

**For information on
20 April 2007**

Sexual Minorities Forum

**Issues relating to alteration of sex status on birth certificate and
recognition of overseas marriage under Marriage Ordinance**

Purpose

This paper seeks to brief members on the captioned issues raised by some members at the sixth meeting of the Sexual Minorities Forum on 1 December 2006.

Alteration of sex status on birth certificate

2. Apart from names of a child aged under 11, the Births and Deaths Registration Ordinance (Cap. 174) does not provide for alteration of any personal particulars in registered birth records. Therefore, transgender persons are not allowed to change their sex status on the birth certificates.

Validity of marriage contracted before the gender reassignment surgery

3. If a transgender person marries an opposite sex person before his or her gender reassignment surgery, that marriage will still be regarded as legally valid in Hong Kong after the concerned surgery unless it is annulled by a decree of nullity granted by upon the petition of either one of the marrying parties. The issue of validity or otherwise will need to be determined according to its individual circumstances. In this relation, the Corbett v Corbett [1970] 2 ALL ER 33 is relevant. In that case, the court held that chromosomal, gonadal and genital tests would, if all three

congruent, determine the sex for the purpose of marriage, and any operative intervention is ignored.

Recognition of Muslim marriage in Hong Kong

4. Under the Marriage Ordinance (Cap. 181), every marriage under the Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage. This implies 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. Under the laws of Hong Kong, a marrying party who has acquired a Hong Kong domicile could not contract a polygamous marriage.

5. Whether a polygamous marriage contracted in places outside Hong Kong is legally recognized in Hong Kong will depend on the law of domicile of the marrying parties concerned¹. A man or woman whose personal law does not allow him or her to marry polygamously has no capacity to contract a valid polygamous marriage.

6. Records available reveal that there is no previous case where a Muslim sponsor applies to sponsor his remaining wife (or one of the remaining wives) after one of his wives is allowed to join him as dependant in Hong Kong. If situation arises, the sponsor will be notified that the applicant is not eligible under existing immigration policy based on monogamy and the concept of a married couple consisting of one male and one female.

¹ As regards the definition of 'domicile', according to the Oxford Dictionary of Law, domicile refers to *'the country that a person treats as his permanent home and to which he has the closest legal attachment. A person cannot be without a domicile and cannot have two domiciles at once. He acquired at birth a place of domicile of origin. Normally, if his father is then alive, he takes his father's domicile; if not, his mother's. He retains his domicile of origin until (if ever) he acquires a domicile of choice in its place. A domicile of choice is acquired by making a home in a country with the intention that it should be a permanent base. It may be acquired at any time after a person becomes 16 and can be replaced at will by a new domicile of choice.'*

In determining a person's place of domicile, all relevant factors should be taken into consideration including his or her place of birth, length of this actual residence in a place, whereabouts of his or her family members and his or her intention to make a place his or her permanent home. Each case will be considered on its individual merit.

The legal effect of s20A of Matrimonial Causes Ordinance on overseas marriage involving same sex marriages

7. Section 20A(1)(a) of the Matrimonial Causes Ordinance provides that section 20 (which sets out the grounds on which a marriage may be declared null and void) shall not affect the determination of any matter relating to the validity of a marriage in accordance with the rules of private international law. According to the rules of private international law governing the validity of a foreign marriage, essentially there are three matters to be considered; namely formal validity and essential validity, and whether the marriage is repugnant to the conscience of the court.

8. Formal validity refers to the form required or recognized as sufficient by the law of the country where the marriage was celebrated. Essential validity refers to the capacity to marry, which is governed by the dual domicile doctrine, i.e. each party's antenuptial domicile. A foreign marriage will not be recognized by the court if it is repugnant to the conscience of the court, even if it is valid according to the law of the place where the marriage was celebrated as well as the law of the antenuptial domicile of the parties. The question of validity or otherwise of overseas same sex marriage falls to be determined by those rules.

Security Bureau
Immigration Department
Home Affairs Bureau

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