



**Answers to frequently asked questions
concerning sexual minorities-related issues in Hong Kong¹**

A. Whether homosexuality is legal in Hong Kong?

Sexual acts between consenting adults, regardless of sexual orientation, are legal. Until almost 30 years ago, homosexual acts between males were criminalized in Hong Kong, but in 1991 the Government of Hong Kong abolished the relevant criminal offences, and so today homosexuality is legal in Hong Kong.

1. The previous statutory offence in Hong Kong criminalizing male homosexuality was traceable to Section 61 of the **Offences Against the Persons Act** of the United Kingdom enacted in 1861 during the Victorian era,² under the section title *Unnatural Offences*, which provided that “[w]hosoever ... convicted of the abominable Crime of Sodomy and Buggery ... shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years.”
2. In 1865, Hong Kong enacted its own and first colonial version of the **Offences Against the Persons Ordinance** (No. 2 of 1865), in which Section 50, under the section title *Abominable Offences*, replicated the above English provision in a materially identical manner.³ Such section title and provision had survived subsequent legislative amendments of the ordinance and ultimately appeared as Section 49 of the **Offences Against the Persons Ordinance** (Cap 212) of 1981

¹ The content herein is for information and discussion only and is not intended as legal advice; HKGALA thanks Alfred Ip of Hugill & Ip Solicitors, Maurice Hoo, and Gloria Wong of Morgan, Lewis & Bockius, and Georgia Dawson, Peter Chang, and Jonavan Zhou of Freshfields Bruckhaus Deringer for their assistance in compiling these answers.

² <https://www.legislation.gov.uk/ukpga/Vict/24-25/100/contents>.

³ <http://oelawhk.lib.hku.hk/archive/files/5ebe87394f2519d9e5ccdec54a54f9f5.pdf>.

men by way of enacting Section 118C of the **Crimes Ordinance**, which provided that:

“[a] man who (a) commits buggery with a man under the age of 21; or (b) being under the age of 21 commits buggery with another man, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.”

2. In **Leung TC William Roy -v- Secretary for Justice** [2005] HKCFI 713 (24 August 2005),⁹ the applicant, who was a gay man under the age of 21, challenged the constitutionality of Section 118C above. In giving the judgment to the applicant, Hartmann J (as the later Non-permanent Judge of the Hong Kong Court of Final Appeal (the **CFA**) then was) first observed that Article 22 under Section 8 of the **Hong Kong Bill of Rights Ordinance** (Cap 383) (the **HKBORO**)¹⁰ – the domestic legislation implementing the **International Covenant on Civil and Political Rights** (the **ICCPR**) as applied to Hong Kong pursuant to Article 39 of the **Basic Law** of Hong Kong, being the constitutional document of the Hong Kong Special Administrative Region¹¹ – stated that:

“[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**” (emphasis added).

3. Although the list of protected statuses above does not expressly refer to homosexuality, by reference to the decision of the Human Rights Committee (the **HRC**) in **Toonen -v- Australia** Communication No. 488/1992 (31 March 1994)¹² and the judgment of the European Court of Human Rights (the **ECtHR**) in **Salgueiro da Silva Mouta -v- Portugal** no. 33290/96 (21 December 1999),¹³

⁹ <http://www.hklii.hk/eng/hk/cases/hkcfi/2005/713.html>.

¹⁰ <http://www.hklii.hk/eng/hk/legis/ord/383/s8.html>.

¹¹ https://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf.

¹² <http://hrlibrary.umn.edu/undocs/html/vws488.htm>, with the HRC being the organ established pursuant to Article 28 of the ICCPR itself and tasked with the objective of monitoring the implementation of the ICCPR amongst its member States.

¹³ <http://hudoc.echr.coe.int/eng?i=001-58404>, with Article 14 of the European Convention on Human Rights (the **ECHR**) being materially identical to Article 22 under Section 8 of the HKBORO.

Hartmann J declared homosexuality as having attained a protected status for the purpose of non-discrimination under Article 22 above.

4. Then the constitutionality issue was reduced to whether Section 118C above was compatible with the constitutional requirement of non-discrimination pursuant to Article 22 above, to which Hartmann J answered in the negative by way of:

- first noting at §22 of the judgment in **Leung TC William Roy -v- Secretary for Justice**: “[t]he threshold age [of consent] being 16, it is lawful for a man and a woman who are both of that age or older to engage in acts of sexual intimacy with each other”; and

- second declaring at §135 of the same judgment:

“[g]ay couples (not yet 21) [however] are prohibited from engaging in the only form of sexual intercourse available to them while heterosexual couples are free to have sexual intercourse in a manner natural to them; that is, *per vagina*. That, in my judgment ... discriminates against gay men. Put plainly, heterosexual couples may have sexual intercourse under the age of 21, homosexual couples may not.”

5. Having established that Section 118C above was discriminatory, Hartmann J continued with his Lordship’s judgment and considered whether any purported justification (for example, certain health objectives that Section 118C above allegedly sought to pursue) satisfied the test of proportionality, to which Hartmann J cited, at §150, the following passage by Abella JA of the Ontario Court of Appeal in **R -v- CM** 23 O.R. (3d) 629:

“[t]here is no evidence that threatening to send an adolescent to jail will protect him (or her) from the risks of anal intercourse. I can see no rational connection between protecting someone from the potential harm of exercising sexual preferences and imprisoning that individual for exercising them. There is no proportionality between the articulated health objectives and the Draconian criminal means chosen to achieve them.”

6. Therefore, given that Section 118C above was discriminatory without any lawful justification, Hartmann J declared the said section as unconstitutional, a judgment that Ma CJHC (as the current Chief Justice of the CFA then was) of the Court of Appeal in **Leung TC William Roy -v- Secretary for Justice** [2006] HKCA 360 (20 September 2006)¹⁴ subsequently affirmed.

7. The legislative amendment equalizing the age of consent eventually came into existence in 2014 by way of the **Statue Law (Miscellaneous Provisions) Ordinance**.¹⁵

C. Whether the laws of Hong Kong prohibit private employers and businesses from discriminating on the ground of sexual orientation?

The Government of Hong Kong is bound by HKBORO and shall not discriminate on the ground of sexual orientation in its administration of public policy.

The existing anti-discrimination ordinances in Hong Kong, while binding on both private employers and the Government of Hong Kong, only confer protection on the grounds of sex, race, disability, and family status, but not on the ground of sexual orientation.

1. Unlike, for example, the **Equality Act** of 2010 in the United Kingdom, which prohibits private enterprises from discriminating against any person on the ground of sexual orientation,¹⁶ the four existing anti-discrimination ordinances in Hong

¹⁴ <http://www.hklii.hk/eng/hk/cases/hkca/2006/360.html>.

¹⁵ <https://www.elegislation.gov.hk/hk/2014/18!en>. Note that, aside from Section 118C, other potentially unequal treatment based on sexual orientation appears to occur on multiple occasions within the **Crimes Ordinance** – see, for example, Sections 118G, 118H, 118I, 118J, 118K, and 141(c), which are the subjects of the judicial review proceedings in the case of **Yeung Chu Wing -v- Secretary for Justice** HCAL 753/2017; the hearing took place in September 2018, with the judgment still pending at the time of this writing. Further note that observing gender neutrality is an important aspect of the ongoing discussion regarding the reform of sexual offences in Hong Kong; see, for example, (i) §7.4 of the consultation paper titled **Miscellaneous Sexual Offences** by the Review of Sexual Offence Sub-committee of the Law Reform Commission of Hong Kong dated May 2018, available at https://www.hkreform.gov.hk/en/docs/miscsexoff_e.pdf; (ii) Recommendation 20 of the consultation paper titled **Sexual Offences Involving Children and Persons with Mental Impairment** by the said sub-committee of the Law Reform Commission of Hong Kong dated November 2016, available at https://www.hkreform.gov.hk/en/docs/sexoffchild_e.pdf; and (iii) the judicial comment by DHCJ McMahon in **HKSAR -v- Yeung Ho Nam** [2018] HKCFI 2664 (28 November 2018), available at <http://www.hklii.hk/eng/hk/cases/hkcfi/2018/2664.html>.

¹⁶ <https://www.legislation.gov.uk/ukpga/2010/15/contents>; plus the further and separate ground of gender reassignment.

Kong,¹⁷ while binding on both the Government of Hong Kong as well as private enterprises, do not confer any anti-discrimination protection on the ground of sexual orientation.¹⁸

2. Outside the legislative framework, the Constitutional and Mainland Affairs Bureau of the Government of Hong Kong in 2014 published the **Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation**¹⁹ (the **Code**), being a set of standards that a private employer, on a voluntary basis, may wish to adopt and incorporate into the employer's standard employment agreement and thereby enable an employee to enforce such standards by way of contract. The bureau also maintains a public list of employers that have pledged to adopt the Code.²⁰ Nonetheless, the precise legal effect of the Code concerning same-sex spousal benefits remains possibly in doubt, given that the **Marriage Ordinance** (Cap 181)²¹ (the **MO**) expressly does not recognize same-sex marriage and also as illustrated in **Leung Chun Kwong -v- Secretary for the Civil Service and another** [2017] HKCFI 736 (28 April 2017)²² and **Leung Chun Kwong -v- Secretary for the Civil Service and another** [2018] HKCA 318 (1 June 2018),²³ a case involving the issue whether the same-sex partner of a Hong Kong civil servant, having officially registered their partnership according to the laws of New Zealand, is entitled to receive the spousal benefits that are otherwise accorded to heterosexual married couples within the civil service. The Court of Appeal has replied in the negative in relation to the issue, and the case is currently pending before the CFA.²⁴

¹⁷The anti-discrimination ordinances are the **Sex Discrimination Ordinance** (Cap 480) (the **SDO**), available at <http://www.hklii.hk/eng/hk/legis/ord/480/>; the **Disability Discrimination Ordinance** (Cap 487) (the **DDO**), available at <http://www.hklii.hk/eng/hk/legis/ord/487/>; the **Family Status Discrimination Ordinance** (Cap 527), available at <http://www.hklii.hk/eng/hk/legis/ord/527/>; and the **Race Discrimination Ordinance** (Cap 602), available at <http://www.hklii.hk/eng/hk/legis/ord/602/>.

¹⁸Under the **Employment Ordinance** (Cap 57), available at <http://www.hklii.hk/eng/hk/legis/ord/57/>, Part 6A allows employees to claim for remedies against employers for dismissal or variation of employment contract terms. However, such statutory protection also appears to be silent on conferring anti-discrimination protection on sexual minorities.

¹⁹https://www.cmab.gov.hk/en/issues/code_of_practice.htm.

²⁰http://www.cmab.gov.hk/doc/issues/Bilingual_List_of_Organisations.pdf.

²¹<http://www.hklii.hk/eng/hk/legis/ord/181/>.

²²<http://www.hklii.hk/eng/hk/cases/hkcfi/2017/736.html>.

²³<http://www.hklii.hk/eng/hk/cases/hkca/2018/318.html>.

²⁴The case also involves the separate issue whether the option of joint assessment for the purpose of filing Hong Kong tax returns is available to the same-sex couple under the **Inland Revenue Ordinance** (Cap 112), available at <http://www.hklii.hk/eng/hk/legis/ord/112/> – the Court of Appeal has also replied in the negative in relation to the joint assessment issue.

3. Having stated the above, Section 7 of the HKBORO is nevertheless clear that, although not binding on private enterprises, the HKBORO does bind the Government of Hong Kong. Therefore, Article 22 under Section 8 of the HKBORO, in conjunction with the judgment of Hartmann J referenced above stipulating that homosexuality is a protected status, means that the Government of Hong Kong shall not discriminate on the ground of sexual orientation when administering its public policies – see further discussion below regarding the judgments of **Director of Immigration -v- QT** [2018] HKCFA 28 (4 July 2018) and [2017] HKCA 489 (25 September 2017) on this point.²⁵

D. Whether bullying is unlawful in Hong Kong? [contributed by Maurice Hoo and Gloria Wong of Morgan, Lewis & Bockius]

At least certain forms of bullying may be unlawful.

1. Although Hong Kong does not have any specific “anti-bullying” ordinance, certain forms of bullying may constitute illegal acts.
2. Verbal bullying such as shouting or speaking obscenities or foul language towards a person, or displaying physical acts such as pointing and gesturing towards a person in a hostile and threatening manner, which cause reasonable apprehension of physical violence under the circumstances, may potentially constitute *assault*; unlawful physical *contact*, including throwing water or spitting on a person, may constitute *battery*.²⁶
3. Other violent forms of bullying, such as hitting, beating, and slapping, may constitute criminal offences under the OAPO.
4. Although Hong Kong has not specifically legislated against cyberbullying, complaints can be lodged at the Office of the Privacy Commissioner for Personal Data, if the cyberbullying involves, for example, collecting and using personal data of a targeted person. Under **Personal Data (Privacy) Ordinance** (Cap 486)²⁷ and the related

²⁵ <http://www.hklii.org/eng/hk/cases/hkcfa/2018/28.html>;
<http://www.hklii.org/eng/hk/cases/hkca/2017/489.html>.

²⁶ From a tortious perspective, and as to assault, see **Pong Seong Teresa and others -v- Chan Norman and another** [2014] HKCFI 1480 (13 August 2014), available at <http://www.hklii.org/eng/hk/cases/hkcfi/2014/1480.html>; as to battery, see **Chan Kin Bun -v- Wong Sze Ming and another** [2006] HKCFI 260 (21 February 2006), available at <http://www.hklii.org/eng/hk/cases/hkcfi/2006/260.html>.

²⁷ <http://www.hklii.org/eng/hk/legis/ord/486/>.

data protection principle – unless the prescribed consent from the data subject is obtained, personal data must only be used for the purpose for which the data were collected or for directly related purposes. Depending on the circumstances, any publication of inappropriate statements on the internet may also constitute criminal offences, such as criminal intimidation or blackmail.²⁸

E. Can a person be forced to receive conversion therapy? [contributed by Maurice Hoo and Gloria Wong of Morgan, Lewis & Bockius]

No, consent must be given.

1. Conversion therapy often refers to the practices which attempt to change an individual's sexual orientation or gender identity, which may include counselling, hypnotizing, inducing nausea, vomiting, or paralysis while showing homoerotic image to the individual, or administering electric shock to the individual if the individual is aroused by same-sex erotic images or thoughts.²⁹
2. Due to the lack of scientific evidence supporting the effectiveness of such therapy, the National Health Service of England in November 2015 in the United Kingdom signed a memorandum of understanding, expressly recording the unethical and harmful nature of such therapy.³⁰ Such practice is also reportedly banned in Argentina, Brazil, Malta and Taiwan, with multiple regions in Canada, Australia, Spain and the United States banning the same.³¹ However, Hong Kong does not have any legislation expressly prohibiting such practice.
3. However, under common law, an individual must give effective consent prior to receiving any medical treatment. For such consent to be effective, the individual's consent has to be real in the sense that he or she understands at least in broad terms what is involved.³² The degree of capacity required for the purpose of giving consent includes the capacity to understand not only in broad terms the nature and effect of

²⁸ As to criminal intimidation, see Section 24 of the **Crimes Ordinance** (Cap 200), available at <http://www.hkllii.org/eng/hk/legis/ord/200/>; as to blackmail, see Section 23 of the **Theft Ordinance** (Cap 210), available at <http://www.hkllii.hk/eng/hk/legis/ord/210>.

²⁹ **Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation** by the American Psychological Association (August 2009), available at <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>.

³⁰ <https://www.psychotherapy.org.uk/wp-content/uploads/2016/09/Memorandum-of-understanding-on-conversion-therapy.pdf>.

³¹ <https://www.independent.co.uk/news/uk/home-news/gay-conversion-therapy-what-is-it-lgbt-rights-christianity-mental-health-torture-electroshock-a8428321.html>.

³² **Chatterton -v- Gerson** [1981] QB 432, [1981] 1 All ER 257.

the treatment proposed and but also the explanation which in all the circumstances of the case a prudent medical practitioner would make.³³

4. In respect of a minor under the age of 18, valid consent should be obtained from the minor for any conversion therapy, if he or she is capable of understanding the nature and implications of the proposed treatment.³⁴
5. Although a parent may consent to a medical treatment on behalf of a minor of any age who does not have the capacity to do so for himself or herself,³⁵ the parent should take into account the effectiveness and side effects of such treatment, the wish of the minor, and whether receiving such treatment is in the best interest of the minor. In addition, certain ordinances in Hong Kong do confer protection on the welfare of a minor; for instance, it is an offence for a parent who has the custody of a child to willfully expose the child in a manner likely to cause the child unnecessary suffering or injury to his health.³⁶

F. Whether the laws of Hong Kong recognize a same-sex relationship?

*In general, no. Same-sex relationship is only recognized in very limited circumstances. For example, the administrative policy concerning immigration has been revised to recognize the status of a dependent who is in a foreign-registered, same-sex marriage or civil union with a Hong Kong resident or permanent resident. Furthermore, the **Domestic and Cohabitation Relationships Violence Ordinance** (Cap 189) (the **DCRVO**)³⁷ also recognizes same-sex relationships for the purpose of prohibiting against domestic violence.*

1. Section 40 of the MO defines a marriage “as involving the voluntary union for life of one man and one woman to the exclusion of all others.” And Hong Kong also does not have another legal apparatus, such as civil partnerships, capable of recognizing a same-sex relationship in general.
2. In **Director of Immigration -v- QT**, an individual of British nationality was in a same-sex relationship with her partner, having registered their same-sex relationship according to the laws of the United Kingdom. That individual came to

³³ **Re F (Mental Patient: Sterilisation)** [1990] 2 AC.

³⁴ See, for example, §2.12 of the **Code of Professional Conduct** by The Medical Council of Hong Kong, available at https://www.mchk.org.hk/english/code/files/Code_of_Professional_Conduct_2016.pdf.

³⁵ **R -v- Kirklees Metropolitan Borough Council, ex p C** [1992] 2 FLR 117.

³⁶ See Section 27 of the OAPO.

³⁷ <http://www.hkllii.hk/eng/hk/legis/ord/189/>.

Hong Kong on the strength of her own employment visa. In any other situation involving a heterosexual married couple, the Director of Immigration would normally grant a dependent visa to the spouse of an employment visa holder. However, the Director refused to grant a dependent visa to the partner of the said British national, having sought to justify the administrative decision largely on the absence of any legal recognition of their same-sex relationship in Hong Kong, and having also initially argued that the Director had committed no discrimination because the Director would also have refused to issue a dependent visa to a person who was heterosexual but not in a marriage with an employment visa holder.

3. A number of points were canvassed in the said judgment of the CFA, two of which are perhaps of more immediate relevance. First, the Director conceded during the course of the proceedings, and the CFA noted, that the circumstances experienced by the British couple constituted indirect discrimination, on the basis that a heterosexual unmarried couple coming to Hong Kong would be able to satisfy the marriage requirement under the laws of Hong Kong, if they had elected to marry each other. However, a same-sex couple would *never* be able to satisfy such marriage requirement under the laws of Hong Kong.³⁸
4. Second, although the Director emphasized that the policy aims behind issuing dependent visas were to attract foreign talent and to maintain strict immigration control, the CFA saw no rational connection between the sexual orientation-based restriction on immigration control and the furtherance of the stated aim of attracting foreign talent:

“90. It is at this point that the Director encounters major difficulties justifying the Policy. In cases like the present, the sponsor has been granted an employment visa presumably because he or she has the talent or skills deemed needed or desirable. Such a person could be straight or gay. The Policy is, as the Director has stated, aimed at encouraging such persons to join our workforce “by giving them the choice of bringing in their

³⁸ Cf. §126 of the judgment of the Court of Appeal in **QT -v- Director of Immigration** [2017] HKCA 489 (25 September 2017), available at <http://www.hklii.hk/eng/hk/cases/hkca/2017/489.html>; for further overseas references, also see the judgment of the Supreme Court of the United Kingdom in **Bull and another -v- Hall and another** [2013] UKSC 73 (27 November 2013), available at <http://www.bailii.org/uk/cases/UKSC/2013/73.html>, and the judgment of the Privy Council in **Rodriguez -v- Minister of Housing of the Government of Gibraltar and another** [2009] UKPC 52 (21 October 2009), available at <http://www.bailii.org/uk/cases/UKSC/2013/73.html>.

dependents to live with them in Hong Kong”. [T]he ability to bring in dependents is an important issue for persons deciding whether to move to Hong Kong. But, ... it runs wholly counter to the Director’s stated aim to say: “You can bring in your partner provided that he or she is straight and would be viewed as married validly under Hong Kong law”. Such a policy is counter-productive and plainly not rationally connected to advancing the “talent” aim.”³⁹

5. Therefore, although the MO does not recognize same-sex marriages in Hong Kong, foreign-registered same-sex relationships may nevertheless be relevant for immigration purposes. Subsequent to the said CFA judgment, the Government of Hong Kong announced on 18 September 2018 that:⁴⁰

“a person who has entered into a same-sex civil partnership, same-sex civil union, ‘same-sex marriage’, opposite-sex civil partnership or opposite-sex civil union outside Hong Kong ... in accordance with the local law in force of the place of celebration and with such status being legally and officially recognised by the local authorities of the place of celebration will become eligible to apply for a dependant visa/entry permit for entry into Hong Kong.”

6. Of further interest to note is that although a same-sex relationship does not qualify for the purpose of the MO, the DCRVO – the legislative intent of which is self-evident – has defined a “cohabitation relationship” as “a relationship between 2 persons (***whether of the same sex or of the opposite sex***) who live together as a couple in an intimate relationship” (emphasis added), since the advent of the **Domestic Violence (Amendment) Ordinance 2009** (18 of 2009).⁴¹

³⁹ Note that such rationality assessment formed one element of the proportionality test that the CFA had deployed for the purpose of gauging the soundness of the justification that the Director had sought to advance – the CFA did not address the separate issue of indignity associated with the situation. For a discussion on the importance of dignity jurisprudence in assessing discrimination and justification, see **The call for dignity jurisprudence in protecting the rights of sexual minorities in Hong Kong** by Peter H. Chang in the January 2019 edition of Hong Kong Lawyer, available at <http://www.hk-lawyer.org/content/call-dignity-jurisprudence-protecting-rights-sexual-minorities-hong-kong>; for a discussion on how the financial services and the legal sectors of Hong Kong sought to intervene on behalf of the applicant, see **Law in Transition: QT v Director of Immigration in Context** by Wally Suphap in the August 2018 edition of Hong Kong Lawyer, available at: <http://www.hk-lawyer.org/content/law-transition-qt-v-director-immigration-context>.

⁴⁰ <https://www.info.gov.hk/gia/general/201809/18/P2018091800579.htm>.

⁴¹ <https://www.elegislation.gov.hk/hk/2009/18!en>.

7. Additionally, under Part 11 of the **Companies Ordinance** (Cap 622) (the **CO**)⁴² – concerning the topic of “Fair Dealing by Directors” – a person is deemed to be an “entity connected with a director” if that person is in a “cohabitation relationship with the director” pursuant to Section 486 of the CO, with the term “cohabitation relationship” bearing the same legislative definition as the one under the DCRVO.
8. Therefore, in very limited circumstances, the statutory provisions and the revised administrative policy concerning immigration do recognize the status of a same-sex couple.⁴³

G. Without much by way of legal recognition, how can a same sex couple organize their personal affairs? [contributed by Alfred Ip of Hugill & Ip Solicitors]

Family Properties

1. Same-sex marriage is not recognized in Hong Kong⁴⁴, even if it is recognized in other jurisdictions, irrespective of the domicile of the parties.
2. At the same time, because of the non-recognition of the same-sex marriage, any agreement relating to the financial arrangement among the parties in same sex marriage is not questioned by lack of intention for the parties to be bound by the same legally due to their relationship, and accordingly it is legal and enforceable under Hong Kong laws. Such agreement is also not regarded as pre-nuptial or post-nuptial agreement, which may not be enforced by the family court in Hong Kong in matrimonial proceedings⁴⁵ unless certain criteria are met.
3. Parties in same sex marriage are accordingly advised to put their financial arrangement in the course of their relationship in writing with a professional drafted

⁴² <http://www.hklii.hk/eng/hk/legis/ord/622/>.

⁴³ The applicant in **MK -v- Government of the HKSAR** HCAL 1077/2018 is currently seeking judicial review of the lack of any legal recognition of same-sex relationships in Hong Kong; the Court has granted leave to proceed with the judicial review application – see §§1 and 2 of the leave decisions in **MK -v- Government of the HKSAR** HCAL 1077/2018, **TF -v- Secretary for Justice** [2019] HKCFI 55 (3 January 2019), and **STK -v- Secretary for Justice** HCAL 2682/2018, available at <http://www.hklii.hk/eng/hk/cases/hkcfi/2019/55.html>.

⁴⁴ See § C2, *supra*.

⁴⁵ As same sex marriage is not recognized in Hong Kong, the Family Court will not deal with any petition for divorce in same sex marriage.

agreement in order to avoid any argument over financial settlement should the parties desire to terminate the relationship in future.

4. Parties in same-sex relationship are particularly warned over ownership of properties. It is common for married couples to acquire properties together, and register the ownership or legal title of such properties in the name of one party only. This may be triggered by mere convenience or distinct financial advantage, such as tax exemption. Upon dissolution of marriage or relationship, the ownership of such properties is often in dispute, and it is common to argue that the party who finance the acquisition of the property has beneficial ownership towards the same, and the title owner is merely holding the same on trust for another party.
5. The party who finance the property acquisition, solely or substantively, would often argue that the legal owner of the property is holding the property as trustee under resulting trust if it is in the name of another party. In this respect, the argument on presumption of advancement, which applies to relationship between husband and wife, may not apply to same sex relationship in Hong Kong due to its lack of recognition.
6. Another doctrine that is commonly adopted in resolving dispute related to properties among couples in romantic relationship is constructive trust, either by way of intangible contribution towards the family of the dependent party or common intention constructive trust that it was the parties' agreement in the course of their relationship to own everything in equal shares.
7. In **Marr -v- Collie** [2017] UKPC 17 (25 May 2017)⁴⁶, the beneficial ownership of property purchased during a same sex relationship for investment purposes in their joint names. The Privy Council decided that beneficial ownership follows legal ownership unless the contrary is proven. It can apply where the parties' personal relationship has a commercial aspect.
8. Whilst the decision of Privy Council in **Marr -v- Collie** has not been applied in Hong Kong cases, and that decision does not bound Hong Kong Court and accordingly its effect is still undetermined, it highlights the importance of parties in same sex relationship to document their intention in the family financial affairs in order to avoid future dispute which may lead to substantial amount of time and legal costs being incurred to resolve the same.

⁴⁶ <https://www.jcpc.uk/cases/docs/jcpc-2015-0050-judgment.pdf>.

Personal Welfare

9. In Hong Kong, there is no legal document which allows a person to appoint an attorney to make decision regarding personal welfare, in particular medical decision when the principal is incapable to do so. Lasting Power of Attorney or Advanced Health Directive are not legal in Hong Kong.
10. Despite the above, it is advisable for parties in a same sex relationship to document their wishes to have their spouse or partner determining their affairs upon incapacity, which will be used as evidence if the capable partner engages in dispute with other family members of incapacitated partner on who to make such decision.
11. Multi-racial relationship is common in Hong Kong, and very often Asians are still influenced by the traditional family concept that they may not come out to their own family members. Another phenomenon is that the same sex partner may be referred as “friend” that the essence of the relationship is not recognized by other family members. Disputes arise when same sex partners are not accepted by the other family members and their status are not recognized, particularly when their view as significant others are often not respected when it comes to determining the best interest of the incapacitated party.

Mental Incapacity

12. Parties in same sex relationship are advised to execute an Enduring Power of Attorney in order to allow their spouse or partner to manage their financial affairs if they become incapacitated and utilize their own financial resources to look after them.
13. Enduring Power of Attorney must be prepared in accordance with the statutory form prescribed by the **Enduring Power of Attorney Ordinance** (Cap 501)⁴⁷, and executed in front of a practicing solicitor and a medical practitioner in Hong Kong. It is often a term that Enduring Power of Attorney only becomes valid after the grantor becomes mentally incapacitated and it is registered with the High Court of Hong Kong.
14. In the absence of Enduring Power of Attorney, in the event of incapacity of a same sex partner, the capable party must apply to Court for an order before he or she can manage the financial affairs of the incapable partner. Such order shall require proof

⁴⁷ <http://www.hklii.hk/eng/hk/legis/ord/501/>.

of incapacity by two medical practitioners recognized by the authority to form an opinion over mental capacity of a person, with notice to other immediate family members and a detailed statement setting out the assets held in the name of the incapacitated person that are to be managed.

15. If any of the immediate family members object the order granted to the same sex spouse or partner to manage the financial affairs of an incapacitated person, it will become a complex litigation, and often the Court will order an impartial third party professional to manage the financial affairs of the incapacitated instead, such as Official Solicitors. There will be professional fees incurred and the family wealth will be eroded for such reason.

Inheritance and Succession

16. Succession laws is governed by both the domicile of the Deceased and the location of the property. In short, personal properties follow the succession laws of the place where the deceased died domiciled (*lex domicilii*), while real properties follow the succession laws of the place where the property is situated (*lex situs*).
17. Same sex marriage and de-facto relationship are not recognized by Hong Kong laws, hence the surviving party of a same sex relationship, irrespective whether it is marriage or cohabitation, is not entitled to inheritance under intestacy rules. This applies to the case when the deceased died domiciled in Hong Kong or when the real property is situated in Hong Kong.
18. Moreover, the entitlement of estate administration is also governed by the law of the place where the deceased died domiciled, hence same sex partner is not entitled to administer the estate unless he or she is named as executor in the deceased's Will.
19. For the above reasons, it is of utmost important for parties in same sex relationship to receive estate planning advice in order to ensure that the spouse can be protected financially upon death. It is particularly important to appoint the same sex partner as executor of the Will in order to confer him or her right to deal with the post-mortem affairs such as funeral arrangement and body disposal.
20. In the event that a dependent in a same sex relationship is deprived of their financial reliance due to the death of his or her partner, he or she can claim against the estate of the deceased partner for financial provision. The court will look at the financial arrangement during the lifetime of the deceased in order to determine whether the

surviving partner is entitled to financial provision. However, Hong Kong court has no jurisdiction over an estate if the deceased died domiciled outside Hong Kong.

21. Similar to other common law jurisdiction, there is no force heirship rules in Hong Kong. However, if the deceased died domiciled in a jurisdiction where force heirship rules apply, and same sex relationship is not recognized (for example, China), family members who are entitled to estate under such rules may challenge any testamentary instruments made by the deceased leaving the estate to the same sex spouse or partner. Hence proper advice and estate planning is essential for couples in same sex relationship, particularly expatriates in Hong Kong who were relocated for work and may not have formed a decision on whether to treat Hong Kong as permanent home.

Tax and Duties

22. There is no inheritance tax in Hong Kong. Estate Duty was abolished on 11 February 2006. There is also no Value Added Tax or Capital Gain Tax in Hong Kong. Hence no tax is payable upon inheritance in Hong Kong.
23. Having said that, if the deceased died domiciled in other jurisdictions with world-wide tax regime, such as United Kingdom, United States or Canada, planning must be carefully devised in order to allow estate to be passed to surviving spouse or partners in the most tax effective manner.

Succession Process

24. As emphasized above, surviving spouse or partner in a same sex relationship is not entitled to administer the estate of the deceased spouse or partner unless the Will appoints the same as executor. Hence it is important for parties in same sex relationship to have a Will in place.
25. In Hong Kong, nobody can legally intermeddle with the deceased's estate without a grant of probate or letters of administration issued by the High Court of Hong Kong, with details of assets in the Estate set out therein.

H. Whether the laws of Hong Kong enable a transgender individual to amend his or her gender on the individual's identity document?

*Yes, although evidence of a full sexual reassignment surgery (the **SRS**) is necessary, and the CFA has recognized that the SRS involves very extensive and irreversible changes to a person's physical state. At the time of writing, the Court is presently*

considering a case challenging the SRS requirement, and the Government of Hong Kong is currently consulting on the same.

1. Currently in Hong Kong, no legislative framework exists for recognizing one's change of gender. The Registration of Persons Offices of the Immigration Department, by way of an administrative regime, do accept gender recognition applications,⁴⁸ as long as the transgender individual seeking to amend his or her gender on the Hong Kong identity card has undergone a full SRS. The Government of Hong Kong in the second half of 2017 conducted the first round of its public consultation on the possibility of introducing a legislative framework for gender recognition, and §§2.3-2.12 of the consultation report⁴⁹ provide a reasonably detailed description of the current administrative system, including the following description of what constitutes a full and qualifying SRS:

“From female to male:

(1) Hysterectomy (removal of uterus/ovaries and upper vagina);

and

(2) Phalloplasty (construction of a phallus like structure) or metiodiolplasty (elongating the enlarged clitoris);

From male to female:

(1) Bilateral orchiectomy (removal of testes);

(2) Penectomy (removal of the penis); and

(3) Vaginoplasty (creation of vaginal space).”

2. At the time of this writing, the Government of Hong Kong has not published the result of the public consultation. Separately, Ma CJ and Ribeiro PJ in the judgment of the CFA in **W -v- The Registrar of Marriages** [2013] HKCFA 39 (13 May 2013)⁵⁰ also provided further details as to the extent of this highly invasive medical procedure:

“13. For male-to-female transsexual surgery, breast augmentation is done for patients whom the breast enlargement after hormone treatment is not sufficient for comfort in the social gender role. Genital surgery includes at least orchidectomy (removal of both

⁴⁸ See item 22 of the frequently asked questions on https://www.immd.gov.hk/eng/faq/faq_hkic.html.

⁴⁹ <http://www.iwgr.gov.hk/eng/pdf/consultation01.pdf>.

⁵⁰ <http://www.hklii.hk/eng/hk/cases/hkcfa/2013/39.html>.

testes), penectomy (removal of penis), creation of a new vagina. The new vagina enables penetration of penis during sexual intercourse. There is preservation of erotic sexual sensation. However, surgery cannot remove the prostate organ or provide a functional uterus or ovaries, or otherwise establish fertility or child bearing ability. Neither can it change the sex chromosomes of the person, which remains that of a male ('XY').

For female-to-male transsexual surgery, the female breasts would be removed. The uterus, ovaries and vagina are removed. Construction of some form of penis is performed. There are different ways of constructing the penis, depending on the desire of person who would balance the risk of physical injuries inflicted on one's body due to the surgery with the benefits. The form of penis construction ranges from an elongation of patient's clitoris (metoidioplasty), raising an abdominal skin tube flap to mimic a penis, to the micro-vascular transfer of tissue from other parts of body to perineum to have a full construction of a penis inside which there is a passage for urine. The best outcome at present is that after surgery, the person can void urine while standing and can have a rigid penis which means it is rigid all the time, as opposed to an erected penis which is flaccid normally but becomes rigid when sexually aroused. However, the new penis, even fully constructed, cannot ejaculate or erect on stimulation, although it will not affect the person's ability to have sexual intercourse and the person can still penetrate a vagina and have sensation in the penis and achieve orgasm because the clitoris and its nerve endings are preserved. The person cannot be provided with prostate (a male sex organ which secretes prostatic fluid which when combined with sperms produced by the testes forms the semen; a female does not have such an organ) or any functioning testes and will have no ability to produce semen, to reproduce or otherwise to impregnate a female. The sex chromosomes also remain those of a female ('XX')."

14. It can thus be seen that SRS involves very extensive and irreversible changes to a person's physical state."

3. Against this background, the Court of First Instance recently handed down its judgment in **Tse Henry Edward -v- Commissioner of Registration** [2019] HKCFI 295 (1 February 2019),⁵¹ in which the Court ruled, amongst other things, that the prerequisite of a full SRS for the purpose of amending one’s identity document as being constitutional and not amounting to a disproportionate infringement of the applicant’s right to privacy protected under Article 14 of Section 8 of the HKBORO. This judgment appears to differ in its approach *vis-à-vis* the judgment of the ECtHR in **A.P., Garçon and Nicot -v- France** nos. 79885/12, 52471/13 and 52596/13 (6 April 2017),⁵² in which the ECtHR made the following observations:

“92. The Court has stressed on numerous occasions that the concept of “private life” is a broad term not susceptible to exhaustive definition. It includes not only a person’s physical and psychological integrity, but can sometimes also embrace aspects of an individual’s physical and social identity. Elements such as gender identity or identification, names, sexual orientation and sexual life fall within the personal sphere protected by Article 8 of the Convention [being materially equivalent to Article 14 under Section 8 of the HKBORO].

93. The Court has also emphasised that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8 of the Convention. This has led it to recognise, in the context of the application of that provision to transgender persons, that it includes a right to self-determination, of which the freedom to define one’s sexual identity is one of the most basic essentials. It has also found that the right of transgender persons to personal development and to physical and moral security is guaranteed by Article 8.”

4. In other words, the constitutional right to privacy has two aspects – one of which being physical integrity, while the other being self-determination of sexual identity. With that in mind, imposing the SRS requirement for the purpose of gender recognition arguably amounts to forcing an individual to sacrifice one aspect of the right to privacy, namely physical integrity, in order to enjoy the other aspect of the right to privacy, namely sexuality identity, which does not appear to be compatible

⁵¹ <http://www.hkii.hk/eng/hk/cases/hkcfi/2019/295.html>.

⁵² <http://hudoc.echr.coe.int/eng?i=001-172913>.

with the spirit of the right being fundamental and constitutional. In particular, the ECtHR characterized the situation in the following way:

“131. Making the recognition of transgender persons’ gender identity conditional on sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – which they do not wish to undergo therefore amounts to making the full exercise of their right to respect for their private life under Article 8 of the Convention conditional on their ***relinquishing full exercise*** of their right to respect for their physical integrity as protected by that provision and also by Article 3 of the Convention.

135. Accordingly, the refusal of the ... applicants’ requests for a change in civil status, on the grounds that they had not provided proof of the irreversible nature of the change in their appearance – that is to say, demonstrated that they had undergone sterilisation surgery or medical treatment entailing a very high probability of sterility – amounts to a failure by the respondent State to fulfil its positive obligation to secure their right to respect for their private lives” (emphasis added).

5. As **Tse Henry Edward -v- Commissioner of Registration** was a first instance judgment, the law in this area in Hong Kong may evolve in the foreseeable future upon further reviews by the appellate Courts.⁵³

I. Whether a post-operative transgender male/female is able to marry a male/female under the Marriage Ordinance?

Yes, provided that the person has legally changed to his/her acquired gender. The Court has been prepared to interpret the words “woman” and “female” in the MO to include a post-operative male-to-female transgender person, having noted that procreation has never been a legal requirement for a valid marriage.

⁵³The Court in **Tse Henry Edward -v- Commissioner of Registration** also ruled that the prerequisite involving the full SRS also did not violate the SDO, on the basis that the applicant had not discharged his evidentiary burden, rather than a full analysis of the relevant jurisprudence. Separately, the Court in another first instance judgment – namely **Navarro Luigi Recasa -v- The Commissioner of Correctional Services and another** [2018] HKCFI 1815 (3 August 2018), available at <http://www.hklii.hk/eng/hk/cases/hkcfi/2018/1815.html> – ruled that a pre-SRS transgender person-in-custody was unable to rely on the DDO in challenging the body search procedures administered by the Correctional Services. Therefore, such incidences seem to suggest that the existing discrimination ordinances are perhaps incapable of conferring non-discrimination protection on transgender individuals.

1. The CFA in **W -v- The Registrar of Marriages** declared that the “[MO] 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” pursuant to Article 37 of the Basic Law and Article 19(2) under Section 8 of the HKBORO, both of which guarantee the freedom of marriage.
2. More specifically, the CFA canvassed the issue surrounding procreation in **W -v- The Registrar of Marriages**. Noting that procreation has never been a legal requirement for a valid marriage, the CFA concluded that:

“86. *There is certainly no justification for regarding the ability to engage in procreative sexual intercourse as a sine qua non of marriage* and thus as the premise for deducing purely biological criteria for ascertaining a person’s sex for marriage purposes” (emphasis added).

3. Accordingly Ma CJ and Ribeiro PJ, who delivered the leading joint judgment, were prepared to order a declaration in terms of the operative passage under §1 above. However, in an act of deference to the legislature, the CFA decided to suspend the declaration for 12 months, in order to allow the legislature to take the necessary remedial steps:

“138. [L]egislative 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**” (emphasis added).

4. As mentioned earlier, the Government of Hong Kong commenced the public consultation in relation to the possibility of introducing a legislative framework for legal recognition in the second half of 2017. At the time of this writing, the Government has not yet published the results of the consultation.