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8 February, 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 9 February 2001

Thank you for your letter of 13 January 2001. Our response to the concerns and questions raised at the second Bills Committee meeting on 9 January 2001 are, in seriatim, set out below.

Item 1: Current legislation

Under the existing Gambling Ordinance, the extraterritorial position in regard to betting with offshore bookmakers is unclear and in any event, a possible defence to a charge under section 8 is that the offshore bookmaker was not committing an offence in Hong Kong and, as a corollary, no offence was committed by the bettor in Hong Kong. As an offshore bookmaker is not committing an offence in Hong Kong, a section 8 offence cannot be laid against a bettor with such a bookmaker in the circumstances.

Item 2: Scope of the proposed section 7

Some members have expressed concerns over the scope of the proposed section 7 as it criminalizes the act of receiving a bet placed from Hong Kong by an offshore bookmaker who may be licensed in the concerned jurisdiction.

With the help of modern communication technology such as IDD and the Internet, many offshore bookmakers, licensed in their own jurisdictions, are now offering gambling opportunities to Hong Kong people. A conservative estimate is that there are at least 500 gambling websites on the Internet. It is indeed worrying to note that an increasing number of such bookmakers are specifically targeting the Hong Kong market, e.g., by offering betting on Hong Kong horse races and Mark Six lotteries and actively promoting such business in Hong Kong. If such bookmaking and promotional activities are not made illegal explicitly, they will exist and flourish as legal or exempted activities in Hong Kong. This is contrary to the Government's policy of restricting gambling opportunities to a limited number of authorized outlets. These are the concerns that the Gambling (Amendment) Bill 2000 seeks to address.

Furthermore, it should be noted that as a result of the lax and non-transparent licensing regimes adopted by some jurisdictions, there are now a large number of "licensed" gambling opportunities around the world. Allowing these offshore bookmakers to take bets from Hong Kong people will give rise to the problem of underage gambling and gambling frauds, and impose a serious threat to our betting revenue (especially betting on Hong Kong horse races and Mark Six). We therefore consider that the proposed amendment to section 7 to cover all offshore bookmakers is reasonable, necessary and in Hong Kong's interest (see item 5 below).

Item 3: Overseas legislation prohibiting betting with offshore bookmakers

(a) US Federal Legislation

The United States seek to restrict gambling at the Federal level. In 1961, the Wire Act was passed. The purpose was to enable

federal law enforcement agencies to prosecute organized crime syndicates and prevent them from benefiting, from wire transmissions, that were being used to lay off large numbers of bets.

One of the members of Congress stated during a reading of the 1961 Bill that the purpose of the Bill was to “assist the States to stamp out this organized wholesale gambling, like bookmaking, by preventing the use of telephones and wires in the transmission of professional bets, wagers and gambling information and payoffs.”

The Act holds criminally liable “whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility *for the transmission in interstate or foreign commerce of bets or wagers* or information assisting in the placing of bets or wagers on any sporting event or contest, or for the *transmission of a wire communication which entitles the recipient to receive money or credit* as a result of bets or wagers, or for information assisting in the placing of bets or wagers.” (emphasis supplied).

At the time the Act was introduced, the development of the Internet was still in its infancy. However, the Wire Act 1961 has been used recently to prosecute and convict offshore bookmakers using the Internet as a medium for their bookmaking. Members may wish to know how a successful prosecution has been laid against an offshore bookmaker.

There is an Internet sports gambling website called World Sport Exchange (WSEX). It is a bookmaker based in Antigua, a small island nation in the eastern Caribbean. The Internet Service Provider (ISP) to the website is located in Antigua. The website targets US based punters by being advertised widely in the traditional US media and toll free telephone services to US residents are provided to facilitate placing of bets. This bookmaking activity appears to have commenced in 1997.

In 1998, Jay Cohen, one of the founders of WSEX, returned to the USA and was arrested and prosecuted under the Wire Act for accepting wagers over a wire communication facility. Cohen pleaded not guilty but was convicted in February 2000. His conviction was of seven counts of illegally accepting wagers over the wire and one count of conspiracy to violate the Wire Act 1961. He was sentenced in August

2000 to 21 months' imprisonment, a US\$5,000 fine and US\$800 special assessment. Cohen is presently on bail pending appeal.

(b) US State Legislation

Nevada has enacted gambling legislation with extraterritorial application similar to what we are proposing. The Nevada Revised Statute stipulates that “a person... shall not knowingly, *within or outside of this state* accept or receive... through a medium of communication a wager from another *person who is physically present within this state*” or “*from within this state*, place, send, transmit or relay through a medium of communication a wager to another person or an establishment that is located *within or outside of this state.*” (emphasis supplied). “Medium of communication” is defined as including but not limited to mail, telephone, telegraph and the Internet. Gambling operations licensed in the state are exempted from the above provisions. Apart from Nevada, a number of other states of the US have passed or introduced legislation prohibiting Internet gambling, including Illinois, Texas and Louisiana; while others, such as Florida, Minnesota, Missouri and California have construed their statutes as covering Internet gaming.

Item 4: Legislation criminalizing an act committed in another jurisdiction although that act is authorized by that jurisdiction

There seems to be a number of offences which can be categorized under this item. Unsurprisingly they are mostly concerned with what can loosely be described as public morals such as gambling (the aforementioned Wire Act 1961 being one example), prostitution and pornography.

Prostitution as an example

In the state of Victoria, Australia, brothels, escort agencies and street prostitution are legal in certain defined situations. In particular, with regard to brothels and escort agencies they are required to have a licence. The Prostitution Control Act 1994 is the governing legislation and it includes a number of offences connected with prostitution. However, *procuring a person for prostitution is not an offence* under the 1994 Act.

In Hong Kong, since the 1930s there have been no licensed brothels. Under the Crimes Ordinance (Cap. 200), at least three offences exist that are not such in Victoria. They are section 129 (trafficking in persons to or from Hong Kong); section 130 (control over persons for purpose... of prostitution); and section 131 (causing prostitution). To use section 131(1)(c) as an illustrative example, the law makes it an offence for a person who “procures another person to leave her or his usual place of abode in Hong Kong, intending that other person to become an inmate or frequent any premises... kept as a vice establishment, in Hong Kong or elsewhere for the purposes of prostitution”. Suppose that a prostitution service provider of a licensed brothel in Victoria wished to employ Hong Kong prostitutes in his brothels in Victoria, he might contact a Hong Kong resident to assist him in identifying suitable persons, in other words to assist him, by way of conspiracy to procure prostitutes. By so doing the Australian prostitution service provider would contravene section 131(1)(c) of the Crimes Ordinance of the Hong Kong law, even though he was not physically in Hong Kong when the crime was committed and it would seem lawful for him to do so in his own country.

If the Victorian prostitution service provider visited Hong Kong to meet the identified persons, he would be liable on his entering Hong Kong to arrest and prosecution for an offence under section 131(1)(c) even though no such offence apparently exists in Victoria.

Items 5, 7 and 8: Liability of offshore bookmakers under the proposed section 7

Some Members are concerned whether the proposed section 7 seeks to cover only those persons who did the acts covered by the section with sufficient intent, whether it covers overseas bookmakers inadvertently accepted a bet placed from Hong Kong, and whether overseas bookmakers would be required to screen out bets placed from Hong Kong.

The proposed amendment to section 7 does not rule out *mens rea* as a constituent part of the offence. Therefore, as with the existing section 7 of the principal Ordinance, there has to be *evidence of knowledge or intent* for an offence to be established. In this regard, the onus of proving the defendants’ knowledge or intent remains with the prosecution.

We would be prepared to consider refining the language of the proposed section 7 to address members' concerns.

Item 6: Uncertainty in law and prosecution

Some members are concerned about the uncertainty in law if it was up to the Administration to decide whether a bookmaker has taken reasonable precautions to prevent receiving bets from Hong Kong and whether to initiate prosecution.

The law is not uncertain. It is clear that if you are an unauthorized bookmaker, i.e., you engage in bookmaking or hold out in any manner that you solicit, receive, negotiate or settle bets by way of trade or business and you so solicit or receive or negotiate or settle bets with a person when he is in Hong Kong, or you organize, manage or control such acts, then you commit an offence. The normal consideration for prosecutions as set out in Department of Justice's Prosecution Policy will apply in the case of any prosecution under Gambling (Amendment) 2000 Ordinance should it be enacted. Nevertheless, practical realities of detection and proof will restrict the number of offshore bookmakers that will be prosecuted.

Item 9: Clarity of the definition of "promoting or facilitating bookmaking"

The proposed section 16E covers any activity which deliberately promotes or facilitates bookmaking. A person who engages in a particular activity *without knowledge of or intention to* promote or facilitate a particular act of bookmaking would not be prosecuted.

Depending on the facts and evidence in each case, a number of acts may fall within the category of "promoting or facilitating bookmaking". These include advertising on betting with an offshore bookmaking company, opening betting accounts for punters, collecting betting deposit for offshore gambling purposes, operating telephone hotlines for Hong Kong punters, etc.

In response to some Members' suggestion, we have considered the option of listing out examples that would be regarded as

“promoting or facilitating bookmaking” in the Bill. While this would provide clearer guidance to the public as to what constitute illegal acts, the downside is that the new legislation may become outdated quickly as offshore bookmakers will no doubt devise new ways to promote and facilitate their business in Hong Kong soon after the enactment of the Bill. Using a generic term of “promoting or facilitating bookmaking” will appear to address this problem. Furthermore, from a policy angle, we do not see why a person who deliberately promotes or facilitates an illegal act should not be punished by law.

We are prepared to consider Members’ suggestions to improve the language of this section.

Item 10: Internet gambling

A Member queried whether our proposal to cover Internet gambling by amending sections 7 and 8 represented a change in the Government’s attitude given its views expressed at the meeting of the then Home Affairs Panel on 13 December 1999.

At that meeting, we acknowledged that Internet gambling was not very prevalent in Hong Kong and that legislating against such activities is a complex matter. Two further developments are relevant. First, we have since obtained further legal advice which suggested that Internet gambling involving local websites is already covered by the existing sections 7 and 8 which do not specify the medium through which bookmaking and betting are to be conducted. Given that the Gambling (Amendment) Bill seeks to insert an extraterritorial element into the Gambling Ordinance, it would not be logical if we were to outlaw local gambling websites but exempt those based in other jurisdictions because the law can easily be circumvented by moving the gambling websites to other jurisdictions. We consider this to be the right approach and do not see why offshore gambling websites should be exempted from the provision simply because the bookmaking is conducted via the Internet.

Secondly, there are an increasing number of offshore gambling websites which specifically target at Hong Kong punters (item 2 above refers). The high profile tactics adopted by some of these bookmakers indicate the seriousness of the problem that is being dealt with.

Item 11: The Hon. Margaret Ng's letter dated 4 January 2001

The Hon. Margaret Ng's letter of 4 January 2001 to the Administration contains questions on whether the existing definition of "bookmaking" in section 2 of the Gambling Ordinance covers bookmaking over the Internet; whether the proposed amendments to sections 7 and 8 apply to bookmaking and betting via the Internet; whether Government is seeking extraterritorial jurisdiction over Internet users and how does the Government propose to monitor compliance.

Legal advice confirms that the existing definition of "bookmaking" and the proposed amendments to sections 7 and 8 apply to bookmaking and betting via the Internet, as they do not specifically exempt any medium through which such activities are to be conducted (i.e. technology neutral).

The proposed amendments to sections 7 and 8 have an extraterritorial element. As regards enforcement, the Police will investigate in the problem similar to what they are doing in respect of other criminal activities which may be committed via the Internet.

Like other crimes occurring in the Internet environment, on-line gambling can only be resolved through international cooperation rather than by individual countries/territories acting in isolation. We consider that the Bill is the first right step forward, and we will keep in view the developments in the international arena and propose further legislative and administrative measures as and when appropriate.

Item 12: Urgency to enact the Bill

Some Members have suggested that there was no urgency to enact the Bill in view of its controversial implications and the impending gambling review.

As we have explained in our letter to you dated 4 January 2001, there is an urgent need to enact the Bill, as evident by the increasing number of offshore bookmakers who exploit the loopholes of the existing Gambling Ordinance and invite Hong Kong people to bet with

them. Government would have no legal basis to take any action against them. Recently, at least three offshore websites have adopted high profile tactics to lure Hong Kong people to bet with them on Hong Kong horse races, promising higher payouts. This is a cogent example of offshore bookmakers targeting Hong Kong bettors, and illustrates the urgency of the legislative amendments.

While we are prepared to discuss with Members the details of the Bill and make revisions where appropriate, we do not agree that consideration of the Bill should be suspended pending the completion of the gambling review. As we have explained before, the two exercises are separate and independent of each other. The review examines a wide range of gambling related issues but is not intended to revert the current policy which the Bill seeks to uphold. Any decision arising from the review would not affect the proposed amendments in the Bill. We strongly advise against deferring the examination of the Bill until a separate exercise is completed.

I should be grateful if you would convey the above information to Members. The officers attending the next meeting of the Bills Committee on 9 February 2001 will be as follows:

Mrs. Betty Fung	Deputy Secretary for Home Affairs
Mr. Stephen Wong	Deputy Solicitor General
Mr. J. D. Scott	Senior Assistant Law Draftsman
Mr. Gavin Shiu	Senior Government Counsel
Mr. Francis Lo	Principal Assistant Secretary for Home Affairs
Ms. Mabel Cheung	Government Counsel
Mr. Vic Yau	Assistant Secretary for Home Affairs.

Yours sincerely,

(Mrs. Betty Fung)
for Secretary for Home Affairs