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**Report of the Bills Committee on
Human Reproductive Technology (Amendment) Bill 2015**

Purpose

This paper reports on the deliberations of the Bills Committee on Human Reproductive Technology (Amendment) Bill 2015.

Background

2. The Human Reproductive Technology Ordinance (Cap. 561) ("the Ordinance"), enacted in 2000, provides a statutory framework to, among others, regulate human reproductive technology procedures and the use of embryos and gametes; confine the provision of reproductive technology procedures to infertile couples; and regulate surrogacy arrangements. The Council on Human Reproductive Technology ("CHRT") was established under section 4 of the Ordinance in April 2001 to implement the regulatory measures. CHRT has promulgated a Code of Practice on Reproductive Technology and Embryo Research to provide guidelines for reproductive technology service providers and embryo researchers.

3. Under section 15(3) of the Ordinance, sex selection using reproductive technology procedures is prohibited except for medical reasons to avoid the birth of a child suffering from a serious sex-linked genetic disease. A list of these serious sex-linked genetic diseases is set out in Schedule 2 to the Ordinance. This apart, sections 16 and 17 of the Ordinance respectively provide for prohibition against commercial dealings of gametes or embryos and commercial surrogacy arrangements, and prohibit advertisements relating to these commercial dealings. The Ordinance, however, does not prohibit advertisement promoting the use of reproductive technology procedures to achieve the purpose of sex selection.

4. According to the Administration, there has been an increase in local press advertisements and leaflets promoting sex selection services offered by overseas providers in recent years. The medical profession has expressed concern on the increasingly aggressive promotional activities in this regard, and there is a call for prohibiting these activities by legislation. For the overall well-being of the society, the Administration considers it necessary to amend the legislation to rectify the above inconsistency in advertising prohibition.

The Bill

5. The Administration introduced the Human Reproductive Technology (Amendment) Bill 2015 ("the Bill") into the Legislative Council on 18 March 2015 to amend the Ordinance to provide for a new offence in respect of publishing or distributing advertisements promoting services for selecting the sex of an embryo through reproductive technology procedures, whether or not the services are provided in Hong Kong. The proposed maximum penalty level for the offence is a fine at level 4 (i.e. \$20,000) and imprisonment for six months on a first conviction, and a fine at level 6 (i.e. \$100,000) and imprisonment for two years on a subsequent conviction. The proposed level of penalty is in line with those relating to advertisements that promote commercial dealings of gametes or embryos and surrogacy arrangements under the Ordinance.

The Bills Committee

6. At the House Committee meeting on 20 March 2015, Members agreed to form a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

7. Under the chairmanship of Dr KWOK Ka-ki, the Bills Committee has held nine meetings with the Administration. The Bills Committee has also received oral representation from 10 organizations and an individual at one of these meetings, and met separately with the Chairman of CHRT at one of its meetings. A list of organizations and individual which/who have given views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

Definition of sex selection services

8. Under section 2(1) of the Ordinance, "reproductive technology procedure" means a medical, surgical, obstetric or other procedure (whether or not it is

provided to the public or a section of the public) assisting or otherwise bringing about human reproduction by artificial means, and includes:

- (a) in-vitro fertilization;
- (b) artificial insemination;
- (c) the obtaining of gametes;
- (d) manipulation of embryos or gametes outside the body;
- (e) a procedure specified in a notice published by the Secretary for Food and Health ("SFH") in the Gazette to be a reproductive technology procedure; and
- (f) a gender selection achieved or intended to be achieved by means of a procedure which falls within this definition,

but excludes a procedure specified in a notice published by SFH in the Gazette not to be a reproductive technology procedure.

9. Members note that by making reference to the above definition of "reproductive technology procedure", the term "sex selection services" is defined under the proposed new section 15(3B) as 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). Some members including Dr LEUNG Ka-lau and Dr Helena WONG are concerned about whether ultrasound examination or maternal blood test for identifying the gender of a fetus for a hidden purpose of sex selection would be regarded as sex selection services.

10. The Administration has advised that medical techniques for screening of fetal genetic disorders and growth monitoring (such as ultrasound, amniocentesis, chorionic villus sampling, or maternal blood tests), which are performed after the embryo is formed inside the body of a woman without using any reproductive technology, do not fall within the definition of "reproductive technology procedure". Hence, they would not be regarded as procedures for achieving sex selection. The Administration has added that reproductive technology procedures to bring about sex selection currently involve the use of pre-implantation genetic diagnosis to determine the sex of an embryo for selective implantation into a woman, or sperm sorting to produce a sample with a higher proportion of sperm carrying a particular sex chromosome for insemination into a woman so as to increase the chance of conceiving a child of the preferred sex.

The ingredient of mens rea of the proposed offence

11. Members note that the proposed new section 15(3A) as currently drafted will catch those persons who "cause to be published or distributed" or "knowingly publish or distribute" advertisements purporting to promote sex selection services using reproductive technology procedures. According to the Administration, the establishment of the proposed offence requires not only the actus reus (i.e. the person has published and distributed an advertisement promoting sex selection services using reproductive technology procedures, or played a part in causing it to be published or distributed) but also the mens rea, and that the actus reus and mens rea must coincide. Members have asked about the proof of mens rea in relation to the proposed offence.

12. The Administration has pointed out that examples of the mens rea of the proposed offence include knowledge about the content or the subject matter to be conveyed by the advertisement; or intention to cause to publish or distribute the advertisement to promote or offer sex selection services using reproductive technology procedures as the case may be. The enforcement authority will collect evidence as to the state of mind of the alleged perpetrator, which may be proved by admission or inference from circumstantial evidence, at the time of causing the publication or distribution (which may be a time before the actual publication) and the content of the advertisement at the material time.

Advertisements that constituted the proposed offence

Information provided by healthcare professionals in the course of care

13. Members have raised queries over the rationale to prohibit advertisements promoting the use of reproductive technology procedures to achieve the purpose of sex selection on both medical and non-medical grounds under the proposed new section 15(3A). The Chairman shares the view of some deputations from the medical sector that those advertisements which have clearly stated that sex selection for non-medical reasons is prohibited in Hong Kong should be allowed for publication or distribution.

14. The Administration has advised that confining the proposed offence to advertisements to promote sex selection services using reproductive technology procedures on non-medical grounds may leave a loophole for those which seek to circumvent the proposed offence.

15. Members have expressed concern whether healthcare professionals' acts of providing, in the course of care, factual information on sex selection services or referring patients with medical indications (i.e. require to cause the sex of an embryo to be selected by means of a reproductive technology procedure in order to

avoid the birth of a child suffering from a serious sex-linked genetic disease as specified in Schedule 2 to the Ordinance) to receive treatment available in Hong Kong or other countries would come within the scope of the proposed offence.

16. The Administration has confirmed that such acts would not amount to promotion of sex selection services. The Administration has also pointed out that the practice of registered medical practitioners is governed by the Code of Professional Conduct for the Guidance of Registered Medical Practitioners issued by the Medical Council of Hong Kong. All registered medical practitioners have to comply with the rules and requirements concerning pre-natal diagnosis and intervention, scientifically assisted reproduction and related technology as set out in the Code.

Promotional effect of the advertisements

17. The proposed new section 15(3A) is drafted to the effect that publication or distribution of advertisements "purporting to" promote sex selection services will be prohibited. The majority of the members have expressed concern that the expression "purporting to" raises doubts as to whether advertisements that do not so purport but have the effect of promoting sex selection services would fall into the scope of the proposed offence. These members have pointed out that in determining whether an advertisement is or is not an advertisement promoting sex selection services, an objective standard is to be used and hence, it might not be necessary to rely on the expression in determining whether it is such an advertisement. They note that sections 16(2) and 17(2) of the Ordinance which respectively provide for prohibitions of advertisements relating to commercial dealings of gametes or embryos and surrogacy arrangements do not contain the expression "purporting to". Members have enquired about the use of the English expressions "purportedly", "purporting to" and "purporting to be", and the Chinese expressions "看來是", "看起來" and "看似" in other ordinances.

18. The Administration is of the view that the advertisements prohibited under sections 16(2) and 17(2) of the Ordinance relate to matters which are more direct and straightforward in nature than sex selection services and are primarily commercial in nature. However, given the nature of sex selection services, advertisers of these services may promote a range of medical consultations, tests and processes which may directly or indirectly achieve sex selection. In addition, experience suggests that an advertisement may not necessarily contain words expressly setting out that sex selection services are provided, but may rather contain suggestive pictures or phrases. There may also be cases that sex selection is offered as part of a reproductive technology package. The expression "purporting to" is intended to capture those advertisements that appear to a reasonable person as promoting sex selection services involving reproductive

technology procedures, without the need of considering whether those promoted services are in fact of proven or unproven effectiveness in achieving sex selection.

19. The Administration has also informed the Bills Committee that the expression "purporting to" is commonly used in the laws of Hong Kong to cover situations in which critical features of a subject or matter in question are not explicit, and in cases where flexibility is required for covering certain situations. Under the proposed new section 15(3A), the Chinese expression "看來是" is used to render "purporting to" because the expressions of "看起來" and "看似" are not used in the similar context.

20. The Legal Adviser to the Bills Committee has pointed out that many of the existing legislative provisions containing the expression "purporting to" are related to admissibility of documents in court proceedings, and are different in nature from the proposed new section 15(3A). Members in general remain concern that confusion will be caused by the expression "purporting to". In particular, the use of the Chinese rendition "看來是" may have the effect of focusing on the appearance, rather than the substance, of an advertisement when determining whether it is promoting sex selection services. They have suggested to use the Chinese rendition "本意是" or "其用意是" in place of "看來是" such that those advertisements which appear to be promoting, but do not mean to promote, sex selection services using reproductive technology procedures would not be caught by the proposed offence.

21. The Administration's views are that using "本意是" or "其用意是" in the context of the proposed new section 15(3A) will practically require proof of the defendant's state of mind, which is not reflective of the policy intent of using the English expression "purporting to". The additional burden of proving beyond doubt the intention of the person causing to publish or distribute, or publishing or distributing as the case may be, the relevant advertisement is to promote sex selection services using reproductive technology procedures, as well as whether the advertisement so published or distributed is meant to provide sex selection services will also undermine the enforceability of the proposed offence provisions.

22. However, in view of members' strong views, the Administration has agreed to move a Committee stage amendment ("CSA") to delete the expression "purporting to" in both English and Chinese texts to leave it the court to decide whether the advertisement concerned is promoting sex selection services using reproductive technology procedures. The Administration has drawn the attention of the Bills Committee to the possibility that, with these CSAs, 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.

Internet advertisements

The Administration's policy intent

23. The Administration has advised the Bills Committee that it is the policy intent that advertising on sex selection services through reproductive technology procedures on all media, including the Internet, will be prohibited. Some members including the Chairman, Ms Cyd HO, Mr Charles MOK and Mr CHAN Chi-chuen are of the view that the proposed prohibition of advertising sex selection services through reproductive technology procedures on the Internet will have an adverse impact on the free flow of information on the Internet. They are concerned that the Bill will set a precedent for regulation of Internet activities or have wide policy implications.

24. The Administration has advised that "advertisement" as defined under section 2(1) of the Ordinance includes any form of advertising whether to the public generally, to any section of the public or individually to selected persons, and that should include advertisements on the Internet. In the course of drafting, the Administration was aware of the ever-increasing use of Internet in advertising. It is strongly of the view that if the proposed offence does not cover advertisements on the Internet, an obvious gap would be left in the regulatory framework. This notwithstanding, the Administration has stressed that the proposed new section 15(3A) as currently drafted will not catch those persons who inadvertently involved in the publication or distribution of advertisements on the Internet.

Territorial application of the proposed offence

25. Given that the primary basis of criminal jurisdiction in Hong Kong is territorial, members are concerned that the concept of territorial would become complicated when Internet advertising is involved. They have raised queries over situation where an online advertisement on sex selection services involving reproductive technology procedures is being uploaded to the Internet by using overseas servers or through a cloud platform. Some members have suggested that, for the avoidance of doubt, it should be expressly stated that it is only when the acts of knowingly published or distributed, or causing to be published or distributed, the relevant sex selection services advertisement take place in Hong Kong that the persons concerned will be caught by the proposed offence.

26. The Administration has explained that there is a presumption in construing a statute creating an offence that is not intended to make conduct taking place outside the territorial jurisdiction of Hong Kong an offence triable in a Hong Kong court. It is envisaged that enforcement against advertisements on sex

selection services using reproductive technology procedures under the proposed new section 15(3A) would be focused on those advertisements published on local webpages and servers in addition to traditional media like local newspapers and magazines. However, given that there will no doubt be persons seeking to circumvent the proposed offence by posting the relevant advertisements targeting at people residing in Hong Kong (such as providing local addresses and/or phone numbers and quoting the service fees in Hong Kong dollars) on overseas Internet webpages or uploading them through servers located outside Hong Kong, the Administration is of the view that it is not appropriate to exclude fully overseas Internet websites and servers under the proposed offence.

27. The Administration has further pointed out that from the drafting perspective, it is not necessary to expressly limit the territorial application of the proposed offence as it is implied. The Administration has expressed concern that if "in Hong Kong" is expressly stated in the proposed offence, the court may presume that the legislature has placed special emphasis on the element "in Hong Kong" and accordingly adopt a restrictive construction to the offence, resulting in exclusion of those cases with any foreign elements, however slight and trivial, even though the substantive act is committed in Hong Kong. This will 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 services advertisements outside of Hong Kong but target at Hong Kong people.

28. Members have expressed doubts that the proposed new section 15(3A) will not have any extra-territorial effect, unless it is expressly provided for. They have enquired whether a sex selection service provider from a place outside Hong Kong where sex selection through reproductive technology procedures is lawful (such as Thailand and the United States), who has initiated the uploading of an advertisement of the service targeting at people residing in Hong Kong on the Internet, and the operator of such an overseas website would be prosecuted under the proposed new section 15(3A) when travelling to Hong Kong.

29. The Administration has confirmed that depending on the circumstances of individual cases, these overseas parties might be considered liable under the proposed offence if there is evidence to substantiate that the mens rea of intention to target the promotion in Hong Kong or to people residing in Hong Kong at the time these parties published or distributed the advertisement concerned on the Internet. They might be prosecuted should they be in Hong Kong.

Liability of operators and owners of Internet search engines

30. Members have enquired whether operators or owners of Internet search engines would be caught under the proposed new section 15(3A) for providing links to archival copies of web pages of overseas institutes where sex selection services using reproductive technology procedures are provided.

31. The Administration has explained to the Bills Committee that an Internet search engine operator or owner who merely provides a search engine for identifying or trawling online information of a topic to be specified by a user does not possess the mens rea for committing the proposed offence, as the search results are generated through an automated process of the search engine without knowledge.

Liability of Internet service providers, administrators of discussion forums on the Internet and webpage hosts

32. The Administration has informed the Bills Committee that, given that Internet service providers, administrators of discussion forums on the Internet and webpage hosts have no knowledge about or control over the advertisement uploaded or distributed by third parties on the openly accessible platforms under their ownership, management or control, they do not have the mens rea for the proposed offence and there is no need to provide an express exemption or defence provision for these persons in the Bill.

33. Mr Charles MOK and Mr CHAN Chi-chuen have expressed disagreement with the argument put forward by the Administration. They consider that the Bill as currently drafted would cast the net so wide that innocent Internet service providers, administrators of Internet discussion forums and webpage hosts might be unnecessarily caught, and this would impede the free flow of information on the Internet. Making reference to the respective arrangement in the Copyright (Amendment) Bill 2014 and the Smoking (Public Health) Ordinance (Cap. 371), they consider that safe harbour provisions or a notice-and-take-down mechanism should be provided for in the Bill to the effect that the above persons would not be liable for the proposed offence if they have, within a reasonable period of time, remove from their service platforms those contents which promote sex selection through reproductive technology procedures.

34. After consideration of members' view, the Administration has agreed to move a CSA to provide an exception clause for persons who own, manage or control a physical space or website if the physical space or website is used by another person (other than an officer, employee or agent of the relevant person) to effect the publication or distribution; and the relevant persons have removed the

advertisement from the physical space or website as soon as practicable after the relevant person becomes aware of the publication or distribution. The Administration has assured the Bills Committee that the proposed CSA will not impose a responsibility on the Internet service providers, administrators of Internet discussion forums and webpage hosts to actively monitor whether there are any offending advertisements on their platforms.

35. According to the Administration, the ordinary dictionary meaning of "website" is "a location connected to the Internet that maintains one or more pages on the World Wide Web". The word "website" in the proposed CSAs therefore covers various online platforms including, among others, social media platforms and mobile applications. The Legal Adviser to the Bills Committee has advised that if the Bill is passed, it would be for the court to interpret the provision and decide whether a particular online platform falls into the meaning of "website", as the expression is not legally defined.

Sharing of information and hyperlinks on social media platforms or mobile applications

36. Members notes that under the Copyright (Amendment) Bill 2014, the mere forwarding or sharing of a hyperlink on a webpage or other Internet platforms, or the mere viewing of or access to materials made available or communicated by others, where the person so doing does not determine the content of the communication, should not constitute a communication to the public. Some members including the Chairman, Mr Charles MOK, Mr CHAN Chi-chuen and Dr Helena WONG have expressed concern about whether a discussion about sex selection through private emails and on social media platforms such as Facebook, which contains information as well as a hyperlink which further links to institutes providing sex selection services using reproductive technology procedures, will amount to cause to be published or distributed an offending advertisement within the meaning of the proposed new section 15(3A).

37. The Administration has explained that it is envisaged that the proposed new section 15(3A) would not catch those who inadvertently involved in distributing sex selection services advertisement on the Internet. While there is no case authority in Hong Kong in respect of hyperlink or hypertext linking in a criminal context, reference may be made to the Canadian court case *Crookes v Newton* 2011 SCC 47, [2011] 3 S.C.R. 269. The Supreme Court of Canada held that a hyperlink, by itself, should never be seen as "publication" of the content to which it refers. Only when a hyperlinker presented content from the hyperlinked material in a way that actually repeated the content, should that content be considered to be "published" by the hyperlinker.

38. The Chairman, Mr Charles MOK and Mr CHAN Chi-chuen take the view that the above explanation given by the Administration cannot address fully their concern. They have suggested that the Administration should provide in the Bill a defence modeling on section 13B of the Smoking (Public Health) Ordinance 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.

39. The Administration does not consider it appropriate to follow section 13B of the Smoking (Public Health) Ordinance as the 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 platforms at that time like today. Sex selection service providers may nowadays launch social media campaigns involving members of the public in the distribution of advertisements through private correspondence. In these cases, it would be very difficult for the enforcement authority to collect sufficient evidence to prove that such private correspondence is for commercial purposes. The Administration is concerned that if a defence for electronic private correspondences for non-commercial purposes is provided in the proposed new section 15(3A), there might be a loophole for providers of sex selection services to circumvent the proposed offence through organizing social media campaigns.

40. However, the Administration has agreed to move a CSA to add a new provision that it is a defence for a person charged with the proposed offence to show that the advertisement was contained in a "private correspondence", which includes correspondence in electronic form. The defence is conditional on the correspondence not being 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 proposed offence). The defence also does not apply if the advertisement was accessible through a hyperlink provided in the correspondence, and the person charged with the offence (or any officer, employee or agent of the person) devised the contents of the advertisement, either in whole or in part; or selected, added to, modified or otherwise exercised control over the contents of the advertisement.

41. The Chairman and Mr CHAN Chi-chuen have requested the Administration to review the drafting of the proposed new provision for the purpose of improving its clarity on the legislative intent that the expression "private correspondence" includes posts on social media platforms (e.g. Facebook, Twitter and Weibo) where the sharing or privacy setting of the personal user account concerned is set as "Public", implying that the posts will be viewable by any person. They have

also suggested that an alternative is to replace the expression with "personal correspondence" or "non-commercial correspondence".

42. The Administration has explained that the word "private" in the proposed new provision will be given its ordinary dictionary meaning which includes "belonging to or for the use of one particular person or group of people only", "not connected with one's work or official position" and "relating to or denoting a transaction between individuals and not involving commercial organizations" according to the Oxford Dictionary. The Administration is of the view that the expression "private correspondence" would suffice to cover posts on social media platforms and mobile applications which are of the above nature. Moreover, the dictionary meaning of "personal", which means "belonging to or affecting a particular person rather than anyone else" according to the Oxford Dictionary, is narrower than that of "private".

43. The Administration also maintains the position that it is inappropriate to use expressions such as "non-commercial" or "non-business" to qualify the term "correspondence", since this would have the effect of limiting the application of the defence to correspondence which involves no financial gain or loss, regardless of whether the business concerned is for promoting sex selection services or not. The Administration has further informed the Bills Committee of its plan to review whether it is necessary to introduce amendments to section 13B of the Smoking (Public Health) Ordinance riding on future legislative exercise.

44. Notwithstanding the Administration's explanations, Mr CHAN Chi-chuen considers that the law should be sufficiently clear to enable an average person to figure out from reading the law what a person can or cannot do. He has indicated that he might move CSAs to the Bill for achieving the effect as set out in paragraph 41 above.

Provision of defence for employees of the relevant companies

45. The Administration has advised the Bills Committee that it is the policy intent that the proposed offence aims at imposing criminal responsibility on the companies that initiate the advertising activities, the agents that assist these companies to advertise, and the media agencies or companies that provide the platform for these advertisements. Some members including the Chairman, Ms Cyd HO, Mr Charles MOK and Mr CHAN Chi-chuen are concerned that the proposed new section 15(3A) as currently drafted, which makes no reference to "companies, agents or media agents", will likely catch those employees who knowingly take part in the advertising process (such as performing the assigned tasks of typesetting or image designing) in the course of their employment and are

not in a position to influence the decision to publish or distribute the relevant advertisements.

46. The Administration has explained that in deciding whether to prosecute a person for an offence, the Department of Justice would consider whether there is sufficient evidence to justify instituting or continuing proceedings; and whether the general public interest requires that prosecution be conducted. On the latter, considerations to be addressed include, among others, whether or not the offence is trivial or technical in nature; the level of the suspect's culpability; the prevalence of the offence and any deterrent effect of a prosecution. Hence, the criminal responsibility would in general be imposed on the person-in-charge of the companies concerned. Reference may be made to the enforcement actions against the offences under the Undesirable Medical Advertisements Ordinance (Cap. 231), which prohibits or restricts any person to publish or cause to be published any advertisements which may induce the seeking of improper management of certain health conditions. The parties convicted during the period of 2012 to April 2015 include eight publishers, 14 treatment providers, 11 product distributors and six retailers. No employees were convicted in respect of the offences.

47. Some members take the view that to avoid doubt, the Administration should, by modeling on the defence provided for in section 53 of the Food Safety Ordinance (Cap. 612), provide a defence for persons who may be regarded as knowingly arranging for the publication or distribution of the advertisement but have no consent or control.

48. The Administration has advised that incorporating a clause of defence for employees will create a loophole for the real culprits of the offence to evade from the liability, simply commit acts that contravene the proposed provision as an employee, or instruct the employees to commit such acts. Moreover, it does not envisaged that an employee who takes part in the advertising process would have mens rea for committing the proposed offence. However, in view of the concerns raised by members, the Administration will move a CSA to the effect that it is a defence for a person charged with the proposed offence to show that the conduct was engaged in by the person in the course of the person's employment, and in accordance with instructions given by the person's employer in the course of that employment. In addition, at the time the conduct was engaged in, the person was not in a position to make or influence a decision regarding the conduct.

Activities and publications which are of an academic or technical character

49. The Administration has advised the Bills Committee that a purely academic forum on sex selection technology without any offer to provide such service should not be regarded as an advertisement. By the same token, a feature article,

including, among others, press reports on interview with an expert on reproductive technology, in which no service provider is identified nor is there any information that promotes the use of such service should not be considered an advertisement.

50. The Legal Adviser to the Bills Committee has pointed out that according to section 5 of the Undesirable Medical Advertisements Ordinance, it is a defence to prove that the advertisement to which the proceedings relate was made only in a publication of a technical character intended for circulation mainly amongst the healthcare professionals. Some members including the Chairman, Ms Cyd HO and Mr CHAN Chi-chuen have requested the Administration to provide a similar clause of defence in the Bill to ensure that professional exchange on reproductive technology amongst healthcare professionals would not constitute an advertising activity on sex selection services within the meaning of the proposed new section 15(3A).

51. The Administration has agreed to move a CSA to the effect that it is a defence for a person charged with the proposed offence to show that the advertisement was contained in a publication of a technical character for circulation amongst registered medical practitioners, as well as the medical and para-medical staff of hospitals and clinics under statutory regulation; or published or distributed for academic teaching, or academic discussion, for these persons.

52. The Administration has assured members that depending on circumstances of the case, registered medical practitioners who make available such publications at their clinics would not be held liable under the proposed offence. As regards the act of making available at their clinics magazines which are not of a technical character and with the presence of sex selection services advertisements, the registered medical practitioners concerned would not be caught by the proposed offence if they do not have the mens rea to cause the distribution of, or knowledge of the relevant advertisements.

Inclusion of the element of financial gain in the proposed offence

53. The Chairman, Mr CHAN Chi-chuen and Dr Helena WONG have suggested requiring proof of financial gain in the proposed offence such that only those persons who publish or distribute, or cause to be published or distributed, the advertisements with financial benefits would be held liable.

54. The Administration has expressed concern that the proposal would create difficulties for the enforcement authority to prove beyond reasonable doubt that the publishing or distributing (or causing to be published or distributed) of the advertisement was done for financial gain. For example, for cases whereby the parties concerned have many business dealings, it would be very difficult to

identify the specific transactions from their accounts as proof of the financial gain for placing the advertisement concerned. There might also be cases that no payment has ever been effected at the time of investigation since payment for the advertisement has been deferred to a much later point of time.

55. After consideration of the Administration's advice and having regard to the CSAs to be proposed by the Administration as elaborated in paragraphs 22, 34, 40, 48 and 51 above, members have agreed that the Bills Committee would not pursue the issue.

Implementation of the Amendment Ordinance (upon enactment of the Bill)

56. The Administration has informed the Bills Committee that upon enactment of the Bill, it would inform the local media, local Internet webpage operators, and other relevant parties to prepare for the compliance with the new provisions.

57. Members note that as of April 2015, no prosecution have so far been made against the existing offences under the Ordinance since its coming into operation in 2000. They have expressed concern about the effective enforcement of the new offence (upon the enactment of the Bill). Mr CHAN Chi-chuen is of the view that instead of only acting upon complaints made to it, CHRT should conduct proactive inspections and collect evidence by posing as customers.

58. The Administration has advised that all reproductive technology treatment centres, including those providing sex selection services, are licensed by CHRT under the Ordinance. These treatment centres are subject to statutory regulation and regular inspections by CHRT. Upon receipt of intelligence or complaints of any suspected offence under the Ordinance, the Secretariat of CHRT would, if satisfied that an offence has been committed, refer the case to the Police for investigation as appropriate.

Comprehensive review of the Ordinance

59. The Chairman, Mr CHAN Chi-chuen and Dr Fernando CHEUNG have expressed concern about the operation of CHRT. They are concerned that from the experience shared by the deputations which made representations to the Bills Committee, CHRT has failed to provide clear and substantive advice within a reasonable time in response to enquiries from reproductive technology service providers and patients on how the provisions of the Ordinance should be interpreted and applied, without which some service providers have refrained from performing certain procedures for their patients. This may prejudice the interests of patients on the one hand, and on the other hand is not conducive to the

long-term development of reproductive technology services in Hong Kong. Members are also concerned that there is a lack of representation of specialists in reproductive medicine in CHRT.

60. According to CHRT, it is not desirable for it to advise on whether matters referred to in the enquiries from the reproductive technology service providers are permissible or not under the Ordinance without knowing the full factual situation of the case. At present, those members of CHRT who are engaged in the teaching or practice of obstetrics and gynaecology could provide advice on reproductive technology issues.

61. Mr CHUNG Kwok-pan has suggested that CHRT should formulate a set of clear guidelines with concrete examples to provide guidance to the reproductive technology service providers, and regularly update its codes of practice to keep up with the rapid developments of reproductive technology. Mr CHAN Chi-chuen has requested the Administration to conduct a comprehensive review of the Ordinance to improve its clarity and certainty, and change the composition of CHRT by appointing specialists in reproductive medicine, who are not licensed persons or responsible persons of local reproductive technology treatment centres, as members of CHRT.

62. The Administration has advised that CHRT has received over the years feedback and suggestions on some regulatory and licensing matters which may fall beyond existing provisions of the Ordinance and involve highly contentious ethical and social issues. These include the maximum period for storage of gametes and embryos under different circumstances and the number of embryos to be placed in a woman in any one cycle of in-vitro fertilization treatment. The Administration has further advised the Bills Committee that it will join hands with CHRT to look into the need to amend the Ordinance having regard to the stakeholders' feedback and the operating experience of CHRT. This involves not only medical technology and clinical procedures, but also wider ethical and social issues. Public consultation may be conducted to gauge the views of the public as and when appropriate. The Administration will keep the Panel on Health Services informed of the progress. No legislative timetable, however, has been worked out in this regard.

Committee stage amendments

63. Apart from CSAs to be moved by the Administration as elaborated in paragraphs 22, 34, 40, 48 and 51 above, the Administration has proposed some consequential amendments to the Bill. A full set of the draft CSAs to be moved

by the Administration is in **Appendix III**. The Bills Committee does not object to these CSAs.

64. The Bills Committee will not propose any CSAs to the Bill.

Follow-up actions by the Administration

65. The Administration has made the following undertakings:

- (a) join hands with CHRT to look into the need to amend the Ordinance, and keep the Panel on Health Services informed of the progress in this regard (paragraph 62 above refers); and
- (b) ride on future legislative exercise, review whether it is necessary to introduce amendments to the Smoking (Public Health) Ordinance concerning advertisements contained in any private correspondence on the Internet and not intended for commercial purposes (paragraph 43 above refers).

Resumption of Second Reading debate on the Bill

66. The Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill at the Council meeting of 25 May 2016, subject to the moving of the CSAs by the Administration.

Advice sought

67. Members are invited to note the deliberations of the Bills Committee and the date for the resumption of the Second Reading on the Bill.

Bills Committee on Human Reproductive Technology (Amendment) Bill 2015

Membership list

Chairman Dr Hon KWOK Ka-ki

Members Prof Hon Joseph LEE Kok-long, SBS, JP, PhD, RN
Hon Cyd HO Sau-lan, JP
Dr Hon LEUNG Ka-lau
Hon Charles Peter MOK, JP
Hon CHAN Chi-chuen (since 9 April 2015)
Hon CHAN Han-pan, JP
Dr Hon Fernando CHEUNG Chiu-hung
Dr Hon Helena WONG Pik-wan
Hon CHUNG Kwok-pan

(Total : 10 members)

Clerk Ms Maisie LAM

Legal Adviser Mr Kelvin LEE

Date 3 August 2015

Bills Committee on Human Reproductive Technology (Amendment) Bill 2015

A. Organizations and individual which have/who has made oral representation to the Bills Committee

1. BGI HK
2. Hong Kong Academy of Medicine
3. Hong Kong Assisted Reproduction Centre Limited
4. Hong Kong Doctors Union
5. Hong Kong Reproductive Health Centre Limited
6. Hong Kong Reproductive Medicine Centre Limited
7. The College of Surgeons of Hong Kong
8. The Hong Kong College of Obstetricians and Gynaecologists
9. The Women's Clinic Company Limited
10. Women's Health and Reproductive Medicine Centre Limited
11. Dr Clement HO

B. Organizations which have provided written submissions to the Bills Committee only

1. Hong Kong Bar Association
2. The Law Society of Hong Kong

Human Reproductive Technology (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Secretary for Food and Health

<u>Clause</u>	<u>Amendment Proposed</u>
Long title	By deleting “purporting to promote” and substituting “promoting”.
3	In the heading, by deleting “ Section 15 amended (prohibitions in connection with embryos, against sex selection and against the provision of reproductive technology procedures to unmarried persons) ” and substituting “ Section 15A added ”.
3	By deleting “After section 15(3)” and substituting “After section 15”.
3	By renumbering the proposed subsections (3A) and (3B) as subsections (1) and (9) respectively.
3	By adding before the proposed subsection (1)— <p style="text-align: center;">“15A. Prohibition against publishing or distributing advertisements promoting sex selection services”.</p>
3	In the proposed section 15A(1), by deleting “purporting to promote” and substituting “promoting”.
3	In the proposed section 15A, by adding— <p style="text-align: center;">“(2) For the purposes of subsection (1), publishing or distributing an advertisement includes publishing or distributing a hyperlink that gives access to an advertisement.</p>

- (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 persons;
 - (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)—
 - (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.
- (8) To avoid doubt, for a person who owns, manages or controls a physical space or website (*relevant person*), subsection (1) does not apply to the publication or distribution of the advertisement on the physical space or website if—
- (a) the physical space or website is used by another person (other than an officer, employee or agent of the relevant person) to effect the publication or distribution; and
 - (b) the relevant person has removed the advertisement from the physical space or website as soon as practicable after the relevant person becomes aware of the publication or distribution.”.

3 In the proposed section 15A(9), by deleting “subsection (3A)” and substituting “this section”.

3 In the proposed section 15A(9), in the definition of *sex selection services*, by deleting the full stop and substituting a semicolon.

3 In the proposed section 15A(9), by adding in alphabetical order to the proposed definition—

“*conduct* (行為) includes acts and omissions;

correspondence (通訊) includes correspondence in electronic form;

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 By deleting the clause and substituting—

“4. Section 39 amended (offences)

Section 39(1), after “(5),”—

Add

“15A(1),”.”.