Introduction

The ancient provenance of gambling and its widespread occurrence across the vast majority of societies has provided the gambling industry with a credible claim that gambling is an indispensable part of human life.\(^1\) The accuracy of this sweeping statement has rarely been questioned but it does not ultimately hold true, as cultures where gambling was not generally practised or was unknown altogether have existed and continue to exist.\(^2\) While this in itself does not invalidate the argument that this form of entertainment may be beneficial to people’s welfare and in particular to society’s economy as a whole,\(^3\) it undermines the claim that gambling is an inherent part of human nature.\(^4\) Rather, it suggests that gambling constitutes a populist construct influenced by religious beliefs, history, cultural and social norms, economics, and legal attitudes towards its regulation. Undisputedly, a legal gambling industry makes significant contributions to respective governments’ revenue streams from direct and indirect taxations. It provides employment opportunities, often in shortage areas, and it offers forms of easily accessible entertainment. Nevertheless, gambling remains controversial. It suffers from powerful negative judgments from religious and moral groups, but this does not prevent it from representing one of the main forms of charitable fundraising. It is fun, exciting and offers places for social interactions. It also, for some people, becomes an addiction. Affected individuals attract a variety of names. UK Health Surveys classify them as problem gamblers or gamblers who are at low or medium risk of developing such problems. Other formal and informal names include pathological gamblers, addicts, compulsive gamblers or those who suffer from a gambling disorder. Irrespective of the attributed label, the condition affecting these individuals is the consequence of their succumbing to a permanent or


\(^2\) Binde (n 1).


\(^4\) Binde (n 1).
temporary vulnerability that caused them to lose control over their gambling. This may lead to them experiencing harm but such harm is not confined to them. Negative consequences often affect their families and friends and some individuals suffer from acute gambling-related harm despite never gambling themselves. This, in turn, impacts on the wider society as a whole by creating additional burdens on the welfare state and by undermining the overall health of society.

Most jurisdictions consider the protection of those who are vulnerable as an important public health issue. Neither prohibition nor an entirely laissez-faire approach can effectively protect consumers. The relatively low social objection to gambling coupled with the overall excitement associated with it renders any expectation that prohibition could entirely suppress demand unreasonable. Prohibition would most likely give rise to expansive illegal markets with associated consequences that often lead to exploitation.\(^5\) Equally, leaving the gambling industry unregulated typically leads to similar outcomes due to the ongoing desire to make profits in a commercial environment and the tendency to stigmatize the needs of those who may find themselves unable to conform. This essentially leaves the policy makers with two realistic alternatives. Gambling may be treated as a tolerated out of necessity but non-stimulated activity. It needs to be regulated and while it is permitted the legalisation only extends as far as the actual demand requires. Or it may be positioned as legitimate entertainment that needs to be regulated only to minimise the costs to society and to give adult consumers sufficient information to enable them to make their own informed choices, but which may be stimulated and encouraged by commercial practices. Each of those choices carries different consequences. Some of them are self-evident and are addressed in advance, but many are unpredictable and uncertain, becoming evident only long after any change is implemented. Fundamentally, the choice between the two options is determined by whether the legislators agree with scholars who perceive gambling as inherently dangerous and ‘an addictive consumption’ industry\(^6\) or with those who advocate for gambling to be treated as a ‘legitimate leisure activity’ that only needs to be controlled in order to ensure that autonomous individuals are treated fairly.\(^7\)

\(^5\) For further discussion on this aspect see WA Bogart, *Permit but Discourage: Regulating Excessive Consumptions* (OUP 2011) 5–11.


The United Kingdom’s policy, introduced by the Gambling Act 2005, adopted the second option. The regulatory containment approach that existed prior to the modernising efforts did not prevent the UK gaming and betting industry flourishing. The industry was able to attain £7.3 billion in gross yield in 1998\(^8\) even though it operated under significant regulatory constraints. However, many flaws meant that the modernisation of gambling laws was long overdue. The prior regulatory regime was, to a substantial extent, embedded within the Acts of Parliaments. This made them inflexible and difficult to change, and prevented the gambling operators from being able to successfully adapt to rapid technological advances. This hindered their ability to compete at the international level and gave an unfair advantage to companies based overseas.\(^9\) The combination of these factors provided the necessary impetus for the gambling law’s reform, which culminated in the statutory intervention of 2005. In contrast with the previous system of controlling gambling by primary legislation, most of the Gambling Act’s provisions are very broad. They create a regulatory framework that sets out the policy objectives that underpin the legislation.\(^10\) The formulation of the detailed rules was delegated to the newly created regulator, the Gambling Commission, which took over the role from the Gaming Board. The Commission was charged with the development of a holistic strategy that would ensure the creation of a gambling industry that works in harmony with the licensing objectives promulgated by the Act. To this effect it was granted wide powers to devise the necessary regulations, in consultation with the relevant stakeholders, and to provide guidance to the operators and local authorities. These are now contained in the main regulatory document, entitled ‘Licence Conditions and Codes of Practice’ (the Code). Since its initial creation under the authority of section 24 of the Act, the Code has had several editions and continues to be revised. The Code has a two-tier status and contains two types of provisions. Ordinary provisions represent a recommendation to the industry. It is good practice to follow these but non-compliance does not affect the validity or the status of a licence. The conditions and social responsibilities provisions contained in the Code gain statutory force by virtue of the operation of section 82 of the Act. Non-compliance with these can


attract a regulatory or criminal response and may lead to regulatory sanctions that include the possibility of the revocation of a licence.

The statutory inflexibilities that were inherent in the previous regime and the inability of the gambling operators to adapt to technological advances were effectively rectified by the delegation of regulatory and enforcement powers to the Gambling Commission. This was further facilitated by formally recognising ‘remote gambling’ as a licensable form. However, the amendments initiated by the Gambling Act extended well beyond addressing the flaws in the previous legislation. The government took the opportunity to introduce laws that were aimed at enabling the United Kingdom to become the ‘world leader in all fields of gambling activity’ and to offer a more diverse and less restrictive choice for adult consumers. From this perspective, the legal framework positioned gambling alongside other types of adult entertainment that should be regulated in order to prevent social harm, but that can be commercially offered and encouraged in a relatively unrestricted manner. Gambling should no longer be treated as an inherent vice. The limits on the expansion of the industry were no longer to be imposed by the regulator but determined by market forces, while the demand test has been removed. This test previously allowed the licensing authorities to refuse permission to offer gambling in a particular area on the basis of lack of demand or lack of additional demand if facilities already existed. This is no longer permitted to be part of the consideration in whether to grant or refuse a licence. Operators also received statutory consent to stimulate consumption by commercial advertising and marketing promotions, and the Gambling Commission was directed to ‘permit gambling’ subject only to the licensing objectives. The overriding licensing aims are listed in section 1 of the Act. The first objective intends to prevent gambling from becoming ‘a source of crime or disorder, being associated with crime or disorder or being used to support crime’, followed by a generic consumer protection objective of ensuring that ‘gambling is conducted in a fair and open way’. The third objective is the primary

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12 Department for Culture, Media and Sport, *Draft Gambling Bill: Policy Department* (Cm.6014-IV, 2003) para 2.10.
13 GA2005, s 72.
14 GA2005, s 22(b).
15 GA2005, s 1(a).
16 GA2005, s 1(b).
focus of this book as it aims to ‘protect children and other vulnerable persons from being harmed or exploited by gambling’.17

This shift in policy and its intended and unintended consequences on vulnerable persons prompted this discourse. The inherent tension between the legitimization of gambling and the need to protect vulnerable individuals, and more specifically the younger generation, raised the question of the extent to which the third licensing objective is compatible with the proliferation of gambling opportunities and the commercial stimulation of demand. The impact of the changes on vulnerable adults is briefly explored but the main focus of this discourse is how the regulatory change impacts on minors. Children have been statutorily designated as a group that is in need of special protection irrespective of whether they are actually vulnerable or not. But there is still a severe paucity of literature that addresses how children and young people react to and are affected by gambling and how law interrelates with this. This has been highlighted by the Joint Committee on the Draft Gambling Bill itself and by the Gambling Commission after the Gambling Act was implemented. But this lack of evidence has not been rectified, as noted by the Parliamentary Report that stated that ‘there has been insufficient data collected to establish whether or not the 2005 Act has been successful in its aim of protecting children from gambling’.18 Moreover, as the current generation of youth is most likely to be affected by the legitimisation of gambling, it was important to give them the opportunity to express themselves regarding how they understand and construct gambling and how it affects them, as opposed to merely analysing the black letter laws or considering the issues from the perspective of how adults thinks minors react to gambling-related matters. The validity of this rationale was reinforced by the impetus that came from the focus group discussions that the author carried out with 200 children aged 14 and 15 years old and young people aged 16 and 17 years old based in secondary schools in the areas of London and Kent, ethical approval for which was granted by the Nottingham Trent University’s Ethics Committee.19 While gaining access to the pupils was very challenging, the participants themselves were very vocal. They tended to be very eager to discuss the issues and engaged in heated debates and exchanges. They

17 GA2005, s 1(c).
19 The names of all the participants quoted or referred to in the text have been anonymised, with the children and young people selecting their own pseudonyms.
Gambling regulation and vulnerability

had witnessed first-hand the transformation that saw a move from a legal regime which aimed to suppress gambling to an environment where gambling became positioned as an adult but legitimate entertainment. This represented a unique opportunity to capture the views and perceptions of the generation that experienced this transition. Their input revealed that the liberalisation of gambling affected them in multiple and nuanced manners. Several of these are similar to the experiences of adults, but some are unique to this age group. Many of the aspects were never recognised or addressed by the legislation and many remain unresolved.

This discourse aims to fill this gap by focusing on the regulation from the vulnerability perspective. It exposes the overall controversies that permeate gambling discussions and considers the implications of the policy choice. The text demonstrates that the restrictiveness of the current interpretation of what constitutes gambling-related harm and who should be classified as vulnerable undermines the actual protection that is being offered and prevents gambling-related harm from being truly considered as a public health issue. Policy choices are, too often, assessed and criticised against the background of regulatory failure without sufficient consideration being given to the overriding principles formulated by the primary legislation, regulatory and enforcement constraints and the practical realities in which any commercial entity operates. They should be assessed against the background of whether regulation can realistically be expected to constitute an effective counterbalance to liberalisation. It is also demonstrated that regulation frequently does not sufficiently focus on the target group that needs to be protected, but rather creates regulatory requirements while addressing the issues from the perspective of an average member of the public. While this is an inevitable consequence of the multi-dimensional features of vulnerability that are almost impossible to overcome, this often leads to extensive measures being implemented that in substance offer limited support to those who actually need it most.

The starting premise remains that everyone has to bear some responsibility for their actions and their behavioural choices. Everyone is supposed to have a free choice regarding whether to engage in gambling or not and thus whether to expose themselves to the associated risks. But it is also recognised that sometimes this choice is more fictional than real. This notional free choice is in fact shaped substantially by the social environment of which culture, religion and legal framework constitute an inherent part, and sometimes individuals lose their ability to exercise control over their own free will. Any regulatory regime should focus on preventing the events or minimising the impact of contributing agents
that lead to such loss of control, but those are precisely the activities where regulation alone cannot be effective. Accordingly, it needs to be recognised and formally acknowledged that any jurisdiction that opts for liberalisation of the gambling industry inherently accepts that some occurrence of gambling-related harm becomes unavoidable. New regulatory frameworks that typically accompany the liberalisation process cannot, nor would it be reasonable to expect them to, eradicate this altogether. Even jurisdictions with total prohibitions have incidences of gambling that may result in harm, but such harm typically escapes formal recognition or acceptance. Liberalised markets recognise these problems and rely on statutory, common law based or industry developed measures to counterbalance them, with various levels of success. Those interventions fall under the broad umbrella of ‘social responsibility’ and each of them target different groups or different patterns of behaviour. Ultimately, the success or failure of any such measure depends on four interconnected paradigms:

1. Does the measure target the correct group?
2. Does it address the root causes of the identified issues with sufficient strength and clarity?
3. Are the measures adopted consistently throughout the whole industry and are they enforced with sufficient rigour to minimise free-riding?
4. Is there sufficient public recognition and acceptance of the measure to prevent social undermining of their implementation?20

Accordingly, this discourse demonstrates the extent to which the individual measures meet the four-pronged test and determines their actual effectiveness in achieving the third licensing objective, i.e., the protection of children and vulnerable persons from exploitation and gambling-related harm.

This book is divided into six chapters. The first two chapters explore the theoretical debate on how legislative and regulatory choices reflect different conceptualisations of gambling-related harm and vulnerability. It exposes the trade-off between economic benefits, the individual’s liberty to run their life in accordance with their own choices, and the need to protect the health of individuals within the society. It demonstrates the limitation of reliance on regulatory provisions on restraining engagement in otherwise lawful activity. It further argues that to a

substantial extent it is the primary legislation that inhibits the regulator’s ability to respond to some of the root causes of gambling-related harm and lures the Commission into focusing primarily on individual pathology, which is insufficient to address the imbalance caused by liberalisation. The remaining chapters focus specifically on the protection of minors. They evaluate the inclusiveness of statutory delimitation of what constitutes gambling and the strength of the effectiveness of statutory rules that aim to prevent minors from having access to gambling that is prohibited to them. It then assesses measures that aim to protect children and young people from being exposed to and excited by gambling advertising. Finally, the impact of demos, social gaming and gambling-like activities within video games on minors’ propensity towards gambling is considered.