

立法會
Legislative Council

LC Paper No. CB(2)2045/14-15
(These minutes have been
seen by the Administration)

Ref : CB2/BC/2/14

Bills Committee on Human Reproductive Technology (Amendment) Bill 2015

**Minutes of the fourth meeting
held on Tuesday, 2 June 2015, at 3:00 pm
in Conference Room 3 of the Legislative Council Complex**

Members present : Dr Hon KWOK Ka-ki (Chairman)
Prof Hon Joseph LEE Kok-long, SBS, JP, PhD, RN
Hon Cyd HO Sau-lan, JP
Dr Hon LEUNG Ka-lau
Hon Charles Peter MOK, JP
Hon CHAN Chi-chuen
Hon CHAN Han-pan, JP
Dr Hon Fernando CHEUNG Chiu-hung
Dr Hon Helena WONG Pik-wan
Hon CHUNG Kwok-pan

Public Officers attending : Mr Davey CHUNG Pui-hong
Deputy Secretary for Food and Health (Health) 2
Food and Health Bureau

Ms Wendy AU Wan-sze
Principal Assistant Secretary for Food and Health (Health)
Special Duties 1
Food and Health Bureau

Dr Sarah CHOI Mei-yee, JP
Assistant Director of Health (Special Health Services)
Department of Health

Dr Kellie SO Pui-sheung
Principal Medical and Health Officer (3)
Department of Health

Mr Jonathan LUK King-hang
Government Counsel
Department of Justice

Clerk in attendance : Ms Maisie LAM
Chief Council Secretary (2) 5

Staff in attendance : Miss Mimi CHANG
Assistant Legal Adviser 11

Ms Priscilla LAU
Council Secretary (2) 5

Ms Michelle LEE
Legislative Assistant (2) 5

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I. Meeting with the Administration

[File Ref.: FH CR 1/6/3921/13, LC Paper Nos. LS53/14-15, CB(2)1188/14-15(02) to (06), CB(2)1309/14-15(04), CB(2)1337/14-15(02), CB(2)1426/14-15(01), CB(2)1561/14-15(01) and CB(3)493/14-15]

The Bills Committee deliberated (index of proceedings attached at **Annex**).

Clause-by-clause examination

2. The Bills Committee commenced clause-by-clause examination of the Chinese text of the Bill up to clause 3.

Follow-up actions required

Admin

3. The Chairman remarked that members in general were gravely concerned about the scope of the proposed offence which sought to cast the net so wide. The Administration was requested to consider moving Committee stage amendments to the proposed new section 15(3A) having regard to the

Action

following suggestions from members -

- (a) the limits of territoriality in the proposed offence should be expressly stated such that it would only catch those who knowingly published or distributed, or caused to be published or distributed, the advertisement in Hong Kong;
- (b) replacing the Chinese rendition of the expression "purporting to" with "本意是" or "其用意是", such that those advertisements which appeared to be promoting, but not meant to promote, sex selection services would not be caught by the proposed offence; and
- (c) the proposed offence should not be applied to correspondence which was of a private nature and was not intended for commercial purposes, such as the mere acts of forwarding or sharing of a hyperlink on a webpage or other Internet platforms without any type of financial incentives or benefits. Reference could be made to the arrangement adopted in the Copyright (Amendment) Bill 2014 in this regard.

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4. The Administration and the Legal Adviser to the Bills Committee were requested to provide examples on the requirement of proof of "financial gain" in criminal offences in other ordinances for reference of the Bills Committee at the next meeting.

II. Any other business

5. The Chairman said that the next meeting of the Bills Committee would be held in early July 2015. Members would be informed of the meeting arrangements in due course.

(Post-meeting note: With the concurrence of the Chairman, the fifth meeting of the Bills Committee has subsequently been scheduled for 6 July 2015 at 8:30 am.)

6. There being no other business, the meeting ended at 4:50 pm.

**Proceedings of the fourth meeting of
the Bills Committee on Human Reproductive Technology (Amendment) Bill 2015
held on Tuesday, 2 June 2015, at 3:00 pm
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker	Subject(s)/Discussion	Action required
<i>Agenda item I: Meeting with the Administration</i>			
000150 - 000339	Chairman	Opening remarks	
000340 - 000522	Admin	Briefing by the Administration on its response to issues raised at the meeting on 12 May 2015 (LC Paper No. CB(2)1561/14-15(01)).	
000523 - 001220	Chairman ALA11 Admin	<p>Referring to the Administration's written response to members' concern about the potential liability of employees of parties which published or distributed, or caused to be published or distributed, an advertisement purporting to promote sex selection as set out in paragraphs 4 to 6 of its paper, the Legal Adviser to the Bills Committee's enquiry about whether it was the legislative intent to hold employees of these parties liable for the proposed offence and if not, the Administration should consider providing defences for employees.</p> <p>The Chairman's concern that in the absence of clauses of exemption or defence for employees, an employee who merely followed the instructions of his or her publisher employer to arrange for the publication or distribution of advertisements promoting sex selection services would likely to be caught by the proposed new section 15(3A); and his enquiry about the case law in relation to employees being convicted of offences of having published or distributed prohibited advertisements under the laws of Hong Kong.</p> <p>The Administration's advice that -</p> <p>(a) to establish the offence under the proposed new section 15(3A), the prosecution had to prove not only the actus reus but also the mens rea and that the actus reus and mens rea coincide. The mens rea included, among others, the intention to get the advertisement purporting to promote sex selection services published or distributed (i.e. the meaning carried by the word "cause"), and knowledge about the content or the subject matter to be conveyed by the advertisement; and</p> <p>(b) according to the judgment handed down by the Privy Council in <i>Attorney General of Hong Kong v Tse Hung-lit</i> [1986] AC 876 as cited in the Administration's paper, the word "cause" was used in a statutory definition that the accused had contemplated or desired that the act would ensue and it was done on his express or implied authority or as a result of him exercising control or</p>	

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		<p>influence over the other person. Having regard to the above, it would be very unlikely that the mens rea of an employee who took part in the advertising process would fall into the scope of "causing (to be published or distributed)" and be caught by the proposed new section 15(3A); and</p> <p>(c) in response to the request made by the Bills Committee at the meeting on 12 May 2015, the Administration had conducted a search of Hong Kong cases using the generic search terms of "advertisement" and "offence". It was unable to find any relevant reported criminal case that was relevant to the issues at hand or contained the elements of offences in the Bill.</p>	
001221 - 001719	Chairman Admin	<p>The Chairman's enquiry about the parties convicted under the Undesirable Medical Advertisements Ordinance (Cap. 231) ("UMAO") and whether financial gain was one of the major considerations of the Department of Justice ("DoJ") in determining whether to prosecute a person for the offence under UMAO.</p> <p>The Administration's advice that according to records of the Department of Health ("DH"), there were a total of 31 advertisements involved in prosecution action and conviction of contravening UMAO for the period of 2012 to 30 April 2015. The parties convicted included publishers, treatment providers, product distributors and retailers. No employees were convicted in respect of the offence. While DH was not in a position to speak on behalf of DoJ on their considerations in determining the parties to be prosecuted for these 31 advertisements, the above figures showed that due consideration had been given to the general public interest criteria under DoJ's Prosecution Code in deciding the parties to be prosecuted. It should be noted the main focus of the enforcement actions under UMAO was to provide a deterrent effect in order to safeguard public health, and prosecuting employees was unlikely to achieve this.</p>	
001720 - 002134	Chairman Admin	<p>In response to the Chairman's enquiry about the reason why the Administration could not provide the prosecution figures relating to advertisements on the Internet, the Administration's explanation that it was unable to conduct full background research for each provision containing the wordings "Internet", "online", "advertise", "advertising" and "advertisement" which were found in over 220 ordinances or subsidiary legislations and the relevant records of prosecutions.</p>	
002135 - 002200	Chairman	<p>Commencement of clause-by-clause examination of the Bill</p>	
002201 - 002254	Admin	<p><u>Examination of the long title and clause 1</u></p> <p>The Administration's advice that it might allow several months after the passage of the Bill to inform the local media, local Internet webpage operators and servers, and other relevant stakeholders to prepare for compliance of the new offence.</p>	

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002255 - 004241	Admin Chairman ALA11	<p><u>Examination of clause 2</u></p> <p><u>Examination of clause 3</u></p> <p>In response to the Chairman's enquiry about the parties to be prosecuted for the publication of an advertisement promoting sex selection services which were offered by an overseas service provider in local newspapers, the Administration's advice that the offence under the proposed new section 15(3A) aimed at imposing criminal responsibility on (a) companies that offered sex selection services and initiated the advertising activities; (b) agents that assisted such companies to advertise sex selection services in Hong Kong; and (c) media agencies or companies that provided the platform for such advertisements. The legislative intent was to hold the persons-in-charge, but not the employees, of these companies liable.</p> <p>Referring to the Administration's response set out in paragraphs 20 and 21 of LC Paper No. CB(2)1426/14-15(01) and the principle that criminal jurisdiction in Hong Kong was territorial, the Legal Adviser to the Bills Committee's enquiry about how the proposed new section 15(3A) as presently drafted, which made no reference to any extra-territorial application in respect of the proposed offence, would have the legal effect of covering those acts of publishing or distributing, or causing to publish or distribute, such advertisements by individuals who were not physically present in Hong Kong.</p> <p>The Administration's advice that -</p> <p>(a) it should be noted that where the contents of the advertisements concerned appeared to target at people residing in Hong Kong (e.g. providing local addresses, phone numbers and/or the service fees quoted in Hong Kong Dollars) and could be viewed in Hong Kong, there might be a prima facie case for contravention of the proposed offence. For those operating these overseas websites or initiating the publishing or distributing of these advertisements abroad, they might still be considered liable under the proposed offence if there was sufficient evidence to show that they had committed the offence under the proposed new section 15(3A). Depending on circumstances of individual cases, these persons might be prosecuted should they be in Hong Kong; and</p> <p>(b) while there were greater difficulties in collecting evidence and taking enforcement actions outside the territory of Hong Kong, it was not advisable to exclude fully from the regulatory regime advertisements posted on overseas Internet websites and servers as well as those acts which were committed abroad as this would undermine the effectiveness of the legislative proposal.</p> <p>The Legal Adviser to the Bills Committee's view that if the act of publishing or distributing (including uploading on the</p>	

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		<p>Internet) the relevant advertisement was not done in Hong Kong, it should not fall within the scope of the proposed new section 15(3A). The Legal Adviser to the Bills Committee enquired with the Administration whether there was any case authorities indicating that the mere fact that an advertisement could be viewed in Hong Kong could be construed as distributing that advertisement in Hong Kong. The Legal Adviser to the Bills Committee referred to the Canadian cases cited by the Administration in its written response and opined that those cases were related to the civil claim of defamation which had its own unique definition on "publishing" and "distributing" and hence, those cases might not be applicable to the proposed new section 15(3A).</p>	
004244 - 004820	Chairman ALA11 Admin	<p>On the Chairman's enquiry about whether an organization would be held liable for the proposed offence if it distributed at a local forum an overseas magazine the content of which included, among others, an advertisement promoting an overseas service provider's sex selections services using reproductive technology ("RT") procedures, the Administration's advice that the establishment of the proposed offence required proof beyond reasonable doubt that the above act of distribution of the advertisement was done "knowingly".</p>	
004821 - 011304	Chairman Dr LEUNG Ka-lau Admin	<p>Dr LEUNG Ka-lau's view that since criminal jurisdiction in Hong Kong was territorial, the drafting of the proposed new section 15(3A) should be revised to the effect that the offence would be limited to catch only those persons who published or distributed, or caused to publish or distribute, an advertisement promoting sex selection services in Hong Kong. In the case of promotion on the Internet, it should be the location where the acts of uploading the advertisement took place, rather than the location of the servers and webpages, that mattered. The factor of whether it would be difficult for the enforcement agencies to collect evidence and take enforcement actions should not come into play in determining the scope of the offence.</p> <p>The Administration's response that except for situations where special provisions were set out in the ordinance, courts in Hong Kong were not concerned with conduct abroad. There was a presumption in construing a statute creating an offence that was not intended to make conduct taking place outside the territorial jurisdiction of Hong Kong an offence triable in a Hong Kong court. From the law drafting perspective, it was not necessary to expressly limit the territorial application of the offence, as the territorial element was implied.</p> <p>The Legal Adviser to the Bills Committee's concern that the written response given by the Administration under paragraph 21 of LC Paper No. CB(2)1426/14-15(01), according to which those who initiated the publishing or distributing of these advertisements abroad and were not residing in Hong Kong might still be considered liable under the proposed offence if there was sufficient evidence to show that they had committed all the necessary elements of the offence concerned, seemed to be contradictory to the current</p>	

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		<p>drafting of the proposed new section 15(3A) and the Administration's response given above. In her view, unless it had been expressly provided, the proposed new section 15(3A) would not have any extra-territorial effect as claimed by the Administration.</p> <p>The Administration's advice that -</p> <p>(a) it was noted that advertisements promoting sex selection services appeared from time to time involved both overseas and local parties. In the context of paragraph 21 of LC Paper No. CB(2)1426/14-15(01), the policy intent was to target at those parties who manipulated local or overseas publishing and distribution operations, media agencies, local or overseas agents, and/or servers outside of Hong Kong to arrange for publishing or distributing of sex selection advertisement outside of Hong Kong but targeted at Hong Kong people; and</p> <p>(b) it should be noted that even the acts of uploading the advertisements took place outside Hong Kong and such advertisements were stored in overseas servers, the parties might be liable for the proposed offence if there was evidence to prove that the advertisements were intended for Hong Kong audience who received them.</p> <p>At the request of the Chairman, the Administration undertook to provide a written response as to whether the limits of territoriality in the offence should be expressly stated in the proposed new section 15(3A) such that it would only catch those who knowingly published or distributed, or caused to be published or distributed, the advertisement in Hong Kong.</p>	Admin
011305 - 013002	Chairman ALA11 Admin Dr LEUNG Ka-lau	<p>The Legal Adviser to the Bills Committee's suggestion that if the Administration wished to use the expression of "purporting to", they might consider using "本意是" or "其用意是" instead of "看來是" as the Chinese rendition. In response to the Administration's claim that many legislative provisions also contained the Chinese expression "看來是", the Legal Adviser to the Bills Committee pointed out that many of those provisions were related to admissibility of documents in court proceedings, which was not the situation here. Using the expression "看來是" would also have an undesirable effect of focusing on the "appearance", rather than the "substance", of an advertisement when determining whether the advertisement was caught by the proposed new section 15(3A).</p> <p>The Chairman and Dr LEUNG Ka-lau's view that it was more appropriate to use "本意是" or "其用意是" as the Chinese rendition of the expression "purporting to" in order to narrow down the scope of the proposed offence, such that those advertisements which appeared to be promoting, but not meant to promote, sex selection services would not be caught by the proposed new section 15(3A). In Dr LEUNG Ka-lau's view, whether the advertisement published or distributed was meant</p>	

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		<p>to promote sex selection services should be left for the court to decide.</p> <p>The Administration's advice that -</p> <p>(a) the policy intent was that the proposed offence should cover advertisements which presented or implied the provision of sex selection services with different forms and manner of presentations, explicit or suggestive pictures or phrases so as to reduce the room for such advertisements trying to circumventing the legislation. The expression "purporting to" was intended to capture those advertisements that appeared to be promoting sex selection services, without the need of considering whether those promoted services were in fact of proven or unproven effectiveness in achieving sex selection. The Chinese text "看來是" was used to render "purporting to" in the present context; and</p> <p>(b) in the light of members' concern regarding the scope of the Chinese text "看來是", the Administration would further consider the drafting of the proposed new section 15(3A) and provide a written response in this regard.</p>	Admin
013003 - 014706	Chairman Dr Helena WONG Admin ALA11	<p>Dr Helena WONG's enquiry about whether the forwarding or sharing of a hyperlink containing information on sex selection services through private emails or social networking platform (e.g. Facebook) would constitute the distribution or publication of advertisements promoting sex selection services under the proposed new section 15(3A).</p> <p>Mr CHAN Chi-chuen's enquiry as to whether a person sharing a hyperlink of a YouTube video originated from overseas which promoted sex selection services offered by an overseas service provider would be held liable for the proposed offence.</p> <p>At the invitation of the Chairman, the Legal Adviser to the Bills Committee's advice that the Administration was invited, vide her letter dated 16 April 2015 (LC Paper No. CB(2)1309/14-15(04)), to consider if it was necessary to expressly provide that the proposed new section 15(3A) did not apply to correspondence which was of a private nature and was not intended for commercial purposes.</p> <p>The Administration's advice that -</p> <p>(a) the Canadian case <i>Crookes v Newton</i> 2011 SCC 47 might serve as a reference. In the case, the Supreme Court of Canada held that a hyperlink, by itself, should never be seen as "publication" of the content to which it referred. Only when a hyperlinker presented content from the hyperlinked material in a way that actually repeated the content, should that content be considered to be "published" by the hyperlinker; and</p>	

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		<p>(b) in order to establish the proposed offence, the prosecution would need to prove beyond reasonable doubt not only the actus reus but also the mens rea and that the actus reus and mens rea coincide. It did not envisage that the proposed new section 15(3A) as presently drafted would catch those who inadvertently involved in the distribution of advertisements and promotional materials on the Internet (e.g. hyperlink). On the other hand, the provision of clauses of exemption for correspondence of private nature and was not intended for commercial purposes would create a loophole for circumventing the proposed offence.</p> <p>The Chairman, Mr CHAN Chi-chuen and Dr Helena WONG's strong view that the drafting of the proposed section 15(3A) should make reference to the arrangements adopted in the Copyright (Amendment) Bill 2014, whereby the mere forwarding or sharing of a hyperlink on a webpage or other Internet platforms, or the mere viewing of or access to materials made available or communicated by others, where the person so doing did not determine the content of the communication, should not constitute a communication to the public. The Administration undertook to further consider the drafting of the proposed new section 15(3A) in this regard.</p> <p>In response to Dr Helena WONG's suggestion that consideration could be given to requiring proof of a "financial gain" in the proposed offence such that only those persons who shared the information with financial benefits would be held liable, the Administration's elaboration of the scenarios in which it would encounter difficulties in collecting evidence to prove the element of financial gain as detailed in paragraphs 2 and 3 of LC Paper No. CB(2)1561/14-15(01). Dr Helena WONG said that she might consider moving Committee stage amendments ("CSAs") in this regard.</p> <p>The Chairman's request for the Administration and the Legal Adviser to the Bills Committee to provide examples on the requirement of proof of "financial gain" in criminal offences in other ordinances for reference of the Bills Committee at the next meeting.</p>	<p>Admin</p> <p>Admin/ ALA11</p>
014707 - 014942	Chairman	The Chairman's remarks that members of the Bills Committee had strong views on the scope of the proposed offence; and his request for the Administration to consider moving CSAs to the proposed new section 15(3A) in order not to cast the net so wide.	
<i>Agenda item II: Any other business</i>			
014943 - 015024	Chairman	Date of next meeting	