

II. REPORT

The date of First Reading of the Bill is 19 March 2014. Members may refer to the LegCo Brief (File Ref.: SB CR 1/3231/13) issued by the Security Bureau on 26 February 2014 for background information.

Object of the Bill

2. To amend the Marriage Ordinance (Cap. 181) (MO) to provide that, for determining the sex of the parties to a marriage, a person who has received a full sex re-assignment surgery (SRS) is to be treated as being of the sex to which the person is re-assigned, and to provide for related matters.

Background

3. According to paragraph 1 of the LegCo Brief, the Bill is to implement the Court of Final Appeal (the Court)'s Order made in the case of *W v Registrar of Marriages* (FACV 4 of 2012) (the W case).

The W case

4. W is a male-to-female transsexual person who has successfully undergone SRS. She and her male partner wished to get married. However, the Registrar of Marriages decided that she did not qualify as "a woman" under MO¹ and the Matrimonial Causes Ordinance (Cap. 179) (MCO)², so that there was no power to celebrate a marriage between her and her male partner.

5. W brought judicial review proceedings to challenge that decision. The challenge failed in the lower courts. Eventually, the Court ruled that while as a matter purely of statutory construction, biological factors were the only appropriate criteria for assessing the sex of an individual for the purposes of marriage under section 40 of MO and section 20(1)(d) of MCO, such restrictive construction is inconsistent with, and fails to give proper effect to, the

¹ 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."

² 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."

constitutional right to marry protected by Article 37 of the Basic Law (BL)³ and Article 19(2) of the Hong Kong Bill of Rights (HKBOR)⁴ under the Hong Kong Bill of Rights Ordinance (Cap. 383). When considering whether an individual like W qualified as a "woman" so as to be entitled to marry a man, the Court held that it ought to consider all circumstances – biological, psychological and social – relevant to assessing that individual's sexual identity at the time of the proposed marriage.

6. On 16 July 2013, the Court made the following Orders⁵, namely, that—

- (a) the appeal is allowed;
- (b) a Declaration be granted 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 with a certificate issued by an appropriate medical authority certifying this change of gender as a result of sex reassignment surgery;
- (c) a Declaration be granted that W was entitled to be included as a "woman" within the meaning of section 20(1)(d) of MCO and section 40 of MO and is accordingly eligible to marry a man; and
- (d) the above two Declarations shall not come into effect until the expiry of 12 months from the date of this Order, i.e. 16 July 2014.

7. In regard to the suspended Declarations, the Court 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

³ 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."

⁴ 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."

⁵ The full judgment on Orders and Costs is at Annex B to the LegCo Brief.

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."⁶

Provisions of the Bill

8. MO is amended by adding the new sections 40A and 40B.

9. The 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 is treated as being of the sex to which the person is re-assigned after completion of the surgery. Under the new section 40A(2) a full SRS is a surgical procedure involving removal of the person's genital organs and construction of organs of the opposite sex.

10. The new section 40B provides for a presumption about the sex stated on a person's identification document at the time of the person's marriage.

11. Further, Clause 4 of the Bill proposes to replace all references to "widower" and "widow" in the Certificate of Registrar of Marriages and Certificate of Marriage in Schedule 1 to MO with "widowed person".

12. The Bill, if passed, would come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

Enquiries by the Legal Service Division (LSD)

13. LSD has made enquiries with the Administration, among others, as to whether it is necessary, for the purposes of better and effective implementation of the Order by the proposals in the Bill, to introduce new legislation or legislative amendments to certain areas of the law to deal with matters such as the impact of a legally recognized gender change on existing marriages, existing spousal rights, dissolution of marriages, children's rights, pension and succession.⁷

⁶ Paragraph 7 of the Court's judgment on Orders and Costs.

⁷ The Court invited the legislature to consider the impact of a legally certified gender change on existing marriages, existing spousal rights and duties, and children's rights at paragraph 141 of the judgment.

14. In reply, the Administration has stated that "as regards comments made by the CFA [Court of Final Appeal] on problems facing transsexuals in other areas of law and treatment of persons who have not received any or full SRS in these areas, they involve complicated legal, medical and social issues, carrying wide-ranging policy implications." The Administration has also stated that an inter-departmental working group on gender recognition (IWG) was established on 13 January 2014 to "consider legislation and incidental administrative measures that may be required to protect the rights of transsexual persons and to make such recommendations for reform as may be appropriate." The Administration has further stated that the IWG had already commenced work, and the possible legal impact of a married person receiving SRS (together with the need, if any, to implement legislative reform), as illustrated in LSD's enquires, was an issue to be considered by the IWG.

Public Consultation

15. There was no separate consultation other than the consultation with the Panel on Security.

Consultation with LegCo Panel

16. The Panel on Security was briefed on 7 January 2014 on the Administration's follow-up actions to the Court's judgment in the W case. Members generally supported the proposed legislative amendments to MO concerning marriage registration by post-operative transsexual persons in Hong Kong. Members had enquired the validity of marriage of a person who had subsequently undergone full SRS and the impact of the legislative amendments on those who had not undergone full SRS. Members also noted that the Administration had taken into account the Court's views and proposed to establish a high level inter-departmental working group to undertake a detailed study on gender recognition.

Submission received upon gazettal of the Bill

17. On 12 March 2014, the Secretariat received a submission from the Centre for Medical Ethics and Law, Faculty of Law of the University of Hong Kong on the Legal Status of Transsexual and Transgender Persons in Hong

Kong.⁸ The submission consists of findings on what the requirements for a change of the legal sex/gender should be and observations on the way forward for Hong Kong for such change.

Conclusion

18. The proposals in the Bill involve the right to marriage protected by Article 37 of BL and Article 19(2) of HKBOR and would impact on spousal rights, dissolution of marriages, children's rights, a widowed person's rights to pension, etc. Members are recommended to form a Bills Committee to study the legal and policy aspects of the Bill in detail.

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LS/B/6/13-14

⁸ The Submission was circulated to Members of the House Committee vide LC Paper No. CB(2)1052/13-14(01) on 14 March 2014.