GAMBLING COMMISSION

Responses to consultation on proposed amendments to *Statement of principles* and *Policy statement*

June 2017

1 Introduction

1.1 On 26 January 2017 we issued our consultation on proposed changes to our enforcement strategy.

1.2 The key documents which underpin our approach to enforcement are:

a) Statement of principles for licensing and regulation
b) Licensing, compliance and enforcement policy statement
c) Statement of principles for determining financial penalties
d) Guidance on decision making after a licence review (Indicative sanctions guidance).

1.3 Following recent changes to our *Licence conditions and codes of practice*, we wanted to review our enforcement strategy and revise our vision for enforcement and the key policy documents which guide how we use our powers.

1.4 The key changes we proposed included:

- putting all regulatory tools, including licence review (both of operator and personal management licences), on an equal footing by removing the current bias in favour of settlement within our existing statement for licensing and regulation
- changes to our statement on financial penalties including introducing higher penalties for breach, particularly where we see systemic and repeated failings
- using time-limited discounts to create better incentives for early settlement.

1.5 Our proposals aimed to build on our experience to date, whilst maintaining the legal and procedural safeguards that have always been a feature of the regulatory framework under the Gambling Act 2005, namely:

- the right to be informed that the Commission was commencing a licence review
- investigatory due process, disclosure and the use of the balance of probabilities test when assessing evidence in regulatory cases
- the opportunity for licensees to respond to the evidence and be given the opportunity for an oral hearing before decisions are made
- a commitment to proportionate decision making and better regulation
- the use of the most appropriate regulatory tools to deal with non-compliance
- the right of appeal to the First Tier Tribunal.

2 The consultation

2.1 The consultation was open for 12 weeks and closed on 21 April 2017. We received 21 responses to the consultation. Respondents identified themselves as follows:

- Local authority – 1
- Industry body – 8
- Other – 11
- Not specified – 1

The numbers above include the operators who responded to the consultation. Some identified themselves as Industry body and some as Other.

2.2 In this document we set out our analysis of the responses and our position on the issues they raised.

2.3 Of the 21 responses we received, four did not complete the consultation responses template and instead submitted narrative responses. This partly explains why there were no more than 17 responses to each of the questions we asked.

2.4 In the consultation we asked 11 questions. For eight of the questions (questions 1, 2, 5, 6, 7, 8, 9 and 11), we used a five-point Likert scale to ask respondents to indicate the extent to which they agreed or disagreed with our stated proposal. We also gave respondents the option to elaborate on their response by adding comments.

2.5 We structured three questions (3, 4 and 10) as open questions and asked respondents to comment on our proposals.

2.6 When we analysed the responses, a number of key themes emerged. These raised some wider issues about our proposals and the consumer-focussed rationale which we provided for the proposed changes. We have addressed these themes separately and set out our position in relation to each below.

2.7 We have set out our analysis of the responses to each of the questions we asked together with our position.

3 Key themes

3.1 A number of key themes emerged from our analysis of some of the responses. They were:

- challenges to the Commission's consumer-focussed rationale for the proposed changes; some respondents suggested that this amounted to an extension of the licensing objectives and the Commission's regulatory authority
- the Commission's obligations to the industry
- the consequences of placing settlements and licence reviews on an equal footing.

These themes ranged across respondents' answers to a number of our questions and so rather than try to fit our response to each of them to a specific question, we have addressed them here.

Putting the consumer first

3.2 Some respondents said that the emphasis on putting the consumer first is not consistent with the Commission's remit as set out in the statutory licensing objectives. At best it amounts to regulatory creep and at worst to the Commission exceeding its powers and remit.

3.3 Respondents asked for an explanation of what is meant by putting consumers first and clarity about what is in the public interest. One expressed concern that the language used within the consultation may lead to unintended bias against operators and questioned whether the shift towards customer focus was appropriate. The same respondent asserted that the Commission should only intervene if an operator fails to deal with customers effectively.

Our position

3.4 The licensing objectives are about protecting children and vulnerable people from being harmed or exploited by gambling, ensuring that gambling is conducted in a fair and open way and keeping gambling free from crime and disorder. Embedded within them is a clear focus on the consumer and wider public interest. The changes that we proposed within the consultation were consistent with our longstanding obligations under the licensing objectives and therefore are consistent with our expectation that operators put consumers first.

3.5 There is nothing new about placing the consumer at the heart of the regulatory system. However, a fast changing gambling industry requires all of us to stay alert to changing consumer experiences, including new risks to the detriment of consumers.

Placing a greater emphasis on consumer interest ensures that both operators and regulator recognise and respond to these changing circumstances, whilst remaining consistent with the licensing objectives. It represents a far less radical approach than some respondents seem to suggest but we acknowledge that we could have been clearer in communicating how our approach relates back to the licensing objectives.

3.6 Some respondents expressed concern at the use of the phrase 'a consumer first culture'. In respect of enforcement this means that we will examine how operators comply with both the letter and spirit of their licence and associated Commission regulations. We want an industry culture where if something goes wrong, an operator recognises the consumer impact, quickly informs us, and swiftly implements an effective remedy, prioritising the interest of those affected.

The Commission's obligations to the industry

3.7 Linked to their concerns about our focus on putting consumers first, a number of respondents asserted that in pursuing consumer interests the Commission is going too far and we are failing to balance our obligations to the industry. Some respondents asked us to remember that consumers can often "play" the system, for example by misusing bonus offers.

Our position

3.8 In many retail or service provision sectors consumers are becoming better informed and more savvy in order to get the best possible deal. This is as true for the gambling sector as for others. Provided consumers' actions do not introduce criminal activities into the gambling market, we have no legal basis to intervene and prevent something which operators' own systems have made available.

3.9 Our legislative framework does not create competing duties to the public and to industry which we are required to balance. The focus of the licensing objectives is to protect the consumer and the wider public. However, as with other statutory bodies we have to exercise our powers in a way that is compatible with fairness and natural justice. The industry can feel assured that when taking decisions we will always seek to ensure that those decisions are lawful, rational and reasonable.

Putting settlements and licence reviews on an equal footing

3.10 A number of respondents expressed concern about the proposal to remove the presumption in favour of settlements, placing all regulatory options on an equal footing.

They said:

a) Licence review should be option of last resort.
b) We should remain proportionate in our use of enforcement (particularly with operators who are investing and improving) and be cautious in our use of licence reviews.
c) Removing voluntary settlement is likely to make operators less compliant.
d) Moving away from working with the industry and a changed approach to settlements is not likely to be effective.
e) The current balance is about right.
f) The consultation shows a stated ambition of recourse to licence reviews (ie giving them a preference as opposed to putting them on the same footing).

Our position

3.11 When we pursue enforcement, we want to have the full range of regulatory tools at our disposal so that we can use the one which fits both the circumstances and severity of the breach.

We did not propose to move to a situation in which we favour licence review, rather we proposed to remove the current bias which exists in favour of settlement. As stated in the consultation document:

"We have redrafted and reordered chapter five in line with our approach to regulatory enforcement, moving away from settlements as a matter of course, and returning to a position where we have discretion about how we approach any instance of non-compliance, be that through settlement or formal licence review."

3.12 Regulatory settlement will continue to be a key tool for us in driving compliance and we will use it in situations where we think it is fit for purpose. Where the facts are agreed, settlement can establish an efficient and effective way to determine an outcome and sanction, giving us scope to divert resources to focus on other priorities, and for the licensee to do the same.

4 The questions

Consultation question one

To what extent do you agree with our proposed amendments to the wording of paragraphs 4.5 and 4.6 [of the Statement of principles for licensing and regulation]?

4.1 Seventeen respondents answered question one and of those, nine agreed or strongly agreed with our proposals. One respondent disagreed, four strongly disagreed and three neither agreed nor disagreed.

4.2 Respondents said:

- The real issue is not paragraphs 4.5 and 4.6 but 4.7. Making formal licence review the default position is not placing it on an equal footing with other tools. Under the "responsive regulation" approach, enforcement should match the attitude of the business towards compliance.
- The existing wording is sufficient. Where a licensee is transparent and willing to cooperate, there should be an opportunity for settlement before the GC moves to licence review.
- Reword paragraph 4.5 to avoid confusion.
- Paragraphs 4.5 and 4.6 are too loose
- How appropriate is the wording of paragraph 4.5?
- Why does the GC want to "deter operators from acting in the same way". Isn't this a good thing in some situations (for consistency)?
- Review the wording of paragraphs 2.2, 2.15
- The Statement should be supported by practice guidelines
- Paragraph 4.6 overlooks the commercial impact of licence review.

Our position

4.3 Over time, settlement has become accepted and expected. Its repeated use is not creating sufficient deterrent and so we want operators to be clear that when we are alerted to a breach the full range of enforcement tools will be considered. We proposed that licence review should be placed on an equal footing with other enforcement tools. This provides us with a full range of enforcement options, from which we can select the most appropriate.

4.4 The Commission expects operators to learn from the published outcomes of casework and to deliver on commitments made during compliance and enforcement activity.

4.5 We will continue to carefully consider the appropriate approach to enforcement activity. We will act and communicate in a constructive manner, for we want an industry culture where if something goes wrong, an operator recognises the consumer impact, quickly informs us, and swiftly implements an effective remedy, prioritising the interest of those affected.

4.6 The Commission deals with a significant number of issues each year, the vast majority of which are dealt with without recourse to formal sanction. However, in fairness to consumers and those operators who are acting responsibly, we will not tolerate those who repeatedly breach or are recalcitrant towards their licensing obligations. They should anticipate the use of the option of a review of their licence and the full range of sanctions available through that process.

Consultation question two

To what extent do you agree or disagree with our proposal to give credit for timely disclosure?

4.7 Sixteen respondents directly answered question two and of those 16, 13 strongly agreed or agreed with the proposal. Three respondents neither agreed nor disagreed.

4.8 Respondents made the following points:

- How is timely disclosure to be determined and calculated?
- How will the GC avoid creating a system of plea bargaining and avoid penalising those who for good eg legal reasons, are not able to move quickly
- Other factors should be taken into account such as the quality and accuracy of information provided and not only the speed with which it is provided
- Should credit be given even where the operator's conduct has been very poor.

Our response

4.9 In our proposals we avoided setting specific time-limits. Whether disclosure is timely will depend on the facts of each situation and we will continue to listen to representations made on this point. Operators and licensees should be clear that it is in their interests to make disclosures to us as soon as they are able to do so. The wording of 4.10 is clear that disclosure is of "all relevant facts and appropriate admissions". We do not anticipate that this new approach will create tension between the quality of information and the speed with which it is provided to the Commission. We are aware that some other regulators have a process of credit based on the stage the formal process has reached when admissions are made. We are not applying such a framework.

4.10 We will not enter into plea-bargaining about alleged breaches and nor will credit and discount be given in every situation. Where an operator or licensee is found to have breached the codes or conditions, paragraph 4.10 provides an opportunity to reduce the level of any financial penalty that might be imposed, but only where it is appropriate to do so.

4.11 Our approach to enforcement has been, and will continue to be, that whilst we are open to argument and discussion, we do not negotiate.

4.12 We will review the documents for accuracy and consistency.

Consultation question three

Do you have any other comments about our proposed amendments to our Statement of principles for licensing and regulation?

4.13 Consultation question three was a free-comment question.

4.14 Respondents said:

- They welcome the explicit confirmation about regulatory burden and proportionality
- They were concerned that we are moving away from licensee's involvement in working towards a remedy to ensure compliance before moving to enforcement action
- Voluntary settlement helps avoid unnecessary regulatory burden

- Annex two, paragraphs 4.5 and 4.6 could cause an imbalance or conflict of interest between aims for consumer protection and responsibilities as independent industry regulator
- Paragraph 2.7- “minimum burden necessary” is better wording than what’s proposed.

Our position

4.15 See our response to questions one and two above.

Consultation question four

Do you have any other comments about our proposed changes to the Licensing, compliance and enforcement policy statement?

4.16 Consultation question four was a free-comment question.

4.17 Respondents said:

- The current wording should be retained. The proposed wording focuses on licence review but other forms of settlement may be more efficient in addressing failings.
- Are settlements really the easier option?
- Review the proposed wording of paragraphs 5.24, 5.47 and 5.48. “Commission thinks” or “considers” – should this be “Commission can demonstrate or prove….” (2)?
- Is the wording of 5.24 and 1.10 consistent (imposition of financial penalty without a review?)
- The section on Test Houses is noted but the Commission could do more to give guidance about new products.
- In sections 4 and 5.38, there is a lack of clarity in use of the terms “may give [credit]” “credit will be given” and “the Commission will seek to give credit”.

Our position

4.18 We have set out our position on licence review elsewhere in this document.

4.19 Prior to publication, we will review the wording of all parts of our enforcement strategy for accuracy and consistency.

Consultation question five

To what extent do you agree or disagree with our proposed amendments to paragraph 2.6 of the Statement of principle for determining financial penalties and the criteria for determining amount?

4.20 Seventeen respondents answered this question and of those, 14 either strongly agreed or disagreed with the proposals. One respondent disagreed and three neither agreed nor disagreed.

4.21 Respondents said:

- There’s a lack of clarity in the terminology. “Removal” could be replaced with “financial recovery”
- There should be clearer guidelines on how penalties will be calculated and how that links to severity of breach
- It should be clear that the gain is the amount lost by the customer less gaming duty paid on the losses
- The detriment/gain should be linked to the breach of the licensing objectives
- Paragraph 2.6 is imprecise.

Our position

4.22 We will continue to determine the amount of any financial penalty based on the facts of the case before us. Rather than providing fixed guidelines and amounts, we will publish the outcomes of our decisions so that operators can see for themselves how decisions on penalties are reached.

4.23 We will review the documents for clarity, accuracy and consistency.

Consultation question six

To what extent do you agree or disagree with our proposed amendments to paragraph 2.8 of the Statement of principles [for determining financial penalties] and the approach to calculation of a financial penalty?

4.24 Seventeen respondents answered this question and of those, 12 either strongly agreed or agreed with the proposal. Three respondents disagreed and one neither agreed nor disagreed.

4.25 Respondents said:

- There should be recognition of the past history of the licensee both when considering the breach and also the financial penalty
- "Seriousness of the breach" is vague
- The level of any penalty should be tied to the circumstances of the breach
- What factors will be taken into account?

Our position

4.26 We will continue to determine the amount of any financial penalty based on the facts of the case before us. The statement does contain a detailed list of factors which will be considered.

4.27 It is not appropriate to provide fixed guidelines and amounts, as decisions are made after reflecting on the full circumstances of the case and the representations made by the operator. We will publish the outcomes of our decisions so that operators can see for themselves how decisions on penalties are reached.

4.28 We will review the documents for clarity, accuracy and consistency.

Consultation question seven

To what extent do you agree or disagree with our proposed amendments to paragraph 2.9 of the Statement of principles [for determining financial penalties] and the factors to be taken into account when calculating a financial penalty?

4.29 Seventeen respondents answered this question and of those, 13 agreed or strongly agreed with our proposals. Two disagreed and two neither agreed nor disagreed.

4.30 Respondents said:

- How will any discount/credit be calculated? There should be fairness and consistency in this (2)
- Definition of "full, frank and open"?

Our position

4.31 We will continue to determine the amount of any financial penalty based on the facts of the case before us. Rather than providing fixed guidelines and amounts, we will publish the outcomes of our decisions so that operators can see for themselves how decisions on penalties are reached.

4.32 We will review the documents for clarity, accuracy and consistency.

Consultation question eight

To what extent do you agree or disagree with our proposal to allow a discount to a financial penalty in certain circumstances?

4.33 Sixteen respondents answered this question and of those, 12 agreed or strongly agreed with our proposals. Two respondents disagreed and two neither agreed nor disagreed.

4.34 Respondents said:

- Discount should be available where it is clear that significant change has been achieved and where there's an opportunity for wider learning.
- The proposed approach shifts the focus from protecting consumers to incentivising speedy processes. Openness and efforts to correct issue should also be taken into account, not just speed.
- Emphasis on "accurate, comprehensive and timely disclosures…"
- Provide a grid to support calculation. Use the CPS model? Appeal procedures?

Our position

4.35 We will review the documents for accuracy, clarity and consistency.

4.36 We do not intend to provide a grid to support calculation or adopt the CPS model. The level of any discount will be based on the facts of the case before the Commission. This allows the Commission to be agile and flexible in its decision making rather than being restricted to a rigid tariff.

Consultation question nine

To what extent do you agree or disagree with our proposals to expand the principles we will apply to deciding how monies from early settlement will be used?

4.37 Fifteen respondents answered this question and of those, 12 agreed or strongly agreed with our proposals. One respondent disagreed and two neither agreed nor disagreed.

4.38 Respondents said:

- Money from early settlement should be used to support improvements in the industry and protect those at risk from harm
- The new principles are consistent with the aim of supporting socially responsible purposes
- Consideration should be given to the sustainability of projects (outside of GambleAware's programme) to ensure sufficient funding is available for completion (2)
- Other charities which address gambling-related harm or promote the LOs should be considered
- Can GambleAware accept hypothecated donations?
- Money should only be returned to victim where there has been a failing on the part of the operator and not where there is fraud/criminal activity by third party.

Our position

4.39 We will review the documents for accuracy, clarity and consistency. The document contains a detailed summary of the principles we intend to apply, these have been refined based on the experiences we have had with previous settlements.

4.40 The framework is flexible but prioritises the return of funds to victims and to socially responsible causes.

Consultation question ten

Do you have any other comments about our proposed changes to the Statement of principles on financial penalties?

4.41 Question ten was a free-comment question.

4.42 Most respondents did not comment on question ten. One suggested there was a need for greater focus on the relationship between timely disclosure and being full, frank and open in relation to discount to financial penalties and for clarity about whether disclosure relates only to first instance disclosure or applies throughout an investigation.

Our position

4.43 The issue of timely disclosure has been addressed elsewhere in this document.

4.44 We will review the enforcement strategy documents for clarity, accuracy and consistency.

Consultation question 11

To what extent do you agree or disagree with our proposed amendments to the guidance on regulatory decision making after a licence review?

4.45 Fourteen respondents answered this question and of those, 11 said they agreed or strongly agreed with the proposals. Three respondents said they neither agreed nor disagreed.

4.46 Respondents said:

- 2.4 and 2.5 refer to factors to be taken into account. Will there be a consistent approach to speed?
- 2.19 contradicts itself.
- There's a need for clarity about the approach to action against the operator and/or PML.
- Annex 4, paragraph 1.3 – contradicts eg Annex 2, 5.7 and 5.28
- Include a reference to the statutory aims in paragraph 1.3.

Our position

4.47 We will review the enforcement strategy documents for clarity, accuracy and consistency.