



SUBMISSION

Alteration of Sex Description and Sex Status Bill [37 – 2003]

Portfolio Committee on Home Affairs, 9 September 2003

INTRODUCTION

The South African Human Rights Commission (SAHRC) welcomes the introduction of the *Alteration of Sex Description and Sex Status Bill (the Bill)* into Parliament. The Commission has for some time now been seized with the handling of a small number of complaints on behalf of persons who have undergone sex change operations. In the handling of these complaints, the SAHRC has called upon the Department of Home Affairs to take the necessary steps in order that such persons may have their sex description altered on their birth certificates thereby allowing for changes on all other official documents that indicate a person's sex.

The SAHRC bases the decision for its support of the legislation on the founding values of our democracy enshrined in our constitution of human dignity, the achievement of equality and the advancement of human rights and freedom.

THE MANDATE OF THE SAHRC

The South African Human Rights Commission (SAHRC) is one of the institutions created in terms of Chapter 9 of the Constitution to support democracy in South Africa. The SAHRC is mandated by section 184 of the Constitution to:

- (a) Promote respect for human rights and a culture of human rights;
- (b) Promote the protection, development and attainment of human rights; and
- (c) Monitor and assess the observance of human rights in the Republic.

BACKGROUND TO THE LEGISLATION

Until 1992, South African law in the Births and Deaths Registration Act of 1963 provided for transsexuals who had undergone sex change surgery to apply to have their sex status changed in the birth register. Section 7B of that Act stated that-

"The Secretary for the Interior may, on the recommendation of the Secretary for Health alter, in the birth register of any person who has undergone a change of sex, the description of the sex of such person, and may for the purpose call for such medical reports and institute such investigation as he may deem necessary."

This meant that any person who had undergone such surgery could get the birth register changed to reflect his or her post-operative status.

This situation was changed by the introduction of section 33(3) of the Births and Deaths Registration Act, 1992, which reads:

"A person who was in the process of undergoing a change of sex before the commencement of this Act may on completion of the said process apply in terms of section 7B of the Births, Marriages and Deaths Registration Act, 1962, for the alteration of the sex description on the birth register."

Those who had begun the process of sex reassignment procedures prior to the coming into force of the provision of the 1992 Act were entitled to have their sex change reflected in the birth register. Thus persons who have commenced sex reassignment surgery post 1992 are currently not entitled to make application to have their sex reflected in the birth register.

We understand that the decision to repeal the old act was based on the WLD decision of Nestadt, J, in the case of WvW 1976(2) SA 308 (WLD) where the court held that a person's sex could not be medically changed.

The central question in the case was whether it was possible for a person to change their sex (as defined for the purposes of marriage). In deciding that it was not, the court employed the so-called "Ormrod Test", from the English Case of Corbett v Corbett (1971). This amounts to a purely biological and genetic definition of sex. It looks to "chromosomal, gonadal and genital tests" and if all three are congruent determine(s) the sex for the purpose of marriage accordingly and ignores any operative intervention. In other words, a person's sex for legal purposes is a wholly biological question and is fixed at birth.

ID documents are dealt with under the Identification Act, 68/97. This Act allows for the amendment of particulars reflected in an identity card only when those particulars are incorrect. Amendment of information found in an individual's birth certificate is similarly restricted by the Births and Deaths Registration Act 51/92. So long as the definition of "sex" set forth in WvW continues to be read as good law, a transsexual's post-operative sex is legally unchanged even after undergoing gender reassignment surgery.

The maintenance of the population register and the issuance of identity documents are governed by the Identification Act, 68/97. Section 7 of that Act provides that:

“[t]he Director-General shall assign an identity number to every person whose particulars are included in the population register.”

That identity number numerically indicates the person’s date of birth and gender as well as whether or not he or she is a South African citizen. The identity number forms part of the personal information entered into the population register, and is printed on every identity card. An individual’s sex as recorded in their identity number is therefore indicated on their identity card.

Section 19 of the Identification Act provides that if “an identity card does not reflect correctly the particulars of the person to whom it was issued,” the Director-General must cancel it and replace it with a corrected identity card. No other provision is made for amending the information contained in the identity card. Therefore, the only way a transsexual could have his or her identity card amended to reflect his post-operative sex would be for the Director-General to determine that the identity number indicating the individual’s pre-operative sex was erroneous. However, although it may be argued that the Director-General has the power to amend the identity document; given the current status of law and the apparent acceptance of the WvW decision, this has not occurred.

The current legal position is thus that although the sex change procedures are allowed in law, a person who has undergone sex reassignment procedures cannot have their new sex reflected in the birth register and their identity documents. Thus, such persons enjoy little or no protection under the law. This constitutes a violation of many rights, including privacy, dignity and equality, which are enshrined in our Bill of Rights. It is somewhat incongruous that a procedure that is allowed in law and even in some cases paid for by the State through the public health system does not then allow for the *de facto* recognition in the birth register. The South African Human Rights Commission has for some time liaised with the Department of Home Affairs in an attempt to bring about a change in this situation. It is clearly apparent that an amendment to the Births and Deaths Registration Act, 1992 that would allow for a post-operative transsexual to change his or her sex in the birth register would address this situation.

TRENDS ELSEWHERE IN THE WORLD

Liberty, a leading civil liberties and human rights organisation in the United Kingdom produced research entitled, “*Integrating Transsexual and Transgendered People*”. The Research was submitted as an *amicus curiae* (friend of the Court) to the European Court of Human Rights in 1997 regarding the rights of persons who have undergone gender realignment surgery.

Some of the interesting findings of this research, which may be of interest to us, are the following:

- ❑ Of the 37 member states of the European Union, 23 permit change of the birth certificate in one form or the other to reflect the reassigned sex of the person.
 - ❑ Only Albania, Andorra and Ireland joined the UK in positively not allowing such a change.
 - ❑ Albania and Andorra did not permit gender reassignment surgery to take place at all.
 - ❑ A further 10 states had unclear positions, with many of these states belonging to the former Eastern Block, including the newly found states that emerged after the break up of the Former Yugoslavia.
 - ❑ The law was thus in a state of flux.
 - ❑ It was only the UK and Ireland in which gender reassignment surgery was publicly funded and legal yet the State would not allow for the alteration of the birth register.
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- ❑ Outside of Europe, Canada, Australia and New Zealand and 50 of the 52 states of the United States of America, all make full provision for the full recognition of the gender reassignment.
 - ❑ In other states such as Namibia, India, Pakistan and Egypt it was found that despite a divergence in of cultural and social norms that none had a positive prohibition on the full recognition of the change of gender identity.

Further observations made by the research that are of interest were the following:

- ❑ In those states that have recognised transsexuals for some time now there has been little controversy of note.
- ❑ The trend of recognition has continued and strengthened in the 1990's.
- ❑ Those states that deny legal recognition base this decision on fundamental moral objections to transsexualism.

The research concludes:

"This significant and enduring development in the practice of states reflect a general and increasing societal recognition of the importance of the transsexuals right to congruent personal identity and the need for tolerance of a different mode of human behaviour, affording respect for the dignity of the transsexual person and the protection of his/her private life."

This research was used by the court in two cases, I v. The United Kingdom and Christine Goodwin v. The United Kingdom, decided in the European Court of Human Rights. In these two cases the the court held that the UK's refusal to grant full legal recognition to a transsexual's post-operative sex and allow amendment of their birth certificates constituted a violation of Articles 8 (the right to privacy) and Article 12 (the right to marry and to found a family) of the Convention for the Protection of Human Rights and Freedoms.

The court rejected the Ormrod test that it had previously followed in a number of cases by stating that it was not persuaded that the state of medical and scientific knowledge provides any determining argument as regards the legal recognition of post-operative transsexuals.

“In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable.” I v. The United Kingdom

IMPACT ON LIVES - REAL EXPERIENCES

Turning to South Africa and the experience of the SAHRC through its work in assisting transsexuals who have undergone sex reassignment surgery, we provide beneath a number of examples of how the non-recognition of their sex status impacts on their lives and the rights that they enjoy by virtue of our Bill of Rights enshrined in the Constitution.

It ought to be stated at the outset that the individuals interviewed for the purposes of this submission were not willing to come forward and be identified in public. They have already endured years of discrimination, as their stories beneath will tell, and preferred that in the interests of retaining their dignity and privacy that the SAHRC put forward on their behalf the many examples of discrimination that they face on a daily basis.

Persons who have undergone sex reassignment surgery and do not have the necessary legal documents reflecting their changed sex status experience the following:

- “The banks are the worst; they absolutely refuse to change your sex details. I will not have a credit card because can you imagine that every time you used your card you have to explain your personal life in public.”
- “My right to confidentiality of my medical records and history is exposed in public each time have to explain my situation.”
- “When I applied to open a bank account at a leading bank, I was questioned in open public in the middle of the bank as to whether I intended committing fraud as there was something wrong with my ID Document. I was made to feel like a criminal.”
- “I have considered obtaining a false ID, but why should I be forced to become a criminal?”
- “Applying for a job is difficult because at some stage you have to show your employer your ID document and then questions are asked.”
- “I left my home town because every time I went out people would look at me and speak about me. I still feel uncomfortable when I return. This is

- why I wish to remain anonymous. I have started a new life in this city and have established new relationships and friendship. I do not want this to be destroyed.”
- “I feel that I do not have freedom, freedom to be who I am. My life would have been very different had I not have had to go through all of this (sex change operation).”
 - “Can you imagine being a boy of 16 years of age who is growing breasts? Physical education was a nightmare!”
 - “I would like to attend church and become part of its activities, but will I be accepted when my sex identity is found out?”
 - “This piece of legislation is so important to me – it is the final stage that is needed to make my sex change complete.”
 - “People treat you as a curiosity. I felt certain once when a new person was employed at the Department of Home Affairs in the section that deals with my applications, that I was called in, merely so that the official could look at me. Others have been very sensitive and helpful.”
 - “Heaven forbid that I should ever be arrested for anything – what would happen to me when they discover my ID document says I am a man when I am a woman. Would they put me in the cells with the men?”
 - “What are my rights? Do I have any? What would happen if I were raped or if my partner were to physically abuse me? What would happen when I went to the police station to report such a crime? I sometimes feel that I do not have any rights.”
 - “Which cell would I be placed in if I were arrested?”
 - “I tried to open an account at a leading jewellery store to buy my girlfriend an engagement ring. They telephoned me up and refused my credit application as they said that my ID document was fraudulent.”
 - “I do not have bank accounts or credit as I am not prepared to suffer the indignity of explaining my personal life to others.”
 - “I do not want post arriving at my home addressed to a person of the opposite sex.”
 - “I cannot get married, people keep asking us why we are not married yet.”
 - “You need to produce an ID document for so many things. Often you have to fill in forms that request your ID number. People can tell from your ID number what your sex is. Say for example, I go to a new dentist, what interest is it to him what sex I am?”
 - “My boyfriend and I are too scared to have me placed on his medical aid, (even though his work would allow this) as he holds a relatively senior position and we could not bare to face the indignity of his work colleagues finding out and responding negatively.”
 - “I am a normal women like every other women, my gender is female and in every way I am female, except for the fact that I cannot give birth.”
 - “I want to conform and be normal, Home Affairs are branding us and attaching a number to us, it is similar to the past when our identity documents reflected our race groups, why are we being branded?”

Privacy

Section 14 of the Bill of Rights states:

“Everyone has the right to privacy, ...”

As the examples indicate, a person private life and aspects of their most intimate and personal life are brought into the public domain, a domain that is always sensitive to the realities of transsexuals, and their right to enjoy privacy is violated. By bringing these intimate details of private life into the social domain the person can be stigmatised and prejudiced against. Not only is the right to privacy violated but so too is the right to inherent dignity.

Dignity

Section 10 of the Bill of Rights states:

“Everyone has inherent dignity and the right to have their dignity respected and promoted.”

It is clear that from the examples cited above that a person’s dignity is infringed when they are placed in the humiliating position of having to reveal confidential and potentially embarrassing details of their medical history to people they would rather not make such disclosures to.

Regarding the right to dignity, O’Regan, J stated in the case, *S v Makwanyane 1995(3) SA 391 (CC) par 144*

“... Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in. ...[the Bill of Rights].”

It is clear from the examples above that the right to dignity is infringed by persons who question the sex status of a person publicly when his or her ID document does not reflect the sexual appearance of the person.

This infringement of the right to dignity and privacy could not be justified in terms of the limitations clause contained in the Bill of Rights as the invasion of the constitutional rights is substantial, serves no discernable purpose and could easily be done away with.

Discrimination on the basis of sex, gender and social orientation

Section 9(3) of the Equality clause of the Bill of Rights prohibits these grounds of discrimination amongst others.

Sex is a biological term, and refers to the biological differences between men and women.

Gender is a social term, refers to ascribed social and cultural male and female requirements, e.g. women as mothers.

In the constitutional court case that dealt with discrimination based on sexual orientation, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (20) SA1 (CC)* the court stated that discrimination based on sexual orientation

“... Applies to persons who are bi-sexual, or transsexual ...”

Institutions, such as our prison system, that operate along accepted gendered lines may find themselves either discriminating against transsexuals or being faced with difficulties in determining where best to place them.

Employers may also find themselves party to sex and gender discrimination lawsuits should they apply the persons legal sex status to positions advertised on a gendered basis.

OTHER RIGHTS

There are many further rights contained in the Bill of Rights that have the potential of being violated due to the non-recognition in law of the transsexuals post-operative sex. These include:

- ❑ Social Security legislation that differentiates on the pensionable age of men and women, right of access to social security
- ❑ Marriage rights, currently the person cannot get married in terms of South African law, right to a family life
- ❑ Labour laws that prohibit discrimination on the basis of sex, gender and sexual orientation, right to fair labour practices

SUBMISSIONS

The SAHRC, whilst welcoming the legislation calls upon the Committee to consider the following submissions.

1. Section 1(3) “... unless such changes have been made public.”

These words could potentially infringe the persons right to dignity and privacy if the reasons for the refusal of the application are made public.

Furthermore, the applicant should be provided with written reasons for refusal in all applications. This would be in accordance with the Promotion of Administrative Justice Act, 2000.

2. Section 1(2) (b). “Prepared by the medical practitioners who carried out the procedures and applied by the treatment.”

An unfortunate reality in South Africa is that many medical practitioners leave the country. In some instances it may be difficult or even impossible to locate the

medical practitioners that carried out the treatment. Medical practitioners could also become unavailable due to death or disability. The legislation ought to make provisions for those instances where the medical practitioners who performed the surgery are no longer available to provide the reports required in terms of this section. This could be easily amended by the insertion of the words such as the example beneath indicates.

“..Or a medical practitioner in the field with experience in the carrying out of such procedures....”

CONCLUSION

The failure to amend the Births and Deaths Registration Act, 1992, in order to reflect the sex description of individuals whose sex description has changed could lead potentially to many constitutional challenges. When looking at international trends it is clear that giving *de facto* recognition in the birth register to a person's sex status will eliminate these types of challenges. Britain for example, for many years stuck to the position that was followed in the South Africa case of WvW and refused to allow for the alteration of sex status in the birth register. This resulted in many challenges that eventually landed up in the European Court of Human Rights. This was despite numerous changes to many laws in an attempt to accommodate post-operative transsexuals. What this litigation demonstrates is that the spectrum of potential discrimination is so wide that the State and individuals, now that we have the PEPUDA (Promotion of Equality and Prevention of Unfair Discrimination Act) in place, that it will merely lead to continuing discrimination that is constitutionally intolerable and numerous challenges being made in the courts.

Based on the rights enshrined in the Constitution, particularly the rights to privacy, dignity and non-discrimination the SAHRC calls upon Parliament to pass this legislation speedily in order that the continuing rights violations that are visited upon individuals who have undergone sexual reassignment surgery will be ended.