

INTERNET LAW

WILL ONLINE GAMBLING BECOME LAWFUL?

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Currently most online gambling sites breach Great Britain's criminal laws, except for pools and online betting. This may soon change if the Budd Report's recommendations are implemented by the Government. Not only would this change make online gambling a lawful activity, but the new regulatory regime proposed by the Report would be likely to make the UK a favoured location for establishing cross-border online gambling operations.

THE BUDD REPORT

The Budd Report on online gambling (the Gambling Review Report) was produced by the Gambling Review Body and presented to the department for Culture, Media and Sport on 17 July 2001. The Gambling Review Body was commissioned by the Home Office to consider the state of the UK gambling industry and the ways in which it might change over the next ten years in the light of economic pressures, the growth of e-commerce, technological developments, and wider leisure industry and international trends. The Report is available in full on the web site of the Department for Culture, Media and Sport located at: <www.culture.gov.uk>. The previous review was carried out by a Royal Commission under the leadership of Lord Rothschild in 1978.

Online gambling (by which the Report refers to gambling over the Internet, mobile phone or interactive television) is key to this consideration. It is anticipated that e-gambling currently amounts to anything from 2 – 5% of the UK gambling market and this percentage is likely to grow sharply in the future as the use of the Internet and development of other personal interactive applications becomes more widespread.

The 250 page Report contains recommendations on every aspect of the gambling industry, from the overall regulatory structure to the details of maximum stakes permitted on gaming machines. Its recommendations are as relevant to the online gambling industry as they are to the purely bricks and mortar operations. This article focuses on the specifics relating to online gambling.

THE CURRENT LAW

The UK gambling legislation has developed over the years in response to the development of the industry. Legislation was first imposed as early as the 17th century and separate regimes have gradually been established for gaming, betting and lotteries. In some cases (for instance betting shops) what started out as a total prohibition of activities has developed into a means of regulating and controlling an industry that flourished despite its prohibition.

The legislation we have in place today dates back to the 1960s and its sporadic development means that there are several different pieces of legislation that apply to the industry and numerous regulators involved with its control.

Gaming

The playing of a game of chance for winnings in money or money's worth, is principally regulated by the Gaming Act 1968 which covers casino gaming, bingo and gaming machines. Each of these activities is subject to different licensing and regulatory systems and all come under the umbrella of the responsibilities of the Gaming Board for Great Britain. Casino operators must apply for certificates of consent from the Gaming Board, bingo halls and casinos require premises licenses from the local licensing justices, and gaming machines are restricted to licensed premises or require additional permits from the local authority.

Betting

Making a contract in which each party agrees to forfeit to the other an amount to be determined on the outcome of an event, is regulated by the Betting, Gaming and Lotteries Act 1963. This covers on-course and off-course betting (both for horse racing and greyhound racing), bookmaking and pools competitions. Various regulators are involved in this sector — the Horseracing Betting Levy Board is charged with approving on-course betting on horses, pool betting is operated by the Horserace Totalisator Board and the National Greyhound Racing Club and bookmakers and their premises must be licensed by the licensing justices. In addition, the Financial Services Authority has responsibility for regulating spread betting under the Financial Services Act 1986.

Lotteries

A distribution of prizes by lot or chance in return for a contribution, are regulated by the Lotteries and Amusements Act 1976 which prohibits outright all lotteries except for those specifically permitted by the Act. One of these specific exceptions was the National Lottery which is regulated by the National Lottery Act 1993 and the National Lottery Commission and was deemed to be outside the scope of the Report.

THE EXISTING POSITION ON ONLINE GAMBLING

The legislation of the 1960s is, unsurprisingly, completely unsuited to regulating online gambling. The law is largely premises based — premises used for gambling must be licensed, and

physical presence of the punter on the licensed premises is often required. Online gambling operations have no premises to which punters can resort, with the result that the application of the current legislation to online gambling is at best uncertain.

This premises approach criminalizes casino, bingo and machine gambling, so that it is illegal to establish online sites in Great Britain. The legislation requires all operators to carry out their gambling activities on licensed and registered premises, and participants must be present on the premises at the time of the gaming. It is impossible for an online business to meet these requirements.

For betting and pools, however, the existing law is more favourable. The legislation permits bookmakers to accept bets via the telephone and it therefore follows that bets may be taken online. Similarly, football pools have always been accepted by post and it is therefore permissible to do the same via other forms of distance communication such as email or via websites.

A different approach is adopted for lotteries, as these will clearly not be confined to a single set of premises. Here though, even a licensed operator cannot lawfully sell tickets online, as the legislation prohibits tickets being sold by machine. Online activities are not assisted by the Gaming Board's recent approval of online lottery applications where it has been satisfied that the actual transaction of the sale of tickets would be effected by humans, not machines.

The effect of these restrictions is to encourage online gambling operators to set up business offshore, as the legislation does not directly prohibit punters from using online sites or regulate their use of them. It is not illegal for a British resident to access an online gambling site based anywhere in the world and neither is it illegal for overseas operators to allow such access to them. However, the extensive restrictions on advertising and other promotional activities in the UK are likely to result in criminal offences being committed, although there is no effective mechanism for prosecuting and enforcing judgments against foreign-based operations.

THE PHILOSOPHY OF THE BUDD REPORT

The Report focuses on the 'central dilemma' of gambling: the desire to allow people to exercise free will versus the fear that such freedom may cause damage to the individuals and society as a whole. In preparing the Report it is notable that submissions were heard from many different sectors of the industry including (at one end of the scale) existing commercial gambling operators and others with a vested interest in deregulation of the industry and (at the other end) anti-gambling bodies and others concerned with the addictive and anti-social elements of the activity.

The Report recommends greater freedom for the individual and a more relaxed and straightforward regulation for operators. This is balanced by an increase in the vetting powers of local authorities to check and verify the identity and standing of those applying to become gambling operators, and heavier obligations on all operators to prevent under age gambling.

Although this article focuses on the specific recommendations related to online gambling, these should not be looked at in isolation — what affects the bricks and mortar operators will apply equally to online gambling operators. A key move to simplify the regulation of the industry was the introduction of a single regulatory authority (the Gambling Commission) with wide ranging powers to vet and approve operators and intervene in

the event of criminal activities together with an appeals body (the Gambling Appeals Tribunal).

As regards the operators, casinos look to benefit most from the recommendations since this is where the majority of deregulation has been suggested. It is expected that the suggested measures (including increasing the numbers of casinos permitted, increasing the size of casinos and their ability to hold slot machines) could lead to significant increases in casino profitability.

Other surprising recommendations include the ability to place bets on the result of the National Lottery. This is a controversial move, which some are seeing as a decoy to draw the heat away from some of the other recommendations since it may distract punters from playing the lottery itself and hence decrease its takings, which is likely to meet with strong resistance.

KEY RECOMMENDATIONS FOR ONLINE GAMBLING

The Report recognizes that the use of interactive television, the Internet, mobile phones and other communications devices, and the 24 hour accessibility of online gambling to old and new participants alike with no social or other entry barriers to playing, will exacerbate the potential for 'social excess' and is likely to introduce the concept of gambling to some participants who may otherwise not have been interested in entering betting shops, bingo halls or casinos.

During its study, the Gambling Review Body referred to the reactions of other countries that have tried to prohibit and/or restrict Internet gambling (including certain states of the US and Australia) and said that it would continue to monitor these countries with interest to see how successful these actions would be. Refreshingly and in contrast to the attitude adopted by those countries, the Report acknowledges that online gambling is not different in nature from other gambling and 'should be seen as just another way of delivering a service'. It therefore concluded that online gambling should be permitted in a controlled environment in the same way as traditional methods of gambling, to regulate and prevent the dangers highlighted above.

Regulation

The Report differentiates between online gaming (gambling services conducted purely online, including virtual casinos and electronic gaming machines) and online betting (betting, pools and lotteries which receive entries online but where the event or draw happens offline) but recommends that both should be permitted under the new regime subject to appropriate regulation. Probably the most important recommendation in the Report is the establishment of the Gambling Commission as the primary regulator. This body would establish qualifying standards for obtaining a licence, oversee the operations of gambling operators, whether on or offline, and ensure the honesty and fairness of the games offered, in particular the software which runs these games. Licensing by the Gambling Commission would be restricted to those operators based in Great Britain. Since online gambling operators need not have any particular geographical presence the Report recommends that as a minimum any operator applying for a licence would need to be registered as a British company, locate its server in Great Britain and use a UK web address for its site.

Realistically the Report recognizes that no licensing regime can prevent punters from seeking to use unlicensed sites or prevent unlicensed operators being able to operate in Great Britain. It hopes that the risks of using such an unlicensed site will prevent punters logging into unlicensed sites and that this will lead operators to lose business to such an extent that they seek to be licensed. Additionally, it recommends that unlicensed operators should be prohibited from advertising their sites in this country, which is another effective way of reducing hits on the site and therefore reducing revenue for unlicensed operators.

Online betting

Internet betting is already permitted and the Report did not recommend any further specific regulation to cover this activity, save for stressing that measures must be taken to prevent bets being placed by under-18s. It did recommend deregulation to the extent that it should be possible to purchase lottery tickets and enter pools competitions online subject only to those lottery or pools operators being correctly licensed.

Online gaming

There are a number of special difficulties inherent in online gambling: how to verify that a computer-generated event (such as a slot machine or casino game) is fair, how to ensure that the punter is giving his credit card details, other payment arrangements and personal details to a reputable entity which will use them purely for the purposes intended, and how to prevent underage gambling. To deal with these issues the Report has recommended that online gaming operators seeking a licence should:

- Submit their gaming software to the Gambling Commission to be tested for fairness; and
- Take positive steps to identify punters playing on their sites and prevent minors having such access, although how they should do this has not been clarified.

To counter the fears that online gambling will inevitably lead to problem gambling, the Report examined various methods of self-regulation for participants. Rather than requiring the operator to monitor the gambling activities of individuals, it concluded that counters should appear at regular intervals on the screen to remind the participant how long he has been on the site and how much he has won or lost up to that time, and that sites should allow a punter to self-impose time or expenditure limits on his activities. As a further disincentive to minors to participate, it has suggested that any prizes that are won should be forfeited (it is not clear to whom).

Further, in recognition of the dangers of excessive gambling, all sites should carry information and links to information and assistance on problem gambling.

WHAT NEXT?

The Budd Report's recommendations have the potential to revitalize the gambling industry, of which online gambling is becoming a very significant part, in particular through the simplification of its regulation. Importantly the Report has taken a very positive and proactive stance towards online gambling, encouraging the industry to stand up and be licensed to enable the Gambling Commission to better watch over and regulate their activities in the same way as offline gambling operations.

One important effect of these recommendations would be to establish Great Britain as one of the best jurisdictions in which to locate an online gambling business. The laws of most other countries are equally as restrictive as those currently in force here, with the result that the online industry is forced to base itself in countries such as Antigua and the Dominican Republic. This restricts their access to both equity and debt finance, as the markets look less favourably on businesses established outside the major trading nations, particularly if their activities are at best of dubious legality within the jurisdiction where the market is based. A properly licensed, UK-based online gambling business would find it significantly easier to raise capital.

Additionally, as other countries look to reform their gambling laws in reaction to the loss of tax revenue caused by prohibiting online gambling, a UK-regulated business will clearly find it easier to obtain permission to operate there simply by virtue of its already established reputation as a respectable and properly run operation. Even where a country's laws prohibit online gambling, it seems unlikely that they would be enforced against a UK-licensed business which refrains from actively targeting customers in that jurisdiction — this is the approach commonly adopted by financial services regulators.

In all this it is important to remember that the Report has only made recommendations. It remains to be seen which of these will be adopted by the legislature, and perhaps as important, how and when they will be adopted (whether in the form of a new enabling Act or in various deregulation steps under the existing legislation). The consultation period for the Report is due to close in October this year, a remarkably short period in for such a comprehensive review, and deregulation measures could follow shortly afterwards. Given that online gambling already exists, and constitutes a major loss of revenue to the Treasury, it seems unlikely that this opportunity for a large degree of liberalization in the law will be rejected.

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