



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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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 22 July 2015. Our response to the questions and comments raised by Members at the meeting on 6 July 2015 is set out in the Attachment.

Yours sincerely,

(Miss Bonnie YIM)

for Secretary for Food and Health

Encl.

c.c.

Department of Health (Attn: Dr Sammy NG)

Department of Justice (Attn: Mr Jonathan LUK)

Human Reproductive Technology (Amendment) Bill 2015

Response to the Concerns Raised at Bills Committee Meeting on 6 July 2015

Overall Response

Having considered the concerns raised by Members at the Bills Committee meeting held on 6 July 2015 and the views expressed at the meeting with deputations held on 27 April 2015, we set out in this response the Committee Stage Amendments (CSAs) under consideration by the Government.

2. Before detailing these proposals, we would like to restate that the Human Reproductive Technology (Amendment) Bill 2015 (the Amendment Bill) aims to provide a new offence in respect of publishing or distributing advertisements involving sex selection services through reproductive technology (RT) procedures, whether or not the services are provided in Hong Kong. At present, section 15(3) of the Human Reproductive Technology Ordinance (Cap. 561) (HRTO) prohibits the use of RT procedures for sex selection of embryos on non-medical ground.

3. In drafting the Amendment Bill, the following considerations have been taken into account –

- (a) couples requiring sex selection services on medical grounds (e.g. to avoid certain sex-linked genetic diseases) would be under the care of registered medical practitioners and related healthcare professionals, and hence the Amendment Bill would not affect them in obtaining the information for the treatments they need; and
- (b) given the popularity of advertising and distributing promotional materials on the Internet, we consider necessary to address this issue in the Amendment Bill notwithstanding the difficulties that may be encountered in enforcement.

It was against the above considerations that we have adopted a more general approach in drafting the proposed section 15(3A).

4. Whilst appreciating the concerns raised by Members, we wish to point out again that section 15(3A) in its current form in fact confines the scope of the proposed offence specifically to sex selection services using RT, as defined under the HRTD viz. selecting the sex of an embryo using medical, surgical, obstetric or other procedures. It should also be noted that, in order to establish the proposed offence, the prosecution must prove not only the existence of both *actus reus* and *mens rea* but also that both should coincide. That said, we are prepared to beef up the proposed section 15(3A) to address the concerns raised by Members. Our proposals are set out in the ensuing paragraphs.

Proposed Government CSAs

(A) Removal of the Term “purporting to”

5. As explained at the Bills Committee meeting on 6 July 2015, we propose to amend section 15(3A) as follows to alleviate the concerns over the Chinese text for the term “purporting to” -

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

(B) Provision of Defence in Certain Circumstances

6. In response to the note tabled by Hon CHAN Chi-chuen (LC Paper No. CB(2)1865/14-15(01)) and the views expressed by other Bills Committee Members, we propose to introduce CSAs in the following areas -.

- (a) *Advertisement Made in a Publication of a Technical Character for Circulation Amongst Specified Persons*

We agree to provide a defence for presence of such advertisement in activities (e.g. lectures) and publications which are of an academic or technical character, modelled largely on the Undesirable Medical Advertisements Ordinance (Cap. 231). It is intended to be a defence for a person charged with the proposed offence, if he can prove that the advertisement made in a publication is of a technical character for circulation amongst specified persons or is made in academic teaching or discussion for specified persons.

We propose that “specified persons” should cover the following –

- (a) registered medical practitioners; and
- (b) medical and para-medical staff of any of the following–
 - (i) a hospital or maternity home to which the Hospitals, Nursing Homes and Maternity Homes Registration Ordinance (Cap. 165) applies;
 - (ii) a clinic to which the Medical Clinics Ordinance (Cap. 343) applies;
 - (iii) a hospital, maternity home or clinic maintained by the Government, The Chinese University of Hong Kong or the University of Hong Kong;
 - (iv) a hospital, maternity home or clinic managed or controlled by the Hospital Authority established under the Hospital Authority Ordinance (Cap. 113); and
 - (v) premises to which a licence granted under the Human Reproductive Technology Ordinance (Cap. 561) relates.

(b) *Private Electronic Correspondences not Intended for Commercial Purposes*

Members requested the Government to consider providing a defence modelling on section 13B of the Smoking (Public Health) Ordinance (Cap. 371) which stipulates that the prohibition on placing tobacco advertisements on the Internet does not apply to advertisements “contained in any private correspondence on the Internet and is not for commercial purposes”. It should however be noted that such a provision was enacted in 1997 when electronic correspondences among the general public were mainly in the form of emails and were not intended to be published or distributed openly. There was virtually no social media platform like today.

Turning to the case for a defence for private electronic correspondences for non-commercial purposes under the Amendment Bill, we have considered this in the past and have explained to the Bills Committee that sex selection service providers may launch social media campaigns involving members of the public in the distribution of advertisements through private correspondences. Under such circumstances, it would be extremely difficult for the enforcement agency to collect sufficient evidence related to businesses distributing sex selection advertisements in the form of private correspondences and it could provide a loophole for providers of sex selection service to circumvent the offence through organising social media campaigns.

Nevertheless, to address Members’ concern over the sharing of hyperlinks and information on social media, we will consider introducing a CSA to the effect that a defendant who publishes or distributes a hyperlink to the advertisement can put up a defence, if the defendant (whether by the defendant, or by the defendant’s officer, employee or agent) does not have control over the content of the advertisement, for example, the defendant is not involved in -

- (a) devising the contents of the advertisement; and
- (b) selecting, adding to, modifying or otherwise exercising control over the contents of the advertisement.”

Other Issues of Concern

(A) Defence for Employees of Advertising, Media or Relevant Organizations

7. We appreciated Members' concern on the potential liability for employees of advertising, media or relevant organisations who were assigned to take part in the advertising process of sex selection services in the course of their employment. In our earlier reply (LC Paper No. CB(2)1426/14-15(01)), we have pointed out that "in practice, in deciding whether to prosecute a person for the proposed offence, the DoJ would consider (a) whether there is sufficient evidence to justify instituting or continuing proceedings; (b) whether the general public interest requires that prosecution be conducted vis-à-vis the guiding principles set out in the *Prosecution Code 2013* promulgated by the DoJ" and "in addition, the term "person" in the new section 15(3A) could be interpreted to include the "person-in-charge" e.g. director(s) or owner(s) of a company and/or individuals who cause such advertisement to be published or distributed knowingly publish or distribute such advertisement". The level of suspect's culpability is one of the important factors to be taken into account when assessing whether it is in the public interest to prosecute a party involved in the offence. We have already provided statistics on prosecutions under the Undesirable Medical Advertisements Ordinance for the past three years (vide LC Paper No. CB(2)1561/14-15(01)) and that no employee has ever been prosecuted in any of the cases concerned. On the other hand, the provision of a defence for employees could create a loophole for employers who after having published or distributed, or arranged to publish or distribute sex selection advertisements, seek to shift the blame to their employees and evade from liability. This would result in serious enforcement difficulties and defeat the purpose of the Bill.

(B) Defence for Internet Operators and Webpage Hosts Which Only Provided the Platform

8. To establish the proposed offence, the prosecution must prove both the *actus reus* and *mens rea* of the defendant and both must coincide. Parties which do not have the *mens rea* (e.g. knowledge about the content or the subject matter to be conveyed by the advertisement, intention to cause to publish or distribute the advertisement to promote or offer sex selection services) should not be held liable. There does not seem to be a strong case for a defence devised specifically for Internet search engine operators/owners who merely provide a

search engine for identifying or trawling on-line information of a topic to be specified by a user would not possess the requisite *mens rea* for committing the proposed offence. Similarly, in order to establish a case, the Prosecution is required to prove the *mens rea* i.e. the operators and webpage hosts “knowingly” publish or distribute the advertisement.

(C) Provision of Information by Medical Practitioners

9. Members enquired about whether a medical practitioner providing information on sex selection services in the course of care or referring patients to receive such services would be considered contravening the proposed provision. In general, providing factual information on sex selection service or referring patients with medical indications to receive treatment in this particular area involving RT procedures in the course of care without promoting the service would not be caught by the proposed offence provision. Besides, practice of registered medical practitioners is governed by the “Code of Professional Conduct for the Guidance of Registered Medical Practitioners” (the Code) issued by the Medical Council of Hong Kong. The Code has a section dedicated to set out rules and requirements concerning pre-natal diagnosis and intervention; scientifically assisted reproduction and related technology with which all registered medical practitioners are required to comply.

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Department of Health
Department of Justice
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