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URGENT BY FAX

18 April 2002

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**

Minutes of meeting on 10 April 2002

Thank you for your letter of 12 April 2002 enclosing the draft minutes of the meeting on 10 April 2002. Our response to the outstanding issues arising from the discussion at the meeting is set out below.

Adding “satellite” and “microwave” transmission to the definition of “bookmaking” as additional media through which soliciting, receiving, etc. of a bet is conducted

A Member suggested at the last meeting that “satellite” and “microwave” transmission should be added to the list of media in the definition of “bookmaking”, i.e. the media through which the soliciting,

receiving, negotiating or settling of a bet is conducted. As opposed to letter, telephone, telegram (in the existing definition) and on-line medium (which we propose to add purely for avoidance of doubts in view of its popularity), “satellite” and “microwave” are not “*media*” as such. Rather, they are the *technologies* used to make these “media” functional. For example, both satellite and microwave are technologies that can be used to provide telephone service and Internet service. We therefore do not consider it necessary or appropriate to insert the two terms in the list of media in the definition of bookmaking.

Actions to be taken by the Police to enforce provisions relating to Internet gambling; principles and guidelines regarding enforcement measures involving on-line communications

It should be noted that neither the existing Gambling Ordinance nor the Bill contains provisions specifically criminalizing Internet gambling. The existing Ordinance is meant to criminalize *all forms of unauthorized gambling*, regardless of the medium through which the gambling is conducted. The Bill, on the other hand, seeks to make this intent clear by plugging certain loopholes being exploited, such as cross-border gambling. This “technology neutral” approach is adopted in criminal offence provisions in many other ordinances in Hong Kong. In fact, a host of different crimes may be committed through the Internet (e.g. theft, deception and counterfeit) and gambling is only one of them. The Police have been tackling gambling-related crimes through the Internet under the existing Gambling Ordinance in accordance with established practices and procedures regarding all crimes involving the use of Internet. The guiding principles are set out at *Annex A*. The same guiding principles will be used in enforcement measures to be taken under the Gambling Ordinance after the relevant provisions in the Bill have come into effect. In other words, we have no plan to take additional measures following the passage of the Bill specifically for the purpose of tackling Internet gambling offences.

Whether it is possible for someone to be physically in Hong Kong but arranges a bet to be received or a bet to be placed outside Hong Kong (or the other way round), and whether such act would be caught under the amended section 7 or 8

As far as the “betting” offence under section 8 (as amended

by the proposed Committee Stage Amendments (CSAs)) is concerned, it would be very difficult to envisage a situation where in legal terms, the bettor is physically located in one place while the act of betting is considered to be taking place in another. In other words, legally speaking, a “betting” act is most likely to be considered to have taken place where the bettor is located. While it is technically possible for a bettor to disguise the location of the act of betting by contractual means or through the use of modern communications technology, or to disguise the location of the bettor, such measures alone would not likely be able to render the concerned betting act to be considered to have taken place outside Hong Kong under the Gambling Ordinance though they could add to the practical difficulty of investigation. Whether any particular betting act would actually be regarded as one having taken place in Hong Kong depends on the entire series of facts and circumstances of the case. The guiding principle is to find out who initiated the betting act, where the person initiating the act was physically located when the act was committed, and what he had actually done to conduct the bet. A brief hypothetical scenario analysis, barring other circumstantial evidence to the contrary, for reference purpose, is at *Annex B*.

As regards the “bookmaking” offence under section 7, it is possible that a person physically located in Hong Kong may own a bookmaking company in an overseas jurisdiction which receives bets from bettors in Hong Kong. In this case, it would be the bookmaking company which is receiving the bets and the bets would likely to be regarded as being received outside Hong Kong. Nevertheless, this would be caught by the purpose-built provision under the proposed section 7(1A) of the Bill which seeks to criminalize the act of receiving outside Hong Kong of a bet placed from Hong Kong, and the person in Hong Kong may be liable to prosecution as owner of the bookmaking company.

Whether it is appropriate to make it clear in the amended section 8 that any person who bets “in Hong Kong” would be caught and its implications for other sections in the Ordinance

As explained in my letter to you dated 9 April 2002, the usual interpretation at common law is that unless there are express provisions stating that an act occurring outside Hong Kong is covered, the relevant provision only applies to *an act occurring within Hong Kong*. This

principle is reflected in the existing legislation in Hong Kong. A provision that is only intended to regulate an act occurring within Hong Kong is not qualified by the words “in Hong Kong”. It is only when a relevant provision is intended to regulate an act occurring outside Hong Kong that express wordings to that effect will be provided.

In the case of section 8 (as amended by the proposed CSAs), since there is no express provision stating that betting outside Hong Kong is covered, the section only applies to *betting in Hong Kong*. The reference to “whether the bet is received within or outside Hong Kong” merely serves to clarify that *where the bet is subsequently received is irrelevant* to whether an offence has been committed. It does not in any way affect the above common law interpretation. We therefore do not see the need to insert this express reference to “in Hong Kong” in section 8.

If we are to specify in section 8 that only betting in Hong Kong would be covered, it could raise doubts as to the coverage of sections 5, 6, 9, 10, 11, 12, 13 and 16 of the Gambling Ordinance. For example, section 5 makes it an offence to operate a gambling establishment. There is no express provision in the section regarding whether operating *outside Hong Kong* a gambling establishment is an offence. Under the usual common law interpretation mentioned above, the section only applies to operating *in Hong Kong* a gambling establishment. However, if we are to insert “in Hong Kong” in section 8 but not section 5, it could raise doubts as to whether the scope of coverage under sections 5 and 8 are different and whether section 5 is intended to apply to operating *outside Hong Kong* a gambling establishment, as opposed to section 8.

Chinese translation of the term “on-line medium” in other jurisdictions where Chinese is used in legislation

At the meeting on 3 April 2002, a Member asked the Administration to provide the Chinese translation of the term “on-line medium” in other jurisdictions using Chinese in legislation. We have searched the legislation in the Mainland, Macau and Taiwan. As far as we could ascertain, none of these jurisdictions adopt the concept of “on-line medium”. For example, legislation of the Mainland, Macau and Taiwan uses terms like “計算機信息網絡”, “互聯網、數據網” and “電信設備”.

These terms refer to similar and related concepts but are not the equivalent of “on-line medium”.

As mentioned in a previous Bills Committee meeting, the term “on-line medium” is adopted from the recently enacted Securities and Futures Ordinance (5 of 2002). There are also references to “on-line” in the Electronic Transactions Ordinance (Cap. 553). We understand from technical dictionaries that “在線” and “聯機” are Chinese renditions commonly adopted for “on-line”. Having regard to the context of the definition of “bookmaking”, we consider that “聯機媒介” is an appropriate Chinese rendition for “on-line medium”.

Exemption under section 16D

A Member suggested that section 16D should include a “due diligence” defence similar to the one provided under section 16E(5). The proposed section 16D deals with the responsibilities of owners, tenants, etc. in respect of premises described under section 16A. It prohibits owners, tenants, etc. from *knowingly* permitting or suffering their premises to be used as premises where unlawful gambling is promoted or facilitated. The word “knowingly” should provide sufficient safeguards for owners and tenants because they would not commit an offence if they do not know that their premises have been so used. Furthermore, the onus is on the prosecution to prove that the owner or tenant concerned does have such knowledge. In fact, there are similar provisions in respect of gambling establishments in section 15 of the existing Gambling Ordinance and vice establishments under sections 143 to 145 of the Crimes Ordinance (Cap. 200).

The proposed section 16E(5) provides that it shall be a defence for an accused to show that he used all due diligence and took all reasonable precautions to avoid the commission of the offence under section 16E (i.e. broadcasting of betting information). However, this defence does not fit in with the nature of the offence provisions under section 16D. Specifically, it is difficult to envisage what are the due diligence or reasonable precautions that could possibly be taken to avoid “knowingly permitting or suffering premises to be used as premises where unlawful gambling is promoted or facilitated.” In the light of the above, we do not consider it necessary or appropriate to provide a “due diligence” defence under section 16D, in addition to the safeguards available under

the qualifying condition of “knowingly” permitting or suffering the use of the premises for the promotion or facilitation of unlawful gambling.

I should be grateful if you would kindly convey the above information to Members. The officers attending the meeting of the Bills Committee on 19 April 2002 will be as follows:

Mr. Stephen Fisher	Deputy Secretary for Home Affairs (2),
Mr. Gilbert Mo	Deputy Law Draftsman (BD&A),
Mr. Stephen Wong	Deputy Solicitor General (General),
Mr. John Reading	Deputy Director of Public Prosecutions,
Ms. Esther Leung	Principal Assistant Secretary for Home Affairs(5),
Mr. Lo Mung-hung	Senior Superintendent of Police (OCTB),
Mr. Llewellyn Mui	Senior Government Counsel, Legal Policy Division,
Mr. David Leung	Senior Government Counsel, Prosecutions Division,
Ms. Mabel Cheung	Government Counsel, Bilingual Drafting Unit, Law Drafting Division, and
Mr. Vic Yau	Assistant Secretary for Home Affairs (5)1.

Yours sincerely,

(Ms Esther Leung)
for Secretary for Home Affairs

cc D of J (Attn.: Mr. Gilbert Mo
Mr. Stephen Wong
Mr. John Reading
Mr. Gavin Shiu
Mr. David Leung
Mr. Llewellyn Mui
Ms. Mabel Cheung)
C of P (Attn.: Mr. Lo Mung-hung)
ALA/LegCo (Attn.: Ms. Kitty Cheng)

**Principles of Enforcement against
Unlawful Gambling Activities Conducted through the Internet**

- (a) A gambling raid on premises must be conducted under a Gambling Authorization issued in accordance with the existing section 23 or the proposed section 23A of the Gambling Ordinance.
- (b) Any computer seized in a gambling raid, which is suspected to have been used in gambling activities, will be sent for forensic examination with a view to obtaining data record showing the relevant activities.
- (c) If it is necessary to obtain the log record of a subject under investigation from a local Internet service provider during the course of an investigation, it will be done with a search warrant issued by court under the Police Force Ordinance, and details will be confined to the specific period suspected to be related to the act.
- (d) If it is necessary to obtain the log record from an overseas Internet service provider for the same purpose, it will be done via a cooperation mechanism with overseas law enforcement agencies and/or the Mutual Legal Assistance system.
- (e) The monitoring of Internet communications refers to the examination of the log record between the communicating parties, such as time of contact and Internet Protocol addresses.
- (f) Bank account transactions and/or credit card transactions between the two parties, required for investigation or evidence purpose, will be obtained with a search warrant issued by court.
- (g) The above principles will apply whether the subject person under investigation is suspected to be a bookmaker or a gambler.

Annex B

Brief hypothetical scenario analysis of the application of section 8 of the Gambling Ordinance in respect of whether the act of betting takes place in Hong Kong, barring other circumstantial evidence to the contrary:

Scenario	Major evidential facts	General interpretation
A	<ul style="list-style-type: none">● Bettor physically in Hong Kong when the bet was initiated● Bet with an unauthorized Internet gambling website by using a foreign Internet service provider (ISP)	Betting act <u>in</u> Hong Kong <u>Reason:</u> The act of betting was initiated in Hong Kong. The foreign ISP is merely a means to place the bet.
B	<ul style="list-style-type: none">● Bettor physically in Hong Kong when the bet was initiated● Bet with an unauthorized bookmaker via a telephone number outside Hong Kong through the use of call-forwarding service	Betting act <u>in</u> Hong Kong <u>Reason:</u> The act of betting was initiated in Hong Kong. The call-forwarding service is merely a means to place the bet.
C	<ul style="list-style-type: none">● Bettor physically outside Hong Kong when the bet was initiated● Bet with an unauthorized bookmaker who takes bets in Hong Kong, through the Internet or telephone	Betting act <u>outside</u> Hong Kong <u>Reason:</u> The act of betting was initiated outside Hong Kong