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URGENT BY FAX

18 July, 2001

Miss Flora Tai
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Miss Tai,

**Bills Committee on
Gambling (Amendment) Bill 2000**

Meeting on 20 July 2001

Thank you for your letter dated 12 July 2001. Our response to the points raised therein is set out below.

Meeting on 11 June 2001

We have conducted further research and identified one more relevant prosecution case in Canada. In this case, the appellant was charged that he, between 1 December 1989 and 31 December 1991, provided and offered to provide information intended to be used in connection with pool-selling on British football, contrary to section 202(1)(f) of the Canadian Criminal Code which states:

*“Every one commits an offence who
(f) prints, provides or offers to print or provide information*

intended for use in connection with book-making, pool-selling or betting upon any horse-race, fight, game or sports, whether or not it takes place in or outside Canada or has or has not taken place,” (see also item 2(c) in the Annex to our letter to the Bills Committee of 9 June 2001.)

The appellant was found guilty of the charge. He appealed on his conviction under section 202(1)(f) on the grounds that the burden was on the Crown to prove that the British football pools, that were the source of the information provided or conveyed, were illegal pools in England. The Ontario Court of Appeal held that there was no requirement in the relevant subsections that the gambling activities must be criminal in the jurisdiction outside of Canada and that such requirement should not be imported. The appeal was dismissed.

Meeting on 20 June 2001

Item (a): Section 16B

Please see the proposed Committee Stage Amendments (CSAs) at *Annex A* which should have addressed Members' concerns about the provision.

Item (b): Section 8

We have carefully considered Members' concerns about the proposed amendment to section 8, which seeks to criminalize betting with offshore bookmakers, in addition to betting with illegal local bookmakers (which is already provided for under the existing Gambling Ordinance). As we have pointed out before, the advancement of telecommunications technology has rendered betting with an offshore bookmaker as easy and convenient as with a local bookmaker. Deleting the proposed amendments to section 8 and hence exempting betting with an offshore bookmaker from the ambit of the legislation means that unlimited unauthorized gambling opportunities would be available to Hong Kong people. These include Hong Kong people betting with international bookmakers who are based overseas as well as local bookmakers who have moved their operation bases outside Hong Kong. As explained in our previous letters to the Bills Committee (our letters dated 4 January 2001 and 19 June 2001), we have given serious consideration to the

proposals for exempting different categories of cross-border betting (e.g. betting by a tourist in Hong Kong or a foreign passport holder), but have come to the view that any such exemption would be arbitrary and could be challenged as discriminatory. In this connection, we have consulted the Tourism Board which have indicated no fundamental objection to the proposed amendment. We will discuss with the Board further on what measures need to be implemented to apprise visitors to Hong Kong of the legislative changes.

If we decide to stand by the principle of prohibiting unauthorized gambling and that both the bookmaker and the bettor should be held liable for an unauthorized gambling act, we would have to adopt the formulation as currently proposed in the Bill.

Meeting on 5 July 2001

Items (a) to (d): Difficulties of tackling activities of offshore bookmakers in Hong Kong under the current Gambling Ordinance

We shall provide a short paper to the Bills Committee separately analyzing the difficulties of tackling activities of offshore bookmakers in Hong Kong under the current Gambling Ordinance. In view of its confidential nature, we suggest that the paper be discussed in a closed-door session to be arranged.

Items (e) and (f): the use of the term “promote” in sections 9 and 16E

Both “推廣” and “籌辦” have been used as the Chinese translations for “promote” in different legislation depending on the policy intent of the specific legislation. In the present case, section 9 deals mainly with the organization and management of an unlawful lottery while the proposed section 16E seeks to criminalize activities which publicize and advertise cross-border gambling activities. Having regard to the policy intent of the two provisions, we consider that the use of “籌辦” in section 9 and “推廣” in the proposed section 16E as the Chinese translations of the term “promote” are appropriate and accurately reflect the policy intent of the two provisions.

Items (g) and (h): Background on the use of “籌辦” and “assist” in the

current Gambling Ordinance

We have looked through the drafting files relating to the preparation of the Gambling Bill 1976 and the authentic Chinese text of the Gambling Ordinance. We are not able to locate in the files any material or information that explains or discusses the use of “籌辦” as the Chinese translation of “promote” in section 9, or the use of the term “assist” in sections 5, 7, 9 and 13 of the Ordinance.

Item (i): The difference between using “assisting” and “aiding or abetting” in the legislation

A situation analysis illustrating the difference between using “assisting” and “aiding or abetting” in the legislation is enclosed at **Annex B** for Members’ reference.

Item (j): The rationale of not using the term “promote” in section 13

We have looked through the drafting files of the Gambling Bill 1976. We are not able to locate in the files any material or information that explains or discusses why the term “promote” is not used in section 13.

Meeting on 9 July 2001

Items (a) to (g): Sections 16A and 16B

Please see **Annex A** for the CSAs proposed in response to Members’ concerns/comments expressed on sections 16A and 16B at the last meeting. We have taken on board Members’ drafting suggestions in items (a) to (g). We have also taken the opportunity to propose further amendments to section 16E to improve its language, which are also contained in the attached CSAs.

Items (h) and (i): Court order made under section 21(1)

I enclose at **Annex C** for Members’ reference a note analyzing whether disobedience of a court order made under section 21(1) of the Gambling Ordinance constitutes a contempt of court.

The Police have confirmed that they have applied for court orders under section 21(1) in recent years, but they keep no statistics on the court orders issued.

In practice, a telephone service provider is most unlikely to deliberately disobey such a court order if served; doing so may constitute a contempt of court. As such, there has been no need for the Police to take further action to enforce such orders.

Item (j): Impact of the amended section 21 as proposed

We recognize that the development in telecommunications services has rendered section 21 less effective than it was in deterring unlawful gambling activities. Nevertheless, we consider that the section is still useful in that it would create a certain degree of inconvenience for a convicted bookmaker, particularly if his telephone number was well used and publicized to his patrons. He would have to use another number that has to be communicated again to his customers. He would also lose telephone services provided to the premises if they are found to have been used in connection with the commission of a gambling offence. As far as the telecommunications service providers are concerned, the amended section does not impose on them any additional obligation than that was imposed on the then Hong Kong Telephone Company Limited.

I should be grateful if you would kindly convey the above information to Members. The officers attending the meeting of the Bills Committee on 20 July 2001 will be as follows:

Mrs. Betty Fung	Deputy Secretary for Home Affairs (2),
Mr. Stephen Wong	Deputy Solicitor General (Advisory),
Mr. Gilbert Mo	Deputy Law Draftsman (BD and A),
Mr. J. D. Scott	Senior Assistant Law Draftsman,
Mr. Gavin Shiu	Senior Government Counsel, Prosecutions Division,
Mr. Llewellyn Mui	Senior Government Counsel, Legal Policy Division,
Ms. Mabel Cheung	Government Counsel, Bilingual Drafting Unit, Law Drafting

Mr. Vic Yau

Division, and
Assistant Secretary for Home
Affairs (5)1.

Yours sincerely,

(Mrs. Betty Fung)
for Secretary for Home Affairs

cc D of J (Attn.: Mr. Stephen Wong
Mr. Gilbert Mo
Mr. Gavin Shiu
Mr. Llewellyn Mui
Ms. Mabel Cheung)

**Situation analysis to illustrate the difference
between using "assisting" & "aiding or abetting" in the legislation**

Case Scenario

A number of persons (the '*agents*') are assigned to go to commercial premises and to look for punters. These agents would hold themselves out as persons who would accept and settle bets. If any person is interested, they could place bets with the '*runners*' who would go to their offices on each and every horse racing day. The runners would collect bets from the punters, enter the records on betting slips, but not collect betting money. Afterwards, the runners would go to a restaurant to give the betting slips to a '*courier*'. The courier would carry the betting slips to an '*accountant*'. The accountant's job is to calculate the bets based on the betting slips received and to compile a consolidated record. The consolidated record and the betting slips would then be sent by the courier to the actual '*bookmaker*'. The bookmaker then asks the courier to go to the Hong Kong Jockey Club to place insurance bets. After the horse races have taken place, the same runners who have collected the bets would then go to the commercial premises to collect the betting money from and to distribute the winnings to the punters.

2. Prior to the bookmaker starting his bookmaking business, his friend (the '*procurer and counsellor*') has encouraged him to start such an operation, has provided him with sample betting slips and told him the way to run such an operation.

3. All these persons have knowledge of the bookmaking business carried out by the bookmaker and they are each aware of their role in the operation.

4. The bookmaker employs an '*amah*' to come to their office on racing days to cook for them as they have to work long hours on the bets and could not leave to eat. The amah is fully aware of the bookmaker's business and the fact that if she does not cook for them, their bookmaking operation cannot take place effectively but she clearly states that she only cooks and does nothing else.

5. A '*worker*' works in one of those commercial premises and he does not know how to place off-course bets. His '*colleague*' tells him about the runners and encourages him to place bets with one of the runners as bets could be placed on credit and loss would be calculated with a discount. On the day when the runners come up, the worker places bets with the runners.

The Common Law Concept of Secondary Parties Liability

6. Assuming that there were no section 7(1)(c) offence in the Gambling Ordinance, the liability of the persons appearing in the above case scenario would be as follows:

Party	Offence
Agents	Section 7(1)(b)
Runners	Section 7(1)(a) - the case of <i>R v Lam Shek-yiu</i> [1982] HKC 314 " <i>An employee who had received a bet or bets on behalf of his employer who ran a bookmaking business received it or them no less in the way of trade or business than did his employer.</i> "
Courier	Aider and Abettor
Accountant	Aider and Abettor
Bookmaker	Section 7(1)(a)
Counsellor and procurer	Counsellor (bookmaking) and procurer
Worker	Section 8
Colleague	Counsellor (betting with a bookmaker) and procurer
Amah	No aiding and abetting, counselling & procuring

The Section 7(1)(c) "Assisting" Offence

7. It stipulates that "*Any person who in any capacity assists, either*

directly or indirectly, another person in bookmaking commits an offence." Therefore, the persons appearing in the above case scenario are liable as follows:

Party	Offence
Agents	Section 7(1)(b)
Runners	Section 7(1)(a) - the case of <i>R v Lam Shek-yiu</i> [1982] HKC 314 " <i>An employee who had received a bet or bets on behalf of his employer who ran a bookmaking business received it or them no less in the way of trade or business than did his employer.</i> "
Courier	Section 7(1)(c)
Accountant	Section 7(1)(c)
Bookmaker	Section 7(1)(a)
Counsellor and Procurer	<p>It is arguable that this person is not assisting, whether directly or indirectly, in the bookmaker's business as at the time when he encourages the bookmaker to start the operation, the bookmaking business is not yet in existence. Therefore, he may not be liable under section 7(1)(c).</p> <p>The more appropriate charge would seem to be the 'procuring and counselling'. However, if the case of <i>R v Fung Sik-chung</i> [1985] HKLR 387 is to be read to exclude a common law prosecution on the basis of procuring and counselling, then this person may not be criminally liable for his acts done.</p> <p>It appears that when the court says "<i>Where the legislature provides a specific offence to cover a person who aids and abets another person to commit an offence he can only be charged with that specific offence and not as an aider and abettor of that other person.</i>", the court only refers to cases where the facts support a charge of 'assisting', then the person should not be charged with aiding and abetting the bookmaker but the specific charge of 'assisting'. Similarly, if the person's procuring and counselling acts support a charge of 'assisting', he should be so charged under section 7(1)(c), and not procuring and counselling.</p>

	Nonetheless, if the acts of the person do not support an 'assisting' charge as framed in the ordinance, it is arguable that the prosecution should still be able to charge him with 'procuring and counselling'. This, however, appears uncertain.
Worker	Section 8
Colleague	Procuring and Counselling (betting with a bookmaker)
Amah	Section 7(1)(c) - in the case of <i>R v Lam Shek-yiu</i> [1982] HKC 314, the court held that " <i>This subsection (s7(1)(c)) was designed to catch those persons who while not soliciting, receiving or negotiating a bet or bets assisted in some other way in bookmaking.</i> " Therefore, the amah is, arguably, assisting indirectly in the bookmaker's business since if no food is provided to them, the bookmaking operation will not be as effective.

8. As a more general observation, "assisting" usually connotes some actual assistance to the person (the principal offender) when the offence is taking place, counselling and procuring inevitably takes place **before** the offence itself and the counsellor and procurer may not be present when the offence is being committed. Therefore, if section 7(1)(c) of the Gambling Ordinance is to be read to have excluded the application of the counselling and procuring limbs, then it might be difficult to prosecute the counsellor and procurer in the above case scenario. On the other hand, there could be situations where a person assists the bookmaker in some ways but not aiding, abetting, counselling or procuring - like the role of the amah. In such a situation, the 'assisting' offence may be able to catch these people. The question is whether the amah should be the target of section 7.

Disobedience of Court Order
Made under section 21(1) of Gambling Ordinance, Cap. 148:
Criminal or Civil Contempt of Court

Nature

The general approach has been that a "criminal contempt" is an act which so threatens the administration of justice that it requires punishment from the public point of view; whereas, by contrast, a "civil contempt" involves disobedience of a court order or undertaking by a person involved in litigation: *Arlidge, Eady & Smith on Contempt* 2nd Ed. Para. 3-1 and 3-66.

2. In a section 21 order a telephone company not involved in the original criminal proceeding is named. The order is to be made only after the original criminal proceeding has been concluded in a conviction. Any disobedience with the order, i.e. did not disconnect or refrain from providing telephone services to subject premises or the defendant himself, is most unlikely to be a threat to any administration of justice which requires punishing the telephone company for disobedience from the public point of view. Contempt by a telecommunication service provider of a section 21 order is therefore a civil contempt.

Penalty

3. In deciding upon the penalty to be imposed, the court must normally be satisfied beyond all reasonable doubt that there was wilful disregard of the court order. However a culpable degree of negligence may render a penalty appropriate. If there was no wilful disregard of the order and no negligence, any penalty would probably be nominal.

4. The court may order committal for a fixed period (that is, effectively imprisonment) or for an unspecified term for civil contempt which is a power to be exercised with very great care. An application to commit for civil contempt is in the nature of a criminal charge and the rules relating to

criminal charges are therefore applicable. The contemnor should be given a proper opportunity to defend; apologise to the court and to mitigate.

5. A court may also enforce an order to do or abstain from doing a particular act by writ of sequestration.

6. The court may, as an alternative to committal or sequestration, impose a fine for civil contempt. A fine is the much more likely alternative in the case of a telecommunication service provider being negligent but not wilfully disregarding the section 21 order. In assessing the amount of the fine, account should be taken of the seriousness of the contempt and the damage done to public interest. This might amount in cases under section 21 to fairly modest fines as the direct damage to the public interest is unlikely to be major. In practice, a telecommunication service provider is most unlikely to deliberately disobey a court order.

7. The court may grant an injunction, in lieu of committal or sequestration, to restrain the commission or repetition of a civil contempt.

8. A contemnor may be ordered to pay costs if he has been guilty of contempt.