

GAMBLING COMMISSION
SUMMARY OF DECISION GC03/07 – ON AN APPEAL BY THE LION FOUNDATION

The Gambling Commission has allowed an appeal by the Lion Foundation against a decision by the Secretary for Internal Affairs to impose a condition on the venue licence for the Kilbirnie Tavern in Wellington.

The appealed condition provided that:

Class 4 gambling must not be conducted in areas where smoking is permitted.

The condition, if it had been upheld by the Commission, would have required the venue operator to reposition five gaming machines at the Kilbirnie Tavern which can currently be in a courtyard area, where smoking is permitted.

The condition was imposed by the Secretary to minimise harm to problem gamblers. The Commission found that the Secretary had the power to impose conditions for this purpose, the key judgement for the Commission being whether the condition proposed was proportionate and fair. In making this assessment, the Commission balanced the likely benefits and detriments and considered whether, overall, the condition was fair and reasonable.

An important issue for the Commission to consider was that of potential benefits arising from the condition. The Secretary reasoned that, since a majority of problem gamblers are smokers, preventing smoking while gambling has the effect of encouraging a majority of problem gamblers to take regular breaks. Furthermore, when problem gamblers take breaks, they reflect on their gambling and are more likely to control their behaviour.

While expert witnesses for the Secretary were generally supportive of this latter theory, the Commission found a lack of research into the apparent relationship between breaks in play and harm reduction. No firm evidence was presented of how or to what extent breaks in play modify gambling behaviour and, in particular, whether breaks in play, and consequent time to reflect, affect problem gamblers (who suffer from diminished ability to control their behaviour) in the same manner as non-problem gamblers. It was not clearly established first, that further restricting smoking would compel problem gamblers to take breaks, and secondly whether and to what extent breaks would benefit problem gamblers.

The Secretary pointed to evidence that the introduction of the Smoke-free Environments Amendment Act 2003 had been followed by a reduction in numbers of people seeking problem gambling treatment and spending on gaming machines. It was not clear, however, to the Commission whether the effect of the legislation and other regulatory changes since 2004 has simply been to reduce gambling activity at pubs and clubs, with the reduction in presentations for

treatment an incidental consequence of reduced activity and expenditure overall. In the Commission's view, harm minimisation conditions can only properly be imposed if they reduce the harm caused by problem gambling, as distinct from simply reducing gambling activity, which is a lawful and permitted activity under the Gambling Act 2003. Conditions cannot be imposed which seek to make gambling less attractive generally in order that it appeal less to problem gamblers.

As a second matter, the Commission also took into account the fact that the proposed condition would represent a further restriction on smokers at class 4 venues. The measure was aimed at problem gamblers who were smokers – a small proportion of the population – but would inconvenience a significantly larger group of smokers who gamble, but who are not problem gamblers.

In essence, it seemed that the aim of the condition was to retain something which had arisen as an unintended consequence of the Smoke-free Environments Amendment Act. The effect would be, however, to ban gambling where smoking is permitted, something that the smoke-free legislation did not do, and to prevent class 4 operators from making effective use of the statutory "open spaces" exception to the smoke-free prohibition.

Taking all these matters into account, the Commission concluded that, overall, the potential harm minimisation benefits, which would always be limited to smoking problem gamblers, were not sufficiently established to justify the restriction proposed, and the consequent detriment to others. Adopting the reasonableness test, the Commission decided to allow the appeal and reverse the Secretary's decision.

The Commission does not expect its decision to produce a proliferation of gaming machines in open smoking areas. The prohibition on smoking except in open areas means that machines facing outside cannot be enclosed in a way that is inconsistent with the requirements of the Smoke-free Environments Act. Any placement of gaming machines in open areas will also be limited by the need for the Department of Internal Affairs to ensure adequate regulatory control of machines, limitations arising from existing building structures and New Zealand climatic conditions (limiting the desirability of use of open areas).