IPSA AISP INTERNATIONAL POLITICAL SCIENCE ASSOCIATION
ASSOCIATION INTERNATIONALE DE SCIENCE POLITIQUE

PANEL

"Homo Ludens: The Public Dimension of Gaming"

Chair: **Prof. Dr.José Ignacio Cases**

Co-chair: **Prof.Dr.Juan Zornoza**

Discussant: **Mr. Jaime Estalella**

Paper:

British Position on On-line Gambling

Mr. Julian Harris

Sponsored by

Homo Ludens: The Public Dimension of Gaming
British Position on Online Gaming
Paper presented by Julian Harris, Harris Hagan, London UK

Introduction

1. According to Benjamin Disraeli, British Prime Minister 1872 – 1880, "there is no gambling like politics. Nothing in which the power of circumstance is more evident". A later Prime Minister, Harold Macmilllan (1957 – 1963) would probably have agreed with him. When asked by an interviewer what he feared most in politics, he said "events, dear boy, events". To some extent, all life is a gamble and gambling is an element in many of the decisions we take, in its broad sense.

2. In its narrow sense, playing a game for the opportunity to win a prize, gambling is as old as man, and examples of it can be found in most, if not all, human societies: sometimes lauded, sometimes reviled, often prohibited but equally often permitted and even used as a means of raising state revenue.

3. In Great Britain, it has generally been accepted that, as parliamentarian and philosopher, Edmund Burke put it, in a House of Commons speech in 1780:

> *"Gambling is a principle inherent in nature".*

4. Whilst gambling is now accepted as an inherent part of human life, attitudes to it, and the way in which it has been regarded, has altered over centuries. The way in which it is treated now in Great Britain reflects changes in attitude, but also is the real result of a number of historical developments. It is necessary to view those developments, and certain historical events, in order better to understand the current British position on gaming generally, and specifically on online gaming.

5. This paper will demonstrate how our current law is the product of tradition and concerns developed through our historical experience over centuries, and, more recently, political events of the sort which the Prime Minister so feared, and also the influence of European politics and jurisprudence.

Terminology

6. The current gambling legislation, the Gambling Act 2005 ("the 2005 Act") defines "gambling" as:

> *"(a) Gaming[1];*

[1] GA 2005, Section 6

(b) Betting[2]; and

(c) Participating in a lottery".[3]

7. "Gaming" means playing a game of chance for a prize; a definition which has changed little since common law and through the major legislation of the 1960s, culminating in the Gaming Act 1968. Gaming includes a game involving both chance and skill, even where the chance element can be eliminated by superlative skill.

8. Early gambling legislation often used both terms interchangeably, and until the Gaming Act 1845, sometimes included within the description of proscribed games, games of skill such as bowls, tennis and quoits.

The Historical Perspective

Gambling or National Reform

9. Under English common law, neither betting nor gaming were unlawful, from which it followed that gaming debts were recoverable through action at law, a position which endured until 1845. The earliest legislation was usually directed to controlling the playing of games, whether they involved wagering on them or not, with the object of preventing such play from interfering with the practice of archery. One recognisably "modern" casino game, dice, was introduced by the Romans, possibly during the rein of Emperor Claudius who "visited" Britain, and was so keen on dice playing himself that his carriages were arranged for the playing of the game, and, academic that he was, he even wrote a treatise on the subject.

10. Possibly the first English legislation involving gaming came in 1190 when an edict was established for the regulation of the Christian Army under the command of Richard 1 of England and Phillip of France during the crusades. This prohibited any person in the army, beneath the degree of knight, from playing at any sort of games for money. Knights and clergymen might play for money, but none were permitted to lose more than 20 shillings in a day on pain of being whipped naked through the army for three days!

11. Cards are much more modern, coming to Europe from China only in the 14th century and becoming popular in England following the marriage of Phillip II of Spain to Queen Mary in the 1550s, when the King's numerous and splendid retinue brought with them the passionate love of cards which then prevailed in the Spanish Court.

[2] GA 2005, Section 9
[3] GA 2005, Section 14 and Schedule 11

12. A serious attempt at prohibition of gaming had however already been made by Queen Mary's famous father, Henry VIII, some years earlier. Again, the concern was to reverse a decline in the practice of archery, so necessary for national defence, which underlay the Unlawful Games Act 1541.[4] The Act required all able bodied men of 60 and below to own a bow and arrow and to practice archery. The statute did not seek to restrict the private playing of games, whether for money or not, but struck at the setting up of commercial gambling businesses by making it a criminal offence to keep open for gain any house or place for the playing of a number of specified games. These included casino games such as dice or cards, but also included some sports, such as bowling, quoits and tennis. The prohibition on gaming houses, whilst subject to amendments to reflect change in social needs, nevertheless remained in force until eventually repealed by the Betting and Gaming Act 1960.[5]

13. In the more religious 17th century, the purpose of gaming legislation was primarily to ensure religious observance: the 1625 Act sough to prevent people from meeting out of their own parishes on Sundays for the purposes of any sports or pastimes, again whether they involved or gambling or not: no distinction was made.

14. Then during the commonwealth (1649 -1660), further attempts were made under Cromwell to prevent gaming, though again no distinction was made between recognisably gambling games and sports.

Coffee House to Casino

15. With the restoration of the Monarchy in 1660, a period began during which gaming in all its forms become widespread throughout society, not only in private, but also in public, with the appearance of coffee houses in London in the 1660s. These became centres for meetings, business and gaming: Lloyds, now better known for insurance, was popular with ship owners and merchants, Child's with the clergy and Jonathan's which subsequently developed into what became the London Stock Exchange. The King himself, Charles II, known to be a man who indulged in many pleasures, was himself fond of gaming; indeed, it was during his rein that the court itself developed gaming through a court official (the Groom Porter) when the King authorised the establishment of gaming tables in an early form of casino, but at the royal palace. Royal support for, indulgence in and encouragement of gaming continued until the mid eighteenth century.

16. As some of the coffee houses metamorphosed into clubs in the 18th century, soon began possibly the most glamorous but also desperate phase of gaming in London. The change from coffee house to club, most notably Whites, Almack's (now Brooks) and the Beefsteak, was indicative of a general need to protect the clientele from

[4] The Bill for the maintaining artillery, and the debarring of unlawful games (33-10-8 C 9)

[5] Betting and Gaming Act 1960, Section 15 Schedule 1 Part 1

thievery, assault, cheats and card sharks. Coffee houses were open to the public and became the centre of life for the criminal. Whites were the first to make a change, and began allowing admission only through membership.

17. At the same time, gaming also flourished at the newly fashionably spa towns such as Bath and Tunbridge Wells, where gaming became an essential part of social life; the spa town created the archetype of the modern casino. In short, gaming became an essential part of social life, to such an extent that in his book "The Compleat Gamester" Richard Seymour noted:

> *"Gaming has become so much the fashion amongst the Beau Monde that he who in Company, should appear ignorant of the Games in Vogue, would be recommend low bred and hardly fit for conversation."*[6]

18. Although gaming remained unlawful under the 1591 Act, the fact that "it was enjoyed" at the highest levels of society, including the royal family, the aristocracy and politicians ensured that the law was simply not enforced.

Cheating and Ruin

19. The inevitable consequence of widespread gambling involving huge sums of money, was that it attracting cheating and the loss of many a fortune. There were numerous attempts to curb abuses. The Gaming Act 1664[7] was passed with the aim of curbing cheating and curbing the risks attached to excessive gaming. Cheating was obviously to be avoided if possible, but the concern about gaming on credit was that losing gamblers were granting mortgages and conveyances for their indebtedness, with the consequence that their estates were being lost to their heirs and successors, with a consequent threat to the social order.

20. Because the Act proved inadequate, the Gaming Act 1710[8] extended the provisions of the 1664 Act by providing that securities given to secure payment of gaming debts would be void, and gaming debts over £100 would be unenforceable. With one important amendment, this provision remained in force until repealed by the 2005 Act.[9]

21. Nevertheless, the legislation proved so ineffective that an anonymous pamphleteer complained in 1722 that:

> *"The wholesome laws now in being against excessive and deceitful gaming and gamesters are being entirely ineffectual: the evil is now above ten times greater than when the last law was made in the 9th year of the late*

[6] R Seymour, The Compleat Gamster (1754), 111
[7] *16 CH 2 C7*
[8] 9 Ann c19
[9] GA 2005, S356 and Sch 17

> *Queen;…….thousands of families since that time have been ruined in gaming only; and it daily increases."*

22. The cause was the growth in popularity of some bankers' games because the player acting as banker enjoyed an advantage over other players, so that a sophisticated player would inevitably win in time from the uninitiated.

23. The aim of much of the legislation in the 18th century[10], ineffective though it might have been, was, in effect, to protect the upper classes from the ruinous consequences of high stake gaming and wagering their inheritance into oblivion. There are numerous examples, but two will perhaps officially illustrate the point. A contemporary of Lord Harvey wrote that:

> *"The beginning of his life was spent in attending his father at Newmarket and his mother at the gaming table".*

24. Lord Thanet was said to have lost his entire income of £50,000 at one single sitting.

25. The continuing patronage of royalty ensured success. A number of clubs were established in London in the early years of the 19th century, thanks to the support of the Prince Regent, later George IV, the most celebrated being Crockfords which had a membership of just over 1,000. Under its chairman, the Duke of Wellington, the most influential figure in London society, it was ensured success and was said to be winning "the whole of the ready money of the then existing generation" in the 1830s. In its first two years, it realised just over £300,000, an enormous fortune.

Work and Religion

26. At the very peak of the popularity of gaming, the first signs of a backlash began to appear in the early years of the 19th century, heralding a very different attitude taken towards such pleasures by the Victorians. Support for abolition came from the protestant churches, and in particular the Methodists, who continue even today, to seek to limit, if not entirely prohibit, gambling. The early 19th century saw the increase of religious and moral arguments against gaming still prevalent in the 21st century, though of less influence in more secular times.

27. The religious and moral argument was fuelled not so much by concern about the ruination of the upper classes, but rather the distraction of the working class from "improving" leisure activities and, most importantly, work. From 1795 onwards, when the first bookmaker was recorded as operating on course, the number of bookmakers increased, and betting on horses became the gambling choice of the working class. This was aided by the growth of the railways, telegraphic communication and the growth of the newspaper industry. Whilst aristocratic

[10] Gaming Act 1738, Gaming Act 1739 and Gaming Act 1744

customers could bet on credit, bookmakers would seek cash from those lower down the social scale, with the result that bookmakers took to operating in public streets, or in cash betting offices.

28. Concern about the increase in bookmaking lead to the appointment of a Select Committee by the House of Commons in 1844 to inquire into gaming of every kind. This concluded that whilst the existing legislation might be effective in protecting the wealthier members of society from the damaging consequences of gambling, but to:

> *"leave comparatively unprotected those with inferior class, who may be sufferers from apparent small losses".*

29. The Gaming Act 1845 resulted from the study, and rendered all gaming and wagering bets void and unenforceable, as well as strengthening the 1541 legislation against gaming houses. Section 2 provided that a place would be deemed to be a "common gaming house" – and therefore illegal – if used for the playing of an illegal bankers' game or the chances of any game were not equally favourable to all the players.

30. Ironically, the 1845 Act coincided with a decline in the popularity of gaming, possibly due to social developments, but also to the rise of betting as the most popular form of gambling and the increasing number of betting houses. Throughout the 19th century and up to the passing of the Street Betting Act 1906 there were attempts to suppress street betting. Like earlier attempts to suppress gaming houses, these was largely unsuccessful, and betting continued to rise in popularity, no doubt aided by the enormous growth in horseracing and subsequently greyhound racing. The support of the Royal Family, notably Edward VII, for horseracing, and his own preponderance for gambling, helped to make the sport fashionable throughout society.

31. In the first half of the 20th century bookmaking remained popular, and indeed the Betting & Lotteries Act 1934 empowered local authorities to grant licences authorising the provision of betting facilities on tracks. Despite these efforts at regulation, there remained an absence of lawful opportunities for off course betting. Despite prosecution and fines, street bookmakers and their agents were undeterred and throughout the country cash bets were accepted at offices and by agents visiting bars, factories and homes.

Background to the Gaming Act 1968

Regulating Commercial Gaming

32. As we have seen, for centuries until the 1960s, legislation attempted to address various issues arising from gaming, though none of that legislation could be described as regulation. It addressed distinct problems, but did not provide for any

framework of regulation. Rather it sought to address particular uses and abuses connected with gaming, or to prevent people being distracted by it from other more authorised activities. The first time the concept of licensing was used was in the Betting & Lotteries Act 1934.

33. Up to the 20th century, legislation had been principally to address the following issues:-

(1) The prevention of time wasting on gaming and the deflection of effort on more worthwhile activities, from archery in the 14th century to religious observance in the 17th century, to work in the 19th century.

(2) Preventing commercial gaming in the 16th century.

(3) Restricting credit in gaming.

(4) The desire to prevent people from ruining themselves and their families through gaming.

(5) Preventing crime, but particularly in relation to fraud and cheating.

34. The post war period saw a number of attempts to grapple with the issue of commercial gaming, and, for the first time, serious consideration was given to the arguments for and against gambling itself and the regulation of it. From 1948 to 1951 a Royal Commission ("The Commission") appointed by Parliament on betting, lotteries and gaming examined the impact of gambling. In its report[11] it concluded that:

> *"Gambling as a factor in the economic life of the country, or as a cause of crime, is of little significance, and its effects on social behaviour, in so far as they are a suitable object for legislation, are in the great majority of cases less important that has been suggested".*

35. This was a surprisingly liberal view, even questioning whether legislation was appropriate. Nevertheless, the Commission did not recommend the legalisation of commercial gaming, which had in any event declined in popularity but rather restricted its recommendations to legalisation of betting in licensed premises. So far as gaming is concerned, the Commission did recommend that legislation permit individuals to take part in gaming and for them to be charged for participation. In a theme which continues today, albeit in a less paternalistic tone, the Commission on the one hand sought to achieve a balance between the liberty of the individual to judge how best to spend his leisure time, and the need to curb the evils of unauthorised commercial gambling on the other.

[11] 1951, CMB8190

36. Whilst wholly successful in relation to betting, founding the well regulated and well run industry Great Britain still has today, the Betting & Gaming Act 1960 which enacted the findings of the Commission, unwittingly enabled commercial gaming to establish itself with an enormous growth in casinos and gaming machines. As the 1978 Royal Commission put it, casinos were "flourishing like feeds in many parts of the country. The reason was that there were no requirements whatsoever within the 1960 Act to control either the quality of casino management, or even the quantity and location of casinos. This was despite the 1951 Royal Commission recommending:-

> *"Strict control over the provision on a commercial basis of all forms of gambling facilities, including the licensing or registration of all those who provide such facilities".*

37. By the mid 1960s there were some 1,000, often tiny, casinos throughout Great Britain, and machines in public houses and other outlets with no control over jackpots or the percentage of stakes paid out. Although an attempt at further control was made by the Betting, Gaming & Lotteries Act 1964, it failed because of a lack of foresight by the Government, enabling machines to be developed to evade the system of regulation. By the middle of decade, casinos and jackpot machines were well established, as were amusement with prizes machines, available not only in public houses and cafes, but also in amusement centres, seaside arcades and at fairs.

38. As the then Home Secretary, Roy Jenkins, summarised the situation:

> *"The Betting & Gaming Act 1960 has led to abuses, particularly in the field of gaming clubs, which were not foreseen by its promoters. This country has become a gamblers paradise, more wide open in this respect than any comparable country. This has lead to a close and growing connection between gaming clubs and organised crime, often violent crime, in London and other big cities."* [12]

Policy of the Gaming Act 1969

39. Unsurprisingly, the conclusion was that a wholesale and radical reform of the law was required. There was no serious consideration of the possibility of prohibition; this flows partly from the view that people who wanted to gamble should be allowed to do so, expressed by the Royal Commission in 1951, but also because of its sheer impracticality following the explosion of gambling during the 1960s. As Lord Stonham, Minister of State at the Home Office commented in the House of Lords:-

[12] The Times, 13 September 1966

> *"One hope of controlling or even containing [commercial gaming] is to make it lawful – but on our terms."*

40. The view of the Home Office was that gambling was a "vice" – thereby hinting at a element of paternalistic and moral disapproval of it – which could not be eradicated, but should be controlled and strictly regulated. The approach of the Gaming Act 1968 was therefore to render illegal bankers' games and games of unequal chance, unless they were played on premises for which a gaming licence was held, and only if played strictly in accordance with conditions laid down by regulations. There would also be controls over those who could apply for a gaming licence, who had to be approved, and the places where casinos could be located. Most significantly, there would be a "demand" test applied to applications for the grant and renewal of licences with a view to ensuring that a criminal element was excluded, and that the proliferation of casinos would be prevented. A new regulator, the Gaming Board for Great Britain, was established to regulate gaming, and to investigate those applying for licences to establish that they were "fit and proper" to do so. Until 2005 there was a rule that only members of the club could play, and there was a cooling off period of 24 hours (originally 48) between joining and playing. All of these rules were designed to ensure that there were no more than sufficient facilities to cater for the demand for them, and that people should not be tempted into gaming on a whim.

41. Most significantly from an online perspective, in order to take part in gaming, people had to be present on the premises at the time gaming took place. The attitude to gaming is neatly summarised in a Royal Commission Report of 1978, which, though paternalistic and outdated now, it at least exhibits a tolerance not seen in many other countries:

> *"The objection that punters are wasting their time is a moral or possibly an aesthetic judgment. As it happens, none of us is attracted by the idea of spending an afternoon in a betting office. But the people who frequent betting offices have chosen to enjoy themselves in their own way and rethink that in a free society it would be wrong to prevent them from doing so merely because others think they would be better enjoyed in digging the garden, reading to their children or playing healthy outdoor sports."*[13]

42. The Gaming Act 1968 was passed with the aim of restoring order to a gambling scene that had become out of control during the 1960s. The Act recognised that commercial gaming could no longer be suppressed, but instead sought to bring it under strict controls. The 1978 Royal Commission replicated the Home Office's "introduction to the Gaming Act" produced in 1968:

[13] The Royal Commission (1978), paragraph 7.30

> *"The main purpose of the Act is to curb all forms of gaming which are liable to be commercially exploited and abused. It recognises that commercial gaming cannot now be suppressed, but seeks to bring it under strict control. The principle on which it proceeds is that no one can claim a right to provide commercial gaming: it is a privilege to be conceded subject to the most searching of scrutiny and only in response to public demand.*
>
> *The controls have as their common object to purge this activity in its criminal elements, to cut out excessive profits, and to ensure that gaming is honestly conducted in decent surroundings. Beyond that, the intention underlying the Act was to reduce trafficking in a number of commercial clubs providing games other than bingo; to restrict bingo to enabling market gaming for modest prizes; and to check the proliferation of gaming machines and machines used for amusements with prizes".*

43. Obviously the 1968 Act made no provision to online gaming. As we have seen, the Act required approval of the operator, in the form of a Certificate of Consent, to conduct gaming from named premises and there was a requirement[14] that those wishing to participate in the gaming should be present on those premises when the gaming took place. Nevertheless the use of the internet to offer gambling facilities for betting and firms overseas was uncontroversial. Since the early 1960s, it had been lawful in Great Britain for bookmakers to take bets from their customers by telephone. Given that the internet was merely a different way of using a telephone line, there was nothing to prevent bets being made and taken online. In fact, the legality of such arrangements was recognised by the Home Office.[15]

44. In the case of gaming, no licences were available in the United Kingdom, as participants would not be present on the premises but numerous offshore gaming sites offered virtual casino games to British customers.

45. In their report for 1995/6, paragraph 1.39 sets out the considered view of online gaming of the Gaming Board for Great Britain, the regulator under the 1968 Act about:

> *"The potential for the proliferation of uncontrolled and unregulated gambling opportunities……large scale hard gambling activities could become available in peoples homes with no proper control over such matters as gambling on credit or by children and other young persons".*

46. Nevertheless, the Board adopted the position that it was not illegal for British residents to participate in gaming on offshore internet sites from the privacy of their own homes, so that the activities of such sites in accepting bets from British

[14] Gaming Act 1968 Section 12
[15] The grant and renewal of bookmakers' permits: Guidelines for Licensing Justices, May 1999

residents was not illegal. This was on the basis that the gaming took place where the servers were located – offshore – and although in law the participation in the gaming by the customer took place within Great Britain, the Board was content to rely on the fiction that this fell within one of the exceptions to illegal gaming, which was gaming "on a domestic occasion". The position so far as internet cafes and other publicly located computers were concerned, was rather more difficult, but the Board took the view that it would not be legal to use those for gaming.

47. Furthermore, offshore operators were permitted to advertise in the UK, provided their advertisements did not amount to an invitation to the public to subscribe money or to apply for information about facilities for subscribing money for gaming. This was on the basis of an exemption for the advertising of foreign casinos in the legislation, to enable, for example, hotel resort casinos in Las Vegas and elsewhere to advertise in holiday brochures. In effect, the Gaming Board determined that players who wished to gamble offshore via the internet could do so, on the basis that they were taking part in gambling overseas, to which there was no objection in law.

The need for change

48. The underlying philosophy of the 1968 Act, namely that gambling was a vice which could no longer be obliterated, but should only be made available to the extent necessary to satisfy unstimulated demand, had begun to look outmoded and out of line with current thinking by the 1990s. Much had changed since 1968. Moreover the pace for change was accelerating and the feeling became rife that the existing legal framework was no longer capable of coping with the changes. There were attempts at some piecemeal deregulation measures, but these were minor and the Government decided that a more wholesale change was required. To that end, it set up the Gambling Review Body ("GRB"), under the chairmanship of economist Professor Sir Alan Budd[16]. The GRB was asked to:

- Consider the current state of the gambling industry and the ways in which it might change during the next ten years against the background of economic pressures, the growth of e-commerce, technological developments and wider leisure industry and international trend;

- Consider the social impact of gambling and its costs and benefits; and

- Consider and make representations for the kind and extent of regulations appropriate for the gambling activities in Great Britain, having regard to their social impact, the need to protect the young and the vulnerable, the importance of preventing gambling from being carried out so as to allow crime, disorder or public nuisance, the need to keep gambling free from criminal infiltration and money laundering risks, the desirability of enabling gambling to maximise the UK's economic welfare, the implications of the taxation of gambling, the need for appropriate and streamlined regulation and the availability and effectiveness of treatment programmes for problem gamblers.

49. The GRB identified its central dilemma:

> *"The most difficult general issue that we have had to resolve concerns the familiar dilemma between the desire to permit free choice and the fear that such choice may lead to harm either to the individual or to the society more widely."*

50. We see from these words a continuation of the desire of the Commissions of 1951 and 1978 to allow individuals free choice and to curb harm. That harm, however, was no longer the abuse and evils arising from uncontrolled gaming, but rather the harm that can be done to individuals from excessive or irresponsible gambling.

[16] DCMS Gambling Review Body – Gambling Review Report CM 5206

51. Their conclusion was to move in the direction of allowing greater freedom for the individual to gamble in ways, at times and in places that were permitted under the 1968 Act, such greater freedom to be balanced by tighter controls on the freedom of young people to gamble. The GRB departed from the views of the 1951 and 1978 Commissions who wanted facilities to be limited, opting instead for a free market approach.

52. The GRB Report was published in July 2001. It contained 176 recommendations for changes to the law. It said that its recommendations were designed to simplify the regulation of gambling and to extend choice for adult gamblers on the one hand, whilst on the other, seeking to ensure gambling be crime free and honest, that players know what to expect and should be free from exploitation and that there should be protection for children and vulnerable persons. It also stressed the need to ensure that any system of regulation should be flexible enough to incorporate technical developments and to enable adjustments to be made to regulations in the light of practical experience. Most significantly, it recommended that all gambling regulation should be incorporated into one Act of Parliament, that all gambling activities should be regulated by a single regulator (the Gambling Commission), though spread betting would not be included, at least initially and would instead continue to be regulated by the Financial Services Authority and the National Lottery should also continue to be separately regulated. In addition, it recommended a system of licensing of individuals and companies to provide gambling, which should be the province of the Gambling Commission, whilst licensing of gambling premises would be a matter for local authorities.

53. Government responded to the Report in the form of a White Paper in March 2002, under the title "A Safe Bet for Success".[17] The White Paper accepted the legislative scheme proposed by Sir Alan Budd and his Committee and many of their specific recommendations. In November 2003, the Government published the first draft of the Gambling Bill[18], which was scrutinised by a Joint Committee of both Houses of Parliament established in July 2003, which reported in April 2004.[19] The Government responded to the Report in June 2004. The Committee was reconvened to consider policy on regional casinos, and report again in 2004, with the Government's response in September 2004. Of the Committee's 151 Recommendations, 123 were accepted by the Government. The Gambling Bill introduced into the House of Commons on 18 October 2004 was therefore based heavily on the evidence and study undertaken by the Committee. It was given a second reading on 1 November 2004 and then sent for detailed consideration to Standing Committee B. A number of significant changes were made, and in particular to the proposals relating to casinos.

[17] CM 5397
[18] CM 6014
[19] HL Paper 63-1 – HC 139-1

54. Perhaps most importantly, the GRB, the Government and the Joint Parliamentary Committee concluded that attitudes to gambling had changed: whereas existing gambling legislation and policy were based on the principle that gambling should merely be "tolerated", it had now become a mainstream leisure and tourist industry. The Committee's recommendations were designed to simplify the regulation of gambling and extend choice for adult gamblers, whilst seeking to ensure at the same time that gambling remained crime free, conducted in accordance with regulation, and honest, so that players knew what to expect and would not be exploited, and with proper protection of children and other vulnerable people.

55. There were to be no limitations borne out of moral, religious or paternalistic arguments, but nor was there to be a free for all. The free market approach was to be tempered by a requirement for social responsibility. As the then Minister, Tessa Jowell, put it:

> *"Our present gambling laws are badly in need of reform and updating. Reforms go hand in hand with tough practical measures to protect the young and vulnerable people. There is no doubt that our current laws, as well as being too complex and out of date, fail to reflect the extent to which gambling has become an every day part of the way in which millions of people choose to spend their leisure. But parents have a right to expect that their children will be protected by the law."* *[Reference?]*

56. A balance was to be struck between developing gambling as a legitimate leisure pursuit and mitigating its potential negative consequences. As the Government put its belief:

> *"Gambling should be seen as part of the mainstream leisure industry, offering fun and attractive products in a regulated environment".* [20]

57. Ironically perhaps, it was in relation to online gaming that the Government's proposals and the recommendations made both by the Budd Report and the Joint Committee remained largely in tact. From the time that the process of reform started with the appointment of the Budd Committee in 1999, and the publication of its Report in 2001, up to the reporting of the Parliamentary Joint Scrutiny Committee, Government Policy was consistent and without major policy changes. But by 7 April 2005 when the Gambling Bill obtained Royal Assent, some five and a half years later, Government Policy, at least in relation to casinos, lay in tatters. In the face of opposition, particularly in the press, and horse trading with other political parties immediately before the election, limits were put on the number of new casino licences that would be allowed in a reversal of the free market approach. Politics intervened to derail a major policy change. However, no such issues arose in relation to online gaming.

[20] DCMS Draft Gambling Bill Policy Document CM 6014 Nov 2003 para 2.10

58. The free market approach was tempered by the three objectives[21] set out at the beginning of the 2005 Act. These were:

- Preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime;
- Ensuring that gambling is conducted in a fair and open way; and
- Protecting children and other vulnerable persons from being harmed or exploited by gambling.

59. These are of fundamental importance to the regulation of licensed gambling, in that the Gambling Commission must aim to pursue and, if appropriate, have regard to the objectives when carrying out any functions under the 2005 Act.[22] For their part, licensing authorities are required to permit the use of premises for gambling insofar the authority thinks it reasonably consistent with the objectives.

60. These reflect the biggest change to the way in which the 2005 Act regulates gambling. The licensing objectives pervade every aspect of the Act:

- Sections 45-64 set out the offences, which are designed to protect children and young persons. For example, it is an offence to invite, cause or permit a child or young person to gamble.
- Section 70 requires the Gambling Commission to have regard to the licensing objectives when considering applications for operating licences.
- In preparing the regulations relating to the advertising of gambling, the Secretary of State was expressly required by section 328 to have regard to the need to protect children and vulnerable persons.
- Section 82 stipulates that operating licences should be subject to the condition that the licensee ensures compliance with any relevant social responsibility provision of a code of practice issued under section 24.
- Pursuant to section 83 an operating licence is subject to the condition that a licensee becomes aware that a child or young person is using its gambling facilities, the licensee must return any stakes as soon as is reasonably practicable and may not give a prize to a child or young person.
- In its licensing conditions and codes of practice, licensees must put into effect policy and procedures intended to promote socially responsible gambling, to prevent underage gambling and to monitor their effectiveness.

[21] GA 2005, Section 1
[22] GA 2005, Section 22

61. These provisions illustrate the social responsibility aspects underpinning the new policy approach to gambling under the 2005 Act.

The 2005 Act Licensing Regime

Definitions

62. The term "remote gambling" is defined[23] to mean gambling where people participate by means of "remote communication". The term is specified to include the internet, telephone, television and radio, but also any other kind of electronic or other technology for facilitating communication. In this way, the 2005 Act ensures that the definition will keep pace with future developments and technology. As an additional safeguard, the Secretary of State may specify in regulations that a particular system or method of communication is, or is not, to be treated as a form of remote communication for the purposes of the definition.

63. The provision of "facilities for gambling" is a fundamental concept in the 2005 Act, underpinning offences in Part 3 and 4, and the requirements for licensing in Parts 5, 6 and 8. In summary, any person who offers the opportunity for people to gamble, will be regarded as providing gambling in accordance with arrangements made by them.[24] The section has important implications to those linked to, but not directly providing, remote gambling, though there is an exception for electronic communications providers who simply act as carriers for information for others providing facilities for gambling, or consumers who participate in it: for example, an internet service provider or mobile telephone operator would not be caught by this section, but a computer in an internet café with a home page menu dedicated to providing mixed gambling websites would be.

64. In the case of remote gambling, Section 36 is the lynchpin. The section provides that where gambling takes place remotely, the person providing facilities for gambling will not fall within the scope of the offence of illegal provision to gambling facilities if he does not have any relevant equipment within Great Britain. This is so even if people within Great Britain can receive gambling being provided. On the other hand, where at least one piece of remote gambling is located in Great Britain, the person providing facilities for remote gambling will come within the scope of the offence, and commits the offence if any part of his remote equipment is located in Great Britain, without the provider having the required licence. This is so regardless of whether the gambling facilities are provided to people in Great Britain or elsewhere.

The Licensing Regime

[23] GA 2005, Section 4
[24] GA 2005, Section 5

65. Part 5 provides for the Gambling Commission to issue operating licences for every type of gambling. For every class of operating licence there are two types: remote and non remote so that every type of gambling which can legally be offered, can be offered either in a land-based or remote environment. An operating licence cannot combine authorisation of both remote and non remote provision of facilities for gaming.

66. The Gambling Commission will determine applications, following extensive investigations, having regard to the licensing objectives, to determine whether the applicant is a suitable person to carry on the licensed activities. In the case of remote licences, the Gambling Commission must have regard to protection of vulnerable persons from being harmed or exploited by gambling, and the availability of assistance to persons who are or who may be affected by problems related to gambling. The Gambling Commission publishes its Statement of Principles for Licensing and Regulation, which include:

- Assessing integrity by requiring relevant individuals to undergo criminal records checks. In some cases information will be sought from public agencies.
- Assessing the competence of applicants to operate a gambling business, particularly with reference to social responsibility issues.
- Enquiring about the financial position of applicants, including directors and business partners of applicants.
- Investigating the source of funding for the proposed business.

67. The Gambling Commission will also enquire into the suitability of any gaming machine, equipment or software to be used in connection with licensed activities and will normally require testing of software by an independent approved testing house.

68. In formulating its policy reflected in the 2005 Act, the British Government rejected prohibition: as the Secretary of State, Tessa Jowell, put it:

> *"Our concern is that if internet gambling were to be prohibited, it would be driven underground and precisely the kind of protections that we want to extend to people would be impossible."*[25]

69. Regulation and licensing was therefore to be the way ahead, but Ms Jowell had more ambitious plans. In the same interview, Ms Jowell expressed the hope that the UK would become a "world leader" in online gambling. Government policy was that if people were going to gamble online, it was better that they should do so on sites that are well regulated and socially responsible. There was an acceptance

[25] BBC Radio 4 31 October 2006

that online gambling was a fact; that it was here to stay and that the approach taken in the same year by the Government of the United States of America – prohibition – was unrealistic, and possibly politically unacceptable: it would certainly go against the freedom of the individual to chose, a concept present even in the 1951 Commission Report. At a conference on the subject in 2006, the Government expressed the hope that internationally agreed minimum standards of regulation could be achieved, but in this regard its ambitions were thwarted, even in relation to the European Union, and it is to legal and political developments there that we must look for the third strand in the Government's approach in developing its policy under the 2005 Act, and its recent determination to change that policy.

European Law and Politics influences on British Policy

70. We have seen that under the 1968 Act the then Regulator, the Gaming Board for Great Britain, took the view that there was nothing to prevent British Citizens from gambling online with overseas based operators, even though, under that Act, no licences were available in the United Kingdom.

71. In developing their policy for the 2005 Act, the Government took the view that it was necessary to permit operators based in an European Economic Area (EEA) to advertise in the UK to ensure compliance with European law. In addition, a number of "white list" jurisdictions would also be permitted to advertise more freely to UK residents, as if their licensees were licensed and regulated in the UK. The specific provisions on advertising are set out elsewhere in this paper. The Government's priority was the protection of British subjects and it markedly acknowledged that it did not have a monopoly on good legislation and regulation of online gambling.

72. The UK Government aspired to lead the way in Europe with its (comparatively) early introduction of a licensing system for online gaming: the UK was to be the "home" of online gaming. Its policy was based on compliance with then Article 49, now Article 56 of the Treaty on the functioning of the European Union. This Article requires the abolition of all restrictions on the freedom to provide services, even where those restrictions apply without distinction to national providers and to those in other member states.

73. Article 46(1) of the Treaty permits restrictions justified on grounds of public policy, public security or public health. Accordingly member states are free to set the objectives to their policy on betting and gambling, according to their own scale and values, and, where appropriate, to define the level of protection required. Unfortunately, only two European member states, Malta and Great Britain, sought to adhere strictly to the freedom to move goods and services under Article 56, probably both in anticipation that this would establish a course which other member states would follow.

74. In numerous Member States restrictive regimes persisted: in some total prohibitions, in others with only state monopolies licensed to offer any form of gambling, including online gambling. These restrictions sought to be justified on public policy, public security or public health grounds but a wide gulf opened up between many Member States on the one hand, and the position adopted by the European Commission. Both the Commissioner Barnier, and his predecessor, Mr Charles McCreevey, argued that in a number of States, restrictions were unjustified, therefore in breach of Article 56 and that the claim to public interest grounds did not in reality justify derogation from the Treaty. As well as infringement proceedings[26] by the European Commission there have been a series of cases in the European Court of Justice (ECJ) in which national monopolies have been challenged by operators, notably from the UK, Ladbrokes and Betfair.

75. In this series of cases, the ECJ developed a number of "general principles" when interpreting national restrictions on freedom to provide services, as follows:-

- Proportionality: restrictions must be no more than are necessary to achieve their purpose;
- Legal certainty: ambiguous restrictions will be interpreted in accordance with EU Law;
- Equality, non-discrimination: restrictions cannot be discriminatory by favouring national operators over other EU based operators;
- A protective justification: excessive restrictions are incompatible with EU law, if this can be achieved by less restrictive means; and
- Subsidiarity: decisions must be taken as closely as possible to a citizen: i.e. by member states and not the EU.

76. The ECJ has applied these general points to online gambling cases to assess the compatibility of national restrictions within freedom to provide services. These may be summarised under the following headings:

Gambling as a restricted commercial activity:

- Gambling can have harmful consequences. Member states therefore have a margin of discretion to limit gambling activities;
- In the absence of EU harmonisation, each member state may determine what is required to ensure that their interests are protected, provided that

[26] Italy, France, Greece, Austria Finland, Sweden, Denmark, Greece and the Netherlands

any restrictive measures do not go beyond what is necessary and are applied without discrimination; and

- The principle of mutual recognition does not apply in the gambling sector; operators licensed within one member state are not automatically permitted to provide the same services in other member states.

Monopolies

- Restrictions are unlawful if based on purely financial grounds. Restrictions can only be justified on public policy grounds where the protection of the public is their main purpose;
- Restrictions on the number of operators must reflect a "genuine dilution of gambling opportunities". However the limitation must be consistent and systematic;
- A monopoly system may be compatible with EU law where justified with the object of combating fraud and crime, and proportionate; and
- For single operating licensing regimes, member states have sufficient discretion to determine the level of protection sought in relation to games of chance.

Proportionate and objectively justifiable

- Restrictions must be proportionate to the purpose. A proportionality test involves examining whether the rule is "suitable" or "appropriate" in achieving its aims;
- National legislation was generally directed at limiting the harmful effects that are given as reasons to justify restrictions;
- A member state undermines its consumer protection argument by letting state run gambling companies engage in intensive advertising campaigns, thereby undermining the argument that its monopolies is limiting addiction;
- The obligation on persons to have their base in particular member states is disproportionate. There are less restrictive measures available to monitor activities and accounts of EEA based operators;

Equality/non-discrimination

- The restriction must be one which is equally applicable to persons established within the Member State, and must be applied without discrimination;

- The obligation on persons to have their base in a particular member state constitutes a restriction on the freedom to provide services and discriminates against companies which have their base in another member state; and

- The absence of a competitive gambling licensing procedure does not comply with freedom of establishment and freedom of services. The absence of transparency is contrary to the principle of equal treatment and the prohibition of discrimination on grounds of nationality and is therefore prohibited by EU law.

National Licensing Regimes

77. As a positive result of the European Commission's infringement proceedings and ECJ rulings, a number of member states have reformed their licensing regimes. France and Italy set the trend for these controlled openings and others, such as Spain and Denmark, have followed suit.

78. The new framework of national licensing regime governing is spearheaded by Italy and France has received the blessing of Europe's institutions though, for the moment, gambling monopolies still dominate in numerous EU member states, such as Norway, Sweden and Portugal. The European Commission discontinued its enforcement measures against France and Italy, signalling its acceptance or at least tolerance of a double/triple/multiple licensing model, whereby a member state may issue separate local licences and impose local taxes.

79. Moreover, the European Union has agreed a common definition of "illegal gambling". According to the Spanish EU Presidency Report[27] illegal gambling may be defined as:

> *"Gambling in which operators do not comply with the national law of the country where the services are offered, provided those national laws are in compliance with EU Treaty principles."*

80. So much for harmonisation. This is a further signal that national law must be adhered to. For the foreseeable future it seems there is no prospect of a European position on online gaming. The consequences may be that each Member State will issue its own licences and set its own rules and taxes. The result will be that operators will have to apply for a licence in each jurisdiction in order to offer its services legally.

[27] 11 May 2010

Current Proposals for Online Gambling in Great Britain

81. Although admirable in its aims, the British Government's attempts to lead Europe down the path of – as they saw it – compliance with Article 56, it must be concluded now that the policy has failed. Some of the reasons are apparent from the cases in the ECJ: other member states have different traditions, different histories, so far as the regulation of gambling is concerned, different priorities and, whilst some have genuine concerns about an open market, others have acted, or failed to act, from a desire to protect national monopolies, and therefore national income. As in some other areas of policy, the UK has found itself on the side-lines, albeit through laudable motives, joined only by Malta.

82. As a market, the UK is an attractive one. It is the largest online gambling market in Europe, at least until Germany opens its market, with a relatively attractive gaming and betting duty at 15% of gross gambling yield. This compares more than favourably with jurisdictions such as France, Italy and Denmark. Unfortunately however for the UK, its creation of the "white list" enabled UK operators to offer their services from some very low tax jurisdictions, such as Alderney, Gibraltar, the Isle of Man and Malta. A further aspect of failure therefore has been that most operators, including those originally from the UK, have chosen to base themselves outside the UK in low tax jurisdictions in order to target the UK market.

83. Against this background, it is hardly surprising that the Government determined to review its policy in relation to online gambling. On 7 January 2010, following a nine month review, the former Minister, Gerry Sutcliffe, announced proposals for new licence requirements for overseas online gambling operators. These would require all online gambling operators wishing to advertise their services in the UK, or to transact with British customers, to be licensed by the UK Gambling Commission.

84. When the Government first announced that it would consider changes, in April 2009, it indicated that it would explore ways to "level the playing field" for UK operators. One of the options proposed was to require overseas operators to contribute to the cost of regulating gambling in the UK. By the time the proposals were announced in January 2010, reasoning had evolved from enabling UK operators to be competitive, to protection for UK consumers. The Government cited concerns about the inconsistency of regulatory standards throughout the EU: indeed, the 2005 Act allows operators based anywhere in the EEA to advertise in the UK, even if there is no regulatory regime at all in the member state in which they are based. This policy reflects the basis upon which other European jurisdictions have introduced "point of consumption" licensing regimes.

85. In July 2011, the Government announced that a UK licence requirement would definitely be introduced, but without offering any indication as to timing. What was clear was that the Government proposed that all gambling operators wishing to

advertise their services in the UK, or transact with UK customers would need a licence from the UK Gambling Commission. A further indication of intent came with the Budget on 21 March 2012, which announced that remote gambling will be taxed at the point of consumption, rather than at the current point of supply. In consequence, operators based offshore will be required to pay duties on profits generated from UK based customers. A target date of 1 December 2014 was given.

86. Currently there are no proposals to introduce enforcement measures, such as ISP blocking. Nevertheless, it will become difficult, if not impossible, to advertise unlicensed gambling services in the UK, under the regime proposed. The media will be aware that they may only accept advertisement from UK licensed operators: otherwise they may be committing a criminal offence.

87. Although relatively straightforward, these changes do require a change to primary legislation, namely the 2005 Act, and Parliamentary time will have to be found, probably in 2013 or early 2014 if the target of December 2014 is to be met.

88. The Government's proposals plainly signal a major policy shift in their approach to online gambling. It will be a move from an open market for all operators based in the EEA and in the whitelisted jurisdictions, to a form of national licensing regime. What is not yet clear is whether it will in fact be a national licensing regime, such as those introduced in Italy and France, or whether it will remain Government policy in the UK to enable those licensed here to supply their services to other jurisdictions. At present there is no restriction, and I believe that is likely to remain the policy. Whilst the 2005 Act contains the power[28] for the Secretary of State to designate a jurisdiction as a "prohibited territory", making it an offence for a person to invite or enable someone in such a territory to participate in remote gambling, no orders have been made under that section. A general ban, limiting licences to UK business, is thought unlikely, but it remains to be seen what the legislative proposals contain.

89. Looking at the specific consequences for operators, these might be summarised as follows:

Taxation and Licensing Fees

The obvious and perhaps most significant implication of the change will be that all operators transacting with UK players will be required to pay remote betting or gaming duty at (currently) 15% of gross gambling yield. In addition, operators will have to pay the annual licensing fees due to the Gambling Commission, though these are fairly reasonable compared to some other jurisdictions, particularly for

[28] GA 2005, Section 44

small scale operators. For those accepting bets on a horserace in the UK, they will need to pay duty to the Horserace Betting Levy Board at 10.75% of gambling yield.

Currently it is not necessary for a UK licence application to be made by a UK company.

Server Location

Currently, all UK licensees are required to locate at least one piece of remote gambling equipment in the UK. The Gambling Commission proceeds from the starting point that all equipment will be in the UK but it does have discretion to allow equipment to be located overseas. It is unlikely to exercise this discretion unless the location in question is a well regulated gambling jurisdiction, where it can communicate with the local regulator and effectively monitor the equipment in question. It may be that in amending the legislation, the Government removes the requirement for any equipment to be located in the UK which would make the transition for a UK licence easier for companies with established operations overseas.

Application Process

It is very likely that some form of transitional arrangements will be set up for operators currently targeting the UK from the EEA and white list jurisdictions. This may allow those operators to continue their UK operations for a period, perhaps six months, pending determination of their UK licence application.

The Commission adopts a bespoke, risk based approach to online gambling regulation. For those applying to the UK currently operating from reputable jurisdictions, the Commission will have the flexibility to carry out a more or less rigorous investigation, depending upon the system of regulation in the home jurisdiction, the scale of operations and the operating record of the applicant. This means that those in white listed jurisdictions, and those from regulated EEA jurisdictions, may find the application process easier than those outside these areas.

Conclusion

90. We have seen, there has always been a tacit acceptance in Great Britain of Edmund Burke's comment that gambling is "inherent in nature". Although, for several hundred years there were attempts, largely unsuccessful, to curb its abuses and excesses, complete prohibition has never formed part of British policy.

91. There is perhaps some irony in the fact that the first serious attempt to create a regulated, licensed betting industry, accidently created circumstances in which a substantial, but unregulated, gaming industry could flourish. Nevertheless, this did not produce a substantial change in policy, but the extension of the policy applied to

betting into gaming. We have looked at the attitude towards gambling generally, evidenced by the legislation of the 1960s, the Royal Commission Reports of 1961 and 1978 and the more recent reports of the GRB and the Joint Parliamentary Committee. Whilst there has been a change in attitude between the 1950s, 1960s and today, from liberal but paternalistic to liberal and free market, there has been throughout the period a constant feeling of acceptance that, if people wish to gamble, they should be able to do so, subject to control and protection.

92. The hope of Government at the time the 2005 Act was passed, that Britain would become a world leader has not been fully realised. Whilst Britain was the first EU Member State to develop comprehensive licensing and regulation for all forms of gambling online, with no distinction between the types of gambling available online and in a land-based environment, there was not the anticipated rush to obtain licensing in the UK. In fact, not a single major online gaming operator relocated to the UK following the 2005 Act. This has been due to two factors: the ability of operators to offer their services into the UK from the white-listed jurisdictions on the one hand, and a 15% tax rate in the UK on the other. Whilst that rate compares favourably with other EU Member States, except Malta, it is far higher than those available offshore.

93. For the future, the dream of the application of Article 56 to the online gambling industry has not been realised, with the result that the British Government will follow the national licensing route adopted by many other Member States. For this dream to be realised, we must look far ahead to a day when there would be sufficient political rules throughout Europe to an EU licensing framework, but at present this would seem to be more fantasy than reality.

Julian Harris, Harris Hagan
11 June 2012