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By Fax (2868 1552)

5 March 2014

Mr Billy WOO
Principal Assistant Secretary (Security) D
Security Bureau
10/F, East Wing
Central Government Offices
2 Tim Mei Avenue
Tamar
Hong Kong

Dear Mr WOO,

Marriage (Amendment) Bill 2014

We are scrutinizing the legal and drafting aspects of the Marriage (Amendment) Bill 2014 (the Bill). We have the following questions for your clarification.

Question 1

Given that the object of the Bill is to implement the Court of Final Appeal's (the Court) Order in *W v. the Registrar of Marriages* (FACV 4/2012) (the W case), would the Administration consider it necessary, for the better and effective implementation of the Order by the legislative proposals in the Bill, to introduce new legislation or legislative amendments to certain areas of the law, as discussed in the Court's judgment of the W case, which involve the impact of a legally recognized gender change on an existing marriage?

For easy reference, the material parts of the Order is reproduced below—

- "(a) That the appeal be allowed;
- (b) That a Declaration be granted 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 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 sex reassignment surgery;
- (c) That a Declaration be granted that the appellant is in law entitled to be included as "a woman" within the meaning of section 20(1)(d) of the Matrimonial Causes Ordinance and section 40 of the Marriage Ordinance and is accordingly eligible to marry a man;
- (d) That the Declarations in paragraphs (b) and (c) shall not come into effect until the expiry of 12 months from the date of this Order;
- (e) That the parties have liberty to apply in relation to the period of suspension of the Declarations referred to in the preceding paragraph; and
- (f)"

The Bill seeks, among others, 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- reassignment surgery (SRS) is to be treated as being of the sex to which the person is re-assigned. It appears that the legislative proposals are compliant with points (b) and (c) of the Order and also cover the situation where a person who has successfully undergone SRS from female-to-male.

However, it appears that in implementing the Order, there may well be areas of the law where legislative intervention would be beneficial in consequence of the impact of a legally recognized gender change on an existing marriage. The Court said at paragraphs 129 to 140 of its judgment that the first area in which legislative intervention would be highly beneficial involves establishing the means for deciding who qualifies as "a woman" or "a man" for

marriage and other purposes by drawing reference to overseas practice, such as the United Kingdom's Gender Recognition Act 2004. In relation to other areas of the law where legislative intervention would be beneficial, the Court said at paragraph 141 of its judgment that the impact of a legally recognized gender change on an existing marriage should be considered. "For example, a male-to-female transsexual may be married to a woman before undergoing sex reassignment treatment qualifying her for legal recognition in her acquired gender as a woman. What impact would that have on the marriage and on the existing wife's rights (and, if there are children, on the children's rights)? Does the transsexual woman retain the rights and duties of a husband and father? If the couple wish to end the marriage, does the gender change provide a ground for doing so?" It is noted that in paragraph 13 of the LegCo Brief on the Bill, the Administration states that "since this subject goes beyond the scope of the CFA judgment in the W Case ... it is appropriate to consider the matter outside the current legislative exercise."

In light of the Court's comments or remarks as discussed in the preceding paragraph, we have tried to elaborate on those comments or remarks in the scenarios below. The purpose is to demonstrate the relevance of those comments or remarks to the implementation of the proposals in the Bill. The Administration may wish to consider the following scenarios to see whether the problems in the scenarios could be resolved without legislative intervention.

Impact of a legally recognized gender change on an existing marriage

Scenario 1

Mr A and Miss B are a married couple. Mr A has undergone successfully SRS from male to female. Assuming that the marriage is not annulled by the gender change, if the couple wishes to end the marriage, does the gender change provide a ground for doing so?

Impact of a legally recognized gender change on existing spousal rights

Scenario 2

The Inheritance (Provision for Family and Dependents) Ordinance (Cap. 481) makes provision for empowering the court to make orders for the making out of the estate of a deceased person of provision for certain members of that person's family and dependants of that person, and for connected matters. Section 3 of Cap. 481 provides that an application for financial provision from the deceased estate may be made by the wife or husband of the deceased. Section 2(1) of

Cap. 481 defines the term "husband" or "wife" to mean, among others, a husband or wife by a valid marriage.

Supposedly, Mr A and Miss B are a married couple. Miss B has now undergone successfully SRS from female to male. Will Mr. B be regarded as the wife of the marriage and hence eligible to apply for financial provision under section 3 of Cap. 481?

Scenario 3

The Married Persons Status Ordinance (Cap. 182) consolidates and amends the law in relation to husband and wife. For example, a married woman has the capacity to do certain things as if she were unmarried (section 3) and a married woman is put in the same position as an unmarried woman as regards property (section 4). The expression "married woman" is not defined in Cap. 182.

Supposedly, Mr A and Miss B are a married couple. Will Cap. 182, for example sections 3 and 4, apply to Mr B who has undergone successfully SRS from female to male?

Impact of a legally recognized gender change on dissolution of marriage

Scenario 4

The Matrimonial Proceedings and property Ordinance (Cap. 192) provides for, among others, ancillary relief and other relief in matrimonial causes and other matrimonial proceedings. There are references to "either party to the marriage", in various parts of Cap. 192, who may apply for various orders in cases of divorce, etc. For example, section 3 of Cap. 192 provides that "either party to the marriage" may apply for maintenance pending suit in cases of divorce, etc. and section 4 of Cap. 192 provides that "either party to the marriage" can apply for financial provision in cases of divorce, etc. Cap. 192 does not define the expression "either party to the marriage". But section 2 of the Marriage Reform Ordinance (Cap. 178) defines "parties to a customary marriage" to mean "the husband and the principal wife (tsai) whether such wife is a kit fat or a tin fong wife ...".

Supposedly, Mr A and Miss B are a married couple in a customary marriage. Miss B has undergone successfully SRS from female to male. In light of the definition of "parties to a customary marriage", will Mr B be regarded as "a wife" in the customary marriage and hence eligible for the ancillary reliefs under Cap. 192?

Scenario 5

The Separation and Maintenance Orders Ordinance (Cap. 16) provides for granting of an order for separation of the parties to a marriage for cause and custody of the children of the marriage and maintenance to one of the parties and the children of the marriage during such separation. Section 3 of Cap. 16 provides for grounds on which an application for an order under section 5 of Cap. 16 which includes an order that the applicant is no longer bound to cohabit with the other party to the marriage, etc. One of the grounds in section 3 of Cap. 16 is that a married person has deserted the other party to the marriage. Section 2 defines the term "married person" to mean a husband or a wife and "other party to the marriage" to mean in relation to a husband or a wife, the wife or husband of that person.

Supposedly, Mr A and Miss B are a married couple. Will Mr B, who has undergone successfully SRS from female to male, be eligible to apply for an order under section 3 of Cap. 16?

Impact of a legally recognized gender change on children's rights

Scenario 6

The Guardianship and Minors Ordinance (Cap. 13) consolidates and amends the law relating to the guardianship of minors. Section 3(1)(d) of Cap. 13 provides that in relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property, the Court of First Instance or a judge of the District Court may, on application, where it is satisfied that the applicant is the father of an illegitimate child, order that the applicant shall have some or all of the rights and authority that the law would allow him as father if the minor were legitimate. The term "father" is not defined in Cap. 13.

Supposedly, Mr A and Miss B are a married couple. An order is made under section 3(1)(d) of Cap. 13 that Mr A has certain rights over his illegitimate child. Will the order be valid if Mr A has subsequently undergone successfully SRS from male to female?

Scenario 7

The Parent and Child Ordinance (Cap. 429) provides for, among others, the determination of parentage in cases where birth or pregnancy results from medical treatment services. In this respect, section 12 of Cap. 429 provides that the court may make an order providing for a child to be regarded in law as

the child of the parties to a marriage (referred to in this section as "the husband" and "the wife") if certain criteria are met. The term "the husband" or "the wife" is not defined in Cap. 429.

Supposedly, Mr A and Miss B are a married couple. Provided that the other requirements in section 12(1) of Cap. 429 are satisfied, will Miss A, who has undergone successfully SRS from male to female, be eligible to apply for an order under section 12(2)?

Scenario 8

The Widows and Orphans Pension Ordinance (Cap. 94) provides for pension or allowance payable to the widow or orphan of a deceased contributor under the Ordinance. Section 19 of Cap. 94 provides, among others, that the allowance or pension payable to an orphan shall cease in the case of a male at the age of 18 years, and in the case of a female at the age of 18 years (where she is married) or at the age of 21 years (where she is not married).

Supposedly, a male unmarried orphan has undergone successfully SRS from male to female at the age of 19 years. Will "she" be regarded as a female orphan within the meaning of section 19 of Cap. 94?

Impact of a legally recognized gender change on pension

Scenario 9

The Pension Benefits Ordinance (Cap. 99) makes provision for the granting of pension benefits in respect of the public service, and for connected purposes. Section 19 of Cap. 99 provides for pension granted to a dependant of a deceased officer. The term "officer" is defined under section 2(1) of Cap. 99 to mean any person who is appointed or re-appointed to the public service and to whom Cap. 99 applies. Section 19(1) of Cap. 99 provides that where an officer dies in specified circumstance, the Chief Executive shall grant, in addition to the death gratuity (if any), in specified circumstance, to the mother or father of the deceased officer. The terms "father" and "mother" are not defined in Cap. 99.

Supposedly, the deceased officer was single and is survived by his or her parents. Will the deceased officer's father, who has undergone successfully SRS from male to female, be eligible for the dependant pension under section 19 of Cap. 99?

Scenario 10

Section 22(4) of Cap. 94 provides that a widow of a contributor may, if she becomes entitled to a pension by virtue of her marriage with her husband, be paid such pension until the occurrence of specified circumstances. In section 2(1) of Cap. 94, "wife" is defined to mean, among others, the lawful wife of any officer married to him by a Christian marriage or its civil equivalent and the provision further provides that "widow" shall be construed accordingly.

Will the wife, who has undergone successfully SRS from female to male before the death of a contributor, be regarded as "a widow" within the meaning of Cap. 94?

Impact of a legally recognized gender change on succession

Scenario 11

The Intestates' Estates Ordinance (Cap. 73) provides for the distribution of a deceased's intestate estates. Section 4(2) of Cap. 73 provides that if the intestate leaves a husband or wife and leaves no issue, etc., the residuary estate shall be held in trust for the surviving husband or wife absolutely. In section 2(1) of Cap. 73, the term "husband" and "wife" are defined to mean, in relation to a person, a husband or wife of that person by a valid marriage.

Supposedly, the husband of a deceased person has undergone successfully SRS from male to female, will "she" be regarded as the surviving husband within the meaning of section 4 of Cap. 73?

The above scenarios are examples only and they are not meant to be exhaustive. If the Administration is unable to provide answers to all or any of the problems in the scenarios, would the Administration consider it necessary, for the better and effective implementation of the Order by the legislative proposals in the Bill, to introduce new legislation or legislative amendments to certain areas of the law, as discussed in the Court's judgment of the W case, which involve the impact of a legally recognized gender change on an existing marriage?

Question 2

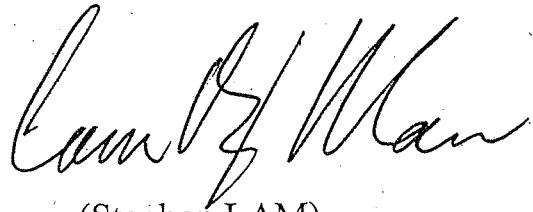
What would be the legal effect of gender change on the validity (either void or voidable) of an existing marriage? Please support your answer with legal reasoning.

Question 3

Is a transsexual person under any legal obligations in the existing laws to disclose his or her previous gender?

To facilitate us to report on the Bill to the House Committee, it is appreciated that your reply, in both languages, could reach us by **11 March 2014**.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Stephen Lam", written in a cursive style.

(Stephen LAM)
Assistant Legal Adviser