



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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30 June 2015

Ms Maisie LAM  
Clerk to Bills Committee  
Legislative Council Complex  
1 Legislative Council Road  
Central  
Hong Kong

Dear Ms Lam,

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

Thank you for your letter of 5 June 2015. Our response to the questions and comments raised by Members at the meeting on 2 June 2015 is set out in the attachment.

Yours sincerely,

(Ms Wendy AU)  
for Secretary for Food and Health

Encl.

c.c.

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

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

### **Response to Questions and Comments Raised at the Bills Committee Meeting on 2 June 2015**

Our response to Members' questions and comments raised at the Bills Committee meeting on 2 June is set out in the ensuing paragraphs.

**(1) The choice of the term “purporting to” and the corresponding Chinese term**

2. Under the Human Reproductive Technology (Amendment) Bill 2015 (the Amendment Bill), the English and Chinese texts of the proposed new section 15(3A) are reproduced below –

*“A person must not cause to be published or distributed, or knowingly publish or distribute, an advertisement purporting to promote sex selection services, whether or not the services are provided in Hong Kong.”*

“任何人不得安排公布或分發看來是推廣性別選擇服務的廣告，或明知而公布或分發該等廣告，不論該等服務是否在香港提供。”

3. In the context of the Amendment Bill, the inclusion of the term “purporting to” in the proposed offence is intended to capture advertisements which would appear to a reasonable person as promoting “sex selection services” involving reproductive technology (RT) procedures. This would then allow the court to assess whether, by a commonsense reading of the advertisement in question, a reasonable person will consider that the advertisements is promoting sex selection services. Or else enforcement agencies and the court would need to go through technical inquiries to prove whether the services being promoted are in fact of proven or unproven effectiveness in achieving sex selection.

4. In addition, there may be scenario that sex selection is offered as part of a RT service package, care should also be taken to avoid a choice of word that would allow a defendant to escape liability by simply

claiming that the defendant is only intending to promote RT services. This would undermine our regulatory regime and render the legislation ineffective.

5. As for the Chinese text, we have considered carefully Members' suggestions to use “本意是” or “其用意是” in place of “看來是”. In the context of the proposed offence under section 15(3A), adopting the Chinese text “本意是” or “其用意是” will practically require proof of the defendant's state of mind. This is not reflective of the intent of the term as explained in paragraphs 3 and 4 above. In terms of enforcement, there is the additional burden of proving beyond doubt the purpose or intent in the mind of the person causing to publish / distribute or publishing / distributing the advertisement was to promote sex selection services and whether the advertisement published or distributed was meant to provide sex selection services. This would undermine the effectiveness of enforcing the proposed offence.

6. Notwithstanding the above, we appreciate Members' concern regarding the scope of the Chinese term “看來是”. After careful consideration, we consider it acceptable to delete the term “purporting to” in both English and Chinese texts. The amendment would retain the reasonable man test as mentioned above. Given the references to RT and sex selection services are clearly defined in the Amendment Bill and the Ordinance, we consider the impact to the effectiveness of enforcement should be not too significant. If supported by the Bills Committee, we will move a Committee Stage Amendment in this regard.

7. It should however be noted that whilst under the above amendment the court would still factually assess whether an advertisement fits into the description of “promoting sex selection services”, owing to the removal of the term “purporting to”, the court may construe the proposed offence as not covering advertisements that are hoaxes or contain claims to promote procedures that in fact could not achieve sex selection.

## **(2) Inclusion of “financial gain” as an element in the offence**

8. Some Members suggested including a “financial gain” element in the offence to avoid capturing civilians who share the information

without any type of financial incentives or benefits. Members suggested the Government to make reference to the Copyright (Amendment) Bill 2014 (“the Copyright Bill”).

9. The proposed section 118(8B), as set out in clause 57 of the Copyright Bill, is as follows-

*“(8B) A person commits an offence if the person infringes copyright in a work by—*

*(a) communicating the work to the public for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward; or*

*(b) communicating the work to the public (otherwise than for the purpose of or in the course of any trade or business that consists of communicating works to the public for profit or reward) to such an extent as to affect prejudicially the copyright owner.”*

10. The offence in the proposed section 118(8B) of the Copyright Bill is to be distinguished from the proposed offence in the present exercise, which involves communication of someone’s work for profit. The offence in the present exercise however involves publication of an advertisement for promotion of a service that is banned in Hong Kong unless for medical reason. The nature of the offence is different.

11. We have also shared with Members scenarios in which the Government would encounter difficulties in collecting evidence. For example, the person who initiates the publishing of the advertisement may arrange with the publisher a deferred payment to avoid the presence of proof of “financial gain” or “profit” during the time of investigation, and in case the two parties have many business dealings, there would be difficulties in identifying specific transactions from the accounts as proof of the financial gain or profit. This would make the provision ineffective and virtually unenforceable.

12. Given our present proposal, the question of liability is a matter of fact, i.e. whether an advertisement promoting sex selection services has

been caused to be published or distributed, or knowingly published or distributed. The requirement to gather sufficient evidence to satisfactorily prove the element of financial gain would create grave concern on enforcement. We consider that the court should be allowed to deliberate on whether the advertisement in question “promotes sex selection service” based on the facts of the case without the need to consider a “financial element”.

### **(3) Defining the offence by territoriality**

13. At the meeting, a Member suggested the Government to expressly state the limits of territoriality in the offence, so that it will catch those who publish or distribute (i.e. “upload”, in the case of promotion with the Internet) the advertisement "in Hong Kong" only.

14. We mentioned at the Bills Committee meeting on 2 June 2015 that there is a general presumption against extra-territorial effect of statutes. This is similar to that of the United Kingdom as provided in the following quote from *Craies on Legislation*, 8th Edition, paragraph 11.1.2-

*"There is a presumption... to the effect that Acts passed by the Parliament of the United Kingdom are intended to extend to the whole of the United Kingdom but no other place. So if an Act is silent as to extent it should be taken to apply to the whole of the United Kingdom and no further."*

From the drafting perspective, it is not necessary to expressly limit the territorial application of the offence, for the territorial element is implied.

15. On the contrary, if "in Hong Kong" is expressly stated in the proposed offence, the court may presume that the legislature has placed special emphasis on the term “in Hong Kong” and accordingly adopt a restrictive construction to the offence. A restrictive construction may exclude those cases with any foreign elements, however slight and trivial, even though the substantive act is committed in Hong Kong. This

would have the effect of undermining the effectiveness of the legislative proposal.

16. In the context of advertisements promoting sex selection services, such a restrictive construction may exclude, for example, advertisements stored in overseas servers, even though they are wholly published or distributed by Hong Kong parties, and are intended for Hong Kong audience who receive them. In fact, we note that the sex selection advertisements that appear from time to time involved both overseas and local parties. If we are to impose restriction on those advertisements uploaded or published in Hong Kong only, it would create a loophole for parties who manipulate local or overseas publishing and distributing 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 target at Hong Kong people. We consider it essential to maintain the responsiveness in the regulatory regime so as to allow us to take appropriate actions against those who try to circumvent the law.

17. In explaining the major elements of the proposed offence, we have pointed out that the establishment of the offence requires not only the *actus reus* and *mens rea* for committing the offence and the *actus reus* and *mens rea* must also coincide. As such and given the above general presumption against extra-territorial effect of statutes, the current provision would not cover overseas parties who advertise sex selection services unless there is evidence to prove the *mens rea* of intention to target the promotion in Hong Kong or to the Hong Kong citizens at the time these overseas parties published the concerned advertisement on the Internet.

Food and Health Bureau  
Department of Health  
Department of Justice  
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