

THE HONG KONG BAR ASSOCIATION’S COMMENTS ON THE PROPOSED PROHIBITION OF THE ADVERTISEMENT OF SEX SELECTION THROUGH REPRODUCTIVE TECHNOLOGY PROCEDURES

1. The Food and Health Bureau invited on 12 June 2014 the Hong Kong Bar Association (“**HKBA**”) to comment on its proposal to prohibit the advertisement of sex-selection through reproductive technologies (“**RT**”), (“**the Proposal**”).

Overview of the HKBA’s position

2. The HKBA is of the view that the Proposal is flawed and further that the Human Reproductive Technology Ordinance (Cap 561) (“**HRTO**”) may benefit from amendments that will ensure its compliance with the Basic Law of the HKSAR.

The Proposal

3. Under section 15(3) of the HRTO, sex selection by way of RT procedures is prohibited in Hong Kong except for medical reasons, namely, to avoid the birth of a child suffering from serious sex-related hereditary diseases which are set out in Schedule 2 to the HRTO.
4. Due to the recent proliferation of local advertisements and promotional materials on sex-selection RT available abroad, the Government is considering legislative amendments similar to the prohibition of advertisements relating to surrogacy arrangements and commercial dealings of embryos/gametes under sections 16(2) and 17(2) respectively of the HRTO.

Specific Comments

5. The HKBA considers that the proposed regulation and/or prohibition will have a potential impact on a number of rights (to be discussed below). Therefore, if the Government hopes to effectively enforce the proposed prohibition, it must clearly set out the rationale of and the reasons for the proposed prohibition.

Sex-selection analogous to commercial surrogacy and dealing in eggs/gametes

6. It appears that the Government consider that the prohibition of commercial surrogacy and the commercial dealings of eggs/gametes to be analogous to the prohibition on non-medical sex-selection and therefore importing the prohibition on advertising found in sections 16(2) and 17(2) wholesale to section 15 would be a satisfactory way to close what is currently perceived to be a loophole in the HRTO.
7. However, the HKBA consider that the non-medical sex selection is not necessarily the same as or like surrogacy and the commercial dealings of embryos/gametes.
8. Section 17 of the HRTO is based on sections 2 and 3 of the United Kingdom's Surrogacy Arrangements Act 1985. This legislation was enacted following the Warnock Report on Human Fertilisation and Embryology (1984) which sought to examine the ethical implications of new developments in the field with a view to recommending legislation. The Inquiry took the view in paragraph 8.17 that:

“Even in compelling medical circumstances the danger of exploitation of one human being by another appears to the majority of us to outweigh the potential benefits, in almost every case. That people should treat others as a means to their own ends, however desirable the consequences, must always be liable to moral objection. Such treatment of one person by another becomes positively exploitative when financial interests are involved. It is therefore with the commercial exploitation of surrogacy that we have primarily, but by no means exclusively concerned.”
9. The Inquiry recommended that legislation be introduced to criminalise the creation or operation in the UK of agencies whose purpose is recruit women for surrogate pregnancies or making arrangements for individuals who wish to find a surrogate. Accordingly, the Surrogacy Arrangements Act of 1985 rendered the negotiation of surrogacy arrangements on a commercial basis illegal. Further, section 3 of the Act prohibited advertising of the same.
10. Whilst the prohibition on advertising in section 17 of the HRTO is somewhat briefer than its United Kingdom counterpart, the intent is arguably the same - namely, to stop any person/agency from promoting or advertising commercial surrogacy negotiations and/or arrangements and/or seeking to find a person willing to do so.

11. The fact that only commercial surrogacy and not private surrogacy arrangements have been rendered unlawful indicates that it is not surrogacy *per se* that is objectionable but rather the potential for exploitation of a third party. It is not difficult to deduce that the law sees fit to protect financially vulnerable women who may be tempted by agencies/agents to use their bodies as a vessel for another's ends. Accordingly, the purpose of the ban on advertising is to further this aim by ensuring such temptation is not found in the public domain in the persuasive and inviting form that advertising necessarily takes.
12. Section 16 of the HRTA prohibits a person or body of persons from making or receiving payment for the supply of, or an offer to supply, a prescribed substance for any RT, embryo research or surrogacy arrangement. Prescribed substance is legislated to mean a gamete, an embryo, fetal ovarian or fetal testicular tissue. Under section 16(2) advertising of the same is also prohibited.
13. The wording of section 16 of the HRTA is virtually identical to that of section 4 of the Human Organ Transplant Ordinance (Cap 465) (“**HOTO**”) which prohibits commercial dealings in human organs. Advertising of the same is likewise prohibited. This suggests that the commercial dealing of eggs/gametes may be more analogous to commercial dealings in human organs than sex-selection.
14. The common denominators between commercial surrogacy, commercial dealings in eggs/gametes and commercial dealings in human organs are: firstly, the potential for exploitation of third parties; secondly, the involvement of an invasive procedure with regard to that third party; and thirdly, a commercial aspect or financial incentive.
15. Sex-selection (medical or otherwise) on the other hand involves only the substances/bodies of the interested parties, there is no exploitation and whilst there is a commercial aspect in terms of agencies offering to arrange sex-selection procedures overseas, there is no financial incentive offered to a third party.
16. The HKBA recognize that there are numerous legitimate reasons for prohibiting non-medical sex-selection. For example, the long-term effects of sex-selection leading to population skew (where one gender outnumbered the other) is often recognised to be a major reason against allowing this RT for non-medical reasons.

17. As the rationale for prohibiting commercial surrogacy and the commercial dealing of eggs/gametes is inherently different to that of prohibiting non-medical sex-selection, the HKBA considers that simply transplanting the prohibition on advertising from sections 16 and 17 of the HRTA to section 15 may not stand up to future scrutiny.
18. The fact that the prohibitions on advertising between commercial surrogacy, the commercial dealing of eggs/gametes and commercial dealings in human organs are analogous is supported by *Halsbury's Laws of Hong Kong* (2nd Ed) Vol 39, [255.017]:

“Similar provisions apply to the publication or distribution of advertisements inviting persons to supply for payment a human organ for the purpose of transplant into a person or indicating that the advertiser is willing to arrange for consideration the supply of a human organ for the purpose of transplant into a person. Further similar provisions apply to the publication or distribution of advertisements inviting persons to supply for payment a gamete or embryo, or fetal ovarian, or fetal testicular tissue, or offering to supply any such substance for payment or indicating the advertiser is willing to initiate or negotiate an arrangement for the supply upon payment of any such substance; or relating to surrogacy arrangements”.

A general principle that prohibited activities ought not to be advertised

19. The HKBA turns to consider the general proposition that the prohibited activities, namely sex-selection RT, ought not to be advertised.
20. There are many legislative provisions prohibiting or restricting certain advertisements in Hong Kong; see, again, *Halsbury's Laws of Hong Kong* (2nd Ed) Vol 39, [255.017]. These restrictions can be roughly grouped into those designed to prevent misleading information, those designed to prevent exploitation and those to related to illegality. Bookmaking, child pornography and recovery of stolen property are examples of advertising based on the latter.
21. Sections 16 and 17 of the HRTA contain a geographic or extraterritorial element since subsection (1)(a) in both sections state: *“No person shall - whether in Hong Kong or elsewhere....”*. Hence it can be suggested that as well as having an advertising restriction on the basis of exploitation, the restriction also applies as a matter of illegality.

22. Section 15 of the HRTO on the other hand does not contain the equivalent geographic or extraterritorial element. It would appear to only be concerned with prohibiting non-medical sex-selection in Hong Kong. That being the case, it is doubtful whether an advertisement advertising sex-selection RT which is to be conducted in an overseas jurisdiction, such as Thailand or the United States where the practice is legal, could be prohibited under the current Hong Kong law. An analogous example would be advertising in Hong Kong for trips to casinos or cruises in international waters for the purposes of gambling. Whilst gambling is illegal in Hong Kong and advertising bookmaking within Hong Kong is prohibited, there is no issue with tour companies advertising gambling trips, for example, to Macau where gambling is legal. For this reason, the HKBA is concerned that such a prohibition is not tenable.

Fundamental Rights Affected

23. The HKBA considers that the Proposal impinges upon the fundamental rights of affected individuals guaranteed under the Basic Law. They include the freedom of expression of the medical professionals to impart information (albeit commercial information), the freedom of expression of the couples to receive the information, as well as arguably the right of the couples to organize their private or family lives (such as the desire of couples who have already had a son to choose to have a daughter for sibling-balancing).
24. Although it has been commented that commercial speech is to be accorded protection to a lesser degree, the same does not necessarily apply in respect of the possibly correlated right of the couples to receive the commercial information, since the couples may not without the medical treatment or technique so advertised achieve the organization of their private or family lives that suit their wishes.
25. It is clear that in the light of the prohibitive or restrictive nature of the Proposal of the above fundamental rights, it must be justified through a proper proportionality analysis that requires the Government to demonstrate that the Proposal pursues legitimate aim(s); that the Proposal is rationally connected with the legitimate aim(s); and that the Proposal is proportionate and does not make excessive inroads into the protected right(s).
26. The Government has not set out its justification in the consultative document for the Proposal. The HKBA advises the Government that such a justification is required for compliance with the Basic Law. For example, if the Government considers that population skew is a sufficient risk

to justify the Proposal, it is incumbent upon it to produce cogent evidence supportive of this consideration.

General Comment

27. Although it is not within the ambit of the Government's consultation, the HKBA has identified a general issue in the HRTO that may merit serious consideration. The HRTO has restricted the availability of RT to married couples. This restriction is liable to challenge on the ground of marital status (or more appropriately the lack of it) in the case of couples who choose not to marry, as well as same-sex couples who cannot lawfully marry in Hong Kong (but can marry in a foreign jurisdiction).

Dated 25th July 2014.

HONG KONG BAR ASSOCIATION