

INDECISION, IMPOTENCE AND INCOMPETENCE: GAMBLING REGULATION IN HISTORICAL PERSPECTIVE

BY JULIAN HARRIS

The raised expectations and initial euphoria that greeted the long-awaited overhaul of UK gambling legislation, and prospects for new casino development in particular, have long evaporated. From conflicting about-turns and disputed changes toward the implementation of the Gambling Act 2005 in September, the process has been tortuous and uncertain - the consequence of a missed opportunity back in 1996. For how long history has been interrupted now remains to be seen.



So they [the Government] go on in strange paradox, decided only to be undecided, resolved to be irresolute, adamant for drift, solid for fluidity, all powerful to be impotent¹. This was Sir Winston Churchill's comment on previous Government, but it is a comment which might justifiably be applied to the current Labour Government, particularly in relation to gambling.

In the first article in this series, I traced the history of gambling regulation up to the appointment of the Budd Committee in 1999. In the second² I wrote the rollercoaster of the process of gambling law reform up to the passing of the Gambling Act 2005, and the appointment of the Casino Advisory Panel. Professor Peter Collins has referred in this magazine³ to "the fiasco of UK casino policy being symptomatic and illustrative of why, in general, we are so badly governed". Nonetheless, shambolic though the process from Budd to statute book may have been, once the Gambling Act 2005 became law, albeit in mangled form, the process of implementation could begin: or at least so we thought.

THE CURSE OF BLACKPOOL

In August 2005, the Department for Culture, Media and Sport (DCMS) issued terms of reference for assisting the Secretary of State in determining geographical distribution. In summary, the primary consideration set by DCMS was to ensure that locations provided the "best possible test of social impact". Subject to that general aim, additional criteria were also:

- To include areas in need of regeneration (as measured by employment and other social deprivation data) and which are likely to benefit in those terms from a new casino;
- To ensure that those areas selected were willing to licence a new casino.

DCMS also asked the Panel to have regard to the Government's National Policy Statement on Casinos published in December 2004. Neither of the above criteria explicitly referred to the desirability of maximising beneficial social impact, probably because at the time the National Policy Statement was published the Act was before Parliament, and at that stage still proposed eight regional casinos, but this figure was reduced to one in the final draft. Nevertheless, the Panel took the view that these considerations were implicit in providing the best possible test of social impact, and were also essential considerations regarding regeneration.

Some indication of the meaning of the "best possible test of social impact" is revealed by paragraph 5 of the National Policy Statement, which explains that in order properly to assess the effect of the new casinos, there needs to be a sufficient number in each category to "allow the impact to be assessed in a range of locations and types of location that might be suitable" including, for example, urban centres and seaside resorts across different parts of Britain. Obviously, in the case of the one regional casino, this would be impossible to achieve.

Then in November 2005, the Secretary of State agreed a Framework Document with the Panel which was intended to augment the terms of reference. In addition to the criteria set out above, and in order to ensure that the impact of new casinos could be assessed on the basis of a range of information and experience, the Panel were asked to identify:-

- A good range of types of areas; and
- A good geographical spread of areas across Britain.

The remit for the Panel was to recommend to the Secretary of State areas for the location of casinos; their recommendations were not to be site or operator specific. The areas chosen by the Panel for the large casinos and for the small casinos were relatively uncontroversial. These were:

LARGE CASINOS

- Borough of Great Yarmouth
- City of Kingston upon Hull
- City of Leeds
- Borough of Middlesbrough
- City of Milton Keynes
- London Borough of Newham
- Borough of Solihull
- City of Southampton

SMALL CASINOS

- Bath and North East Somerset
- Dumfries and Galloway
- East Lindsey
- Borough of Luton
- Borough of Scarborough
- County Borough of Swansea
- Borough of Torbay
- Metropolitan Borough of Wolverhampton

What however was rather surprising, was the fact that of the 16 areas selected, 9 were already areas permitted for casinos under the 1968 Gaming Act and a number of large towns and cities which had not hitherto been permitted for casinos, were omitted. Given that the reason for this was that

they did not meet the population criteria in 1972, but now do, this is perhaps surprising. It becomes more so when one takes into account the fact that some of those who were included already have several casinos.

The real controversy, however was, the selection of the City of Manchester for the regional casino. Many commentators and observers had assumed that either the Millennium Dome in London's Greenwich (subsequently renamed 'The O2'), or more particularly Blackpool would have been chosen. For many years Blackpool has been vociferous in its campaigning for a resort-style casino, and this was a *cause populair* with many MPs. But in the end Blackpool was not selected because the Panel felt that it would not represent the best test of social impact. The Panel thought that most of its social effects would be exported, and that the potential regeneration benefits were found to be unproven and more geographically limited than in other proposals. Furthermore, the Panel did not think that a regional casino on its own would effect the transformation sought locally, nor would it optimise the wider regeneration through regional and national economic growth. As to Greenwich, the Panel felt that the proposal suffered from uncertain "additionalities" as regards regeneration benefits in general, and the proposal was unconvincing in its claim to offering the best possible location in which to test social impact.

In every respect, the Panel professed themselves impressed by Manchester's proposal, which they found had a "unique formula" to offer, which set it apart from the rest in terms of the full range of the Panel's remitted criteria of best test of social impact, regeneration need and benefits, as well as willingness to licence.

Parliament however did not agree. Whilst the necessary order for approval passed the lower House of Commons, the upper House of Lords rejected the order for the 17 casinos by three votes, because the Government submitted all new casinos as a package. Whether or not one agrees with the Panel's decision, the reality is that however cogent their reasoning and impeccable their judgement, any location other than Blackpool for the regional casino would have been unacceptable to a large body of opinion, uninformed though some of it was. Once again, the Government and in particular the Secretary of State, Tessa Jowell, demonstrated breathtaking incompetence in putting forward the Order, knowing that it would fail in the House of Lords, but without having a strategy to announce when it did indeed fail. The result was that Government policy lay in tatters once again, and the industry remained in limbo. Tobin Prior, UK Chief Executive of Kerzner International, commented:-

"These processes are always more complicated than observers might initially anticipate, but in Britain it has been particularly complicated and highly politicised. We certainly didn't think it would take this long to still be left in a stalemate".

There was some speculation that the order might be reintroduced omitting the regional casino in the dying moments of the Blair administration. The basis for this belief was that Gordon Brown would not want casinos on his agenda, once he took up the reins of power. However, it was not to be. It hardly came as a surprise to anyone that one of Gordon Brown's first acts was to sack the former Secretary of

State, Tessa Jowell, whose departure would no doubt have been more widely celebrated, had anyone in the industry believed that her replacement, James Purnell, would be an improvement.

The existing casino industry may also have felt a little more relief at the indication by the new Prime Minister as early as his first Parliamentary question time that the one regional casino would be scrapped. But they probably realised, like the rest of us, that for the first time in more than half a century we have a Government which regards the gambling industry as a pariah and that things are almost certainly about to get a horrible lot worse.

In his ministerial statement on 16 July, the new Secretary of State, whilst confirming that the Order for the 8 large and 8 small casinos would be represented to Parliament, he had written to the relevant local authorities giving them the opportunity to withdraw their area, should they wish to do so. He also indicated that the Order would not be brought back before Government had considered the results of the prevalence study to be published in September.

INDUSTRY VERSUS GOVERNMENT

On 11 June 2007, Mr Justice Langstaff delivered his Judgment in a judicial review⁴ brought by the British Casino Association against the Secretary of State. The case challenged the Government, arguing that the regime established by the 2005 Act, and regulations made under it, subjected them to considerable competitive disadvantage. The complaint was threefold, namely:-

1. that a small casino would be entitled to have four times the maximum number of gaming machines open to an existing casino, with large casinos even better favoured;

2. that those latter two can provide bingo, and even a small casino betting, which they cannot; and
3. that the market is such that it may not easily sustain rival casinos of both existing and new types in the same locality. They also complained about the removal of the entitlement to operate section 21 machines, which they have been able to enjoy in large numbers for some years. Once the Act comes fully into force on 1 September 2007, those machines must go⁵.

The Court was asked to determine whether the process by which the Government decided the entitlement of existing casinos was legal, as compared with those to be enjoyed by the proposed 17 new casinos. While the Judge concluded that the Government had met its legal obligations, he acknowledged the industry's concerns about the new regime and the inequalities created by it.

Although in law the challenge was never destined to succeed as a matter of law, the importance lies not in what was decided, but in the more general issues which it highlighted. The new Gambling Act will be fully in force on 1 September 2007 and there have been numerous changes in the industry. All casinos can now have more jackpot machines, category B1, (though only the new Regional will be allowed category A machines), there is no longer a cooling off period between joining a casino and gaming, the membership requirement will go altogether on 1 September, when casinos will be able to advertise widely, they are now permitted to have live entertainment and are generally more visible than they use to be. Yet of all these changes, only the removal of the membership criterion and the restrictions on



advertising are a product of the Gambling Act; the others were relaxations under the old legislation, and even advertising and membership changes could have been achieved by straightforward amendments to that legislation. It is perhaps ironic that of all of the varied opposition groups to the new legislation, it is the casino industry itself that has sought to challenge the Act in the courts.

This demonstrates the extraordinary situation which our legislators have created. I use the term advisedly: politicians of all three major parties have colluded in the destruction of gambling law reform. After all, it was the Conservative Party and the Liberal Democrats who forced the Government into the limitation on numbers for new casinos, apparently at random, and finally reduced the regional casino proposal to one controlled experiment. However, it is Government who have to take the lion's share of the blame, because they failed to stick to a course set by guiding principles, and allowed themselves to be constantly deflected by those either seeking political or commercial gain, or with a moral axe to grind.

A MATTER OF PRINCIPLE

In adopting the original Budd Report, Tessa Jowell stated Government's "key objective":

"We want gambling to be safe, not only for those who take part in it, but also in the way that it impacts on wider society. Gambling must continue to be conducted fairly, remain free of criminal influence and infiltration, and operate within a regulatory framework that offers protection of children and vulnerable adults. We also, however, want to see a successful British gambling industry; one that is able to respond rapidly and effectively to technological and customer led developments in both the domestic and global market place, building on its existing reputation for quality and integrity, and in the process increasing its already important contribution to the UK⁶".

These key objectives follow those in the Budd Report, and are based on the following principles:

"To interfere as little as possible with individual liberty to take part in the various forms of gambling but to recommend the imposition or continuance of such restrictions as are desirable and practicable to discourage socially damaging excesses and to prevent the incursion of crime into gambling".

Those words are not those of Budd, but of the Royal Commission on Gambling⁷ in its report published in 1978. That was itself based on words from the previous Royal Commission, which had reported in 1951. They were quoted in the British Casino Association's own call for reform in 1995⁸, which sought only limited changes, such as: abolition of the then 48-hour rule, relaxation of a ban on advertising (though interestingly did not seek to advertise on broadcast media), limited increases in stakes and prizes for machines with the number of machines being related to the number of tables and updating the permitted areas regime by applying a minimum population and a minimum distance criteria. Again, ironically, all of these changes, save for the last, had to a greater or lesser extent been enacted under the 1968 legislation.

Whilst the 2005 Act removes the demand criterion as a test for the grant of new casino licences, and whilst it has provided an alternative mechanism for a free market approach (without any limitation to particular areas or criteria⁹), the Act now enshrines the limitation of casino numbers in each category, subject to the ability of the Secretary of State to amend the maximum number by Order¹⁰.

CONTINUITY OF PRINCIPLE

For many years now, there has been continuity in the principle of gambling regulation, albeit with some changes in the way that principle should be interpreted and effected. This can be traced as far back as 1951, and has continued through the objectives of the Gaming Act 1968 up to and including the Budd Report in 2001, and the adoption of that Report by the Government. It can even be seen in the Joint Scrutiny Committee Report on the original draft Gambling Bill. Cracks started to appear as soon as the Government began interfering with the Joint Parliamentary Scrutiny Committee's recommendations, for example by restricting Category A gaming machines to regional casinos only. They then moved on to the numbers game, by which time they had overturned 50 years of reliance on the principles of regulation only where necessary, and instead of introducing those restrictions required to prevent undue proliferation began, at the opposite end of the spectrum, to permit only very small numbers of new, larger casinos, and then subjecting them to absurd tests for compliance not with regulatory requirements, but with nebulous concepts such as "social impact" and "regenerative benefits". Instead of allowing the industry to provide what it believed the public wanted, and allowing the public to express its own preferences, both were to become guinea pigs for the Government's social experimentation.

As described in previous articles, the enormous, and accidental, proliferation of casinos in the 1960s caused the then Government to pass the Gaming Act 1968, permitting casinos but including provisions that would regulate them and prevent proliferation of numbers. The principle of allowing the industry to operate and to grow commercially, subject to regulation and restriction to a greater or lesser degree, is a continuation of the principles behind gambling regulation set out by the original 1961 Commission. The limitation of numbers for any new casinos, with those casinos having competitive advantages over the existing market, whilst that market was frozen and prevented from further growth after April 2006 is an abandonment of the principle applied to gambling regulation first set out in 1951.

The Government's excuse for the changes and limitations was that it was responding to public concerns; the reality was that it was panicked into ever narrower limits on its reforms by the press and by religious fringe groups who were, and who continue to be, given far more credence than their constituency merits.

However, there is one example in the Act of a new restriction which reverses a 40-year old freedom, for which no one, other than Government, can be blamed. Whilst the position on advertising of casinos was restrictive under the 1968 regime, there was an exception for the advertising of casinos overseas¹¹, provided that people were not actually asked to subscribe money for gaming. There was a practical reason for this; it was to enable the advertisement of

overseas casino resorts in locations such as Las Vegas and Monte Carlo to have their holidays advertised in the UK. For reasons which are unfathomable, given that there could be no mischief arising from such advertising that needs to be addressed, the new Act makes it an offence to advertise non-EEA, or "foreign" gambling¹². In the explanatory notes to the section¹³ "foreign" gambling is referred to as gambling which takes place physically in a non-EEA State, and the example of a casino in Australia is given. Whilst it is open to the Secretary of State to make regulations specifying countries which are to be treated as though they were EEA States for the purposes of the section, unless and until that is done, any advertising of gambling in, for example, Australia, is a criminal offence. It would be a brave travel company indeed that offers holidays at casino resort hotels outside the EEA, because in so doing it will risk imprisonment of its directors.

THE CONSEQUENCES OF FAILURE

The supposed "policy", to use that term loosely, introduced for casinos is that the 16 new casino licences will be tested for social impact by means of three year prevalence studies, and that two such studies will take place before any consideration is given to either an increase in numbers or a removal of the restriction on numbers. It follows that it will be an absolute minimum of six years from the opening of those casinos before there can be a change. Taking into account the time that will be taken in granting licences and then building premises, even if the process were to start now, the probability is that at least 10 years will pass before there is any change.

The free market approach favoured by the Budd Committee has gone, as has public choice. Given that the necessary Parliamentary Order for the 16 new locations will not be presented until the Government has considered the prevalence study in September, if at all, we face the extraordinary situation that it is not possible in Great Britain to apply for a new casino licence in any circumstances whatsoever. For the moment at least, we join Albania, Ireland and Norway as the only other countries in Europe in which it is not possible to apply for a licence to operate a new casino.

A further allegedly unforeseen, but perfectly obvious consequence of Government policy is that there have been a flood of applications for new casino licences under the old Gaming Act 1968 until the opportunity for such applications ended on 28 April 2007. As at 31 March 2000, there were 118 trading casinos. By April 2006 there were 140 casinos operating, with 27 licences granted, but not yet operational and a further 32 applications are pending (of which two were for substitute of extended premises).¹⁴ Apart from progressing into a new enlightened age, with a less restrictive regime for casinos, operators have had to look back and use the restrictive outdated mechanism of 1968 legislation in order to expand their businesses by obtaining new licences.

Time will tell whether the Government's Casino Order does get through Parliament, in reduced form, but if it does it will be by the will of a new Secretary of State and under the stewardship of an unenthusiastic Gordon Brown. He is known not to like or want to encourage the gambling industry; hence his stifling the potential online industry when Chancellor with his tax regime, ensuring that it would be stillborn, his backtracking on a regional casino and on advertising on the broadcast media. The industry would be right to be pessimistic about its future prospects.

Had the British casino industry achieved its goals set out in 1996, the Government could have avoided the pain which it and so many of us have suffered over the Gambling Act. The changes could have been effected by straightforward amendments to the Gaming Act 1968, as in fact many of them were, and numbers of casinos could have increased according to the public demand for them without threat of the embargo we now have. As in so many areas of our national life, our Government has interfered to over protect us from ourselves, interrupted the flow of history, and creating chaos out of order. So far as the development of interpreting gambling regulation of casinos in the UK is concerned, it is galling now to remember the Labour party election slogan in 1997: "Things can only get better". **CGI**

REFERENCES:

- 1 Hansard, November 12, 1936
- 2 CGI 2006 Issue 4; CGI 2007 Issue 1
- 3 CGI 2006 Issue 4
- 4 [2007] EWHC 1312 (Admin) case number: CO/1863/2007
- 5 Gambling Act 2005, paragraph 65 of Part 7 of Schedule 4
- 6 "A Safe Bet for Success – Modernising Britain's Gambling Laws" CM 5397
- 7 Rothchild Commission (1978)
- 8 "Modernising Britain's Gaming Laws" – BCA 1995
- 9 Gambling Act 2005 – Section 159
- 10 Section 175 of the Gambling Act 2005
- 11 Gaming Act 1968, Section 42(1)(c)
- 12 Gambling Act 2005, Section 331
- 13 Paragraph 813
- 14 Report of the Gambling Commission 2005/06ss

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With over 20 years experience of gambling law Julian has advised some of the world's largest gaming and entertainment industry corporations. He and his team have also advised trade associations, including the British Casino Association and the Casino Operators' Association of the UK. Julian came to specialise in this area representing the Gaming Board for Great Britain (the UK regulator) for five years early in his career.

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