

For discussion
on 7 January 2014

Legislative Council Panel on Security

**Follow up on the Court of Final Appeal order
in the Judicial Review case
*W v Registrar of Marriages (FACV 4/2012)***

PURPOSE

This paper briefs Members on the Administration's follow up actions in the light of the Court of Final Appeal (CFA)'s order in the judicial review case of *W v Registrar of Marriages (FACV 4/2012)* (the W Case) made on 16 July 2013, concerning marriage registration by post-operative transsexual persons in Hong Kong.

BACKGROUND

2. The Applicant in the W Case ("W") is a post-operative male-to-female transsexual person who has undergone full sex reassignment surgery (SRS) at a hospital managed by the Hospital Authority (HA) in Hong Kong and the sex entry of her Hong Kong Identity Card (HKIC) was changed to "female". She and her male partner wished to get married in Hong Kong but the Registrar of Marriages refused to celebrate their marriage under the Marriage Ordinance (MO) (Cap. 181), taking the view that, for the purpose of marriage, the sex of a party referred to biological sex by birth.

3. The Applicant brought judicial review proceedings to challenge the Registrar's decision above. Both the Court of First Instance and Court of Appeal dismissed the Applicant's application, upholding the Registrar's decision that the Applicant did not qualify as "a woman" under the MO and the Matrimonial Causes Ordinance (MCO) (Cap. 179). The CFA allowed the Applicant's appeal, ruling that, as a matter purely of statutory construction, the Registrar was correct in construing section 40 of the MO, which provides that every marriage under the Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage, implying 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, that biological factors were the only appropriate criteria for assessing the sex of an individual for the purpose of marriage (the “construction” issue). In other words, a male-to-female transsexual should still be considered a “man” under the existing MO, even after completion of full SRS. However, in adopting the above restrictive criteria, the CFA held that the provision is unconstitutional because it is inconsistent with, and fails to give proper effect to, the constitutional right to marry protected by Article 37 of the Basic Law¹ (BL 37) and Article 19(2) of the Hong Kong Bill of Rights² (HKBOR 19(2)) (the “constitutional” issue).

4. The CFA judgment on both issues applies equally to section 20(1)(d) of the MCO, which provides, amongst other things, that a marriage shall be void³, among other things, on the ground that the parties (to the marriage) are not respectively male and female (at the time of marriage registration).

5. The CFA held that “a transsexual in W’s situation, that is, one who has gone through full SRS⁴, should in principle be granted a declaration that, consistently with BL 37 and HKBOR 19(2), she is in law entitled to be included as ‘a woman’ within the meaning of section 40 of the MO and section 20(1)(d) of the MCO and therefore eligible to marry a man”. In its final order made on the W Case on 16 July 2013 (suspended for 12 months until 16 July 2014 to allow time for corrective legislative amendments to be considered), the CFA granted a Declaration that section 40 of the MO and section 20(1)(d) of the MCO 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.

6. At present, persons with Gender Identity Disorders in Hong Kong having received hormonal treatment and gone through real-life

¹ Article 37 of the Basic Law provides that the freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law.

² Article 19(2) of the HKBOR provides that the right of men and women of marriageable age to marry and to found a family shall be recognized.

³ A marriage that is void in law is taken as not having taken place and no status of matrimony as ever having been conferred.

⁴ In his affirmation made on 28 January 2010 in relation to the W case, the Consultant surgeon and the Chief of Surgical Service of the Ruttonjee Hospital of the HA affirmed that insofar as the practice in Hong Kong is concerned, a person should have **removed the original genital organs and constructed some form of genital organs of the opposite sex** in order to be provided with the certificate that he/she has undergone SRS. These procedures as essential steps of the SRS are generally accepted among the medical profession.

experience in the preferred sex may be recommended for undergoing SRS in public hospitals under the HA. Persons who have undergone full SRS (i.e. removal of the original genital organs and construction of some form of genital organs of the opposite sex) will be issued a medical certificate certifying that they should be recognized as a person of the reassigned sex. Based on the medical certificate, the persons concerned will be able to change their HKIC to reflect their reassigned sex. Under Regulations 18(1)(a) and 19 of the Registration of Persons Regulations (Cap. 177A), any person who, without reasonable excuse, fails to report a change of particulars (including his or her sex) previously submitted for the purpose of registering and applying for an HKIC is guilty of an offence liable to a fine at Level 3 and imprisonment for one year. The Administration will maintain the existing administrative guidelines for applications to change the sex entry in the HKIC, pending the study mentioned in paragraphs 11 and 12 below.

LEGISLATIVE PROPOSAL

7. To implement the CFA's order within the 12-month period, legislative amendment to the MO is required to provide that, for the purpose of marriage registration under the Ordinance, a person who has undergone full SRS (i.e. removal of the original genital organs and construction of some form of genital organs of the opposite sex) shall be identified as being of the sex to which the person has been reassigned.

8. As explained in paragraph 6 above, transsexual persons in Hong Kong who have undergone full SRS are able to have the sex entry on the HKIC changed to reflect their post-operative reassigned sex. To obviate the need for transsexual persons who have undergone full SRS and already had the sex entry on the HKIC changed to present the relevant medical certificate to the Registrar at the point of marriage registration, we intend to make it clear in the MO that the sex of any party to a marriage as stated at the time of the marriage in his or her personal identification document shall be *prima facie* evidence of the sex of that party.

9. The amendment as specified in paragraph 7 above will apply to the MCO as well, such that a person who has undergone full SRS and registered marriage in his or her reassigned sex under the MO will also be identified as his or her reassigned sex under section 20(1)(d) of the MCO, lest that marriage shall be void on the ground that the parties are not respectively male and female.

10. The CFA made clear that nothing in the W Case judgment was intended to address the question of same sex marriage. The legislative

proposal above, which is intended to implement the CFA's order made in the W Case, will not affect the existing heterosexual nature of marriage in Hong Kong.

GENDER RECOGNITION

11. In the judgment, the CFA also made some comments on problems facing transsexuals in other areas of law and treatment of persons who have not undertaken any SRS or have not fully completed SRS in these areas, including drawing the line as to who qualifies as "a woman" or "a man" for marriage and other purposes, and the impact of a legally recognized gender change in all legal contexts. 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 United Kingdom's Gender Recognition Act 2004.

12. The Administration attaches great importance to the CFA's comments and problems facing transsexuals. Since this subject involves complicated legal, medical and social issues, carrying wide-ranging policy implications, the Administration has decided to set up a high level inter-departmental working group, to be chaired by the Secretary for Justice with members comprising representatives of relevant bureaux and other appropriate members such as members of the legal profession, to undertake a detailed study on gender recognition, taking into account the CFA's views that consideration should be given to enacting legislation to deal with various issues relating to gender recognition, and to strike a balance between the rights of transsexual persons and the rights of other affected persons in doing so. The working group will consult stakeholders and other members of the public in finalizing its proposals to the Administration.

WAY FORWARD

13. The Administration plans to introduce the required legislative amendments specified above within the first quarter of 2014.

**Security Bureau
December 2013**