IS IT TIME TO RE-EVALUATE THE DISTRIBUTION OF CASINOS IN GREAT BRITAIN?

Julian Harris
Partner
Harris Hagan

This year marks the tenth anniversary of the Gambling Act 2005 (the '2005 Act') coming into force in 2007. This year also sees the Government's triennial review, which – apart from difficult issues concerning Fixed Odds Betting Terminals (FOBTs) and the advertising of gambling products - has led to calls for a review of the number of Category A machines permitted in casinos. This inevitably draws attention to the apparent discrimination between those licensed pursuant to the 2005 Act, and those with grandfather licences originally granted under the Gaming Act 1968 (the '1968 Act').

The reality is that there is probably little chance of Government taking any action in this regard, given the political hot potato that is gambling generally, though that is not to say that these arguments should not be made, nor that they do not carry considerable weight. However, in addition to that important issue, this important anniversary year should also prompt a look at the casino market more generally, given the rather curious position in which the industry now finds itself; a position not of its choosing, not recommended by the Gambling Review Body ('GRB') and not intended by Government.

The recommendations of the GRB[1], chaired by Sir Alan Budd, proposed in relation to casinos an abolition of the demand test for the granting of new licences and of their limitation to certain "permitted areas", a subject to which I will return. Instead, there was to be a free market, with the number of casinos left to commercial considerations, but with a minimum size requirement to prevent a return to the proliferation of small casinos seen prior to the passing of the 1968 Act. Even the gambling regulatory authority at the time, the Gaming Board for Great Britain ("GBGB"), whose Chairman, Peter Dean, was a member of the GRB, applauded the recommendations, as achieving: *"a proper*

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balance between increasing consumer choice for adults, affording greater protection for young people and the minority who have a problem with their gambling and ensuring that those who provide commercial gambling observe high standards of probity and social responsibility."

In its decision document published in March 2002[2], the Government largely accepted the recommendations of the Budd report (156 of 176), and with the first draft of the Gambling Bill published in November 2003, the scene was seemingly set for what the GBGB described as a "long overdue modernisation of Britain's gambling laws", with a free market for casinos, balanced by increased regulatory requirements, specifically with regard to social responsibility measures.

Then politics intervened. Suffice to say, given that the story is painful and well known, the Gambling Bill became caught up in a press frenzy and the "wash up" negotiations immediately prior to the 2005 general election. In order finally to get the new legislation onto the statute book, the Government was forced to introduce an experimental period of small numbers of the new casinos proposed by the Gambling Bill, in each of the three categories of casinos defined by size: regional, large and small, with just eight of each. In their "Casinos: Statement of National Policy" document[3], the Government recognised that the casino proposals "represent[ed] a significant change" which needed a "cautious approach". This was to enable them to assess whether their introduction would lead to an increase in problem gambling. However, and importantly, they also stated their belief that there needed to be a sufficient number in each category to allow the impact to be assessed in a range of areas and types of location that might be suitable. Then, when the assessment was made, it was decided that "it will be easier to judge the continuing need for a limit." This assessment was proposed to take place "no earlier than three years after the award of the first premises licence." The assessment was to be based on advice from the Gambling Commission, and, with the help of regional bodies, establishing the extent of the regeneration and other economic benefits.

In some respects, the story since then, is a sorry one. The largest proposed category fell victim to the factors mentioned above, so far as seven of them were concerned, and then in 2007, the one regional casino still proposed (in Manchester) was blue-pencilled by Gordon Brown as one of his first acts as Prime Minister. The large casino licences have now all been awarded, but of the eight small casino licences, only five have been awarded, and in at least two areas, it remains unlikely that there will be any commercial interest in the foreseeable future.

Meanwhile, what of the assessment of the success or otherwise of this experiment? And an experiment is what it was. This is supported by the instruction to the Advisory Panel[4] appointed to recommend areas in which the new casinos were to be located; namely to identify "a good range of types of area, and a good geographical spread of areas across Britain" in order to best test the social impact and regenerative benefits of casinos. This signalled a complete departure from the former demand criterion and the population basis on which permitted areas were selected under the previous legislative regime. In this context, it is perhaps odd that of the sixteen areas selected for the new casinos, no less than nine were in areas already permitted for casinos under the 1968 Act. The wisdom of placing casinos in areas in need of regeneration might also be queried, from the perspective of social responsibility.

The first licence was awarded to Aspers for the large casino in the London Borough of Newham in 2011, and it opened in 2012. By the end of 2016, thirteen of the sixteen available licences had been awarded, and of those, four[5] casinos had been opened. Several of the new licences were simply put into existing 1968 Act casinos. The Leeds casino opened in January 2017, bringing the total to five. Therefore, the earliest date for an assessment of the results of the experiment was 2014. Unfortunately, there was no long-stop date proposed by Government: The trigger was expressed in the Statement to be that the Government would "ask the Gambling Commission to advise…". Government has not, so far as I am aware, done so; nor, again so far as I am aware, has the Gambling Commission suggested that it should do so. The Commission has a duty to advise the Secretary of State about the regulation of gambling when it "thinks appropriate", which the Commission might to mean when it considers there is a threat to the licensing objectives.

It might be asked by some why this matters. However, the present position was intended to be temporary, and for good reason. Plainly the Government mentioned three years before having an assessment for a reason: presumably on the basis that this would be sufficient. But more than five years since the starting gun was fired on that period, it is beginning to have the air of permanence. As a permanent regime, it is illogical – anathema to a lawyer; it is contrary to market principles, and it has created barriers to entry greater even than those under the 1968 Act, which was one of the main criticisms of it. But most importantly, it undermines the whole basis of the regime proposed by the Budd Report, the GBGB and the Government.

It is perhaps ironic that, pursuant to regulation made under

the 1968 Act[6], anyone who could pass the regulator's probity test could apply for a casino in any one of fifty-three so-called permitted areas, including much of central London and other major cities, such as Manchester, Liverpool and Birmingham. Yet in 2017, no person or company can apply for a new casino licence anywhere in the United Kingdom, unless casino competitions start in a now very limited number of areas. Instead of a "great leap forward", we have regressed more than fifty years to the period before the 1968 Act when licences for casinos first became available.

Logic and commercial considerations

Flaws in the Betting and Gaming Act 1960 Act led to a proliferation of small unlicensed gaming clubs: over 1,000 by 1968. The 1968 Act therefore set up a regime in which gaming licences would be limited to certain permitted areas, and then only where the local licensing justices were satisfied that sufficient demand existed for the additional facilities proposed. The permitted areas, aside from some seaside resorts and three central London boroughs, were county boroughs with an estimated population of 125,000 or more during the years 1970 and 1973. Although this too created a market set in stone and with no flexibility, at least permitted areas were selected on the basis of population, and there were fifty-three of them. Moreover the demand test at least provided the opportunity for new licences where unmet demand could be shown.

The current regime, with the experimental aspect of fixed numbers, has no basis in logic, other than as a test. Furthermore, the brief to the Advisory Panel was to select areas other than on a commercial basis, so these were not necessarily those that a free market would choose: the evidence on that is clear, not least in the absence of any interest in some of them, where no sufficient demand is thought to exist.

Barriers to entry

In contested cases for new licences under the 1968 Act, this was an inevitable argument, especially when several operators in an area together objected to a new applicant. This was particularly so in areas where the casinos were in the hands of the major national operators. Today, single casino businesses are unusual, but the barriers to entry are even more stark. Yes, there are competitions for the new licences under the 2005 Act, but the high costs, complex issues and enormous amount of time that these involve, make them a serious barrier to entry for new or smaller entrants, especially those without access to very substantial funds. In any event, those licences have either been granted, or there is no competition process available.

The remainder of the market; i.e those casinos whose licences were granted under the 1968 Act, was frozen in 2007[7]. Although there is a limited ability to move licences within the same licensing area, they can neither be moved elsewhere, nor can any more be granted. So unless an entrant or other operator can acquire an existing licence, the market is completely static. Again, ironically, it cannot respond to demand. Furthermore, given the ultra low limit on machine numbers permitted in 1968 Act casinos, they are hamstrung and, in the main, cannot even viably expand into larger premises because of the imbalance they would then suffer in the ratio between gaming tables and machines.

No wonder then that some of these licences are no longer in use, while others have been moved adjacent to other licensed premises in order to maximise machine numbers and develop a viable business. There can be no barrier to entry greater than the fact that in 2017, no new casino licences can be applied for.

Purpose of the 2005 Act

Both in relation to casinos, and generally, the 2005 Act was intended to modernise what were generally agreed to be outdated gambling laws, stemming from an age when gambling was seen as "at best morally questionable" and "grudgingly tolerated" to a time when it had become "part of the main stream of leisure activity"[8]. Accordingly, there was to be a removal of unnecessary regulatory burdens on an industry which the Government believed had "built a world reputation for integrity".[9] The balance was to be a requirement to adhere to a code of social responsibility.

That code has been developed, and this, together with many other developments designed to protect players, is embodied in the Licence Conditions and Codes of Practice, which after three revisions, now runs to some eighty-one pages.

By contrast, we have a position where there is almost no scope at all for growth in the casino industry. In 2007 there were 142 casinos operating in Great Britain. This had grown only to 148 by March 2016 though in some cases there are two licences per premises. This then became 147 with the closure of Genting's Star City casino in Birmingham, formerly the largest casino licensed under the 1968 Act. Significantly some forty 1968 Act licences are dormant. Without change to the current licensing regime, there is likely to be further ossification, given that the market is prohibited by law from opening any new premises, or, in most cases, even from enlarging existing ones in a way which works commercially.

Instead of a free market, with operators able to apply for licences in areas where a casino would be successful, subject only to a minimum size to prevent proliferation, as prepared by the GRB and accepted by Government, the market is now moribund, with no scope for expansion, or even to respond to consumer demand.

Unintended consequences

Had the criteria set for the Advisory Panel been commercially based, the practical need for re–assessment might be less urgent. Currently there is no scope for review or change to the areas permitted for 1968 Act casinos. The fact that 2005 Act casinos were allowed only in sixteen areas, not all of which are commercially viable, in effect means that the industry is substantially worse off then it was before the new legislation.
In this context, it is interesting to note that as early as 1976, the Royal Commission report recommended that the regulations on permitted areas be revoked. Given that the 1968 Act had reduced the number of clubs from over 1,000 to about 125 by the end of 1977, it concluded that a rigid and arbitrary formula should be replaced by entrusting the decision to the good sense of local licensing authorities, subject to advice from the GBGB. Now we have a rigid system even for the 2005 Act casinos.

The subject was not, however, pursued until the deregulation proposals of the 1990s. The then Government in February 1996 concluded, sensibly, that there should be additional permitted

areas on the basis that the 1971 criteria were no longer relevant. The somewhat complex proposals would have added as permitted areas: Croydon, Dartford, Folkestone, Gloucester, Hastings, Ipswich, Morecombe, Oxford, Peterborough, Redbridge, Slough, Swindon and Weymouth. The second, in November 1996, proposed: London Docklands, Bath, Eastbourne, Exeter, Harrogate, Norwich, Telford and York. Finally, in March 1997, Milton Keynes and Weston-Super-Mare were added. Whilst this might be thought only to be of historical interest, the significance is that many of these areas are those that would have qualified under the 125,000 population trigger, had the figures ever been updated. The same and others too would seem to be obvious candidates. Nevertheless, leaving the detail behind, these locations serve to emphasise the rigor mortis besetting the casino market.

Apart from Bath and Milton Keynes, which were included in the sixteen new licences, none of these other towns and cities have ever been permitted casinos, regardless of public demand or other consideration.

The vast majority of the casino market – over ninety percent – was originally licensed under legislation passed almost fifty years ago. Even forty years ago it was thought to have outlived its limitations. Twenty years ago it was thought appropriate to add some twenty-three more permitted areas. None have ever been added. And instead of creating a substantial market of 2005 Act casinos, there are only sixteen allowed, and those exclude some important and large cities and towns.

Whilst some of the former restrictions on 1968 Act casinos were removed by the new legislation, such as the ban on alcohol on the gaming floor, less restricted advertising and the removal of the twenty four hour rule and membership requirements, they remain at an enormous competitive disadvantage to 2005 Act casinos, primarily due to lower machines, in terms of numbers and stake and prize limits.

Moreover, they face enormous competition on gambling spend from remote gambling, where there are limits on live numbers, no stakes and prize limits, no speed of play restrictions and when all forms of permitted gambling may be provided on one site. Indeed until 2014 even obtaining a licence and paying UK tax was optimal.

Conclusion

It is perhaps unfortunate that Government did not provide a more specific framework for assessing the effects of the new licences and moving on from its test programme. As Dan Waugh of Regulus Partners pointed out in his excellent review of gambling "Budd Revisited – Gambling in Great Britain 15 years on".[10]:

"Restraining gambling venues within anachronistic licensing constructs while at the same time unshackling remote gambling can create regulatory imbalance – and the consequences of this may not be uniformly positive".

In an ideal world, we would, as Dan Waugh suggests, have a further systematic review of gambling policy after fifteen years since the Budd report, given that the GRB's recommendations were never implemented as intended, and given the profound changes that have taken place during the intervening years. But that is a hope that cannot translate into realistic expectation. :: CGi

References

1 Gambling Review Report: CM 5206
2 A Safe Bet for Success – Modernising Britain's Gambling Laws: CM 5397
3 DCMS 16 December 2004
4 DCMS January 2007
5 The Opera House Casino in Scarborough was awarded the small casino licence in February 2012 but they are still operating under their original 1968 licence.
6 Gaming Clubs Regulations 1971
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JULIAN HARRIS

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With over 30 years experience of gambling law Julian has advised some of the world's largest gaming industry corporations. He and his team have also advised governments, trade associations and private equity houses in both online and land based gaming.

Julian is an experienced advocate, a respected and sought after conference speaker and author. He is recommended in all guides to the legal profession, and has been described by Chambers Guide as "the best gaming lawyer in London". Harris Hagan was awarded "Gaming Law Firm of the Year" in 2013. Julian is past President of the International Association of Gaming Advisors.