

**Legislative Council Bills Committee on  
Marriage (Amendment) Bill 2014  
Follow-up to the seventh meeting  
on 10 June 2014**

This paper responds to Members' enquiries raised at the seventh Bills Committee meeting on 10 June 2014 and Hon Tommy Cheung's further letter of 13 June 2014 concerning whether refusal by religious bodies to celebrate a marriage involve post-operative transsexuals because on religious beliefs would be a violation of the Disability Discrimination Ordinance (DDO) (Cap. 487) and/or the Sex Discrimination Ordinance (SDO) (Cap. 480), and whether a relevant exemption provision should be included for religious bodies in the Bill.

**Whether refusal to celebrate marriages of post-operative transsexuals would violate any discrimination ordinance(s)**

2. The Court of Final Appeal (CFA) held in the W Case that a transsexual person who has received full sex re-assignment surgery (SRS) should be treated as a person of the re-assigned sex at marriage registration and therefore has the right to marry an opposite-sex partner. The CFA, however, did not discuss or come to a conclusion on how such right is to be exercised under the Marriage Ordinance (MO) (Cap. 181), including whether the marriage must be celebrated in a particular manner of the transsexual person's choice.

3. Currently, there are no specific laws in Hong Kong prohibiting an unfair treatment to a person on the grounds that such person is a transsexual person. As to whether religious bodies would violate the DDO should they refuse to celebrate marriages of post-operative transsexuals, we consider that it would be difficult to come to a conclusion without considering the facts of a specific case.

4. According to the 10th revision of the International Statistical Classification of Diseases and Related Health Problems (ICD-10), gender identity disorder (GID) (including transsexualism) is categorized under mental and behavioural disorders. The Hospital Authority advised that

transsexualism is an illness which requires psychological, medical and surgical treatment. The mental distress can be relieved after appropriate medical treatment and afterwards patients should not be considered as persons of having serious illness or disability.

5. Section 2 of the DDO provides that disability, in relation to a person, means –

- (a) total or partial loss of the person's bodily or mental functions;
- (b) total or partial loss of a part of the person's body;
- (c) the presence in the body of organisms causing disease or illness;
- (d) the presence in the body of organisms capable of causing disease or illness;
- (e) the malfunction, malformation or disfigurement of a part of the person's body;
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour,

and includes a disability that –

- (i) presently exists;
- (ii) previously existed but no longer exists;
- (iii) may exist in the future; or
- (iv) is imputed to a person;

6. Since the DDO has specified objective criteria on the definition of disability and not given any specification as to whether a given kind of sickness must or must be treated as a disability, it cannot be generally concluded whether a person with GID who has received full SRS is protected under the DDO without considering whether that person's physical and psychological states would fall within the objective criteria of disability under s. 2 of the DDO.

7. In considering whether religious bodies or civil celebrants would violate section 26 of the DDO should they refuse to celebrate marriages of a post-operative transsexual, we note that apart from determining whether a person falls under the definition of disability under the DDO having regard to the specific case circumstances, there is also a need to consider other provisions of the DDO, including whether the body /

individual concerned has involved in provision of goods, services and facilities as defined in the DDO, whether it can be established that the refusal is based on religious reasons and/or on the person's disability, and whether celebrating a marriage for that person would constitute unjustifiable difficulties to the body / individual concerned (factors under consideration includes the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned)<sup>1</sup>. Therefore, in the process of determining whether an act would be regarded as discriminatory under the DDO, there are many other factors that need to be taken into account. We believe that the Court (or the Equal Opportunities Commission) would take into consideration all relevant factors pertinent to the case, and would consider all relevant provisions under the DDO as well as other legal provisions (including the Article 32 of the Basic Law and Article 15 of the Hong Kong Bill of Rights which protect the freedom of religion) when investigating into a complaint or during legal proceedings arising from the DDO.

8. On the other hand, when deciding whether an act constitutes sex discrimination under the SDO, it is necessary to compare the cases of two persons of opposite sex but whose circumstances are otherwise materially the same or similar. It is considered sex discrimination if, on the ground of one's sex, he/she was being treated less favourably than another person of the opposite sex. We consider that if religious bodies or civil celebrants refuse to celebrate marriages of transsexuals, regardless of whether the transsexual is male-to-female or female-to-male, such act would not be considered as sex discrimination under section 28(1) of the SDO.

### **Exemption clauses for such circumstances**

9. As discussed above, the CFA did not discuss or come to a conclusion on how the right of a transsexual person to marry is to be exercised under the MO, including whether the marriage must be celebrated in a particular manner of the transsexual person's choice. Currently, the MO empowers the Chief Executive to license any place of public worship to be a place for celebration of marriages. The MO does not compel any licensed places of public worship to celebrate (or not

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<sup>1</sup> s.4 and s. 26 of the DDO

celebrate) marriages involving any persons. The right to marry of post-operative transsexuals would not be affected for the reason that his/her marriage is not celebrated in a particular licensed place. Therefore, we do not consider it necessary to include a provision in the MO similar to section 6A(3A)<sup>2</sup> of the United Kingdom Civil Partnership Act.

10. The suggestion for including an exemption clause concerns the applicability of anti-discrimination laws. We are aware that different sectors of the society have divergent views on this issue. Before including any exemptions under the anti-discrimination laws, it is necessary to consider whether it is justifiable to do so, and whether the reasons would satisfy the legal principles of reasonableness and proportionality. Such question is complicated and controversial and should not be considered in the context of the Bill. We will draw these concerns, amongst other views on gender recognition issues raised by the CFA in the judgment but fall outside the scope of its Order and hence the Bill, to the attention of the Interdepartmental Working Group on gender recognition for consideration.

**Security Bureau**  
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<sup>2</sup> Under the concerned provision, it was specified that “For the avoidance of doubt, nothing in this (Civil Partnership) Act places an obligation on religious organisations to host civil partnerships if they do not wish to do so.” Such provision was introduced as part of the Equality Act 2010.