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31 March 2015

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Principal Assistant Secretary for
Food and Health (Health) Special Duties 1
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2 Tim Mei Avenue, Tamar
Hong Kong

Dear Ms AU,

Human Reproductive Technology (Amendment) Bill 2015

Thank you for your letter of 19 March 2015. We have considered your reply and shall be grateful if you could clarify the following matters.

Answer to Question 1

In your answer to our question 1, it was stated that "*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*". There is no dispute that the primary basis of criminal jurisdiction in Hong Kong is territorial and that offences committed in Hong Kong would fall within the jurisdiction of Hong Kong courts. However, when Internet advertising is involved, the concept of "territorial" will become complicated and it is necessary to clearly define the scope of the prohibition under the new section 15(3A) and the circumstances under which an act will be regarded as "committed in Hong Kong".

We further note that in your answer, it was mentioned that "*Where the advertisements are uploaded onto the Internet outside Hong Kong, there may be greater difficulties in collecting evidence...*". However, the fact that there may be greater difficulties in collecting evidence overseas would seem to be more related to the question of enforcement rather than the question of liability.

To enable us to better understand the scope of the new offence, please clarify whether the new section 15(3A) only targets at those who publish or distribute or upload the advertisement in Hong Kong, such that if: (i) the advertisement is uploaded or distributed by using overseas server; or (ii) the act of uploading or distributing takes place outside Hong Kong, it would not fall within the new section even if the advertisement can be viewed in Hong Kong.

Answer to Question 4

Please clarify whether it is the policy intent to prohibit not only advertisements which purport to promote sex selection services but also those which do not so purport but have such an effect. If so, please consider whether it is appropriate to revise the new section 15(3A) to the effect that: "*A person must not cause to be published... an advertisement promoting or purporting to promote sex selection services...*".

Answer to Question 7

In your answer to our question 7, it was stated that the Amendment Bill 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*". In the context of placing such an advertisement in a local newspaper or magazine, it would appear that not only the publisher, but the employees who are assigned the tasks of, say, typesetting or image designing, would also have the knowledge of the advertisement. The new section 15(3A) makes no mention about consent or control. Please clarify whether in such circumstances, the employees who take part in the advertising process are also liable under the new section.

With reference to provisions relating to publication of advertisements, we note that under the Non-Local Higher and Professional

Education (Regulation) Rules (Cap. 493B), there is an express provision (section 3) providing that:

"Where a person is charged for contravention of subsection (3) in respect of an advertisement, it shall be a defence for such person to prove –

- (a) that he carried on the business of publishing or arranging for the publication of advertisements, that he received the advertisement for publication in the ordinary course of business, and that at the time he published the advertisement he had no reason to believe that the contravention would occur by reason of the publication of the advertisement; or*
- (b) that he took all reasonable steps and exercised all due diligence to avoid the contravention."*

Also, under section 8(1) of the Preservatives in Food Regulation (Cap. 132BD), there is an express provision providing that:

"In any proceedings for an offence against this Regulation in relation to the publication of an advertisement, it shall be a defence for the defendant to prove that, being a person whose business is to publish, or arrange for the publication of, advertisements, he received the advertisement for publication in the ordinary course of business."

Please consider if it is necessary to provide a similar defence to the new offence under this Bill.

In the LegCo Brief, it was stated that *"Subject to availability of evidence, local webpage hosts or operators who knowingly post advertisements purporting to promote sex selection services on a webpage under their management could be held liable"*. If it is intended that a webpage host or operator could be held liable under the new section 15(3A), please consider if it is necessary to make an express provision to reflect this intention. We note that under the Clearing and Settlement Systems (Amendment) Bill 2015, with regard to the new offence of knowingly promoting the issue of stored value facilities, there is an express provision providing that *"a reference to promoting or otherwise assisting includes promoting or otherwise assisting by means of*

providing network or internet portal access or any other technological means".
Will the Administration consider adopting a similar approach to the new offence in respect of publishing or distributing advertisements purporting to promote sex selection services under this Bill?

Answer to Question 9

As the phrase "directly or indirectly" is intended to refer to the reproductive technology procedure, please consider revising the Chinese version of the new section 15(3B) to "藉生殖科技程序(不論直接或間接，包括將某一性別的胚胎植入一名女性的體內)選擇胚胎的性別而提供的服務" for the sake of clarity.

We should be grateful if you could reply to us in both Chinese and English as soon as possible, preferably before the first Bills Committee meeting to be held on 9 April 2015.

Yours sincerely,

(ML CHANG)

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