

**Human Reproductive Technology (Amendment) Bill 2015
Draft Committee Stage Amendments**

The Government issued the first batch of draft Committee Stage Amendments (CSAs) vide our letter dated 20 October 2015. The proposed additional CSAs, together with the first batch of CSAs as revised, are marked up in the revised Human Reproductive Technology (Amendment) Bill 2015 (the “**Amendment Bill**”) at **Annex**. Explanations on the respective CSAs are set out in the ensuing paragraphs.

(I) Issues on hyperlink

2. During the previous discussions, Members have expressed concerns related to the possible liability for civilians who post hyperlinks leading to sex selection services advertisements and requested for a defence. To address Members’ concerns, we propose to provide a defence related to publishing or distributing a hyperlink that gives access to an advertisement on sex selection services contained in a private correspondence (s.15A(3)(c)). To avoid promoters of sex selection services from making use of this defence, we propose to specify in s.15A(4)(a) that such defence does not apply to the correspondence published or distributed in the course of a business of promoting sex selection services.

(II) Defence for employees

3. In relation to Members’ suggestions to provide a defence for employees against the new offence under the Amendment Bill, we have elaborated in our previous response (paragraph 7 of LC Paper No. CB(2) 2153/14-15(01)) that we are concerned that employers publishing or distributing advertisements which promote sex selection services (or arranged to publish or distribute the same) may seek to shift the blame to their employees. In the light of the Members’ suggestions, we propose to include a defence for employees and agents (s.15A(5)) modelling on

the relevant provisions in the Food Safety Ordinance (Cap. 612). In order to prevent employers from shifting the blame to their employees, we also propose to model on the relevant provisions of the Food Safety Ordinance (Cap. 612) and provide in s.15A(6)(a) and (b) that conduct engaged in by an employee/agent in the course of employment (or in the case of an agent, when the agent is with the principal's authority) is also to be treated as engaged in by the employer/principal, as the case may be. At the same time, s.15A(7) will provide a defence to employers and principals who have taken reasonable steps and exercised due diligence to prevent the employee or agent from committing the offence.

(III) Technical revisions

4. Arising from the inclusion of the new batch of CSAs, we have proposed some technical amendments such as re-numbering the provisions and rearranging various elements of the Amendment Bill.

**Food and Health Bureau
Department of Health
Department of Justice
December 2015**

Human Reproductive Technology (Amendment) Bill 2015

Draft Committee Stage Amendments

Marked-up Version of the Amendment Bill¹

A BILL

To

Amend the Human Reproductive Technology Ordinance to provide for a new offence in respect of publishing or distributing advertisements ~~purporting to promote~~ promoting sex selection services.

Enacted by the Legislative Council.

1. Short title and commencement

- (1) This Ordinance may be cited as the Human Reproductive Technology (Amendment) Ordinance 2015.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Food and Health by notice published in the Gazette.

2. Human Reproductive Technology Ordinance amended

The Human Reproductive Technology Ordinance (Cap. 561) is amended as set out in sections 3 and 4.

3. Section 15A added ~~amended (prohibitions in connection with embryos, against sex selection and against the provision of reproductive technology procedures to unmarried persons)~~

After section 15~~(3)~~—

Add

¹ The draft CSAs may be subject to further refinement.

“15A. Prohibition against publishing or distributing advertisements promoting sex selection services

~~“(3A1)~~ A person must not cause to be published or distributed, or knowingly publish or distribute, an advertisement ~~purporting to promote~~ promoting² sex selection services, whether or not the services are provided in Hong Kong.

(2) For the purpose of subsection (1), publishing or distributing an advertisement includes publishing or distributing a hyperlink that gives access to an advertisement.³

(3) It is a defence for a person charged with an offence for contravening subsection (1) to show that the advertisement was—

(a) contained in a publication of a technical character for circulation amongst specified persons⁴;

(b) published or distributed for academic teaching, or academic discussion, for specified persons; or

(c) contained in a private correspondence.

(4) Subsection (3)(c) does not apply if—

(a) the correspondence was published or distributed in the course of a business of promoting sex selection services (whether or not carried on by the person charged with the offence); or

(b) the advertisement was accessible through a hyperlink provided in the correspondence and the person charged with the offence (whether by the person or by any officer, employee or agent of the person)—⁵

² This CSA has been discussed and agreed among the members as well as the legal advisor of the Bills Committee at previous meetings (6 July and 5 October 2015).

³ As advocated by the Bills Committee members, the Government drafted this subsection together with the defence in s.15A(3)(c) to avoid inadvertently capturing the act of hyperlink sharing for non-commercial purposes.

⁴ This clause together with the s.15A(3)(b) and the definition of “*specified person*” below has been presented to members vide CB(2)90/15-16(01).

⁵ To better address the concerns of the Bills Committee members on the liability and vulnerability of employees, the Government has devised this CSA (subsections 15A(4)-(7)) by modelling on various provisions raised by both the members and the legal advisor, e.g., the Food Safety Ordinance (Cap 612) to offer protection to employees.

- (i) devised the contents of the advertisement, either in whole or in part; or
 - (ii) selected, added to, modified or otherwise exercised control over the contents of the advertisement.
- (5) It is a defence for a person charged with an offence for contravening subsection (1) to show that—
 - (a) the conduct was engaged in by the person—
 - (i) in the course of the person’s employment; and
 - (ii) in accordance with instructions given by the person’s employer in the course of that employment; and
 - (b) at the time the conduct was engaged in, the person was not in a position to make or influence a decision regarding the conduct.
- (6) For the purposes of this section—
 - (a) conduct engaged in by an employee in the course of employment is to be treated as engaged in by the employer, as well as by the employee (whether or not the conduct was engaged in with the employer's knowledge or approval); and
 - (b) conduct engaged in by an agent with the authority of the principal is to be treated as engaged in by the principal, as well as by the agent (whether the authority was express or implied, and whether the authority is precedent or subsequent).
- (7) If the employer or principal is charged with an offence for contravening subsection (1) in respect of conduct alleged to have been engaged in by the employee or agent (as the case may be), it is a defence for the employer or principal to show that the employer or principal took all such steps as were reasonable and exercised all due diligence to prevent the employee or agent (as the case may be) from—
 - (a) engaging in the conduct; or

(b) engaging in conduct of that description in the course of the employee's employment or the agent's authority.

(3B8) In subsection (3A) this section—

conduct (行為) includes acts and omissions;

correspondence (通訊) includes correspondence in electronic form;

sex selection services (性別選擇服務) means services provided for selecting the sex of an embryo by means of a reproductive technology procedure, whether directly or indirectly (including by the implantation of an embryo of a particular sex in the body of a woman);²².

specified person (指明人士) means any of the following persons—

(a) registered medical practitioners;

(b) the medical and para-medical staff of—

(i) premises to which a licence relates;

(ii) a hospital or maternity home to which the Hospitals, Nursing Homes and Maternity Homes Registration Ordinance (Cap. 165) applies;

(iii) a clinic to which the Medical Clinics Ordinance (Cap. 343) applies;

(iv) a hospital, maternity home or clinic maintained by the Government, The Chinese University of Hong Kong or the University of Hong Kong;

(v) a hospital, maternity home or clinic managed or controlled by the Hospital Authority established under the Hospital Authority Ordinance (Cap. 113).”.

4. Section 39 amended (offences)

Section 39(1), after “[\(35\).](#)” —

Add

“~~;~~[\(3A\)15A\(1\).](#)”.