

EO Files (July 2014)

“THINGS WE DO, PEOPLE WE MEET - Reflections in Brief”

Change for the Better... or Worse?

On 9 July 2014, the Legislative Council will resume its second and third reading of the Marriage (Amendment) Bill. The bill was gazetted in February to implement the order of the Court of Final Appeal, in the case of *W v the Registrar of Marriages*. The bill provides that transsexual persons will have the right to marry in their affirmed gender, after having completed sex reassignment surgery.

In the ensuing months, there has been extensive and divisive debate on the bill, which seemed to have raised, rather than answered, questions, many of which pertained to the work of the Equal Opportunities Commission (EOC). For instance, some asked how a transsexual person, particularly one who has voluntarily chosen to undergo sex reassignment surgery, can be considered a person with disability under the Disability Discrimination Ordinance (DDO). Others were puzzled as to why the EOC would object to a bill that enables transsexual persons to marry as decided by the Court of Final Appeal. Still others have expressed concerns about the passage of the bill, citing the need to protect children and the traditional family from “moral degeneration” as a reason.

Given the confusion and questions surrounding these issues, it is worthwhile to clarify some of the misunderstanding and our position.

The EOC currently considers complaints of discrimination from transsexual persons under the DDO, because gender dysphoria is considered a mental health condition as defined by the World Health Organization. The main factors to determine if such persons have a disability is not whether they have undergone sex reassignment surgery, but whether having gender dysphoria affects their thought processes and emotions. It should also be noted that the DDO can apply in relation to past disabilities, not just existing ones.

The confusion and lack of comprehension around this is also demonstrated in some of the unfair characterizations of transgender people, including attempts to equate them with sexual deviance, with which the EOC strongly disagrees.

Transgender and transsexual persons are fellow members of our humanity. Just because their gender identity does not match their biological sex, they are exposed to discrimination and constant indignities. These stereotypes further stigmatise a population that is already legally marginalised, unfairly maligned, and largely misunderstood. Certainly, our society needs more public understanding and wider dialogue on the issue.

The EOC's position on human rights concerns with the bill was well-stated in our submission to the Bills Committee. In April, the EOC gave evidence to the Committee to voice our main objections to the government's proposals.

Our point of contention is not about sex reassignment surgery's lawfulness as a form of treatment in all situations, as some have misconstrued. For some, sex reassignment surgery may indeed be their preferred form of medical treatment for gender dysphoria.

Rather, the EOC's main concern is with setting such procedures as a prerequisite for one to legally change gender and access rights, including the right to marry and its associated benefits. As numerous medical experts have noted, not all transsexual persons can or will choose to undergo full reassignment surgery, which is not without potentially dangerous complications.

The government has argued that the choice to undergo sex reassignment surgery ultimately belongs to each transgender or transsexual individual. But this is an oversimplification. If the ability to access rights is conditional upon having had these surgeries in full, then the choice could hardly be categorized as truly "free". Indeed, those who cannot or choose not to undergo such operations are left at high risk of discrimination and harassment, given the possible incongruence between their gender on identity documents and their appearance.

The Court of Final Appeal rightly refrained from ordering that *only* persons who have undergone full surgery can be recognised in their preferred gender. Instead, the court recommended that the government establish a formal gender recognition process, specifically mentioning the UK's Gender Recognition Act as a possible model, to provide both the process for changing gender as well as all the relevant rights upon its completion. The court even

delayed the effect of the order by one year so as to give the government and the Legislative Council enough time to consider these issues.

Disappointingly, the government's proposed bill fails to implement the court's recommendations. Instead, the government has relegated the issue of possible gender recognition legislation to the high-level inter-departmental working group, which has since indicated that it will take two years to issue its report. In practice, this means possible continuing breaches and a lack of clarity for the rights of transsexual persons for a substantial period.

It is worth noting that this bill, if passed, would incorporate the requirement of sex reassignment surgery for gender recognition into legislation for the first time. It would represent a significant shift from the current situation, where the requirement is only an administrative policy. To repeal it later would require legislative amendment – a considerably more arduous task.

It is also undoubtedly problematic to incorporate into law a provision that likely violates the human rights of transsexual persons. Full sex reassignment surgery results in sterilization. In May, the United Nations issued an Interagency Statement urging governments to “ensure that sterilization, or procedures resulting in infertility, is not a prerequisite for legal recognition of preferred gender.”

Elsewhere around the world, we have already seen progress on this front, with many countries shedding outdated requirements for gender recognition and taking proactive steps to ensure the human rights of all. Even in the last few months since the bill has been introduced, landmark steps have been taken in Denmark and India away from requiring sex reassignment surgery for legal gender change. Hong Kong surely can also do better.

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