

香港特別行政區政府
保安局



香港添馬添美道 2 號

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The Government of
The Hong Kong Special Administrative Region
Security Bureau

2 Tim Mei Avenue, Tamar, Hong Kong

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30 May 2014

Legal Service Division
Legislative Council
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong
(Attn: Mr Stephen Lam)

Dear Mr Lam,

Marriage (Amendment) Bill 2014

Thank you for your letter of 22 May 2014.

The Court of Final Appeal (CFA) in the case of *W v Registrar of Marriages* (FACV 4/2012) (the W Case) declared, *inter alia*, that 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 “woman” 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). In paragraph 210 of the CFA judgment, Mr Justice Bokhary NPJ indicated that "Since the sex reassignment surgery which W underwent was male-to-female, the foregoing way is the one in which the question has been put in argument. But the answer would of course be the same whether the sex reassignment surgery is of the male-to-female kind or the female-to-male kind." In paragraph 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. In paragraph 124 of the judgment, the CFA left open the question whether transsexual persons who have undergone less extensive treatment might also qualify.

The main object of the captioned Bill is to amend the Marriage Ordinance (Cap. 181) to implement the above declaration made by the CFA to clearly reflect the right to marry under the Basic Law and the Hong Kong Bill of Rights enjoyed by post-operative transsexual persons who has gone through full SRS as in the case of W. The new section 40A(2)(a) provides that a full SRS is a surgical procedure that has the effect of re-assigning the sex of a person from male to female by (i) removing the person's penis and testes and (ii) constructing a vagina in the person. The new section 40A(2)(b) provides that a full SRS is a surgical procedure that has the effect of re-assigning the sex of a person from female to male by (i) removing the person's uterus and ovaries and (ii) constructing a penis **or some form of a penis** in the person.

We note from the *Standard of Care for the Health of Transsexual, Transgender and Gender Nonconforming People* by the World Professional Association for Transgender Health, the current operative techniques of the construction of male genital organs are varied. The choice of techniques may be restricted by anatomical or surgical considerations (and by other person considerations of clients)¹. As also acknowledged and explained by Dr Albert Yuen, Consultant Surgeon of the Ruttonjee and Tang Shiu Kin Hospitals at the Bills Committee meeting on 20 May 2014, for SRS that has the effect of re-assigning the sex of a person from female to male, removal of uterus and ovaries is relatively straightforward and safe in current Hong Kong medical care standard. As regards construction of a penis or some form of a penis, there are different ways of surgery to achieve the outcome, depending on the desire of the person who would be able to balance the extent of surgery with the benefits. As Dr Yuen explained, the extent of surgery ranges from constructing a full size and functional penis, the surgical technology available takes multiple operations and involves scarring on other parts of body, to a less functional penis involving fewer operations and lower complications (achieving the construction of “some form of a penis”). The proposed new section 40A(2)(b)(ii) of “constructing a penis or some form of a penis” (instead of just “constructing a penis”) provides the needed flexibility to cover both the construction of a full size and functional penis and a less functional penis involving simpler operative methods.

¹ See page 62-63 of the Guidelines. The Guidelines can be downloaded from the website of the World Profession Association for Transgender Health:
http://www.wpath.org/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf

As the definition of “full sex re-assignment surgery” in the new section 40A(2)(b)(ii) does not require that all female persons who wish to become male persons must construct a full-size and functional penis and the alternative requirement of constructing “some form of a penis” would involve simpler operative methods, we consider that the new section 40A(2)(b)(ii) does not have the effect of treating female transsexual persons less favourably as compared with male transsexual persons in respect of their right to marry. In the circumstances, we are of the view that the new section 40A(2)(b) does not constitute any form of sex discrimination under Article 22 of the Hong Kong Bill of Rights.

Yours sincerely,



(Billy Woo)
for Secretary for Security

c.c.

Secretary for Justice

(Attn: Mr Alan Chong
Ms Mary Ho)

Secretary for Food and Health

(Attn: Ms Wendy Au)

Secretary for Constitutional and Mainland Affairs (Attn: Mr DC Cheung)