



中華人民共和國香港特別行政區政府總部食物及衛生局

Food and Health Bureau, Government Secretariat  
The Government of the Hong Kong Special Administrative Region  
The People's Republic of China

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**Your Ref.:** LS/B/9/14-15

**Tel:** 3509 8913

**Fax:** 2840 0467

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Ms M L CHANG  
Assistant Legal Adviser  
Legislative Council Secretariat  
Legislative Council Complex  
1 Legislative Council Road  
Central, Hong Kong  
(Fax: 2877 5029)

Dear Ms CHANG,

**Human Reproductive Technology (Amendment) Bill 2015**

Thank you for your letter of 13 March 2015. Our response to the questions raised in the letter is set out in the ensuing paragraphs.

Question 1

The Amendment Bill seeks to prohibit publication and distribution of advertisements in Hong Kong that purport to promote sex selection services. Whether the uploading of such advertisements and related materials onto the Internet would constitute “publishing” or “distributing” for the purpose of the proposed section 15(3A) depends on the circumstances of individual cases. Where the advertisements are uploaded onto the Internet outside Hong Kong, there may be greater difficulties in collecting evidence to prosecute offenders who use overseas servers to post or cause to be posted the prohibited advertisements. Whether the new section could be enforced also hinges on the question of jurisdiction. The primary basis of criminal jurisdiction in the Hong Kong SAR is territorial. So long as the offence (of “publishing” or

“distributing”) is committed in Hong Kong, it would fall within the Hong Kong SAR’s jurisdiction.

## Question 2

Up to now, there is no decided case in Hong Kong on the legal position of hyperlink or hypertext linking in a criminal context.

We understand that in Canada, there is case law to the effect that there is no presumption that a person who merely posts a hyperlink may be regarded as “publishing” the content of the secondary website. On the one hand, hyperlinks communicate that a website exists but do not by themselves communicate the relevant content, and require some act on the part of the third party before he or she gains access to the relevant content. On the other hand, if the manner of hyperlinking conveys the impugned content of the secondary website, the person should be considered to have “published” that content.

Notwithstanding the above, in the absence of real facts, we are not in a position to advise or confirm categorically whether a particular scenario would amount to “cause the advertisement to be published or distributed” within the meaning of the proposed section 15(3A).

## Question 3

The word “cause” implies the requirement of knowledge or *mens rea* as to the things done. Hence for a person to be found guilty of the offence of “cause to be published or distributed” an advertisement under the proposed section 15(3A), there must be evidence that the person does the relevant act with knowledge or *mens rea*.

## Question 4

From our experience, an advertisement may not necessarily contain words expressly setting out provision of sex selection services are provided, but may rather contain suggestive pictures or phrases. Hence, we consider the expression “advertisement purporting to promote sex selection services” appropriate. The word “purporting” would receive an objective interpretation. Of note is, it will be a matter of fact and degree for the tribunal of fact after all.



### Question 5

In the proposed section 15(3A), the word “purporting” qualifies “advertisement” and is not a part of the mental element of the offence. Accordingly the word “purporting” would receive an objective interpretation.

The advertisements prohibited under sections 16(2) and 17(2) relate to matters which are more direct and straightforward in nature than sex selection services and are primarily commercial in nature *viz.* commercial dealing of gametes/ embryos and surrogacy arrangement.

Section 16(2) targets at advertisements that contain an invitation to supply gametes/embryos or an indication that the advertiser is willing to initiate or negotiate an arrangement to pay for them. In the case of section 17(2), the provision targets at advertisements relating to surrogacy arrangement, which essentially is the advertising of an arrangement to carry a child for someone else.

In contrast, advertisers of sex selection services may promote a range of medical consultations, tests and processes which may directly or indirectly achieve sex selection. It is therefore apt to add the word “purporting” to include those advertisements that claim to provide sex selection services.

### Question 6

We have set out our general position in the response to Question 2 above on the involvement of hyperlinks. Whether a person who not only engages in a discussion about the topic of sex selection on the Internet but also posts a hyperlink which may further link to institutes where sex selection services are provided would amount to “advertisement purporting to promote sex selection services” within the meaning of the proposed section 15(3A) is a question of facts. If the said discussion contains representations purporting to promote sex selection services (e.g. such words suggesting that sex selection services are available), the representations together with the link may constitute “advertisement” as a whole and these matters, once put on the Internet, may (depending on the circumstances of the case) constitute “publishing an advertisement”. At the end of the day, it will be a matter of fact and degree for the tribunal of fact.

### Question 7

The Amendment Bill seeks to protect public morals and the overall well-being of society. It is drafted to catch those persons who “cause to be published or distributed” or “knowingly publish or distribute” advertisements purporting to promote sex selection services. If a webpage host or operator (being an innocent disseminator) has no knowledge about or control over the advertisement uploaded or distributed, he / she could not even have the necessary *mens rea* for the offence and so, a defence is not required in such circumstances. The Government does not see any specific need to provide a statutory defence in favour of webpage host and operator.

### Question 8

The practice of using the word “shall” to impose an obligation has been discontinued in legislative drafting in Hong Kong.<sup>1</sup> Under the current practice, “must” is generally used as the substitute for “shall”.<sup>2</sup> In drafting provisions imposing a prohibition with statutory sanction, the expression “No person shall ...” has been replaced by “A person must not ...”.<sup>3</sup>

### Question 9

The proposed section 15(3B) is drafted to define “sex selection service” by making reference to section 15(3), *viz*:

“No person shall, by means of a reproductive technology procedure, cause the sex of an embryo to be selected, whether directly or indirectly (including by the implantation of an embryo of a particular sex in the body of a woman)...”

The phrase “directly or indirectly” refers to the reproductive technology procedure to bring about sex selection, which currently may involve –

- Pre-implantation genetic diagnosis (PGD) to determine the sex of an embryo for sex-selective implantation into a woman; or

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<sup>1</sup> *Drafting legislation in Hong Kong: A guide to style and practices* para. 9.2.1

<sup>2</sup> *Ibid.* para. 9.2.1.

<sup>3</sup> *Ibid.* para. 9.2.6.

- Sperm sorting to produce a sample with a higher proportion of sperm carrying a particular sex chromosome for insemination into a woman so as to increase the chance of conceiving a child of the preferred sex.

The phrase is added to accommodate future advances in reproductive technology in this regard.

Question 10

We have studied the experiences of other jurisdictions. Among them, Canada, Taiwan, Singapore as well as the Mainland prohibit advertising of sex selection services in various forms. Further details are at the **Annex**.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Wendy Au". The signature is fluid and cursive, with the first name "Wendy" and the last name "Au" clearly distinguishable.

( Ms Wendy AU )  
for Secretary for Food and Health

c.c.

Department of Health      (Attn: Dr Kellie SO)  
Department of Justice      (Attn: Mr Jonathan LUK)



**Regulation of Advertisement of Sex Selection through Human Reproductive Technology (RT) in Other Jurisdictions**  
 其他司法管轄區就藉人類生殖科技程序進行性別選擇的廣告的規管

<b>Jurisdictions</b> <b>司法管轄區</b>	<b>Is sex selection through RT regulated?</b> <b>藉人類生殖科技程序進行性別選擇是否受規管？</b>	<b>Is sex selection advertisement prohibited?</b> <b>性別選擇的廣告是否受禁制？</b>
1. USA 美國 2. Thailand 泰國	No 否	No 否
3. UK 英國 4. Australia (Victoria) 澳洲（維多利亞州） 5. New Zealand（紐西蘭）	Sex selection is allowed for medical reasons only.  只准因醫學理由而進行性別選擇。	No 否
6. Canada 加拿大	Sex selection is allowed for medical reasons only.  只准因醫學理由而進行性別選擇。	Sex selection advertisement is prohibited under the Assisted Human Reproduction (AHR) Act.  《輔助人類生殖法》(Assisted Human Reproduction (AHR) Act) 已禁制性別選擇的廣告。
7. Mainland China 中國內地	Sex selection is allowed for medical reasons only.  只准因醫學理由而進行性別選擇。	There is no legislation specifically governing sex selection advertisement but Measures for the Administration of Medical Advertisements (《醫療廣告管理辦法》) in general bans advertising of all prohibited activities.  雖然沒有法例專門規管性別選擇的廣告，不過《醫療廣告管理辦法》一般禁制所有被禁制活動的廣告。



<b>Jurisdictions</b> <b>司法管轄區</b>	<b>Is sex selection through RT regulated?</b> <b>藉人類生殖科技程序進行性別選擇是否受規管？</b>	<b>Is sex selection advertisement prohibited?</b> <b>性別選擇的廣告是否受禁制？</b>
<b>8. Singapore 新加坡</b>	<p>Sex selection is allowed for medical reasons only.</p> <p>只准因醫學理由而進行性別選擇。</p>	<p>There is no legislation specifically governing sex selection advertisement. Advertising of medical services is in general restricted under the Private Hospitals and Medical Clinics (PHMC) (Publicity) Regulations and the Medicines (Advertisement and Sale) Act.</p> <p>當地沒有法例專門規管性別選擇的廣告。不過涉及醫療服務的廣告一般受《私家醫院及醫務診所附屬法例》(Private Hospitals and Medical Clinics (PHMC) (Publicity) Regulations) 及《藥物（廣告及銷售）法》(Medicines (Advertisement and Sale) Act) 規管。</p>
<b>9. Taiwan 台灣</b>	<p>Sex selection is allowed for medical reasons only.</p> <p>只准因醫學理由而進行性別選擇。</p>	<p>There is no legislation specifically governing sex selection advertisement. Medical advertisement is in general restricted under Medical Care Act.</p> <p>當地沒有法例專門規管性別選擇的廣告。不過醫療廣告一般受《醫療法》規管。</p>