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MEMORANDUM

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DATE: Monday, 3 April 2006

Following on our meeting on 24 March 2006, this memo was prepared to contribute to Zi Teng's submissions to the Legislative Council's Security Panel. The Panel is scheduled to meet on 4 April 2006 to consider the topic of "Police undercover operations for vice activities".

You have informed us that Zi Teng has recorded numerous complaints by sex workers against undercover police officers, who receive sexual services in the course of investigating prostitution-related offences. These services range from masturbation and oral sex to full sexual intercourse.

This memo contains our preliminary views on the legal implications of this police conduct and focuses specifically on the following issues:

1. Is it necessary for undercover agents to receive sexual services in order to gather sufficient evidence for the prostitution-related offences they are investigating?
2. Is the receipt of sexual services by undercover agents illegal?
3. Can the practice of receiving sexual services ultimately jeopardize the criminal investigation?
4. By receiving sexual services, has the undercover agent breached any ethical standards (either according to those of the Hong Kong Police or other international standards)?

Brief Summary

We believe the practice of undercover agents receiving sexual services is generally unnecessary (or can otherwise be avoided) for proving prostitution-related offences in Hong Kong. The practice carries with it the risk that the agent may commit various criminal offences. Aggressive police tactics, which induce the commission of an offence, may potentially halt a prosecution. Even where the practice is passive and not illegal, it is probably considered unethical police conduct by international standards, particularly when it is unnecessary or done repeatedly before an arrest is made. To safeguard its reputation, it is highly recommended that the Hong Kong Police Force adopt a clear policy against this practice by its undercover agents.

Analysis

1. Is it necessary for undercover agents to receive sexual services in order to gather sufficient evidence for the prostitution-related offences they are investigating?

We believe it is unnecessary for undercover agents to receive sexual services in order to gather sufficient evidence for the purposes of prosecuting any of the following prostitution-related offences:

Massage Establishments Ordinance (Cap 266)

- 4(1) Operating or assisting in the operation of a massage establishment without a licence
- 13(1) Operating or assisting in the operation of a massage establishment not in accordance with the conditions of the licence

Crimes Ordinance (Cap 200)

- 137(1) Living on the earnings of prostitution
- 139(1) Keeping or assisting in the management of a vice establishment
- 143(1) Letting premises for use as a vice establishment
- 144(1) Permitting premises to be kept as a vice establishment
- 145(1) Permitting premises to be used for purposes of habitual prostitution
- 147(1) Soliciting in a public place for any immoral purpose

None of the above offences includes as an essential element the commission of a sexual act. Indeed, the provision of paid sexual services between adults in and of itself is not a criminal offence in Hong Kong. Proof of the above offences can be achieved by using circumstantial evidence (eg statements from females inside the premises offering paid sexual services¹), confession evidence, and evidence of steps taken short of sexual contact to effect the agreement for paid sexual services.

A “massage establishment” is defined as “any place used or intended to be used or represented as being used for the reception or treatment of persons requiring massage or other similar service or treatment”.² It is clear that no sexual contact is needed to prove whether a certain place is a massage establishment.

We are aware of the case of *HKSAR v Fok Wai Man* in which ICAC used covertly recorded communications to try to prove that the licensee was in breach of her massage establishment license which imposed a condition that ‘no vice or immoral activities shall take place in the premises’.³ The recordings were of female staff members outlining possible sexual services available to the undercover agents. Only massage services had been provided before the ICAC raided the premises. In allowing the appeal from conviction, Mr Justice Jackson expressed in *obiter* his doubt whether there was sufficient evidence that vice or immoral activities had in fact taken place in the premises.⁴ The conversation was not in itself a vice or immoral activity. However, he allowed the appeal on a different basis, i.e. the magistrate’s erroneous approach to defence evidence.

¹ Statements offering prostitution services can be used to prove the character of the place in which they are made without infringing the hearsay rule, see *Woodhouse v Hall* (1981) 72 Cr App R 39 (CA).

² Massage Establishments Ordinance (Cap 266), s 2.

³ *HKSAR v Fok Wai Man* [2003] HKEC 639 (CFI).

⁴ *Ibid.*, paras 14 & 21.

It is possible to read *Fok Wai Man* as legitimizing the practice of receiving sexual services in order to prove that the licensed premises was being used for a vice or immoral activity. However, this state of affairs is created not by the law but by the wording of the condition imposed on the license. The Commission of Police has an absolute discretion as to whether and what conditions are to be imposed on a massage establishment licensee.⁵ Thus, a more carefully drafted condition could avoid effectively requiring undercover agents to engage in sexual conduct before there can be sufficient evidence of a breach in the license condition. For the legal and ethical reasons given below, it would be highly advisable from hereon if the imposed condition was broadened to ensure that “no vice or immoral activities shall *be conducted or attempted* in the premises”. With such a condition, there would be sufficient evidence of a breach where the undercover agent received an unsolicited offer of sexual services and steps short of sexual contact were taken to further the provision of such services (eg removal of clothing).

To prove that a place is a “vice establishment”, it is necessary to prove either the place was “used wholly or mainly by 2 or more persons for the purpose of prostitution”, or was “used wholly or mainly for or in connection with the organizing or arranging of prostitution”.⁶ Caselaw has defined this further in the context of the offence of managing a vice establishment:

the forbidden conduct is the offering for lewdness for gain whether the offering is done indiscriminately by common, selectively by discreet or by both common and discreet prostitutes. If there is any use of the premises by women offering themselves for lewdness for gain there is a use for the purpose of prostitution within the meaning of section 139 [of the Crimes Ordinance (Cap 200)].⁷

From this interpretation, one sees that the presence of women offering sex for gain is the *sine qua non* to determining whether a certain place is a vice establishment. Undercover agents can provide direct evidence of such offering without engaging in any sexual contact.⁸

Obtaining evidence of actual prostitution taking place within the targeted premises can of course bolster the prosecution’s case. However, as discussed below, there are risks to the integrity of the investigation and to the reputation of the Hong Kong Police if agents are allowed to receive sexual services gratuitously and when the exigencies of the investigation do not warrant such conduct.

2. Is the receipt of sexual services by undercover agents illegal?

The receipt of consensual sexual services by undercover agents is not illegal per se. However, if it turns out that the female person providing the sexual service is under the age of 16, the officer will have committed one or more of the following offences (as any consent given by the female person would be invalid):

⁵ Massage Establishment Ordinance (Cap 266), s 6(2) & Schedule.

⁶ Crimes Ordinance (Cap 200), s 117(3).

⁷ *The Queen v Ho Chi Fai & Others* [1985] HKCFI 31, HCMA000825/1984 (HC).

⁸ Caselaw from the United Kingdom and Canada on similar offences states the same proposition, see generally *Winter v Woolfe* [1931] 1 KB 549; *Kelly v Purvis* 76 Cr App R 165; *R v Sorko* [1969] 4 CCC 241 (BCCA); *R v Tremblay* (1991) 68 CCC (3d) 439 (Que CA).

Crimes Ordinance (Cap 200)

146(1)	Indecent conduct towards a child under 16
122	Indecent assault
124	Intercourse with a girl under 16
120	Procurement to do an unlawful sexual act by false pretenses

It is not a defence for the agent to claim that he believed (whether honestly or on reasonable grounds) that the female person was 16 years or older for the purposes of the offence under section 124.⁹

If the undercover agent sets out to obtain a sexual service without intending to pay for such service, this could constitute the offence of obtaining services by deception.¹⁰ The ultimate issue will be whether the agent has acted dishonestly. However if the agent carries through with the operation by intending and providing payment for the services, he would not likely be found to be acting dishonestly.

3. Can the practice of receiving sexual services ultimately jeopardize the criminal investigation?

If the undercover agent goes beyond providing a mere opportunity to commit the offence and has in fact induced the accused to commit the offence, the agent may be found to have entrapped the accused and the prosecution is liable to be stayed.¹¹ In practical terms, this would mean that if the undercover agent initiates sexual contact, requests sexual services, or repeatedly inquires about the availability of sexual services, the accused may raise the defence of entrapment at trial and there is a risk that the prosecution will fail on grounds of abuse of process.

4. By receiving sexual services, has the undercover agent breached any ethical standards (either according to those of the Hong Kong Police or other international standards)?

Nine police Codes of Conduct were surveyed from jurisdictions around the world.¹² Although the prohibition of sexual activities while on duty explicitly appears only rarely,¹³

⁹ *HKSAR v So Wai Lun* [2005] 1 HKLRD 443 (CA).

¹⁰ Theft Ordinance (Cap 210), s 18A.

¹¹ See *R v Looseley* [2001] 1 WLR 2060 (HL).

¹² New South Wales Police Service Code of Conduct and Ethics, <http://www.gaiaguys.net/Police-Code-of-Ethics.htm>; Hong Kong Police Force Common Purpose and Values, <http://www.info.gov.hk/police/hkp-home/english/misc/vision.htm>; Western Australia Police Code of Conduct, http://www.police.wa.gov.au/AboutUs/SupportServices/pdf/WA_Police_Service_Code_of_Conduct.pdf; British Columbia (Canada) *Police Act, Code of Professional Conduct Regulation*, http://www.qp.gov.bc.ca/police/r205_98.htm; The United Nations Code of Conduct for Law Enforcement Officials, G.A. res. 34/169, annex, 34 U.N., <http://www.freedomtocare.org/page125.htm>; Code of Conduct of the University of Texas System Police, http://www.utsystem.edu/pol/code_of_conduct.html; The Police Authorities (Model Code of Conduct) Order 2001 (UK), <http://www.opsi.gov.uk/si/si2001/20013578.htm>; Code of Conduct for Police Officers (UK), <http://www.police999.com/careers/conduct.html>; Schererville, IN (USA) Police Department Code of Conduct, <http://www.ci.schererville.in.us/police/codeofconduct.html>.

¹³ The Code of Conduct of the University of Texas System Police, *Ibid.*, prohibits officers from engaging in any sexual conduct while on duty, at 5.16.6.

the police activity at issue appears to fall afoul of various broader principles which repeatedly emerge from these Codes. These include the duty of officers to observe principles of:

- Integrity and honour
- Honesty
- Efficient and economical use of public resources
- Responsible exercise of authority
- Professionalism
- Fairness and impartiality
- Private interests not conflicting with public duty
- Behaviour not undermining public confidence in the police.

While the Hong Kong Police Force has not published a detailed Code of Conduct, its published statement of “Common Purpose and Values” recites many of the above mentioned principles.¹⁴

In addition to the questionable use of public funds for police officers’ sexual gratification, the practice of undercover police receiving sexual services in the course of their investigation of vice activities is arguably an abuse of authority.¹⁵ This practice could also be viewed as a conflict of interest – that is, leading to private gain at public expense. At worse, it could be viewed as corruption where there has been no superior authorisation.¹⁶ Generally, the unrestrained employment of such practices would tend to damage the reputation of the Hong Kong Police Force.

Police are held to a higher standard of conduct than the general public because of the public trust they are granted to enforce the law. Police services are self-regulating professions, which makes it important that police conduct remains above moral reproach. The International Association of Chiefs of Police states, in its Law Enforcement Code of Conduct,

All law enforcement officers must be fully aware of the ethical responsibilities of their position and must strive constantly to live up to the highest possible standards of professional policing.

¹⁴ The Hong Kong Police Force website states that its values include:

- Integrity and Honesty
- Respect for the rights of members of the public and of the Force
- Fairness, impartiality and compassion in all our dealings
- Acceptance of responsibility and accountability
- Professionalism
- Dedication to quality service and continuous improvement
- Responsiveness to change
- Effective communication both within and outwith the Force.

¹⁵ See *R v Waterfield* [1963] 3 All ER 659 (CCA) for a statement of a police officer’s duties at common law. See also Police Force Ordinance (Cap 232), s 10.

¹⁶ The United Nations Code of Conduct for Law Enforcement Officials, *Ibid.*, states the following regarding police corruption: “[I]t should be understood to encompass the commission or omission of an act in the performance of or in connection with one’s duties, in response to gifts, promises or incentives demanded or accepted, or the wrongful receipt of these once the act has been committed or omitted.” (Article 7, Commentary). See also the implications of s. 3 of the Prevention of Bribery Ordinance (Cap 201).

When it comes to official functions, the appearance of propriety is as important as propriety itself. This is articulated in the New South Wales Police Service Code of Conduct, as follows:

All officers have an obligation to act **and to be seen to act** by the public in accordance with the spirit and the letter of the law including the terms of this Code of Conduct whether on or off duty. [Emphasis added.]

This is also repeatedly articulated in the Code of Conduct by the International Association of Chiefs of Police:

Consistent and wide use of discretion, based on professional policing competence, will do much to preserve good relationship and retain the confidence of the public.... The public demands that the integrity of police officers be above reproach. Police officers must, therefore, avoid any conduct that might compromise integrity and thus undercut the public confidence in a law enforcement agency... Police officers must not receive private or special advantage from their official status. Respect from the public cannot be bought; it can only be earned and cultivated.

A police officer's character and conduct while off duty must always be exemplary, thus maintaining a position of respect in the community in which he or she lives and serves. The officer's personal behaviour must be beyond reproach.

The Western Australia Police Code of Conduct presents the following test for determining whether a course of action is ethical:

- Is it legal and consistent with official policy?
- Am I acting impartially?
- Can I justify my stance?
- Will I be comfortable if my actions are assessed by others?
- Would I consider it ethical if someone I disliked did the same thing?
- Could the outcome be perceived as a conflict of interest?
- Am I serving or injuring the public interest?

It is submitted that police having sex with prostitutes in the course of their investigation of vice activities does not hold up under these questions. It is an unethical practice, and there should be a clear and public policy against the practice.

This concludes our preliminary views and we would be happy to discuss this memo with you further.