

**Legislative Council Bills Committee on
Marriage (Amendment) Bill 2014
Follow-up to the fifth meeting on 26 May 2014**

This paper sets out the Administration's consolidated response to the issues raised in the written submissions made by the Equal Opportunities Commission (EOC), The Law Society of Hong Kong (The Law Society), the Hong Kong Bar Association (HKBA) and various religious organisations.

Overall approach to follow up on the CFA judgment

2. The EOC, the Law Society and the HKBA call for a comprehensive gender recognition procedure in Hong Kong following the approaches in the United Kingdom (UK).

3. As previously indicated, the Administration attaches great importance to the decision and recommendations of the Court of Final Appeal (CFA) in the case of *W v Registrar of Marriages (FACV 4/2012)* (the W Case) and has taken proactive follow-up actions on two fronts in parallel. First, with the CFA judgment, the Administration has an obligation to introduce the Marriage (Amendment) Bill 2014 (the Bill) to align the statute law with the judgment so as to afford the public a clear understanding of the right to marry enjoyed by transsexual persons who have received full sex re-assignment surgery (SRS). This is consistent with the rule of law. Second, in response to the CFA's recommendations, the Government set up an Inter-departmental Working Group on Gender Recognition (IWG) led by the Secretary for Justice earlier this year to consider legislation and incidental administrative measures that may be required to protect the rights of transsexual persons in all legal contexts, and to make such recommendations for reform as may be appropriate.

4. The purpose of the Bill is therefore only to align the statute law with the CFA Order in the W Case, which declared that transsexual persons whose gender has been certified by an appropriate medical authority to have changed as a result of (full) SRS must be included as a

person of the reassigned sex under section 20(1)(d) of the Matrimonial Causes Ordinance (MCO) and section 40 of the Marriage Ordinance (MO).

5. We acknowledge that there is at present no gender recognition scheme or laws in Hong Kong. With the ongoing study by the IWG, other issues involving gender recognition will be considered in context having regard to relevant legislation, case-law and relevant schemes in other jurisdictions (including but not limited to UK) and opinions from different sectors of the community on the possible ramifications. The IWG will listen to expert (such as legal and medical) opinions and consult the public in due course. Different sectors of the community will have ample opportunities to engage in the discussion of such gender recognition issues raised by the CFA but fall outside the scope of its Order.

Scope of the Bill

6. The EOC, the Law Society and the HKBA are concerned that the Bill may be in breach of the human rights of persons who have not received full SRS.

7. As explained in the Administration's response to issues raised at the meeting on 1 April 2014 (LC Paper No. CB(2)1491/13-14(02)), the CFA judgment and Order in the W Case were concluded with regard to W's situation, i.e. a person who has received full SRS. The question of whether transsexual persons who have undergone less extensive treatment might also qualify to be regarded as the re-assigned sex within the meaning of section 40 of the MO and section 20(1)(d) of the MCO was, amongst other issues relating to gender recognition, left open in the CFA judgment. It is clear that the Bill, which seeks only to implement the CFA Order made in the W case, does not affect the existing rights of transgender and transsexual persons who have not received full SRS. The Bill does not have the effect of coercing any persons who have not received full SRS to undergo full, or any, 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.

8. The Administration understands that whether to receive full or any SRS is ultimately a choice to be made by individuals personally taking into account all relevant considerations pertinent to his or her own circumstances. As explained by Dr Albert Yuen, SRS expert in the Hospital Authority (HA), at the Bills Committee meeting on 20 May 2014 and according to *the Standard of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People (Standard of Care)* by the World Professional Association for Transgender Health (WPATH), it is medically necessary for some people with transsexualism to undergo the therapeutic regimen of SRS to make their bodies as congruent with their identified sex as possible in order to ease the ongoing anxiety and distress. For patients treated by the HA in Hong Kong, they are assessed and treated by psychiatrists and clinical psychologists for a substantial period of time before surgeries. After hormonal medication and real-life experience in the opposite sex, patients would be explained the consequences, risks and impacts of the surgeries, to be proceeded only with patients' consent after thorough consideration. We fail to see that anyone would be coerced into receiving the surgeries with these safeguards in place.

9. As explained by the Secretary to the IWG at the Bills Committee meeting on 29 April 2014, amongst other things, the IWG will consider the question of qualification criteria (including medical and evidential requirements, etc.) and the procedure (including what type of authority should determine applications for gender recognition, etc.) for gender recognition. 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.

Provisions of the Bill

Concerns of the HKBA

10. The HKBA has concerns on two specific provisions of the Bill. First, it is concerned that the Bill would render a marriage of a post-operative female-to-male transsexual voidable under section 20(2)(a) of the MCO since post-operative female-to-male transsexual may not be able to achieve coital penetration.

11. The purpose of the Bill is only to align the statute law with the CFA Order in the W Case (which concerns a male-to-female transsexual who has received full SRS). As in paragraph 125 of the CFA judgment, “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 210 of the CFA judgment, Mr Justice Bokhary NPJ also indicated that “Since the SRS 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 SRS is of the male-to-female kind or the female-to-male kind.” It is thus considered necessary and appropriate for the Bill to cover the situation of the female-to-male transsexual person, following the principles laid down in the W Case.

12. We note from the *Standard of Care* by the WPATH and as advised by Dr Albert Yuen, the current operative techniques of the construction of male genital organs are varied. To cater for the different operative techniques available, the proposed new section 40A(2)(b)(ii) of "constructing a penis or some form of a penis" (instead of just "constructing a penis") has been so drafted to provide the needed flexibility to cover cases where a less functional penis (i.e. where coital penetration may or may not be achieved) involving simpler operative methods is constructed.

13. In any event, under the current MO, physical dysfunctions preventing a person from consummation do not affect his/her right to marry. Whether or not a marriage is voidable is to be decided by the Court depending on the individual circumstances of the case and continues to be governed by the provisions of the MCO¹, which is a separate matter from the right of a transsexual person who has received full SRS to marry under the MO.

¹ It is noted that under the MCO, “non-consummation owing to incapacity of either party” is one of the grounds specified in section 20(2), which would render the marriage voidable (i.e. one which is valid and subsisting until a decree of nullity is made) at the instance of the other party according to section 19 and subject to section 20(3).

14. As regards HKBA's second concern on the legal effect of gender change on the status of an existing marriage, as explained in our reply to Assistant Legal Adviser's letter dated 5 March 2014 (LC Paper No. CB(2)1203/13-14(04)), based on legal advice we received, a marriage should not automatically become void under section 20(1)(d) of the MCO solely on the ground that one of the parties to the marriage had subsequently (i.e. after celebration in accordance with all requirements under the MO) received full SRS. The effect of a gender change on the subsisting marriage is an issue of gender recognition which goes beyond the scope of the CFA Order in the W Case and may be an issue to be looked into by the IWG among other post-recognition issues.

Concerns of the EOC

15. As regards the EOC's proposal to amend the Bill to only refer to the current administrative requirements, and that those requirements be changed to no longer require full SRS, as the Administration has explained before, whether persons who have not received full SRS may marry in the sex of their choice is indeed a gender recognition issue on which the CFA did not decide in the W Case. The IWG would consider, amongst other things, the question of qualification criteria (including medical and evidential requirements, etc.) for a suitable gender recognition system for Hong Kong. As set out in paragraph 5 of the Legislative Council Brief on the Bill prepared by the Administration and reiterated in our response to the issues raised at the first meeting of the Bills Committee (LC Paper No. CB(2)1491/13-14(02)), the existing administrative guidelines would be maintained at the present stage.

16. Against this background, the Administration is of the view that the Bill, as it is currently drafted, would be able to provide clear legal protection to the right of transsexual persons who have received full SRS to marry and would assist marrying parties, civil celebrants and the public at large to understand the legal requirements, thereby reducing uncertainty, confusion and unnecessary disputes. The provisions would also ensure equal treatment for residents and non-residents of Hong Kong alike.

Whether religious organisations may refuse celebrating marriages of post-operative transsexuals

17. Several religious organisations expressed concerns that refusing to celebrate a marriage to which one of the parties is a post-operative transsexual would be rendered unlawful should they find themselves unable to accept and celebrate such marriages due to religious grounds.

18. Section 4 of the MO empowers the Chief Executive to license any place of public worship to be a place for celebration of marriages. Section 19 of the same Ordinance provides that marriages may be celebrated in any licensed place of worship by any competent minister of the church, denomination, or body to which such place of worship belongs, and according to the rites or usages of marriage observed in such church, denomination, or body. The current MO does not prohibit any religious organisations from refusing to celebrate marriages of any person (including transsexual persons who have received full SRS) by its ministers on religious grounds.

19. Freedom of religion is protected under Article 32 of the Basic Law and Article 15 of the Hong Kong Bill of Rights. The MO does not prohibit different religious bodies from determining rules relating to celebration of marriages in their licensed places of worship having regard to their own religious beliefs and principles. The issue raised by the religious bodies was neither addressed nor determined in the W Case. It is therefore not appropriate to deal with this matter in the context of the Bill, the purpose of which is to align the statute law with the CFA judgment only. We will draw these concerns, amongst other views on gender recognition issues raised by the CFA but fall outside the scope of its Order and hence the Bill, to the attention of the IWG for consideration.

Security Bureau
June 2014