

**For discussion
on 3 July 2025**

Legislative Council Panel on Constitutional Affairs

**Follow-up of the Court of Final Appeal's Judgment in
the Judicial Review case**

***Sham Tsz Kit v Secretary for Justice* (FACV 14/2022)**

PURPOSE

On 5 September 2023, the Court of Final Appeal (CFA) delivered a judgment¹ in the case of *Sham Tsz Kit v Secretary for Justice* (FACV 14/2022) (hereinafter referred to as “Sham Tsz Kit Case”), which held that in view of the privacy rights protected under Article 14² of the Hong Kong Bill of Rights (BOR14), the Government has a positive obligation to establish an alternative framework for legal recognition of same-sex partnerships and provide for appropriate rights and obligations attendant on such recognition. Thereafter on 27 October 2023, the CFA made the final order³ which directed that the operation of the judgment be suspended for a period of two years from the date of the final order so that the Government can follow up on fulfilling its positive obligation under BOR14. This paper briefs Members on the Government’s follow-up actions on the judgment.

BACKGROUND

2. The Appellant of the above-mentioned case entered into a same-sex marriage with his partner in the United States in 2013. In the absence of any law

¹ Please see (2023) 26 HKCFAR 385, [2023] HKCFA 28.

² BOR14: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

³ Please see (2023) 26 HKCFAR 478, [2023] HKCFA 31.

in Hong Kong which recognises same-sex marriage or recognises same-sex marriage contracted abroad, the Appellant commenced judicial review proceedings in 2018 seeking the court’s determination on three questions, namely, (i) whether he has a constitutional right to same-sex marriage under Article 25 of the Basic Law (BL25) and BOR22 (Question 1); (ii) alternatively, whether the absence of any alternative means of legal recognition of same-sex relationship constitutes a violation of BOR14 and/or BL25 and BOR22 (Question 2); and (iii) whether the non-recognition of foreign same-sex marriage constitutes a violation of BL25 and BOR22 (Question 3).

3. The Court of First Instance and the Court of Appeal ruled against the Appellant on the above-mentioned three Questions in September 2020 and August 2022 respectively. The Appellant then appealed to the CFA. The CFA handed down its judgment on 5 September 2023:

- (a) On Questions 1 and 3, the five judges unanimously dismissed the Appellant’s appeal, and pointed out that “the constitutional freedom of marriage guaranteed and protected” by BL37 and BOR19(2) “is confined to opposite-sex marriage and does not extend to same-sex marriage”⁴; and
- (b) On Question 2, the CFA, by a majority of three to two, allowed the Appellant’s appeal, and held that “the failure of the Government to fulfil its positive obligation to establish an alternative framework for legal recognition of same-sex relationship and to provide for appropriate rights and obligations attendant on such recognition violated the Appellant’s BOR14 rights”.

4. The CFA exercises the power of final adjudication in accordance with BL2, BL19 and BL82, and its judgments are final, conclusive, and binding on all parties to the proceedings (including the Government). The HKSAR Government should make every endeavour to fulfil its positive obligation of establishing an alternative framework for same-sex couples within the two-year suspension period (i.e. before 27 October 2025) in compliance with the requirements of BOR14.

⁴ Paragraph 95 of the judgment: “It is clear, for these reasons, that the constitutional freedom of marriage guaranteed and protected by Article 37 of the Basic Law is confined to opposite-sex marriage and does not extend to same-sex marriage.”

5. The establishment of an alternative framework involves complex issues and wide-ranging implications. During the two-year suspension period, the HKSAR Government has been conducting detailed research on developing the alternative framework, including carrying out in-depth research on various policy and legal aspects, and practices in different jurisdictions, etc.

EXISTING MARRIAGE SYSTEM

6. The HKSAR Government firmly upholds the monogamous and heterosexual marriage system which is clearly stated in the law of Hong Kong. As stipulated in section 40 of the Marriage Ordinance (Cap. 181) in Hong Kong, every marriage under the Ordinance “shall be a Christian marriage or the civil equivalent of a Christian marriage”, which implies “a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others”. In Sham Tsz Kit Case, the CFA’s judgment also affirms that Hong Kong residents’ constitutional freedom of marriage guaranteed and protected under BL37 and BOR19(2) is confined to opposite-sex marriage to the exclusion of same-sex marriage. Therefore, when establishing an alternative framework for legal recognition of same-sex partnerships, the HKSAR Government must avoid causing any impact on Hong Kong’s marriage system and traditional social values, and must make it clear that same-sex partnerships registered under the alternative framework are not equivalent to marital relationships⁵.

ESTABLISHING AN ALTERNATIVE FRAMEWORK

7. The HKSAR Government has the responsibility to implement the CFA’s order on Sham Tsz Kit Case by establishing, through legislation an alternative framework for legal recognition of same-sex partnerships in order to ensure non-interference with their privacy rights. Meanwhile, the court clearly pointed out that the Government has a flexible margin of discretion in deciding the form of legal recognition. In developing the alternative framework, we should establish

⁵ Paragraph 194 of the judgment: “*The alternative scheme for recognition sought does not involve conferment of rights and obligations mirroring those of a marriage.*”

an alternative framework for legal recognition of same-sex partnerships, while providing for appropriate rights and obligations attendant on such recognition to meet their basic social needs.

REGISTRATION MECHANISM FOR SAME-SEX PARTNERSHIPS

(I) Conditions for registration

8. The Government's proposal is to enable, by means of legislation, same-sex couples to apply for registration under the newly established registration mechanism for legal recognition of their same-sex partnerships. Same-sex couples should fulfil all of the following conditions when applying for registration:

- (a) The parties are of the same sex;
- (b) The parties have both reached 18 years of age;
- (c) The parties are each, or a party is, a Hong Kong resident⁶;
- (d) The parties have registered a valid same-sex marriage, same-sex civil partnership or same-sex civil union in a place outside Hong Kong in accordance with the law of that place;
- (e) Each of the parties does not have a valid marriage, civil partnership or civil union that is registered with a third party; and
- (f) The relationship of the parties must not be within the prohibited kinship relationship.

9. In determining the above-mentioned registration conditions, we have holistically considered the following relevant factors:

- (a) The actual situations in Hong Kong, including prevailing social system, family and traditional values of Hong Kong, etc. In fact, the judgment also states that different jurisdictions may develop the law in ways that

⁶ A Hong Kong resident is a resident of the Hong Kong Special Administrative Region under BL24.

reflect their own constitutional traditions, legal procedures and social values;

- (b) Indeed, as there remains differing views in the society on the legal recognition of same-sex partnerships, we must be prudent in our consideration and exercise our discretion in striking an appropriate balance so as to avoid creating social divisiveness thus undermining social harmony;
- (c) There should be suitable requirements for registration under the alternative framework, the purposes of which are to align with practical circumstances and societal expectations, whilst at the same time protecting the applicants' rights and interests and preventing abuse; and
- (d) The legal recognition granted under the registration mechanism is based on a same-sex relationship that has been committed and stable⁷.

(II) Registration procedures

10. The Government proposes that a same-sex partnership registry be set up so that applicants who meet all registration conditions may submit an application form and make an appointment for proceeding with the relevant registration procedures. The registrar will verify the documents and information provided by the applicants in order to determine their eligibility. Both parties applying for registration must meet the registrar in person at the registry and take an oath before the registrar. If the registrar is satisfied and confirms that all registration conditions are met, a same-sex partnership (registration) certificate will be issued to the applicants, which can be accepted as legal evidence of registration of the same-sex partnership stated on the certificate. If it is discovered that applicants may have engaged in illegal conduct during the application process, such as submitting forged documents or making false statements, the registry will refer such cases to law enforcement agencies for follow-up actions. The registrar is empowered to declare the registration of a same-sex partnership null upon subsequent discovery that the registered same-sex couple did not actually meet

⁷ Paragraph 129 of the judgment: "As we have noted, under Hong Kong law, same-sex couples do not have access to the institution of marriage. However, the need for couples such as the appellant and his partner, in committed, stable relationships, to have access to an alternative framework for legal recognition of their relationship has been compellingly advocated for two main reasons."

the registration conditions when registering their partnership. Besides, the registrar is empowered to revoke the partnership registration of a same-sex partnership if their same-sex partnership registered overseas has been dissolved.

11. With reference to the above-mentioned application procedures, the Government will set up a same-sex partnership registry to handle relevant application procedures for same-sex partnership registration, and the registrar will be a public officer appointed by the Secretary for Constitutional and Mainland Affairs.

(III) Rights and obligations attendant on same-sex partnerships

12. As the CFA pointed out that legal recognition of same-sex partnerships is required to “meet same-sex partners’ basic social requirements”, the following categories of rights and obligations will be conferred on the legally recognised same-sex partners:

(a) *Registering same-sex partnerships*

With this right, same-sex partners who meet the registration conditions can register their same-sex partnerships and obtain legal recognition under the alternative framework. Eligible applicants may submit their applications to the same-sex partnership registry for registering their same-sex partnerships. Upon completing the relevant application procedures, and if the registrar is satisfied that the application is in order, a same-sex partnership (registration) certificate will be issued to register the applicants’ same-sex partnership for legal recognition of their relationship.

(b) *Revoking same-sex partnership registration*

With this right, same-sex couples who have successfully registered their same-sex partnerships with the registry can apply to revoke the registration. If both parties intend to revoke the relevant registration, or in the event that the relevant same-sex partnership registered overseas has effectually been dissolved or become void, both parties or one of the parties may submit an application for revocation to the registry.

Additionally, for any registered same-sex partners, if their same-sex partnerships registered overseas have effectually been dissolved or become void, they have the responsibility to notify the registrar so that the registration would be revoked.

(c) *Dealing with medical-related matters of same-sex partners*

Same-sex couples will be entitled/will continue to be entitled to the rights related to medical matters of their same-sex partners, including:

- (i) Visit in-patient partners: This involves visits during regular visiting hours specified by hospitals, as well as visits in emergencies and intensive care units with the consent of responsible medical personnel;
- (ii) Obtain medical information and participate in medical decisions: A party to a same-sex partnership may give consent for the other party to access his/her medical information and participate in his/her medical decisions. As for mentally incapacitated adult patients, their same-sex partners can act as a guardian to participate in their medical decisions;
- (iii) When a party to a same-sex partnership is in a life-threatening situation, his/her personal data can be exempt from the restrictions of data protection principles under the Personal Data (Privacy) Ordinance (Cap. 486), so that the other party can be informed of the situation in a timely manner; and
- (iv) Organ transplant: Under the Human Organ Transplant Ordinance (Cap. 465) and the Human Organ Transplant Regulation (Cap. 465A), the transplanting of human organs between living persons will be allowed for same-sex partners.

(d) *Handling after-death arrangements for deceased same-sex partners*

Same-sex couples will be entitled/will continue to be entitled to the rights to handle after-death arrangements for the deceased same-sex

partners, including:

- (i) Identification of body at a public mortuary;
- (ii) Apply for a “death-related certificate”;
- (iii) Body claiming: Upon obtaining a “death-related certificate”, a same-sex partner can claim the body of the deceased partner and make funeral arrangements;
- (iv) Under the Cremation and Gardens of Remembrance Regulation (Cap. 132M), a same-sex partner can apply to the Department of Health for a cremation permit to cremate the human remains of the deceased partner;
- (v) Use cemeteries, crematoria and columbaria under the Food and Environmental Hygiene Department (FEHD): A same-sex partner can apply for burial, cremation and ash-keeping services for the deceased partner at the cemeteries, crematoria and columbaria under the FEHD; and
- (vi) Under the Medical (Therapy, Education and Research) Ordinance (Cap. 278), a same-sex partner can decide whether the body of the deceased partner is to be used for therapeutic purposes or for purposes of medical education or research.

13. The rights and obligations mentioned in paragraph 12 above can be put in place through existing legislation, legislative amendments, or policy/administrative measures.

14. In addition, as for the court rulings of the past judicial reviews concerning same-sex marriages, the Government will continue to implement the relevant judgments in accordance with the court rulings.

WAY FORWARD

15. To implement the CFA's order on Sham Tsz Kit Case within the time frame, we propose to submit the Registration of Same-sex Partnerships Bill to the Legislative Council for scrutiny in due course, with a view to establishing the registration mechanism under the alternative framework for legal recognition of same-sex partnerships and conferment of appropriate rights and obligations.

Constitutional and Mainland Affairs Bureau
July 2025