



立法會秘書處 法律事務部  
LEGAL SERVICE DIVISION  
LEGISLATIVE COUNCIL SECRETARIAT

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By Fax (2102 2520)

16 April 2015

Ms Wendy AU  
Principal Assistant Secretary for  
Food and Health (Health) Special Duties 1  
Food and Health Bureau  
19/F, East Wing  
Central Government Offices  
2 Tim Mei Avenue, Tamar  
Hong Kong

Dear Ms AU,

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

Thank you for your letter of 8 April 2015. We have considered your reply and shall be grateful if you could further clarify the following matters.

#### Answer to Question 1

We note from your answer that "*Whether an offence has been committed depends on whether there is sufficient evidence to show that the acts 'causing' such advertisement to be published or distributed, such as the initiation of placing such advertisement, making payment in relation to the placing of such advertisement etc. take place in Hong Kong.*" The examples given by you seem to suggest that for an advertisement to fall within the scope of the new section 15(3A), it would require certain "connections" with Hong Kong (e.g. the initiation of placing the advertisement or the making payment of the advertisement to take place in Hong Kong). If this is indeed the policy

intent, please consider if it is necessary to state clearly in the new provision what those "Hong Kong connections" are. In this respect, we note that under the Unsolicited Electronic Messages Ordinance (Cap. 593), there is a provision specifically provides for the meaning of "Hong Kong link". Section 3(1) of Cap. 593 states as follows:

- "(1) For the purposes of this Ordinance, a commercial electronic message has a Hong Kong link if, and only if –
- (a) the message originates in Hong Kong;
  - (b) the individual or organization who sent the message or authorized the sending of the message is –
    - (i) an individual who is physically present in Hong Kong when the message is sent;
    - (ii) an organization (other than a Hong Kong company) that is carrying on business or activities in Hong Kong when the message is sent; or
    - (iii) a Hong Kong company;
- ..."

Please consider whether it is appropriate to adopt a similar approach for the new section 15(3A).

#### Answer to Question 2

We also refer to your answer to our question 2 as contained in your letter dated 19 March 2015. While we understand that each case will depend on its own facts in determining whether or not an individual has committed an offence under the new section 15(3A), we are of the view that the law should be sufficiently clear to enable an average citizen to figure out from reading the law what he/she can or cannot do. In view of the way the new provision is drafted, an individual who forwards a hyperlink containing information on sex selection services to others may be said to be "knowingly distributing" or "caused to be distributed" the advertisement. Please consider if it is necessary to expressly provide that the new section 15(3A) does not apply to correspondence which is of a private nature and is not intended for commercial purposes.

Answer to Question 4

In your answer to our question 4 as contained in your letter dated 8 April 2015, it was stated that "*...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. The expression 'purporting to' is meant for covering such scenarios.*" In determining whether an advertisement is or is not an advertisement promoting sex selection services, an objective standard is to be used and thus it may not be necessary to rely on the expression "purporting to" in determining whether it is such an advertisement. Please consider if it is appropriate to delete the phrase "purporting to" from the new section 15(3A).

Answer to Question 7

(a) Employees' liability

In your answer, it was stated that "*The proposed offence aims at imposing criminal responsibility on companies, agents or media agencies who cause to be published or distributed, or knowingly publish or distribute, an advertisement purporting to promote sex selection services.*" However, the new section 15(3A) is drafted in general terms by using the phrase "*A person must not cause to be published or distributed...*" without any reference limiting the phrase to "companies, agents or media agencies". In view of the way the provision is drafted, an employee who merely follows the instructions of his or her publisher employer to arrange for the publication/distribution of such an advertisement would likely be caught by the new section 15(3A).

Please consider if it is necessary to provide a defence for those employees who may be regarded as "knowingly" arranging for the publication or distribution of the advertisement but they do so in the course of their employment and are not in a position to influence the decision to publish or distribute. In this respect, we note that there is a similar defence in section 53 of the Food Safety Ordinance (Cap. 612) which reads as follows:

"It is a defence for an employee charged with an offence under this Ordinance to show that –

- (a) the act or omission of the employee was done or made in the

- course of the employee's employment and under instructions given by the employer in the course of that employment; and
- (b) the employee was not, at the relevant time, in a position to make or influence a decision regarding that act or omission."

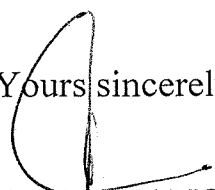
Please consider if a similar approach should be adopted for the new section 15(3A).

(b) Liability of publishers/Internet operators/webpage hosts

As stated in paragraphs 7 and 8 of the LegCo Brief, the new section 15(3A) not only targets at those who initiate the placing of the advertisements but also media agencies such as publishers of newspapers and magazines, as well as Internet operators and webpage hosts that provide the platform for the advertisements. At the meeting on 9 April 2015, Members have raised concerns about the justification for holding liable those who simply provide a platform for publication; and those who upload such an advertisement onto the Internet from their countries where it is entirely lawful to do so. In addition to the question of justification, it would also seem unrealistic to expect that all Internet operators/users around the world will be aware of this new offence in Hong Kong.

In view of Members' concerns, please consider if it is appropriate to narrow the scope of the prohibition under the new section 15(3A) to those who initiate the advertisements in Hong Kong (or by those who have certain degree of connection with Hong Kong), and not to target at those who merely provide the platform for placing advertisements.

Your early reply will be much appreciated.

Yours sincerely,  
  
(M L CHANG)

Assistant Legal Adviser

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