

# 立法會

## Legislative Council

LC Paper No. CB(2)1962/13-14

Ref : CB2/BC/2/13

### **Report of the Bills Committee on Marriage (Amendment) Bill 2014**

#### **Purpose**

This paper reports on the deliberations of the Bills Committee on the Marriage (Amendment) Bill 2014 ("the Bill").

#### **Background**

2. According to the Administration, the Bill is to amend the Marriage Ordinance (Cap. 181) ("MO") to implement the Court of Final Appeal ("CFA")'s Order made in the case of *W v Registrar of Marriages* (FACV 4 of 2012)<sup>1</sup>("the W case")<sup>2</sup>.

#### The W case

3. W is a male-to-female transsexual person who has successfully undergone a sex re-assignment surgery ("SRS") at a hospital managed by the Hospital Authority ("HA") in Hong Kong. She and her male partner wished to get married. However, the Registrar of Marriages, taking the view that for the purpose of marriage, the sex of a party referred to biological sex by birth, decided that she did not qualify as "a woman" under MO and the Matrimonial Causes Ordinance (Cap. 179) ("MCO"), so that there was no power to celebrate a marriage between her and her male partner.

---

<sup>1</sup> The CFA's judgment on the W case is available at the website of the Judiciary ([http://legalref.judiciary.gov.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=87115&QS=%2B&TP=JU&ILAN=en](http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=87115&QS=%2B&TP=JU&ILAN=en)).

<sup>2</sup> This statement is based on paragraph 1 of the Legislative Council Brief and the Explanatory Memorandum of the Bill.

4. W brought judicial review proceedings to challenge that decision. The challenge failed in the lower courts. Eventually, CFA ruled that while as a matter purely of statutory construction, biological factors are the only appropriate criteria for assessing the sex of an individual for the purposes of marriage under section 40 of MO<sup>3</sup> and section 20(1)(d) of MCO<sup>4</sup>, such restrictive construction is inconsistent with, and fails to give proper effect to, the constitutional right to marry protected by Article 37 of the Basic Law ("BL")<sup>5</sup> and Article 19(2) of the Hong Kong Bill of Rights ("HKBOR")<sup>6</sup> under the Hong Kong Bill of Rights Ordinance (Cap. 383). In the judgment, the CFA also made some comments on problems facing transsexuals in other areas of law and treatment of transsexuals who have not undertaken any SRS or have not fully completed SRS. The CFA remarked that the Administration should consider how best to address problems facing transsexuals in all areas of law by drawing reference to overseas practice, such as the Gender Recognition Act 2004 of the United Kingdom ("UK").

5. In its final Order<sup>7</sup> made in the W case on 16 July 2013, CFA allowed the appeal and made the following Declarations —

- (a) that section 40 of MO and section 20(1)(d) of MCO must be read and given effect so as to include within the meaning of the words of "woman" and "female" a post-operative male-to-female transsexual person whose

---

<sup>3</sup> Section 40 of MO provides that—

"(1) Every marriage under this Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage.

(2) The expression "Christian marriage or the civil equivalent of a Christian marriage" implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others."

<sup>4</sup> Section 20(1)(d) of MCO provides that—

"A marriage which takes place after 30 June 1972 shall be void on any of the following grounds only ... (d) that the parties are not respectively male and female."

<sup>5</sup> Article 37 of BL provides that—

"The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law."

<sup>6</sup> Article 19(2) of HKBOR provides that—

"The right of men and women of marriageable age to marry and to found a family shall be recognized."

<sup>7</sup> The full judgment on Orders and Costs is available at the Judiciary's website ([http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_frame.jsp?DIS=88072&currpage=T](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_frame.jsp?DIS=88072&currpage=T)).

gender has been certified by an appropriate medical authority to have changed as a result of SRS; and

- (b) that W is in law entitled to be included as a "woman" within the meaning of section 40 of MO and section 20(1)(d) of MCO and is accordingly eligible to marry a man.

CFA has also suspended the effect of the above two Declarations for a period of 12 months (i.e. until 16 July 2014) to allow time for any corrective legislative amendments to be considered. In regard to the suspended Declarations, CFA made the following remark —

"We accept that the suspended Declarations have ramifications going beyond the specific circumstances of the appellant, making it desirable that the Government and Legislature be afforded a proper opportunity to put in place a constitutionally compliant scheme capable of addressing the position of broader classes of persons potentially affected. We consider the 12-month suspension appropriate."<sup>8</sup>

## **The Bill**

6. According to the long title of the Bill, it amends MO to provide that, for determining the sex of the parties to a marriage, a person who has received a full SRS is to be treated as being of the sex to which the person is re-assigned, and to provide for related matters.

## **The Bills Committee**

7. At the House Committee meeting on 21 March 2014, Members agreed to form a Bills Committee to study the Bill. Mr IP Kwok-him and Mr Dennis KWOK were elected as Chairman and Deputy Chairman of the Bills Committee respectively. The membership list of the Bills Committee is in **Appendix I**.

8. The Bills Committee has held a total of nine meetings to study the Bill. The Bills Committee has met with relevant medical professionals

---

<sup>8</sup> Paragraph 7 of the Court's judgment on Orders and Costs.

(**Appendix II**) at three of these meetings to gain better understanding on the treatment services for persons with gender identity disorder/gender dysphoria and has received a briefing by representatives of the Inter-departmental Working Group on Gender Recognition ("IWG") formed by the Administration in January 2014 to study issues relating to gender recognition. The Bills Committee has also received views from 94 organizations and individuals at two of its meetings. The names of organizations and individuals that/who have given oral representations of their views to the Bills Committee are in **Appendix III**. A total of 2 727 written submissions on the Bill have been received.

## **Deliberations of the Bills Committee**

### Requirement of full SRS

#### *Justifications for the full SRS requirement*

9. The proposed new section 40A(1) of MO provides that, for construing the references to "man" and "woman" in section 40(2) of MO and the references to "male" and "female" in section 20(1)(d) of MCO, a person who has received a full SRS as defined in the proposed new section 40A(2) of MO is treated as being of the sex to which the person is re-assigned after the surgery. Members have enquired about the rationale for adopting full SRS as the requirement for a transsexual person to qualify as a person in the re-assigned sex for the purposes of marriage and the position of transsexual persons who, due to medical, psychological or other special reasons, could not receive full or any SRS.

10. The Administration has explained that the purpose of the Bill is to implement the CFA's Order made in the W case. The CFA has conclusively decided in the case that the Appellant, a transsexual who has received full SRS, and others in the same situation, should qualify as a person of the post-operative re-assigned sex for the purposes of marriage. As regards treatment of transsexuals who have not (yet) received full SRS, the question is, amongst other issues relating to gender recognition, left open in the CFA's judgment. To follow up these issues left open by CFA, the Administration has set up IWG, chaired by the Secretary for Justice ("SJ"), which has commenced work since January 2014 to conduct a comprehensive review of the issues concerning the rights of transsexual persons in Hong Kong, with a view to making recommendations to the Administration on possible legislation and incidental administrative measures that may be required to protect the rights of transsexual persons in all legal contexts. Whether or not legislation taking reference from the

UK's Gender Recognition Act 2004 is suitable for Hong Kong will be considered in that context.

11. Some members including Ms Cyd HO, Mr LEUNG Kwok-hung, Mr CHAN Chi-chuen and Dr Fernando CHEUNG have queried whether the full SRS requirement proposed in the Bill is too high a threshold. They have pointed out that some transsexual persons are not willing to undergo full or any SRS for various reasons such as preference for less extensive treatment, while some are not able to do so as they are medically or psychologically unable to cope with the surgeries. These members are concerned that the full SRS requirement proposed in the Bill would have the effect of coercing transsexual persons to undergo full SRS before they are granted the right to marry in their preferred gender, which, in their view, would constitute a form of torture, or cruel and inhuman treatment. They have queried whether such a requirement would violate HKBOR or international human rights laws including the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

12. Dr Priscilla LEUNG is of the view that the scope of CFA's Order applies only to transsexual persons in the same situation as W who have gone through full SRS. She has expressed objection to broadening the scope of the Bill to the effect that transsexual persons who have not received full or any SRS are qualified as persons in the re-assigned sex for the purpose of marriage. In her view, it may open up legal challenges on the definition of man and woman in different legal contexts. Dr LEUNG has stressed that CFA's judgment in the W case does not change the existing law on the institution of marriage in Hong Kong, which is based on the monogamous union of one man and one woman. She has expressed concern about the implications on the existing institutions of marriage and family if transsexual persons who have completed only part of SRS or have not undergone any SRS are allowed to marry in their preferred gender.

13. Some members including Ms Starry LEE and Mr CHAN Kin-por consider that a balance should be struck between the rights of transsexual persons and the rights of other affected persons in dealing with various issues relating to gender recognition. Mr CHAN is of the view that the degree of social acceptance of transsexual persons is an important factor which needs to be taken into account and he is concerned whether a low threshold will receive social acceptance.

14. The Administration has stressed that CFA's judgment and Order in the W case were concluded with regard to W's situation, i.e. a person who has received full SRS. On the question of whether transgender and other transsexual persons who have not received full SRS may marry in their self-identified sex, relevant legal matters have not yet been considered in detail by CFA and hence there is no conclusion thereon at this stage. As the purpose of the Bill is only to implement the CFA's Order made in the W case, the recommendations in the Bill do not restrict the existing rights of transgender and transsexual persons who have not received full SRS. In the view of the Administration, the Bill is in compliance with BL, HKBOR and other international conventions applicable to Hong Kong.

15. The Administration has further advised that according to the *Standard of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* by the World Professional Association for Transgender Health, 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 their ongoing anxiety and distress. For patients treated by 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 which would be proceeded only with patients' consent after thorough consideration. The Administration does not consider that anyone would be coerced into receiving the surgeries with these safeguards in place.

16. Some members including Mr Ronny TONG, Dr Fernando CHEUNG and Mr CHAN Chi-chuen have pointed out that while CFA has held in its judgment that post-operative transsexual persons should be qualified to marry in their re-assigned sex, it has not specified that only post-operative transsexual persons would be so qualified. These members have also queried whether it is necessary to specify full SRS as the only qualification criterion in the Bill.

17. Referring to paragraph 124 of CFA's judgment, Mr Paul TSE has expressed concern that the proposed new section 40A(1) as currently worded may have the effect of limiting the right of transsexual persons to marry in their preferred sex to only those who have completed full SRS. In his view, it is outside the terms of CFA's judgment and may open up further legal challenges. He has queried the need to include the second part of the proposed new section 40A(1), which reads ".....", and the references to man and woman in section 40(2), and the references to male and female in section 20(1)(d) of MCO are construed accordingly".

18. The Administration has advised that in the W case, CFA has declared, among other things, that section 20(1)(d) of MCO and section 40 of 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 SRS. Given that the relevant sections of MO and MCO have been conclusively declared by CFA as incompatible with Article 37 of BL and Article 19(2) of HKBOR, the Administration has the obligation to state clearly the meaning of man and woman in these provisions, so as to align the statute law with CFA's judgment.

19. Ms Cyd HO and Mr CHAN Chi-chuen have further questioned the need for the Administration to specify the requirement of full SRS in the long title of the Bill, which has narrowed the scope for moving amendments to the Bill in respect of the full SRS requirement. The Bills Committee notes that Ms Cyd HO has indicated her intention to move Committee stage amendments ("CSAs") to the Bill. Ms HO has provided for the consideration of the Bills Committee two sets of CSAs which seek respectively (a) to delete the full SRS requirement in the proposed new section 40A and providing instead that a person is to be regarded as being of the gender with which the person identifies if expert medical or psychological evidence indicates that the person has gender dysphoria and intends to maintain his/her self-identified gender or has undergone or is undergoing some form of psychological, medicinal, hormonal, surgical or other treatment for transitioning to the self-identified gender; and (b) to provide for exemption from the full SRS requirement where it is unreasonable in the circumstances of the case to so require. Mr CHAN Chi-chuen has also indicated his intention to move CSAs to the provisions in the Bill relating to the full SRS requirement. In the view of the Administration, the CSAs proposed by Ms Cyd HO are beyond the scope of CFA's judgment in the W case, and hence are outside the scope of the Bill.

#### *Definition of full SRS*

20. The definition of a full SRS is provided under the proposed new section 40A(2). Under the proposed new section 40A(2)(a), 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 proposed 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.

21. Dr Helena WONG is of the view that the definition of "full SRS" which involves both the removal of a person's original genital organs and the construction of genital organs of the opposite sex is too stringent and onerous and lacks the flexibility to cater for transsexual persons in different situations. She has suggested that consideration should be given to replacing the words "and" with "or" in the proposed new section 40A(2)(a) and (b) so as to make the requirement less onerous for transsexual persons and ameliorate the difficulties faced by them.

22. Mr CHAN Chi-chuen considers the requirement of constructing "some form of penis" under the proposed new section 40A(2)(b)(ii) unclear. Noting from Dr Albert YUEN, Consultant Surgeon of the Ruttonjee and Tang Shiu Kin Hospitals, that the construction of a fully functional penis in a person involves difficult and complicated surgical procedures, Dr Helena WONG is concerned that the surgical procedure for sex-reassignment specified under the proposed new section 40A(2) is particularly burdensome for persons who wish to change from female to male. Members note that the legal adviser to the Bills Committee has sought clarification from the Administration whether the proposed new section 40A(2)(b) would be considered as a form of sex discrimination under Article 14 of the European Convention on Human Rights and Article 22 of HKBOR, in that the requirement of surgery is more disadvantageous and burdensome for people seeking legal recognition of their transition from female to male than male to female.

23. The Administration has reiterated that the main object of the Bill is to amend MO to implement CFA's Order in the W case to clearly reflect the right to marry under BL and HKBOR enjoyed by post-operative transsexual persons who have gone through full SRS as in the case of W. The Administration has further advised that the surgical procedures specified under the proposed new section 40A(2), which are formulated according to the advice of relevant experts in HA, are generally accepted among the medical profession as essential steps of SRS and are in line with international practices. As explained by Dr Albert YUEN to the Bills Committee, for the construction of a penis or some form of a penis in the female-to-male SRS, 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. The extent of surgery ranges from constructing a full size and functional penis which takes multiple operations and involves scarring on other parts of body, to a less functional penis involving fewer operations and lower complications. In



the view of the Administration, 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 already provided the flexibility required. As the definition of "full SRS" in the proposed 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, the Administration considers that the proposed 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, and hence does not constitute any form of sex discrimination under Article 22 of HKBOR.

24. Noting that the Administration has stressed that the purpose of the Bill is to implement the CFA's Order in the W case, which involves sex re-assignment from male to female, Mr CHAN Chi-chuen has enquired about the justification for introducing the proposed new section 40A(2)(b) relating to sex re-assignment from female to male, which appears to be outside the terms of the CFA's Order in the W case.

25. The Administration has pointed out that CFA has held in its judgment<sup>9</sup> 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**. Mr Justice Bokhary NPJ has also indicated in the judgment<sup>10</sup> 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." Similarly, CFA has also held that "the right to marry guaranteed by our constitution extends to the right of a post-operative transsexual to marry in the reassigned capacity. This means... that the legislation concerned would be unconstitutional unless the words of gender therein are read to include gender acquired by sex reassignment surgery."<sup>11</sup> The main object of the Bill is to amend MO to implement the declaration made by CFA to clearly reflect the right to marry under BL and HKBOR enjoyed by post-operative transsexual persons who have gone through full SRS as in the case of W. It is thus considered necessary and appropriate for the Bill to cover the situation of the female-to-male transsexual person, following

---

<sup>9</sup> Paragraph 125 of CFA's judgment in the W case.

<sup>10</sup> Paragraph 210 of CFA's judgment in the W case.

<sup>11</sup> Paragraph 225 of CFA's judgment in the W case.

the principles laid down in the W case.

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

26. Members note that the definition of full SRS under the proposed new section 40A(2) is consistent with the criteria for completion of SRS set out in the existing administrative guidelines for considering applications to change the sex entry on a Hong Kong Identity Card ("HKIC") ("administrative guidelines") issued by the Immigration Department, and that under the proposed new section 40B(2), HKIC is prima facie evidence of the sex of a person for marriage registration. Mr CHAN Chi-chuen is of the view that as the existing administrative guidelines have been working effectively, the Administration should take on board the proposal of the Equal Opportunities Commission ("EOC") of continuing to adopt such administrative guidelines as requirements for gender change instead of stipulating the full SRS requirement in legislation, so as to afford greater flexibility to any future changes to the requirement for gender change in the light of medical advice.

27. The Administration has advised that EOC has proposed not only to provide for the current administrative requirements in the Bill, but also that those requirements be changed to no longer require full SRS. In the Administration's view, the Bill, as it is currently drafted, would be able to provide clear protection in statute law for the right of transsexual persons who have received full SRS to marry and would assist the relevant parties to understand the legal requirements. Whether persons who have not received full SRS may marry in the sex of their choice is a gender recognition issue on which CFA did not decide in the W case. IWG would consider, amongst other things, the question of qualification criteria (including medical and evidential requirements) for a suitable gender recognition system for Hong Kong. The existing administrative guidelines would be maintained at the present stage pending the completion of the IWG's study.

*SRS performed outside Hong Kong*

28. Members have sought clarification whether SRS performed outside Hong Kong and medical proof issued by overseas medical authorities would be recognized for the purpose of ascertaining a person's gender in marriage registration; and if so, whether the surgical requirements are the same as those specified in the proposed new section 40A(2).

29. The Administration has advised that while a person can receive SRS in Hong Kong or overseas, he/she must produce medical proof certifying that the surgeries he/she has received have met the requirements stipulated in the proposed new section 40A(2), so as to be qualified as a person in the re-assigned sex for the purposes of marriage. A person who has not received any or full SRS as defined under the proposed new section 40A(2), even if he/she has legally changed his/her gender in places outside Hong Kong, will not meet the requirements under MO, upon passage of the Bill. The medical proof issued by overseas doctors would be accepted if it contains the relevant information supporting the application including the doctor's medical qualification, place where the medical qualification was obtained, other contact information of the doctor and the surgical procedures performed. Where there are doubts about the medical proof issued by an overseas doctor, the Registrar of Marriages may consult HA for medical opinions. 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.

Impact of legally recognized gender change on subsisting marriage and connected legislation

30. Members have enquired about the legal effect of gender change on the validity of the marriage of a person who has subsequently undergone SRS and whether the gender change would provide a ground for annulment of the marriage.

31. The Administration has advised that based on the legal advice it has received, a marriage should not automatically become void under section 20(1)(d) of MCO solely on the ground that one of the parties to the marriage has subsequently (i.e. after celebration in accordance with all requirements under MO) received full SRS. However, a married person who has subsequently undergone full SRS after marriage (or the other party to the marriage or on joint application by both parties) can apply for dissolving the marriage if he or she or they wish to do so.

32. Mr Dennis KWOK has drawn the attention of the Bills Committee and the Administration to a different view taken by the Hong Kong Bar Association ("HKBA") on the effect of gender change on an existing marriage. In the view of HKBA, when a party to an existing marriage has subsequently gone through full SRS to satisfy the proposed new section

40A, the marriage will be rendered void under section 20(1)(d) of MCO<sup>12</sup> (with its use of the present tense "are not") and thereby nullified. To avoid any doubt, Mr KWOK has informed the Bills Committee of his intention to move CSAs to the proposed new section 40A to make it clear that an existing marriage will not automatically be rendered void when a party to a marriage has subsequently received a full SRS.

33. Mr Tommy CHEUNG and Mr Christopher CHUNG have expressed concern that if an existing marriage remains valid when one of the parties to the marriage has subsequently completed full SRS and changed his/her gender, the marriage will in effect become one between two males or two females, i.e. a same sex marriage. Members have also sought clarification from the Administration how it seeks to address the legal issues arising from a married person receiving SRS (such as the impact on existing spousal rights and guardianship) and other legal issues relating to the rights of transsexual persons (such as succession, right under the small house policy and pension benefits).

34. The Administration has explained that in Hong Kong there is all along no prohibition on married persons to undergo SRS. The Bill seeks to deal only with the recognition of the gender identity of an unmarried post-operative transsexual person at the point of marriage registration for the purposes of MO, which provides for matters connected with marriage registration only. Matters which take place after a marriage is registered in accordance with the provisions and requirements under MO fall outside the scope of MO and the Bill (and the CFA's Order). The legal impact of a married person receiving SRS (together with the need, if any, to implement legislative reform) and problems facing transsexuals in other areas of law are issues to be considered by IWG among other gender recognition issues. The Administration has also stressed that CFA has made it clear that nothing in its judgment on the W case is intended to address the question of same sex marriage.

#### Prima facie evidence of the sex of a person for the purpose of marriage registration

35. The proposed new section 40B provides that, in the absence of evidence to the contrary, the sex of a party to a marriage as shown on an identification document (i.e. HKIC or a valid travel document) of the party at the time of the marriage is presumed to be the sex of the party.

---

<sup>12</sup> Section 20(1)(d) of MCO provides that —

"A marriage which takes place after 30 June 1972 shall be void on any of the following grounds only ... (d) that the parties are not respectively male and female."

Currently, for a person who has received full SRS, he/she would submit the medical certificate certifying the surgeries that he/she has received to the Commissioner of Registration to apply for a change of the sex entry on his/her HKIC. Since the sex on a person's HKIC would have been changed to reflect his/her re-assigned sex if he/she has received full SRS, the need for him/her to present the medical certificate to the Registrar of Marriages again when he/she subsequently wishes to marry under MO is obviated by the presumption in the proposed new section 40B.

36. Noting that under the proposed new section 40B(2), a valid travel document would be prima facie evidence of the sex of a person for the purposes of marriage, some members have expressed concern whether a person holding a foreign passport who has legally changed his/her sex overseas but has not completed full SRS can marry in his/her re-assigned sex in Hong Kong.

37. The Administration has explained that the personal identification document of a person would be prima facie evidence of the sex of the person at the time of marriage registration, unless there are reasonable grounds for any doubt. If in doubt (e.g. the record of the Immigration Department indicates that the person is of a different sex), the Registrar of Marriages would request a party to an intended marriage to provide medical proof issued by qualified medical professional certifying that he/she has received full SRS.

38. Mr CHAN Chi-chuen has pointed out that a transsexual person who has performed full SRS and changed the sex entry on his/her HKIC may no longer meet the full SRS requirement when he/she subsequently marries (e.g. a female-to-male transsexual may have his penis or some form of penis removed either intentionally or after an accident after he has changed the sex entry on his HKIC). Noting that HKIC is prima facie evidence of the sex of a person at marriage registration, members have sought clarification whether such a transsexual person would still be eligible to marry in his/her re-assigned sex and whether there is any requirement of certification by an appropriate medical authority that the full SRS criterion is met before marriage registration.

39. The Administration has explained that a transsexual person has to submit medical proof showing that he/she has met the full SRS requirement when he/she applies for a change of sex entry on his/her HKIC. As stated in the CFA's judgment, SRS involves irreversible changes to a person's physical state. In cases where a transsexual person who has completed full SRS subsequently becomes physically incapacitated and has to have his/her genital organ(s) removed (for

example, a female-to-male transsexual may have his penis amputated after an accident), his/her eligibility to marry in his/her re-assigned sex should not be affected. The Administration has further explained that under MO, marrying parties (regardless of nationality and residency) who wish to solemnize a marriage in Hong Kong will have to give a Notice of Intended Marriage to the Registrar of Marriages and make an affidavit under section 12 of MO to affirm, among others, that there is no lawful hindrance to the marriage. In accordance with the Bill, the Administration intends to amend the affidavit to specify the legal requirement under MO that every marriage must be the union of one man and one woman, and to set out that for persons who have received full SRS, they are to be treated as being of the sex to which they are re-assigned after the surgery, so as to make it clear to the marrying parties the need to meet such legal requirements at the point of marriage registration<sup>13</sup>.

#### Whether religious organizations may refuse to celebrate marriages of post-operative transsexuals

40. Members note the concern expressed by some religious bodies that, upon passage of the Bill, if a minister refuses to celebrate a marriage, when the minister reasonably believes that one of the parties to the marriage is a post-operative transsexual, such act may be considered to be discriminatory under the Disability Discrimination Ordinance (Cap. 487) ("DDO") and/or the Sex Discrimination Ordinance (Cap. 480) ("SDO"). These religious bodies have requested that an exemption provision be added to the Bill along the line of section 6A(3A) of the UK's Civil Partnership Act to the effect that religious bodies would not be obliged to celebrate marriage for a post-operative transsexual if they do not wish to do so. Members consider it necessary for the Administration to address the legal concern raised by the religious bodies. Mr Tommy CHEUNG has further sought clarification whether a civil celebrant of marriages who refuses to celebrate marriages under MO for post-operative transsexuals on religious ground may also be considered to be discriminatory act under DDO and/or SDO.

41. The Administration has explained that since DDO has only specified some objective criteria on the definition of disability, it is not certain whether a person with gender identity disorder who has subsequently received full SRS is protected under DDO without considering whether the person's physical and psychological status would qualify the objective criteria of disability under section 2 of DDO. In considering whether religious bodies or civil celebrants would violate section 26 of DDO should they refuse to celebrate marriages of

---

<sup>13</sup> The proposed revised affidavit provided by the Administration is set out in LC Paper No. CB(2)1841/13-14(01).

post-operative transsexuals, apart from determining whether a person falls under the definition of disability under DDO having regard to the specific case circumstances, there is also a need to consider other provisions of DDO, including whether the body/individual concerned has involved in provision of goods, services and facilities as defined in DDO, whether it can be established that the refusal is based on religious reasons and/or the person's disability, and whether conducting marriage celebration for that person would constitute unjustifiable difficulty to the body/individual concerned. It is therefore difficult to come to a conclusion without considering the facts of each individual case. As regards SDO, the Administration has advised that SDO stipulates that it is necessary to compare the cases of persons of different sex such that the relevant circumstances in the one case are the same, or not materially different, in the other, when deciding whether an act constitutes sex discrimination. It is considered as sex discrimination if, on the ground of one's sex, he/she was being treated less favourably than a person of the other sex. In the Administration's view, 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 SDO.

42. The Administration has further advised that MO does not compel any licensed places of public worship to celebrate (or not celebrate) marriages involving any persons. The right to marry of post-operative transsexuals would not be affected for the reason that he/she cannot wed in a specific licensed place. As the suggestion for including an exemption clause concerns the applicability of anti-discrimination laws which involves complicated and controversial issues, the Administration does not consider it appropriate to deal with this matter in the context of the Bill. The Administration will draw these concerns, amongst other views on gender recognition issues raised by CFA, to the attention of IWG for consideration. Members note that Mr Tommy CHEUNG has indicated his intention to propose CSAs to the Bill to provide an exemption provision for religious bodies to the effect that ministers are not obliged to celebrate marriage for a post-operative transsexual person on the ground of religious beliefs.

#### Amendments to various Forms under Schedule 1 to MO

43. Members note that the Administration has proposed to make technical amendments to various Forms in Schedule 1 to MO to change the terms a "widow" (寡婦) or a "widower" (鰥夫) to the gender neutral term a "widowed person" (喪偶), on the ground that a widowed person with a full SRS and intends to re-marry may not be appropriately described as a

"widow" (寡婦) or a "widower" (鰥夫). Mr CHAN Chi-chuen has sought clarification whether it is more appropriate to use the term "喪偶者" instead of "喪偶" as the Chinese rendition of the term "widowed person", given that the term "喪偶" is an adjective rather than a noun, so as to better tally with the original Chinese terms of "寡婦" and "鰥夫". The Administration has explained that the term "喪偶" is used so as to tally with the parts of speech of the other Chinese terms i.e. "未婚" and "離婚" used in the relevant Forms. According to the Administration, the term "喪偶" has also been used in other ordinances to refer to a person whose spouse has deceased.

#### Overall approach to follow up the CFA's judgment

44. Some members have expressed concern about the approach taken by the Administration in implementing CFA's Order. Ms Cyd HO and Mr CHAN Chi-chuen have expressed dissatisfaction that the Administration, in introducing the proposed amendments to MO, has merely adopted a minimalist approach in implementing the CFA's Order in the W case without paying due regard to the judgment as a whole, instead of introducing a gender recognition ordinance to thoroughly address the various issues associated with gender recognition which carry wide-ranging policy implications. Mr CHAN Chi-chuen and Dr Fernando CHEUNG are concerned that the Bill in its present form, if passed, would narrow the room for IWG's study and recommendations on the issue of gender recognition, in the light of the full SRS requirement stipulated in the Bill.

45. Some other members including Mr YIU Si-wing, Mr KWOK Wai-keung and Mr Martin LIAO are of the view that the Bill can afford clear legal protection to the marriage rights enjoyed by post-operative transsexual persons who are in the same position as W, as well as ensuring clarity in statute law and compliance of the relevant statutory provisions with BL and HKBOR in accordance with CFA's judgment. They consider that given the controversial and wide ranging nature of the issues relating to gender recognition, such issues should be carefully considered by IWG, the legislature and the society at large, and it is more appropriate that they be considered outside the scope of the current legislative exercise. Mr Paul TSE has stressed that it is not possible for the Administration and the Legislative Council ("LegCo") to put in place legislation addressing the complicated and wide ranging issues relating to the rights of transsexual persons within the 12-month suspension period granted by CFA.



46. The Administration has advised that it attaches great importance to the decision and recommendations of CFA in the W case and has taken proactive follow-up actions on two fronts in parallel. First, with the CFA's judgment, the Administration has an obligation to introduce 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 SRS. This is consistent with the rule of law. Second, in response to CFA's recommendations, the Administration has set up IWG to consider legislation and incidental administrative measures that may be required to protect the rights of transsexual persons in all legal contexts. The Administration considers that the two-pronged approach it has adopted is prudent and pragmatic to follow up on the CFA's judgment in the W case in a holistic manner.

47. The Bills Committee has received a briefing from representatives of IWG on the role, scope of work and work plan of IWG. Members note that IWG plans to focus its study first on recognition issues (including matters relating to transsexual persons as well as the laws and schemes on gender recognition in other jurisdictions), then on post-recognition issues (including the impact of gender recognition on existing laws and any required legislative or procedural reform) if an agreement is reached that Hong Kong should establish a gender recognition scheme. IWG will engage the assistance of relevant experts and professionals, and consult stakeholders and the public as and when appropriate. Members also note that IWG commenced work in January 2014 and aims to produce an initial report on its work, making such recommendations for reform as and where appropriate, in about two years' time. The Administration has stressed that it has no stance on issues relating to gender recognition pending the recommendations of IWG.

48. Mr Dennis KWOK and Mr LEUNG Kwok-hung are of view that given the controversies over the Bill and the study currently being undertaken by IWG, the Administration should consider including in the Bill a sunset clause to the effect that the Administration would review the legislation upon completion of the study by IWG. Mr CHAN Chi-chuen considers that the Administration should provide a timetable for drawing up a gender recognition ordinance in Hong Kong.

49. Members note that Mr Dennis KWOK would propose CSAs to the Bill to include a sunset clause to the Bill to specify that the proposed new sections 40A and 40B shall expire on 31 July 2017 and that SJ shall conduct a public consultation exercise on issues concerning the rights of transsexual persons and submit to LegCo before 1 August 2017 a report on the results of the consultation with recommendations on any legislative

proposals arising therefrom. Dr Priscilla LEUNG has expressed objection to the proposed incorporation of a sunset clause into the Bill, on the ground that it would create uncertainty and confusion on the requirements under MO. She also considers it unlikely that the community can reach any consensual view on gender recognition issues in three years' time.

50. The Administration does not consider it appropriate to include a sunset clause in the Bill, as it would render the statute law incongruous with the CFA's Order in the W case after the expiry date specified in the sunset clause, creating confusion to the marrying parties and the public. The Administration has assured members that IWG will conduct a comprehensive study and public consultation on the broad issues involved and it is considered not necessary nor appropriate to make statutory provisions for such review and consultation.

### Urgency of the Bill

51. Members have sought clarification from the Administration on the legal implications of the CFA's Order made in the W case in the event that the scrutiny of the Bill is not completed before 16 July 2014 (i.e. the expiry of the 12-month suspension of the declarations given by CFA in its Order), or that the Bill is vetoed by LegCo; and the follow-up work to be carried out by the Administration under these two scenarios.

52. The Administration has explained that the Order of CFA in the W case would come into effect upon expiry of the suspension on 16 July 2014, irrespective of whether the Bill has been passed by LegCo then. Under common law principles, the judgment has become case law and is part of the laws of Hong Kong. Its effect would not be affected by the fact that the Bill is pending passage or has been vetoed. Hence, regardless of whether the Bill is passed or not, W and other transsexuals in the same situation, i.e. one who has received full SRS, may marry in his or her re-assigned sex an opposite-sex partner upon expiry of the suspension in accordance with the CFA's judgment. The Registrar of Marriages would also perform marriage registration of those persons under MO as decided by CFA. Nonetheless, the Administration sees the need to pass the Bill in a timely manner, so as to ensure clarity in statute law to provide protection to the marriage rights enjoyed by post-operative transsexual persons under the law and render the law more accessible to all parties concerned (including the marrying parties, civil celebrants and the public).

53. Some members are of the view that the Administration should consider making an application to CFA for an extension of the suspension

period if the scrutiny of the Bill cannot be completed before 16 July 2014. The Administration has pointed out that although CFA has, in its Order, granted both parties the liberty to apply in relation to the period of suspension, the Court has also made it clear that it must not be assumed that any application for an extension would be viewed favourably in the absence of compelling reasons. Furthermore, an extension of the suspension period, if granted, would mean that the Appellant and others in the same position as her could still not marry in their re-assigned sex during the extended suspension period. According to the Administration, it has no plan to apply for an extension of the suspension period.

### **Resumption of Second Reading debate**

54. Some members are opposed to the resumption of the Second Reading debate on the Bill within the current legislative session. These members consider that the Bill should not be enacted in haste, given the complexity and the need for wide public consultation on gender recognition issues. They take the view that these issues should be considered in a holistic manner, given the fact that the CFA's Order would come into effect after 16 July 2014 regardless of whether the Bill is passed within the current legislative session.

55. Some other members hold different views. They consider that to demonstrate respect to CFA's decision, the Bill which involves straightforward proposals should be dealt with in the current session before the expiry of the suspension period of the CFA's Order. In their view, given the complexity and wide-ranging nature of gender recognition issues, it will take time for the society to have thorough discussion on the issues which should be dealt with outside the scope of the current legislative exercise.

56. The Administration has informed the Bills Committee of its intention to resume the Second Reading debate on the Bill at the Council meeting on 9 July 2014. A vote was taken at the meeting on 17 June 2014 on whether the Bills Committee supported the Administration's proposed resumption date. The Bills Committee decided by a vote of 8 to 5 that the proposed date of resumption be supported.

## **Committee stage amendments**

### CSA by the Administration

57. The Bills Committee notes that the Administration has proposed to introduce a CSA to specify the commencement date of the Marriage (Amendment) Ordinance 2014 as 17 July 2014 (i.e. same as the effective date of the CFA's Order), instead of to be further decided by the Secretary for Security by notice published in the Gazette separately, so as to align the statute law with the CFA's judgment in the W case.

### CSAs by individual members

58. The Bills Committee takes note that Ms Cyd HO and Mr CHAN Chi-chuen have indicated their intention respectively to move CSAs in relation to the full SRS requirement proposed in the Bill as detailed in paragraph 19 above. Mr Dennis KWOK intends to move CSAs to the Bill in relation to the validity of an existing marriage if a party to the marriage has subsequently undergone SRS and to introduce a sunset clause in the Bill, as detailed in paragraphs 32 and 49 above respectively. Mr Tommy CHEUNG has indicated his intention to move CSAs to provide an exemption provision for religious bodies to the effect that ministers are not obliged to celebrate marriage for a post-operative transsexual person as detailed in paragraph 42 above.

59. The Bills Committee has not proposed any amendment to the Bill.

## **Consultation with the House Committee**

60. The Bills Committee reported its deliberations to the House Committee on 20 June 2014.

**Bills Committee on Marriage (Amendment) Bill 2014**

**Membership list**

|                        |   |
|------------------------|---|
| <b>Chairman</b>        | Hon IP Kwok-him, GBS, JP  |
| <b>Deputy Chairman</b> | Hon Dennis KWOK   |
| <b>Members</b>         | Hon James TO Kun-sun<br>Hon Emily LAU Wai-hing, JP<br>Hon Tommy CHEUNG Yu-yan, SBS, JP<br>Hon Ronny TONG Ka-wah, SC<br>Hon Cyd HO Sau-lan<br>Hon Starry LEE Wai-king, JP<br>Hon CHAN Kin-por, BBS, JP<br>Dr Hon Priscilla LEUNG Mei-fun, SBS, JP<br>Dr Hon LEUNG Ka-lau<br>Hon Mrs Regina IP LAU Suk-yea, GBS, JP<br>Hon Paul TSE Wai-chun, JP<br>Hon LEUNG Kwok-hung<br>Hon YIU Si-wing<br>Hon Gary FAN Kwok-wai<br>Hon MA Fung-kwok, SBS, JP<br>Hon Charles Peter MOK<br>Hon CHAN Chi-chuen<br>Hon KWOK Wai-keung<br>Dr Hon Fernando CHEUNG Chiu-hung<br>Dr Hon Helena WONG Pik-wan<br>Hon Martin LIAO Cheung-kong, JP<br>Hon TANG Ka-piu<br>Ir Dr Hon LO Wai-kwok, BBS, MH, JP<br>Hon Christopher CHUNG Shu-kun, BBS, MH, JP<br>Hon Tony TSE Wai-chuen |
|                        | (Total : 27 members)  |
| <b>Clerk</b>           | Ms Amy YU   |
| <b>Legal Adviser</b>   | Mr Stephen LAM  |

**Bills Committee on Marriage (Amendment) Bill 2014**

Medical professionals who had been invited to attend meetings of the Bills Committee

1. Dr Albert YUEN Wai-cheung  
Consultant, Department of Surgery, Ruttonjee and Tang  
Shiu Kin Hospitals
2. Dr HO Pui-tat  
Associate Consultant, Kwai Chung Hospital
3. Dr Greg MAK Kai-lok  
Associate Consultant, Castle Peak Hospital
4. Dr NG Man-lun  
Clinical Co-Director, Academy of Family Therapy
5. Dr HONG Kwai-wah  
Specialist in Psychiatry

**Bills Committee on Marriage (Amendment) Bill 2014**

Organizations/individuals which/who have given oral representation of views to the Bills Committee

1. Hong Kong Youth Alliance
2. Justice Alliance
3. Federation of Parent-Teacher Association of Yau, Tsim, Mongkok Districts Limited
4. Parents' Association of Hong Kong
5. Hong Kong Human Rights Monitor
6. People Power
7. Nu Tong Xue She
8. Rainbow of Hong Kong
9. Rainbow Action
10. Association of World Citizens Hong Kong China
11. Ms CHU Fung-mei
12. Mr WONG Chi-cheung
13. Ms TSE Yuk-ling
14. Equal Opportunities Commission
15. God's Glory Ministry Ltd.
16. Garden Against Turbulence
17. Mr CHEUNG Hon-sing Ray
18. Care for the Well-being of Children

19. Miss HO Yuet-lai, Kathy
20. 愛家護孩家長組
21. 守護傳統婚姻聯盟
22. Christians at the Bar
23. EFCC Yan Fook Church
24. Mr LEUNG Chun-kit
25. Miss WOO Yuk-chu
26. Hong Kong Sex Culture Society Limited
27. Labour Party
28. Parents for the Family Association
29. Mr LEUNG Ho-yin
30. Ms TSUI Sum-yin
31. League of Young Professionals
32. 維家愛苗行動
33. Ms WONG Fung-ping
34. Dr Stephen John Winter, WPATH
35. Amnesty International Hong Kong
36. Mr LEUNG Siu-fai
37. Miss YU King-yan, Queenie
38. Biases Concern
39. Miss NG Wing-yan
40. Justice Family



41. Gender Rights Watch
42. BigLove Alliance
43. Transgender Resource Center
44. Action Q
45. Pink Alliance
46. Society for the Preservation of the Culture of Chinese Family
47. Mr CHOW Wang-ngai
48. Social Value Defense's Alliance
49. Family Value Foundation of Hong Kong Limited
50. Mr HUONG Cheong-fai
51. 護家愛孩同盟
52. The Society for Truth and Light
53. Ms FONG Lai-hung
54. 同心同行家長組
55. Prof KWAN Kai-man
56. Dr HONG Kwai-wah
57. Family School Sodo Concern Group
58. Ms LAW Ka-chun, Priscilla
59. Mr FUNG Kin-shing
60. Hong Kong Christian Institute
61. Parents Concern
62. Mr CHAN Ping-lung
63. Life Transformer

64. Ms CHEUNG Wai-ping
65. Ms Anna CHOW
66. 關注性傾向條例小組
67. China Hong Kong Federation of Youth Culture
68. Diocesan Pastoral Commission for Marriage and the Family
69. Gender Concerns Hong Kong
70. Passing the Torch
71. Lohas Family Culture Concern Group
72. Christian Fellowship of Alice Ho Miu Ling Nethersole Hospital
73. SME Global Alliance
74. Christian Doctor Network
75. 捍衛傳統家庭觀念家長聯盟
76. Hong Kong Greater China SME Alliance Association
77. 關注兒童成長組織
78. 愛家愛夫賢妻會
79. 幼兒教育家長聯盟
80. 反對性小眾特權化關注組
81. 基督教幼兒教育家長協會
82. 傳統道德網絡大聯盟
83. 新世代價值觀網絡監察組織
84. 兩性健康研究關愛協會

85. 幼兒健康研究關愛協會
86. 關注青少年成長協調會
87. 維護傳統婚姻家庭核心大聯盟
88. Mr LAM Chung-wai, Alex
89. Dr LAI Hak-kan
90. Dr CHAN Chun-yee, Thomas
91. Ms CHIU Kit-ching
92. Healthy Family
93. Liberal Party Ban Gay Marriage Hong Kong
94. 道德倫理關注組