

Submission to the Legislative Council and the Security Bureau of the Hong Kong SAR on the Legal Status of Transsexual and Transgender Persons in Hong Kong

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Submission: The Legal Status of Transsexual and Transgender Persons in Hong Kong

Background

The need to allow a change of legal sex/gender in certain cases is no longer disputed in most jurisdictions. The Hong Kong Court of Final Appeal's decision in *W v Registrar of Marriages* means that this now is true for Hong Kong as well, and a new statutory basis needs to be implemented by May 2014.

The question has therefore really shifted from the 'if' to the 'how', and thus first and foremost to what the requirements for such a change of the legal sex/gender should be. Many jurisdictions have legislated or developed an administrative approach to changing sex/gender, but the requirements differ significantly from jurisdiction to jurisdiction, particularly with regard to age, nationality, surgery requirements/infertility and marital status.

Following an International Conference on this subject hosted by the Centre for Medical Ethics and Law at the University of Hong Kong and led by **Dr Jens M. Scherpe** (Visiting Professor at the University of Hong Kong and Senior Lecturer at the University of Cambridge) as Principal Investigator the following findings and recommendations are submitted.

Issues

Comparison of jurisdictions at different stages of legal and societal developments showed a number of common patterns and trends:

- In the discussions of this topic there is almost universally an unhelpful **conflation of issues of gender identity and sexual orientation**. Often legislation concerning a change of legal sex/gender therefore is opposed in order to 'prevent same-sex marriage'. This is based on a fundamental misconception of the issue, and indeed one could argue that by NOT allowing a change of legal sex/gender the law is actually permitting same-sex marriages. In the case of *W v Registrar of Marriages*, W self-identifies and is perceived by society as female, and even many of her identification documents were amended accordingly; nevertheless she was denied the right to marry a man. This, of course, implies that she would have been allowed to marry a woman, which from a societal point of view surely would be perceived as a same-sex marriage, much more so than if she had been allowed to marry a man.
- There is absolutely no doubt that the issues concerning the legal status of transsexual and transgender persons are complex. That is why there is a clear trend towards **specific legislation** across jurisdictions. Where there were major court (or constitutional court) decisions, all these decisions have emphasised (e.g. in the U.K. and in Hong Kong) that the

issues ought to be **dealt with by the legislature** and are not amenable to a 'quick fix'. As for Hong Kong, the mandate by the Court of Final Appeal is clear: legislation needs to be implemented. A simple amendment (for example to allow only post-operative transsexual/transgender persons to fully change their legal sex/gender and thus marry accordingly) of the existing legislation

1. would be inappropriate to deal with the matters concerned;
2. would be contrary to what the *W v Registrar of Marriages*-decision requires,
3. would aggravate the situation of those concerned who could not and or would not fulfil such narrow requirements; and
4. would merely attract new litigation which eventually would lead to the new provisions being struck down as well as a violation of the Basic Law (on which see also below).

There is broad consensus amongst experts that what is required for Hong Kong is a fully-fledged **Gender Recognition Ordinance**. Most experts agree with the Court of Final Appeal that the UK's Gender Recognition Act 2004 might serve as a useful starting point/comparator for any Hong Kong legislation, given the similarity of the legal systems. However, there are some concerns about some parts/provisions of the Gender Recognition Act 2004; as is inevitable with new legislation, some of the provisions in practice turned out to be problematic, and so careful analysis of the UK Act would enable the Hong Kong legislature to avoid these problems, and also to draft an Ordinance suitable for the Hong Kong legal system.

- As in most jurisdictions, and indeed in Hong Kong after the Court of Final Appeal's decision in *W v Registrar of Marriages*, there is no doubt that a change of legal sex/gender must be permitted, the focus of the discussions therefore was on what the requirements for such a change should be. Here in all jurisdictions the same issues appear to be debated:

1. The Age of the Applicant

The earlier statutes/legal provision of the 1970/80s (for example those of Sweden and Germany) often stipulated a certain minimum age for an applicant (e.g. 18 years or even 25 years). More recent statutes, having the benefit of being able to rely on modern medical and psychological research, have moved away from a minimum age requirement. In the case of Germany such a requirement was even found to be a violation of Germany's Basic Law. Any age limit essentially is an arbitrary one, and each applicant therefore deserves to be considered as an individual and the particular circumstances of the individual need to be taken into account.

2. Nationality of the Applicant

Likewise, earlier statutes tended to limit the possibility to change one's legal sex/gender to the nationals of the respective jurisdiction. While there is a certain logic to this, as a state of course cannot change the identification

documents of the citizens of another state, the more modern approach is to base access to the legal procedure to change legal sex/gender on habitual residence, and as a consequence recognising the 'affirmed' gender/sex for all intents and purposes in the jurisdiction where the successful application was heard.

3. Existing Formalised Relationship of the Applicant

In many jurisdictions, including Hong Kong, marriage is only possible between a man and a woman. Therefore, if a person changes his or her legal sex/gender after having married, this raises implications regarding the existing marital relationship; similar issues arise in jurisdictions where civil/registered partnership is only open to two persons of the same sex/gender. Needless to say, the legal responses to this issue depend on the availability of legal regimes for couples, ranging from the need to dissolve the existing union before entering into the one permitted with the 'affirmed' gender to a simple conversion from one to the other upon the application of the two persons concerned. In jurisdictions where this is not possible because there are no equivalent legal regimes available (such as in Hong Kong) the requirement of dissolution appears to be the inevitable consequence. However, a decision by the German Constitutional Court was particularly instructive. In Germany, where marriage is restricted to two persons of the opposite sex/gender, the institution of marriage is protected under the German Basic Law. So is the right to being recognised in one's gender identity. The German Constitutional Court held that a requirement to dissolve a valid, constitutionally protected marriage in order to be allowed to change one's legal sex/gender – also a constitutionally guaranteed right – amounted to a violation of the German Basic Law. Such a requirement would force the applicant to give up one constitutionally protected right for another for which there was no justification.

4. Requirement of Surgery and Sterility

As with the previous criteria discussed, earlier statutes often stipulated a requirement of the applicant to have undergone surgery and/or be sterile. The reasons given for this usually were that otherwise the existing family law concepts would be disturbed, as well as the – fundamentally flawed and misguided – assumption that 'this is what these people want anyway'. The next generation of statutes instead tended to refer to 'medical treatment', which intentionally allowed for a more lenient interpretation and therefore generally did not require surgery as such. More modern statutes (e.g. the new Dutch legislation, Argentina, the UK) do not have such strict requirements

The argument that the procedure is what is wanted is nonsensical if a person objects to such procedures; the desire to maintain the existing family law structures cannot justify the deep and profound interference with – and indeed violation of – the physical integrity of those immediately concerned.

Given the clear medical and psychological evidence, requiring surgery or specific medical treatment can no longer be considered acceptable. Forcing a person who might not want to have surgery and/or medical treatment to undergo such a procedure in order to be allowed to change one's legal sex/gender amounts to a violation of a person's physical integrity – a constitutionally protected right. That is why, for example, the German Constitutional Court held unanimously that such a requirement violated the German Basic Law. Being forced to choose between surgery and gender/sex recognition is not a free choice in any sense of the word, and in no area of law do civilised nations force their citizens to make such choices.

The Way Forward for Hong Kong

Based on the findings of an international research project and conference, the following observations can be made:

1. There needs to be an informed debate on the topic, as this area of law and debates about it often are fraught with misapprehensions and misconceptions.
2. There is no alternative to a fully-fledged Gender Recognition Ordinance. A mere amendment of existing ordinances would be wholly inappropriate to deal with the complex issues.
3. The United Kingdom's Gender Recognition Act would be a good starting point for the Hong Kong legislature when drafting a Gender Recognition Ordinance because of the similarities of the legal systems. In doing so it should be aware of the practical problems that have arisen with the UK Gender Recognition Act as well as the need to adapt it to the Hong Kong legal system.
4. When drafting a Gender Recognition Ordinance, special attention needs to be given to the following aspects:
 - a) The change of legal sex/gender should not require a specific minimum age; the individual circumstances of the case need to be considered.
 - b) The change of legal sex/gender should not require a specific nationality but habitual residence in Hong Kong.
 - c) It needs to be examined carefully whether a change of legal sex/gender ought to require the dissolution of a previous formalised relationship (such as marriage), particularly given the absence of a civil partnership or comparable regime for same-sex couples. Regarding pre-existing marriages, special attention needs to be paid to Article 37 of the Basic Law, and the German Constitutional Court's decision on this matter should be instructive.
 - d) The change of legal sex/gender should not require any form of surgery, specified medical treatment or sterility. A choice between one's physical integrity and the recognition of their gender identity is no choice at all. Such requirements are contrary to modern human rights standards, constitute a deep and unacceptable interference with the physical integrity of a person and violate the human

dignity of the person concerned. As any such requirements would leave legislation open to further challenges, and experience from other jurisdictions shows that these challenges are successful where adequate constitutional protections – such as the Hong Kong Basic Law – are in place. The Court of Final Appeal in *W v Registrar of Marriages* quite clearly, albeit *obiter*, addressed this issue as well. Therefore it is recommended very strongly not to include requirements regarding surgery, sterility or specific medical treatments in any future legislation in Hong Kong.

- e) The Hong Kong legislature would be well-advised not to look for a ‘minimum implementation’ of what is required by the decision in *W v Registrar of Marriages*, but to implement a full, modern Gender Recognition Ordinance which reflects the current state of medical and psychological research as well as international human rights standards, and thus will not be susceptible to further legal challenge but rather will be good law for the foreseeable future. Only this will give full respect to the Court of Final Appeal decision, and not only the people immediately concerned, but indeed the people of Hong Kong generally deserve no less.

Based on the understandings of best practice internationally in this area we hope that this submission will give some clear guidance on legal and other concerns in the development of the Hong Kong legislation.

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