

**Split Premises and Primary Gambling
Activity:
Responses**

October 2008

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1 Introduction

- 1.1 In June 2008 the Gambling Commission (the Commission) published a consultation document inviting comments on proposed revisions to the second edition of the Guidance to Licensing Authorities (the Guidance) and the Licence Conditions and Codes of Practice (the LCCP) relating to:
- the meaning of a single 'premises' in the context of the Gambling Act 2005 (the Act)
 - the need for holders of different categories of premises licences to ensure that the gambling activity appropriate to the licence type is actually offered as the **primary activity** at those premises; and not simply as an adjunct to, or sometimes wholly replaced by, the making available of gaming machines as permitted by virtue of the licence.
- 1.2 The proposed revisions to the Guidance are in response to the Commission's own concern that the statutory provisions are not being properly interpreted, as well as to calls from local licensing authorities, operators and others to provide more extensive guidance in the light of differences in legal interpretation which have emerged in the handling of premises licence applications. We were concerned that we had not made our position sufficiently clear and that there was scope for the guidance to be improved.
- 1.3 The proposed revisions do not represent a change in Commission policy or in the Commission's understanding of the Act; they clarify and elaborate on our position as set out in the Guidance. They reiterate our opinion that the provision of gaming machines must be ancillary to the primary purpose of the relevant licence, a view that DCMS confirm they share. As noted in paragraph 1.26 of the Guidance, interpretation of the legislation is ultimately for the courts. Meanwhile, in the absence of decided cases, the proposed elaboration of the Guidance, which local licensing authorities are required to take into account, is intended to assist, but not replace, local licensing authorities' own application of the legislation to any given case.
- 1.4 The Guidance remains the document that licensing authorities should refer to when discharging their functions under the Act. The Commission said it would give appropriate notice when and if, as proposed, any further clarification of the Guidance was made as a result of the consultation.
- 1.5 The Commission stated that it aimed for the minimum degree of regulation consistent with pursuit of its functions, but was also considering whether it might be beneficial to introduce a greater degree of clarity through additional operating licence conditions or through regulations made by the Secretary of State for Culture Media and Sport and Scottish Ministers imposing additional conditions on premises licences.
- 1.6 We therefore consulted on introducing operating licence conditions which would ensure that the licensed activity is provided in each premises as the primary gambling activity which the Commission considers to be implicit in the Act and associated regulations.
- 1.7 This document summarises the responses that the Commission has received and the Commission's position arising from the consultation process.
- 1.8 The consultation period commenced on 16 June 2008 and closed on 8 September 2008. The consultation document was downloaded from the Commission's website 1,605 times. 75 submissions were received. Of the responses received, 29 were from licensing authorities, 27 from operators, eight from industry bodies, three from faith groups, three from lawyers/legal bodies, one from a regulatory body, one from a help group and three from other sources. The Commission also held two workshops, on 6 and 15 August to discuss the proposals. 61 organisations were represented at the workshops. A list of respondents to the consultation and organisations attending the workshops are given in Appendix 1 of this document.

1.9 The Commission is grateful to all those who attended the consultation workshops and responded to the consultation document.

2 Responses to the consultation

2.1 The consultation attracted a great deal of interest which is demonstrated by the number of times the document was downloaded and the number of responses received.

2.2 Three detailed responses were received which made a number of legal submissions. A number of responses provided detailed answers to specific questions, for example, as to what should be taken into account in determining whether a plan represents a separate set of premises.

2.3 In general terms the responses fell into two camps: those who considered that no revisions to the existing Guidance and LCCP were necessary or desirable (or indeed possible) and those who sought the clarification and elaboration that a revision would deliver.

2.4 The latter group were largely composed of licensing authorities. However there was no consensus as to the best method of achieving this aim. Some considered that only change to the primary legislation would work, others that revision of the Guidance would be sufficient.

2.5 A number of recurrent themes emerged in answer to several of the questions and cut across stakeholder groupings within the industry:

- the impact (and for some the legality) of any revisions, as suggested by the Commission, on operators who have modified their premises
- the specific circumstances of coastal and seaside resorts and the effect any changes might have on their future viability
- the role of the Commission and how interventionist it could or ought to be
- whether proposed revisions would usurp or support the role of licensing authorities and whether the Commission would be acting beyond its statutory remit if the revisions were introduced
- whether there is a need for greater consistency across the country, with which the Commission might assist or whether it is up to operators and licensing authorities to determine what works in any specific area and in any specific building or premises.

2.6 Closely related to the foregoing are what were suggested to be divergent interpretations of the Act itself. Some respondents questioned how far the spirit of the Act and the intentions behind it supported the Commission's position on the need for revisions. Is the Act essentially permissive and therefore requires no further elaboration? Do (at least some of) the changes require amendments to primary legislation? Some respondents suggested that the Commission was putting a 'gloss' on the Act that cannot be found in its wording.

3 The Commission's role relating to premises

Consultation proposal

3.1 The Commission indicated that, if there were to be continuing uncertainty or wide variation in the way local licensing authorities interpret the Guidance and the legislation, there might be merit in the Commission making representations either in respect of particular licence applications or by way of application for a review by the licensing authority of a particular premises licence so as to enable the issues of wider application to be determined, if necessary on appeal. This would help to establish whether the approach adopted by the Commission to the interpretation of the legislation is correct.

3.2 We invited views on whether we should seek to reinforce the interpretation of the meaning of 'premises' and the need for the licensed activity to take place as the primary gambling activity, which the Commission considers to be implicit in the Act and associated regulations.

We suggested that a greater degree of clarity could be introduced through an additional operating licence condition or through the Secretary of State and Scottish Ministers making regulations to impose additional conditions on premises licences.

- 3.3** Finally, the Commission proposed a range of options to ensure that the provision of gambling facilities was compliant with the legislation in two specific circumstances, namely:
- where an operator has been granted two or more premises licences for what we would regard as one set of premises, or in circumstances where it is clear that the desire to provide category B gaming machines was the principal reason for obtaining a licence
 - where an operator was granted betting office licences under previous legislation intending (and in some cases being required to undertake) not to offer facilities for betting other than by means of fixed odds betting terminals (FOBTs) which are now classed as category B2 gaming machines under the Act.

Consultation questions

- Q1 The Commission does not normally make representations on premises licences unless we have concerns about an operator's prior behaviour. What criteria should the Gambling Commission apply in determining whether to make a representation on a premises licence application or request a review of a specific premises licence?
- Q2 Depending on the exact circumstances and whether or not additional operating or premises licence conditions are introduced, should the Commission consider:
- inviting licensing authorities to consider with operators how they can bring their premises into compliance, with a view to reviewing those that do not comply
 - inviting licensing authorities to review specific premises licences which do not comply with our interpretation of the Act and regulations and the Guidance or
 - reviewing an individual operating licence (for failure to provide gambling facilities in accordance with statutory provisions) with a view to imposing specific conditions, or even if the circumstances warrant, suspending or revoking the licence?
- Q3 Should the Commission's interpretation of the Act be made more explicit and bolstered by:
- introducing operating licence conditions (generally or individually) which ensure that the primary licensed activity is provided in each premises and/or
 - asking the Secretary of State and Scottish Ministers to introduce revised regulations on mandatory and default conditions on premises licences?

Respondents' views

- 3.4** We received 56 responses to the question asking what criteria the Commission should apply in determining whether to make representations on a premises licence application or request a review of a specific premises licence.
- 3.5** Just over half of the respondents did not want any change to the current situation, all but one of these being operators or trade associations. One trade association stated that the Commission is entitled to make representations within a statutory period if it has concerns, or if it considers the law is not being properly applied as stipulated in the Act. One operator highlighted the statutory remit of the Commission in such matters (section 22) and that we should aim to 'permit gambling insofar as the Commission thinks it reasonably consistent with pursuit of the licensing objectives'.
- 3.6** One theme common to many responses, both those in favour of the *status quo* and those in favour of the Commission adopting a more proactive position, was what one industry body described as 'regulatory uncertainty'.

This was perceived to be caused by premises licences being granted, in the absence of representations from the Commission, and the subsequent clarification as contained in the consultation document potentially affecting those licences.

- 3.7** One trade association captured the view of a number of licensing authorities in recommending that, because of the uncertainty and variation in the way local authorities interpret the legislation, there would be merit in the Commission making representations in respect of premises licence applications. Further, that the Commission should apply for reviews by licensing authorities of licences, the grant of which appears contrary to the clearer guidance proposed in the consultation document.
- 3.8** The same trade association also raised an issue which was noted by a minority of licensing authorities, that in circumstances where the Commission has not made representations this is taken as tacit approval, either by the operator or the licensing authority, or both.
- 3.9** As to what criteria the Commission might employ in deciding whether to make representations or apply for a review there was a wide variety of responses. A regulatory body requested the Commission to extend its brief beyond operator-related concerns whilst a faith group wished the Commission to review past applications and monitor future ones using the revised guidance. Two licensing authorities sought consultation with the Commission on all premises licence applications. One licensing authority, whilst agreeing that the Commission should make representations, also suggested a regular bulletin which would provide greater clarity on matters which have a more general application.
- 3.10** Of the 62 responses received to Q2 asking for opinions as to whether the Commission should invite licensing authorities to consider with operators how they can bring their premises into compliance or move to review, 25 were from operators and 24 from licensing authorities: the remainder being a combination of faith groups (three), trade associations (four) and other stakeholders (six).
- 3.11** Responses to this question most clearly demarcated the positions that different stakeholders adopted to the consultation. Half the responses were opposed to the proposal. One trade body judged that it was for the courts to arbitrate on such matters. Twenty operators and a trade association were of the view that, for various reasons, such action would be *ultra vires* and in breach of the European Convention on Human Rights.
- 3.12** A regulatory body regarded the first option to be problematic. They stated 'reviews of existing licences should be based on existing licensing objectives and not a retrospective application of an elucidated guidance'.
- 3.13** A more general point was made by one operator who stated it had complied with the spirit of the Act and not pursued multiple premises licences for what had previously been a single premises, but could find that it was in an unfair position if the operators of split premises licences were to receive 'grandfather rights'. Another operator cited the December 2006 DCMS guide to Transitional Provisions and stated that it was the clearly expressed 'guarantee' of the Government that (specifically) rights accrued under betting office licences issued under the 1963 Act would be 'grandfathered'. The operator went on to note that the only circumstances in which DCMS had indicated a licensing authority could refuse an application for a 'grandfathered' premises licence would be where it was obvious to the licensing authority from the plan of the premises that the applicant would be unable to comply with any condition attached to the category of premises licence that was being applied for. The respondent cited further material said to support its view from the Explanatory Memorandum to the Gambling Act 2005 (Commencement No 6 and Transitional Provisions) Order 2006.
- 3.14** Question 2 option two asked for responses to the proposal that the Commission consider inviting licensing authorities to review specific premises licences which do not comply with our interpretation of the Act and regulations, and the Guidance.

- 3.15** Thirty three respondents rejected this proposal, the majority of these questioning its legality. This included one trade association (their position being endorsed by 19 members without further comment) who viewed it as a breach of the Human Rights Act 1998. Twenty six respondents broadly agreed with the Commission's suggestion. However another regulatory body stated that the majority of (licensing) authorities would not welcome this sort of involvement by the Gambling Commission given that licensing authorities had made decisions at the time based on information with which they had been provided, the Act and the Guidance.
- 3.16** Several submissions stated that in respect of premises licence matters the Commission should discuss concerns with the licensing authority. A number of licensing authorities were keen to ensure that the Commission worked closely with them in resolving areas of concern as they have knowledge of local issues and circumstances. However, they considered that the Commission does have a productive role in circumstances where an operator is operating non compliant premises in a number of licensing authority areas.
- 3.17** The final option in question 2 (option three) asked whether the Commission should review an individual operating licence (for failure to provide gambling facilities in accordance with statutory provisions) with a view to imposing specific conditions or suspending or revoking the licence. This was viewed as the only feasible option by another regulatory body. A further 18 submissions supported the proposal, 12 of which were from licensing authorities. Among the positive responses, four organisations argued that the options should be used in escalating order from one to three.
- 3.18** Option three was rejected by one trade association (and 19 members without further comment) on the grounds that 'the Commission's untested and novel interpretation of the Act would be a wholly disproportionate way to proceed'. Another operator submitted that the Commission should remain within its statutory remit (section 22 of the Act) and would not be doing so should it seek to review individual operating licences that had been granted through due process.
- 3.19** Sixty four responses were received to question 3 which asked whether the Commission should make its interpretation of the Act more explicit, bolstered by introducing operating licence conditions (generally or individually) to ensure that the primary licensed activity was provided in each premises and/or ask the Secretary of State and Scottish Ministers to introduce revised regulations on mandatory and default conditions on premises licences.
- 3.20** Thirty two respondents, to a greater or lesser degree, indicated that either the primary legislation needed to be changed or the Commission's interpretation of the Act was flawed and we should not take any action. The latter position was taken by two trade associations, 20 operators, one MP and one lawyer.
- 3.21** The first option (introducing operating licence conditions to ensure primary licensed activity is provided in each premises) was preferred by five licensing authorities, whilst 15 supported both options. (The latter option being to ask the Secretary of State and Scottish Ministers to introduce revised regulations on mandatory and default conditions on premises licences.)
- 3.22** One submission, from a lawyer, pointed out the special circumstances that might arise in, for example, motorway service stations. Although all the facilities are offered for a traditional bet the gaming machine yield is likely to be much higher as customers want a result immediately rather than having to wait for the result from traditional sporting events.
- 3.23** Those in favour of the proposal were divided about how it might be achieved. One licensing authority, for example, suggested that the starting point should be the premises licence stipulating the primary gambling activity, however should this route fail to deliver and there be concern at a national level, then it would be appropriate for operating licence conditions to be introduced as opposed to mandatory or default conditions on a premises licence. One industry body agreed clarification to the Guidance was 'a good start' but suggested that it would need to be reinforced with legislation.

Also they argued that whilst changes to operating licence conditions would be a shorter route it might blur the boundaries between the premises and operating licences. A third position was taken by another licensing authority who advocated conditions on both premises and operating licences as the speediest route.

The Commission's position

- 3.24** The Commission does not consider it appropriate to make representations routinely on premises licence applications and to do so would have significant resource implications. The use of premises for gambling is better dealt with at a local level by licensing authorities. We note the comments from licensing authorities and others that such a lack of representation is being taken as tacit approval and wish to reiterate our position that it should not be interpreted in such a way. Exceptionally, where an application for a premises licence, or the operation of a current premises licence, raises matters of wider or national significance we will consider the option of making representations or requesting a review.
- 3.25** The Commission recognises that licensing authorities and officers have sometimes experienced difficulties in interpreting the Guidance and have felt the need for more support from us. They have not felt confident in challenging premises licence applications, particularly where an operator has successfully obtained premises licences in other authority areas. We are therefore developing plans to offer a programme of training and events for licensing officers much as we did when we first issued the Guidance. We also want to pool best practice with other regulatory bodies and disseminate the results to strengthen the support we offer to licensing authorities. The aim is to improve the confidence of officers in interpreting the Guidance and more generally to develop further our working relationship with licensing authorities.
- 3.26** In the light of the foregoing, where a licensing authority considers that decisions previously made were based on a mistaken interpretation, they will need to consider, in consultation with affected operators, how to bring premises into compliance, and to review those that remain non-compliant. The Commission will monitor the effect of the measures adopted as a result of this consultation exercise. Should DCMS have continuing concerns that local licensing authorities' actions indicate a continuing misinterpretation, they may wish to introduce additional premises licence conditions in order to achieve greater consistency.
- 3.27** We have decided to introduce an operating licence condition which will ensure that the primary licensed gambling activity is provided in each set of licensed premises. To this end we will be conducting a four week consultation on the precise format of the condition in November 2008 before publishing the finally specified condition in a supplement to the LCCP by the end of December 2008 with a view to its coming into effect on 1 April 2009.

4 The definition of premises

Consultation proposal

- 4.1** The Commission stated its view that the Act clearly envisages premises that are distinct entities and recognisable as such. The Commission maintained that if this were not the case, the different machine entitlement provisions would be meaningless. It appeared to the Commission that some operators were adopting an approach to the meaning of 'premises' which departed from common sense, with a view to encouraging licensing authorities to grant more than one licence for adjoining 'units' and thereby increase the number of high value machines available in what was, in reality (and, we considered, in law) a single premises.

- 4.2** We therefore invited licensing authorities, operators and other interested parties to comment on how, in practice, they define or recognise a single set of premises as identified on the deposited plan.
- 4.3** The current mandatory and default premises licence conditions support the concept of separate premises by preventing direct access between certain classes of licensed premises. For example there cannot be direct access between two adult gaming centres. However, the Commission had been asked by a number of stakeholders what ‘direct access’ means. We therefore proposed to clarify the meaning of direct access and invited suggestions as to how this might be done.
- 4.4** The Commission stated that there are at present no statutory requirements for fixed or opaque barriers between premises. However licensing authorities can require such barriers between premises if they consider this appropriate. In some cases where they have not done so, the lack of fixed barriers has resulted in it being very difficult to determine where one premises ends and another begins, so apparently creating in practice a composite ‘premises’ with the multiple allocation of gaming machines arising by virtue of the number of premises licences granted. The Commission concluded that the existence of local discretion in a wholly new regime, applied by a large number of licensing authorities, had led to unacceptably wide and doubtful interpretations of what is required to delineate separate premises.

Consultation questions

- Q4** What factors do licensing authorities take into account in determining whether a plan represents a separate set of premises? What factors should they take into account?
- Q5** Is further clarification needed on what is meant by direct access and how might we do this?
- Q6** Should the Commission recommend further Regulations in respect of mandatory and/or default licence conditions, how such principles could be formulated as regulations, and if so should they contain the following:
- introducing a ban on direct access between bingo premises (bringing this type of premises into line with other premises entitled to have high value machines) and/or
 - requiring barriers of a minimum specification (e.g. height, width, length and opacity) to delineate premises and/or
 - setting a minimum unlicensed area between licensed premises and/or
 - requiring that a minimum number of players positions are made available in bingo and casino premises.

Respondents’ views

- 4.5** We received 59 responses to question 4 varying from the practical and specific to those which principally addressed legal issues. Twenty three were from local authorities who tended to offer the more detailed responses, often referring to local conditions in their area. Of the remainder, 24 were from operators, three from faith groups, one from another regulatory body, five from industry bodies and three from other stakeholders.
- 4.6** One local authority, which had received an application to sub-divide existing premises, provided an edited version of a submission prepared for an anticipated hearing at which they were to oppose the application. The submission stated that ‘the fact that “premises include any place” cannot be construed as meaning of that “any place constitutes premises” for the purposes of the Act’. (The application was withdrawn before the hearing and therefore not tested in law.)

- 4.7** An alternative legal perspective was offered by a trade association (and endorsed by 19 members without further comment) which cited case law to indicate that premises are ‘a defined area limited by metes and bounds’.
- 4.8** One operator, which works across more than 70 licensing authorities and has been granted multiple licences for in excess of 90 buildings, stated that the licensing authorities concerned had applied the section 353 definition of premises and applied the Mandatory Conditions appropriately. In their view the only factors that should be taken into account are those appearing on the face of the Act and regulations made under it.
- 4.9** A regulatory body set out, in common with many licensing authorities, a detailed list of factors including, barriers, entrances, areas between premises, compliance with mandatory and default conditions; they also noted that paragraph 7.12 of the current Guidance is ‘not helpful’ as operators argue it allows for the splitting of premises. One licensing authority, in a comprehensive response to the question, noted that they found paragraph 7.19 of the Guidance (June 2007) which relates to direct access requirements problematic and open to differing interpretations. Having sought the advice of the Commission which they found to be ‘less than helpful’ they sought Counsel’s advice and made representations against applications. They subsequently produced their own criteria which were within their own interpretation of the legislation, regulations and guidance.
- 4.10** An operator observed that, in terms of licensing authorities’ interpretation of what constitutes premises, ‘the inconsistency is not explicable by reference to an exercise of discretion’ and furthermore ‘the extent of variation in approaches is such as to bring the law into disrepute and create uncertainty amongst operators and others.’ Another operator stressed the need for a change in the law rather than the Guidance but also stated that casinos have been unnecessarily included; the reason being that casinos require a separate entrance from the street and the public cannot move from another type of gambling premises directly into a casino. This latter comment reflected an argument repeated in response to other questions and by both trade bodies and operators who perceived that casinos were being unfairly included in this consultation process and were not the source of the concerns that prompted the Commission to act in the first place.
- 4.11** The consultation then asked (question 5) whether clarification of direct access was required and how the Commission might do this. The most categorical set of responses were from licensing authorities, 14 of whom stated that such clarification is required. Three other stakeholders and one faith group also held this view. One trade body stated that any change would require further consultation and would need to set out the reasons for the change; however they sought flexibility dependent on specific circumstances. This position was endorsed by 19 members of the association without further comment
- 4.12** Two licensing authorities dissented from this position, one stating that it was now too late to change the Guidance and the other that licensing authorities have worked well with the existing guidance. These positions were also held by an operator who stated that no change to the bingo access conditions was either necessary or advisable, in what is already a ‘beleaguered’ sector. The operator considered that additional conditions would not only undermine the decisions that have been made (by licensing authorities) in respect of current split premises but also the process of local democracy and accountability.
- 4.13** The response from a regulatory body noted that exemptions, such as for piers and similar seaside establishments, would be required. The particular circumstances relating to these premises in terms of layout, geographical location and economic viability was also raised in relation to other questions. Respondents sharing these concerns included licensing authorities, operators and trade bodies.
- 4.14** One operator which opposed the proposed change also considered that any change must be the subject of further consultation and be justified by applying ‘Better Regulation’ principles.

- 4.15** One operator and one licensing authority argued that for the Commission to achieve clarification, a change to the mandatory or default premises licence conditions or the Act is needed whilst another licensing authority suggested obtaining definitive guidance from the DCMS.
- 4.16** The final question in relation to premises asked whether the Commission should recommend further Regulations in respect of mandatory and default conditions for premises licences and what they should contain in relation to direct access between bingo premises, barriers, access between licensed premises, a minimum unlicensed area between licensed premises and minimum player positions in bingo and casino premises.
- 4.17** Responses to the question were both varied and in many cases detailed. The most succinct response was from a trade body (and was endorsed by 19 members without further comment) who reiterated their answer to the previous question, namely that such changes would require further consultation, including the reasons for change and that flexibility was required depending on particular circumstances.
- 4.18** Three licensing authorities, two faith groups, an academic and a police body supported the need to make all the changes suggested. A regulatory body agreed that the changes were required in the absence of modifications to the primary legislation.
- 4.19** One operator rejected the proposals and referred the Commission to the licensing objectives, specifically querying whether there was evidence of harm having arisen from the sub-division of premises, which they stated was not the case.
- 4.20** Another operator argued that the creation of standards of separation in mandatory conditions should be deferred as a reserve power. The reason they gave was that 'if the mandatory conditions are amended so as to require a certain type of partition between premises, the argument is likely to follow that therefore a premises is created even where there are no partitions at all, otherwise there would be no need to add conditions regarding partitions.' The submission went on to argue that a better solution was to give clear guidance regarding the definition of premises and then review ones that are non compliant.
- 4.21** A licensing authority suggested removing all direct access conditions which would remove the need to define the area between gambling premises. Another authority, in common with others, did not want anything 'too prescriptive'. They added that they would like a change to the primary legislation concerning the sub-division of premises 'where the purpose is to circumvent the maximum number of higher payout machines'.
- 4.22** Licensing authorities, operators and trade bodies primarily based in or representing coastal areas and seaside resorts all, to a greater or lesser degree, expressed strong concerns about access arrangements between licensed premises. Their case was that the layout of multi-venue complexes and amusement arcades (most of which are not purpose built) would not be able to comply with such an arrangement. Insistence on such compliance would be to the detriment of the economic viability of such premises. One large urban licensing authority noted that the proposed requirement for a minimum number of playing positions could potentially prejudice smaller premises and instead proposed a ratio of player positions for the primary activity in relation to those for the non primary activity would be more appropriate. Another coastal licensing authority suggested that the removal of all direct access conditions would eliminate the need to introduce or define the nature and type of areas between gambling premises.
- 4.23** One casino operator and a trade body stated that casinos have been incorrectly included within this question (and also more generally within the consultation document). In regard to question 6 the operator stated that the four points listed do not apply to casinos; there is nothing in law requiring casinos to have a minimum number of player positions; further the issue of split premises is irrelevant as it is impossible to obtain a new licence.

- 4.24 One trade body, an MP and a lawyer stated that such matters were best left to the licensing authority and no change was required.

The Commission's position

- 4.25 The Commission noted the considerable work that licensing authorities have undertaken to draw up the factors they consider when looking at the plans for a licensed premises. Significantly these factors are able to take into account the particularities of the premises – for example piers in coastal towns. The Commission has also taken into consideration the strongly expressed view (from different parts of the industry) that ultimately such matters are the responsibility of the local licensing authority. We are therefore issuing the revised Guidance in tandem with this responses document to assist licensing authorities in their considerations and we will issue further guidance should it prove necessary.
- 4.26 The Commission is confident that the definition of premises as given in the revised Guidance is legally correct. However it is licensing authorities and not the Commission who have the responsibility for ensuring that (subject to the statutory exception in respect of tracks) not more than one licence is granted in respect of any premises and that the ambit of, and other circumstances relating to, any area for which an applicant seeks a licence are such that it can properly be said to comprise distinct premises. Accordingly, the Commission expects that licensing authorities will wish to give careful consideration to whether they need to revisit decisions in the light of the revised Guidance and consider whether to review any particular premises licence. Clearly the licensing authority would want to work with operators in a way that is reasonable and proportionate in the circumstances for the operator to achieve compliance. The Commission will not normally itself seek to take action in relation to premises licences unless there is a risk to the licensing objectives and the issue is also of more than local significance.
- 4.27 However, the Commission is aware of particular premises which have been permitted more than one premises licence following sub-division of the premises. In some of these cases, the Commission does not accept that this sub-division of premises into two or more areas thereby creates two or more separate premises and so such cases are in apparent breach of the Act. Such a breach does not necessarily constitute a risk to the licensing objectives and these cases are therefore unlikely to be a priority for the Commission's limited resources. As noted in paragraph 3.26, should DCMS have continuing concerns that local licensing authorities' actions indicate a continuing misinterpretation, they may wish to introduce additional premises licence conditions. These might include a ban on direct access between bingo premises; requiring access to licensed premises from a street without having to pass through other licensed premises; requiring barriers of a minimum specification; and/or setting a minimum unlicensed area between licensed premises.
- 4.28 It has been suggested by some respondents that it would be impermissible, unacceptable or unfair for a licence that has been granted in good faith to be subsequently reviewed in a case in which the licensing authority later came to the view that its previous interpretation of the legislation was mistaken, with the result that its decision may be ultra vires. The Commission does not agree. Whatever licensing authorities, or the Commission, may have done by way of grant or purported grant of a licence cannot override the provisions of the Act. Furthermore, even where a licensing authority or the Commission considers it had perfectly properly granted a licence but subsequently develops concerns in relation to the licensing objectives it is open to the licensing authority or the Commission to review the licence with a view to reducing that risk to the relevant licensing objective.

5 Primary gambling activity

Consultation proposal

- 5.1** The Commission observed that some operators (in particular existing AGC operators) may be considering applying for operating licences, or have been given operating licences, even though they do not intend to provide the primary gambling activity the relevant type of licence authorises on their premises.
- 5.2** Whilst we recognised that ultimately it is for the Courts to decide how statutes should be interpreted, the Commission considered that such arrangements are not permissible given the framework provided by the Act. In the Commission's opinion an operator must to some degree provide the activity specifically authorised by its operating and premises licences before they can take advantage of any additional entitlement, such as that to make a limited number of gaming machines available for use on their premises.
- 5.3** The Commission concluded that what constitutes primary or ancillary activity lies at the heart of the matter and is a question of fact and degree to be determined by the licensing authority in each case. However, the Commission considered that individual licensing authorities would welcome clearer guidance on the subject. The Commission therefore proposed that the following could provide indicators of the primary gambling activity. (It is emphasised that not all would need to be present in a particular case, nor do they preclude other indicators. However the combination of those that are present might help the licensing authority determine whether the activity is the primary one in any individual case.)

In all premises:

- the relative ratio of the spaces available to members of the public allocated to the primary gambling activity to those allocated to other gambling activities
- information provided to customers about how the gambling facilities work and the extent to which the primary activity is promoted on the premises and by way of external advertising (eg newspapers, flyers, posters, signage and on the internet)
- the use proportionately expected or made of the different facilities.

In the case of bingo:

- the number of dedicated seating positions for those playing bingo, having regard to the overall size of the premises
- the regularity and frequency that bingo is or is intended to be played on the premises, as compared with the periods when the premises is open
- whether revenue from bingo does/will generally exceed £2000 per week (the threshold over which clubs require a bingo licence)
- whether there will be:
 - live calling of main stage bingo available at the premises
 - a permanent area for ticket/card sales
 - bingo played whenever sessions are advertised
 - display of main stage prize board information
 - a mechanism to stop a game to claim a win

In the case of betting:

- the existence of a bet placing capacity (and where solely by terminal, whether there are more betting terminals than gaming machines)
- information available on details of events (e.g. races, competitions, likelihood of things occurring etc.) including the results of all such events, on which bets can be made
- gross yield from betting compared to that derived/likely to be derived from gaming machines
- ability to pay out winning bets on the premises
- the extent to which machines are/will be in use when betting is not provided.

In the case of converted casinos (those first licensed under the Gaming Act 1968):

- space/positions allocated to casino gaming
- number of tables/seating positions (are there at least as many playing positions as there are gaming machines?)
- the extent to which live tables are/will be made available on demand whenever the club is open
- presence of such monitoring and security equipment as would normally be expected in casino premises.

5.4 The Commission also proposed to add paragraphs to the Guidance to Licensing Authorities regarding the statutory 'primary purpose' requirements which were included as Annex A.

5.5 We further proposed to underpin the statutory provisions by the imposition of a general condition on converted casino, bingo and betting operating licences explicitly to prevent the use of such premises for the provision of gaming machines as the principal or only activity. Annex B set out the proposed licence conditions which could be attached to casino, bingo and betting operating licences to ensure that operators do not rely on high stake machine gaming without an appropriate level of casino gaming, bingo or betting being made available to customers.

5.6 The Commission stated that, where operators were not currently providing the primary activity under their operating licence, it might be appropriate to add conditions that limited the availability of gaming machines and that where no live gaming was available, gaming machines did not dominate the premises. The Commission added that it might need to apply specific licence conditions to different categories of operating licence and would discuss with operators and the customer groups targeted. A number of new licence conditions could apply and these were set out in Annex B.

5.7 The Commission considered recommending to the Secretary of State that further Regulations should be made under section 240 of the Act to control the circumstances in which gaming machines are made available for use. These would explicitly constrain the use of gaming machines in relation to times when the primary activity is available. The Commission also considered whether some of the features of premises set out in paragraph 3.3 of the consultation document (see paragraph 5.3 above) should be embedded in Regulations setting out mandatory and default licence conditions, whilst recognising that this would reduce flexibility for both operators and licensing authorities.

Consultation questions

Q7 Do you agree with the Commission's interpretation of the requirements in the legislation and the need for primary activity? If not, why not?

Q8 Are the indicators of primary purpose appropriate; should others be added?

Q9 What criteria should the Commission apply if it were to attach additional operating licence conditions to prevent gaming machines being provided alone or as the primary activity in a premises with a converted casino, bingo or betting premises licence?

Q10 What views do you have on the possible need for additional regulations?

Respondents' views

5.8 Question 7 divided the opinion of respondents very clearly. It asked whether organisations agreed with the Commission's interpretation of the legislative requirements and the need for primary activity.

Thirty four respondents did not agree with the Commission's interpretation although a minority of these did support the need for the primary activity. The reason for their rejection of the Commission's position was that it is not clearly stated in the legislation and the respondents therefore considered that to do this would require changes to the legislation or a judgment from the courts.

- 5.9** A regulatory body stated that without a change to the primary legislation these matters are an operating licence issue and that Guidance is not an appropriate way to introduce the concept of primary activity.
- 5.10** A trade association agreed with the Commission and suggested that the proliferation of licensed betting premises is attributable to the increased popularity of category B2 gaming machines rather than to any increase in betting business.
- 5.11** Another trade association expressed concern about the list of conditions in Section 3.3 of the consultation (see 5.3 above). It stated that the list would impede technological advances and suggested that, should such a list be used, it should be a guide only. Furthermore, it argued that, in the case of casinos the proposed licence conditions at Annex B should be dropped and that casinos do not require a prescribed list as they cannot be split into multiple units.
- 5.12** One recurring theme in submissions opposing the Commission's interpretation focused on how far the Act mandated or merely permitted an activity. One trade body referred to section 150 of the Act in which (they pointed out) the Act 'authorises' premises to be used for an activity rather than requiring an activity to take place. They argued that the Commission was therefore incorrect in its interpretation. Similar points were made in answer to other questions, for example question 9.
- 5.13** In response to question 8, 23 respondents agreed that the indicators are, in general terms, appropriate. A number of additions and caveats were mentioned including, for example, by a faith group which considered that the proportion of profits and the number of people playing were appropriate indicators; a licensing authority questioned whether some of the indicators were subjective, whilst another wanted the indicators to be included in LCCP and mandatory conditions.
- 5.14** 30 respondents disagreed with the Commission's position for a variety of reasons. One operator and one trade body considered that such matters were better handled by a licensing authority. Two trade bodies and 20 operators stated the proposal to be inappropriate and wrong in law. Others declared the tests to be neither workable nor valid. For example, one operator stated that gross gaming yield may vary substantially from week to week; further the concepts of gross gaming yield and popularity are not aligned; a more popular activity may generate a lower gross gaming yield. Further they questioned whether popularity is measured numerically by length of time spent or amount of money spent on the activity? Finally they questioned who would audit and test such a measure?
- 5.15** One trade body thought the indicators to be very comprehensive and appropriate, especially the financial indicators for bingo and betting which would illustrate, for example, the role of gaming machines in betting shops.
- 5.16** From those who responded positively there was no significant demand for any further indicators to be added.
- 5.17** Question 9 sought further elaboration of views on primary activity, asking respondents to indicate what criteria should be attached to additional operating licence conditions to prevent gaming machines being provided alone or as a primary activity in premises (other than in AGCs and FECs).

- 5.18** Twenty operators, three trade bodies and a legal organisation did not consider there was any need for such criteria. One operator stated that the Commission would be exceeding its powers if it took this step. A lawyer and a licensing authority considered it would be unfair to attach further conditions post-conversion (of 1968 Act casinos).
- 5.19** One industry body and a licensing authority supported the criteria and thought that they should be attached to operating licences rather than to premises licences to avoid local variation. Not all licensing authorities responded to this question; however of those that did, four specified that Annex B in the consultation document would achieve the Commission's aims. One operator, in support of the criteria, suggested that the category B2 gaming machine use should be controlled by the premises mandatory and default conditions.
- 5.20** One operator contested the Commission's position. They stated that the Act 'authorises but does not mandate' the provision of certain activities. Furthermore, they argued, it is a matter for local democracy and decision making rather than for the Commission. Their response then pointed to examples from previous Commission guidance which, it argued, are inconsistent with the Commission's view on primary purpose. They considered that the Commission should focus on the 'drift' from potentially softer forms of gambling to potentially harder forms of gambling under one roof rather than multiple licences in the same premises for one form of gambling.
- 5.21** A faith group noted that the Commission, in a separate exercise, is reviewing the impact of high value gaming machines. They understood that the review was likely to include an investigation into the impact of such machines on the principal gambling activity in casino, bingo and betting premises and whether a risk is thereby posed to vulnerable groups or communities. The outcome of the review, the respondent suggested, 'should contribute to decisions on what criteria should apply in respect of preventing gaming machines being provided alongside primary activities that are deemed lower in impact'.
- 5.22** The final question in this section asked for responses on whether there was a need for further regulation. Of the 49 replies, 17 were from licensing authorities, five from trade bodies, 22 from operators, one from a faith group, one from a regulatory body and three from other stakeholders.
- 5.23** Twenty six organisations stated that there was no need for new regulations, however within that group a regulator felt that 'clarity is needed on the face of the Act'. A trade association and a licensing authority both agreed to regulation so long as it leads to clarity. A further two licensing authorities considered that additional regulations may be required for 'consistency and/or clarity'.
- 5.24** One trade body commented that the proposed casino licence condition and the proposed list of prescribed casino facilities (set out in 5.3 above) be abandoned because they are 'irrelevant and restrictive'. They conclude that they 'see no point in creating additional licence conditions or regulations covering issues that do not exist in casinos, but could have unintended consequences for existing businesses'. An operator endorsed this position.
- 5.25** One licensing authority, whose views were similar to a number of others, stated that the Commission should pursue new regulations under section 240 of the Act 'to ensure that primary use is not abused'. However two licensing authorities judged that legislation was required to address the issue whilst another considered that case law was required before introducing additional conditions. A different position was taken by another licensing authority to establish primary purpose; they stated that a change to conditions on premises and operators' licences was a speedier and more effective route.

The Commission's position

- 5.26** The Commission remains firm in its view that the primary licensed activity must be provided on individual premises and that this is the correct interpretation of the legislation. An additional operating licence condition will be specified to reinforce this requirement and the indicators of primary gambling activity will be set out in a draft ordinary code of practice. A focused four week consultation period will permit stakeholder input as to the precise wording of the licence condition and code of practice.
- 5.27** The Commission has decided not to include indicators of primary gambling activity in the Guidance at present but to defer a decision on that until after this further consultation has been concluded. Any such changes to the Guidance would be announced with our response to the further consultation and be incorporated in the next edition of the Guidance.
- 5.28** The Commission does not consider it appropriate, at this point, to impose individual operating licence conditions; we will instead introduce general licence conditions. We note the demand for consistency and clarity across the country and consider that this is the best way of achieving this. The four week focused consultation will inform our decisions. We note the comments made in regard to technological innovation and the development of new forms of existing types of gambling. We also note the fact that different activities are more popular at different times of the day within one premises. These and other observations will contribute to our decision making process.
- 5.29** The Commission agrees with the majority of respondents who opposed the introduction of further regulations imposing additional mandatory premises licence conditions to underpin the requirement to provide the primary gambling activity. We judge that the changes we will be implementing, as outlined above, will achieve the objective of ensuring that appropriate primary gambling activity takes place along side the provision of gaming machines as envisaged by Parliament. However, regulations remain an option for the DCMS in the future should they consider them to be necessary.

6 Revision of the Guidance

Consultation proposal

- 6.1** The Commission noted that the widely different interpretations of the Guidance and the many requests for advice or help in determining premises licence applications suggested that we needed to expand our guidance on the question of what amounts to a single set of premises to which the various machine entitlements attach. In addition, the Commission noted that it had also become evident that there is widespread uncertainty amongst licensing authorities as to whether a premises licence implicitly requires the activity it authorises to be the primary activity or whether making available the gaming machines to which the premises licence gives an entitlement can itself constitute the primary activity.
- 6.2** The Commission therefore proposed to revise its Guidance along the lines indicated in the consultation document to clarify and elaborate its views. The proposed revised Guidance was included as Annex A.
- 6.3** We also proposed a change to the Guidance to clarify that the absence of representations by the Commission in response to a notice of application for, or variation of, a premises licence, or an indication that it is not intended to make any representations, should not be taken to mean that the Commission supports, sanctions or approves the application.

Consultation question

Q11. If the proposed revisions to the Guidance to Licensing Authorities do not provide sufficient or appropriate guidance on primary purpose and individual premises, what further or different guidance is necessary?

Respondents' views

- 6.4** The last question in the consultation document asked specifically about what, if any, changes to the Guidance were required should the proposed revisions not prove sufficient or appropriate. Fifty six organisations responded.
- 6.5** Twenty five organisations very clearly indicated that they thought no further revisions were required. As one respondent stated 'the definition of premises set out in section 353 of the Act should be applied without placing upon that definition glosses or pre-conditions which the statute does not itself provide'. The respondent went on to say that the same should apply to DCMS Regulations and that the primary matter is the licensing objectives.
- 6.6** Of those broadly in favour of the need for revised Guidance a number of respondents offered detailed and specific comments relating to the wording of particular sections as well more general issues about the approach that the Commission had taken. An example of the latter came from a trade organisation which stated that future amendments should be principles based rather than from a non-exhaustive list which they feared might be followed 'slavishly...to the exclusion of common sense'. A legal organisation echoed the view of others in highlighting the element of subjectivity contained in, for example paragraph 7.15 and 7.18 which it considered to be inappropriate.
- 6.7** A regulatory body stated that they considered the underlying issue behind the consultation appeared to be the need to control the number of machines per premises yet they were 'unaware of evidence to support the need for this control'. They also questioned the 'elucidated guidance' that 'will introduce new concepts that do not appear in the Act, which is then likely to be challenged by operators, particularly if retrospectively applied'. In common with the majority of licensing authorities, as well as others, they requested clarity. As one licensing authority put it, the Guidance should be the 'first port of call' for clarification and should contain all the advice the Commission wishes to impart without the need for further or different guidance. The need for clarity was also endorsed by an operator. They stated that the Guidance should clearly set out the three relevant questions for licensing authorities which they considered it currently does not do. The respondent added that in order to clarify for licensing authorities what the Parliamentary objective underpinning all three questions is, it is worth specifically including paragraph 7.6 of the Explanatory Memorandum (contained at footnote 1 of the consultation document).
- 6.8** A licensing authority endorsed the proposed revisions, however they also suggested section 7.7 should be amended to make clear that the factors identified should be used not just to determine a premises licence but as grounds for a review. A further amendment was suggested to section 7.11 to reflect that the Act was now in force.
- 6.9** Another specific suggestion from a licensing authority was to change the system relating to the provision of gaming machines, adopting something similar to the way it works in alcohol licensed premises. As they explained 'the premises could be licensed under new regulations for primary purpose and then separate applications for gaming machine permits could follow'. This, they suggested, would allow licensing authorities discretion according to specific circumstances.

- 6.10** One licensing authority, whilst broadly endorsing the proposed revisions, drew on recent experience of an application for an Adult Gaming Centre which, if successful, would have resulted in it containing only four machines, all category B. They suggest that a useful addition to the proposed revisions would be a reference to the size of the premises and a rule then stipulating that, only, say, 25% of machines are category B.

The Commission's position

- 6.11** The Commission is issuing the revised Guidance in conjunction with this Responses document. The revised Guidance has been modified from the version contained in the consultation document (Annex A) in the light of the comments received. A new edition of the Guidance is planned for April 2009. We will issue a set of indicators of the provision of primary gambling activity in the light of the comments received during the forthcoming consultation and will publish them in due course.
- 6.12** In summary the modified version of Annex A states the following:
- by distinguishing between premises types the Act makes clear that the main activity of the premises should be that described. This applies to bingo, converted casino and betting premises licences
 - in the Act 'premises' is defined as including 'any place'. Section 152 therefore prevents more than one premises licence applying to any place. However a single building could be subject to more than one premises licence provided they are for different parts of the building, and the different parts of the building can reasonably be regarded as different premises
 - in most cases the expectation is that a single building/plot will be the subject of an application for a licence, for example, 32 High Street. The Commission does not consider that areas of a building that are artificially or temporarily separated, for example by ropes or moveable partitions, can properly be regarded as different premises
 - with the exception of AGCs and FECs, premises are not to be used exclusively for gaming machines but must provide the gaming facilities corresponding to the premises licence type
 - licensing authorities should take particular care in considering applications for multiple premises licences for a building and those relating to a discrete part of a building used for other (non-gambling) purposes
 - where more than one premises licence is permitted within a building the machine entitlement for the premises may not be aggregated
 - different premises licences cannot apply in respect of single premises at different times
 - the Commission will normally only comment on an application of which it has notice if it wishes the licensing authority to be aware of some aspect relating to the operator. If no response is heard from the Commission, licensing authorities should not assume we have any view (whether supportive or otherwise) on the merits of the premises licence application
 - in relation to a particular premises, the licensing authority may review any matter connected to the use made of the premises if it has reason to suspect that premises licence conditions are not being observed.
- 6.13** Following the publication of this responses document the Commission will be publishing a revised second edition of the Guidance to Licensing Authorities and conducting a four week consultation on the indicators that the primary gambling activity is being, or intended to be, carried on.

Appendix 1:

Organisations contributing to the consultation

Arun Council	Licensing authority
Association of British Bookmakers	Industry body
Association of Chief Police Officers in Scotland	Other
Billy Manning Ltd.	Operator
Bingo Association	Industry body
Birmingham Council	Licensing authority
Blackpool Council	Licensing authority
Bracknell Forest Council	Licensing authority
British Amusement Catering Trades Assoc.	Industry body
British Association of Leisure Parks, Piers and Attractions Ltd.	Industry body
British Casino Association	Industry body
British Resorts and Destinations Association	Industry body
Broxtowe Council	Licensing authority
Buckingham Bingo Ltd	Operator
Bury Council	Licensing authority
Business in Sport and Leisure	Industry body
Camden Council	Licensing authority
Casino Operators Association	Industry body
East Lindsey Council	Licensing authority
Evangelical Alliance	Faith group
Fletchers	Operator
Gala Coral Group	Operator
Genting Stanley	Operator
Glasgow Council	Licensing authority
Grand Pier Ltd.	Operator
Great Yarmouth Council	Licensing authority
Hackney Council	Licensing authority
Haverfordwest Coin Machines	Operator
Hull Council	Licensing authority
J Humble MP	Other
Joywheel gaming	Operator
JSP Leisure	Operator
K. W. Reader and Sons Ltd.	Operator
Kingston Leisure Ltd.	Operator
Kravis Ltd.	Operator
Ladbrokes plc.	Operator
Law Society of Scotland	Other
Licensing Legal Solicitors	Other
Liverpool Council	Licensing authority
Local Authorities Co-ordinators of Regulatory Services	Regulatory body
Manchester Council	Licensing authority
Masons Amusements Ltd (Cleveley)	Operator
Methodist Church	Faith group
Mr Rigby's Leisuretime	Operator
National Leisure Ltd.	Operator
Newham Council	Licensing authority
Noble Organisation Ltd.	Operator
North Lanarkshire Council	Licensing authority
Nottingham Council	Licensing authority
P. Evans (University of Birmingham)	Other
Perth and Kinross Council	Licensing authority

Playland Holding Ltd.	Operator
Quaker Action on Alcohol and Drugs	Other
R. Etchells	Other
Rank Group	Operator
Reflex Gaming Ltd.	Operator
Restormel Council	Licensing authority
Riva Gaming Group	Operator
Riviera Leisure	Operator
Salvation Army	Faith group
Sandwell Council	Licensing authority
Stade Developments (Hastings) Ltd	Operator
Stirling Council	Licensing authority
Teddy Leisure	Operator
Tendering Council	Licensing authority
Thomas Entertainment	Operator
Torbay Council	Licensing authority
Treatview Ltd.	Operator
W. Ball and Sons Amusements	Operator
Wandsworth Council	Licensing authority
Worcester Council	Licensing authority
Cllr J Squires (Worcester Council)	Licensing authority

Workshop attendees

Aldgate Capital	Other
Berwin Leighton Paisner LLP	Other
Bingo Association	Industry body
Birmingham Council	Licensing authority
Blackpool Council	Licensing authority
Bracknell Council	Licensing authority
Breckland Council	Licensing authority
British Amusement Catering Trades Association	Industry body
British Casino Association	Industry body
Broxtowe Council	Licensing authority
Casino Operators Association	Industry body
Chesterfield Council	Licensing authority
Coventry Council	Licensing authority
Daventry Council	Licensing authority
Dept. for Culture Media and Sport	Other
Dudley Council	Licensing authority
East Lindsey Council	Licensing authority
East Riding of Yorkshire Council	Licensing authority
Exeter Council	Licensing authority
Falkirk Council	Licensing authority
Gala Coral Group	Operator
Glasgow Council	Licensing authority
Genting Stanley/Crockfords Club	Operator
Greenwich Council	Licensing authority
Grosvenor Casinos	Operator
Hackney Council	Licensing authority
Haringey Council	Licensing authority
Hounslow Council	Licensing authority
Hull Council	Licensing authority
Insight	Other
Institute of Licensing	Other
Ipswich Council	Licensing authority

Lambeth Council	Licensing authority
Leeds Council	Licensing authority
Local Authorities Coordinators of Licensing	Regulatory body
Malvern Hills Council	Licensing authority
Manchester Council	Licensing authority
Mecca	Operator
Newcastle Council	Licensing authority
Noble Organisation	Operator
North Shropshire Council	Licensing authority
Northampton Council	Licensing authority
Norwich Council	Licensing authority
Nuneaton and Bedworth Council	Licensing authority
Oxford Council	Licensing authority
Rank Group	Operator
Reading Council	Licensing authority
Salisbury Council	Licensing authority
Stafford Council	Licensing authority
Stockton-on-Tees Council	Licensing authority
Stoke on Trent Council	Licensing authority
Swindon Council	Licensing authority
Tamworth Council	Licensing authority
Telford and Wrekin Council	Licensing authority
Torbay Council	Licensing authority
Torfaen Council	Licensing authority
Vale of Glamorgan Council	Licensing authority
Walsall Council	Licensing authority
Westminster Council	Licensing authority
Wirral Council	Licensing authority
Wokingham Council	Licensing authority
Wolverhampton Council	Licensing authority
Worcester Council	Licensing authority

Gambling Commission October 2008

Keeping gambling fair and safe for all

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