Marriage (Amendment) Bill 2014

Submission of the Hong Kong Bar Association

Introduction

1. The Hong Kong Bar Association ("**HKBA**") makes this Submission in respect of the Marriage (Amendment) Bill 2014 ("the Bill"). The main object of the Bill, as stated in the Explanatory Memorandum, is "to amend the Marriage Ordinance (Cap. 181) to implement an *order* made by the Hong Kong Court of Final Appeal ("**CFA**") in the case of *W v The Registrar of Marriages (FACV 4/2012)* ("**W Case**") and provide for related matters" (emphasis supplied).

2. The way that the Bill seeks to "implement" to the CFA order in the W Case is by introducing amendments to the Marriage Ordinance to provide only that 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 for the purpose of determining the sex of the parties to a marriage (namely the proposed section 40A) and to create a presumption that in the absence of evidence to the contrary, the sex of a party to a marriage is to be the sex as shown on an identification document of the party at the time of the marriage (namely the proposed section 40B). There is a schedule of related amendments to the forms in the Marriage Ordinance.

3. It is instructive to recall what the CFA order was. The CFA declared that:

   'consistently with Article 37 of the Basic Law and Article 19(2) of the Hong Kong Bill of Rights, section 20(1)(d) of the Matrimonial Causes Ordinance and section 40 of the Marriage Ordinance must be read and given effect so as to include within 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 sex reassignment surgery'.

   At the same time, the CFA suspended this declaration for 12 months in order to afford the Administration and the Legislative Council "a proper opportunity to put in place a *constitutionally compliant scheme* capable of addressing the position of *broader classes of persons potentially affected*" (emphasis supplied). The CFA also granted the parties liberty to apply in relation to the period of suspension.[1]

4. The CFA agreed to suspend the declaration in the light of the Administration's submission that "any corrective enactments to render the impugned provisions constitutional, would require the Government and Legislature to consider issues significantly broader than those arising specifically in relation to the appellant, having a possible impact on the institution of marriage and beyond".[2]

5. The HKBA finds it unsatisfactory that the Administration, having been allowed 12 months by the CFA to "put in place a *constitutionally compliant scheme*

[1] Para. 7 of the CFA Judgment on Orders and Costs (16 July 2013).
[2] Para. 5 of the CFA Judgment on Orders and Costs.

capable of addressing the position of *broader classes of persons potentially affected*" (emphasis supplied), seems to have done very little. Although the CFA handed down its Substantive Judgment on 13 May 2013 and made its provisional orders final on 16 July 2013, the Administration established the Inter-Departmental Working Group on Gender Recognition only in January 2014 and ordered the gazettal and introduction of the Bill only in February 2014. The Bill received its First Reading in the Legislative Council only on 19 March 2014, less than two months before the expiry of the period of 12 months calculated from the date of the Substantive Judgment and less than four months before the expiry of the period of 12 months calculated from the date of the Judgment on Orders and Costs. In the three-quarters of a year between the CFA judgments in W Case and the introduction of the Bill into the Legislative Council, the Administration had conducted no public consultation on any of the issues related to the putting in place of the requisite constitutionally compliant scheme. And when the Legislative Council Panel on Security was briefed on 7 January 2014 in respect of the Administration's follow-up actions in the light of W Case, Members of the Legislative Council were only informed of the legislative proposal to amend the Marriage Ordinance.

6. The Secretary to the Inter-Departmental Working Group on Gender Recognition indicated on 29 April 2014 to the Bills Committee that it was hoped that an *initial report* would be produced in *two year's time* on how the rights of transsexual persons would be protected in all legal contexts. A very optimistic estimate for the putting in place of "a *constitutionally compliant scheme* capable of addressing the position of *broader classes of persons potentially affected*" by W Case is probably six years from April 2014.

The Provisions of the Bill

7. The Bill does not address in any way the "broader classes of persons" as the CFA indicated. It seeks *no more than* to give effect to the relief to which W (and others in exactly the same position) will be entitled *in any event* whether or not consequential legislation is put in place.[3] In other words, the Bill has not assuaged the predicaments that are faced by transsexuals.

8. The HKBA finds that the Bill, by focusing solely on the terms of the order of the CFA (which refers to section 40 of the Marriage Ordinance and section 20(1)(d) of the Matrimonial Causes Ordinance), failed to address the implication of the introduction of section 40A of the Marriage Ordinance to the rest of section 20 of the Matrimonial Causes Ordinance. An obvious example is section 20(2)(a) of the Matrimonial Causes Ordinance, which renders a marriage that "has not been consummated owing to the incapacity of either party to consummate it" voidable. The CFA had dealt with the issue of consummation in para. 55 of the Substantive Judgment: "The test for consummation has traditionally been regarded as full coital penetration but without any requirement of emission, far less of conception.

[3] Para. 148 of the CFA Substantive Judgment (13 May 2013), which is reported in (2013) 16 HKCFAR 112. The Administration has acknowledged this in the Legislative Council Brief at para. 14 where it is stated that: "Even if we do not amend the MO, the Appellant W (and others in the exact same position as she is) will still be entitled to marry in her re-assigned sex after the 12-month period. Nonetheless, there would be less clarity in statute law."

Moreover there is in any event authority to support the view that consummation can be achieved where the woman has had a surgically constructed vagina, suggesting that there is no legal impediment to consummating a marriage with a post-operative transsexual woman who is able to engage in sexual intercourse." The CFA also rejected the Registrar of Marriages' question on this issue in para. 218. However, the CFA had in these paragraphs addressed the case of W and other persons belonging to her class of post-operative transsexual women. No consideration was given and in the context of the W Case, needed to be given in respect of the class of post-operative transsexual men, some of whom will, depending on the extensiveness and extent of success of surgery, be able to consummate, but some other may not.

9. The Bill requires full SRS, which is defined in the Bill as "a surgical procedure that -

   (a) 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; or

   (b) 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."

10. This definition of SRS in relation to the re-assignment of sex from female to male is concerned only with the physical construction of a penis in the person and does not address the issue of the capacity or capability of the constructed penis to achieve coital penetration. It accordingly leaves marriages with a party who is a post-operative transsexual male potentially voidable, bearing in mind that some post-operative transsexual male may not be medically or physically able to have the surgery performed or successfully performed.

11. The Bill proposes the introduction of section 40A of the Marriage Ordinance "for the purposes of this Ordinance" so that a person who has received a full SRS is to be treated as being of the sex to which the person is re-assigned. This provision appears to affect the status of couples who are already married under the Marriage Ordinance, so that when one of them goes through full SRS to satisfy section 40A, the marriage will be rendered void under section 20(1)(d) of the Matrimonial Causes Ordinance (bearing in mind that it uses the present tense of "are not") and thereby nullified. The Administration has not appeared to have addressed this matter, which could be tackled by inserting a caveat to section 40A to limit recognition to marriages contracted on or after the commencement date or by considering the matters the CFA identified in para.142 of the Substantive Judgment.

12. The Bill also proposes to introduce in section 40B of the Marriage Ordinance a presumption of the sex of a party to the marriage to be the sex as shown on an identification document, such as a Hong Kong Identity Card, at the time of the marriage. This presumption, if enacted, would leave the task of gender recognition with the Commissioner of Registration, who at present maintains a practice to accept a certifying letter from the consultant surgeon of the change in gender as a

basis for issuing a replacement identity card and passport reflecting the changed gender of the post-operative transsexual.[4] The Commissioner's present practice reinforces the uncompromising statutory test now proposed in section 40A.

Gender Identity

13. The urgent need on the part of the Administration to produce "a *constitutionally compliant scheme* capable of addressing the position of *broader classes of persons potentially affected*" by W Case is illustrated by how broad the classes of relevant persons are. A convenient summary of gender identity was given by the Supreme Court of India recently in *National Legal Services Authority v Union of India and others*[5] at para. 19, per K S Radhakrishana J:

> "Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category."

14. The CFA in its Substantive Judgment on 13 May 2013 in the W Case has also enunciated the condition of transsexualism[6]. Suffice for present purposes to highlight the following:

(1) "there is no doubt that in severe cases, it can give rise to much suffering and possibly self-destructive behaviour" (para. 8)

(2) "their mental and emotional being is also affected by other's perception of and judgment on them" (para. 9);

(3) "intrusive social pressures can cause great hardship and even lead to tragic consequences" (para. 10); and

(4) "[t]he gender recognition which the law accords to them is obviously relevant in this context" (para. 9).

15. As noted in the CFA Substantive Judgment:

> "... not all transsexual patients choose to undertake SRS. The level of psychological discomfort in people with gender identity disorder differs, ranging from mild gender dysphoria to severe transsexualism. Those less severely afflicted may decline surgery. There may also be social constraints, for instance, a desire not to put good careers at risk by undergoing a sex reassignment. Or the patient may not be willing to face the painful process of surgery with what may be an uncertain outcome, especially in the case of

[4] See paras. 16, 17 of the CFA Substantive Judgment.
[5] Writ Petition (Civil) No. 604 of 2013, 15 April 2014.
[6] Section A, para. 5 onwards.

female to male transsexuals where the surgery is more complex and difficult." (para. 12)

What the CFA held

16. In the W Case, W has completed a full SRS. The Declaration granted by the CFA, as noted above, was confined to her situation. However, the CFA has made it very clear in its Substantive Judgment that:

> "We would not seek to lay down a rule that *only* those who had had full gender reassignment surgery involving both exercising and reconstructive genital surgery, qualify. We leave open the question whether transsexual persons who had undergone less extensive treatment might also qualify." (para. 124) (emphasis original)

17. The CFA has in its Substantive Judgment outlined the disadvantages with the approach of formulating some test by judges for deciding who qualifies as "a woman" or "a man" for marriage and other purposes, which usually involves the drawing a line at some point in the sex reassignment process for making the stage at which a gender change is recognized. The disadvantages are that: -

    (1) on the one hand, "it would be highly undesirable to formulate different tests for different purposes ... so that a person would only sometimes be recognized as an individual of his or her acquired gender";

    (2) on the other hand, "a bright line test applied universally is inevitably likely to produce hard cases in certain circumstances unless special provision is made" (para. 136).

18. In particular, the CFA has highlighted that "drawing the line at the point where full SRS has been undertaken may have *an undesirable coercive effect* on persons who would not otherwise be inclined to undergo the surgery" (para. 136) (emphasis added). In this regard, it is worth noting that in *National Legal Services Authority v Union of India and others* (supra), the Supreme Court of India also held that: "no one shall be forced to undergo medical procedures, including SRS, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity" (para. 20, per K S Radhakrishana J).

19. As explained by the CFA at para. 137:

> "It is with such disadvantages in mind that we have refrained, at least at this stage, from attempting any judicial line-drawing of our own, contenting ourselves with declaring that a person in W's post-operative situation does qualify and leaving it open whether and to what extent others who have undergone less extensive surgical or medical intervention may also qualify."

20. The CFA found the second approach "distinctly preferable":

'The second approach, involving legislative intervention, would in our view, be distinctly preferable. The legislature could set up machinery for an expert panel to vet gender recognition claims on a case-by-case basis and also to deal with some of the other legal issues mentioned below. A compelling model may readily be found in the United Kingdom's Gender Recognition Act 2004 ("GRA 2004") which, it will be recalled, was being prepared when *Bellinger* was decided in the House of Lords. The approach of the Act was then described by Lord Nicholls as "primary legislation which will allow transsexual people who can demonstrate they have taken decisive steps towards living fully and permanently in the acquired gender to marry in that gender."'

21. This is the reason why the CFA agreed to suspend the operation of the Orders:

    (1) "... we of course recognize that possibly difficult issues could arise in certain areas and it is with a view to allowing an opportunity for the Government and the legislature *to consider enacting legislation to deal with such areas* that we are prepared to suspend operation of the Orders to be made by the Court." (para. 128) (emphasis added)

    (2) "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.* " (para. 7 of the Orders and Costs dated 16 July 2013)

The Ramifications of the Bill

22. The HKBA is concerned that the Bill not only does not ameliorate the hardship of transsexuals, but also, by reason of its confining recognition of gender changes to those who have completed a full SRS *only*, may deprive society as a whole of the opportunity to engage in the discussion of whether transsexual persons who have undergone less extensive surgical or medical intervention may also qualify as a person entitled to marry in his or her acquired gender. This might also have adverse effect on the "mental and emotional being" of transsexuals[7].

23. The Bill, by proposing full SRS as the statutory test in section 40A, is uncompromising. The Administration in doing so has put to one side what the CFA had considered to be "distinctly preferable", namely an "expert panel" system to vet claims of gender recognition on a case-by-case basis. The Administration should explain why it has ignored the CFA's suggestion.

24. The following remarks given by K S Radhakrishana J in the Supreme Court of India in *National Legal Services Authority v Union of India and others* truly warrant deep reflection:

[7] See para. 14 above.

"Seldom, our society realizes or cares to realize the trauma, agony and pain which the members of Transgender community undergo, nor appreciates the innate feelings of the members of the Transgender community, especially of those whose mind and body disown their biological sex. Our society often ridicules and abuses the Transgender community and in public places like railway stations, bus stands, schools, workplaces, malls, theatres, hospitals, they are sidelined and treated as untouchables, forgetting the fact that the moral failure lies in the society's unwillingness to contain or embrace different gender identities and expressions, a mindset which we have to change." (para. 1)

The HKBA thus calls upon the Administration to give more distinct efforts to address the well-being of transsexuals.

Dated: 16th May 2014

Hong Kong Bar Association