

立法會 *Legislative Council*

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Bills Committee on Marriage (Amendment) Bill 2014

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper sets out the background to the Marriage (Amendment) Bill 2014 and gives a brief account of the discussions by the Panel on Security ("the Panel") on the Administration's proposal to amend the Marriage Ordinance (Cap. 181) ("MO") to implement the order made by the Court of Final Appeal ("CFA") in the case of *W v Registrar of Marriages* (FACV 4/2012) ("the W Case") concerning marriage registration by post-operative transsexual persons in Hong Kong.

Background

2. In the W Case, the applicant W was a post-operative male-to-female transsexual person who had undergone full sex reassignment surgery ("SRS") at a hospital managed by the Hospital Authority ("HA") in Hong Kong and the sex entry of her Hong Kong Identity Card ("HKIC") had been changed to "female". She and her male partner wished to get married in Hong Kong but the Registrar of Marriages ("the Registrar") refused to celebrate their marriage under MO, taking the view that, for the purpose of marriage, the sex of a party referred to biological sex by birth. The applicant brought judicial review proceedings to challenge the Registrar's decision. Both the Court of First Instance and Court of Appeal dismissed the applicant's application, upholding the Registrar's decision that the applicant did not qualify as "a woman" under MO and the Matrimonial Causes Ordinance (Cap. 179) ("MCO"). CFA subsequently allowed the applicant's appeal. It held that section 40 of MO was unconstitutional because it was inconsistent with, and failed to give proper effect to, the constitutional right to marry protected by Article 37 of the Basic Law ("BL 37") and Article 19(2) of the Hong Kong Bill of Rights ("HKBOR 19(2)").

3. CFA held that "a transsexual in W's situation, that is, one who has gone through full SRS, should in principle be granted a declaration that, consistently with BL 37 and HKBOR 19(2), she is in law entitled to be included as 'a woman' within the meaning of section 40 of MO and section 20(1)(d) of MCO and therefore eligible to marry a man". In its final order made on the W Case on 16 July 2013, suspended for 12 months until 16 July 2014 to allow time for corrective legislative amendments to be considered, CFA granted a declaration that section 40 of MO and section 20(1)(d) of MCO must be read and given effect so as to include within the meaning of the words "woman" and "female" a post-operative male-to-female transsexual person whose gender had been certified by an appropriate medical authority to have changed as a result of SRS.

Discussions by the Panel

4. When the Panel was briefed at its meeting on 7 January 2014 on the Administration's follow-up work on the CFA order on the W Case, members noted that the Administration planned to introduce legislative amendments to MO to provide that for the purpose of marriage registration under MO, a person who had undergone full SRS should be identified as being of the sex to which the person had been reassigned. The Administration proposed that the amendment would apply to MCO as well, such that a person who had undergone full SRS and registered marriage in his or her reassigned sex under MO would also be identified as his or her reassigned sex under section 20(1)(d) of MCO, lest that marriage should be void on the ground that the parties were not respectively male and female.

Validity of the marriage of a person who had subsequently undergone SRS

5. Concerns were raised over whether a marriage would become invalid when one of the parties to the marriage had subsequently completed full SRS, thus causing the marriage to become one between two males or two females.

6. According to the Administration, a marriage would not automatically become invalid on the ground that one of the parties to the marriage had subsequently undergone full SRS. A married person who had subsequently undergone full SRS after marriage could apply for dissolving the marriage if he wished to do so.

Prima facie evidence of the sex of a person for the purpose of marriage registration

7. Some members raised concern over whether a person who had undergone full SRS would be required to produce other evidence besides personal identification document at the point of marriage registration. Information was sought on whether a person who had undergone full SRS must report his or her change of sex and apply for change of the sex entry in his or her HKIC.

8. Members noted that in order to obviate the need for transsexual persons who had undergone full SRS and had the sex entry on his or her HKIC changed to present the relevant birth certificate at the point of marriage registration, the Administration intended to introduce legislative amendments to MO to provide expressly that the sex of any party to a marriage as stated at the time of the marriage in his or her personal identification document would be prima facie evidence of the sex of that party. If the record of the Immigration Department ("ImmD") indicated that a person was of a different sex, ImmD would ask whether the person concerned had undergone full SRS and request him or her to apply for changing the sex entry on his or her HKIC.

9. Information was sought on whether the sex of a person as appearing on his or her birth certificate would not be considered in the process of marriage registration after enactment of the proposed legislative amendments.

10. According to the Administration, the HKIC of a person would be prima facie evidence of the sex of a person at the time of marriage registration. A birth certificate was a record of the sex of a person at the time of birth. The sex entry on the birth certificate of a person could not be changed, even if the person had undergone full SRS.

Gender Recognition

11. Members noted that CFA had also made some comments in the judgment on problems facing transsexuals in other areas of law and treatment of persons who had not undertaken any SRS or had not fully completed SRS in these areas, including drawing the line as to who qualified as "a woman" or "a man" for marriage and other purposes, and the impact of a legally recognized gender change in all legal contexts. In this connection, the Administration had decided to set up a high level

inter-departmental working group, to be chaired by the Secretary for Justice with members comprising representatives of relevant bureaux and other appropriate members such as members of the legal profession, to undertake a detailed study on gender recognition, taking into account CFA's views that consideration should be given to enacting legislation to deal with various issues relating to gender recognition, and to strike a balance between the rights of transsexual persons and the rights of other affected persons in doing so.

Relevant papers

12. A list of the relevant papers available on the Legislative Council website is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
31 March 2014

Appendix

**Relevant papers on
the Administration's follow-up actions
in the light of the Court of Final Appeal order
in the judicial review case of *W v Registrar of Marriages***

Committee	Date of meeting	Paper
Panel on Security	7 January 2014 (Item V)	Agenda Minutes

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