

# Response ID ANON-AY63-8UZZ-X

Submitted to **Changes to corporate governance framework (Regulatory Panels)**

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## Introduction

### 1 What is your name?

**Name:**

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### 3 What is your organisation?

**Organisation:**

Harris Hagan

### 4 Privacy notice

I CONSENT to the publication of my name and organisation to indicate I responded to this consultation

## Background

### Our proposals

#### 5 Proposed changes to the Scheme of Delegation of licensing and regulatory decisions in respect of gambling

#### 6 Proposed changes to regulatory decisions: procedures and guidance for regulatory hearings

#### 7 Proposed changes to Licensing decisions: procedures and guidance for licensing hearings

## Questions

### 8 Do you agree with the proposal to use adjudicators on regulatory panels?

No

#### Question 4 comments:

We do not agree with the proposal to use Commission-employed adjudicators on regulatory panels. Regulatory panels provide an opportunity for applicants and licensees to challenge decisions made by Commission staff and are the only quasi-independent option available for applicants and licensees.

The regulatory panel provides an important safeguard to applicants and licensees. Using adjudicators, who are not commissioners and therefore must be employees to empower the Commission to delegate a function to them (paragraph 8(1)(c), Schedule 4), will encroach on the principles of natural justice and the Commission's values of being fair, accountable, professional and consistent. The risks posed by employed adjudicators cannot be mitigated and it appears that absolutely no effort has been made by the Commission to alleviate such concerns.

To improve, or at least not diminish, public and professional confidence in the Commission's decisions, the regulatory panel must remain quasi-independent from the Commission. In our view, this can only be achieved by: (1) the Secretary of State appointing more commissioners, which could, of course, include a new breed of commissioner that is legally-qualified; or (2) legislative change to formalise the independence of the regulatory panel.

If an adjudication model with employed adjudicators is used, we urge the Commission to:

- Issue a detailed consultation on the draft adjudication governance framework, including who selects adjudicators (including the recruitment/appointment panel), on what basis, whether they are allowed to do other work for the Commission, how they are managed and, critically, removal criteria to protect against their removal simply because the Commission does not like their decisions; and

- Retain a separate legal adviser to the regulatory panel.

The only consideration appears to be about saving costs, time for the Commission and commissioners, and speeding up the process. In doing so, the duty to act fairly has been sacrificed.

Whilst the aims appear to be about saving costs and time, in the absence of any cogent explanation as to how fairness can be achieved, the overall impression from the consultation is that the real purpose is to reduce the purpose of the regulatory panel to that of a rubber stamp for decisions of the Commission, without

any, or any proper, regard for the principles of fair regulation, natural justice or the provisions of the Human Rights Act 1998. In this context, it is profoundly disappointing that the Commission has chosen to make no mention of these considerations.

We urge the Commission to be transparent, publish full details of its proposals, information on regulatory panel waiting times, full details of current costs, an adjudication framework, the adjudication models considered and explore alternatives.

#### a) Status as employees

Whilst we are not employment lawyers, we note that being described as an employee is not a decisive factor. This is an important consideration given the adjudicator's crucial status as an employee. The Commission has provided insufficient and inadequate information on the adjudicator's position as an employee and the indicative factors.

It seems unlikely to us that the adjudicators will be, de facto, employees of the Commission under employment law. It seems more likely that they will be self-employed contractors/consultants, which precludes them from sitting as members of the regulatory panel, unless they are commissioners. We note the following:

- As employees they will be expected to conform to the Commission's day-to-day direction and rules and policies governing conduct and standards at work. This erodes their independence and impartiality.
- They will need to be integrated with the Commission and subject to its policies and procedures. Again, this erodes their independence and impartiality.
- They will need to be paid even if there is not sufficient work, which raises the question of whether adjudicators are continuously paid or paid only for when they are called upon.
- The consultation refers to "[o]verheads relating to their status as employees, agents or contractors. We propose to model the employment on...existing contracts e.g. advisory panels/independent members." Adjudicators must either be Commission employees (raising several concerns mentioned in this response) or commissioners. Otherwise, they cannot perform delegated functions. We are therefore not clear on why the consultation refers to agents and contractors.

Questions regarding the recruitment process are also raised; who will be responsible for selecting adjudicators and on what basis will they be selected? A job specification and selection criteria (for example, the work experience, legal qualifications, knowledge and expertise) is not included. Details of the appraisal process are also not included.

It is implausible to believe that adjudicators, who are to be recruited, employed and appraised by the Commission, will be independent from the Commission, and that their decisions will be robust and capable of scrutiny.

#### b) Loss of experience

Whilst we understand there is no legal mechanism under the 2005 Act to empower the Commission to have regulatory panel hearings heard by a formally independent panel, the commissioners provide vital experience and knowledge from a wide range of sectors and industries, as the Commission's website acknowledges. By way of contrast, adjudicators will be legally qualified and, in almost all cases, not come from diverse backgrounds, or at least the same type of diverse backgrounds as commissioners.

#### c) Impartiality & independence

Decisions made by adjudicators will not be impartial as they will be Commission employees. The test should be whether sufficient guarantees exist to exclude any legitimate doubt of impartiality, applying an objective standard. Critically, this requires consideration of the appointment of adjudicators and their terms of office, and whether adequate safeguards will exist against outside pressures and whether it presents an appearance of independence. No explanation is provided in the consultation as to what, if any, safeguards will be put in place to ensure impartiality and independence from the Commission. No consideration is given to the governance framework.

By way of contrast, as commissioners are public appointees, they are required to comply with the Cabinet Office's Code of Conduct for Board Members of Public Bodies which require adherence with the Seven Principles of Public Life, including integrity, objectivity, accountability and openness, which must inform their actions and decisions.

Whilst we acknowledge that adjudicators will be legally qualified, and therefore subject to their own professional code of conduct (and also the Commission's), we question how they could, in reality, act and take decisions in an open and transparent manner, whilst employed by the Commission.

We are also concerned that the Commission could have the power to remove adjudicators for making decisions that are not welcomed by the Commission, resulting in adjudicators that will conclude only in the Commission's favour, thereby weakening the independence and fairness of the regulatory panel and its decisions.

The proposals do not explain how the regulatory panel's independence will be maintained. No details are provided as to how fair decisions will be made and how the regulatory panel will be clearly separated from the Commission's licensing, enforcement and legal departments. An adjudication governance framework could go some way in addressing these concerns, but the Commission has not provided one, nor suggested that there will be any such framework.

#### d) Quality of decisions

Regulatory decisions must withstand scrutiny. To do this, decisions must be fair, consistent, robust and proportionate.

We strongly believe the quality of decisions will be impacted, to the disadvantage of applicants/licensees, with the use of Commission employed adjudicators and changes to quorum. The consultation fails to provide any reassurance on these issues.

Fair, impartial and robust decisions will not be made, meaning decisions are more likely to be appealed. As there is no internal appeal process, applicants/licensees will be forced to appeal to the First-Tier Tribunal, significantly increasing legal costs for them and the Commission. Making decisions that are more likely to be appealed and, therefore, do not withstand scrutiny is not cost-effective, particularly given the risk of a costs order against the Commission in the event of a successful appeal.

#### e) Legal costs

The only consideration appears to be about saving costs. The consultation refers to the Commission being "satisfied that this proposal represents a cost-effective way of conducting hearings" and provides scant details on proposed costs and savings. The only ambiguously quantified costs appear to be budgeting "an extra £40,000 for a year's adjudications". To be "open and transparent" the Commission should publish:

- the costs of the current regulatory panel (with commissioners) and its legal advisers for the last three financial years;
- the forecasted costs of the proposed regulatory panel, using adjudicators, for the first year of adjudication model; and
- the costs saving to the Secretary of State in using adjudicators given that commissioners will not be required as frequently to sit as members of the regulatory panel. We understand that the day rate of a commissioner is £295, based on an average of 48 days per year.

#### f) Presumption to provide legal advice

We question how the adjudicator will be able to also perform the role of legal adviser. In our strong view, there is, or at least could be, a genuine and direct conflict between the role of a regulatory panel member and an independent legal adviser.

A personal licensee's Article 6 right is likely to be infringed because legal advice cannot be given in his/her presence, and the adjudicator will always have the benefit of receiving and knowing the legal advice beforehand.

The consultation refers to other regulators using "the mixed panel"; however, there is no explanation and we are not aware of other regulators using an adjudication model similar to the Commission's proposals without an independent legal adviser.

#### g) Lack of evaluation

We are very concerned by the lack of evaluation by the Commission on the performance of the regulatory panel, as presently structured. The consultation process, and any new regulatory panel structure, is entirely futile without proper evaluation. Given the Commission's strong preference in favour of collaboration, we are hopeful that it would see the benefit of our feedback on potential areas for improvement.

If any such evaluation has been performed: (i) it has been done without canvassing the views of the gambling industry and is, therefore, unreliable and potentially biased; and (ii) it should be made publicly available.

#### h) Other adjudication models

The Commission's proposal explains that other regulators use the mixed panel model, but no regulators have been referenced and it is wholly unclear which adjudication frameworks have been considered and whether any aspects have been utilised to support the Commission's proposals and save costs. Many other regulators use industry panel members that are not employees and bring with them a wealth of knowledge and independence.

By way of examples:

- Approximately half of the Financial Conduct Authority's Regulatory Decisions Committee's 18 members come from finance or financial services backgrounds. The other half have esteemed legal, governance, policy or academic backgrounds. Independence is further emphasised by the FCA handbook stipulation that none of the members are employees and the committee has its own legal advisers and support staff.
- The Solicitors Regulation Authority uses an Adjudication Panel with a minimum of two members and will normally comprise three, excluding the independent legal adviser.

The consultation does not refer to the adjudication models considered by the Commission. We are left to assume this is deliberate given that the FCA and SRA models of adjudication appear impartial, independent and robust.

It is unjust that other regulated businesses and professionals have access to a more independent adjudication process, whilst operating and personal licensees would not under the Commission's proposals.

#### i) Adjudication and governance framework

As mentioned earlier in this response, an adjudication or governance framework has not been provided, nor suggested. Such a framework is a basic requirement of good governance and accountability and could, potentially, go some way in addressing some of our concerns. Decisions made by the regulatory panel include revocation and suspension of licences, and enormous financial penalties, which could destroy and financially cripple gambling businesses and personal licensees. At a minimum, to help the regulatory panel make fair, consistent and transparent decisions, we would suggest the framework include:

- appointment, training and appraisal of adjudicators;
- who interviews and selects adjudicators;
- selection criteria;
- management of adjudicators (if within the Commission, the department and responsible Executive Director and measures to protect against bias and support

independence);

- term of adjudicators;
- the role of adjudicators (ensuring it is not to provide legal advice to the regulatory panel, which is reserved for its independent legal adviser);
- criteria for removal of adjudicators (for example, poor performance), protecting against removal simply because the Commission does not like their decisions;
- quorum;
- separate legal advisers;
- decision-making process, specifically addressing the principles of transparency, fairness, proportionality and consistency;
- an internal appeal process;
- practice notes on procedural matters including unrepresented applicants/licensees, service of documents, financial penalties and calculating quantum, legal advice, a bank of licence conditions likely to be used by the regulatory panel, interim orders and proceeding in the absence of a licensee;
- a more detailed indicative sanctions policy that considers in detail the principles of proportionality, seriousness, mitigating factors, aggravating factors, remediation; and
- conflicts of interest.

We urge the Commission to issue a consultation on any draft adjudication governance framework.

#### j) Separation between the regulators' investigation and adjudication functions

We consider there are strong benefits to be gained from the separation of investigation from adjudication, not least of which is ensuring public and professional confidence in the decisions of the adjudicator. However, such separation could not be achieved under the Commission's proposals.

No such separation could be created and maintained if the appointment process for, and management of, adjudicators is managed by the Commission. There must be a high degree of independence. This could include separate staffing, separate legal advisers or a separate tribunal service within the Commission, similar to the Medical Practitioners Tribunal Service or Health & Care Professions Tribunal Service.

#### k) Principles of enforcement

The Principles of inspection and enforcement, as set out in Philip Hampton's Reducing administrative burdens: effective inspection and enforcement report state, "[r]egulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take setting out a number of core principles of effective regulation – the standard against which all regulators' performance should be judged."

Whilst we acknowledge that different regulatory regimes are structured in very different ways, regulators are required to follow the principles of regulatory enforcement set out in the report. In our view:

- no research has been published by the Commission to suggest it has monitored the efficiency and effectiveness of its regulatory panel;
- there has been no trial using adjudicators;
- no performance management framework or system is in place to monitor the impact of the proposed changes on applicants/licensees; and
- by employing the adjudicators, the licensing and enforcement decisions made by the regulatory panel will no longer be independent.

### **9 Do you agree with the proposed changes to the 'Scheme of Delegation of licensing and regulatory decisions in respect of gambling'?**

No

#### **Question 5 comments:**

##### a) "Legally qualified individuals employed by the Commission"

As set out above in 8, we believe that adjudicators do not qualify as employees of the Commission and are, therefore, unable to sit as members of the regulatory panel. Please see above for our detailed concerns.

##### b) Quorum

The proposed reduction to a maximum of one or two panel members is unjust. The common and very sensible position across regulators, regardless of the industry, is that a panel is made up of at least three people, comprising both professionals (from the industry) and non-professionals (such as lay or legally qualified members).

The consultation states the "increasingly complex and legalistic" cases being heard by regulatory panels as the reason for the proposals. Firstly, the Commission has not provided evidence of this. Secondly, if it is the case that regulatory panel cases are becoming increasingly complex, it would follow that a high number of commissioners are retained and recruited, as opposed to reducing to one commissioner.

A Regulatory Panel of one commissioner, as opposed to the standard three, particularly for operating licence hearings, will undoubtedly impact on the fairness of the hearing and regulatory decision. Surely, particularly in complex matters, there is a strong argument for retaining that number, not reducing to one commissioner.

No provision is made for a Regulatory Panel of two, which is split on the decision and who has the binding vote. Is it the adjudicator because they will "ordinarily" provide the legal advice to the Regulatory Panel? Presently, one commissioner presides over the proceedings, but all three have equal decision-making powers and this quorum must continue.

A Regulatory Panel of one member is not a panel. The Cambridge Dictionary defines a panel to mean "a small group of people chosen to give advice, make a decision or publicly discuss their opinions". It is therefore misleading to suggest a single adjudicator considering personal licence hearings would establish a Regulatory Panel. In such hearings there may be an argument that a decision made by a new-style Regulatory Panel fails to be "independent and impartial", in accordance with the Human Rights Act 1998. It is our strong view that at least one commissioner is required on personal licence hearings heard by the regulatory panel.

No provision is made for how the adjudicator will manage the role of legal adviser to the Regulatory Panel whilst also being a member. By way of comparison, the SRA uses an Adjudication Panel; however, it has a minimum of two members and will normally comprise three, excluding the independent legal adviser. Other regulators (such as the General Medical Council) require chairs to be legally qualified. If the Commission genuinely considered cases to be "increasingly legalistic and complex", use of a legally qualified chair (in addition to the legal adviser) would be a more sensible and fair approach, rather than the current proposals.

The need for procedural fairness has long been recognised as an important requirement in disciplinary proceedings. Common law requirements of natural justice have been supplemented by the incorporation into domestic law of Article 6 of the European Convention on Human Rights with which the regulators must comply. Article 6 provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

#### **10 Do you agree with the proposed changes to 'Regulatory decisions: procedures and guidance for regulatory hearings'?**

No

##### **Question 6 comments:**

a) Quorum and adjudicators

We disagree on the proposed changes in relation to quorum and adjudicators, as set out in our comments under questions 8 and 9.

b) Representations and evidence

Whilst we broadly agree with the proposed addition of paragraph 3.22, "late stage", "necessary" and "good reason" are not explained. Further, the reference to, and addition of, ensuring "fairness to both parties" is perplexing. Fairness is of paramount importance to the applicant/licensee.

c) Financial penalties

If the regulatory panel requires information, in the form of "further representations from the Commission in response to any representations made by the licensee" (paragraph 4.7), this should be shared with the licensee.

The regulatory panel should be required to include, in its reasoning, its detailed calculation methodology with specific reference to the consumer detriment element, financial gain element, penal element and any quantifiable uplift/discount with reasons.

#### **11 Do you agree with the proposed changes to 'Licensing decisions: procedures and guidance for licensing hearings'?**

No

##### **Question 7 comments :**

a) Role of legal adviser

We disagree on the proposed change in respect of an adjudicator taking on the role of legal adviser (paragraph 3.15) for the reason set out above.

b) Representations and evidence

Whilst we broadly agree with the proposed addition of paragraph 3.22, "late stage", "necessary" and "good reason" are not explained. Further, the reference to, and addition of, ensuring "fairness to both parties" is perplexing. Fairness is of paramount importance to the applicant/licensee.

### **Before you submit your response**

#### **12 How did you hear about this consultation?**

Gambling Commission website

**If you answered other, please specify :**

#### **13 Overall, how satisfied were you with our online consultation tool?**

Satisfied

**How could we improve this service?:**