ARTICLES

NEITHER HERE NOR THERE: THE CURRENT STATUS OF TRANSSEXUAL AND OTHER TRANSGENDER PERSONS UNDER HONG KONG LAW

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This is the first of two articles on the law relating to transgender persons in Hong Kong. This article examines the current administrative and legal status of Hong Kong's transgender persons. It argues that, whilst various policies and practices adopted by the authorities undoubtedly facilitate the every day lives of certain transgender persons, the legal situation (which perpetually condemns them to their biological sex as designated at birth) is inhumane and should no longer be tolerated. The second article, Robyn Emerton, "Time for Change: A Call for the Legal Recognition of Transsexual and Other Transgender Persons in Hong Kong", also intended for publication in the Hong Kong Law Journal, will consider how the current position could be challenged by way of judicial review under the Hong Kong Bill of Rights Ordinance, or, ideally, changed through legislative reform.

Introduction

Significant headway has been made in the legal recognition of transgender persons[1] in their chosen gender across a growing number of jurisdictions in the last few years. This is particularly the case in respect of those whose physical self has been brought into conformity with their gender identity through gender reassignment surgery – frequently referred to as "post-operative transsexual

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1 On terminology used in this article, *see* the section below, at p 248.

persons". Such progress can largely be attributed to the tireless efforts of transgender activists in bringing test cases before their national and supranational courts and their persistent lobbying for legislative change.

The European Court of Human Rights' ("ECHR") decisions in *Christine Goodwin v United Kingdom* and *I v United Kingdom*[2] ("*Goodwin*") in July 2002 undoubtedly represent the pinnacle of international transgender jurisprudence to date. In its judgment, the ECHR held that the United Kingdom's ("UK") failure to allow post-operative transsexual persons to change their birth certificates and to recognise their chosen gender for marriage and other legal purposes constituted a violation of their right to respect for private life and their right to marry under the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ("European Convention"). The *Goodwin* judgment is of particular significance as it rejects and effectively overturns the legal test of sex in the context of marriage as established in English case of *Corbett v Corbett* (1970).[3] *Corbett* has for some thirty years dominated the judicial discourse in the UK, as well as many other common law jurisdictions, confining transgender persons both for the purpose of marriage and indeed for other legal purposes to their biological sex as designated at birth, even if they have undergone gender reassignment surgery.[4] Enlightened jurisprudence has also been handed down in various domestic courts around the world. In the Asia-Pacific region, courts in both Australia[5] and New Zealand[6] have upheld the validity of marriages entered into by post-operative transsexual persons, and courts in the Philippines have ordered the authorities to amend the birth certificates of individual petitioners so as to reflect their chosen gender and name after gender reassignment,[7] although one such case is currently under appeal.[8]

2 *Christine Goodwin v United Kingdom Government* [2002] ECHR 28957/95; *I v United Kingdom Government* [2002] ECHR 25680/94, judgment delivered 11 Jul 2002 (hereinafter collectively referred to as "*Goodwin*"). This and all other ECHR decisions referred to in this article are available at the ECHR's HUDOC database, at http://www.echr.coe.int/Eng/Judgments.htm.

3 *Corbett v Corbett* [1970] 2 All ER 33 (hereinafter "*Corbett*").

4 However, *Goodwin* still allows member states the discretion to determine the particular conditions (such as the completion of gender reassignment surgery) under which marriage is accessible to transgender persons in their jurisdiction, and therefore does not provide a complete solution to the iniquities present in this field. *See Goodwin* (n 2 above), at para 103.

5 *Attorney General for the Commonwealth v "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission* [2003] FCA 94 (hereinafter "*Kevin and Jennifer*"), available at the Australian Legal Information Institute (Family Court of Australia Cases) at http://www.austlii.edu.au/ (visited 28 Jun 2004).

6 *Attorney General v Otahuhu Family Court* [1995] NZLR 603.

7 *In the Matter of Change of the Entries as to Name and Sex in the Certificate of Live Birth from Rommel Jacinto Dantes Silverio to Mely D Silverio and from Male to Female*, SP Case No 02-1055207, Republic of the Philippines, National Capital Judicial Region, Regional Trial Court, Branch VIII, Manila (4 Jun 2003), one of several successful petitions (on file with the author), kindly provided by Attorney Benito Cuesta of Cuesta & Associates, Manila, the Philippines. *See* "UP Prof From Rommel to Mely", *Philippine Star News*, 2 Aug 2003, p 1.

8 *Ibid.*, the *Mely D Silverio* case is currently being appealed by the Attorney-General. Information provided by Attorney Benito Cuesta of Cuesta & Associates, in Manila, the Philippines on 16 Mar 2004.

In addition, the last few years have seen the ranks swelling of countries and states which have passed legislation granting partial or full legal recognition to transgender persons in their chosen gender. The UK's Gender Recognition Act 2004, which received Royal Assent on 1 July 2004 and is due to be implemented by early 2005,[9] promises to be one of the most progressive models to date. In the Asia-Pacific region, a number of Australian states,[10] New Zealand,[11] Singapore[12] and, most recently, Japan[13] have all legislated in this area as regards post-operative transsexual persons.[14] There are even reports of post-operative transsexual persons being granted full legal recognition by the administration in certain provinces of the People's Republic of China, including for the purpose of marriage.[15]

Somewhat surprisingly, however, given that gender reassignment surgery has taken place in Hong Kong since the mid 1980s and has received state recognition and financing through the public health service, this issue has never come before Hong Kong's courts, nor has it ever been considered by Hong Kong's Legislative Council.

This is the first of two articles on the law relating to transgender persons in Hong Kong – a topic which has not previously been explored in any depth academically.[16] This article examines the current administrative and legal status of Hong Kong's transgender persons. It argues that, whilst various

9 For the text of the Gender Recognition Act and documentation relating to its legislative passage, *see* UK Department of Constitutional Affairs at http://www.dca.gov.uk/constitution/transsex/legs.htm; and for other useful background information, *see* http://www.dca.gov.uk/constitution/transsex/ (visited 16 Jul 2004).

10 Gender Reassignment Act 2000 (Western Australia); Births, Deaths and Marriages Registration Amendment Act 1997 (Northern Territory); Births, Deaths and Marriage Registration Act 1997 (Australian Capital Territory); Births, Deaths and Marriages Registration Act 1995 (New South Wales); and Sexual Reassignment Act 1988 (South Australia).

11 Births, Deaths and Marriages Registration Act 1995, s 30(2).

12 Women's Charter Amendment Act 1996, s 12.

13 Law Concerning Special Cases In Handling Gender For People With Gender Identity Disorder, which came into effect on 16 Jul 2004. The first case in which a person successfully applied to the court to change their legal gender under this law was reported on 29 Jul 2004, *see* "Transsexual's 'Change' Recognized", CBSNEWS.com, Tokyo, 29 Jul 2004, at http://www.cbsnews.com/stories/2004/07/29/world/main632792.shtml (visited 3 Aug 2004).

14 These various legislative models will be examined in detail in the second article.

15 *See* Chan Siu-Sin, "Wedding Belle", *South China Morning Post* (hereinafter "SCMP"), 3 May 2004, p 5; Ray Cheung "Transsexual Ties the Knot after Gender Approval", *SCMP*, 18 Mar 2004, p A8; and Alice Yan, "Transgender Man First to Legally Wed", *SCMP*, 3 Jan 2004, p 4. Some 500 persons are estimated as having undergone gender reassignment surgery in China as at the end of 2003, "Transsexuals Come Out of the Closet in China", *China Daily*, 27 Nov 2003, at http://www.chinadaily.com.cn/en/doc/2003-11/27/content_285111.htm (visited 28 Jun 2004).

16 For an earlier overview of the issues, *see* Robyn Emerton, "Country Report: Hong Kong: Legal Issues" (6 Dec 2002), at http://web.hku.hk/~sjwinter/TransgenderASIA/country_report_hk_legal.htm (visited 28 Jun 2004); M.L. Ng *et al*, "Transsexualism: Service and Problems in Hong Kong", 11:12 (1989) *Hong Kong Practitioner*, 591, which contains (at pp 599–600) a brief summary of some of the legal problems faced by transsexual persons; Shirley Lau "Prisoners of Gender", *SCMP*, 25 Jan 2003, Features, p 1; and Editorial, "Sex-Change Law Has Not Kept Up With The Times", *SCMP*, 25 Jan 2003, p 12.

policies and practices adopted by the authorities undoubtedly facilitate the every day lives of certain transgender persons, the legal situation, which perpetually condemns them to their biological sex as designated at birth, is inhumane and should no longer be tolerated. The article concludes that it is high time that Hong Kong's transgender persons, however small a minority (and precisely for this reason), be granted the respect, dignity, privacy and equality to which each and every one of us is entitled, through full legal recognition of their chosen gender.

The second article, Robyn Emerton, "Time for Change: A Call for the Legal Recognition of Transsexual and Other Transgender Persons in Hong Kong" (also intended for publication in the HKLJ) considers how the current legal status of transgender persons in Hong Kong might be challenged by way of judicial review under the Hong Kong Bill of Rights Ordinance, drawing substantially on international and comparative case law. Concluding that in the current, rather conservative, judicial climate, litigation is unlikely to offer a successful route to their legal recognition and associated rights, the article calls for full legal recognition to be granted to Hong Kong's transgender population through legislative means, and considers which of several models might be most suitable for Hong Kong.

Terminology

The term "transgender" was coined relatively recently, and its usage is not yet uniform. In this article, it is used as an umbrella term for all those persons who have a deep conviction that their biological sex, as designated at birth, is incompatible with their gender (their psychological or inner sense of being male or female), and who have an overwhelming desire permanently to live and function in the opposite gender to their biological sex. It includes transsexual persons, who intend to undergo surgical procedures to bring their physical self in alignment with their gender identity (usually referred to as "pre-operative transsexual persons"), and those who have already undergone such gender reassignment surgery ("post-operative transsexual persons"). It also encompasses those other transgender persons who, for whatever reason, be it health-related or otherwise, do not intend to undergo surgery (though they may be taking hormones), but who have nevertheless permanently adopted the opposite gender to their biological sex, or have an overwhelming desire to do so. Sometimes, a broader meaning of the term "transgender" is adopted in the literature, which also includes cross-dressers (colloquially referred to as "transvestites"). As cross-dressers do not desire to live *permanently* in the opposite gender to their biological sex, however, their particular situation falls outside the general scope of this article, although the section

on cross-dressing will obviously be relevant to their circumstances. Transgenderism is a recognised medical condition, usually referred to as "gender identity disorder"[17] or "gender dysphoria".[18]

For the purpose of this article, those transgender persons who identify as men are referred to as "transgender men" (or "transsexual men" as appropriate), and those transgender persons who identify as women are referred to as "transgender women" (or "transsexual women" as appropriate). This is intended to give due respect to a person's gender identity, which is denied by the opposite classification in some of the literature.

It should be noted that transgender jurisprudence to date (and academic discussion to a slightly lesser extent) has focused almost exclusively on the legal status of post-operative transsexual persons. Thus, despite its growing jurisprudence in this field, the ECHR has yet to consider the rights under the European Convention of transgender persons who have *not* undergone gender reassignment surgery, and the same can be said of most domestic courts around the world. This obviously has some bearing on the language used in this article. Nevertheless, the terms "transgender" and also "chosen gender" (as opposed to "reassigned sex" or "new sex") are used wherever possible, to ensure that those transgender persons who are not "post-operative transsexuals" are not excluded from the debate – nor from their (equal) rights.

Hong Kong's Transsexual and Transgender Population

It is not known how many transgender persons there are in Hong Kong's population of around seven million. The only estimates which can be gauged are in relation to transsexual persons who have sought and undergone gender reassignment surgery through the public health service in Hong Kong.

The first documented case of gender dysphoria in which the patient underwent gender reassignment surgery in Hong Kong was in 1981.[19] In 1986, a specialist Gender Identity Team was established within the Sex Clinic of the Psychiatric Unit of the Queen Mary Hospital in Hong Kong, to evaluate, support and treat persons with gender dysphoria. This is currently the only public clinic at which gender reassignment surgery is conducted in Hong Kong. All persons going through the Gender Reassignment Programme must be referred by a practicing physician, social worker, clinical psychologist or mental

[17] As adopted, for example, by the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, DSM IV, 1994* (the main diagnostic reference of mental health professionals in the USA) (hereinafter "APA *DSM IV*").

[18] As adopted, for example, by the Harry Benjamin International Gender Dysphoric Association, *see* http://www.hbigda.org (visited 28 Jun 2004).

[19] *See* Ng *et al* (n 16 above), at p 591.

health worker. After a period of counselling and psychiatric assessment, those who proceed further are required to successfully complete a one year "real life" test in which they have to establish and live in society according to their chosen gender identity.[20] They will also receive hormonal treatment. The process culminates in gender reassignment surgery, a long and painful procedure involving a number of operations, particularly in the more complex cases of female-to-male surgery. Indeed, many female-to-male transsexual persons opt not to undergo full genital surgery, involving the creation of a penis (phalloplasty), due to the numerous surgical procedures involved and their variable, and often disappointing, results.[21] Surgery is not performed on any patient who is under the age of 21.[22] At the outset, surgery was also not available to anyone who was married "owing to legal complications which could ensue".[23] However this is no longer the case.[24] Full public funding is provided under the auspices of the Health Authority for those accepted onto the Gender Reassignment Programme, and for those proceeding to gender reassignment surgery under it.

By the end of 1998, a total of 78 persons had been assessed by the Gender Identity Team; 48 of those had gone on to have surgery and seven were still under evaluation.[25] The number of persons being managed by the Gender Identity Team appears to have remained fairly stable over the years, with an average of around three to four new referrals each year, roughly 70 per cent of those being diagnosed as transsexuals, and around 50 per cent of those initially referred going on to have gender reassignment surgery.[26] The most recent figures show that there were six persons diagnosed by the Gender Identity Team as transsexuals in 2002 and three in 2003. Three of these nine persons have undergone gender reassignment surgery to date, two in Hong Kong and one in the UK.[27]

[20] *Ibid.*, at p 594.

[21] This issue will be discussed further in the second article, in relation to the preconditions set in some jurisdictions for full legal recognition of a person's chosen gender.

[22] *Ibid.*

[23] *Ibid.*

[24] Helen Luk, "Professor in Sex Switch", *SCMP*, 30 May 1999, p 1, referring to the first married person to go through the Gender Reassignment Programme.

[25] M.L. Ng and J.L.C. Ma, "Hong Kong" in Robert T. Francoeur (ed), *International Encyclopedia of Sexuality on the Web: Volume 4* (New York and London: Continuum Publishing Group, 2001), pp 216, 230 at http://www.sexquest.com/IES4/ (visited 28 June 2004).

[26] These are the author's own estimates, based on figures contained in John Sik-Nin Ko, "Research and Discussion Paper: A Descriptive Study of Sexual Dysfunction and Gender Identity Clinic in the University of Hong Kong Psychiatric Unit, 1991–2002" at http://web.hku.hk/~sjwinter/TransgenderASIA/paper_qmh_evaluation.htm (visited 28 Jun 2004). According to Ko (at p 1), 34 cases were referred to the Gender Identity Unit for gender reassignment surgery between 1991 and 2001, 28 of which were diagnosed as transsexual, and (at p 8), about 25 per cent of the latter group stopped attending follow-up during the assessment period before having surgery.

[27] Information provided to the author by Dr Emil Ng, University of Hong Kong / Gender Identity Team, Queen Mary Hospital, by e-mail, 17 Jun 2004 (on file with the author).

Based on data collated by the Gender Identity Team until the end of 1998, it has been estimated that the number of persons undergoing gender reassignment surgery through the public health service system in Hong Kong is around 1 in 200,000,[28] with around 1 in 100,000 initially seeking such surgery. Even taking into account the fact that some persons may have had surgery privately in Hong Kong (at least one doctor performs the operation in Hong Kong's private sector)[29] or overseas (a relatively cheap option exists in nearby Thailand for example, which also bypasses the Hospital Authority's assessment procedures),[30] this prevalence rate is extremely low compared to international experience. The most frequently cited figures, which are referred to in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders DSM-IV*, indicate that around 1 in 30,000 males seek gender reassignment surgery and 1 in 100,000 females.[31] Even these figures, which are based on the experience of several small European countries, have been criticised as being extremely out of date and as significantly underestimating the current prevalence rate.[32]

Interestingly, the proportion of women compared to men who have sought gender reassignment surgery in Hong Kong is 1.2 to 1 respectively,[33] which represents an unusually high proportion of female-to-male transsexual persons compared to male-to-female transsexual persons when contrasted with Western experience, where the ratio is in the region of 1 to 3.[34] It is possible that more men than women in Hong Kong might choose to go overseas for gender reassignment surgery, since male-to-female surgery is less complicated and therefore less time-consuming and less expensive than female-to-male surgery.[35] However, there have not yet been any academic studies into this particular Hong Kong phenomenon.

[28] *See* Ng and Ma (n 25 above), at p 230.

[29] Patsy Moy, "More Women Opt for Local Sex Change", *SCMP*, 29 Oct 2000, p 4.

[30] In Thailand, pre-operative assessment and surgery can be completed within one month at the very reasonable cost of HK$50,000 (all-inclusive), *see* Ko (n 26 above), at p 8.

[31] *See* APA DSM IV (n 17 above), at p 579.

[32] Lynn Conway, *How Frequently does Transsexualism Occur* (17 Dec 2002), available at http://ai.eecs.umich.edu/people/conway/TS/TSprevalence.html (visited 28 Jun 2004); GID Reform Advocates, *DSM-IV-TR: Gender Identity Disorder in Adolescents and Adults, 302.85*, at http://www.transgender.org/tg/gidr/gid30285.html (visited 28 Jun 2004). For further comparative statistics, showing, for example, that the prevalence of transsexualism in Hong Kong is lower than Thailand and Singapore, *see* Ko (n 26 above), at p 8.

[33] Joyce L.C. Ma, "Social Work Practice with Transsexuals in Hong Kong Who Apply for Sex Reassignment Surgery" 29(2) (1999) *Social Work in Health Care* 85.

[34] *Ibid.*, at p 85.

[35] *See* Patsy Moy (n 29 above), p 4.

Administrative Concessions Towards Post-operative Transsexual Persons

In addition to providing funding for the treatment of gender dysphoria, including gender reassignment surgery, the Hong Kong authorities have also put in place certain policies aimed at facilitating the lives of post-operative transsexual persons. However, these concessions are not available to other transgender persons, even if they have permanently adopted their chosen gender and are dressing, living, working and otherwise functioning according to that gender. This obviously makes life very difficult for them.

Ability to Change Identity Card

Transsexual persons who have completed gender reassignment surgery[36] may apply to the Immigration Department to have their Hong Kong identity card changed under the Registration of Persons Regulations,[37] on production of a medical certificate and a sworn statement to this effect. In addition, a person can legally change their name by deed poll at any District Administration Office. Having done this, they can also change the name on their identity card. A new identity card will then be issued, showing the person's new first name, chosen gender (which is represented by the symbol "M" or "F") and photograph. According to the Director of Immigration, as between January 1994 and June 2002, 27 applications were received from transsexual persons wishing to amend the details on their identity cards.[38] 15 of these applications were from female-to-male transsexual persons and 12 from male-to-female transsexual persons. All applications were approved and replacement identity cards issued.[39] The Director of Immigration has noted that this "current practice is in line with the ruling of the European Court of Human Rights which support[s] the practice of allowing sex change for the purpose of identification documents".[40]

[36] One person has reported to the author that she was granted a new Hong Kong identity card in her chosen gender as soon as she was able to produce a letter verifying that a date had been scheduled for her surgery in Hong Kong, although this is possibly because she was UK born and a UK passport had already been issued to her in her chosen gender. Others have not had the same experience.

[37] Registration of Persons Regulations (Cap 177A), Laws of Hong Kong, Reg 14(1)(a). According to the Immigration Department there is also a legal *duty* on a person to inform the Immigration Department if they have had gender reassignment surgery, pursuant to Reg 18. Letter to the author from the Director of Immigration, 7 Aug 2002 (on file with the author).

[38] *Ibid.*

[39] *Ibid.*

[40] *Ibid.* It is not clear whether this reference is to the ECHR judgment in *B v France* (1993) 16 EHRR 1; [1992] ECHR 13343/87, or to its judgment in *Goodwin* (n 2 above), which was handed down one month before the Department's letter. Whilst the ECHR held in *B v France* that a violation of Art 8 of the European Convention could arise where a transsexual person had to suffer almost daily disclosure of her private life to third parties through the inability to change her national identity card and other documentation, it went further in *Goodwin*, requiring the authorities to recognise a transsexual person's post-operative status under the birth registration system, for example, by reissuing their birth certificate, which is currently not an option in Hong Kong.

Until recently, it was of significant concern to transsexual persons that, on replacement of their identity cards, a "B" code was included to denote the fact that the gender displayed on their card was different from that recorded on their birth certificate. The "B" code also identifies a change in the place and date of birth recorded on a person's birth certificate, however, this would only arise in the unlikely event that there had been an error in a person's original birth certificate. Thus, there was a fear in the transgender community – regrettably realised in some instances – that the "B" code, particularly when combined with an "N" code to denote a change of name, could easily flag up the holder's transsexuality to anyone "in the know". This could include the police, immigration and social welfare authorities, as well as experienced human resources managers. However, having considered the inconvenience or possible discrimination that the transgender person may face when carrying an identity card with a "B" code, the Immigration Department revised this policy in June 2003,[41] with the effect that replacement identity cards for post-operative transsexual persons no longer carry the "B" code.[42] This development is to be warmly welcomed.

Ability to Change Passport and Other Documents

Once a person has successfully obtained a replacement identity card showing their chosen gender, they will be issued with a replacement Hong Kong SAR passport.[43] This also paves the way for them to change other personal documentation, such as their driving licence, credit cards and bank accounts. The Hong Kong Education Authority will also reissue a person's education certificates. However, peculiarly it insists on maintaining a reference on the certificates to the holder's previous name and gender, as well as their new name and gender. This fails to address the privacy and discrimination concerns that transgender persons have on the production of such certificates to potential employers, educational establishments and others, and the policy has rightly been challenged by several transgender persons, albeit with no success to date.

There is no doubt that these administrative concessions ease the every day lives of post-operative transsexual persons in Hong Kong. This is

41 Letter to the author, acting in a representative capacity for members of TEAM, from the Director of Immigration, 12 May 2004 (on file with the author).

42 This includes both cards issued to persons who have recently undergone gender reassignment surgery, and those who have previously undergone gender reassignment surgery and are replacing their identity card in the new smart card process (who may request that such a change be made – encouragingly, the Immigration Department reports that it does not maintain a database which could be used to advise such persons of the change in policy), *ibid.* A number of persons in both situations have reported to the author that they have been issued with replacement identity cards which do not bear the "B" code, thus verifying the fact that the policy is being duly implemented by the Immigration Department.

43 Letter to the author from the Director of Immigration, 6 Dec 2002 (on file with the author).

particularly true of the reissue of identity cards, since by law, Hong Kong residents are required to be able to produce their identity card at all times,[44] and consequently identity cards are used as the primary means of identification in Hong Kong. However, the identity card does not establish a person's gender for legal purposes. Rather, this is determined by a person's birth certificate, and currently, a person's birth certificate can never be changed in Hong Kong. This gives rise to a number of iniquities for transgender persons in Hong Kong.

Other Policy Areas in Which the Chosen Gender of Post-operative Transsexual Persons is Accommodated

There are also other policy areas in which the authorities show a general willingness to accommodate the chosen gender of post-operative transsexual persons, if not transgender persons more generally. As a prime example, the Correctional Services Department has advised that post-operative transsexual persons who are required to serve a period of imprisonment will be accommodated according to the prison/ward appropriate to their chosen gender.[45] Meanwhile, pre-operative transsexual persons or persons who are in the process of gender reassignment will be assigned to the Vulnerable Prisoner Unit at Siu Lam Psychiatric Centre.[46] The same no doubt applies to other transgender persons who have not undergone gender reassignment surgery.

The next section considers the legal status of transsexual and other transgender persons in Hong Kong in the context of cross-dressing, birth certificates, marriage, gender-specific crimes and discrimination. These may be described as the key legal matters affecting transgender persons in Hong Kong.[47]

The Legal Status of Transsexual and Other Transgender Persons in Hong Kong

No specific provision is made for transgender persons in Hong Kong's legislation. The following analysis is therefore largely based on the statutory

[44] Immigration Ordinance (Cap 115), Laws of Hong Kong, s 17(C).
[45] Letter to the author from the Correctional Services Department, 18 Jun 2003.
[46] *Ibid.*
[47] These are certainly the concerns which come up most frequently in discussion with Hong Kong's transgender community. The list is by no means exhaustive, however. For an overview of some of the other issues, *see* Emerton (n 16 above).

interpretation of ordinances of general application, relating, for example, to the registration of births and to marriage, crime and discrimination. Since the Hong Kong courts have never been called upon to consider the way in which these ordinances apply to transgender persons, the analysis relies wherever possible on the administration's interpretation of the legislation, as reflected in current policy and practice. The authorities' policies tend to be grounded either explicitly or implicitly in English precedent, specifically the case of *Corbett*. Where their position is not evident, however, the analysis draws primarily on English case law, although some case law from other jurisdictions is also considered.

The Central Role of English Precedent in Determining the Legal Status of Transsexual and other Transgender Persons in Hong Kong

The central role which English precedent inevitably plays in this area is dictated by the Basic Law, which, it is generally accepted, establishes the continued primacy of English common law in Hong Kong after 30 June 1997.[48] Thus, under the Basic Law, any English judicial decisions[49] relating to transgender issues which were handed down before 1 July 1997, including the seminal case of *Corbett*[50] (as recently confirmed by the House of Lords in *Bellinger v Bellinger*),[51] are binding on lower Hong Kong courts in accordance with the principle of *stare decisis*.[52] Although the Basic Law expressly authorises judges to refer to precedents of other common law jurisdictions[53] – some of which could be most useful in this field, eg the marriage decisions emanating from Australia and New Zealand[54] – it is unfortunately clear that such

[48] *See*, for example, Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 2nd ed, 1999), pp 367–368. Art 18 of the Basic Law provides that the sources of Hong Kong law shall include the "laws previously in force as provided for in Article 8", which in turn defines these to include the "common law". Although the Basic Law does not expressly state that this shall be *English* common law, commentators generally accept this to be the case, due to the reference to "the laws *previously in force*", which under colonial rule, was the common law of England; and the fact that the Interpretation and General Clauses Ordinance (Cap 1), Laws of Hong Kong, s 3, defines the common law as "the common law of England". The cut-off date for determining which laws were "previously in force" for the purposes of Art 18 was established as 30 Jun 1997 in *HKSAR v Ma Wai Kwan David* [1997] 2 HKC 315, 329.

[49] This appears to cover judicial decisions relating to the development of common law rules and, more importantly in the context of transgender rights, judicial decisions relating to the interpretation of English statutory provisions identical to, or substantially the same as, those in Hong Kong. Certainly, in discussing the scope of the common law in 1994, Peter Wesley-Smith notes that Hong Kong's courts considered themselves bound to apply all decisions of the House of Lords and the Privy Council, not just in judge-made law, but in the interpretation of common legislation as well, *see* Peter Wesley-Smith, *The Sources of Hong Kong Law* (Hong Kong: Hong Kong University Press, 1994), at p 94.

[50] *See* n 3 above.

[51] *Bellinger v Bellinger* [2003] 2 All ER 593 (hereinafter "Bellinger").

[52] *See* Ghai (n 48 above), at p 371; Wesley-Smith (n 49 above), at pp 181–201.

[53] Art 84 of the Basic Law.

[54] *See Kevin and Jennifer* (n 5 above); *Attorney General v Otahuhu Family Court* (n 6 above).

precedents are to be of persuasive value only, and subject to any English authority on point.[55]

In addition, English precedent after 1 July 1997 is likely to be highly persuasive to Hong Kong courts (although not legally binding), particularly if it involves the interpretation of statutory provisions which are common to England and Hong Kong. As a purely practical matter, Hong Kong judges also tend to be particularly familiar and comfortable with English law due to Hong Kong's former status as a British colony (and with most judges having completed their legal training under that era), which is likely to influence their decision-making.[56] Therefore, it is to be expected that English precedent both before and after 1 July 1997 will play a key role in any statutory interpretation in this field. Of course, as the final arbiter of Hong Kong law,[57] the Court of Final Appeal has the power to overrule any English decision, including decisions of the House of Lords, if the Court of Final Appeal finds them to have been wrongly decided,[58] not suitable to local conditions,[59] or indeed incompatible with the Hong Kong Bill of Rights Ordinance ("BORO"). It is certainly feasible that *Corbett* and other relevant English authorities could be overruled by the Court of Final Appeal as being incompatible with certain rights guaranteed by BORO, particularly by reference to the ECHR decision in *Goodwin*. However, this possibility is rather remote in practice.

Ability to Change Birth Certificates

Although, as mentioned above, accommodations are made for post-operative transsexual persons to amend their identity cards and other documentation, there is currently no mechanism by which they, or indeed any other transgender persons, can amend their birth certificates. This leaves them permanently stranded as their designated birth sex for all legal purposes.

[55] Under Art 84 of the Basic Law, all decisions must be made in accordance with the law as specified in Art 18, which indirectly refers to the English common law. *See* Ghai (n 48 above), at p 386.

[56] Andrew Byrnes, "And Some Have Bills of Rights Thrust Upon Them: The Experience of Hong Kong's Bill of Rights" in Philip Alston, *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 1997), at p 355.

[57] Subject to the power of interpretation of the Basic Law vested in the Standing Committee of the National People's Congress by Art 158 of the Basic Law, which was so controversially used to "reinterpret" the decision of the Court of Final Appeal in *Ng Ka-Ling & Others v Director of Immigration* [1999] 1 HKLRD 315.

[58] *See* Ghai (n 48 above), at p 370.

[59] *Ibid.*, at p 369, n 12, referring to the Privy Council decision in *Invercargill City Council v Hamlin* [1996] 3 WLR 367, which upheld the decision of New Zealand's Court of Appeal to depart from a House of Lords decision, on the basis that it was not suitable to local conditions. There have also been instances in which the Hong Kong Court of Final Appeal has departed from a House of Lords' decision without giving any reason for doing so, *see* for example *Tang Siu Man v HKSAR* [1998] 1 HKC 371 as cited in Ghai, *ibid.*, at p 370, n 14. Thus even House of Lords decisions are no longer legally sacrosanct in the way they once were, *see* Wesley-Smith, who, in 1994, referred to the Hong Kong courts as having regarded all House of Lords decisions as "the legal equivalent of holy writ" since the 1980 case of *de Lasala v de Lasala*; Wesley-Smith (n 49 above), at p 189.

Registration of births in Hong Kong is governed by the Births and Deaths Registration Ordinance.[60] Although this does not stipulate the criteria for determining the sex of a child at birth, the practice of the Registrar of Births, Deaths and Marriages is to rely on the birth return furnished by the relevant hospital.[61] This is completed by reference to biological criteria – primarily the genitals (penis in males; vagina in females), but also gonads (testes in males; ovaries in females) and chromosomes (XY in males; XX in females) in less straightforward cases. As a historical record, the only circumstances in which a birth certificate can legally be amended is if it can be shown there was a clerical error or an error of fact or substance when the birth was recorded.[62] In the case of sex, the Registrar has confirmed that this would require an error to be proven in the recorded biological sex of the person, implicitly relying on *Corbett's* biological test of sex. This would be extremely rare, although not impossible in the case of inter-sexed persons, whose biological make-up was incongruent at birth. Therefore, according to the Registrar, there is no mechanism by which a person's birth certificate can be amended to reflect their chosen gender, even after gender reassignment surgery.[63] In addition, although a person can legally change their name, the only situation in which the name on a person's birth certificate can be changed is in the case of a child under the age of 11.[64]

The inability of transgender persons to change their birth certificates has privacy implications, as it means that their biological sex and transgender history may be revealed against their wishes whenever they are required to produce their birth certificate. In turn, this makes them vulnerable to prejudice and discrimination. Fortunately, the existence of the compulsory identity card scheme minimises the occasions on which the birth certificate is relied upon for identification purposes in Hong Kong. However, a transgender person must still disclose the sex recorded on their birth certificate for various official purposes, as well as when they enter into certain types of insurance contract (*uberrimae fidei* i.e. utmost faith contracts), which might otherwise be rendered invalid. In addition, their birth certificate remains the mechanism by which their sex is determined for the purpose of the law. This situation results in a fundamental discrepancy between their legal status and personal identity, which can be most distressing to transgender persons.[65]

60 Births and Deaths Registration Ordinance (Cap 174), Laws of Hong Kong.

61 Letter to the author from the Director of Immigration (who is also the Registrar of Births, Deaths and Marriages), 7 Aug 2002 (on file with the author).

62 Births and Deaths Registration Ordinance, s 27.

63 Letter to the author from the Director of Immigration, 7 Aug 2002 (on file with the author).

64 Births and Deaths Registration Ordinance, s 13.

65 As recognised by the ECHR in *Goodwin* (n 2 above), at para 77. For further reasons why birth certificates matter to transgender persons, *see* Claire McNab, "Why Birth Certificates DO Matter" at http://www.pfc.org.uk/campaign/bcmatter.htm (Dec 1998) (visited 28 Jun 2004).

In England, the Registrar General's refusal to amend the entries of two post-operative transsexuals in the register of births or to change their birth certificates (which refusal was based on identical statutory provisions to those in Hong Kong's Births and Deaths Registration Ordinance), was unsuccessfully challenged in a judicial review action before the High Court in *R v Registrar General for England and Wales, Ex p P & G* (1996).[66] However, the situation in the UK was recently found by the ECHR in *Goodwin* to constitute (or contribute to) a violation of the right to respect for private life under the European Convention.[67] The position in Hong Kong might therefore be open to challenge under BORO, which similarly guarantees the right to privacy.[68] This will be discussed in detail in the second article, intended for a subsequent issue of this journal.

Freedom to Cross-Dress

It is obviously of crucial importance that transgender persons have the freedom to express their identity by dressing in the clothes traditionally associated with their chosen gender ("cross-dressing"). There is no law prohibiting cross-dressing in public in Hong Kong, unlike in Malaysia for example.[69] However, a misguided report in Next Magazine in May 2003,[70] which implied that cross-dressing could be an offence under Hong Kong law, resulted in both considerable anxiety and indeed indignation amongst Hong Kong's transgender community. It is important therefore, to take the opportunity to refute it here.

In the Next Magazine article, a solicitor, Mr Leung Wing Heng of Yip, Tse and Tang, Hong Kong, opined that cross-dressing might constitute an indecent public performance, contrary to section 12A of the Summary Offences Ordinance.[71] This section provides that "no person shall, whether for reward or not, take part in any public live performance of an indecent, obscene, revolting or offensive nature". The offence carries a fine of HK$25,000 or a maximum of one year's imprisonment. Mr Leung was reported as saying that "any person appearing in the street wearing the clothes of someone of the opposite sex without permission of the government may be regarded as publicly performing ... when such men dressed as women appear in the street, they expect to be seen by the public. This is an act of public performance. If

66 Unreported. Available at Press for Change, http://www.pfc.org.uk/legal/rp-pg.htm (visited 28 Jun 2004).
67 *See Goodwin* (n 2 above), at para 90.
68 BORO, Art 14.
69 Cross-dressing is prohibited in Malaysia both in relation to Muslims (a 1983 Islamic "fatwa" prohibits cross-dressing and gender reassignment surgery) and non-Muslims (the offence of indecent behaviour under the Minor Offences Act is used), *see* Yik Koon The, "Country Report: Malaysia", at http://web.hku.hk/~sjwinter/TransgenderASIA/country_report_malaysia.htm, pp 1–2 (visited 19 Jul 2004).
70 "Men in Bras", *Next Magazine*, Issue 688, 15 May 2003, p 72.
71 Summary Offences Ordinance (Cap 228), Laws of Hong Kong.

a passer-by feels disgusted and raises a complaint to the relevant authority, then the cross-dressers may be convicted".[72] He added, however, that as the definition is vague, no person has been convicted for cross-dressing to date in Hong Kong.

This interpretation of the Summary Offences Ordinances is certainly novel, if not far-fetched, and was rightly criticised by a local community group.[73] Even setting aside the question of whether cross-dressing could be regarded as "indecent, obscene, revolting or offensive" (whilst it has admittedly been branded as "indecent behaviour" in Malaysia,[74] it would surely not be so regarded in more liberal Hong Kong), the Summary Offences Ordinance defines "public live performance" to include plays, shows, exhibitions and displays in a public place.[75] Any ordinary reading of the definition of "public live performance" could not possibly include a private individual going about their everyday business in the clothes traditionally associated with the opposite gender, nor indeed any other attire, however "radical" or exhibitionist it might be regarded as by others. The fact that no one has ever been convicted of taking part in an indecent public performance in Hong Kong simply for cross-dressing supports the more rational interpretation that the offence is aimed at indecent and offensive public *performances*, not the particular mode of attire adopted by a person in public, whether transgender or not.

It should also be mentioned for the sake of completeness – and because this issue does genuinely trouble many transgender persons in Hong Kong (as well as holding a peculiar fascination with the public) – that there are certain offences under the Public Health Ordinance which would bar a person who is cross-dressed from using public toilets and changing facilities (applying *Corbett*, even those transsexual or transgender persons who have permanently adopted their chosen gender would be caught). It is understood that this is not applied in practice by the Hong Kong Police to those who have had gender reassignment surgery, nor to those who are currently under the real life test of the Gender Reassignment Programme.[76] However, others are in a less fortunate position, and face the trauma of whether or not to use a public toilet or changing facility, in case they might be charged.[77]

[72] Unofficial translation (the original appears in Chinese).

[73] By letter of 16 May 2003, Civil Rights for Sexual Diversities requested Yip, Tse and Yan to issue a public statement to clarify the possible misinterpretation of the law by Mr Leung, but received no reply.

[74] *See* n 69 above.

[75] Summary Offences Ordinance, s 12A(9).

[76] This information is based on the experience of transgender persons, and also on the advice of a transgender policewoman.

[77] One case is personally known to the author in which a transgender person was given a warning by the police for using the "opposite sex" toilets. A particular Hong Kong university is also known to have asked a transgender woman currently under assessment by the Gender Identity Team at Queen Mary Hospital to use the disabled toilets, so as not to cause offence or embarassment to other students.

Potentially of more serious concern is the criminal offence of loitering under section 160(3) of the Crimes Ordinance.[78] This provides that if a "person loiters in a public place or in the common parts of any building, and his presence there ... causes any person reasonably to be concerned for his safety or well-being, he shall be guilty of an offence and shall be liable on conviction to imprisonment for two years". The "common parts" of a building are defined to include a toilet which is in common use by the occupiers of a building,[79] ie in a private or public building. This offence has been used to convict a cross-dressed person of loitering in a restaurant toilet; an eight-week prison sentence was handed down.[80] However, there were aggravating circumstances in this particular case. Press reports state that the defendant hid in the toilets of the McDonald restaurant to peep at female staff, and that it was also his second offence of loitering, having been convicted some four months earlier of taking pictures up the skirt of an employee in the toilets of the same restaurant.[81] Importantly, there are no reported cases of a person having been convicted of the offence of loitering simply on account of being in a public place or using toilet facilities whilst cross-dressed. Indeed (notwithstanding a transgender policewoman's indication that the offence could be used in this way), it seems highly improbable that a court would find these actions to constitute loitering, nor to comprise threatening behaviour, so as to have caused another person *reasonably* to be concerned for his safety or well-being, as required under the elements of the offence.

Ability to Marry in Chosen Gender

The next topic to be considered is marriage. Marriage is important not only because it provides an opportunity for a couple to publicly declare their love and commitment to each other, but also because it brings with it numerous legal rights (for example, inheritance rights) and responsibilities (for example, provision of maintenance on the breakdown of marriage), as well as a wide range of benefits, including tax, financial, immigration and social benefits. In Hong Kong, such benefits include the married person's tax allowance, the right as a married couple to public housing, the right to employment benefits for one's spouse (such as pension, health and travel benefits), the ability to bring one's foreign spouse into Hong Kong as a dependent, and the ability to

78 Crimes Ordinance (Cap 200), Laws of Hong Kong.

79 *Ibid*, s 160(4)(b).

80 *See* reports in *Hong Kong Economic News*, 31 July 2003, p A31; and *Sing Tao Daily*, 31 July 2003, p A15 (both in Chinese). The case concerned Chung Kai-Lun, District Court (Criminal), Case No KCCC 8896/2003, 16 July 2003. No judgment was delivered as the defendant pleaded guilty to the charge, letter to the author from Registrar, District Court, Wanchai Law Courts, 15 Oct 2003 (on file with the author).

81 *Ibid.*, *Hong Kong Economic News*.

obtain artificial donor insemination or to use a surrogate mother to conceive a child.[82] Reproductive assistance is of particular relevance for those transgender persons who wish to have a child with their partner, but who obviously cannot conceive naturally if they are of the same biological sex.[83]

Marriage is also the context in which the seminal English case of *Corbett*[84] was decided, and in which many other courts around the world have first had to grapple with transgender issues. As mentioned above, *Corbett* has set the boundaries of transgender jurisprudence in England and other common law jurisdictions for over thirty years in relation to both marriage and other areas, and continues to exert its influence in domestic courts even now.[85] *Corbett* also clearly underpins the authorities' approach to transgender issues in Hong Kong and would undoubtedly govern the Hong Kong courts' determination of such issues, were they ever to come before the courts.

Because of its legal significance, it is worth looking at *Corbett* in some detail. The case concerned Arthur Corbett, a biological man, who had married April Ashley, a transsexual woman. Ms Ashley had undergone gender reassignment surgery prior to the marriage, a fact of which Mr Corbett was fully aware when he married her. On the breakdown of their marriage, Mr Corbett petitioned for a declaration of nullity on the ground that his wife was male at the time of the marriage, or alternatively, incapable of consummating the marriage. The Court found in his favour on both grounds. At the time, the case involved the interpretation of the common law definition of

[82] Under the Human Reproductive Technology Ordinance (Cap 561), Laws of Hong Kong, which was passed in 2000 but is not yet in operation, reproductive technology is permitted to be provided to married couples only (s 15(5)); and similarly, for the purposes of a surrogacy arrangement, only the gametes of two persons who are the parties to a marriage may be used (s 14).

[83] Although no such cases are known to the author to have arisen in Hong Kong, this issue has arisen in other countries. For example, in Taiwan, responding to a case in which a transgender man sought sperm from a sperm bank for his wife (the couple were legally married in Taiwan), the Health Department issued a statement that if a transgender man was legally married, he was regarded as any other infertile male and there was nothing illegal in assisting his wife to become pregnant. However, rather incongruously, the Health Department stated that it would be illegal for a transgender woman to ask another to bear a child for her through surrogacy, even if married. Reported in *Taiwan News Online* in Oct 2003 (no longer available on-line); confirmed as current legal status by Professor Josephine Ho, National Central University, Taiwan, by e-mail, 10 Nov 2003. In the UK, artificial donor insemination is available on the public health service for the female partners of transgender men. However, the transgender man is not permitted to be registered as the father on the child's birth certificate. This situation was unsuccessfully challenged as a violation of the right to respect for the transgender man's private and family life and as being discriminatory as compared to the situation of non-transgender men, who are allowed to be registered as the child's father, before the ECHR in *X, Y and Z v UK* (1997) 24 EHRR 143. *See* Stephen Whittle, "Respect and Equality: Transsexual and Transgender Rights" (London: Cavendish, 2002), at pp 16–17 and pp 191–194; and Terence Shaw, "Transsexual Loses Legal Fight to be Registered as Father", *Electronic Telegraph*, Issue 698, 23 April 1997.

[84] *See Corbett* (n 3 above).

[85] *See* the 2003 decision of the House of Lords (UK) in *Bellinger* (n 51 above), and the 1999 decision of the Texas Court of Appeal (USA) in *Littleton v Prange*, Texas (1999) 9 SW 3d 223. For a discussion of *Littleton v Prange*, *see* Stephen Whittle (n 83 above), at pp 137–139.

marriage, which provides that marriage is "the voluntary union for life of one man and one woman to the exclusion of all others" (*Hyde v Hyde* (1866)).[86] In determining Ms Ashley's sex for these purposes, Justice Ormrod adopted a biological definition of sex, which took into account three factors – a person's chromosomes, gonads and genitals. If all three criteria were congruent at birth, then this would determine a person's sex for the purpose of marriage.[87] Although all the (nine) medical expert witnesses in *Corbett* agreed that psychological factors were also relevant in the assessment of the sex of a person, Ormrod J. chose not to include psychological criteria in his legal definition of sex.[88] This can be explained by the great emphasis Ormrod J. placed in his judgment on the role of procreative sex within marriage, rendering it "a relationship which depends on sex and not on gender"[89] (gender being understood to include psychological factors). As Justice Ormrod stated, even gender reassignment surgery could not "reproduce a person who is naturally capable of performing the essential [procreative] role of a woman in marriage",[90] therefore Ms Ashley could not be considered a woman for the purpose of marriage. Further, noting the "common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth and cannot be changed",[91] Ormrod held that a person's legal sex for the purpose of marriage was immutably fixed at birth, and that any surgical intervention, such as gender reassignment surgery, must be ignored.

The second submission in *Corbett* was that, even if the marriage was in fact valid, Ms Ashley was unable to consummate the marriage and that this would render the marriage voidable under English law. Although technically Justice Ormrod did not need to determine the point since he had already found in favour of Mr Corbett on the first submission, he nevertheless expressed the view that intercourse using "a completely artificial cavity", such as that surgically created in Ms Ashley, as a transsexual woman, could "not possibly be described as ordinary and complete intercourse"[92] and therefore that the respondent was physically incapable of consummating the marriage. This finding further underscored Justice Ormrod's position in relation to the first submission that sex (in terms of biological criteria) and not gender (in terms of psychological criteria), was central to the concept of marriage – a

86 (1866) LR 1 P & D 130.
87 *See Corbett* (n 3 above), at p 48. For a detailed discussion of "The (Bio)logic of the Law", *see* Andrew N. Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (London: Cavendish Publishing, 2002), Ch 3, pp 39–56.
88 *Ibid*, at p 44.
89 *Ibid*, at p 49.
90 *Ibid*, at p 48.
91 *Ibid*, at p 47.
92 *Ibid*, at p 49.

fact which has since assisted courts in Australia[93] and New Zealand[94] to distinguish *Corbett* in similar marriage cases, since, in their laws, non-consummation is not a ground on which a marriage can be voided. Thus, the legal validity of a marriage of a post-operative transsexual person in their chosen gender has been judicially upheld in both these countries.

Shortly after *Corbett*, the UK Matrimonial Causes Act (1973) gave statutory effect to the common law position that a marriage is void if the parties are not respectively male and female (section 11(c)) and that a marriage is voidable if it has not been consummated owing to the incapacity of either party (section 12(a)). These provisions are reproduced *verbatim* in section 20(1)(d) and 20(2)(a) of Hong Kong's Matrimonial Causes Ordinance respectively. It was in this statutory context that the Court of Appeal (2001)[95] and the House of Lords (2003)[96] recently upheld *Corbett* in *Bellinger*.

Bellinger concerned Elizabeth Bellinger, a transsexual woman who had married Michael Bellinger in 1981, shortly after gender reassignment surgery. Mr Bellinger was fully aware of his wife's background at the time of marriage and the couple continued to live together as man and wife. Ms Bellinger sought a declaration from the court that her marriage was valid for the purposes of section 11(c) of the Matrimonial Causes Act. After her application was rejected at first instance, Ms Bellinger appealed. Although accepting that there was a "growing momentum for recognition of transsexual persons",[97] both the Court of Appeal and the House of Lords applied the *Corbett* biological criteria to determine Ms Bellinger's sex. They therefore held that the appellant, despite having undergone gender reassignment surgery, remained a biological male for the purposes of marriage, and that her marriage was void under section 11(c) of the Matrimonial Causes Act.

Corbett has been explicitly applied by the authorities in their interpretation of Hong Kong laws relating to marriage. Under section 40 of the Hong

[93] *See Kevin and Jennifer* (n 5 above). In distinguishing *Bellinger v Bellinger*, [2001] EWCA Civ 1140 (Court of Appeal); [2002] 1 All ER 311 (hereinafter "*Bellinger (CA)*") and *Corbett*, the Family Court of Australia remarked (at para 293) that the most significant ground for distinguishing the case was that procreative sex was still relevant to marriage in England, and the inability to consummate the marriage still provided a ground for a decree of nullity in England, whereas in Australia it no longer did so.

[94] *See Attorney General v Otahuhu Family Court* (n 6 above). In this case, Ellis J. (at p 606), rejected *Corbett*, observing that the ability to procreate was not essential to marriage, nor was the ability to have sexual intercourse, and concluded that "the law of New Zealand has changed to recognise a shift from sexual activity and more emphasis is being placed on psychological and social aspects of sex, sometimes referred to as gender issues."

[95] *See Bellinger (CA)* (n 94 above).

[96] *See Bellinger v Bellinger (HL)* (n 51 above).

[97] *Ibid.*, at para 18; *see* also *Bellinger (CA)* (n 93 above), in which the Court observed (at para 90) the "momentum for change" in the jurisprudence of the ECHR and domestic courts around the world.

Kong Marriage Ordinance, for example, a marriage is stipulated to be the "voluntary union for life of one man and one woman".[98] Although the Ordinance does not define the words "man" and "woman", the Registrar of Births, Deaths and Marriages has stated that a person's biological sex (as recorded on their birth certificate) will be referred to for this purpose, and expressly noted that this position was in accordance with *Corbett*.[99] The Registrar states that he is therefore "not in a position to celebrate [a] marriage between persons of the same biological sex".[100] As a consequence, the whole gamut of rights, responsibilities and benefits which attach to marriage are denied to heterosexual transgender persons[101] and their partners. They are also denied ... the fundamental social recognition of their relationship.

It follows from the Registrar's statement that not all transgender persons are barred from marrying in Hong Kong. *Corbett* does not bar homosexual or lesbian transgender persons[102] from marrying a person of the opposite biological (birth) sex to them. Thus, for example, a post-operative (male-to-female) transsexual woman, or indeed any transgender woman, may legally marry a biological woman under Hong Kong law. Whilst in law, this would classify as an opposite sex marriage, to all other intents and purposes it would be a same-sex marriage, with such marriages not otherwise permitted in Hong Kong.

There is no doubt that the position adopted by the Registrar of Births, Deaths and Marriages, regarding his inability to celebrate the marriage of two persons of the same biological sex, is legally correct. As *Corbett* is a pre-1 July 1997 English decision, it is legally binding in Hong Kong.[103] Technically, as a judgment by a single judge sitting at a court of first instance, *Corbett* has very little standing, but the Hong Kong courts would unquestionably give deference to the extraordinary influence which *Corbett* has had on transgender jurisprudence in both the UK and common law world since 1970. Moreover, *Corbett* has recently been affirmed by the House of Lords, in *Bellinger*.[104] This confirms its status as good law in more modern times, and verifies its highly authoritative status *vis-à-vis* the Hong Kong courts, even though *Bellinger*, a 2003 decision, as not itself legally binding on the Hong Kong courts.

98 Marriage Ordinance (Cap 181), Laws of Hong Kong, s 40.

99 Letter to the author from the Director of Immigration (who is also the Registrar of Births, Deaths and Marriages), 7 Aug 2002 (on file with the author).

100 *Ibid.*

101 *ie* "those who are sexually attracted to persons of the opposite gender identity, albeit that both parties share the same biological (birth) sex".

102 *ie* "those who are sexually attracted to persons of the same gender identity, but the opposite biological (birth) sex".

103 See p 255 above.

104 *See Bellinger* (n 51 above).

Despite the legal position, the author is aware of "marriages" which have in fact taken place in Hong Kong where the couple are of the same biological sex. This is possible because the Marriage Registration Office relies upon the couple's identity cards or passports when they attend to give notice of their marriage, not their birth certificates.[105] The celebrant usually does the same, if indeed any identification is required at all at this stage. If the transgender party carries an identity card or passport which has been reissued after gender reassignment surgery, then his or her transgender history is unlikely to come to light during the proceedings, with the result that the marriage can in fact take place. However, applying *Corbett*, any marriages between two persons of the same biological sex which "slip through the net" in this way are invalid pursuant to section 20(1)(d) of Hong Kong's Matrimonial Causes Ordinance. This section (which is identical to section 11(c) of the UK Matrimonial Causes Act, on which the House of Lords' decision in *Bellinger*, affirming *Corbett*, was based) provides that any marriage which is not respectively between a male and a female is void.[106] To cap it all, a person who "knowingly and willfully" celebrates a marriage in Hong Kong when he or she is not legally competent to do so commits an offence punishable with up to two years' imprisonment.[107]

Although the law in Hong Kong is that persons of the same biological sex may not validly marry, the ECHR's decision in *Goodwin*[108] paves the way for this position to be challenged under BORO. In *Goodwin*, the UK was held to be in violation of the right to marry under the European Convention by failing to allow a post-operative transsexual person to marry someone of the same biological sex. The government's argument that transsexuals were not barred from marriage since they were able to marry someone of the opposite biological sex, was held by the ECHR to be "artificial".[109] Moreover, the ECHR specifically rejected the biological test, as first laid down in *Corbett*, as being no longer the appropriate determinant of sex for the purpose of marriage, given modern social, medical and scientific advances in the field of transsexuality.[110] However, the ECHR left it open to member states to determine the particular conditions under which marriage would be accessible to transgender persons in their jurisdiction,[111] thereby allowing states to put other obstacles (for example the requirement of gender reassignment surgery) in the way of this fundamental right.

[105] Immigration Department: Public Services: Marriage Registration, at http://www.immd.gov.hk/ehtml/bdmreg_4.htm (visited 28 July 2004).
[106] Matrimonial Causes Ordinance (Cap 179), Laws of Hong Kong.
[107] Marriage Ordinance, s 33.
[108] *See Goodwin* (n 2 above).
[109] *Ibid.*, at para 101.
[110] *Ibid.*, at para 100.
[111] *Ibid.*, at para 103.

As BORO, in similar language to the European Convention, guarantees "the right of men and women of marriageable age to marry" in Hong Kong,[112] the Hong Kong courts might possibly be persuaded to follow *Goodwin* in interpreting the right to marry under BORO, thus extending it to heterosexual transgender persons. However, as noted above, *Corbett* was upheld by the House of Lords in *Bellinger*, notwithstanding the ECHR's prior decision in *Goodwin*. Although the UK courts have a legal duty to read and give effect to domestic legislation in a way which is compatible with the European Convention,[113] the House of Lords found it impossible to read the words "male" and "female" in the Matrimonial Causes Act to include post-operative transsexuals in accordance with *Goodwin*,[114] and declared that the issues were "altogether ill-suited for determination by courts and court procedures", but rather "pre-eminently a matter for parliament".[115] This does not bode well for any BORO challenge in Hong Kong, as will be discussed in detail in the second article on this topic.

Recognition of Overseas Marriages in Hong Kong

It is now possible for post-operative transsexual persons validly to marry a person of the same biological sex in many overseas jurisdictions, including China, Japan, Singapore, Taiwan, Australia, New Zealand, most countries in Europe and many states in Canada and the US. Shortly such marriages will also be possible for all transgender persons who have permanently adopted their chosen gender in the UK. The question therefore arises whether an overseas marriage involving a transgender person would be legally recognised in Hong Kong. Similar issues arise in relation to the recognition of overseas marriages between homosexual couples.[116] Several examples are used to examine the position below.

First, under the Matrimonial Causes Ordinance, the Hong Kong courts have jurisdiction to hear cases regarding divorce, judicial separation, etc, only in respect of "monogamous marriages".[117] Such marriages are defined, if they took place outside Hong Kong, as marriages involving the "voluntary union for life of *one man and one woman* to the exclusion of all others".[118] Given that the

[112] BORO, Art 19. The Basic Law also guarantees that "the freedom of marriage of Hong Kong residents ... shall be protected by law", Art 37.

[113] Human Rights Act 1998, s 3(1).

[114] They did, however, make a declaration of incompatibility under the Human Rights Act, s 4(2), on the basis that s 11(c) of the Matrimonial Causes Act was incompatible with European Convention, as interpreted in *Goodwin*.

[115] *See Bellinger* (n 51 above), *per* Lord Nicholls of Birkenhead, at para 37.

[116] *See*, for example, Tim Cribb, "Same Sex: Different Rules", *SCMP*, 27 Nov 2003, p 14; Chow Chung-yan, "Gay and Lesbian wed in Benefits Protest", *SCMP*, 26 Mar 2002, p 7.

[117] Matrimonial Causes Ordinance, s 9.

[118] *Ibid*, s 2. Emphasis added.

Corbett criteria are currently applied to determine the sex of parties to a marriage celebrated in Hong Kong, it follows that the same criteria would be applied to marriages contracted overseas. Thus, it must be expected that the words "man" and "woman" in the Matrimonial Causes Ordinance would be interpreted to refer to a transgender person's biological sex as designated at birth, with the result that the Hong Kong courts would not have jurisdiction to hear cases concerning overseas marriages involving transgender persons.[119]

This is certainly the stance taken by the Immigration Department in its policy on admitting foreign[120] spouses to Hong Kong where one of the parties is transgender. Echoing the language of the Matrimonial Causes Ordinance, the Director of Immigration explains that the Immigration Department's current policy is "based on monogamy and the concept of a married couple consisting of one male and one female".[121] This would not include marriages involving transgender persons, which the Department regards, together with marriages involving homosexual persons, as "irregular marriages".[122] However, the Immigration Department acknowledges that whilst such relationships are "between persons who are not married in the sense recognised by the laws of Hong Kong ... the persons in the relationship are as committed to it as persons who are married". The Immigration Department will therefore normally give prolonged visitor status to spouses of such irregular marriages if they can be financially supported by their spouse, even though it is unable to extend to them the privileges granted to spouses of marriages recognised under Hong Kong law.[123]

As a final example, for taxation purposes, eg for the married person's allowance, marriage is defined in the Inland Revenue Ordinance as "(a) any marriage recognised by the law of Hong Kong; or (b) *any marriage, whether or not so recognised, entered into outside Hong Kong according to the law of the place where it was entered into and between persons having the capacity to do so*".[124] The second limb of this definition suggests that if a marriage is validly entered into overseas, then it will be recognised in Hong Kong for taxation purposes, even if it is not recognised under Hong Kong law. However, the Inland

[119] Compare the government's position that the courts do not have jurisdiction under the Matrimonial Causes Ordinance over marriages validly contracted overseas by homosexual couples, *see* LegCo Panel on Homes Affairs Subcommittee to study discrimination on the grounds of sexual orientation. "Marriage Certificates Issued by Overseas Countries for Homosexual Couples", LC Paper No CB(2) 521/01-02(02) (Home Affairs Bureau, Nov 2001).

[120] This term is used loosely also to include Mainland Chinese persons. Despite the fact that Hong Kong is now part of the People's Republic of China, its status as a special administrative region means that it has maintained its borders and exercises a separate immigration regime from Mainland China.

[121] Letter to the author from the Immigration Department, 6 Dec 2002 (on file with the author).

[122] *Ibid.*

[123] *Ibid.*

[124] Inland Revenue Ordinance (Cap 112), Laws of Hong Kong, s 2. Emphasis added.

Revenue Department has interpreted the Inland Revenue Ordinance strictly in relation to overseas homosexual marriages, reading into this clause the requirement for the "marriage" to be between a man and a woman, in accordance with the definition of marriage contained in the Matrimonial Causes Ordinance. The Inland Revenue Department has recently confirmed that it would take the same stance towards overseas marriages involving transgender persons, that is, that it would not regard such marriages as being as between a man and a woman, with the result that the marriages would not be recognised for taxation purposes in Hong Kong.[125]

It is therefore clear that even marriages validly conducted overseas by transgender persons and their partners are not recognised for the purposes of Hong Kong law.

Gender for the Purpose of the Crimes Ordinance

The legal gender ascribed to a transgender person is also relevant to the criminal law, specifically in the context of sexual offences. Although there has been a movement towards gender-neutrality in the sexual offences legislation of many other countries (such as the UK, Australia and South Africa), Hong Kong's Crimes Ordinance is still riddled with offences in which the gender of the offender or the victim is relevant to the establishment of the crime. The most obvious example is the offence of rape, which can only be perpetrated by a man against a woman.[126] The offence of indecent assault[127] is available, whatever the gender of the offender or the victim, but this carries a maximum penalty of 10 years' imprisonment compared to life imprisonment for rape, and the social stigma attached to a conviction of indecent assault is unquestionably far less than for rape. Other offences under the Crimes Ordinance which can be perpetrated only by a man against a woman include unlawful sexual intercourse with a girl under the age of 13,[128] unlawful sexual intercourse with a girl under the age of 16[129] and anal sexual intercourse (archaically still referred to in the Crimes Ordinance as "buggery") with a girl under the age of 21.[130] In addition, only a man can be charged with unlawful intercourse or buggery with a mentally incapacitated person,[131] and the various offences of gross indecency contained in the Crimes Ordinance require both (or several) parties to be men.[132]

[125] Letter to the author from the Inland Revenue Department, 6 Aug 2004 (on file with the author).
[126] Crimes Ordinance (Cap 200), Laws of Hong Kong, s 118.
[127] *Ibid.*, s 122.
[128] *Ibid.*, s 123.
[129] *Ibid.*, s 124.
[130] *Ibid.*, s 118D.
[131] *Ibid.*, ss 125 and 118E respectively.
[132] *Ibid.*, gross indecency with or by a man (s 118H), gross indecency with or by a man under 21 (s 118I) and gross indecency otherwise than in private (s 118J).

Although transgender persons are known to have been convicted of crimes in Hong Kong,[133] none of these have been gender-specific crimes, so it is not certain how the Hong Kong courts would determine the gender of a person (whether as perpetrator or victim) for the purposes of the Crimes Ordinance. However, there is binding English precedent, in the form of the Court of Appeal decision in *R v Tan & Others* (1983),[134] which held that *Corbett* also applies in the field of criminal law. This has the result that a person's biological sex at birth is the determining factor, regardless, in particular, of any gender reassignment surgery they may have had. Upholding various convictions for prostitution-related offences which were dependant on Gloria Greaves, a post-operative transsexual woman, still legally being a man, the Court of Appeal in *R v Tan* stated that "both common sense and the desirability of certainty and consistency" demanded that *Corbett* should apply not only for the purposes of marriage, but also for the purposes of the sexual offences legislation in question.[135]

On the basis of *R v Tan*, it is usually assumed that *Corbett* would apply to all criminal offences in the UK – and it follows, in Hong Kong as well. However, in the unreported case of *R v John Matthews* (1996),[136] it was held that penile penetration of the surgically constructed vagina of a transsexual woman could constitute rape. The fact that *Corbett* had held that a woman with an artificial vagina could not consummate a marriage "was of little help in resolving the issue of whether penetration of it would constitute rape", which in the Court's judgment, it could.[137] Unfortunately, *R v John Matthews* is a Crown Court decision, which is not legally binding in the UK or in Hong Kong, although arguably of some persuasion to the Hong Kong courts.

Looking to the jurisprudence of other common law countries, albeit as a secondary source of law,[138] there are Australian precedents which have departed from *Corbett* in the criminal law field. In *R v Cogley* (1989),[139] a conviction of assault with the intent to commit rape was upheld where the victim was a post-operative transsexual woman. As in Hong Kong, the crime of rape could only be committed against a woman. This could be used by the Hong Kong courts in support of the *R v John Matthews* position. In addition,

[133] Letter to the author from the Correctional Services Department, 18 Jun 2003. *See* also Magdalen Chow, "Prison for Transsexual", *SCMP*, 2 Aug 1998, p 4; Patricia Young, "Sex-change Trafficker Jailed", *SCMP*, 2 Nov 1996, p 5; and Magdalen Chow, "Fine for Sex Swap Defendant", *SCMP*, 1 Jun 1994, p 8.

[134] *R v Tan & Others* [1983] 2 All ER 12.

[135] *Ibid.* p 19.

[136] *R v John Matthews*, Reading Crown Court, RCC No.T960397 (28 Oct 1996), available at Press for Change, http://www.pfc.org.uk/legal/index.htm#otherukcourt (visited 28 Jun 2004).

[137] *Ibid.* p 4.

[138] Basic Law, Art 84.

[139] *R v Cogley* 799 VR 799.

in another Australian case, *R v Harris and McGuiness* (1988),[140] two transsexual women, only one of whom had undergone gender reassignment surgery, were charged with committing, as men, an act of indecency with another man. Both defendants argued that they were not male within the meaning of the Crimes Act 1914. Interestingly (as this issue has so rarely come before the courts), the court made a distinction between the two women, finding that the defendant who was post-operative was not a "male" for the purposes of the Act, whereas the defendant who was pre-operative was still "male" for those purposes. As in Hong Kong, the offence of indecency under Australian criminal law required both parties to be male; since the court had found that one of the defendants was not male, neither could be convicted.

Notwithstanding these Australian cases, it is highly likely that the Hong Kong courts would follow the English precedent of *R v Tan* and apply *Corbett* in the criminal field. They might possibly make an exception for the crime of rape by reference to *R v John Matthews*. However, the courts might be concerned from a policy and consistency perspective that if they recognised the chosen gender of post-operative transsexuals for the purpose of one criminal offence, they might be opening the back door to general recognition in the remainder of the criminal law field, or, more seriously perhaps, to recognition in other fields, most particularly marriage. Indeed, as mentioned above, the "desirability for certainty and consistency" was cited by the Court of Appeal in *R v Tan* as a reason for applying *Corbett* in the English criminal law context.[141] The same desire for consistency was expressed by the Australian Family Court in *Kevin and Jennifer*,[142] with the opposite result. In this case, the Court noted that all the previous cases in Australia[143] had recognised the chosen gender of post-operative transsexual persons. Finding that no valid reason had been put forward as to why a post-operative transsexual person's chosen gender should not also be recognised in the context of marriage, the Court decided not to apply *Corbett* (which, whilst persuasive, was not legally binding on them) and upheld the validity of the appellant's marriage, despite both parties to the marriage being of the same biological sex.

Protection Against Discrimination and Harassment

Transsexual and other transgender persons frequently suffer discrimination and harassment from others in their every day lives in Hong Kong. Indeed, the colloquial term for a post-operative transsexual woman in Cantonese is

[140] *R v Harris and McGuiness* 17 NSWLR 158.
[141] *See* above, p 269.
[142] *See Kevin and Jennifer* (n 5 above), at para 289.
[143] *See* the criminal cases of *R v Cogley* and *R v Harris and McGuiness*, discussed above, as well as a social security case, *Secretary, Department of Social Security v SRA*, [1993] 118 ALR 467.

"yan yiu", which translates as "abnormal/evil man".[144] This in itself indicates the deep-seated prejudice against transsexual persons in Hong Kong. Discrimination seems to occur in the workplace in particular, especially during or after the difficult process of transition "on the job", but also where a person's transgender history is revealed in the interview process for a new position or in the course of their existing employment. Examples personally known to the author include a school teacher who suffered so much discrimination during her transition that she was forced to request a transfer to another school after gender reassignment surgery; a university lecturer who was requested by her employer to go on her sabbatical one year early so as to transition overseas (although her actual surgery took place four months after her return to Hong Kong); a partner in a law firm who resigned before transition, rather than disclose her status (and who subsequently took a much lower position in another law firm); and a transgender hairdresser who was stalked and "outed" by the press and consequently lost her job, even though her employer had known of, and been sympathetic to, her transgender status.[145] A transsexual woman was also excommunicated from the church she had worshipped at for over thirty years after gender reassignment surgery.[146]

Hong Kong has three anti-discrimination ordinances, two of which might potentially offer protection to transsexual and other transgender persons, namely the Disability Discrimination Ordinance ("DDO") [147] and the Sex Discrimination Ordinance ("SDO").[148] The DDO and SDO provide protection against discrimination and harassment by both public and private bodies in a wide range of areas, including employment, training, education, housing, access to public premises, and the provision of goods, services and facilities.[149] Although the ordinances can also be traditionally litigated through the courts, their primary means of enforcement is through conciliation, conducted by the Equal Opportunities Commission ("EOC"). The confidentiality offered by the conciliation route (in addition to its other advantages *vis-à-vis* litigation, including being faster, less expensive and less formal than the court process, and suiting the perceived traditional preference amongst the Chinese for mediation over litigation),[150] is likely to be particularly attractive to

[144] Sam Winter, "An Overview of TG in Asia", at http://web.hku.hk/~sjwinter/TransgenderASIA/paper_an_overview_of_tg.htm (visited 28 Jun 2004).
[145] Ravina Shamdasani, "Cross-dresser Slams Media Stalking", *SCMP*, 26 May 2003, p C.3.
[146] Sara Bradford, "Sex-change Mormon Sues Church", *SCMP*, 16 Mar 2001, p 3.
[147] Disability Discrimination Ordinance (Cap 487).
[148] Sex Discrimination Ordinance (Cap 480).
[149] For an overview of the substantive provisions of the ordinances, *see* Carole J. Petersen, "Equal Opportunities: A New Field of Law for Hong Kong" in Raymond Wacks (*ed*), *The New Legal Order in Hong Kong* (Hong Kong: Hong Kong University Press, 1999), p 595. Specifically on protection against discrimination in the employment field, *see* Carole J. Petersen, "Hong Kong's First Anti-Discrimination Laws and their Potential Impact on the Employment Market", 27(3) *HKLJ* 325.
[150] Bobby K.Y. Wong, "Traditional Chinese Philosophy and Dispute Resolution" 30 *HKLJ* 304.

transgender persons, who understandably might not want to air their grievances publicly in court and be subjected to the high level of press interest which would inevitably result in cases of this kind. However, it would be wrong not to mention that, after building up a reputation as a strong, efficient and independent body, willing to challenge even government discriminatory practices where necessary,[151] the public's confidence in the EOC appears to have plummeted in the last year after a series of unfortunate events, set in motion by the last-minute replacement of its assertive and effective former chair person, Ms Anna Wu, with Mr Michael Wong, a retired judge, with no prior background in anti-discrimination or human rights law, who resigned from the post some three months after his appointment.[152] Recent reports show that complaints to the EOC have almost halved in the first six months of the year as compared to last year, although the EOC insists that the number of inquiries has remained stable.[153]

Returning to the scope of the DDO and SDO, there is a very strong legal argument that the DDO would prohibit discrimination and harassment against transgender persons. This is because the DDO defines "disability" very broadly, to include "disorders that affect a person's thought processes and emotions".[154] In the author's view, this would definitely include gender dysphoria or gender identity disorder, as a medically classified psychiatric disorder.[155] Certainly, in a recent Hong Kong case, *The Church of Jesus Christ of Latter-Day Saints Hong Kong Limited v Jessica Park* (2001),[156] the Court of

[151] *K, Y and W v Secretary for Justice*, [2000] 3 HKLRD 777 (government policy not to employ persons who have a parent suffering from mental illness for any job in the disciplined services held to be discriminatory under DDO); *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690 (Department of Education system of allocating secondary school places held to be discriminatory under SDO). For a discussion of these cases, *see* Carole J. Petersen, "The Right to Equality in the Public Sector: An Assessment of Post-Colonial Hong Kong", 32 *HKLJ* 103.

[152] These events included the appointment and almost immediate termination of a new Director of Operations, which together with certain other incidents that affected the credibility of the EOC, are currently the subject of an independent inquiry by a panel appointed by the Secretary for Hong Affairs. *See* Carole Petersen, "The Paris Principles and Human Rights Institutions: Is Hong Kong Slipping Further Away From the Mark?", 33 *HKLJ* 513; and Editorial, "Inquiry must give Watchdog back its Teeth", *SCMP*, 19 Jul 2002, p 10. The independence of the panel has already been cast in doubt, however, and questions have also been raised over the direction of the inquiry to date, *see* Ravina Shamdasani and Quinton Chan, "Anna Wu lashes out at Inquiry into EOC scandals", *SCMP*, 19 Jul 2004, p 1, and Ravina Shamdasani, "Patrick Ho defends Inquiry into EOC Affair", *SCMP*, 20 Jul 2004, p 2.

[153] Ravina Shamdasani, "Complaints to Scandal-Hit EOC are more than Halved", *SCMP*, 19 Jul 2004, p 1. The EOC explained that more was being done in terms of publicity, training, consultancy, promotion and education, which might explain the drop in the number of complaints, *ibid.*

[154] DDO, s 2, definition of "disability", under (g).

[155] *See* APA, *DSM IV* (n 17 above). Although note that, in the US, a number of state courts have interpreted their disability rights statutes to exclude transgender plaintiffs, *see* Paisley Currah and Shannon Minter, "Unprinciples Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People", 7 *Wm & Mary J of Women & L*, 37, 43–44 and accompanying notes.

[156] *The Church of Jesus Christ of Latter-Day Saints Hong Kong Limited v Jessica Park* (unreported, HCA 001167/2001), available at the Hong Kong Legal Information Institute, at www.hklii.org (visited 28 Jun 2004).

First Instance agreed that the defendant, a transsexual woman whose Church had excommunicated her and was now seeking an injunction to prevent her from entering their premises, had raised a serious question to be tried under the DDO.[157] However, the case settled out of court, so the point was never judicially determined. In addition, the EOC has accepted two complaints of discrimination or harassment against post-operative transsexual persons.[158] The first of these complaints (involving three different unlawful acts, which were not successfully conciliated) concerned alleged discrimination by a private body against a post-operative transsexual woman, following her gender reassignment surgery.[159] The second complaint (involving six unlawful acts which are still in the investigation stage), relates to the provision of a service by a public body, during which the complainant, a post-operative transsexual woman, was required to reveal her transgender status. She has complained of discrimination by the organisation as regards its requirements and harassment by its employees.[160] The EOC based its jurisdiction in these cases on the DDO, either on the ground that gender dysphoria is a disorder affecting a person's through processes and emotions, or interestingly, that persons who have undergone gender reassignment surgery have incurred the partial or total loss of a part of their body, which is also included under the definition of disability in the DDO.[161]

Taking a case under the DDO obviously presents somewhat of a dilemma, however, since it relies on the argument that transgender persons have a disability, with all the negative connotations that that brings with it. Arguably, the negative impact might be less if it could be successfully argued that the disability results from the loss of a body part rather than from a mental disorder. However, this line of reasoning can obviously only be applied in relation to persons who have undergone gender reassignment surgery, and does not address discrimination against transgender persons more broadly, regardless of their having been diagnosed with gender dysphoria. Further, it still results in transsexualism being classified as a disability. It would therefore undoubtedly be more palatable to argue a case under the SDO. However, the definition of sex discrimination in the SDO makes this problematic.

The SDO provides that a person discriminates if "on the ground of her sex he treats her less favourably than he treats or would treat a man",[162] and

[157] *Ibid.*, para 12.
[158] Letter to the author from the EOC, 3 Aug 2004 (on file with the author).
[159] *Ibid.*
[160] *Ibid.* Note that the EOC was unable to disclose any further details of these two cases, due to the confidentiality of the complaints procedure. Whilst further details of the cases are personally known to the author through her contacts in the transgender community, these details are also not disclosed here in order to respect the confidentiality of EOC proceedings.
[161] *See* s 2, "disability" definition, under (b).
[162] SDO, s 5.

likewise as regards discrimination against a man.[163] The question is whether this test is capable of encompassing discrimination on the grounds of a *change* of a person's sex, or discrimination against a post-operative transsexual or other transgender person, "simply" on the grounds that they are transgender, that is, without reference to an opposite sex comparator.[164] In England, it was held for many years that the identical test of discrimination in the Sex Discrimination Act 1975 ("SDA")[165] would not cover these circumstances.[166] In fact, what the English courts did was to employ an opposite sex comparator in the form of a transsexual person of the opposite biological sex to the complainant, as if transsexual persons were some sort of "third sex". Thus, in *P v S and Cornwall County Council* (1996),[167] the Industrial Tribunal found that, under English law, an employer had not discriminated within the meaning of the SDA by dismissing a transsexual woman after she had notified the employer of her intention to undergo gender reassignment surgery, as the employer would have treated a transsexual man in the same manner.

However, the Tribunal in *P v S and Cornwall County Council* was concerned that there might be a conflict on this point between the SDA and the European Community's Equal Treatment Directive[168] (which has direct effect in UK law as regards the Government and other public bodies). The Tribunal therefore referred the case to the European Court of Justice ("ECJ")[169] for a preliminary ruling on the meaning of the Equal Treatment Directive, which provides that, in the field of employment, there shall be "no discrimination whatsoever on the grounds of sex".[170] The ECJ held that the prohibition of sex discrimination under the Equal Treatment Directive extended to discrimination against transsexual persons. Therefore, in line with the ECJ ruling, the SDA was subsequently interpreted in England to prohibit discrimination against transsexual persons in the UK.[171] Later, the SDA was amended by the UK government, so as to expressly prohibit

[163] *Ibid.*, s 6.

[164] For a detailed analysis of the issues arising in this context by comparative reference to the jurisprudence of the US, Europe and Canada, *see* Laura Grenfell, "Embracing Law's Categories: Anti-Discrimination Laws and Transgenderism" 15 *Yale J.L. & Feminism* 51.

[165] Sex Discrimination Act 1975, ss 1(a) and 2.

[166] *White v British Sugar Corporation* [1977] IRLR 121.

[167] *P v S and Cornwall County Council* [1996] IRLR 347.

[168] Council Directive 76/207/EEC of 9 Feb 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 1976 L 39, p 40).

[169] *P v S and Cornwall County Council*, judgment of the European Court of Justice, 30 Apr 1996, Case C-13/94, at http://www.curia.eu.int/en/ (visited 28 Jun 2004).

[170] Equal Treatment Directive, Art 2(1), and further Art 5(1).

[171] *Chessington World of Adventures v Reed*, [1997] IRLR 556, *see* Whittle (n 83 above), at pp 108, 110.

discrimination in employment against transsexual persons who are undergoing or have undergone gender reassignment surgery.[172]

Whilst this development is mentioned for completeness, it would be highly unlikely to have any bearing on the interpretation of the discrimination test in the SDO were this question ever to come before the Hong Kong courts. This is because the test for discrimination under the SDO in Hong Kong remains in line with the old test for discrimination in the SDA in the UK, and the ECJ ruling in *P v S and Cornwall County Council* is based on the UK's obligations under European Community law, which are obviously not binding in Hong Kong. Nevertheless, the ECJ decision in *P v S and Cornwall County Council* could possibly be of relevance in the context of Article 22 of BORO. This prohibits discrimination by the government and other public bodies "on the grounds of ... sex" (or indeed "other status", which arguably could include gender identity), which appears to be broader than the SDO. This point will be explored further in the second article.

Currently, the most viable argument for protection against transgender discrimination is therefore on the basis of their suffering from a disability, so as to bring them within the terms of the DDO. Despite the EOC's favourable stance on the matter, however, it has yet to be confirmed by the Hong Kong courts whether such discrimination does indeed fall within the DDO. There is therefore no legally binding precedent to date which can be relied upon by transgender persons for protection in this field.

Conclusion

From the above analysis, it is clear that the status of transsexual and other transgender persons under Hong Kong law is far from satisfactory.

Important administrative concessions, such as the replacement of identity cards, passports, driving licenses, educational certificates (subject to the criticisms made above) and other documentation undoubtedly ease the daily lives of post-operative transsexual persons. Police and prison practices also demonstrate a general willingness on the part of the authorities to recognise the chosen gender of post-operative transsexual persons, and to accommodate those currently completing the "real life test" or undergoing surgery. However,

[172] Sex Discrimination (Gender Reassignment) Regulations 1999. These legislative amendments were, however, strongly criticised in some quarters, including on the basis that they were unnecessary (since the courts had already interpreted the SDA in accordance with *P v S and Cornwall County Council* in *Chessington World of Adventures*); offensive in marking out transsexual persons as a "third sex"; limited only to the area of employment; and subject to numerous exceptions, in which areas it still remains legal to discriminate, *see* further Whittle, (n 83 above), at pp 111–122.

these various concessions do not extend to *all* transgender persons, even if they have permanently adopted their chosen gender.

Moreover, despite the more favourable administrative position, the fundamental problem remains that transsexual and other transgender persons are not recognised as their chosen gender in *law* in Hong Kong, but rather remain legally condemned for their lifetime to their biological sex, as recorded immutably on their birth certificate. This denies the very identity of transgender persons, usually pursued by them at great personal cost, and with it, the dignity, respect and privacy to which we are all entitled. In addition, it means that most transgender persons cannot marry, and are consequently deprived of all the rights and benefits that accompany marriage. Even if they validly marry overseas, they suffer the indignity of the marriage not being recognised in Hong Kong. They cannot even use a public toilet or changing facility without fearing that they might be charged of an offence. They may find that even if they have a vagina, they cannot be raped under the law. They are vulnerable to discrimination whenever their transgender history is disclosed, added to the general prejudice in a society which labels them as "evil" or "abnormal" and even suggests that they might be committing an offence by wearing the clothes they wish to wear, as everyone else is free to do. And whilst transgender persons may be legally protected from certain types of discrimination under Hong Kong law, even that potential small safe haven relies on the argument that they are disabled.

This unsatisfactory situation, in which transgender persons are forced to live, as the ECHR succinctly put it in *Goodwin*, "in an intermediate zone as not quite one gender or the other",[173] seems particularly unsustainable by a government which has for over twenty years recognised gender dysphoria as a medical condition and provided funding for the treatment of it. The legal status of persons in Hong Kong cannot be regarded as a mere "inconvenience".[174] As Lord Reed, judge of Scotland's supreme civil court, the Court of Session, has so persuasively argued (although ideally his words should be read to extend to transgender persons more broadly):

> "For the law to ignore transsexualism, either on the basis that it is an aberration which should be disregarded, or on the basis that sex roles should be regarded as legally irrelevant, is not an option. The law needs to respond to society as it is. Transsexuals exist in our society, and that

[173] *Ibid.*, para 90.

[174] As recognised by the ECHR in *Goodwin* (n 2 above), at para 77. Note that in the earlier ECHR case of *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, the UK government argued that "any inconvenience which the applicants may suffer is not such as to upset the fair balance which must be struck between the general interests of the community and their individual interests", *see* para 48.

> society is divided on the basis of sex. If society accepts that transsexualism is a serious and distressing medical problem, and allows those who suffer from it to undergo drastic treatment in order to adopt a new gender and thereby improve their quality of life, then reason and common humanity alike suggest that it should allow such persons to function as fully as possible in their new gender".[175]

It is high time that the legal status of transgender persons was challenged in Hong Kong, and that such persons be granted the respect, dignity, privacy and equality to which they are entitled, by full legal recognition of their chosen gender. Such a challenge might be pursued through the courts, by means of judicial review under BORO of some of the administrative policies discussed above, or might be effected by the more certain, and indeed more comprehensive, route of legislative reform.

The second article, intended for a subsequent issue of this journal, will examine in detail how Hong Kong could be brought into line with the many jurisdictions around the world which have now legally recognised the gender identity of post-operative transsexual persons through judicial or legislative means. Significantly, through its Gender Recognition Act 2004, the UK will shortly recognise the gender identity of *all* transgender persons who have permanently adopted their chosen gender, regardless of whether they have undergone gender reassignment surgery. The second article will argue how, ideally, Hong Kong should follow the UK's example, bringing all of Hong Kong's transgender population into both its legal and social mainstream.

[175] The Hon. Lord Reed, *Splitting the Difference: Transsexuals and European Human Rights Law* (paper presented to the International Bar Association Conference held in Amsterdam on 17–22 Sep 2000), cited by Thorpe LJ in his dissenting judgment in *Bellinger* (CA) (n 93 above), at para 159; and by the Full Court of the Family Court of Australia in *Kevin and Jennifer* (n 5 above), at para 296.