



Marriage (Amendment) Bill 2014

Submissions

Background

1. In *W v. the Registrar of Marriages* (FACV 4/2012) (the *W* case), the appellant *W* underwent full sex reassignment surgery (SRS) and intended to get married. The Registrar of Marriages refused to celebrate their marriage, deciding that *W* did not qualify as a woman under the Marriage Ordinance (Cap 181) (MO). The Director of Immigration (as the Registrar of Marriages) took the view that, for the purpose of marriage, the sex of a person referred to biological sex by birth. *W* brought judicial review proceedings to challenge the decision. Finding in favour of *W*, the Court of Final Appeal (CFA) held that biological factors were the only appropriate criteria for assessing the sex of an individual for the purposes of marriage, but such restrictive construction is inconsistent with the constitutional rights to marry protected by Art 37 of Basic Law and Art 19(2) of the Hong Kong Bill of Rights.
2. The CFA made it clear at the start of its judgment of *W* that the issue before the court was not same-sex marriage, but the marriages of the transgender persons who have undergone full SRS¹.
3. In a subsequent Orders and Costs dated 16 July 2013, the CFA agreed to a 12-months' suspension of its order to afford the Government and the Legislature a proper opportunity to put in place a constitutionally compliant scheme capable of addressing the position of broader classes of persons potentially affected².

¹ Para 2, Judgment in FACV 4/2012 dated 13 May 2013

² Para 7, Order and Costs in FACV 4/2012 dated 16 July 2013

The Marriage (Amendment) Bill 2014

4. In consequence, the Government introduced the Marriage (Amendment) Bill 2014 (the Bill) to implement the above CFA judgment. The Bill provides that for determining the sex of a party to a marriage under the MO, a person who has received a full SRS will be treated as being of the sex to which the person is re-assigned after the surgery³.
5. Full SRS is defined in the Bill in respect of certain surgical procedures (Clause 40A (2)).

Scope of the proposed legislative amendments

6. The Law Society notes that the scope of the Bill, as provided for, is quite narrow -
 - (a) the Bill only addresses how the gender in MO are being construed for the purposes of MO; in other words, it provides for matters connected only with marriage registration;
 - (b) Matters which take place after a marriage is registered fall outside the scope of the Bill.
7. The Law Society was given the understanding that, as explained in the Explanatory Memorandum of the Bill, the Administration's paper for discussion at the Security Panel on 7 January 2014, the Legislative Council Brief issued on 28 February 2014, as well as the Secretary for Security's speech moving the Second Reading of the Bill on 19 March 2014, the only purpose of the Bill is to implement the order of the CFA in W.
8. As such, the Bill could be considered as an "interim measure" taken by the Administration, as its response to the CFA judgment. In respect of other issues relating to, e.g. gender recognition, which has been left open by the CFA, the Law Society was advised that the Administration has set up an inter-departmental working group (IWG) on gender recognition⁴ to consider.

³ See Preamble to the Bill and its Explanatory Memorandum.

⁴ Letter from the Security Bureau to the LegCo (Legal Services Division) dated 13 March 2014

At the time of this submission the IWG has not yet produced any report or made any recommendations to the Administration.

9. The Law Society shall keenly wait for consultation (if any) and/or the reports from the IWG and urges the Administration to thoroughly and carefully consider all those relevant matters arising from the *W* case and the Bill, including the issues which the Law Society identifies in the following paragraph.

Legal Issues arising from the Bill

10. The Law Society notes that the Legislative Council Secretariat has on 5 March 2014 and 25 March 2014 written to the Security Bureau to raise a number of valid and important questions on implications of the Bill upon various existing legislation concerning marriages, guardianship and inheritance law. The Law Society agrees that all these issues are pertinent, but they have not been canvassed at this stage. These should be addressed by the Administration, when the Administration is to proceed with the legislative process, either by this Bill or other legislative proposals.

Constitutional Issues arising from the Bill

11. The Law Society understands that SRS involves major and almost irreversible surgical procedures in that certain organs are to be removed and/or other organs are to be constructed. It necessarily carries with it a significant extent of pain and suffering, and an obligatory intensive rehabilitation programme, both physical and psychological⁵.
12. It is also the understanding of the Law Society that, medically speaking, after SRS has been completed, the transgender person would normally become sterile for the rest of his/her life.
13. Yet, under the Bill, in order to avail themselves to proper marriage recognition, transsexual persons need to undergo full SRS, as defined. There is no other means open to the transsexual people for marriage recognition.

⁵ For the purpose of this submission, the SRS as averred to refer to those surgical procedures intimated for the purpose of the Bill and is not for, for example, life-saving purposes.

14. This prerequisite for full SRS would therefore have an undesirable coercive effect on persons who would not otherwise be inclined to undergo this type of surgery⁶:
- (a) people in the transgender community may choose to undergo only some of the surgical procedures defined in the Bill; others may decide not to undergo any SRS at all. The reasons for not undergoing full SRS, or completing all the stages for full SRS could include a lack of financial resources, appreciation of the risks involved in the surgery, medically or psychologically unable to cope with these surgeries, and/or preference for other less invasive medical treatment (e.g. hormonal treatment). The singularly narrow requirement of the Bill does not address these widely different needs of the transgender community;
 - (b) by insisting upon and enshrining the surgery requirement to become a legal prerequisite, the Government is in effect compelling the transgender community to undergo the surgery to have their sex re-assigned in order they can satisfy the new requirements for the purpose of the MO.
15. The above are a prima facie violation of the following human rights:
- (a) rights to marry;
 - (b) rights to reproduction;
 - (c) rights to privacy and family life.

These rights are protected by

- Article 37 of the Basic Law;
- Article 3 and 19(2) of section 8 of the HK Bill of Rights Ordinance, Cap 383
- Article 16, 17 and 23 of the International Covenant on Civil and Political Rights, 1966 (ICCPR); and
- Article 15, Convention on the Elimination of All forms of Discrimination against Women, 1981.

⁶ See the remarks of Lord Nicholls in *Bellinger v. Bellinger* [2003] 2 AC 467 at para 41

16. Apparently the SRS itself could also amount to violation of those other rights against cruel, inhuman or degrading treatment which are protected by international conventions, such as the Convention Against Torture and Inhuman, Cruel or Degrading Treatment or Punishment 1984 (CAT) (Articles 2, 16) the European Convention on Human Rights (Article 3) and ICCPR Art 7.
17. Additionally, there could be potential discrimination arising from the Bill. The views of the Chairperson of the Equal Opportunities Commission on the above are noted by the Law Society⁷.

Approaches in the UK

18. The Law Society notes that in the majority judgment, Ma CJ and Ribeiro PJ stated in clear terms that the Court preferred to establish a gender recognition procedure (to be achieved by legislation) whereby each case is examined with a view to certification by an expert panel. The Court suggested reference could be drawn to the United Kingdom's Gender Recognition Act 2004 (GRA 2004) which was described by Lord Nicholls as "primary legislation which will allow transsexual people who can demonstrate they have taken decisive steps towards living fully and permanently in the acquired gender to marry in that gender".
19. The following passage extracted from *Bellinger v. Bellinger* [2003] 2 AC 467 on GRA 2004 is note-worthy:

"True to that description, the GRA 2004 does not lay down a bright line test for when a transsexual person does or does not qualify for recognition in his or her acquired gender. Instead, the Act sets up a panel with legal and medical members which hears applications for gender recognition and requires the panel to grant a gender recognition certificate:

... if satisfied that the applicant –

- (a) has or has had gender dysphoria,*
- (b) has lived in the acquired gender throughout the period of two years ending with the date on which the application is made,*
- (c) intends to continue to live in the acquired gender until death, and*

⁷ See SCMP articles on 28 March 2014 and on 2 April 2014 both by York Chow.

(d) *complies with the requirements imposed by and under s.3 [which lays down the requirements regarding medical evidence and certain other supporting documents].*⁸

20. Under the UK system, the completion of the full SRS seemingly is not the single criterion relied on by the expert Panel. Instead, the Panel examines broader issues such as the applicant's history and intention of living in the acquired gender.
21. In point of fact, SRS is a medical procedure which technically speaking is outside the ambit of knowledge of the legal profession. Relying on and drawing reference to SRS as the criterion for recognizing the marriages of transgender people give rise to complication the CFA acknowledges in *W*, i.e. asking the judges for "a formulation of a line at some point in the sex reassignment process for marking the stage at which a gender change is recognized". This is described to be disadvantageous and should not be preferred.

Conclusion

22. The Law Society is of the view that, in the light of the matters identified in the above, the Administration should seriously consider either amending the Bill or to prepare a separate set of comprehensive legislation to deal with all those related issues. In the process of legislation, the Administration should consider the experience in other jurisdiction, including those in the UK, as set out in the preceding paragraphs.
23. The Law Society notes the 12-month "deadline" but suggests that in case the related legislative amendments have not yet been effected, a party, if so required, should not have major difficulties to obtain a declaration for the purpose of marriages, as envisaged in the case of *W*.

The Law Society of Hong Kong
13 May 2014

⁸ para. 139