

**Legislative Council Bills Committee on
Marriage (Amendment) Bill 2014
Follow-up to the fourth meeting
on 20 May 2014**

This paper responds to Members' enquiries raised at the fourth Bills Committee meeting on 20 May 2014 about the legal implications of the Court of Final Appeal (CFA)'s Order made in the case of *W v Registrar of Marriages (FACV 4/2012)* (the W Case) in the event that (i) scrutiny of the Marriage (Amendment) Bill 2014 (the Bill) is not completed upon expiry of the suspension of declaration given by the CFA in its Order, or that (ii) the Bill is vetoed by the LegCo; and the follow-up work to be carried out by the Administration under the two scenarios.

Background

2. The CFA handed down its Order of the W case on 16 July 2013, granting a Declaration that (i) section 20(1)(d) of the Matrimonial Causes Ordinance (MCO) and section 40 of the Marriage Ordinance (MO) must be read and given effect so as to include within the meaning of the words "women" and "female" a post-operative male-to-female transsexual person whose gender has been certified by an appropriate medical authority to have changed as a result of sex re-assignment surgery (SRS), and (ii) the appellant (W) is in law entitled to be included as "a woman" within the meaning of section 20(1)(d) of the MCO and section 40 of the MO and is accordingly eligible to marry a man.

3. At the same time, the CFA suspended effect of the declaration for 12 months¹ in order to allow time for any corrective legislative amendments to be considered by the relevant authorities. As pointed out by the CFA in paragraphs 123 to 125 and 148 of the Judgment, the remedial interpretation provided by the CFA to section 20(1)(d) of the MCO and section 40 of the MO would come into effect in any event at the expiry of the suspension period regardless of whether or not

¹ That is, until 16 July 2014, with liberty for both parties to apply in relation to the period of suspension.

supporting consequential legislation is in place. The right to marry of W and other transsexuals in W's situation, that is, one who has gone through full SRS², would not be affected.

Analysis

4. The legal system of the Hong Kong Special Administrative Region (HKSAR) is provided under the Basic Law (BL). Under Article 82 of the BL, the power of final adjudication of the HKSAR shall be vested in the CFA. Under Articles 8 and 18 of the BL, the laws in force in the HKSAR include the common law and ordinances.

5. The CFA decided in the W Case that it would violate the right to marry as protected by Article 37 of the BL and Article 19(2) of the Hong Kong Bill of Rights³ if the words "woman" and "female" under section 20(1)(d) of the MCO and section 40 of the MO do not include a post-operative male-to-female transsexual person. The Order of the CFA in the W Case would come into effect upon expiry of the suspension. As with other decisions made by the Court, under common law principles, the judgment has become case law and is part of the laws (common laws) of Hong Kong. Its effect would not be affected by the fact that the Bill is pending passage or has been vetoed.

6. Under Article 64 of the BL, the Government of the HKSAR must abide by the law. Therefore, regardless of whether Bill is passed or not, W and other transsexuals in the same situation, that is, one who has received full SRS, may marry in his or her reassigned sex an opposite-sex partner upon expiry of the suspension in accordance with the CFA judgment. The Registrar of Marriages would also perform marriage registration of those persons under the MO as decided by the CFA.

² In para 125 of the judgment, the CFA held that a transsexual person, who has been issued with a certificate that his or her gender has been changed on the basis that the original genital organs have been removed and some form of the genital organs of the opposite sex have been constructed, ought in any event to qualify as a person entitled to marry in his or her acquired gender.

³ Under Article 11(2) of the BL, no law enacted by the legislature of the HKSAR shall contravene the BL.

7. The Administration sees the need to pass the Bill according to the CFA judgment in a timely manner. Not only does it demonstrate our respect and efforts to implement the Court's decision, but it also promotes clarity in the definitions of "man" and "woman" under the institution of marriage of one man and one woman as provided in the MO. With the passage of the Bill, the relevant legal provisions would be clear to provide protection to the marriage rights enjoyed by post-operative transsexual persons under the law. Moreover, the amended MO would promote understanding in the public on the legal requirements, reducing confusion and unnecessary disputes over the legal meaning of "man" and "woman" in the MO. Therefore, enactment of the Bill is a way that is consistent with the rule of law and would render the law more accessible to all parties concerned (including the marrying parties, civil celebrants and the public). On the other hand, if the Bill is not enacted, the relevant descriptions in the forms under the MO would not be updated in a timely manner to reflect the situation where a person receives full SRS after being widowed and re-marries in the reassigned sex with an opposite-sex partner (for example, if a man receives full SRS after the death of his wife and marries in her capacity as a reassigned woman with another man, the marital status of such person would be "widow", which is inconsistent with the role of a husband in the previous marriage.)

8. The Administration would continue to promote the scrutiny of the Bill.

Security Bureau
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