

# Regulatory Impact Statement

## Additional policy approval for the Gambling Amendment Bill (No 3)

### Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Department of Internal Affairs (the Department).

This statement analyses options to ensure that the policy intent in establishing the Gambling Commission as the efficient, specialist appellate body that considers gambling issues is fully realised.

The analysis has been conducted at a high level. In reviewing the range of options, the Department has relied upon the observed effects of the current gambling legislation and the Department's experience as the regulator of the sector. Some assumptions about the likely behaviour by participants in the Class 4 sector have also been made.

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Paul James, Chair, Regulatory Impact Analysis Panel

**Department of Internal Affairs**

## **Executive summary**

1. This regulatory impact analysis examines a discrete issue relating to gambling that meets the regulatory impact analysis requirements as it is a new policy issue proposed to be included in the Gambling Amendment Bill (No 3). The problem is defined, with an outline of the possible options to address the problem, including the status quo and the advantages and disadvantages of the options.
2. The issue is about the process Class 3 and 4 gambling operators can use to appeal the decisions of the Department of Internal Affairs (the Department) or have them reviewed. An emerging trend is for appeals to be drawn out, in particular because some societies appeal to both the Gambling Commission and seek judicial review of the decisions. One of the policy objectives in establishing the Gambling Commission as the appellant body to consider appeals was for efficiency gains, as well as for technical expertise and to avoid tying up court resources. The analysis considers how these original policy objectives could be better achieved.
3. Four options were considered to address the issue. The preferred option proposes to amend the Act to require societies to first appeal to the Gambling Commission before applying for judicial review. This option achieves the policy objectives of upholding the goals originally sought in establishing the Commission as an appellant body and ensuring that money from gambling benefits the community rather than being used to fund long legal appeals.
4. The Cabinet paper associated with this regulatory impact statement also seeks agreement to a Supplementary Order Paper (SOP) for the Gambling Amendment Bill (No 2). The Department has prepared a Preliminary Impact and Risk Assessment of the amendments proposed for the SOP and considers that the RIA requirements do not apply to these amendments as they meet the exemption for technical revisions that improve legislative clarity (including fixing of errors, clarification of existing legislative intent, or has minor impact on businesses).

## **Introduction**

### ***New Zealand's gambling framework***

5. All gambling in New Zealand is regulated by the Act. Under the Act, the Department is the gambling regulator. The Department issues various licences in order for applicants to conduct gambling, and also monitors and ensures compliance with the Act, regulations, licence conditions, game rules and standards.

### ***Class 3 gambling***

6. Class 3 gambling includes gambling where prizes offered or awarded in the gambling activity, or in one session of the gambling, exceed \$5000. Larger-scale lotteries, housie, instant games and other forms of gambling such as 'gaming sessions' (also known as 'casino evenings') are common forms of Class 3 gambling.
7. The purpose of Class 3 gambling is to raise money for an authorised purpose (typically a charitable or non-commercial community purpose) and the gambling must be run by a society. In order to issue a Class 3 operator's licence, the Department must be satisfied that the proposed gambling operation is financially viable, that costs will be minimised and that returns to the community maximised.

### ***Class 4 gambling***

8. Class 4 gambling involves the operation of electronic gaming machines outside of casinos. Non-commercial corporate societies are licensed by the Department to operate Class 4 gaming machines. Corporate societies are broadly characterised as club

corporate societies (which typically have gaming machines in their own clubrooms) and non-club corporate societies (which have their machines hosted in venues like pubs and bars).

9. Most corporate societies are clubs (301 out of 347 currently licensed societies). The 46 non-club corporate societies own the vast majority of gaming machines (13,711 out of 17,320 gaming machines, or 79.2 per cent) and most of the proceeds are generated by these machines.<sup>1</sup> Total expenditure for the Class 4 sector was \$854 million in the 2011/12 financial year.

## **Issue: Ensuring that the appeals process available to Class 3 and 4 gambling operators is efficient**

### ***Introduction: appeals framework under the Gambling Act 2003***

#### *Gambling Commission*

10. The Gambling Commission (the Commission) was established under the Act and is an independent statutory decision-making body with the powers of a Commission of Inquiry. Its functions are wide-ranging and include the following:
  - determining appeals against regulatory and licensing decisions made by the Department in respect of Class 3 and Class 4 gambling; and
  - hearing complaints about the Department's actions in relation to Class 4 gambling.
11. In exercising these functions, the Commission has wide powers to determine its own procedures, to engage experts and to receive evidence. It considers all matters afresh or from the beginning ("de novo"). Under the Act, the Commission makes its decisions independently of the Minister and the Secretary for Internal Affairs. There is no power to direct the Commission on any matter.
12. When the Act was being developed the Commission was given the role of the appellate body so that appeals could be heard quickly and efficiently by a body independent of the original decision-maker. Using the Commission was seen as preferable to the courts because it would develop expertise and precedents in a highly specialised area and avoid creating extra work for the courts.
13. The Commission's appeal proceedings follow judicial lines. The appellant files submissions and evidence, the Department responds with submissions and evidence, and then subsequent submissions and evidence are provided in reply from the appellant. There is no further right of appeal against the Commission's decisions about Class 3 or Class 4 operator/venue licences.

#### *Judicial review*

14. Licence holders and potential licence holders may seek a judicial review of the Department's or the Commission's decisions. Judicial review is the exercise of the High Court's inherent jurisdiction to determine whether a statutory power has been lawfully exercised. The right to apply for judicial review is also protected by the New Zealand Bill of Rights Act 1990. The focus is on the decision-making process, not the decision itself (unlike a general appeal where the decision is assessed on its merits).

#### ***Problem definition***

15. If a society exercises its right to appeal the Department's decision on a matter, the decision is suspended until the appeal is withdrawn or resolved. Societies will typically

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<sup>1</sup> Figures as at 30 September 2013.

appeal to the Commission in response to the Department's decisions to suspend, cancel or not renew a licence.

16. The Commission estimates that a standard Class 4 gambling appeal process can be resolved within a three-month timeframe. However, appeals can be prolonged because of a range of circumstances, including where the Commission agrees to vary its standard hearing timetable or to extend the 15 working-day period for making an appeal. The parties may also make pre-hearing applications to the Commission that extends the timeframe.
17. A society may also seek judicial review of the Department's decision at the same time as appealing to the Commission. To date, there have been three instances where this approach was pursued. There is a risk that this action could become more frequent. The Commission determines what the impact of a judicial review will be on an appeal, and societies normally apply to the Commission for a stay on an appeal to enable the judicial review to proceed. If granted, this lengthens the appeal process while the parties await the outcome of the judicial review.
18. The Department does not have any data on the overall legal costs of the three societies that have sought a judicial review in addition to appealing to the Commission, and how this compares to the costs for societies that only pursue an appeal.
19. Societies' legal costs are a gambling-related operating cost and can be resourced by gaming machine proceeds. There is no economic incentive for societies to resolve appeal matters swiftly. When this is combined with the automatic stay on the licensing decision, the appeals framework can be seen to be vulnerable to abuses of process. If delay tactics are used, the associated legal costs absorb what would otherwise be community funding.
20. In addition, lengthy appeals proceedings allow allegedly non-compliant societies to carry on operating unaffected for long periods. Delays in appeals being resolved can undermine the effectiveness of the licensing regime and weaken the integrity of the sector. A lack of consequences for non-compliance can cause a drop in compliant behaviour in general.

### ***Policy objectives***

21. The policy objectives that we aim to achieve by addressing this issue include:
  - a. ensuring that money from gambling benefits the community;
  - b. upholding the goals originally sought in establishing the Commission as an appellants body; and
  - c. adhering to principles protected in the New Zealand Bill of Rights Act 1990 (specifically, natural justice and the right to judicial review).
22. The preferred option achieves one or more of the objectives.

### ***Options to address the problem***

#### *Option One: Status quo*

23. The status quo undermines the objectives of efficiency and ensuring the community benefits from gambling funds, therefore does not meet the first two policy objectives (although it does uphold natural justice and the right to judicial review).

*Option Two: Licence decision takes effect during appeal process*

24. Other licensing regimes use an approach where the decision about a licence takes effect immediately and remains in place during the time an appeal is being resolved.<sup>2</sup> To balance the potential impact on the licensee, often the appellate authority or court can stay the decision until the appeal is heard.<sup>3</sup> The jurisdiction of the High Court to provide relief to the appellant will also normally be available.
25. One of the underlying policy reasons in these other regimes for giving immediate effect to the decision is because of an imminent risk to public safety (for example, driver's licence or licence to transport goods). In addition, the decision is usually of limited scope and affects only one party (for example, an individual venue selling alcohol, or a real estate agent).

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• It would incentivise societies to resolve appeals quickly if a stay was not granted.</li> <li>• May result in less community funding being used for legal costs, or in more serious cases, being syphoned away by seriously non-compliant societies.</li> <li>• It could minimise the risk of gambling harm because non-compliant societies that were not minimising the risk of gambling harm in their venues would not be able to continue operating.</li> </ul>	<ul style="list-style-type: none"> <li>• Would be inconsistent with elements of the other licensing regimes where there is a powerful need for immediacy due to public safety.</li> <li>• Gambling licensing decisions have potentially very wide impact that can be detrimental for parties other than the society itself. For example, the implications of a society's licence cancellation would be substantial for its staff and (potentially) a considerable number of venue operators.</li> <li>• In order to maintain principles of natural justice, societies could automatically seek relief from the Commission or High Court for a stay on the Department's decision until their appeal was heard, drawing out the process and defeat the purpose of the change.</li> </ul>

*Option Three: Impose limits on the timeframe for appeals or on societies' legal costs*

26. Another option is a form of procedural limitation on the appeal proceedings. Typically procedural limitations establish a deadline for filing an appeal, beyond which an appeal is unavailable. An alternative kind of limitation would be to stipulate a maximum length of time for the appeal process itself. The Department's decision could take effect after a certain amount of time by default (say, six months) if the appeal had not been resolved.

<sup>2</sup> For example – a driver's licence disqualification (section 106, Land Transport Act 1998); cancellation of a liquor licence (section 153, Sale and Supply of Alcohol Act 2012); cancellation of an electrical worker's employer licence (section 147ZG, Electricity Act 1992).

<sup>3</sup> Under section 153 of the Sale and Supply of Alcohol Act 2012 the appellate tribunal has the power to order that a decision does not have effect while the appeal is pending. Other examples are: section 117 of the Real Estate Agents Act 2008, where the High Court may make an interim order before the final determination of an appeal, in order for an appellant licensee to carry out their real estate agent's work under the licence; and section 82 of the Immigration Advisers Licensing Act 2007, where the District Court has a similar power for immigration advisers.

27. A cap on legal costs could be imposed to prevent the unrestricted use of community funds for legal costs. This would be a similar imposition in nature as a defined appeal timeframe.

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Would ensure issues were not drawn out as societies would need to resolve appeals within time and/or funding limits.</li> <li>• Would be likely to result in less community funding being used for legal costs.</li> </ul>	<ul style="list-style-type: none"> <li>• Would undermine natural justice principles by weakening the right to appeal generally.</li> <li>• Would interfere with the independence of the Commission to determine its own processes.</li> <li>• There may be legitimate issues that need to be resolved that require further time or funding.</li> </ul>

*Option Four: Require societies to first appeal to Commission as specialist body before applying for judicial review (preferred option)*

28. Another option would be to restrict the ability of potential licensees and current licensees to the concurrent access to judicial review. This approach can be seen in other statutes.<sup>4</sup> Legislation Advisory Committee Guidelines state that it is acceptable for procedural limitations on judicial review to be prescribed until statutory rights of appeal have been exhausted.<sup>5</sup>
29. In response to a licensing decision, societies would need to take up their right to appeal to the Commission as the first step. A decision on the appeal would need to be made by the Commission before a society could initiate a judicial review.

Advantages	Disadvantages
<ul style="list-style-type: none"> <li>• Fulfils the original objective of having a streamlined appeals process, using the Commission's expertise in applying a complex and prescriptive piece of legislation, rather than taking up the time and resources of the courts.</li> <li>• The Commission's processes are efficient in that appeals are almost entirely considered "on the papers" (without the need for oral hearings).</li> <li>• May help reduce some legal costs for the Department and the appellant (these are not quantified).</li> <li>• An unsuccessful appellant or the Department can still apply for judicial review of the Commission's decision.</li> <li>• Limiting access to judicial review is justified, with statutory rights of appeal.</li> </ul>	<ul style="list-style-type: none"> <li>• Does not provide societies with an incentive to resolve appeals quickly, so community funding may remain at risk.</li> <li>• May be considered a disproportionate response when there are only three examples to date of appellants concurrently applying for judicial review.</li> </ul>

<sup>4</sup> Examples in current legislation include the Sale and Supply of Alcohol Act 2012 (section 167) and the Legal Services Act 2011 (section 83).

<sup>5</sup> Chapter 13, Legislation Advisory Committee, May 2001.

## ***Analysis of options and whether objectives are met***

<b>Option</b>	<b>Ensure that money from gambling benefits the community</b>	<b>Uphold the goals originally sought in establishing the Commission as an appellant body</b>	<b>Adhere to principles protected in the New Zealand Bill of Rights Act 1990</b>
1. Status quo	No	No	Yes
2. Licence decision takes effect during appeal process	Yes	Possibly	Possibly
3. Impose limits on the timeframe for appeals or on societies' legal costs	Yes	No	No
4. Require societies to first appeal to Commission as specialist body before applying for judicial review (preferred option)	Partially	Yes	Yes

### ***Conclusion***

30. After considering the objectives against the four options, Option Four is considered to be the preferred option. It is a less severe response than that offered by some of the other options. The option is more effective in maintaining natural justice principles for societies while still allowing efficiency objectives to be achieved. There are no compliance costs for societies in this option.

### **Recommendations**

31. The Department recommends that the Act is amended so that judicial review is available only if and until an appeal has been lodged and heard by the Gambling Commission.

### **Implementation**

32. It is proposed that this recommendation for changes to the Act is achieved through the Gambling Amendment Bill (No 3). This bill is currently being drafted by the Parliamentary Counsel Office.
33. The limitation on the right to access to judicial review has no implementation implications.

### **Monitoring, evaluation and review**

34. The number and types of appeals to the Gambling Commission are monitored by the Department and reviews will be undertaken of these from time to time as a typical part of tracking the behaviour of the gambling sector.