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Minors and Gambling Regulation

*Malgorzata (Margaret) Carran**

Early initiation of gambling has been argued to be closely correlated with placing players at higher risk of developing problem gambling behaviour in the future. The vast majority of jurisdictions, including Great Britain, attempts to eliminate minors' access to gambling by making it illegal and by requiring gambling providers to adopt strict age-verification procedures. Despite those measures minors continue to successfully access gambling. This paper demonstrates that British legal framework suffers from many statutory loopholes. It considers weaknesses in the regulatory offences as well as enforcement deficiencies. It further highlights how the differences between black letter law, political rhetoric and practical application undermine the strength of the prohibition of gambling by minors.

I. Introduction

The current legal framework that governs all regulated gambling, other than the National Lottery in Great Britain was established by the Gambling Act 2005. The main purpose of the Act was to liberalise prior statutory regime in order to better reflect the commercial nature of the activity, to offer a better choice for adult consumers and to eliminate the anomaly which saw British operators being banned from offering and advertising online gambling services while foreign providers were permitted free access to GB customer base.¹ The majority of the provisions came into force on 1st September 2007 and almost instantly changed the nature of gambling from a permitted but non-stimulated and discouraged activity to a regulated but commercially promoted entertainment offered on a relatively unrestricted basis. Gambling was recognised as a legitimate entertainment rather than an inherent "vice" that should be freely permitted subject only to the implementation of appropriate safeguards.

The Gambling Act 2005 has been implemented relatively recently and accurate evaluation of any regu-

lations' true effectiveness is complex, especially in light of the relative paucity of methodologically sound empirical data.² In light of the variety of existing concept papers this article does not aim to undertake another generic assessment of the impact of current legislative framework on potential future levels of problem gambling. It also does not intend to criticise or support existing political choice as such. Instead this article aims to offer the reader a narrower but an in-depth evaluation of specific statutory provisions to highlight that the actual legislative framework does not truly support the third licencing objective³ or the political rhetoric utilised to justify the passage of the Act. The gambling law, in many aspects, resembles the current regulation of alcohol and liquor industry making the analysis relevant to this risk behaviour as well. Cogent medical evidence of the social cost of smoking recently compelled the government to re-evaluate their policies with regards to tobacco products. Although the process of active suppression of cigarettes has started only recently, its very slow success to date⁴ on overall smoking levels proves that reversing liberalisation or suppressing pre-

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1 Report of the Gaming Board for Great Britain 2001–2002, p. 4; Presented pursuant to Act Eliz. II 1968 c.65 s.50; ordered by the House of Common to be printed 11th July 2002; available on the Internet at <www.official-documents.gov.uk/document/hc0102/hc10/1016/1016.pdf> (last accessed in November 2013). The liberalising nature of the new legislation is also embedded in the Gambling Act 2005 itself which can be seen by a joint reading of ss. 1, 22 and 72.

2 As identified by Simon Planzer and Heather Wardle "The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling"; (2011) report for the Responsible Gambling Fund (currently Responsible Gambling Trust), London available on the internet at <<http://ssrn.com/abstract=2045052>>, (last accessed November 2013) .

3 S. 1(c) of the Gambling Act 2005

4 It is reported that since 2000 the overall adults smoking rate are declining by 0.4% annually. ASH Fact Sheet on Smoking Statistics, March 2013, available on the Internet at <www.ash.org.uk/files/documents/ASH_106.pdf> (last accessed November 2013) .

viously stimulated demand is somewhat difficult. This article is designed to consider each of the three paradigms that underpin the success or failure of any normative rule aimed at regulating social behaviour in turn. Those are: strength and clarity of statutory provisions; effective enforcement and social acceptance of the rule.⁵ After setting the context and explaining the legislative framework the article firstly evaluates the effectiveness of statutory measures aimed at preventing minors' access to "for money" gambling services followed by the analysis of effectiveness of the enforcement policy. The final part considers the extent to which gambling exposure has been legalised that may affect social adherence to regulatory prohibitions.

II. The context

Safeguards designed to prevent excess, to ensure that gambling does not lead to higher levels of crime or social disorder and to "prevent children and other vulnerable persons from being exploited or harmed by gambling" are necessary.⁶ There is no common definition of "harmful gambling"⁷ and for many people the activity offers exciting and harmless entertainment. Yet, for some participants gambling causes highly negative individual and financial outcomes and may lead to the development of gambling disorder⁸ as recognised by the Diagnostic and Statistical

Manual of Mental Disorders (DSM-V⁹) which disadvantageously impacts the society as a whole. In this article the term "gambling related problems" is used in a broad and all-inclusive manner to refer to any negative consequences resulting from gambling activity that adversely affects a person regardless of whether this individual acknowledges the negative consequences or not. The existing empirical evidence is conclusive that certain groups of individuals are at increased risk of developing gambling related problems and the developmental stage of the adolescents makes them especially vulnerable. The psychological literature from across different jurisdictions is in agreement that risk to minors suffering gambling related problems is approximately three to four times higher than it is the case with adults.¹⁰ Young people "are considered to be especially at risk for problem gambling due to their need to satisfy internal motivation with limited ability to cognitively understand the risks"¹¹. Minors also experience high comorbidity rates between gambling and other psychological problems such as depression,¹² alcohol, drug abuse and smoking.¹³ The progress towards gambling addiction, which is a progressive illness, may be hidden for many years due to lack of clearly visible signs of harm, especially amongst adolescents.¹⁴ When difficulties begin they are often further exacerbated by minors being less likely to recognise or accept that they may have a problem and by being less likely than adults to ask

5 D. J. Galligan, *Law in Modern Society*, Clarendon Law Series, (Oxford: Oxford University Press 2007).

6 S. 1 of the Gambling Act 2005

7 The use of the term "harmful gambling" within the literature is inconsistent and varies depending on the nature of study and the screening measure used. It includes pathological, compulsive, problem and at-risk gambling.

8 DSM-V defines gambling disorder as:
"A. Persistent and recurrent problematic gambling behavior as indicated by four (or more) of the following in a 12-month period: 1. Needs to gamble with increasing amounts of money in order to achieve the desired excitement; 2. Is restless or irritable when attempting to cut down or stop gambling; 3. Has repeated unsuccessful efforts to control, cut back, or stop gambling; 4. Is often preoccupied with gambling (e.g., persistent thoughts of reliving past gambling experiences, handicapping or planning the next venture, or thinking of ways to get money with which to gamble); 5. Gambles often when feeling distressed (e.g., helpless, guilty, anxious, depressed); 6. After losing money gambling, often returns another day to get even ("chasing" one's losses); 7. Lies to conceal the extent of involvement with gambling; 8. Has jeopardized or lost a significant relationship, job, or educational or career opportunity because of gambling; 9. Relies on others to provide money to relieve desperate financial situations caused by gambling; B. The gambling behavior is not better accounted for by a Manic Episode."

9 The Diagnostic and Statistical Manual of Mental Disorders (DSM-V) has recently been published. Further details will be available on the Internet at <<http://www.dsm5.org/Pages/Default.aspx>> (last accessed on 25 November 2013) and a brief comment by Simon Planzer is available in this issue.

10 S.E. Fisher, "A prevalence study of gambling and problem gambling in British adolescents", 7 *Addiction Research* (1999), pp. 509 et sqq. Similar results can be found in other jurisdictions. See H.J. Shaffer, R. LaBrie, and S. Canlan et al, "Pathological gambling amongst adolescents: Massachusetts gambling screen (MAGS)", 10 *Journal of Gambling Studies* (1994) pp. 339 et sqq.

11 Margee Hume and Gillian, Sullivan Mort, "Fun, Friend, or Foe: Youth Perceptions and Definitions of Online Gambling", 17(1) *Social Marketing Quarterly* (2011), pp. 109 et sqq.

12 Catriona Morrison and Helen Gore, "The relationship between excessive internet use and depression: a questionnaire – based study of 1,319 young people and adults", 43 *Psychopathology* (2010), pp. 121 et sqq.

13 Steve Sussman, Nadra Lisha and Mark Griffiths, "Prevalence of the Addictions: a problem of the majority or the minority?" 34 *Eval Health Professional* (2011).

14 Many negative outcomes associated with problem gambling amongst adults are visible such as losing jobs, home repossession or divorce but those do not apply to children as they are still at school, live with their parents and are unmarried.

for help when experiencing gambling related issues.¹⁵

Those are compelling reasons why any government wishing to liberalise and expand gambling industry should counterbalance the potential risks with appropriate measures to protect minors and other vulnerable persons and regularly monitor their effectiveness. However, what measures are considered sufficient, whether any are necessary at all and how they are situated within the legislative framework is determined by a specific political choice that results from balancing politically difficult questions of morality, priorities in public health versus economy and commercial interests. With regards to gambling the author is unaware of any scholar that advocates an entirely *laissez faire* approach and jurisdictions that have been identified as permitting unregulated online forms of gambling¹⁶ (Costa Rica, Panama and Belize) have been placed in this category due to their practical ineffectiveness of controlling their offerings rather than due to genuine lack of any regulations.¹⁷ Some jurisdictions choose the opposite approach and they prohibit gambling either in entirety¹⁸ or they prohibit some forms of it (most frequently online / remote offerings).¹⁹ This method has been argued by many scholars to be ineffective due to the wide social acceptance of gambling as a leisure activity that is popular in demand and which attracts low moral opprobrium.²⁰ The vast majority of jurisdictions prefer to

permit gambling subject to legal regulations and controls. The level of legal intervention varies significantly between different States. Regulators that agree with scholars who perceive gambling as inherently dangerous and an “addictive consumption industry”²¹ tolerate gambling but aim to restrict availability, suppress advertisements and impose tight controls on the operators. Others agree with scholars who advocate for gambling to be treated as a legitimate leisure activity.²² Those legal frameworks permits active commercial promotion of all forms of gambling and focus predominantly on ensuring that customers are treated fairly and have the means to make an informed choice whether to participate or not. Bogart in the book “Permit but Discourage”²³ extensively analysed different regulatory regimes of risk behaviour and argues that permitting risk activities but actively discouraging participation by subtle “nudges”²⁴ is the most effective method.

In Great Britain the current regulatory framework treats gambling in a similar way to the supply of alcohol but differently to the supply of cigarettes and tobacco products. The acceptance of the medical evidence that stipulates that there are no safe levels of smoking and even minimal amounts are harmful whereas alcohol and gambling can be harmless if enjoyed in a responsible way justifies such differentiation. However, early exposure and participation has been identified by Messerlian et al²⁵ as the most like-

15 Karen Hardoon, Jeffrey Derevesky and Rina Gupta, “Empirical measures vs. perceived gambling severity among youth – why adolescents problem gamblers fail to seek treatment”, 28 *Addictive Behaviors* (2003), pp. 933 et sqq.

16 Jamie Wiebe and Michael Lipton, “An Overview of Internet Gambling Regulations”, August 2008 submitted to the Ontario Problem Gambling Research Centre, available on the Internet at <www.gamblingresearch.org/applydownload.php?docid=11002>, (last accessed in November 2013).

17 Costa Rica permits any company to offer online gambling services worldwide provided they do not accept wagers from Costa Rica residents and earning money from games of chance is illegal in their jurisdictions – see <<http://www.gamblingsites.com/online-gambling-jurisdictions/costa-rica>>; Panama and Belize require companies to obtain licences under their Panama Online Gaming Act of 2002 and the Belize Gaming Control Act respectively. Belize government announces on their official website that there are only two companies that are in possession of Belize licence (Fulton Data Processing Limited and Sports Off-Shore Limited) and everyone else claiming to have such a licence are clandestine – see <<http://www.belize.gov.bz/ct.asp?xItem=1953&ctNode=346>>.

18 E.g. See Saudi Arabia for a total prohibition of any gambling under Islamic Sharia law.

19 E.g. See Russia for a partial prohibition of online gambling or US for their attempt at outlawing online interstate gambling.

20 See arguments by Ian Abovitz, “Why the United States should rethink its legal approach to internet gambling: a comparative analysis of regulatory models that have been successfully implemented in foreign jurisdictions”, 22 *Temp. Int @ I & Comp. L.J.* (2008), p. 437. See also Bentham Dayanim, “Internet Gambling Under Siege”, 11(5) *Gaming Law Review* (2007).

21 E.g. P. Adams, J. Raeburn and K. De Silva, “A question of balance: Prioritizing Public Health Responses to Harm from Gambling”, 104(5) *Addiction* (2009), pp. 688 et sqq., cited by Simon Planzer and Heather Wardle, “The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on propensity for Problem Gambling”, (2011) report for the Responsible Gambling Fund, available on the Internet at <<http://ssrn.com/abstract=2045052>>, (last accessed November 2013).

22 E.g. D. Korn, “Expansion of Gambling in Canada: Implications for Health and Social Policy”, 163 (1) *Canadian Medical Association Journal* (2000), pp. 61 et sqq., or A. Blaszczynski, R. Ladouceur and H. Shaffer “A Science-based framework for Responsible Gambling: The Reno Model”, 20 *Journal of Gambling Studies* (2004), pp. 301 et sqq.

23 W. A. Bogart, *Permit But Discourage: Regulating Excessive Consumption*, (Oxford: Oxford University Press 2011).

24 Such as targeted taxation or public education campaigns.

25 Carmen Messerlian, Andrea Byrne and Jeffrey Derevensky, “Gambling, Youth and the Internet: Should we be concerned?”, 13(1) *The Canadian Child and Adolescents Psychiatry Review* (2004).

ly predictor of the development of problem gambling. Although the recent parliamentary review²⁶ conceded that there is still “*insufficient data collected*” to determine the effect of the Gambling Act on minors, it does not refute the Rank Group’s view that the rates of play amongst adolescents are “*still unacceptably high*”. This is concerning. Despite the lack of definitive proof of causation between early involvement in gambling and subsequent problems²⁷ it is undisputed that early participation is correlated with increased risk. This is supported not only by the fact that “*adults diagnosed as problem gamblers nearly always report early initiation*”²⁸ but also by available evidence from other “*risk industries*”. No similar consensus has been reached with regards to a mere exposure which has been pointed out by Planzer and Wardle²⁹ to be distinct from an actual engagement. The social adaptation theory indicates that over time people learn how to successfully deal with new social phenomena without suffering negative consequences.³⁰ The adaptive process, however, clearly fails for those who develop gambling related problems and the question remains whether significant expansion of gambling opportunities permitted under the Gambling Act significantly increases the number of those who found themselves unable to adapt to the new environment.

III. Legislative framework

The need to prevent children from gambling participation has been explicitly put at the forefront of the Gambling Act. It prominently states in s. 1(c) that one of the licencing objectives of the Act is to ensure that “*children and other vulnerable persons are not harmed or exploited by gambling*”. The Act makes a tacit distinction between soft, medium and hard core forms of gambling by excluding the former from the Act’s application and by setting different age limits applicable to medium and hard forms. Hard gambling is perceived by the draftsman to be potentially most harmful³¹ and includes commercial gaming in casinos; class A, B and C slot machines and commercial betting which are permitted only for those over the age of 18. Medium types include national lottery, scratch-cards and football pools for which the age limit is set at 16 and soft forms of gambling include non-commercial forms of gaming and betting,³² Category D gaming machines,³³ equal chance gaming

under prize gaming permit or at a licenced family entertainment centre³⁴ and participation in a prize gaming at a non-licenced family entertainment centre or at a travelling fair.³⁵

The legislation starts from the basic premises that under-aged customers will be sufficiently protected from gambling related harm if they are isolated from “*hard core*”³⁶ and medium gambling activities. To this effect the Gambling Act created new offences, listed in Part IV of the Act,³⁷ that underpin the need for the gambling industry to develop, adopt and monitor age-verification measures in order to prevent inappropriate access. The offences can broadly be classified as “*invitation*”, “*employment*” and “*participation*” offences. The first one can be committed by “*a person*” while the remaining two can be committed by “*a person*” or “*a young person*”. No definition of “*a person*” is provided within the Act but “*young person*” is an “*individual who is not a child but who is less than 18 years old*”³⁸ and a child is “*an individual who is less than 16 years old*”.³⁹ This implies, on the basis of the principle *unius est exclusio alterius*, that a child is not capable of committing any of the offences under the Act and a young person can be liable only for those that are specifically mentioned. This is in contrast with the provisions of the National Lottery

26 Parliamentary report “The Gambling Act 2005: A bet worth taking” published by the Media, Culture and Sports Committee on 12 July 2012, available on the Internet at <http://www.publications.parliament.uk/pa/cm201213/cmselect/smc-umeds/421/42102.htm> (last accessed in November 2013)

27 David Forrest and Ian McHale, “Gambling and Problem Gambling Among Young Adolescents in Great Britain”, 28 *Journal of Gambling Studies* (2012), pp. 607 et sqq.

28 Forest and McHale, 28 *Journal of Gambling Studies* (2012), *supra* note 27, at p. 607.

29 Simon Planzer and Heather Wardle, “The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling” (2011) report for Responsible Gambling Fund, London, available on the Internet at <<http://ssrn.com/abstract=2045052>>, (last accessed in November 2013).

30 Planzer and Wardle, *supra* note 29.

31 Stephen Monckom and contributors, *Smith and Mockom the Law of Gambling* 3rd ed, (Tottel Publishing 2009), at p. 304.

32 S. 46(2)a and s46(2)b of the Gambling Act 2005.

33 S. 46(2)d of the GA 2005.

34 S. 46(2)f and s. 46(2)g of the GA 2005.

35 S. 46(2)h and s. 46(2)i of the GA 2005.

36 Stephen Monckom and contributors, *Smith and Mockom the Law of Gambling* 3rd ed, (Tottel Publishing 2009).

37 Titled “Protection of children and young persons”.

38 S. 45(2) of the GA 2005.

39 S. 45(1) of the GA 2005.

etc Act 1993 where an offence of selling a lottery ticket can be committed by anyone subject to criminal liability; that is anyone over the age of 10.⁴⁰ All types of offences under Part IV of the Gambling Act are subject to the same potential punishment.⁴¹ Convicted adults or corporate entities can be liable, on summary conviction, to imprisonment for a maximum period of 51 weeks or a maximum statutory fine⁴² or both, while a young person can be liable for a maximum fine of £1000.

“To invite, cause or permits a child or young person or both to engage in a [prohibited]⁴³ gambling activity” is made unlawful by ss. 46(1), 56 and 57. S. 47 criminalises any person who “invites or permits a child or young person” to enter a variety of premises where prohibited gambling is taking place or where there are opportunities for such gambling to occur. Those premises exhaustively include a casino,⁴⁴ premises with a betting licence where betting actually takes place,⁴⁵ areas used in pursuance of adults gaming centre licence,⁴⁶ areas where betting facilities are located on a horse or dog track unless a horse or dog race is either taking place or is due to take place on the same day⁴⁷ and premises with fam-

ily entertainment licence where Category C gaming machines are used or capable of being used.⁴⁸ Premises are defined as “including any place and, in particular (a) a vessel, and (b) a vehicle”.⁴⁹ Invitation offences have the broadest potential application. The Act does not define what “inviting, causing or permitting to gamble” means but the natural language of the section suggests broad interpretation. The words must be read disjunctively as each describes a different type of conduct and the proof of any of them individually would suffice for a conviction but the application has to be confined only to the specific words chosen and all other types of behaviour must be excluded.⁵⁰

“Employment” offences are committed if a child is employed to provide facilities for gambling including lottery or football pools⁵¹ but excluding private or non-commercial gaming or betting or prize gaming at a travelling fair under s. 292⁵². It is also unlawful to employ a child to perform any function on premises where bingo is being played,⁵³ on premises that are used in pursuance of a club gaming or club machine permit⁵⁴ or in premises which operate under casino premises licence, betting premises licence or an adult gaming centre premises licence unless the child is employed in an area where they cannot get engaged in any gambling functions.⁵⁵ A child must also not be employed on premises where Category A, B, C or D gaming machines are situated and the child may have to perform any duties with regards to the operation of those machines.⁵⁶ Identical provisions apply to the employment of a young person with the exception of employment in connection with the lottery, football pools, bingo or premises with gaming permit or club machine permit.

“Participation” offences are addressed towards young persons. A child is not capable of committing any crime under the Act but a young person may be liable if s/he is engaged in a prohibited gambling,⁵⁷ provides facilities for such activity⁵⁸ or enters premises where a young person’s presence could expose the proprietor to a liability.⁵⁹

The legislation does not aim to rely exclusively on criminal law to prevent minors’ participation. It prominently charges the Gambling Commission, which took over from the Gaming Board as a corporate body to regulate the gambling industry, to issue appropriate licences and to ensure compliance, with the task of developing an appropriate strategy for the

40 With the removal of presumption of *doli incapax* by s. 34 of the Crime and Disorder Act 1998 a person is presumed to be criminally competent from the age of 10.

41 S. 62 of the GA 2005.

42 Currently level 5 which equal £5000 under s. 17 of the Criminal Justice Act 1991.

43 S. 46(2) lists several exceptions which permits soft types of gambling to be offered to minors despite them otherwise satisfying the definition of gambling within the meaning of s. 3 of the Act.

44 S. 47(1) of the GA 2005.

45 S. 47(4) of the GA 2005.

46 S. 47(5) of the GA 2005.

47 S. 47(6) and s. 182 of the GA 2005.

48 S. 47(7) of the GA 2005.

49 S. 353 (1) of the GA 2005.

50 This conclusion is further supported by the fact that the legislator specifically choose inviting, causing and permitting to gamble but only inviting and permitting to enter restricted premises.

51 S. 52 of GA 2005.

52 S. 51 of the GA 2005.

53 S. 53(a) of the GA 2005.

54 S. 53(b) of the GA 2005.

55 S. 55(1) and (2) of the GA 2005.

56 S. 54(1)a and b of the GA 2005.

57 S. 48 of the GA 2005.

58 S. 50 of the GA 2005.

59 S. 49 of the GA 2005.

protection of minors.⁶⁰ The Commission is deemed to be independent but it operates under the supervision of and reports to the Department of Media, Culture and Sport. It publishes industry's guidance; sets and reviews licence conditions and grants appropriate licences; monitors compliance and applies a variety of regulatory sanctions for non-compliance. Those sanctions vary from issuing warnings and increased inspection levels which may lead to higher administrative costs for the business thus encouraging compliance, to financial penalties and removal of a licence or instigation of criminal prosecutions.

IV. How effective is it?

The criminalisation of allowing underage gambling and the prominent role allocated to the Gambling Commission appears to send a strong legislative directive that children should not be involved in any hard core gambling. The Gambling Commission and the gambling industry undertook significant efforts to eliminate underage gambling but despite those efforts a significant number of children still participate. The latest Ipsos Mori research undertaken on behalf of National Lottery Commission⁶¹ showed that during the seven days preceding the survey, 18 % of children between the age of 11 and 15 were involved in some forms of gambling where they actually spend money. Although this represents a drop from 2011 which saw 23 % of children admitting to gambling it cannot, as yet, be taken as representing a downwards trend. The rate of gambling among minors was 22 % in 2007 which dropped by 4 % in 2008 to 18 %⁶² for it only to rise again to 23 % in 2011. 16 to 18 years old are excluded from the above mentioned survey. They are included in the British Prevalence Survey but are grouped together with 18 to 24 years old rather than being treated as an independent cohort. The latest British Prevalence Survey was carried out in 2010⁶³ and reported that 68 % of respondents aged between 16 and 24 participated in some forms of gambling which includes lottery.⁶⁴ Previous rates were 58 % in 2007 and 66 % in 1999. Although the majority of the players in this category are likely to be those over 18 it is legitimate⁶⁵ to assume that some of them would fall within the 16 to 18 age group.

The figures above show that the legislative message does not seem, as yet, to reach a substantial num-

ber of people who continue to be engaged in activities that are illegal for them. In the author's view this is not surprising. A detailed analysis of the statutory framework shows that the seemingly strong desire to stop underage access is a political rhetoric and the actual position is significantly more relaxed and liberal. Any normative rule that aims to regulate social behaviour relies on three interrelated factors: strength and clarity of the provision; effective enforcement and social acceptance of the rule. As it will be demonstrated below, the current legislative regime has significant loopholes in each of the three aspects which undermine the overall effectiveness of the legislative framework.

V. Statutory weaknesses

The nature of the criminal offences created by the Gambling Act 2005 places them firmly within the regulatory type of *mala prohibita* offences as opposed to *mala per se*⁶⁶. Yet, the Act does not stipulate the offences to be of strict liability nor does it provide any comprehensive definition of the *mens rea*, if any at all, that is required. Only s. 46(3) provides, with regards to sending advertisement to a child or young person, that such distribution will incur criminal liability if it was done intentionally. If a marketing document was sent with contact details of a relevant person⁶⁷ no offence is committed if this person did not consent or gave authority for such communication or if such document was sent to an adult and minor's exposure to it was merely inciden-

60 S. 1(c) of the GA 2005.

61 Ipsos Mori Research "Underage gambling in England and Wales", published in July 2012, available on the Internet at <<http://www.natlotcomm.gov.uk/publications-and-research/research-programme/underage-play/ipsos-mori-young-people-omnibus-2012.html>>, (last accessed in November 2013).

62 The same level as reported in 2012.

63 Heather Wardle, Alison Moody, Suzanne Spence et al, "British Gambling Prevalence Survey 2010" (2011) prepared for Gambling Commission and published by National Centre for Social Research, available on the Internet at <www.gamblingcommission.gov.uk>, (last accessed November 2013).

64 Wardle, Moody and Spence supra note 63, at p. 37.

65 By comparison with prevalence rate available for those under the age of 16.

66 J. F. Windersheid, "Victimless crimes: The Threshold questions and beyond", 52 *Notre Dame Lawyer* (1977), No. 995.

67 Relevant person is a "person to whom payment may be made or from whom information can be obtained".

tal.⁶⁸ This makes it clear that, at least with regards to advertisement, the *actus reus* must be accompanied by the requisite intention before anyone can be successfully convicted. No such clarity is available for the other offences but the provision of statutory defence of due diligence⁶⁹ makes it clear that they are not of strict liability either. By comparison, selling a national lottery ticket to an under-aged customer has been considered to be of strict liability in *Harrow London Borough Council v Shah*.⁷⁰ Such conclusion was based on the need to “*encourage greater vigilance against the commission of offenses*”⁷¹. This anomaly cannot be explained by the different hazard levels of both activities as in fact lottery is considered to be one of the less addictive type of gambling. Rather it is an evidence of the relaxation of political attitudes towards gambling generally.

The due diligence defence set out in s. 63(1) is sufficiently significant to justify its full exposition. S. 63(1) provides “*where a person is charged with an offence under this Part of doing anything in relation to an individual who is a child it is a defence for the person charged to prove that – (a) he took all reasonable steps to determine the individual’s age, and (b) he reasonably believed that the individual is not a child*”. S. 63(2) is a corresponding provision relating to a young person. Both elements must be satisfied. Reasonable belief without taking due care to ascertain the age of the customer will not suffice. What constitutes “reasonable steps” would be determined on the basis of individual circumstances but to date there is no direct precedent that would offer some judicial determination. The availability of the defence, coupled with the generic difficulties of proving subjective beliefs and knowledge, already weakens the provisions as it makes successful prosecution very difficult.

This is further exacerbated by the interpretation of those rules offered by the Gambling Commission which understandably has been adopted by the in-

dustry. The Commission, in the Licence Conditions and Codes of Practice provides extensive guidance as to the procedures that the operators should adopt to ensure compliance. The Code lacks the statutory force but it gains its regulatory authority from s. 24 of the Act. This section dictates that Courts must consider the application and scope of the Code, if relevant, when determining the outcome of any civil or criminal litigation.⁷² Due to the practical variations between face to face and online interaction the Code makes different provisions for each environments. The Code requires all providers to develop, implement and monitor policies and procedures to prevent minors from accessing their services. Within the online environment the Code mandatorily prescribes for such policy to include warnings to customers that underage gambling is an offence, a requirement that players must affirm that they are of legal age, a requirement of adequate training for staff and a regular review of existing policies to take account of technological advances.

In land based establishments the age-verification takes place at the point of purchase. Online, due to the distant nature of the transactions, the Code permits a period of 72 hours within which the age-verification process must be completed. In the interim period the customer is permitted to use the services, i.e. gamble but no withdrawals can be made until the player is fully verified as over the age of 18.⁷³ There is no provision within the Act that would discharge the provider from liability in the interim period between an attempt to gamble and the provider recognising that the attempt was made by a minor. This means that the permitted 72 hours time-lag has no statutory basis and should not be supported, especially when the modern capabilities of online technology allow the customers to be verified almost instantly and in real time. Commercial realities dictate that companies should be allowed to use a variety of effective age-verification mechanisms but there is no reason why a customer should not be prevented from gambling until after the process has been fully completed. A child may never attempt to withdraw money; yet they may become excited about the game itself.

Secondly, the Code permits reliance on e.g. age – verification software solutions or credit cards companies provided the gambling provider is satisfied that the third party carried out the age-verification process satisfactorily. The statutory defence should

68 S. 46(3), (4), (5) and (6) of the GA 2005.

69 S. 63 of GA 2005.

70 *Harrow London Borough Council v Shah* [2000] 1 W.L.R.83.

71 *Harrow London Borough Council v Shah* [2000] 1 W.L.R.83.

72 S. 24(9) of the GA 2005.

73 “The Licence Conditions and Code of Practice”, Gambling Commission, consolidated in December 2011, available on the Internet at <www.gamblingcommission.gov.uk>, (last accessed in November 2013).

only be made out if “*all reasonable steps are taken by the person (providing the facility⁷⁴) himself*” whereas the Code effectively permits the delegation of this task to third parties. This is so despite the lack of official authorisation by the credit card companies to use their cards for online verification purposes. Age-verification software providers actively promote their products to gambling industry. There are several offerings with different business models and different pricing structures available on the market but the use of third parties is not compatible with the black letter law.

It may be argued that this should not be raised as a matter of concern because it seems that these online methods are significantly more effective than their land based equivalents. Chambers and Willox⁷⁵ examined 15 large sites listed on the stock exchange and reported that all operators required actual proof of age⁷⁶ before using the site but the authors do not stipulate, in their methodology, whether this was ascertained by relying on the information provided on the site or whether an actual test purchase was attempted. Nevertheless, the rolling mystery shopping exercise carried out by the Gambling Commission indicated that only 4.7% of gambling websites were identified as being potentially vulnerable to minors’ attempts to play⁷⁷ and prevalence studies confirm that the rates of play by minors online for money is low.⁷⁸ This may be contrasted with land based establishments where the compliance rates have been found to be significantly lower. The original test purchases conducted in May 2009 in betting shops known to have failings in social responsibility measures produced a staggeringly low 2% rate of compliance.⁷⁹ Follow-up mystery shopping exer-

cise carried out in betting shops in December 2009⁸⁰ and in adult gaming centres in June 2010⁸¹ showed that Gambling Commission’s efforts were producing excellent results. Yet still no full adherence to the rules was established with 64.4% compliance rate for betting shops and 70.64% for adult gaming centres being reported. The Gambling Commission views those rates as “encouraging”⁸² despite them actually representing that approximately one in three attempts to play made by minors may still be successful. It is accepted that 100% compliance is perhaps never achievable but one in three still represents too many.

Some scholars consider online gambling verification processes to be excellent and so good that they should be used as a model example to other industries dealing with age-restricted products.⁸³ The tests and studies undertaken appear to confirm this view as they indicate high compliance rates. Nevertheless, those optimistic results should be treated with caution. The Gambling Commission’s methodology involves testing gambling websites against purchases made by debit card linked to a child bank account and against compliance with the Code. This may not identify issues that may arise if alternative payment methods are used such as pre-paid cards, pay-safe cards, direct bank transfer or newly created payment mechanisms such as “*bitcoin*”⁸⁴ and as it has already been highlighted the Code focuses on ensuring that no customer can withdraw money without being verified rather than emphasising solely that no-one under the age of 18 really plays. The testing programme does not extend to sites that are either licenced by other jurisdictions or who may operate illegally altogether and the results only reflect the verification of

74 Note added.

75 C. Chambers and C. Willox, “Gambling on compliance with the new 2005 Act: Do organisation fulfil new regulation?”, 23 *International Review of Law, Computers and Technology* (2009), pp. 203 et seq.

76 As opposed to mere asking customers to self-affirm their age.

77 Gambling Commission (2009) “Online Mystery Shopping Programme”, Information Note, July 2009; available on the Internet at <www.gamblingcommission.gov.uk>, (last accessed November 2013). 2.5% of websites were identified as inconclusive and 2.2% were identified as having weaknesses.

78 Ipsos Mori Research on Underage Gambling on behalf of the National Lottery 2012 reported only 2% of minors aged 11–15 gambling online for money.

79 Press release “Mystery Shopping tests continue”, 31st July 2009. A 17 year old was able to place a bet over the counter in 98 out of 100 betting shops, available on the Internet at <www.gamblingcommission.gov.uk>, (last accessed February 2013)

80 Press release “Underage gambling in betting shops – operators face further tests”, 3rd December 2009, available on the Internet at <www.gamblingcommission.gov.uk>, (last accessed February 2013).

81 Press release “Monitoring underage gambling in adult gaming centres”, 15th June 2010, available on the Internet at <www.gamblingcommission.gov.uk>, (last accessed February 2013)

82 Gambling Commission Annual Report and Accounts 2010/2011 at page 16. The Annual report and Accounts 2011/2012 do not provide any details relating specifically to test purchases in land based establishments.

83 Mark Griffith, “Internet Gambling, Players Protection and Social Responsibility” in Robert Williams, Robert T Wood and Jonathan Parke (ed.), *International Handbook of Internet Gambling* (London: Routledge International 2012).

84 “Several online gambling sites are planning to accept Bitcoins” – see Robert Courtneidge, Vicky Lloyds and Locke Lord, “Accepting Bitcoin as payment for online gambling services”, 12(2) *World Online Gambling Law Report* (2013).

the gambling account holder and not necessarily of who actually plays.

Nevertheless, it is acknowledged that online it is quite difficult for a minor to access legitimate “for money” gambling games in his or her own name due to a combination of the inability to pay by cash, the industry real willingness to adopt robust age-verification measures and the strict procedures adopted by financial institutions when processing online payment transactions. However, there may be several instances where an underage person gambles online using the account of parents, older siblings or friends with or without their permissions. In Great Britain the attitudes towards gambling are becoming increasingly positive across all socio-economic sectors of the population.⁸⁵ Research from other jurisdictions also shows that many parents do not consider gambling to present significant risks to their children,⁸⁶ consider gambling as a legitimate alternative to other forms of entertainment that can be enjoyed by a family together⁸⁷ and the allure of a potential life changing win makes gambling products (e.g. lottery tickets or scratch-cards) an attractive gift to youngsters⁸⁸.

This shows that, unlike the purchase of alcohol and cigarettes, many parents may be less concerned

about purchasing gambling products for their children. More worryingly some players choose online gambling especially so they can play with their whole family unlike in an on-site casino. One participant in a qualitative study conducted by Cotte and Latour⁸⁹ expressly stated “*And here [at home⁹⁰] if I win something big, I can experience it with my [4 years old⁹¹] daughter. “Mommy won!” “Mommy just won!”. At a casino, she wouldn’t be able to sit there, have that kind of enjoyment with me. ... She gets to clap. ... I don’t think she understands what I am doing, but she gets excited when she hears the noise on the computer. ... So she’ll start jumping up and down too.*”⁹²

Instances of parents/siblings/friends playing with their children or allowing access to the gambling account may not be fully recognised and accounted for in prevalence studies and they may be significantly higher than the current estimates indicate. There is nothing in the Act itself that would counterbalance positive and relaxed parental attitudes. Unlike the regulation of alcohol,⁹³ no proxy offence exists whereby an adult commits a crime if he purchases gambling product on behalf of a minor. In practice it is not possible for an adult to play e.g. poker or slot machine on behalf of a child but one can easily envisage an older friend allowing access to his online gambling account or purchasing scratch-card or a betting slip for or together with a child. Such liability, although probably impossible to enforce, is likely to be welcome by the industry and could help with education and raising overall awareness that gambling does carry some risks and would further strengthen current provisions. Existing educational campaigns are very sparse and no legislative or policy measures require them to be frequently used.

VI. Enforcement issues

With the introduction of the Gambling Act 2005 the Gambling Commission became the main enforcer of the statutory provisions. The Commission must operate within the legal framework of its primary duties, stated in ss. 22(a) and (b)⁹⁴ and it must have regards to the Regulators’ Compliance Code; Hampton and Macrory⁹⁵ reviews and the Enforcement Concordat.⁹⁶ Those principles advocate comprehensive risk based assessments to ensure that resources are allocated to areas mostly in need and to carry out in-

85 C. Jawad and S. Griffiths, “Taming off the casino dragon”, 1(3) *Community, Work and Family* (2012), pp. 329 et seq.

86 J. Derevensky et al, “Parental Attitudes towards gambling: results from national Canadian study”, presented at the NCPG Conference in Singapore, August 2009.

87 J. Felsher, J. Derevensky and R. Gupta, “Parental influences and social modelling of youth lottery participation”, 13 *Journal of Community & Applied Social Psychology* (2003), pp. 361 et seq.

88 J. Derevensky et al, “Adolescents Problem Gambling: Legislative and Policy Decision”, 8(2) *Gaming Law Review* (2004).

89 June Cotte and Kathryn Latour, “Blackjack in the Kitchen: Understanding Online versus Casino Gambling”, 35 *Journal of Consumer Research* (2009), pp. 742–758.

90 Note added.

91 Note added.

92 Cotte and Latour, 35 *Journal of Consumer Research* (2009), *supra* note 89, at p. 754

93 S. 149(3) of the Licensing Act 2003.

94 Ss. 22(a) and (b) states “to pursue, and whenever appropriate to have regards to the licencing objectives, and to permit gambling in so far as the Commission thinks reasonably consistent with the pursuit of the licensing objectives”.

95 Macrory Review’s recommendation underpinned the Regulatory Enforcement and Sanction Act 2008

96 “Gambling Commission’s Statement of principles for licensing and regulation”, September 2009 available on the Internet at <www.gamblingcommission.gov.uk>. (last accessed in November 2013).

spectations only where there is an identifiable reason to do so. This leads the Commission to adopt a facilitative and negotiating rather than a strict enforcement approach. Such “light touch” is also explicitly anticipated by the Act itself which can be seen by contrasting ss. 27–28 of the Gambling Act with e.g. ss. 22 or 24. Ss. 27–28 are permissive and power granting in nature whereas s. 22 and s. 24 are duty imposing. This means that the Commission “*may assess compliance with the Act and licence conditions*”⁹⁷; “*may investigate whether an offence has been committed*”⁹⁸ and “*may institute criminal proceedings in respect of any offence*”⁹⁹ whereas is “*shall aim to permit gambling...*”¹⁰⁰ and “*shall issue one or more Codes of practice*”¹⁰¹. In light of the permissive tone of the legislation it seems reasonable that prevention of illegal gambling and money laundering and the collection of licencing revenues may be given a higher priority than tackling underage access. In any case the overriding duty to permit gambling sits uneasily with the Commission’s role as the protector of the social good. Commercial demands normally advocate lenient attitudes which are largely incompatible with the protectionist requirements that usually desire the exact opposite. Other external factors also constraint in practice the enforcement powers of the Commission. The enforcement role of the police and local authorities has been reduced to superficial levels¹⁰² and the Commission employs 200 officers with only around 60 members of staff performing the function of field compliance officers with investigative powers¹⁰³. The significant limit on available resources necessitates reliance on good faith and voluntary compliance with the regulations by the industry¹⁰⁴ and on co-operation with the general public¹⁰⁵ rendering the soft approach may be the only practical option, but not necessarily the most effective one.

VII. Exposure

The Gambling Act has undisputedly encouraged a significant expansion of perceived and actual gambling opportunities. The proliferation of gambling shops on a High Street resulted from the removal of the demand test¹⁰⁶ which prevents the Commission and other bodies from restricting the number of licences due to market saturation or a desire of a local authority to limit the number of gambling venues

within their areas. Although minors are not even permitted to enter land based betting shops and casinos no similar restriction seems to apply to “virtual” places and premises. The online gambling industry does not generally restrict a mere access or entry to the websites where betting or gaming takes place. There is only a small number of providers¹⁰⁷ that require registration before entering the actual site. Online casinos and betting shops offer exciting graphics of a variety of gambling games such as roulette, slots or card games often accompanied by stimulating audio effects as well as a wealth of information relating to gambling: rules of games, tips, suggestions, strategy advices and previous betting and gaming results as applicable. Many also offer free demo games which allow all players regardless of age to practice and learn how to gamble for free before having to risk any of their own money. For all intended purposes they are the virtual equivalents of land based betting and gaming venues but the Act does not provide any provision that would outlaw such virtual entry to minors.

Furthermore the Act permitted demand to be further stimulated by commercial advertisements which often glamorise gambling and focus on the life changing benefit of a major win¹⁰⁸. No regula-

97 S. 27 of the GA 2005.

98 S. 28(1)a of the GA 2005.

99 S. 28(1)b of the GA 2005.

100 S. 22(b) of the GA 2005.

101 S. 24 of the GA 2005.

102 Julia Black, “Tension in the Regulatory State”, 58 *Public Law* (2007), at p. 2

103 Data collected from the Gambling Commission’s website. Available on the Internet at <www.gamblingcommission.gov.uk> and <www.gamblingkingz.com> (last accessed in November 2013).

104 With nearly 3000 licences that have been issued to operators it would be impossible for the 60 field officers to effectively enforce compliance in the face of widespread and regular breaches of the Code.

105 The Gambling Commission operates a “confidential intelligence line” where general public may report any company offering or is suspected of offering illegal gambling or which is otherwise in breach of the Licensing Code.

106 S. 72 of GA reads as follows: “*In determining whether to grant an operating licence the Commission may not have regards to – (a) the area in Great Britain within which it is proposed to provide facilities, or (b) the expected demand for facilities which it is proposed to provide*”.

107 There are some operators e.g. Endemol Games Ltd who require registration prior to entering the actual site or playing practice games but the number of operators with such policy is very small.

108 John McMullan and Delthia Miller “Wins, Winning and Winners: The Commercial Advertising of Lottery Gambling”, 25 *Journal of Gambling Studies* (2009), pp. 273–295.

tions which may be devised by the Secretary of State have as yet been issued. In order to sustain demands commercial marketing initiatives play an important role within any industry but they may be particularly influential to those who already experience some difficulties with their gambling.¹⁰⁹ Gambling advertisements must not use youth themes or other features that may be attractive to adolescents and their broadcast should be restricted to after the watershed of 9pm. This rule does not apply during transmission of live sport entertainment. This is justified by the business needs of the industry but live sporting events are very popular on terrestrial and subscriptions based television channels and are often watched together by the whole families. As identified by Bogart¹¹⁰ on pages 254 and 255 there is an inherent conflict between “*marketing practices of gambling providers*” which aim to increase consumption and “*responsible gambling*” which more often than not involves encouraging people to gamble less. Furthermore, providers from the European Economic Area¹¹¹ and other “white listed”¹¹² jurisdictions are also able to freely promote their services to British customers without being subject to British law. The Gambling (Licencing and Advertising) Bill,¹¹³ if put into force, will impose British regulation on all remote gambling companies that offer

their services to British customers regardless of their physical location.¹¹⁴ This would constitute a barrier to the EU free trade principle but as long as the barrier is not discriminatory,¹¹⁵ is proportionate¹¹⁶ and it meets “*an appropriate overriding public policy objective*”¹¹⁷ it is unlikely to offend the EU Treaty. Despite increased knowledge and understanding amongst adolescents of the marketing aims and mechanics children are still more vulnerable to the influence of advertisements than it is the case with adults.¹¹⁸ The widespread promotion of gambling in print, on television, radio and online further promotes the appeal of gambling to all. The actual impact of advertisement on participation rates is contentious¹¹⁹ but even if they don’t increase the actual uptake they certainly contribute to the normalisation of gambling as a familiar and socially acceptable leisure activity.

VIII. Conclusion

This article demonstrates that the protective statutory provisions are narrow in scope and offer a weak foundation for the protection of children from gambling related harm. It is the goodwill of the gambling companies and their desire to protect their reputational status within the society that prevents widespread defiance of the law rather than the force of the legislative framework itself. The legalisation of commercial marketing of commercial products as well as the widespread availability of gambling both on the High Street and online actively promotes positive attitudes towards gambling and contributes towards the perception of such activity being a harm-free, fun entertainment. Tobacco advertising effectively ceased on UK television in 1991 and supermarkets are now required to sell cigarettes from behind closed shelves whereas gambling is actively promoted on all forms of mass media. This expansion of exposure is not effectively counterbalanced by the statutory prohibition of minors’ gambling. The prohibition is not absolute and the defence of due diligence focuses the industry’s attention more on ensuring that they have a valid and workable policy in place and less on stopping youngsters from successfully purchasing gambling services. This is further exacerbated by the lax enforcement which can be demonstrated by the fact that 18% of children between the age of 11 and 15 years old admitted to gam-

109 G. Valentine and K. Hughes, “New Forms of Participation: Problem Internet Gambling and the Role of the Family”, Nov 2011, available on the Internet at <www.lssi.leeds.ac.uk/project/5> (last accessed in November 2013).

110 W.A. Bogart, *Permit But Discourage: Regulating Excessive Consumption*, (Oxford: Oxford University Press 2011).

111 As required by Art. 46 and Art. 49 of the EC Treaty and equivalent provision with regards to other EEA States.

112 White listed jurisdictions are: Alderney, Antigua and Barbuda, Gibraltar, Isle of Wight and Tasmania.

113 Published on 3rd December 2012.

114 On the basis of regulation at the point of consumption and not at the point of provision.

115 Art. 43 and 49 EC Treaty.

116 See, e.g. Case C-124/97, *Läära*, ECR [1999] I-06067; or Case C-67/98, *Zenatti*, ECR [1999] I-07289.

117 See, e.g. Case C-337/4, *Van Binsbergen*, ECR [1974] 01299.

118 “Letting Children be Children” Report of an Independent Review of the Commercialisation and Sexualisation of Childhood by Reg Bailey, available on the Internet at: <<https://www.education.gov.uk/publications/.../Bailey%20Review.pdf>>, (last accessed in November 2013).

119 Simon Planzer and Heather Wardle, “The Comparative Effectiveness of Regulatory Approaches and the Impact of Advertising on Propensity for Problem Gambling Report” (2011), prepared for the Responsible Gambling Fund (currently Responsible Gambling Trust), available on the Internet at <<http://ssrn.com/abstract=2045052>> (last accessed in November 2013).

bling in 2011; yet there has been no reported case of any gambling company or person being prosecuted under Part IV of the Gambling Act. To paraphrase Bogart's book title¹²⁰ the main problem with existing framework is that British government permits gam-

bling but does not do enough to discourage "excessive consumption".

120 W.A. Bogart, *Permit But Discourage: Regulating Excessive Consumption*, (Oxford: Oxford University Press 2011).