

**立法會**  
**Legislative Council**

LC Paper No. CB (2)1267/15-16  
(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 seventh meeting  
held on Tuesday, 12 January 2016, at 10:45 am  
in Conference Room 2B of the Legislative Council Complex**

- Members present** : Dr Hon KWOK Ka-ki (Chairman)  
Prof Hon Joseph LEE Kok-long, SBS, JP, PhD, RN  
Hon Charles Peter MOK, JP  
Hon CHAN Chi-chuen  
Hon CHUNG Kwok-pan
- Members absent** : Hon Cyd HO Sau-lan, JP  
Dr Hon LEUNG Ka-lau  
Hon CHAN Han-pan, JP  
Dr Hon Fernando CHEUNG Chiu-hung  
Dr Hon Helena WONG Pik-wan
- Public Officers attending** : Ms Wendy AU Wan-sze  
Deputy Secretary for Food and Health (Health) 2  
(Acting)  
Food and Health Bureau
- Dr Sarah CHOI Mei-yee, JP  
Assistant Director of Health (Special Health Services)  
Department of Health
- Dr Sammy NG Ping-sum  
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** : Mr Kelvin LEE  
Senior Assistant Legal Adviser 3

Ms Priscilla LAU  
Council Secretary (2) 5

Ms Louisa YU  
Legislative Assistant (2) 5

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**I. Meeting with the Administration**

[LC Paper Nos. 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), CB(2)1838/14-15(01), CB(2)1865/14-15(01), CB(2)2153/14-15(01), CB(2)90/15-16(01), CB(2)521/15-16(01) to (02), and CB(3)493/14-15]

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

2. The Bills Committee completed clause-by-clause examination of the Bill. The Bills Committee also completed scrutiny of the draft Committee stage amendments ("CSAs") to the Bill to be proposed by the Administration as set out in LC Paper No. CB(2)521/15-16(02). It was noted that the Administration would revise its CSAs to replace "人員" with "高級人員" as the Chinese rendition of the term "officer" in the proposed new section 15A(4)(b).

Admin

3. The Bills Committee requested the Administration to:

- (a) consider, and provide a written response to, members' suggestion of expressly stating the spirit, if not the details, of the proposed "Notice-and-Takedown" mechanism in the legislation to the effect that prosecution would only be initiated against those administrators of discussion forum on the Internet and webpage

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hosts that had failed to comply with the enforcement authority's request for removal of the sex selection services advertisement, or the webpage or message promoting sex selection services; and

- (b) in respect of the defences provided for under the proposed new section 15A(6), the drafting of which was modeled on section 52 of the Food Safety Ordinance (Cap. 612), provide for members' reference information on the factors that had been taken into account in deciding whether to prosecute a person for the offence under the Food Safety Ordinance and the number of prosecutions initiated since the Ordinance had come into operation.

**II. Any other business**

4. The Chairman said that he would decide on the date of the next meeting of the Bills Committee after receipt of the Administration's written response and the draft CSAs, if any, to be proposed by the Administration. Members would be informed of the meeting arrangements accordingly.

Members

5. The Chairman invited members who intended to propose CSAs to the Bill and wished their CSAs to be considered by the Bills Committee to forward such proposed CSAs to the Secretariat as soon as practicable for the consideration of the Bills Committee at the next meeting.

*(Post-meeting note: With the concurrence of the Chairman, the eighth meeting of the Bills Committee has subsequently been scheduled for 30 March 2016 at 8:45 am.)*

6. There being no other business, the meeting ended at 12:47 pm.

**Proceedings of the seventh meeting of  
the Bills Committee on Human Reproductive Technology (Amendment) Bill 2015  
held on Tuesday, 12 January 2016, at 10:45 am  
in Conference Room 2B of the Legislative Council Complex**

Time marker	Speaker	Subject(s)/Discussion	Action required
<i>Agenda item I: Meeting with the Administration</i>			
000630 - 000808	Chairman	Opening remarks	
000809 - 001124	Chairman Admin	Briefing by the Administration on the latest draft Committee stage amendments ("CSAs") to the Human Reproductive Technology (Amendment) Bill 2015 ("the Bill") proposed by the Administration [LC Paper No. CB(2)521/15-16(02)], and its proposal to introduce a "Notice-and-Takedown" administrative mechanism for administrators of discussion forum on the Internet and webpage hosts [LC Paper No. CB(2)521/15-16(01)]	
001125 - 002217	Chairman Admin Mr CHAN Chi-chuen SALA3	<p>In response to the Chairman and Mr CHAN Chi-chuen's enquiry about the nature and the implementation of the "Notice-and-Takedown" mechanism, and the liability of the administrators of discussion forum on the Internet and webpage hosts under the above mechanism, the Administration's advice that:</p> <p>(a) the "Notice-and-Takedown" mechanism was proposed with reference to the current arrangements for the removal of tobacco advertisements. The mechanism was proposed to be an administrative mechanism under the Department of Health ("DH") which was the enforcement authority of the Bill, instead of the safe harbour regime as set out in the Copyright (Amendment) Bill 2014;</p> <p>(b) under the proposed "Notice-and-Takedown" mechanism, DH would issue a warning letter to the administrator of the discussion forum on the Internet or web hosting company concerned to request for removal of an advertisement promoting sex selection services through reproductive technology ("RT") procedures or the webpage or message containing such advertisements within a specified period. Prosecution action would only be initiated if the administrator or the company, as the case might be, failed to comply with the request set out in the warning letter; and</p> <p>(c) as long as the administrators of the discussion forum on the Internet and webpage hosts complied with the requests set out in the warning letters, they were not required to actively monitor and seek whether there were any sex selection services advertisement on their platforms in order to receive protection under the "Notice-and-Takedown" mechanism.</p>	
002218 - 003130	SALA3 Chairman Admin Mr CHAN Chi-chuen	The Legal Adviser to the Bills Committee's concern about the lack of details of the "Notice-and-Takedown" mechanism. Since it was proposed to be an administrative mechanism, it would not be subject to the scrutiny of the Legislative Council and the	

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		<p>Administration might change the mechanism without informing the Legislative Council. It would be difficult for Members to monitor the implementation of the mechanism. Further, whether the mechanism would provide sufficient protection to the administrators concerned was also not sure. Making reference to the safe harbour provisions in the Copyright (Amendment) Bill 2014, the Chairman was of the view that the "Notice-and-Takedown" mechanism should be set out in the Bill in order to provide better protection to administrators of discussion forum on the Internet and webpage hosts.</p> <p>The Administration's response that:</p> <ul style="list-style-type: none"> <li>(a) to establish the proposed offence, the prosecution had to prove both the actus reus and mens rea of the defendant and both had to coincide. Given that the provision of a platform for viewing and information sharing was an activity of a passive nature, administrators of discussion forum on the Internet and webpage hosts that did not have the mens rea to cause the sex selection service advertisements published or distributed on their platforms would not be held liable;</li> <li>(b) notwithstanding the above and having taken into account members' concerns about the liability of administrators of discussion forum on the Internet and webpage hosts who did not aware of the content of those sex selection services advertisements posted by third parties on their platforms, the Administration proposed to set up a similar "Notice-and-Takedown" mechanism with reference to the current arrangements for tobacco as well as undesirable medical advertisements. The mechanism was proposed to be an administrative mechanism as of that for the above two types of advertisements which had all long been working effectively; and</li> <li>(c) under the proposed mechanism, a reasonable period of time, say, ranging from several to 14 days, would be clearly stipulated in the warning letters issued to the administrators of discussion forum on the Internet or the webpage hosts concerned to request them to remove those advertisements, webpage or messages promoting sex selection services.</li> </ul> <p>In response to Mr CHAN Chi-chuen's enquiry as to whether the administrators of discussion forum and webpage hosts would be expected to have a responsibility to monitor the activities on their platforms if they had received, at different time, a certain number of warning letters from DH concerning the publication of a sex selection services advertisement of the same content on their platforms, the Administration's reply in the negative.</p>	
003131 - 005137	Chairman Mr CHAN Chi-chuen Admin SALA3	In response to Mr CHAN Chi-chuen's enquiry on the availability of the details of the "Notice-and-Takedown" mechanism, the Administration's advice that the details would be worked out before the commencement of the Bill (if enacted) which would be a date to be appointed by the Secretary for Food and Health by notice published in the Gazette.	

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		<p>The Legal Adviser to the Bills Committee's remark that it would be more desirable for the Administration to provide the details of the "Notice-and-Takedown" mechanism for the consideration of the Bills Committee; and the Chairman's view that the Administration should include the mechanism in the Bill, as of the case for removal and disposal of tobacco advertisement as set out in section 14A of the Smoking (Public Health) Ordinance (Cap. 371).</p> <p>The Administration's clarification that the purpose of section 14A of the Smoking (Public Health) Ordinance was to provide the necessary legal backing for the enforcement authority to remove any tobacco advertisement or advertising structure which it suspected that an offence under that Ordinance had been or was being committed. Under the proposed "Notice-and-Takedown" mechanism, the enforcement authority would request administrators of discussion forum on the Internet and webpage hosts to remove the sex selection services advertisements on their platforms. This could be achieved through an administrative mechanism, such as that for tobacco and undesirable medical advertisements.</p> <p>The Chairman and Mr CHAN Chi-chuen's strong view that the spirit, if not the details, of the proposed "Notice-and-Takedown" mechanism should be stated expressly in the legislation to the effect that prosecution would only be initiated against those administrators of discussion forum on the Internet and webpage hosts that had failed to comply with the enforcement authority's request for removal of the sex selection services advertisement, or the webpage or message promoting sex selection services. The Administration was requested to consider the above suggestion and provide a response in writing.</p> <p>The Chairman's further view that the Administration should review the Smoking (Public Health) Ordinance and Undesirable Medical Advertisements Ordinance (Cap. 231) ("UMAO") given the increasing popularity of advertising and distributing promotional information on the Internet.</p>	<p><b>Admin</b></p>
005138 - 010609	Chairman Mr CHAN Chi-chuen Admin SALA3	<p>The Chairman and Mr CHAN Chi-chuen's concern as to whether the proposed defence for sex selection services advertisements contained in private correspondence as provided for under the proposed new section 15A(3)(c) of the Human Reproductive Technology Ordinance (Cap. 561) ("HRTO") covered hyperlinks (that gave access to a sex selection services advertisement) posted on the social media platform (such as Facebook) which, in some cases, could have a significant number of followers.</p> <p>The Legal Adviser to the Bills Committee's remark that as a reference, section 13B of the Smoking (Public Health) Ordinance, which prohibited the placing of tobacco advertisement on the Internet, did not apply to any tobacco advertisement contained in any private correspondence on the Internet and was not for commercial purposes. Given that there was no case law in Hong Kong relating to the definition of "private correspondence" in the</p>	

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		<p>Internet era, it was uncertain whether hyperlinks posted on social media platform should be regarded as private correspondence.</p> <p>The Administration's advice that:</p> <ul style="list-style-type: none"> <li>(a) the proposed new section 15A of HRTO was intentionally drafted in a loose manner to enable the application of the defence to, among others, all private correspondence, except for correspondence published or distributed in the course of a business of promoting sex selection services, or advertisement accessible through a hyperlink provided in the correspondence and the person charged with the offence devised the contents of the advertisement or selected, added to, modified or otherwise exercised control over the contents of the advertisement as specified under the proposed new section 15A(4)(a) and (b) of HRTO;</li> <li>(b) under the proposed new section 15A(8) of HRTO, "correspondence" included correspondence in electronic form. According to the Oxford Dictionary, "private" meant "belonging to or for the use of one particular person or group of people only" and "not connected with one's work or official position". Hence, the defence provided for under the proposed new section 15A(3)(c) of HRTO covered hyperlinks posted on social media platform; and</li> <li>(c) it should be noted that section 13B of the Smoking (Public Health) Ordinance was enacted in 1997 when electronic correspondences among the general public were mainly in the form of emails. There was virtually no social media platform like today.</li> </ul>	
010610 - 011201	Chairman Admin	<p>The Chairman's enquiry about whether a healthcare professional providing information on sex selection services using RT procedures, including information on the services available in places where the provision of such services were permitted, in the course of care to a patient would contravene the proposed new section 15A(1) of HRTO.</p> <p>The Administration's explanation that providing factual information on sex selection services or referring patients with medical indications to receive sex selection services in the course of care would not be caught by the new offence as such activities would not amount to "promotion" of such services.</p>	
011202 - 012149	Chairman Mr CHAN Chi-chuen Admin Mr Charles MOK SALA3	<p>Mr CHAN Chi-chuen and Mr Charles MOK's enquiry about whether the following acts would constitute the offence under the proposed new section 15(A) of HRTO: (a) a person posted on the Facebook a hyperlink which led to a sex selection services advertisement provided by a company to that person; (b) another person shared on the Facebook the hyperlink of the above person; and (c) a person who was interested in sex selection services using RT procedures frequently posted, not for gain, information and advertisements in this regard on the Facebook.</p>	

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		<p>The Administration's response that:</p> <p>(a) while the advertisement in the first scenario was contained in a private correspondence (i.e. Facebook), depending on circumstances of the case, it might be regarded as an advertisement published or distributed in the course of a business of promoting sex selection services. If this was the case, according to the proposed new section 15A(4)(a), the defence provided for under the proposed new section 15A(3)(c) could not be invoked; and</p> <p>(b) depending on circumstances of the cases in the other two scenarios, the persons charged with the offence might rely on the defence provided for under the proposed new section 15A(3)(c) unless, as specified under the proposed new section 15A(4)(b), they had devised the contents of the relevant advertisement contained in the Facebook; or had selected, added to, modified or otherwise exercised control over the contents of that advertisement.</p> <p>In response to Mr CHAN Chi-chuen and Mr Charles MOK's enquiry, the Legal Adviser to the Bills Committee's remarks that persistent or repeated acts done by a person might constitute an act "in the course of a business" even the person concerned had no contractual commitment or pecuniary gain.</p>	
012150 - 012208	Chairman	Continuation of clause-by-clause examination of the Bill	
012209 - 012731	Chairman Mr Charles MOK Admin	<p><u>Examination of clauses 3 and 4 and the Committee stage amendments ("CSAs") proposed by the Administration to the clauses</u> (Annex to LC Paper No. CB(2)521/15-16(02))</p> <p>Members noted that the Administration would revise its CSAs to replace "人員" with "高級人員" as the Chinese rendition of the term "officer" in the proposed new section 15A(4)(b).</p>	
012732 - 012949	Chairman Mr Charles MOK Admin	<p>In response to Mr Charles MOK's enquiry, the Administration's advice that the proposed use of "高級人員" as the Chinese rendition of the term "officer" in the proposed new section 15A(4)(b) would be in line with the Chinese rendition of the term in the Companies Ordinance (Cap. 622). Under the Companies Ordinance, "officer" was defined as a director, manager or company secretary of a body corporate.</p>	
012950 - 014121	Chairman Admin	<p>The Chairman's concern about whether a registered medical practitioner would be regarded as having contravened the proposed new section 15A(1) of HRTO by reason of making available magazines and publications of a technical character which contained sex selection services information for reading by members of the public at the clinic.</p> <p>The Administration's explanation that:</p> <p>(a) a defence was provided for under the proposed new section 15A(3)(a) for those sex selection services advertisements</p>	



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		<p>contained in a publication of a technical character for circulation amongst those specified persons set out under the proposed new section 15A(8). Depending on circumstances of the case, registered medical practitioners who made available such publications at their clinics would not be held liable; and</p> <p>(b) as regards the act of making available at their clinics magazines, which were not of a technical character, with the presence of sex selection services advertisements, the registered medical practitioners concerned would not be caught by the proposed offence if they did not have the mens rea to cause the distribution of the relevant sex selection service advertisements.</p>	
014122 - 015249	Chairman Admin	<p>Referring to the proposed new section 15A(6) of HRTO, the Chairman's enquiry about (a) whether the employer and the employee, or the principal and the agent, as the case might be, would both be caught by the proposed offence; and (b) the reason why both express and implied authority, and both precedent and subsequent authority would constitute the authority given by the principal to the agent concerned under the proposed new section 15A(6)(b).</p> <p>The Administration's advice that:</p> <p>(a) the level of suspect's culpability was one of the important factors to be taken into account when assessing whether it was in the public interest to prosecute a party involved in the proposed offence. As a reference, no employee had even been prosecuted under UMAO in any of the cases concerned;</p> <p>(b) to address members' concern about the potential liability for employees of advertising, media or relevant organizations, a defence for employees and agents was provided for under the proposed new section 15A(5). In order to prevent employers or principals from shifting the blame to their employees or agents, as the case might be, it was proposed under the proposed new section 15A(6) that conduct engaged in by an employee in the course of employment or by an agent with the principal's authority, as the case might be, would be treated as engaged in by the employer or the principal. Similar defences were currently provided for under section 52 of the Food Safety Ordinance (Cap. 612). At the same time, the proposed new section 15A(7) would provide a defence for employers and principals who had taken reasonable steps and exercised due diligence to prevent the employee or agent from committing the proposed offence; and</p> <p>(c) the drafting of the proposed new section 15A(6)(b) was modelled on section 52(2) of the Food Safety Ordinance with a view to covering all types of authority (i.e. whether express or implied and whether precedent or subsequent) given in a principal-agent relationship.</p>	

Time marker	Speaker	Subject(s)/Discussion	Action required
		The Chairman's request for the Administration to provide for members' reference written information on the factors that had been taken into account in deciding whether to prosecute a person for the offence under the Food Safety Ordinance and the number of prosecutions initiated since the Ordinance had come into operation.	<b>Admin</b>
015250 - 015511	Chairman Mr CHAN Chi-chuen Admin	In response to the Chairman and Mr CHAN Chi-chuen's enquiry on the definition of "conduct" as set out under the proposed new section 15A(8), the Administration's advice that "conduct", in relation to the publication or distribution of an advertisement promoting sex selection services, included both "acts" and "omissions". Section 52 of the Food Safety Ordinance contained similar expressions.	
015512 - 020154	Chairman Admin	In response to the Chairman, the Administration's advice that whether a healthcare professional, such as a registered medical practitioner, who had been convicted of the proposed offence would be subject to disciplinary proceedings of the professional body concerned would depend on the regulation and where applicable, the code of professional conduct of the relevant professional body.	
<i>Agenda item II: Any other business</i>			
020155 - 020335	Chairman Mr CHAN Chi-chuen	Closing remarks  Arrangements for the next meeting	