



立法會秘書處 法律事務部  
LEGAL SERVICE DIVISION  
LEGISLATIVE COUNCIL SECRETARIAT

(Revised)

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By Fax (2868 1552)

25 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**

Thank you for your letter of 13 March 2014. We have further questions in relation to the Bill for your clarification.

#### **Question 1**

In line with the wording of paragraph 2(b) of the Court of Final Appeal (CFA)'s Order in the case of *W v Registrar of Marriages* (FACV 4/2012) (the Order), would the Administration consider it necessary to modify the drafting of the new section 40A(2) of the Marriage Ordinance (Cap. 181) (MO) to include a requirement of certification by an appropriate medical authority of the change of gender of a post-operative male-to-female or female-to-male transsexual person as a result of a full sex re-assignment surgery?

#### **Question 2**

If the Administration considers it necessary to modify the provision as proposed in Question 1 above, would the Administration clarify the legal

effect of such certification, e.g. is it conclusive evidence as to the gender of a person?

### Question 3

In relation to paragraph 2(b) of the Order, must a post-operative male-to-female transsexual person [or female-to-male transsexual person] have undergone a surgical procedure specified in the new section 40A(2)(a) and (b) of MO, before an appropriate medical authority could certify that there is a gender change as a result of such sex re-assignment surgery?

### Question 4

The effect of the Bill, if passed, is that only those who have received a full sex re-assignment surgery as defined in the new section 40A(2) of MO would qualify as "a woman" or "a man" for the purposes of marriage. However, according to paragraph 124 of the judgment, when considering who qualifies as "a woman" within the meaning of section 40 of MO and section 20(1)(d) of the Matrimonial Causes Ordinance (Cap. 179), CFA held that "[w]e would not seek to lay down a rule that only those who have had full gender reassignment surgery involving both excising and reconstructive genital surgery, qualify. We leave open the question whether transsexual persons who have undergone less extensive treatment might also qualify." This stance was reiterated in paragraph 137 of the judgment. In the circumstances, would the Administration explain why it does not seek to implement this part of the judgment in the Bill?

### Question 5

CFA in paragraph 136 of the judgment referred to House of Lords' decision in *Bellinger v Bellinger* [2003] 2 AC 467 in which Lord Nicholls pointed out 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." In this regard, would there be any human right implications for forcing a person to undergo a full sex re-assignment surgery before his or her sex could be re-assigned under the new section 40A of MO? It has been held by the European Court of Human Rights that the right to respect for private life protected by Article 8 of the European Convention on Human Rights encompasses the physical, moral and psychological integrity of a person. A similar right is protected under Article 14 of the Hong Kong Bill of Rights (HKBOR). Will the coercive nature of the surgery amount to a violation of a person's physical integrity protected by Article 14 of BORO?

## Question 6

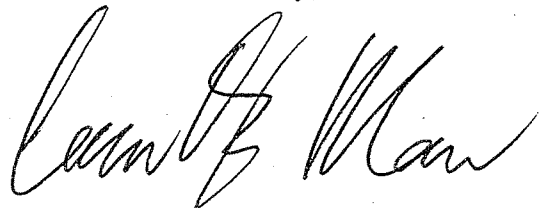
In paragraphs 130 to 140 of the judgment, CFA mentioned the two main approaches to deciding who qualifies as "a woman" or "a man" for marriage or other purposes. Having discussed the various disadvantages of the line-drawing approach by reference to certain point of surgery, CFA held at paragraph 138 of the judgment that the approach involving legislative intervention would be distinctly preferable. Under this approach, 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 involved. CFA then cited the United Kingdom's Gender Recognition Act 2004 (GRA 2004) as an example. In light of the CFA's judgment, would the Administration explain the reasons for not adopting the GRA 2004 model in the present legislative exercise? Indeed, has the Administration considered the approaches adopted by overseas jurisdictions before introducing the Bill?

## Other issues

As mentioned in our letter dated 5 March 2014, the re-assignment of sex following the commencement of the Bill, after its enactment, would have legal implications on a number of existing statutory provisions which are drafted and operate on the basis of the parties being husband and wife. It is noted that this issue will be considered by an inter-departmental working group on gender recognition (IWG) chaired by the Secretary for Justice. Since it would take time for IWG to complete its study and for legislative amendments to be made, please clarify how the relevant existing provisions would operate in the event that a husband or wife has undergone a full sex re-assignment surgery and has his or her sex re-assigned in the interim? Will the Administration consider making transitional arrangements to save their legal rights or duties?

It is appreciated that your reply, in both languages, could reach us by 31 March 2014.

Yours sincerely,



(Stephen LAM)  
Assistant Legal Adviser