

Committee : Licensing Committee	Date 3/9/08	Classification Unclassified	Report No.	Agenda Item No.
Report of Colin Perrins Head of Trading Standards and Commercial		Title Gambling Act 2005 Delegated Authority		
Originating Officer: John Cruse		Ward affected: All		

1.0 Summary

1.1 This report covers the following:

- The delegation of authority to the Licensing Manager and to the Head of Environmental Health Commercial and Trading Standards to determine the validity of representations submitted in respect of applications made under the Gambling Act 2005.

2.0 Recommendations

2.1 That Members note the report and adopt the recommendations contained in 5.2 of this report.

LOCAL GOVERNMENT ACT 1972 (AS AMENDED) SECTION 100D
LIST OF "BACKGROUND PAPERS" USED IN THE DRAFTING OF THIS REPORT

Brief description of "background paper"

Tick if copy supplied for register

If not supplied, name and telephone number of holder

File Only

John Cruse
020 7364 5024

3.0 **Background**

- 3.1 The Gambling Act 2005 is broadly similar in its approach to licensing premises as the Licensing Act 2003, although by no means identical.
- 3.2 The Gambling Commission has issued advice to Licensing Authorities regarding representations. See **Appendix 1**. Thus it can be seen that, as with the Licensing Act 2003, not all attempted representations are valid, as there are legal hurdles.
- 3.3 The problem for Members is that they are potentially increasing their number of meetings to no obvious purpose, if they have to determine the validity of representations as they have to have a hearing to decide whether or not to have a hearing. Hence the recommendation that officers are delegated the authority to determine the validity of representations that are received, as detailed in **5.2** of this report.

4.0 **Relevant Representations**

- 4.1 The Gambling Act 2005 itself reserves various matters at different levels within the Council. While most matters can be delegated to the Licensing Committee two cannot: the determination of the Statement of Licensing Policies under the 2003 and the 2005 Act; and a resolution not to issue Casino Licences.
- 4.2 In a similar way there is a very important matter which the Licensing Committee cannot delegate, that is the determination of a contested application. Where valid representations are made Members must hear and determine the matter, it cannot be delegated to officers.
- 4.3 Members are not however required to have a hearing every time an objection is made to an application and are also not required to hear representations which are not made by either a “responsible authority” or an “interested party” both of which are defined by legislation. See **Appendix 2** for the advice of the Gambling Commission on this point. It is clear that a judgement has to be made as to the status of an objector.
- 4.4 There is a further hurdle, which concerns the substance of any representation. Essentially this is that the representation must not be
 - vexatious,
 - frivolous, or
 - will certainly not influence the authority's determination of the application.

5.0 **Delegation**

- 5.1 It would not seem an effective use of Members time to require the a Licensing sub-Committee Hearing to meet to consider every purported

representation, and indeed would seem to defeat the purpose of having the ability to dispense with a hearing if, in fact a hearing has to be held to make such a determination.

- 5.2 Consequently, it is recommended that the authority to determine whether or not the representations that have been submitted are valid in order to ascertain whether or not a hearing is necessary within Section 62(3) of the Gambling Act 2005 is delegated to the Licensing Manager and to the Head of Environmental Health Commercial and Trading Standards.

6.0 Legal Comments

- 6.1 Section 10 of the Licensing Act 2003 (“the 2003 Act”) allows for delegation of functions by a Licensing Committee. This not only applies to licensing authority functions under the 2003 Act but also licensing authority functions under the Gambling Act 2005 (“the 2005 Act”). Section 154(1) of the 2005 Act provides that licensing authority functions under that part of the 2005 Act (that is part 8) are delegated to a licensing committee of the licensing authority established under section 6 of the 2003 Act. Section 154(3) of the 2005 Act provides that section 10 of the 2003 Act applies in relation to functions delegated to the Licensing Committee by virtue of section 154(1) of the 2005 Act with exceptions.
- 6.2 Under section 10 of the 2003 Act, the Licensing Committee may delegate its functions to a Licensing Sub-Committee and can also, subject to subsection (4) delegate certain functions to officers. Essentially, what cannot be delegated to officers is the determination of applications where representations are made.
- 6.3 For an application to be determined, however, the representation must be valid. Section 162(1)(a) of 2003 Act requires that the Licensing Authority must hold a hearing to determine an application where representations have been made (and not withdrawn) by an interested party or responsible authority. That being said, section 162(3) of the 2005 Act provides that a licensing authority may also determine an application for a premises licence without a hearing despite subsection (1)(a) if the authority think that the representations made under section 161 are vexatious, are frivolous, or will certainly not influence the authority's determination of the application.
- 6.4 Quite clearly, pursuant to section 162(3) of the 2005 Act, it is envisaged that there will be some form of prior checking of representations to ensure that unnecessary hearings are not held and therefore it is considered appropriate that such determination should rest with the relevant officers in the first instance so as to avoid potentially unnecessary hearings being convened for a Licensing Sub-Committee to consider an application and the first steps of such Committee is to determine that the validity of representation which is clearly invalid.

7.0 **Finance Comments**

7.1 There are no financial implications in this report.

8.0 **Appendices**

Appendix 1 Guidance to Licensing Authorities (2nd Edition June 2007) issued by the Gambling Commission concerning Representations

Appendix 2 Guidance to Licensing Authorities (2nd Edition June 2007) issued by the Gambling Commission concerning interested parties.

APPENDIX 1

Guidance to Licensing Authorities

2nd Edition June 2007 issued by the Gambling Commission

Representations

7.44 In dealing with an application, licensing authorities are obliged to consider representations from two categories of person referred to in the Act as 'responsible authorities' and 'interested parties'. Please see Part 8 of this guidance for more information on these categories.

7.45 It would be helpful if licensing authorities provide advice in a form that is readily accessible (for example on their websites) about how representations can be made.

7.46 When considering a representation, the first thing the licensing authority should determine is whether the representation has been made by a responsible authority or interested party. This is very important as only representations from these two categories of person can be deemed **admissible**. If the representation has not been made by a responsible authority or interested party it is **inadmissible**.

7.47 Licensing authorities should be aware that their decision on this initial issue could be subject to legal challenge in the courts. There is no right of appeal under the Act against a licensing authority's determination that representations are not admissible.

7.48 After determining whether the representation has come from a responsible authority or interested party, and consequently whether it is admissible or inadmissible, the authority must then determine its relevance. The only representations that are likely to be relevant are those that relate to the licensing objectives, or that raise issues under the licensing policy statement, or the Commission's guidance or codes of practice (ie those matters mentioned in section 153 of the Act).

7.49 The Secretary of State and Scottish Ministers have made regulations under section 160 of the Act concerning notice of application. These require applicants for premises licences to give notice of their application to the responsible authorities. They also stipulate that applicants publish notice of their application in a local newspaper and display it on the premises for the benefit of interested parties. These provisions apply, with one or two necessary modifications, in relation to applications for provisional statements and some ancillary applications that can be made in relation to a premises licence. Responsible authorities will have a legitimate interest in the development of the premises, because of the functions that they will need to carry out in relation to them. But licensing authorities must take care to ensure that the concerns that responsible authorities may have in relation to their own functions are not taken into account if they are not relevant to the application for a premises licence under the Act. Thus, for example, the following examples of possible representations would not be likely to be relevant:

- _ that there are already too many gambling premises in the locality (although it may be relevant if it points, as a result, to rising problems in crime, disorder, underage gambling or problem gambling);
- _ that the proposed premises are likely to be a fire risk;
- that the location of the premises is likely to lead to traffic congestion; or
- _ that the premises will cause crowds of people to congregate in one area, which will be noisy and a nuisance.

This list is by no means exhaustive, and each case must be decided on the facts.

7.50 It should be noted that, unlike the Licensing Act, the Gambling Act specifically

does not include as a licensing objective the prevention of public nuisance. Any nuisance associated with gambling premises should be tackled under other relevant laws.

7.51 Linked to this is the question of what is a 'frivolous' or 'vexatious' representation.

This is a question of fact, and authorities are advised to seek help from their legal advisers in interpreting these phrases. Representations that could be considered 'frivolous' or 'vexatious' are more likely to come from interested parties. However, matters that licensing authorities will want to look at are likely to include:

- _ who is making the representation, and whether there is a history of making representations that are not relevant;
- _ whether it raises a 'relevant' issue; or
- _ whether it raises issues specifically to do with the premises that are the subject of the application.

APPENDIX 2

Guidance to Licensing Authorities

2nd Edition June 2007 issued by the Gambling Commission

Part 8: Responsible authorities and interested parties – definitions

8.1 The Act sets out two categories of organisations and individuals ('responsible authorities' and 'interested parties') which may feature in applications for and reviews of premises licences. (Please note that these are not the same as the definitions in the Licensing Act 2003 – see Annex A.)

Responsible authorities

8.2 Responsible authorities are public bodies that must be notified of applications and that are entitled to make representations to the licensing authority in relation to applications for, and in relation to, premises licences. All representations made by responsible authorities are likely to be relevant representations if they relate to the licensing objectives.

8.3 Section 157 of the Act identifies the bodies that are to be treated as responsible authorities. They are:

- (a) a licensing authority in England and Wales in whose area the premises is wholly/partly situated;
- (b) the Gambling Commission;
- (c) the chief officer of police/chief constable for the area in which the premises is wholly or partially situated;
- (d) the fire and rescue authority for the same area;
- (e) (i) in England and Wales, the local planning authority;
- (ii) or in Scotland, the planning authority;
- (f) the council constituted under section 2 of the Local Government etc (Scotland) Act 1994;
- (g) an authority which has functions in relation to pollution to the environment or harm to human health;
- (h) anybody, designated in writing by the licensing authority as competent to advise about the protection of children from harm;
- (i) HM Revenue & Customs; and
- (j) any other person prescribed in regulations by the Secretary of State.

8.4 Section 211(4) provides that in relation to a vessel, but no other premises, responsible authorities also include navigation authorities within the meaning of section 221(1) of the Water Resources Act 1991 that have statutory functions in relation to the waters where the vessel is usually moored or berthed or any waters where it is proposed to be navigated at a time when it is used for licensable activities. This would include:

- (a) the Environment Agency;
- (b) the British Waterways Board; and
- (c) the Secretary of State. (Note: in practice, the Secretary of State for Transport who acts through the Maritime and Coastguard Agency.)

8.5 The Act contains a similar list of responsible authorities to that contained in the Licensing Act 2003, despite the lack of the corresponding licensing objective of public safety. The result the Act aims to achieve through the inclusion of a wide range of responsible authorities is one where all relevant regulatory bodies and

organisations are made aware of the applications for gambling premises licences or other permissions. In many instances comments that responsible authorities make will be relevant to the licensing authority's determination.

8.6 Equally, in some cases, representations may not relate to matters that lead to the licensing authority refusing a premises licence. However, a policy of wide dissemination of applications allows responsible authorities to take action under their own legislation and enforcement powers, even if there is no direct role for them in the gambling licence process. The Gambling Act contains no obligation on responsible authorities to respond to applications for premises licences if they do not wish to do so.

8.7 Licensing authorities are required to set out, in their policy statement made under section 349, their approach to their functions under the Act. One of those functions is to determine who will be competent to advise them about the protection of children from harm. Regulations made by the Secretary of State or Scottish Ministers deal specifically with this issue and require licensing authorities to set out their approach in a separate section of the licensing policy statement.

8.8 In many licensing authority areas, it is expected that the body recognised by the licensing authority to be competent in this regard will be the Local Safeguarding Children Board in England and Wales, or the Child Protection Committee in Scotland.

8.9 The Secretary of State may prescribe other responsible authorities by means of regulations. It is expected that regulations will provide for fire and rescue services in Scotland to be added (to deal with changes to legislation).

Interested parties

8.10 Section 158 of the Act defines interested parties. To accept a representation from

an interested party, the licensing authority must take the view that the person:

(a) lives sufficiently close to the premises to be likely to be affected by the authorised activities; or

(b) has business interests that might be affected by the authorised activities; or

(c) represents persons in either of these two groups.

8.11 Interested parties can be persons who are democratically elected such as councillors and MPs. Where appropriate this will include county, parish and town councillors. Other than these persons, authorities should require written evidence that a person 'represents' someone who either lives sufficiently close to the premises to be likely to be affected by the authorised activities and/or business interests that might be affected by the authorised activities. A letter from one of these persons requesting the representation is sufficient.

8.12 The following gives further advice on the interpretation of these sections.

(a) Persons living close to the premises

8.13 The approach taken by licensing authorities in determining who is an interested party is also a function that should be dealt with in their three-year licensing policy statement. As in relation to responsible authorities, regulations require this information to be in a separate section of the licensing policy statement.

8.14 The factors that licensing authorities should take into account when determining what 'sufficiently close to the premises' means (in each case) might include:

_ the size of the premises;

_ the nature of the premises;

_ the distance of the premises from the location of the person making the representation;

_ the potential impact of the premises (number of customers, routes likely to be taken by those visiting the establishment); and

_ the circumstances of the complainant. This is not the personal characteristics of the complainant, but the interests of the complainant which may be relevant to the distance from the premises. For example, it could be reasonable for an authority to conclude that 'sufficiently close to be likely to be affected' could have a different meaning for (a) a private resident (b) a residential school for children with truanting problems and (c) a residential hostel for vulnerable adults.

(b) Persons with business interests that could be affected

8.15 It could be argued that any gambling business could be affected by another gambling business expanding into any part of Great Britain. But that is unlikely to be enough to satisfy the test of being 'a person with business interests that might be affected by the premises' under consideration. For example, an operator in a particular sector (be it casino, bingo, betting etc) should not be able to lodge representations on every application put in by a rival operator anywhere in the country, simply because they are in competition within the same gambling sector. The licensing authority should be satisfied that the relevant business is likely to be affected. In this respect, licensing authorities should bear in mind that the 'demand test' in the 1963 and 1968 Acts has not been preserved in the 2005 Act. Factors that are likely to be relevant include:

_ the size of the premises;

_ the 'catchment' area of the premises (ie how far people travel to visit); and

_ whether the person making the representation has business interests in that catchment area that might be affected.

Licensing authorities should take care to distinguish between deciding whether a person is an interested party (ie whether their representations are admissible) and forming a view on the substance of their representations (ie whether their representations are relevant). Representations made would not be relevant if they did not relate to the licensing objectives, but instead related to demand and competition. But the licensing authority would need to accept the representations as admissible (if the grounds were made out) and then consider their relevance to the licensing objectives.

(c) Persons representing those in the above categories

8.17 Licensing authorities should include guidance in their three-year licensing policies

on whom they consider comes within this category. For example, it should include democratically elected representatives such as local councillors and MPs, and could include bodies such as trade associations and trade unions, and residents' and tenants' associations. In other cases licensing authorities will probably wish to satisfy themselves on a case by case basis, and possibly request written evidence, that a person does represent interested parties. For example, a school head or governor might act in representing the interests of pupils or parents and a community group might represent vulnerable people living near to the proposed premises.

8.18 Authorities will need to have regard to anything an interested party says about his status to make representations.