about someone who has been certified in his or her new gender in another country without having gone through full surgery? This should be made explicit in the provisions.

We will recommend to the government and Legco that this bill should refer to existing administrative practices rather than an explicit legal requirement for full sex reassignment surgery. Doing so leaves room for later changes to these administrative prerequisites away from demanding full surgery and for the potential introduction of a comprehensive Gender Recognition Ordinance that can fully address the health and well-being of the transgender community.

Many transgender people have told me how they were rejected by their

loved ones and marginalised from an early age. They deserve to be treated with dignity. There is an opportunity with this bill not only to provide transgender people with the right to marry, but also to demonstrate clearly the government's commitment to advancing human rights and equality for those people. It would be a huge loss to miss this chance.

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