

**Legislative Council Bills Committee on
Marriage (Amendment) Bill 2014
Follow-up to the first meeting
on 1st April 2014**

Purpose

This paper sets out the Administration's response to the issues raised at the first meeting of the Bills Committee held on 1 April 2014.

Administrative Guidelines for considering applications to change the sex entry on Hong Kong Identity Cards (HKICs)

2. The Immigration Department (ImmD) issued the administrative guidelines for considering applications to change the sex entry on HKICs in April 2012. The Guidelines were formulated according to the advice of relevant experts in the Hospital Authority (HA) and in consultation with the medical sector in Hong Kong. They can be found at the **Annex**¹. As set out in paragraph 5 of the Legislative Council Brief prepared by the Administration, the existing administrative guidelines would be maintained pending the completion of the study being conducted by the Inter-departmental Working Group on Gender Recognition (IWG).

Statistics

3. In 2012/13, there were 108 persons receiving sex-reassignment counselling services at the psychiatric specialist outpatient clinics in various clusters of the HA. From 2009/10 to 2013/2014 (as at 31 December 2014), sexual re-assignment surgeries (SRS) were performed by the HA on 21 persons, with 13 other persons undergoing or waiting for SRS.

¹ The administrative guidelines is available at ImmD's website at http://www.gov.hk/tc/residents/immigration/idcard/hkic/faq_hkic.htm (Frequently Asked Questions no.22).

Compatibility with international conventions such as ICCPR

4. At the meeting on 1 April, Members would like to know whether the Bill is compatible with such international conventions as the International Covenant on Civil and Political Rights (ICCPR). As explained by the Administration at the meeting, the purpose of the Bill is to update relevant sections of the Matrimonial Causes Ordinance (MCO) (Cap. 179) and the Marriage Ordinance (MO) (Cap. 181) which have been conclusively declared as incompatible with Article 37 of the Basic Law (BL 37) and Article 19(2)² of the Hong Kong Bill of Rights (HKBOR 19(2)) by the Court of Final Appeal (CFA) in its Order made in the case of *W v Registrar of Marriages* (FACV 4/2012), so as to bring the statutes in conformity with relevant requirements under the Basic Law and the HKBOR and according to the CFA Order.

5. The CFA has ruled in the W Case that, according to the legislative intent³ when formulating section 20(1)(d) of the MCO, biological factors were the only criteria considered appropriate for assessing the sex of an individual for the purposes of marriage. By extension, section 40 of the MO should also be given the same interpretation as it covers materially the same ground as section 20(1)(d) of the MCO. Therefore, the Registrar of Marriage was right in construing the term ‘woman’ under those sections by excluding the appellant W⁴. However, the CFA held at the same time that since those provisions denied the right of transsexual persons who have received full SRS and become a woman (like W) to marry a man, they were equivalent to denying her the right to marry at all⁵ as guaranteed under BL 37 and HKBOR 19(2).

² HKBOR 19(2) implements Article 23(2) of the International Covenant on Civil and Political Rights.

³ The CFA accepted that the statutory intent was to follow an Act of the United Kingdom which was enacted in accordance with the judgment in the case of *Corbett v Corbett* by the English Court. The English Court ruled in the case that procreative intercourse was the essential constituent of a marriage at Common Law. See paragraph 34 of the judgment of the W Case.

⁴ Paragraph 117 of the judgment of the W Case.

⁵ The CFA also opined that it was unnecessary to embark upon a discussion of the extent, if any, to which W’s right to privacy under Article 14 under the Bill of Rights may support her constitutional right to marry. See paragraphs 111 and 112 of the judgment of the W Case.

6. Whether transgender and other transsexual persons who have not received full SRS may marry in their self-identified sex is not the question that the W Case seeks to deal with. The CFA had not made any decision on this in its judgment and orders in the W Case.

7. The CFA's judgment on the legislative intent of relevant provisions under the MCO and the MO and its judgment and order that W is eligible to marry in her re-assigned sex was concluded in regard to W's situation (a person who has received full SRS). As regards transgender and other transsexual persons who have not received full SRS, relevant legal matters have not yet been considered in detail by the Court and hence there is no conclusion thereon at this stage. In other words, their right to marry in their self-identified sex has not yet been established; their right to marry under the MO has not been affected by the CFA judgment and Order made in the W case.

8. As the purpose of the Bill is to implement the Order made by the CFA in the W case, the recommendations of the Bill have not restricted the existing rights of transgender and transsexual persons who have not received full SRS. In this light, the Bill is in compliance with the Basic Law, the Hong Kong Bill of Rights and other international conventions applicable to Hong Kong. As the Bill does not involve changes in policy and laws in regard to transgender and transsexual persons who have not received full SRS, the Administration has not consulted relevant groups on the Bill.

9. To follow up on various issues left open by the CFA in the W Case, including the aforementioned matters and other issues relating to gender recognition, the IWG, chaired by the Secretary for Justice, has commenced work since January this year. The IWG will review existing laws of Hong Kong and compare relevant legislation in other jurisdictions. The IWG will also engage the assistance of relevant experts or professionals, and consult stakeholders and the public as and when appropriate. In considering a suitable gender recognition system for Hong Kong, the IWG will take into account the laws and international conventions applicable to Hong Kong.

Overseas Experience

10. As regards the experience of the United Kingdom (UK) as raised by some members, it should be noted that, contrary to the objective

of the Bill, the UK's Gender Recognition Act 2004 (GRA) aimed at introducing a statutory gender recognition scheme and is hence not comparable with the Bill. Matters relating to gender recognition are now being studied by the IWG. That said, according to publicly available information, the UK Government set up an inter-departmental working group to review on problems facing transsexuals in different areas in April 1999. Following consultation and legislative process, the GRA came into force in April 2005.

11. Although the Bill does not seek to address problems facing transgender and transsexual persons who have not received full SRS or other issues relating to gender recognition, we note that the relevant practice and legal requirements vary widely amongst different jurisdictions around the world. According to the Table of Gender Recognition Systems in Approved Countries and Territories Under the GRA⁶ and other publicly available information, many countries in Europe (including Denmark and Switzerland) require transsexual persons to have received SRS and obtained medical certification before they would be recognized as being of the acquired sex. Some other European countries (such as Germany) accept gender change applications according to the transgender person's own declaration without requiring evidence. In the United States and Canada, most of the states / provinces have laws in place requiring medical proof of SRS received from transsexual persons who would wish to change their birth certificate and other related documents. In Asia, transsexual persons in Japan, Singapore and Mainland China are required to have received SRS before they can change the sex entry on their household register or identification document.

Security Bureau
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⁶ The GRA stipulates that the UK must recognize the gender change of a person by a country or territory approved by the Secretary of State as prescribed by order. The table of approved countries and territories was last updated in 2011.

Procedures for changing the sex entry on Hong Kong Identity Cards

http://www.gov.hk/en/residents/immigration/idcard/hkic/faq_hkic.htm

Q21. What procedures should be followed and what supporting documents should be submitted if I want to change the sex entry on my identity card?

Generally speaking, persons who have received different forms of treatments by professional psychiatrists and clinical psychologists, including psychotherapy, hormonal treatment and real-life experience of the chosen gender role for a period of time may be recommended for sexual reassignment surgery (SRS).

Persons who have undergone the above treatments and have completed SRS should follow the below procedures and submit application together with the relevant supporting documents to reflect their change of sex on their identity cards:

- (a) produce a medical proof which should indicate that the following criteria for the completion of SRS are met:-
 - (i) for sex change from female to male
 - removal of the uterus and ovaries; and
 - construction of some form of penis;
 - (ii) for sex change from male to female
 - removal of the penis and testes; and
 - construction of the vagina;
- (b) In general, the medical proof should be produced by the doctor who performed the SRS in accordance with the criteria as set out above;
- (c) If the SRS was performed outside Hong Kong, the medical proof should carry the doctor's medical qualification, place where the medical qualification is obtained and other contact information of the doctor;
- (d) Where there are difficulties in obtaining the relevant medical proof from the doctor who performed the SRS outside Hong Kong, the applicant may request a Hong Kong registered doctor to give an assessment on the SRS that has been undergone;
- (e) Please refer to the sample medical certificates which are available through the following link.

[Sample medical certificate for registered doctors practising in Hong Kong](#)
[Sample medical certificate for doctors practising outside Hong Kong](#)

Other forms of medical proof used by medical practitioners may also be accepted when the relevant information supporting the application is contained; and

- (f) Upon receipt of the relevant documents, consideration will be given to whether to allow amendment of the personal particular sought by an applicant having regard to the particular circumstances of the case.

Notes to applicants:-

- (1) Further information may be required for processing the applications depending on case circumstances.
- (2) To ensure consistency in identity documents and avoid possible inconveniences, the applicant may be required to make corresponding changes to other identity documents (e.g. travel documents) as necessary.

Date: _____

To: Whom it may concern

Medical Certificate

(to be completed by a registered doctor practising in Hong Kong)

Re: _____ (name)

Holder of Hong Kong Identity Card no. _____ /

Travel Document Type and no. _____ *

PART A

For the purpose of supporting the application for amendment of sex entry on the Hong Kong identity card of the above-named person, I [certify / am satisfied¹]* that the above-named person has undergone –

a female to male sex reassignment surgery (SRS) , which includes

(i) removal of the uterus and ovaries; and

(ii) construction of some form of penis.

a male to female SRS, which includes

(i) removal of the penis and testes; and

(ii) construction of the vagina.

PART B (if the SRS was not performed by the doctor completing this form)

My assessment was based on the following evidence:

clinical examination / operation record / pathology report / radiological report /
others (please specify: _____) *

Signature of doctor: _____

Name in block letters: _____

Medical registration no.: _____

¹ Please complete Part B if you are not the original doctor who performed the SRS

* Please delete where appropriate

Date: _____

To: Whom it may concern

Medical Certificate

(to be completed by a doctor practising outside Hong Kong who performed the Sex Reassignment Surgery (SRS) and qualified to practise surgery in the place where the SRS was conducted)

Re: _____ (name)

Holder of Hong Kong Identity Card no. _____ /

Travel Document Type and no. _____ *

I certify that the above-named person has undergone –

a female to male SRS, which includes

- (i) removal of the uterus and ovaries; and
- (ii) construction of some form of penis.

a male to female SRS, which includes

- (i) removal of the penis and testes; and
- (ii) construction of the vagina.

Signature of doctor: _____

Name in block letters: _____

Medical qualification: _____

(Country): _____

(Institute): _____

Contact information (Tel): _____ (Fax): _____

(Address): _____

(E-mail): _____

* Please delete where appropriate